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NOTE

HISTORIC PRESERVATION—AN INDIVIDUAL'S PERSPECTIVE

INTRODUCTION

Compared with recent efforts to clean up polluted air and water, rid the countryside of litter, and ensure the protection of endangered wildlife, efforts to preserve and protect the historical and cultural environment of this country have been slow to develop. Perhaps this lag can be explained by the private citizen's lack of awareness of the various alternatives available to him regarding historic preservation. If the movement is to gain momentum and to be successful, it is necessary that all citizens achieve a greater awareness of the preservation effort. Such awareness will permit more participation by citizens in the preservation of our historical culture.

It is the purpose of this work to provide an overview of the actions taken by federal, state, and local governments to preserve the historic heritage of the United States and to emphasize the effect of these programs on the individual and private preservationist groups. The practical application and implementation of federal and Kentucky laws will be delineated in Parts I and II of this Note with emphasis on the role of the private citizen. Part III will discuss the use and effect of local historic zoning ordinances. Finally, the indirect incentives to private historic preservation contained in federal and Kentucky tax law will be detailed in Part IV.

I. HISTORICAL PRESERVATION ON THE FEDERAL LEVEL

A. *Early Legislation*

The initial effort of Congress to establish organized historical preservation was the Antiquities Act of 1906.¹ This Act empowered the President "to declare by public proclamation historic landmarks, historic and prehistoric structures, and

¹ 16 U.S.C. §§ 431-33 (1976). See note 6 *infra* for the method of federal protection prior to 1906.

other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."² This legislation has resulted in the designation of such nationally significant areas and landmarks as the Grand Canyon,³ the Statue of Liberty, and the Edison Laboratory.⁴ Although serving a useful and beneficial function for the citizens of the United States,⁵ the scope of the Antiquities Act is very narrow.⁶

Since the statute deals with land owned or controlled by the federal government, its impact on the proprietary rights of the individual is negligible. The beneficial consequence of the act is the existence of a system of "playgrounds" to which citizens can go to enjoy the relatively unspoiled and unmarred scenic and cultural landmarks of this country.

The Historic Sites Act of 1935⁷ "is significant to contemporary preservation law in two respects. It establishes a national policy of historical preservation and provides the authority for the development of an administrative program to identify and

² 16 U.S.C. § 431 (1976).

³ See *Cameron v. United States*, 252 U.S. 450 (1920) (controversy over whether the Grand Canyon was covered by the Act).

⁴ 16 U.S.C. § 430 (1976) lists the National and International Monuments and Memorials that are included in the list of nationally significant landmarks.

⁵ The areas protected by the Antiquities Act are maintained and operated by the National Park Service, 16 U.S.C. §§ 1-3 (1976).

⁶ The Antiquities Act nominally affects the individual by making it a federal crime, punishable by fine or imprisonment, to "appropriate, excavate, injure, or destroy" any historic property located on federal property. 16 U.S.C. § 433 (1976). The National Park Service, which controls the administrative procedures relating to the system of National Monuments and Memorials, has issued extensive regulations as to what is permissible and impermissible activity at the parks and monuments under their jurisdiction. See 36 C.F.R. § 7 (1977) which deals with designated areas.

The importance of the Antiquities Act should not be underestimated:

Prior to 1906, the designation of properties to be afforded federal protection was carried out by Congress through . . . legislation. Although workable for a limited program designating outstanding properties, such a system had obvious limitations. The Antiquities Act broke with this tradition and entrusted the executive branch with discretion to determine the significance of cultural properties [T]he basic concept of executive branch responsibility eventually evolved into the sophisticated administrative system used today for the identification and evaluation of historic properties.

Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31, 34 (1976).

⁷ 16 U.S.C. §§ 461-67 (1976).

evaluate cultural resources.”⁸ In its preamble, the Historic Sites Act states: “It is declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.”⁹ This Act established the National Survey of Historic Sites and Buildings to be administered by the Secretary of the Interior¹⁰ in cooperation with the Advisory Board on National Parks, Historic Sites, Buildings and Monuments.¹¹ The current list of National Historic Sites contains such properties as Ford’s Theatre, the John F. Kennedy Home, and the Vanderbilt Mansion.¹² Again, as in the Antiquities Act, the focus of the Historic Sites Act is on nationally significant properties and landmarks.

The Historic Sites Act of 1935 did, however, expand the program for historic preservation of nationally significant property. The Act empowers the Secretary of the Interior to

[a]cquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, . . . or any interest or estate therein. . . . *Provided*, that no such property which is owned by any religious or educational institution . . . shall be so acquired without the consent of the owner¹³

The Act also gives the Secretary the power to make contracts or agreements with the “individuals . . . to protect, preserve, maintain, or operate any historic or archaeologic building, site, object, or property . . . regardless as to whether the title thereto is in the United States.”¹⁴ So, in two new respects, the private citizen may enter into the coverage of a preservation act: the private citizen could be directly affected by being forced to convey land to the United States. Through contract, the individual could have specific responsibilities with regard to privately owned property. Like its predecessor, the Antiquities Act of 1906, the Historic Sites Act’s regulations set up

⁸ Fowler, *supra* note 6, at 34.

⁹ 16 U.S.C. § 461 (1976).

¹⁰ 16 U.S.C. § 462 (1976).

¹¹ 16 U.S.C. § 463 (1976).

¹² For a complete list of National Historic Sites, see 16 U.S.C. § 461 (1976).

¹³ 16 U.S.C. § 462(d) (1976).

¹⁴ 16 U.S.C. § 462(e) (1976).

provisions for the protection and maintenance of the areas designated as National Historic Sites,¹⁵ and also provide for criminal penalties for violations of such laws.¹⁶

Without this early legislation, the rapid and explosive industrial growth of the country in the past seventy-five years could have resulted in the extermination of many of the natural and environmental national "wonders" that afford us a great deal of aesthetic enjoyment today. These attempts by the federal government to preserve the natural, historic, and cultural resources of America have produced an extensive and sophisticated system of National Parks for which all people, Americans or otherwise, should be very grateful.

B. *The National Historic Preservation Act of 1966*

1. *The Scope and Policies*

With the enactment of the National Historic Preservation Act in 1966 (NHPA),¹⁷ the federal government entered a new realm of cultural and historical, as well as environmental, protection. Its broad declaration of policy¹⁸ makes it clear that, as

¹⁵ 36 C.F.R. §§ 1-7 (1977). It should be noted that the regulations contained in these sections are not specifically designated to pertain to either the Antiquities Act or the Historic Sites Act, but to all areas under the control and supervision of the National Park Services through the Department of Interior. *See id.* § 1.2(h).

¹⁶ 36 C.F.R. § 1.3 (1977). The sanctions include fines of not more than \$500, imprisonment for not more than six months, and payment of all costs of the proceedings.

¹⁷ 16 U.S.C. § 470 (1976).

¹⁸ As stated in the Act,
[T]he spirit and direction of the Nation are founded upon and reflected in its historic past; . . . the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people. . . .

16 U.S.C. § 470(a)(b) (1976).

Congress recognized that the federal government should play a larger role in historic preservation efforts if the policies it had formulated were to be implemented with success:

[A]lthough the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is . . . necessary and appropriate for the Federal Government to accelerate its historic preservation programs . . . to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments . . . to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470(d) (1976). The study reported that nearly half of the 12,000 buildings

opposed to earlier acts, the program of historic preservation encompasses properties that are important not only to all Americans, but also properties significant to their respective states and communities.¹⁹

The greatest impact on the historic environment of the United States has been produced by provisions of NHPA establishing responsibilities of the federal agencies with respect to the governmental programs for historic preservation²⁰ and provisions authorizing the Secretary of the Interior to establish a comprehensive grants-in-aid program in order to assist state historic preservation efforts.²¹

recorded under the auspices of the National Historic Sites Act of 1935 had been destroyed in some manner since the passage of the Act. See Fowler, *supra* note 6, at 39 n.29. See also legislative history of NHPA: H.R. REP. No. 1916, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 3307-11.

¹⁹ Despite the Congressional zeal expressed in its preamble, the NHPA languished for some time after its enactment. In 1971, then President Nixon issued Executive Order 11,593, entitled "Protections and Enhancement of the Cultural Environment," directed at the federal agencies and the Secretary of the Interior. Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), reprinted in 16 U.S.C. § 470 (1976). This Executive Order was, no doubt, an attempt to prod the bureaucratic behemoth into some sort of concrete action with regard to the programs and policies of the Act. Part of the problem was funding, although not really from a lack of it, but more from a lack of what to do with it. See S. REP. No. 781, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 988, 2989.

The absence of clear and definite guidelines to the proper procedures to be followed by the agencies (as well as by the states) was probably a substantial factor in the initial ineffectiveness of the Act. The Advisory Council did not establish their procedures for compliance with the NHPA until February 28, 1973; see 38 Fed. Reg. 5388 (1973). Amendments were added in 1974 after consultation with the various federal agencies. See 41 Fed. Reg. 5910 (1976).

²⁰ 16 U.S.C. § 470(f) (1976).

There is another significant section of NHPA, 16 U.S.C. § 470(n) (1976), which authorizes the participation of the United States in the International Centre for Study of Preservation and Restoration of Cultural Property (Rome Centre). "The Centre is an independent, intergovernmental organization which was established by UNESCO." Its activities are to "collect, develop, and disseminate technical information relating to the preservation of culturally and historically important objects" and to conduct educational programs. [1970] U.S. CODE CONG. & AD. NEWS 2991. "There is widespread agreement that an essential step in the timely solution of this problem [historical preservation] is to join with conservators of other nations in cooperative programs of training and research. . . ." *Id.* at 2997.

²¹ 16 U.S.C. § 470(a)(2) (1976). See text accompanying notes 37-57 *infra* for a discussion of the grant-in-aid program. Also significant is the creation of the National Register of Historic Places. See text accompanying note 49 *infra* for a discussion of the importance of the National Register.

2. NHPA and Government Agencies

Section 470f of the National Historic Preservation Act provides that federal agencies must file reports with the Advisory Council²² concerning possible effects on historically significant properties within a proposed project's bounds so that the council may evaluate those repercussions.²³

The Council and the agency consult with each other and evaluate the feasibility of completing the project as proposed.²⁴

²² 16 U.S.C. § 470(f) (1976). To oversee the proper implementation of and compliance with the provisions of the Act, the NHPA established the Advisory Council on Historic Preservation composed of twenty-nine members, seventeen of whom are either agency officials or cabinet members, and twelve of whom are from outside the federal government and appointed by the President. 16 U.S.C. § 470(i) (1976). The primary functions of the Advisory Council are to "advise the President and the Congress in matters relating to historic preservation; recommend measures to coordinate activities of Federal, State and local agencies and private institutions and individuals relating to historic preservation, and advise on the dissemination of information pertaining to such activities." 16 U.S.C. § 470(j) (1976).

