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A CHALLENGE TO HISTORIC PRESERVATION IN KENTUCKY

[The houses are] two of many run-down rooming houses in the City of Louisville¹ [T]hey are in fact examples of where the bloom has gone from the rose, and they lack the realistic capability of becoming a "silk purse." The entire record of the hearing . . . is completely void of any evidence of these buildings being historical²

[The two houses] "illustrate the extraordinary diversity yet harmony of urban integration achieved by Old Louisville architects in its heyday."³ [They are] "[a]mong the finest Richardsonian Romanesque revival houses extant in this country."⁴

INTRODUCTION

The validity of