²³ Various interpretive problems with the Act arose and had to be settled in the courts. One of the questions NHPA presented involved the meaning of "federally funded." See *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976); *O'Brien v. Brinegar*, 379 F. Supp. 289, 290 (D. Minn. 1970) (a project is federally funded for NHPA purposes if it is "wholly or partially funded with federal money").

The application of NHPA to states was an issue. See *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971) (NHPA imposes no duties on the states and operates only upon federal agencies).

The issue arose as to whether compliance by the agency was required when property was listed on the National Register after appropriations for the project had been made. See *Kent County Council for Historic Preservation v. Romney*, 304 F. Supp. 885 (W.D. Mich. 1969) (Council comment not required after payments made to state). See also *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (6th Cir. 1969), and *Hart v. Denver Urban Renewal Auth.*, 551 F.2d 1178 (10th Cir. 1977). Another question was whether compliance by the agency was required after substantial or partial completion of the project; see *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323 (S.D.N.Y. 1975) (Property listed on National Register in January of 1975 did not require the Department of Housing and Urban Development to submit reports to the Advisory Council since project was nearly completed. However, an injunction was granted to halt demolition of property based on a provision in Executive Order 11,593 which imposed the duty on federal agencies of adopting internal procedures for historical preservation, and on HUD's constructive incorporation of the Advisory Council's regulations.) These issues were settled in 1976 when the text of 16 U.S.C. § 470(f) was amended to include property "eligible for inclusion in" the National Register. [1976] U.S. CODE CONG. & AD. NEWS 2442.

²⁴ 36 C.F.R. § 800.4(a)(2) (1977). The agency official and the State Historic Preservation Officer are to evaluate whether "the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural character that qualifies the property under the National Register criteria." *Id.* § 800.8. For the criteria regarding what constitutes adverse effect, see *id.* §

Various information-gathering techniques are used, such as on-site inspection or open public meetings. Such meetings allow private citizens and interest groups to make a valuable contribution in this decision-making process.²⁵ Even if the Council decides against the project, the Council's comments are in no way binding on the agency official. The Council is, as its name implies, advisory. If the Council determines that the project as it is planned would have an adverse effect on the properties involved, the agency official may decide to proceed with the original project.²⁶

Although the NHPA has more far-reaching ramifications to the individual in conjunction with the grants-in-aid program, the role of the individual land owner or concerned citizen does have some significance under Section 470f.²⁷ As one commentator noted, the NHPA "relies for its effectiveness on the

800.9. Basically, neglect includes destruction, alteration, isolation, the introduction of elements out of character with the setting, and neglect. *Id.*

²⁵ See 36 C.F.R. § 800.5(c) (1977).

²⁶ Under the regulations, however, the agency officer will be required to file subsequent reports to the Council as to the ultimate effect of the project on the property involved. 36 C.F.R. § 800.6(j) (1977).

Although, theoretically, the agency official is the final arbiter of the project's status, his initial decisions as to the importance of the area affected may be subject to scrutiny. A particularly dramatic example of this type of situation arose in *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976), which involved the construction of a federally funded highway through Moanalua Valley, a scenic and historically significant area on the island of Oahu (*see id.* at 436 n.1). The Secretary of Transportation, after receiving comments from the Hawaii Historic Places Review Board that the valley was of "marginal" local significance decided to go ahead with the highway construction. When plaintiff intervened, asking the court for an injunction to halt construction until the Transportation Secretary had conformed to the procedural requirements of NHPA, the district court entered, but then dissolved, the injunction. Plaintiffs appealed and the Ninth Circuit Court of Appeals reversed the lower court, recognizing the necessity for the Secretary of the Interior to have the power to determine, independently of state or agency action, the significance of a particular property. The Court of Appeals stated:

If it should be held that the Interior Secretary has no power to determine that properties have state or local historic significance, there would, in our view, be a virtual nullification of NHPA Whenever a city or state preferred a federally funded [project] to an historic site, the local body could simply declare the site insignificant.

Id. at 441 n.13.

²⁷ See *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323 (S.D.N.Y. 1975); *Kent County Council for Historic Preservation v. Romney*, 304 F. Supp. 885 (W.D. Mich. 1969); *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (6th Cir. 1969) for examples of citizen involvement.

conscientiousness and awareness of the federal agency."²⁸ Much of the litigation arising under the Act is based on the theory that the federal agency involved had failed or neglected to comply with the provisions of Section 470f.²⁹ A survey of the case law indicates that private organizations have formed in order to insure that the policies and procedures of the NHPA are implemented properly. Thus if a federal agency embarks upon a project in which historical sites are threatened without taking the necessary steps to preserve the area or without considering the effect of the project on the area involved, the private citizen (or citizens as a group) may then bring suit to enjoin the agency from continuing with the project until it has complied with the appropriate procedures. This situation does, of course, raise the problem of the individual's "standing" to sue as a person "injured" or "adversely affected" by the agency action or omission.³⁰

The criteria by which standing is defined has a very checkered and diverse past, especially in cases categorized as "environmental" in nature.³¹ One of the earliest cases to be brought to the courts under NHPA was *South Hill Neighborhood Association v. Romney*.³² The court inferred that because the plaintiffs did not own or legally control the buildings in question, they had no personal interest in the litigation.³³ This

²⁸ Comment, *National Historic Preservation Policy: A Review*, 49 TEMP. L.Q. 119, 123 (1975).

²⁹ See, e.g., *Save the Courthouse v. Lynn*, 408 F. Supp. 1323, 1327 (S.D.N.Y. 1975). A particularly gross example of agency contravention of NHPA occurred in *Don't Tear It Down, Inc. v. Gen. Serv. Adm'n*, 401 F. Supp. 1194 (D.D.C. 1975). After having agreed to halt demolition of the property in question until after submission of the matter to a full Advisory Council meeting to be held in May, 1974, the GSA officials decided to go ahead and demolish the buildings on March 3, 1974. Since the comments of the Advisory Council are not binding on the agency (see accompanying note 26 *supra*) and the agency is the final determinor of the continuance of the project, the GSA reasoned that even if the Council comments were negative, they would, as is their right, continue with the project as originally planned. This case demonstrates one of the major problems with the Act's procedures. For a critical analysis, see Comment, *supra* note 28.

³⁰ See The Administrative Procedure Act, 5 U.S.C. § 702 (1976).

³¹ This work does not encompass a complete discussion of the standing issue and the problems involved. An excellent treatment is contained in Vardaman, *Standing to Sue in Historic Preservation Cases*, 36 LAW & CONTEMP. PROB. 406 (1971). This subject is also treated in Comment, *Historic Preservation Cases: A Collection*, 12 WAKE FOREST L. REV. 227 (1976).

³² 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

³³ *Id.* at 460-61. See also Vardaman, *supra* note 31, at 412.

view that the party involved must have an economic or proprietary interest in the litigation has for the most part been rejected in the cases involving an environmental "injury" to the parties.

Recent decisions by the United States Supreme Court have applied a more acceptable and lenient standing criteria.³⁴ The more lenient standing requirement reflects the general policies of the National Historic Preservation Act that the private individual "should continue to play a vital role"³⁵ in the efforts to preserve our national heritage. "It is appropriate that concomitantly with the enactment of these statutes and the growing public and private concern with the protection of the environment, the courts have liberalized the doctrine of standing so that it no longer looms as a major obstacle to environmental and conservation litigation."³⁶

The individual's involvement in the program for historical preservation which the federal government has authorized retains a great deal of vitality. The private citizen, or a group of citizens, need not sit idly by while a federal agency plans projects which threaten that citizen's historical and cultural environment with destruction.

3. *The Federal Grants-In-Aid Program: A Major Step In a More Cohesive Historical Preservation Program*

The most important aspect of NHPA, in terms of fostering a more comprehensive historical preservation effort, is the creation of a matching grants-in-aid program to be administered by the Department of the Interior in conjunction with the State

³⁴ A two-prong standard was proposed in *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). First, the action by the agency must have caused the plaintiff injury in fact. The injury is not limited to economic harm but may encompass aesthetic, conservational, or recreational interests. Secondly, the interest that the plaintiff wishes to protect must be within the zone of interest that the statute regulates. See Comment, *Historic Preservation Cases: A Collection*, 12 WAKE FOREST L. REV. 227 (1976). See also *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), where this concept was refined. It has been judicially determined that "an organization whose members are injured may represent those members in a proceeding for judicial review." *Id.* at 739. See, e.g., *NAACP v. Button*, 371 U.S. 415, 428 (1962). For application of this standing issue in the context of historic preservation, see *River v. Richmond Metropolitan Auth.*, 359 F. Supp. 611 (E.D. Va. 1973).

³⁵ 16 U.S.C. § 470(d) (1976).

³⁶ Vardaman, *supra* note 31, at 415.

Historic Preservation Program.³⁷ The states are encouraged to participate in the federal efforts for historic preservation; states can receive federal funds for acquisition, protection, rehabilitation, restoration, and reconstruction of properties included in the National Register.³⁸

The basic requirements for state participation in the grants program are: (1) a comprehensive statewide plan and survey of historic preservation, approved by the Secretary of the Interior; (2) compliance with regulations and procedures set forth by the Department of the Interior; (3) assumption of total costs of maintenance of the property after completion of the work for which the funding was granted; and (4) appropriation by the state of at least one-half of the preservation project's cost.³⁹ Other administrative requirements have also been set forth by NHPA.⁴⁰

The most important requirement necessary to qualify a state for participation is the comprehensive statewide plan of preservation.⁴¹ The regulations published by the Interior⁴² provide the states with the relevant guidelines as to exactly how they are to set up their respective plans, and what information they will be required to furnish the Secretary of the Interior in order to satisfy those requirements. The state historic preservation plan is, in general, "a series of reports on the state historic

³⁷ 16 U.S.C. § 470(a)(2) (1976). Part of the legislative history of NHPA sets forth the rationale of this program. Principally, the grant system is used because of the limited knowledge of the "need for assistance in preserving properties of local, State, and regional significance." H.R. REP. No. 1916, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 3307, 3309.

³⁸ 36 C.F.R. § 60.3 (1977). These terms are defined specifically by the Department of the Interior in materials furnished to each state.

Actually, there are two grant-in-aid programs on the federal level. One allows funds for grants to states for the purpose of preservation of historic property. The second program authorizes grants to states for use in establishing a state plan. See the report cited in note 37, *supra*.

³⁹ 16 U.S.C. § 470(b) (1976). This section was amended in 1976 to authorize the Secretary of the Interior to increase the federal portion of a specific grant to 70% of the costs of a single project as long as the total funds apportioned to the state historic preservation did not exceed 50% of the state's total allocation. See 16 U.S.C. § 470(b)(c) (1976).

⁴⁰ See, e.g., 16 U.S.C. § 470(d) (1976), which prohibits grants to surveys or projects receiving assistance from other federal programs; 16 U.S.C. § 470(e) (1976), which requires record keeping by recipients of assistance.

⁴¹ 42 Fed. Reg. 47,658-59 (1977).

⁴² See 36 C.F.R. § 60,800 (1977), 42 Fed. Reg. 47,658 (1978).

preservation program. These reports . . . shall describe, analyze, and make future projections about the program."⁴³ The plan is to include the following information: "an explanation of the philosophy or rationale behind the program component, a report on current status, an evaluation of effectiveness, and a projection of future plans."⁴⁴ The regulations outline the responsibilities of the State Historic Preservation Officer, the process for a statewide survey,⁴⁵ and the establishment of a state professional staff⁴⁶ and a State Review Board.⁴⁷ The state plan should set out these necessary offices and officers along with their requisite administrative and operational functions.⁴⁸ Specifics of each state's plan are generally left to the discretion of the state preservation officer.

When a state has established an approved preservation plan and property within that state is listed on the National Register, individuals within that state can then seek a federal grant for a preservation project. The individual owner of Kentucky property must follow state as well as federal procedures. The federal matching grants are used exclusively for the preservation of property listed on the National Register.⁴⁹

Nomination of a property to the National Register may be made by the federal government (in any of its various capacities), a state, or a private group or citizen (through the state plan).⁵⁰ The state has the authorization to nominate "properties of State and local significance, regardless of locations within the State and whether publicly or privately

⁴³ 42 Fed. Reg. 47,660 § 61.7 (1977).

⁴⁴ *Id.*

⁴⁵ *Id.* at 47,658-59 §§ 61.2, .6 (1978).

⁴⁶ *Id.* at 47,659 § 61.3. The staff consists of full-time professionals in history, archeology, and architectural history or architecture.

⁴⁷ *Id.* § 61.4.

⁴⁸ *Id.* at 47,658 § 61.2(b) (1978). The federal regulations also indicate the responsibilities of the State Historic Preservation Officer. *Id.*

⁴⁹ "The National Register is an authoritative guide to be used by Federal, State and local governments, private groups, and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment." 36 C.F.R. § 60.2 (1977). For a current list of those properties listed in the National Register, see 43 Fed. Reg. 5,163 (1978).

⁵⁰ 36 C.F.R. § 60.2 (1977). All nominations initiated by individuals or private organizations must be received by and administered through the state's historic preservation offices.

owned"⁵¹ and federally owned property as well.⁵² The state should follow the "Criteria for Evaluation" in considering whether a specific property is appropriate for nomination.⁵³ Things to be considered include the quality or significance in American history, architecture, archeology and culture, the property's association with historic events or persons, and the artistic contributions or distinctiveness that the property embodies.⁵⁴ Once a property is deemed worthy of nomination, the state must provide notice to the property owners.⁵⁵

The nomination forms submitted by the state are reviewed by the federal Office of Archeology and Historic Preservation.⁵⁶ If the nomination is "found to be technically and professionally sufficient and in conformance with the National Register criteria for evaluation [it] will be approved . . . and entered in the National Register."⁵⁷

The Kentucky program functions as a separate but interwoven part of the national preservation effort. The preservation program in Kentucky will therefore be analyzed with emphasis on grant-in-aid procedures and the relationship between the state and federal programs.

II. THE KENTUCKY HISTORIC PRESERVATION EFFORTS

A. *The Kentucky Heritage Commission*

Legislation to preserve the historical heritage of the state of Kentucky was enacted in 1966⁵⁸ with the creation of the Kentucky Heritage Commission (KHC).⁵⁹ Unlike the Kentucky

⁵¹ *Id.*

⁵² *Id.* § 60.11 (1977).

⁵³ One of the problems addressed in these regulations was the respective roles of the federal agency, the state, and the private sector. As the regulations point out, when the federal agency is in the process of determining the eligibility of a specific site, the opinion of the State Historic Preservation Officer is advisory, and only the Secretary of Interior has the authority to make a definitive ruling. 42 Fed. Reg. 47,663 (1977).

⁵⁴ 36 C.F.R. § 60.6 (1977).

⁵⁵ *Id.* § 60.12 (1977).

⁵⁶ *Id.* § 60.15 (7) (1977).

⁵⁷ *Id.* § 60.15(8) (1977). See also *id.* § 60.12(c) (1977), which states that, while identification and nomination for the National Register is a state function, the National Park Service usually accepts the state proposals.

⁵⁸ 1966 Ky. Acts, ch. 87 § 3.

⁵⁹ KY. REV. STAT. § 171.381 (Supp. 1976) (hereinafter cited as KRS). This statute, which has language very similar to that of the NHPA, was approved approximately six months prior to the enactment of the federal law.

Historical Society,⁶⁰ the Commission operates as a separate administrative body of the state government and consequently is authorized to act within the bounds of its stated authority.⁶¹ In 1972, the Commission was designated as the appropriate agency to implement the policies and procedures of NHPA in Kentucky.⁶²

B. *Procedures for Obtaining a Matching Grant-in-Aid in Kentucky*

To illustrate exactly how an individual or private group⁶³ in Kentucky must proceed to secure a federal matching grant, assume that the Township Kentucky Historic Society is the owner of a somewhat dilapidated, but structurally sound house which is listed on the National Register. There is documented evidence (deeds, letters, etc.) that the house was once owned and lived in by the founder of Township, who later went on to become prominent in state politics. There is also some evidence that other prominent Kentucky figures were frequent guests in the house and that some of the original furnishings and household effects (which are still owned by the Society) were gifts from these guests.

The Kentucky Heritage Commission sends out grant-in-aid pre-application forms each year to the owners or administrators of those properties listed in the Register. So, in the

⁶⁰ The Kentucky Historical Society was created in 1880 and is organized as a corporation with a state granted charter. The Society functions as an information gathering organization with emphasis on the "advancement and dissemination of knowledge of the history of Kentucky." See KRS § 171.311 (Supp. 1976).

⁶¹ The Kentucky Heritage Commission is authorized to, among other things, review projects to insure preservation, accept grants, enter into contracts, acquire property, and initiate its own projects for historic preservation. See KRS § 171.381 (Supp. 1976).

⁶² Executive Order 72-869, September 18, 1972. A statewide survey and plan was developed by the Commission and has been approved by the Department of the Interior. 42 Fed. Reg. 47,660 § 61.7 (1977).

The most recent Status Report issued by the Kentucky Heritage Commission, covering the period of July 1, 1977—June 30, 1978, stated: "[T]he major program goals of the Kentucky Heritage Commission are successfully being accomplished." KENTUCKY HERITAGE COMMISSION, PROGRAM STATUS REPORT 108 (July 1, 1977—June 30, 1978).

⁶³ This designation includes private organizations, local historic commissions, and cities or towns. Letter from the Kentucky Heritage Commission to Applicants for Preservation Funds (March, 1978).

hypothetical situation, the Society will at some point, early in the fiscal year, receive grant-in-aid pre-application forms from the Commission. The Society will have until the following July 1 to complete these forms and return them to the Commission if it decides to seek a grant.⁶⁴ The Township Kentucky Historic Society would like to restore and preserve the building and has been able to raise some money for the partial restoration of the property but not enough to complete the process. The Society decides that the only way the project can be completed is to get help from the government. The Society completes the forms and returns them to the Commission.

The KHC evaluates the Township project, considering such factors as the historical significance of the property, the community support, and the capability of the applicant to match the federal grant.⁶⁵ The KHC reviews the Township forms and considers the project important enough to include it in its annual request for allocation of grant funds. The United States Office of Archeology and Historic Preservation will in turn review the State's request and appropriate the funds accordingly.⁶⁶

If the Office of Archeology approves the request, the Township Kentucky Historic Society must then "submit plans and specification of professional quality for all proposed work to the Kentucky Heritage Commission."⁶⁷ The review process by the Commission is renewed and, if approved, it is again forwarded to the Office of Archeology and Historic Preservation for its ultimate approval.⁶⁸

If the Office of Archeology approves the project and the amount of funds to be allocated, the recipient is then eligible actually to receive the funds from the grants program. How-

⁶⁴ See KENTUCKY HERITAGE COMMISSION, PRESERVATION GRANTS MANUAL 1 (1973) [hereinafter cited as PRESERVATION GRANTS MANUAL].

⁶⁵ *Id.*

⁶⁶ If Congress appropriates the full 60 Million dollars for the National Historic Preservation fund in FY 79, it is anticipated that Kentucky will receive \$1.2 million as her share. Yet, it is clear that even the new funding level will be inadequate to meet the need for restoration projects in Kentucky which is in excess of \$9 million.

KENTUCKY HERITAGE COMMISSION, PROGRAM STATUS REPORT 108 (July 1, 1977—June 30, 1978).

⁶⁷ PRESERVATION GRANTS MANUAL at 1.

⁶⁸ *Id.*

ever, even if the Township Project is not approved on the federal level, there may be an additional source of funds for this Kentucky preservation effort. The Kentucky Heritage Commission has developed its own State Grants-In-Aid Program, which operates independently of and in conjunction with the federal program. In addition, the state may provide part of the matching funds normally provided by an individual or group when the federal program provides the other half of the funds.⁶⁹

Regardless of whether the resources come from federal or Kentucky grants,⁷⁰ the recipient of the grant must administer the project in accordance with the applicable state and federal regulations. These administrative requirements revolve primarily around the proper documentation and recordation of the expenses incurred by the project administrator in the course of the work on the historic property. Progress reports are also required.⁷¹

As a result of receiving these matching funds, the recipient has certain obligations with respect to the property, contingent upon acceptance of the grant. The recipient's primary obligation is to insure proper maintenance of the property once the preservation project is completed:

When grant assistance is transferred to a private organization or individual for the restoration of historic property, the transferee shall encumber the title to the property with a covenant running with the land, in favor of and enforceable by the state, providing that the owners and their successors in interest, if any, shall repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and environment.⁷²

⁶⁹ See KENTUCKY HERITAGE COMMISSION, GRANT-IN-AID HISTORIC PRESERVATION POLICIES AND PROCEDURES.

⁷⁰ The State Program is essentially patterned after the federal program in terms of project administration, deed covenants for post-project administration, and public benefit policies.

⁷¹ For a detailed description of these requirements, see the PRESERVATION GRANTS MANUAL. The recipient must be very careful to insure that these procedures are correctly and sufficiently followed because the grant money is received as reimbursement for money actually spent, not as an advance lump sum payment of 50% of the prospective expenses. If, however, the project expenses are large enough, the administrator may request periodic reimbursement during the period that the actual work is being done. PRESERVATION GRANTS MANUAL at 2.

⁷² *Id.* at 15.

The length of time for which this restrictive covenant runs is dependent upon the amount of money received by the owner from the federal program.⁷³

Since one of the goals of the grant program is to enhance the cultural and historic environment of the general public, the recipient of such funds must comply with designated "public benefits" policies.⁷⁴ This requirement may include providing access to the historically significant property to the public for at least twelve days a year.⁷⁵

The benefits received by a recipient of a federal or state grant (not to mention the societal benefits) is disproportionately great when compared to the rather minimal obligations demanded by the government as prerequisites for participating in the grants program. It seems that the developers of the program have attempted to simplify the bureaucratic process by which the grants are obtained as much as possible while not forsaking the necessary safeguards for control that such a program of this size and nature demand.

III. LOCAL PRESERVATION EFFORTS

A. *Municipal Zoning Laws*

In an examination of the effect of historic preservation laws on owners of historic or architecturally significant structures, it is important to consider the impact of local legislative efforts, which may take the form of direct regulation of historic property through the use of zoning ordinances. Zoning provides a municipal body with a flexible tool to assist in preventing undesirable development or change within an historical area and may also serve to require or encourage uses compatible with an historic setting. For that reason historic preservation

⁷³ The length of the covenant is based on the following levels of assistance:

1. Federal assistance from \$0 to \$5,000: Letter of Agreement Only/No Covenant.
2. Federal assistance from \$5,001 to \$20,000: 5 year covenant.
3. Federal assistance from \$20,001 to \$50,000: 10 year covenant.
4. Federal assistance from \$50,001 to \$100,000: 15 year covenant.
5. Federal assistance over \$100,000: 20 year covenant.

Letter from Kentucky Heritage Commission to Grant Recipients (July 24, 1978).

⁷⁴ PRESERVATION GRANTS MANUAL at 15.

⁷⁵ *Id.* at 15-16. This includes access to the interior of structures for which funding was allocated.

ordinances have become an integral part of many communities' comprehensive plans to preserve their historical, cultural, and natural environment. Seven cities in Kentucky have enacted such ordinances.⁷⁶

The Kentucky ordinances are enacted pursuant to an enabling statute which allows zoning to be employed to "facilitate . . . the visual or historical character of the [planning] unit."⁷⁷ The ordinances vary in form and degree of regulation, the most frequently occurring type being what is commonly referred to as an "historic district ordinance."⁷⁸ Typically, the ordinance establishes an architectural review board.⁷⁹ The board is empowered to inspect and designate area structures and premises that it considers to have substantial historic or architectural merit, and to make recommendations regarding the establishment of historic districts.⁸⁰ The procedure for establishment⁸¹ is initiated either by the board, the planning commission, the local legislative body, or an individual owner of potentially subject property.⁸² The procedures call for a se-

⁷⁶ COVINGTON, KY., COMM'R ORDINANCE No. 50 (1976) [hereinafter cited as COVINGTON]; FRANKFORT, KY., ZONING CODE art. 27 [hereinafter cited as FRANKFORT]; LEXINGTON, KY., ZONING CODE art. 11 [hereinafter cited as LEXINGTON]; LOUISVILLE, KY., ORDINANCE 58 (1973) [hereinafter cited as LOUISVILLE]; MAYSVILLE, KY., ZONING ORDINANCE art. XIII (March 1974) [hereinafter cited as MAYSVILLE]; PADUCAH, KY., ZONING CODE § 62 [hereinafter cited as PADUCAH]; PARIS, KY., art. III § 3.27 (1976) [hereinafter cited as PARIS].

⁷⁷ KRS § 100.201 (1971). The statute specifically authorizes the creation of historic districts, *id.* § 100.203(i)(e) (Supp. 1978) and allows for the establishment of an administrative board to advise the zoning administrator regarding the issuance of "permits" in such districts, *id.* § 100.127(3). The board is to be guided by the standards and restrictions of the community's comprehensive plan and by the historic district regulations adopted by the planning unit. *Id.*

⁷⁸ Frankfort, Lexington, Maysville, Paducah, and Paris have historic district ordinances.

⁷⁹ For the structure and composition of the board, see FRANKFORT, *supra* note 76, at §§ 27.91-.911; LEXINGTON, *supra* note 76, at § 11.3; MAYSVILLE, *supra* note 76, at § 13.5; PADUCAH, *supra* note 76, at §§ 62.01-.02; PARIS, *supra* note 76, at § 3.273.

⁸⁰ See *e.g.*, LEXINGTON, *supra* note 76, at § 11.32; MAYSVILLE, *supra* note 76, at § 13.52; PARIS, *supra* note 76, at § 3.2732.

⁸¹ See LEXINGTON, *supra* note 76, at § 11.4; MAYSVILLE, *supra* note 76, at § 13.6; PARIS, *supra* note 76, at § 3.274. Frankfort and Paducah have not combined establishment procedures within their historic district ordinances. Presumably the procedure would be that normally employed in the establishment of restrictive zones.

⁸² This act is done by the filing of an application for designation with the architectural review board. If a governmental body submits the application, the owner is required to be promptly notified by registered mail. LEXINGTON, *supra* note 76, at § 11.41; MAYSVILLE, *supra* note 76, at § 13.61; PARIS, *supra* note 76, at § 3.2741.

ries of public hearings and recommendations by both the board and the planning commission. The recommendations are acted upon by the local legislative body which has the power to designate an area as an historic district.

The historic district classification normally acts as an "overlay zone" in that the regulations thereunder are imposed in addition to those under the zone classification otherwise in effect for the subject area.⁸³ All structures within an area zoned as an historic district become subject to the regulations under the ordinance regardless of their historic or architectural significance. The regulations operate to prohibit the building inspector from issuing permits for the destruction, construction, alteration, moving, or change in external appearance of any structure within an historic district unless a "certificate of appropriateness" has been issued.⁸⁴ In order to obtain a certificate, an owner must file an application with the architectural review board. In reviewing the application, the board is required to consider certain criteria and standards as set forth in the ordinance.⁸⁵ If the board approves the application, the certificate is issued by the planning commission and, presuming all other legal requirements are met, the owner is allowed to proceed. If the board disapproves the application the owner may appeal to the planning commission. If, after holding a

⁸³ See LEXINGTON, *supra* note 76, at § 11.2; PARIS, *supra* note 76, at 3.217. Frankfort, Maysville, and Paducah do not use the overlay zone concept but rather limit the uses in historic districts. For example, in Maysville the only uses permitted in an historic zone are those uses allowed in residential zones; uses for governmental, professional, insurance, real estate, and other similar office purposes; uses for banks and savings and loan offices (excluding drive-in facilities); and uses for retail businesses having a substantial relationship to matters of historic interest, e.g., gift, antique, book, art, handicraft, and other similar businesses. MAYSVILLE, *supra* note 76, at § 27.2.

⁸⁴ See FRANKFORT, *supra* note 76, at §§ 27.81, .9; LEXINGTON, *supra* note 76, at § 11.5; MAYSVILLE, *supra* note 76, at § 13.7; PADUCAH, *supra* note 76, at § 62.01; PARIS, *supra* note 76, at § 3.275.

⁸⁵ See, e.g., LEXINGTON, *supra* note 76, at § 11.51:

[T]he Board . . . shall examine the architectural design and the exterior surface, treatment of the structures on the site in question, and their relationship to other structures within the area, and other pertinent factors affecting the appearance and efficient functioning of the Historic District. The Board shall not consider any interior arrangements nor shall it make requirements except for the purpose of preventing developments obviously incongruous to the historic aspects of the district.

See also FRANKFORT, *supra* note 76, at § 27.82; MAYSVILLE, *supra* note 76, at § 13.71; PARIS, *supra* note 76, at § 3.2751; PADUCAH, *supra* note 76, at § 62.01.

public hearing, the commission also disapproves, a stay period is imposed during which time the board and the commission may negotiate a compromise with the owner.⁸⁶ If such a compromise is not reached by the expiration of the stay period, most ordinances permit the owner to proceed with the proposed project, although some may permanently deny the permit.⁸⁷

There exists a second form of historic preservation ordinance which typically extends protective regulation to individual landmarks or landmark sites. Such "landmark commission ordinances" have been adopted in two cities in Kentucky.⁸⁸ The ordinances establish a "landmark commission" whose powers and duties generally exceed those of an architectural review board.⁸⁹ However, the administrative bodies perform basically the same function as an architectural review board with regard to proposed changes in designated structures or areas.⁹⁰ The

⁸⁴ Although the procedures for approval or disapproval of the proposed project are similar among the historic district ordinances in Kentucky, the protection afforded to the property varies significantly. FRANKFORT, *supra* note 76, at §§ 27.89, .9 (for any construction, alteration, moving, or change in exterior appearance, a stay period is imposed until a compromise is reached); LEXINGTON, *supra* note 76, at § 11.5 (six month stay period for all permits); MAYSVILLE, *supra* note 76, at § 13.712 (two year stay period for all permits); PADUCAH, *supra* note 76, at § 62.01 (building permits and permits to "raze, wreck, or remove" can be permanently denied unless found to be in harmony with the preservation of the historic zone); PARIS, *supra* note 76, at § 3.2753 (3 month stay period for all permits).

⁸⁷ See note 86 *supra*.

⁸⁸ See COVINGTON, *supra* note 76; LOUISVILLE, *supra* note 76.

⁸⁹ For example, the Louisville ordinance gives the commission (Historic Landmarks and Preservation Districts Commission) the power to receive, hold, and spend funds, LOUISVILLE, *supra* note 76, § 2f, and to adopt all regulations necessary to carry out its functions, *id.* § 2g. The commission has the power to designate historical areas and sites (subject to approval of the board of aldermen). *Id.* § 4. In addition, the commission is empowered to perform such complementary activities as conducting area surveys, establishing a marker identification system, and disseminating information to the public. *Id.* § 3. Such powers are not typically extended to an architectural review board.

The Louisville ordinance is somewhat unique in providing for a second administrative body to be created for each area or site designated under the ordinance. This body serves as intermediary between the property owner and the commission. A person desiring to alter a designated structure must first apply to this body for a "certificate of no external effect." If the body denies such a certificate, then the owner must apply for a certificate of appropriateness. It is then the function of the body to make recommendations on the application to the commission. LOUISVILLE, *supra* note 76, §§ 4(c), 7-8.

⁹⁰ See LOUISVILLE, *supra* note 76, §§ 6-8; COVINGTON, *supra* note 76, § 40.07-10. One noticeable difference is the finality of the commissions' decisions. See LOUISVILLE, *supra* note 76, § 8 (no administrative appeal provided for); COVINGTON, *supra* note 76,

protective regulations, like those under historic district ordinances, entail the imposition of a stay period upon refusal by the landmark commission to grant a certificate of appropriateness.⁹¹ One ordinance includes a permanent bar against demolition.⁹² In addition, the ordinances impose an affirmative maintenance duty on owners of designated property, the violation of which could lead to the imposition of criminal penalties.⁹³

B. *Other Preservation Techniques*

In addition to the imposition of land use restrictions, a municipality may also rely on its power of eminent domain to provide for the protection or preservation of historic property.⁹⁴ Such power may be used either as an alternative or a supplement to historic district and landmark ordinances. For example, if a structure is protected under an ordinance only for a temporary period, at the expiration of the period a city may condemn the threatened property. Similarly, if protection is afforded only to structures within historic districts, the power of eminent domain may be used to protect individual landmark or landmark sites that are outside of the district.

However, the acquisition of a fee interest in such property

§ 40.12 (administrative or judicial appeal provided for but only where alleged error committed by commission).

Another difference exists with respect to the designation of areas or sites. See COVINGTON, *supra* note 76, § 40.08 (commission conducts survey, classifies structures as "exceptional," "excellent" or "notable" and submits list from which the board of commissioners designates areas or sites. Persons or organizations may "recommend" structures or areas for "consideration"); LOUISVILLE, *supra* note 76, § 4 (commission designates after a public hearing; no procedure for initiation of the process by an individual).

⁹¹ COVINGTON, *supra* note 76, § 40.07 (permanent denial, but owner may modify application and resubmit); LOUISVILLE, *supra* note 76, §§ 8(e)-(f) (six month stay period).

⁹² See COVINGTON, *supra* note 76, § 40.10. However, if the owner can show that property is "encapable [*sic*] of earning an economic return upon its value," the commission must recommend to the owner a "satisfactory plan for its preservation." *Id.*

⁹³ See COVINGTON, *supra* note 76, § 40.11; LOUISVILLE, *supra* note 76, §§ 10, 12.

⁹⁴ While each state possesses the sovereign power of eminent domain within its jurisdiction, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1844), a municipality has no such inherent power. A city must therefore derive its power from state enabling statutes. The enabling statutes in Kentucky are KRS §§ 94.680, 85.120(4), 86.110(8), 87.090, 88.100 (Supp. 1978).

may present a financial problem to a city in two ways: the required compensation is often substantial, and the purchase removes the property as a revenue-generating tax source. As an alternative to permanent acquisition in fee, the property could be acquired and resold to persons who desire to preserve the unique character of the structure. Preservation of the property could be assured by including restrictive covenants prohibiting incompatible use or alteration in the deed.⁹⁵ An additional alternative would be the purchase or condemnation of a less than fee interest in the form of a protective easement. While Kentucky statutes prohibit local legislative bodies from exercising the power of eminent domain to acquire a scenic or open space easement,⁹⁶ there apparently is no prohibition from using the power to obtain a facade easement.⁹⁷

To the extent a less than fee interest is acquired, the reduction in the property's value could manifest itself in a lower property tax assessment.⁹⁸ A substantial tax reduction could induce owners of historic property who wish to maintain the existing use to donate a protective easement.⁹⁹

⁹⁵ A city's comprehensive plan for historic preservation often includes the establishment of a revolving fund to accomplish this technique. Funded only once, the depletion of the fund from purchase of historic property is offset by returning the sales proceeds to the fund, thus making money available for a subsequent purchase.

⁹⁶ KRS § 65.460 (Supp. 1978). For a definition of a scenic easement, see *id.* § 65.410(4). If property covered by a scenic easement agreement is obtained by the exercise of eminent domain, the scenic easement will terminate. *Id.* § 65.460.

⁹⁷ A facade easement is distinguishable from a scenic easement in that the latter restricts development which will destroy the "open space character" of property, KRS § 65.410(4), while the former prohibits the owner from altering the exterior portions of or demolishing a structure without the permission of the holder of the easement.

⁹⁸ However, this result is not always true, especially where scenic easements are involved. See Comment, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962).

Kentucky statutes specifically state that where a scenic easement has been donated or has been purchased by a municipality, the property tax assessment shall be lowered to reflect the decrease in value. KRS § 65.450 (Supp. 1978).

For examples of other states providing for reduced assessments for historic property, see Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334, 344-46 (1976).

⁹⁹ Recipients of such donations could be private organizations interested in historic preservation or governmental agencies. For example, in Lexington, the Lexington-Fayette Urban County Historic Commission is authorized to receive donations of property interests, LEXINGTON, KY., CODE § 2-89(h), and private Lexington groups such as the Bluegrass Trust actively seek and encourage such donations.

On the state level both the Kentucky Historical Society and Kentucky Heritage

Additional property tax incentives may be provided by local government.¹⁰⁰ For example, a city may create an exemption for historic property, allow credits for rehabilitation expenditures, or grant abatements upon a showing that the continuing existence of a structure is threatened because of the high tax burden imposed, or that the structure can no longer earn a reasonable rate of return.¹⁰¹ A municipality may also make available financial assistance for those persons interested in acquiring an historic structure. This is likely to be in the form of mortgage money, insurance, or low interest loans.

C. *Constitutional Limitations*

To the extent that historic preservation laws restrict the right of an individual to do what he desires with his property, they must conform to certain constitutional requirements. The restrictions imposed by such laws are most often challenged on the basis that they constitute a "taking" of property without just compensation in violation of the fifth and fourteenth amendments or that they arbitrarily deprive a person of his property without due process of law in violation of the four-

Commission are authorized to receive private donations of real or personal property. KRS §§ 171.311 art. I, .381(5)(d) (Supp. 1978).

The gift of a property interest may also qualify the donor for income, estate, and gift tax charitable contribution deductions. See notes 38-43 *infra* and accompanying text.

¹⁰⁰ In addition to local legislative efforts, private interest groups, usually non-profit organizations, may play a critical role in a community's preservation plan. For example, in Lexington, the Bluegrass Trust for Historic Preservation has participated in the promotion and selection of a professional planning staff for the Lexington-Fayette County Planning Commission and the establishment of the Board of Architectural Review and the Lexington Fayette County Historic Commission. It has provided necessary research and study for the promotion and designation of historic districts in the city and for the design of sites or areas to be listed on the National Register. It has established an historic structure identification program, placing markers on historically significant property. In addition to purchasing, restoring, and maintaining property, the Trust has purchased deed restrictions and assisted in paying for restoration of public structures. The Trust has also established a revolving fund for one of the city's historic districts, which is used to purchase threatened structures, restore their exteriors and resell the property for residential or commercial use subject to protective deed restrictions. The dissemination of public information about restoration and the promotion of public interest in historic preservation has also been a function of the Trust.

¹⁰¹ For a more detailed discussion of property tax incentives see Schull, *supra* note 98.

teenth amendment.¹⁰² Most challenges are directed toward state and local legislation, since federal laws do not regulate directly the use of privately owned historic property.¹⁰³

Since the enactment of historic district ordinances is a relatively new concept in Kentucky, the Kentucky Supreme Court and Court of Appeals have not had occasion to comment on the constitutionality of such laws.¹⁰⁴ However, courts in other jurisdictions indicate that land use restrictions are subject to selected arbitrariness and taking challenges.¹⁰⁵

¹⁰² "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See also KY. CONST. arts. 13, 242.

¹⁰³ Federal law focuses on the National Register for Historic Places. The primary legal consequences stemming from property being listed or eligible for listing on the Register is that the appropriate federal agency must consider the impact of its federally-funded projects on listed or eligible property, see notes 22-36 *supra* and accompanying text; the property may potentially qualify for matching grant-in-aid restoration funds, see notes 37-75 *supra* and accompanying text; and certain tax consequences may attach to the property, see notes 123-149 *infra* and accompanying text. While these legal consequences may indirectly affect the use of listed or eligible property, they do not prohibit any use of the property and therefore do not constitute a "taking" of the property. The owner may use the property as he desires even to the extent of altering or demolishing a significant structure. The Tax Reform Act of 1976 took away certain income tax advantages accruing to owners who demolished structures and replaced them with new construction. But the Supreme Court has held that no individual has a vested right in the provisions of any tax statute in the sense that loss of previously available deductions or other benefits could be considered a "taking" of property. *United States Trust Co. v. Comm'r of Internal Revenue*, 311 U.S. 678 (1940). See 78 OP. ATT'Y GEN. 305 (1978); Letter from James D. Webb, Associate Solicitor, Department of the Interior, to Robert F. Stephens, Attorney General, Commonwealth of Kentucky (Mar. 3, 1978).

¹⁰⁴ The only Kentucky court to express an opinion on the constitutionality of historic preservation ordinances was the Jefferson Circuit Court in *City of Louisville v. Women's Club*, No. 197724 (Jefferson Cir. Ct. Jan. 17, 1976), *rev'd per curiam (on other grounds)*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976). The lower court held the Louisville ordinance unconstitutional. The Kentucky Supreme Court held that the constitutionality of the ordinance was not at issue in the case. For a criticism of the circuit court's opinion, see Comment, *A Challenge to Historic Preservation in Kentucky*, 65 Ky. L.J. 895 (1977).

¹⁰⁵ The power of a municipal body to promulgate land use restrictions is a derivative of the general police power inherent in every state to regulate matters relating to the public health, safety, morals, or general welfare. See Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611, 616 (1970). To satisfy due process, a zoning ordinance must be enacted in pursuit of a legitimate public purpose. See *e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *Paris Adult Theatre v. Slater*, 413

While an historic district ordinance need not be rigidly drawn so as to preclude reasonable administrative discretion,¹⁰⁵ the ordinance cannot delegate unfettered authority to architectural review boards and survive a due process challenge. To the extent the ordinances provide inadequate decision-making criteria for the designation of areas or sites or for the issuance of a permit for alteration or demolition, the ordinance may be held unconstitutional.¹⁰⁷ However, factors such as specific designation of areas to which the board's authority runs, requiring persons appointed to the board to have expertise in the area of historic preservation, the availability of surveys and other historic data to guide decisions, and the availability of judicial or administrative review have been sufficient to prevent a finding of arbitrary and discriminatory action even where there existed no specific guidelines to regulate the board's decisions.¹⁰⁸

U.S. 49 (1973); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Legislative bodies are entrusted with the task of defining public purpose, *Maheer v. City of New Orleans*, 516 F.2d 1051, 1059 (5th Cir. 1975), and where their determination is "fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, 388 (1926). Normally, historic district and landmark preservation ordinances, including those in Kentucky, state that preservation and protection of areas and structures of historic or architectural significance are within the public interest, *see, e.g.*, Louisville, Ky. Ordinance 58 series 1973, § 1(b) (1973). Despite the presumption of validity, such declarations have been challenged in the courts. Land use regulations designed to enhance the quality of life by preserving the character and desirable aesthetic features of a city have been recognized to be in furtherance of a legitimate public interest, *see, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Berman v. Parker*, 348 U.S. 26, 33 (1954). For a discussion of aesthetic zoning, *see Schroder, The Preservation of Historical Areas*, 62 Ky. L.J. 940 (1974); Comment, *Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historic Landmarks*, 1975 DUKE L.J. 999. Aesthetic considerations may also be coupled with an economic interest to promote tourism. *See, e.g.*, *Maheer v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *New Orleans v. Levy*, 64 So.2d 798 (La. 1953). The "public interest" question with respect to zoning may no longer be an issue, *see Penn Central Transp. Co. v. City of New York*, 98 S. Ct. 2646 (1978), where the petitioner conceded legitimacy.

¹⁰⁵ *Maheer v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 18 (N.M. 1964).

¹⁰⁷ *See generally* *Maheer v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

¹⁰⁸ *Id.* at 1061-63. *See generally* *New Orleans v. Levy*, 64 So.2d 798 (La. 1953); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13 (N.M. 1964). *See also* *Penn Central Transp. Co. v. City of New York*, 98 S.Ct. 2646 (1978). *But see* *City of Louisville v. Women's Club*, No. 197724 (Jefferson Cir. Ct. Jan. 17, 1976), *rev'd per curiam (on other grounds)*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

A challenge of discriminatory or "reverse spot"¹⁰⁹ zoning may still be made against landmark ordinances. Historic district ordinances have survived such challenges on the basis that they are designed not only to preserve individual structures but also the unique character of an entire area by imposing restrictions which are uniform and binding upon all persons similarly situated.¹¹⁰ Landmark ordinances, however, single out individual structures to be regulated. As a result, the benefits accruing to structures within an historic district are not present. This distinction, however, has not been sufficient to sustain challenges to landmark ordinances on the ground that they are "discriminatory" if they have been enacted pursuant to a comprehensive plan to preserve structures of historic or aesthetic interest throughout a jurisdiction.¹¹¹

The taking issue has emerged as the primary challenge to the application of historic district and landmark legislation. The issue is basically one of fairness: "[The] [f]ifth amendment's guarantee [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹¹² The question of when "fairness and justice" require compensation for economic injuries suffered by a property owner depends primarily upon the particular circumstances surrounding the alleged taking.¹¹³ Despite the *ad hoc* nature of such factual inquiries, it is clear from the 1978 Supreme Court opinion in *Penn Central Transportation Company v. City of New York*¹¹⁴ that certain considerations permeate the analysis of taking challenges to historic preservation ordinances.¹¹⁵

¹⁰⁹ The term "reverse spot" zoning is frequently used to refer to land use legislation which arbitrarily singles out a particular parcel of land, imposing upon it restrictions not applicable to surrounding parcels.

¹¹⁰ *E.g.*, *City of New Orleans v. Pergament*, 5 So.2d 129 (La. 1941).

¹¹¹ *Penn Central Transp. Co. v. City of New York*, 98 S.Ct. 2646, 2663 (1978).

¹¹² *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹¹³ *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

¹¹⁴ 98 S.Ct. 2646 (1978).

¹¹⁵ The issue of whether a land use restriction rises to the point of a "taking" within the meaning of the fifth and fourteenth amendments has been an issue of considerable difficulty for the courts. Courts and commentators alike have espoused various theories as to when a governmental action results in a compensable taking. Various judicial attempts include the "physical invasion test" (a taking results when the government occupies, appropriates, or systematically intrudes on the affected

Of primary concern is the severity of the economic impact on the owner of affected property. The application of an ordinance cannot be unduly harsh so as to deny a reasonable use or to interfere severely with distinct investment-backed expectations.¹¹⁶ To the extent this test requires an examination of diminution in the property's value or rate of return, certain questions remain unsettled. Such questions include: To what extent is a property's value attributable to societal efforts?¹¹⁷ What are the specific elements of return?¹¹⁸

property), *see, e.g.*, Callender v. Marsh, 18 Mass. (1 Pick.) 417 (1823); Coates v. City of New York, 7 Cow. 584 (N.Y. Sup. Ct. 1827); The "noxious use test" (a government can impose land use restrictions to prohibit a use which is injurious to health, morals, or safety of the community regardless of the impact upon the affected property owner), *see, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887); the "diminution in value test" (a taking results where the economic impact on the affected property is too great), *see, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The most notable attempts by legal scholars have been by Professor Joseph Sax: Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) and by Professor Frank Michelman: Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). For a discussion of the above theories, *see Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1462-86 (1978).

Despite these efforts, the law remains unsettled. Penn Central Transp. Co. v. City of New York, 98 S.Ct. 2646 (1978) was the first attempt by the Supreme Court to address the taking issue in the context of historic preservation. To the extent the Court's opinion will mold future judicial challenges, the brief textual discussion will be limited to factors considered important by the Court.

¹¹⁶ 98 S.Ct. at 2659. In *Penn Central*, New York City's Landmark Preservation Act had been applied to deny the construction of a multi-story office complex on top of Grand Central Station. The Court noted that the ordinance did not interfere with the current use of the terminal, the use to which the property was most suited; that all use of the "air rights" above the terminal had not been denied; and that the law allowed a reasonable return on the owners' investment by providing for property tax relief should the owner show incapability of earning such a return. The Court therefore concluded that a taking had not been established. *See also* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) (petitioner required to show denial of reasonable return, not merely that maximum economic potential impaired).

¹¹⁷ It has been suggested by at least one court that an historic structure's (or any property's) value is in part attributable to the efforts of society and therefore the law need not guarantee a reasonable return on that portion of the property's total value. *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd* 98 S.Ct. 2646 (1978). For a discussion of this idea, *see* Comment, *New York's Changing Conceptions of Land Use Law: Penn Central Transportation Co. v. City of New York*, 27 BUFFALO L. REV. 157, 166-69 (1978). The Supreme Court in deciding *Penn Central* did not address this issue. 98 S.Ct. at 2658 n.23.

¹¹⁸ For example, should return be computed by using current earnings, which could reflect management's inadequacies, or should it be computed on the property's

Of secondary importance is the nature of the government action involved. An ordinance cannot be applied so that it amounts to an acquisition of resources for public use without requiring just compensation to the owner of the property.¹¹⁹ A similar question regarding public use arises with respect to the exercise of eminent domain. However, the public use concept raises a threshold issue in the context of eminent domain: a governmental body may exercise eminent domain only if it is taking property for public use.¹²⁰ Generally, courts have defined "public use" broadly. For example, the Kentucky Court has upheld the exercise of eminent domain where the historic structure was to be privately managed so long as the government maintained ownership of the property and the Court has also upheld eminent domain where the property might potentially be resold to a private citizen interested in preserving the property's historic integrity.¹²¹ In other states the public use concept has also been broad enough to validate the taking of a scenic or facade easement which leaves the affected property in private hands.¹²²

capacity to earn a reasonable return? Should income from surrounding structures, owned by the same person, be imputed to the affected structure? See *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd* 98 S.Ct. 2646 (1978); Comment, *supra* note 117.

¹¹⁹ Even though a taking may be established, there remains the problem of determining "just compensation." Some ordinances attempt to mitigate the economic burden by providing forms of property tax relief or by making available "transfer development rights." See, e.g., *NEW YORK CITY, N.Y., ZONING RES. §§ 74-79, 74-791 to -793* (1975), which allows unused development rights to be transferred to contiguous parcels in the same general area, thus allowing construction of those parcels to exceed the maximum height and area requirements in the zone area. Because few challenges to historic preservation ordinances have survived, there is little indication of the validity of these forms as just compensation. For a discussion of these problems and the problem of determining the amount of compensation required, see Comment, *supra* note 117.

¹²⁰ The public use concept is embodied in the fifth amendment; for the actual language of the fifth amendment, see note 102 *supra*. See also *Ky. Const. arts. 13, 242*.

As with the enactment of historic district or landmark ordinances, see note 105 *supra*, the exercise of the power of eminent domain for the protection of historic sites has been held to be in pursuit of a legitimate public purpose. *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896); *Roe v. Kansas*, 278 U.S. 191 (1926).

¹²¹ *Coke v. Commonwealth*, 502 S.W.2d 57 (Ky. 1973) (involving the state's exercise of eminent domain in acquiring the Mary Todd Lincoln house in Lexington); *City of Louisville v. Women's Club*, No. 197724 (Jefferson Cir. Ct. Mar. 31, 1977), *rev'd per curiam* (on other grounds), No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

¹²² See, e.g., *State v. Houghton*, 176 N.W. 159 (Minn. 1920). Kentucky municipali-

IV. TAX INCENTIVES TO HISTORIC PRESERVATION

An indirect means by which federal and state governments can promote the preservation of historic sites and areas is by providing income and estate tax incentives to owners who maintain such property. While tax provisions will not prohibit destruction or alteration of historic property, an individual or commercial business owner faced with the decision of what to do with such property should consider the alternatives in light of the possibly substantial tax consequences.

A. Federal Law

Prior to 1976, both federal and Kentucky¹²³ tax law were structured in such a way as to provide disincentives for historic preservation. However, in recognition of the national interest in restoration and preservation of historic structures and areas, Congress included in the Tax Reform Act of 1976¹²⁴ certain provisions designed to discourage destruction of such property and to stimulate private preservation efforts.¹²⁵

The primary disincentives to historic preservation had been in regard to the deduction of demolition costs and the favorable depreciation treatment on subsequently constructed improvements. For example, assume an owner of a somewhat deteriorated, depreciable historic structure was faced with the

ties are prohibited from exercising the power of eminent domain to acquire scenic easements. See note 96 *supra* and accompanying text.

¹²³ For a discussion of Kentucky tax law, see notes 148-49 *infra* and accompanying text.

¹²⁴ Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified in various sections of the Internal Revenue Code [hereinafter cited as I.R.C.]). The Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (1978), contained numerous technical corrections to the Tax Reform Act in areas discussed herein. Subsequent citations to the Internal Revenue Code, unless otherwise designated, will be to sections as amended by the Revenue Act. For a discussion of the legislative history behind the passage of the Tax Reform Act and certain problems in the original statutory language giving rise to the need for the technical corrections, see Comment, *Historic Preservation and the Tax Reform Act of 1976*, 11 U.S.F.L. Rev. 453 (1977).

¹²⁵ It is impossible within the broad scope of this note to give an exhaustive treatment of the impact of the Tax Reform Act on historic preservation. For an excellent treatment of the subject, see Comment, *supra* note 124. See also Covington & Burling, Re: Impact of the Tax Reform Act of 1976 on the Preservation of Historical Properties (Jan. 27, 1977) (written for the National Trust for Historic Preservation); Note, *State and Federal Tax Incentives for Historic Preservation*, 46 U. CIN. L. REV. 833 (1977).

decision either to demolish the structure and erect a new building in its place or to maintain the old structure and incur substantial rehabilitation expenditures. If the choice was to demolish, the demolition costs as well as the remaining undepreciated basis in the structure were deductible in the year of demolition as an ordinary loss.¹²⁶ The new building then constructed qualified for accelerated depreciation.¹²⁷ However, if the choice was to maintain the old structure, the rehabilitation costs were required to be added to the taxpayer's basis,¹²⁸ the increased basis then being subject only to straight line depreciation if the use of the property had not originated with the taxpayer¹²⁹—as would be the case with most historic property. Therefore, the tax treatment clearly favored demolition.

Aware of the seriousness of this threat to the continued preservation of historic structures, Congress, in the Tax Reform Act, essentially reversed the tax treatment in favor of preservation. Now, if a structure is a "certified historic structure" as defined in Code Section 191(d)(1),¹³⁰ the cost of its demolition

¹²⁶ Demolition costs and the undepreciated basis of the property are deductible under I.R.C. § 165(a),(c) as a loss incurred in trade or business or in a transaction entered into for profit if the plan to demolish was formulated subsequent to the acquisition. Treas. Reg. § 1.165-3 (1961). If the structure is purchased with the intent to demolish it, the entire purchase price as well as the subsequent demolition costs are allocated to the basis of the land. *Id.*

¹²⁷ I.R.C. § 167(c)(2). Normally, a taxpayer will elect to use an accelerated method over the straight line method since the former allows for larger deductions during the earlier years of the property's useful life.

¹²⁸ I.R.C. §§ 263, 1016. The expenses are capital in nature.

¹²⁹ I.R.C. § 167(c)(2). An exception is provided for used residential rental property which qualifies for 125% declining balance. I.R.C. § 167(j)(5).

¹³⁰ In order to qualify as a "certified historic structure" the property must be subject to depreciation and either be (1) listed in the National Register, or (2) located in a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district. A registered historic district is a district which is either listed on the National Register or designated under a state or local statute which is certified by the Secretary of the Interior as containing criteria which substantially achieve the purpose of preserving and rehabilitating buildings of historic significance to the district. The state or locally designated district must in addition be certified by the Secretary as meeting substantially all of the requirements for the listing of districts in the National Register. I.R.C. §§ 191(d)(1)-(2). It should be noted that this definition does not include individual buildings designated as "landmark sites" under local ordinances unless such property is listed in the National Register.

An individual property owner cannot qualify a district as a registered historic district by obtaining a certification of state or local statutes. Only the duly authorized representative of the government which enacted that statute may request certification

and the remaining undepreciated basis are disallowed as an ordinary loss deduction.¹³¹ Instead, these amounts are added to the basis of the land.¹³² Not only is the immediate offset to ordinary income lost, but, since land is a nondepreciable capital asset,¹³³ the increase in basis cannot be depreciated and, upon sale of the land, the cost would offset capital gains (or increase capital losses) rather than ordinary income.¹³⁴ In addition, the Code now disallows the use of accelerated depreciation methods for real property constructed in whole or in part on a site which had been occupied, on or after June 30, 1976, by a "certified historic structure" that was demolished or substantially altered other than by virtue of "certified rehabilitation."¹³⁵ In contrast, qualifying restoration or rehabilitation expenditures now receive the favored treatment; the taxpayer may elect either to amortize such expenditures over a sixty month period¹³⁶ or add the costs to his basis in the property and

by the Secretary of Interior. For the requisite procedures and standards for obtaining certification of statutes, see Department of Interior Regulations, 42 Fed. Reg. 40436 (1978) (to be codified in 36 C.F.R. § 67.9). However, once an historic district is so designated, the burden of obtaining the certification of historic significance for an individual structure is placed on the record owner of the property. The owner must follow the regulations issued by the National Park Service in applying for such designation by the Secretary of the Interior. See 36 C.F.R. § 67.1-8 (1977).

¹³¹ I.R.C. § 280B. The application of this section cannot be avoided by the owner's failing to request certification since a presumption of historic significance is created under the section absent certification of nonsignificance by the Secretary of the Interior. *Id.* § 280B(b).

The section applies only to the demolition of certified historic structures occurring between June 30, 1976, and January 1, 1981. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2124(b), 90 Stat. 1520 (1976).

¹³² I.R.C. § 280B(a)(2).

¹³³ While land is a capital asset, it is not subject to depreciation because its useful life is not amenable to estimation.

¹³⁴ With respect to gains, the offset to ordinary income is more desirable since capital gains are taxed at a lower rate. See I.R.C. § 1202.

¹³⁵ I.R.C. § 167(n)(1). Like Section 280B, the rule applies automatically to all structures within a registered historic district unless the Secretary of the Interior issues a certificate of nonsignificance. *Id.* For a discussion of certified rehabilitation, see notes 136-37 *infra*.

¹³⁶ I.R.C. § 191. Code Section 191 allows expenditures for "certified rehabilitation" incurred between June 14, 1976, and June 15, 1981, to be amortized over a sixty-month period. The term "certified rehabilitation" means the certified historic structure has been improved in a way which the Secretary of the Interior has certified "as being consistent with the historic character of such property or the district in which the property is located." *Id.* § 191(d)(3). For the applicable certification procedures and evaluative standards utilized by the Secretary, see 36 C.F.R. §§ 67.6-.7 (1977). The

use an accelerated method of depreciation in relation to his entire basis.¹³⁷

An additional incentive to historic preservation added by Congress through the Tax Reform Act was the expansion of the charitable contribution deduction to encompass gifts of certain partial interests in property. Prior to the enactment of the Tax Reform Act, only a gift of a remainder interest in a personal residence or farm or an undivided portion of the taxpayer's entire interest in property gave rise to a charitable deduction absent satisfaction of rather complex rules dealing with interests transferable in trust.¹³⁸ Section 170(f) now allows charita-

qualifying rehabilitation expenses form what is termed an "amortizable basis." This part of the property's total basis can, at the election of the taxpayer, be amortized over the sixty-month period beginning with either the next month after the expenses are incurred or the first month of the succeeding taxable year. I.R.C. § 191(a), (d)(z). For the requisite procedures in making the election, see Temporary Treas. Reg. § 7.191-1(a). The amount of the deduction is determined by a formula which results in an equal write-off of the amortizable basis during each of the sixty months. I.R.C. § 191(a). The remaining portion of the property's total basis is unaffected by the election and therefore is still subject to depreciation during the time the rehabilitation expenditures are being amortized. *Id.*

The amortization election under § 191 is available to owners, life tenants, and certain lessees of historic structures who incur the rehabilitation expenditures. *Id.* § 191(a),(f). In order for a lessee to qualify, the remaining term of his lease (without regard to any renewal period) must, at the time the certified rehabilitation is completed, have a remaining term equal to or in excess of the useful life or the improvements but in no event less than thirty years. *Id.* § 191(f).

¹³⁷ I.R.C. § 167(o). As an alternative to the amortization election, a taxpayer incurring expenses for certified rehabilitation may elect under § 167(a) to utilize, with respect to "substantially rehabilitated property," accelerated depreciation in lieu of the straight line depreciation otherwise allowable. "Substantially rehabilitated historic property" means any certified historic structures with respect to which capitalized expenditures for certified rehabilitation during the twenty-four month period ending on the last day of any taxable year, reduced by the amortization or depreciation taken with respect thereto, exceeds the greater of (a) the adjusted basis of the property as of the beginning of the twenty-four month period or (b) \$5000. *Id.* § 167(o)(2). The electing taxpayer is treated under the section as the original user of the property and therefore the property's entire basis qualifies for the 150% (or 200% for residential rental property) declining balance method of depreciation.

For an analysis of the taxpayers choice between §§ 191(a) and 167(o), see Comment, *supra* note 124, at 475-77.

¹³⁸ I.R.C. § 170(f)(3) (amended 1976). The rules governing the contribution of property placed in trust are contained in § 170(f)(2). A remainder interest is deductible where transferred to a charitable remainder annuity trust, a charitable remainder unitrust (I.R.C. § 664), or a pooled income fund (I.R.C. § 642(c)(5)). An income interest is deductible if (1) the interest is in the form of a guaranteed annuity or if the trust instrument specifies that the interest is a fixed percentage of the fair market

ble deductions for donations made before June 14, 1981, of less than the full interest in the taxpayer's individual or commercial property where the contribution is in the form of a lease, option to purchase, or easement with respect to real property granted in perpetuity¹³⁹ to a charitable organization organized exclusively for conservation purposes.¹⁴⁰ In addition, a charitable deduction is allowed for the contribution of a remainder interest in all real property (not just farms and residences) granted to such an organization.¹⁴¹ The term "conservation purposes" is defined to include the preservation of historically important land areas or structures.¹⁴² Therefore, gifts of a facade easement giving the donee the right to protect the outside architectural features of a structure may now qualify for a charitable deduction. Similarly, scenic or open space easements designed to restrict future development on the site might give rise to a charitable deduction.¹⁴³

value of the trust property, and (2) the income from trust property is taxable to the grantor under I.R.C. §§ 671-679.

¹³⁹ After the passage of the Tax Reform Act of 1976, the Code allowed a charitable deduction for a lease, an option to purchase, or an easement with respect to real property of not less than 30 years. However, Congress amended the Code to its present state which requires that such interests contributed after June 14, 1977, be in perpetuity. Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126 (1977).

¹⁴⁰ I.R.C. § 170(f)(3)(B)(iii). The amount of the charitable deduction is the fair market value of the partial or remainder interest given. *Id.* § 170(a); Treas. Reg. 1.170A(c) (1975). Special valuation problems arise in relation to gifts of easements and remainder interests since there is a lack of comparable market prices. For valuation rules applicable to scenic (and presumably facade) easements, see Rev. Rul. 73-339, 1973-2 C.B. 68 (clarified by Rev. Rul. 76-376, 1976-2 C.B. 53). See also Thayer, 36 T.C.M. (CCH) 1504 (1977); Browne, Jr. and Van Dorn, *Charitable Gifts of Partial Interest in Real Property for Conservation Purposes*, 29 TAX LAW. 69 (1975). For the rules applicable to remainder interests, see Treas. Reg. § 1.170A-12(b)(3) (1975).

¹⁴¹ I.R.C. § 170(f)(3)(B)(iv).

¹⁴² *Id.* § 170(f)(3)(C). The definition also includes the preservation of land areas for public outdoor recreation or education or scenic enjoyment and the protection of natural environment systems. *Id.*

¹⁴³ A facade easement normally prohibits the owner of a building from altering or modifying the exterior of the structure without consent of the holder. It may also impose a duty of maintenance, allow the holder to inspect periodically, and grant the right to sue for an injunction upon violation of the terms of the easement.

A scenic, open space, or developmental rights easement restricts the owner of the burdened property from certain development either as to land not containing structures or unused air space above an existing structure. In order to satisfy the perpetuity requirement of § 171(f)(3)(B)(iii), the easement must contain a provision that it will be binding upon all future owners of the property. If recorded properly, the easement

A final incentive to historic preservation contained in the Tax Reform Act arises indirectly through the enactment of Code Section 2032A, which deals with the estate tax valuation of real property used in connection with a farming operation or a closely held business. Prior to the enactment of the section, all historically significant property was valued for estate tax purposes at its highest or best use value, i.e., its value for commercial development.¹⁴⁴ As a result of a valuation exceeding the property's present use value, heirs were often forced to sell such property in order to pay the estate tax. Through application of Section 2032A, if certain conditions are met,¹⁴⁵ the executor of an estate containing an historically significant farm or an historic structure used in a closely held business may elect¹⁴⁶ to value the historic property on the basis of the property's current rather than best use value.¹⁴⁷ While historic sig-

"runs with the land" and does not terminate upon sale or transfer of the property. *See* Comment, *supra* note 124 at 484-85 n.130.

For a discussion of tax planning techniques encompassing scenic and facade easements, *see* A. ARNOLD, *TAX SHELTER IN REAL ESTATE UNDER THE TAX REFORM ACT OF 1976* 43-45 (1977); Comment, *supra* note 124, at 484-85.

¹⁴⁴ "Under present law, the value of the property included in the gross estate of the decedent is its fair market value at the date of the decedent's death (or at the alternate valuation date). One of the most important factors in determining fair market value is the 'highest and best use' to which the property can be put." H.R. REP. NO. 1515, 94th Cong., 1st Sess., app. A, at 609 (1976).

¹⁴⁵ In order to qualify, the real property must be located in the United States and on the date of the decedent's death it must be used either for farming purposes or in a trade or business. The property must have been used in this manner for five out of the eight years preceding the decedent's death and during that period the decedent or a member of the decedent's family must have owned the property and materially participated in the operation of the farm or other business. For an in depth discussion of the material participation requirement, *see* Note, *Material Participation and the Valuation of Farm Land for Estate Tax Purposes Under the Tax Reform Act of 1976*, 66 Ky. L.J. 848 (1978). The property must pass to a member of the decedent's family (i.e., an ancestor or lineal descendant, a lineal descendant of a grandparent, the decedent's spouse, or the spouse of any such decedent). In addition, the adjusted value of the real or personal property used in the farming or business operation must comprise at least fifty percent, and the qualifying real property must exceed twenty-five percent, of the adjusted value of the decedent's estate. The term "adjusted value" means the value of property for estate tax purposes (determined without regard to § 2032A) reduced by any indebtedness attributable to such property. I.R.C. § 2032A.

¹⁴⁶ The procedural dimensions of making an election are governed by I.R.C. § 2032A(d).

¹⁴⁷ I.R.C. § 2032A(a)(1). The Code specifically provides a method for valuing qualified real property used for farming purposes. The value is based on an average capitalization of comparable rental values. *See id.* § 2032A(e)(7); proposed Treas. Reg.

nificance is not a prerequisite to the application of the section, this provision nevertheless provides some relief from the valuation pressures placed on certain historic property that otherwise meets its requirements.

B. *Kentucky Law*

While the Kentucky legislature has not directly provided for income tax incentives for historic preservation, the state's tax law is structured so that all deductions allowable to individuals or businesses under chapter one of the Internal Revenue Code are permissible deductions in deriving state taxable net income.¹⁴⁸ Therefore, the preservation income tax incentives included in the Tax Reform Act of 1976 are incorporated into Kentucky law.

In contrast, the inheritance and estate tax laws of the state do not parallel those on the federal level. However, the 1978 legislative session passed an act creating, with respect to farmland, an inheritance tax valuation provision similar to Internal Revenue Code Section 2032A.¹⁴⁹

§ 20.2032A-4, 43 Fed. Reg. 31039 (1978). For qualified real property used in a closely held business (or for farming purposes where there are no comparable rental values or the executor elects not to use the capitalization formula), the value is determined by examination of all relevant factors including capitalization of income and fair rental values, differential or use value land assessments, and comparable sales of other farms or closely held businesses. I.R.C. § 2032A(e)(8).

The Code limits the resulting decrease in property valuation from the application of the special use formula to \$500,000. *Id.* § 2032A(a)(2). In addition, a recapture provision is set forth requiring recapture in whole or in part of the tax benefit resulting from the special valuation if, within fifteen years after the decedent's death, a qualified heir disposes of any interest in the property to one other than a member of his family or ceases to use the acquired property for a "qualified use". *See* I.R.C. § 2032A(c)(1), (7).

¹⁴⁸ KRS § 141.010(11), (13) (Supp. 1978). Exceptions exist, but they are inapplicable for purposes of this discussion.

¹⁴⁹ 1978 Ky. Acts, ch. 138, §§ 5-12. The new statutes provide that, at the election of the person responsible for filing the return, real property includable in the gross estate of a decedent dying between July 1, 1978, and June 30, 1979, which is either agricultural or horticultural land and has been used for agricultural or horticultural purposes for five years prior to the death of the owner may be valued for inheritance tax purposes at its agricultural or horticultural use value if the value of the land exceeds fifty percent of the gross taxable estate. The real property must, however, pass to a "qualified person," i.e., a surviving spouse, who proposes to devote the property to agricultural or horticultural purposes for at least five years after the death of the decedent. The reduction in the gross estate cannot exceed \$500,000, and the tax benefit

CONCLUSION

It is hoped that by the dissemination of the information contained in this work all persons interested in preserving a significant and important aspect of our environment and society will be encouraged to participate, or continue their participation with renewed fervor, in historic preservation efforts. It has been pointed out that tools have been provided by all levels of government with which to preserve our historic environment. These tools increasingly affect the private citizen. Under the NHPA, federal agencies and private citizens can take action to prevent destruction of historic property by federal projects. Grants are available to owners of such property for rehabilitation purposes under both the NHPA and the Kentucky Historic Preservation Program. Interested owners of culturally valuable property in several Kentucky cities can seek the establishment of an historic district under local zoning ordinances. Finally, federal and Kentucky tax law now offer incentives for owners of historically significant property to maintain the property in its present valuable state or to rehabilitate property in a currently deteriorated condition.

Like the protection of the air, water, and other natural resources, preservation of our historic environment is a continuing responsibility of all citizens. Just as we cannot be satisfied with air that is merely "acceptable," or water that is marginally drinkable, we cannot be satisfied with preserving only

is recaptured if the qualified property is sold, conveyed, or otherwise transferred, or if the existing use is changed. The recapture is secured by a five year lien on the property. KRS §§ 140.300-.360 (Supp. 1978).

In comparing the availability of the Kentucky special use valuation provisions with the federal provision in I.R.C. § 2032A, it should be noted that the Kentucky statutes do not require material participation by a decedent or a member of the family, and in addition limit the post death transfer or change in use to five rather than fifteen years. Therefore, an historical farm which has been passively rented prior to the death of the owner may qualify for special valuation for Kentucky inheritance tax purposes but not for federal estate tax purposes. The absence of a material participation requirement on the beneficiary coupled with a relatively small time limitation on transfer or change of use makes the Kentucky provision more attractive. However, it should also be noted that the Kentucky statutes more narrowly define to whom the qualifying real property must pass, compare KRS §§ 140.300(5) with I.R.C. § 2032A(e)(1), and limit the valuation to land and income producing improvements, excluding residences which may qualify for a lower valuation under the federal provisions. Compare KRS §§ 140.300(1)-(2), 132.010(7)-(8) with I.R.C. § 2032A(e)(3).

some of the historic resources that now exist. And, unlike the air and the water which are capable of being revitalized and restored, once an object of historic and cultural value is lost, it is lost forever.

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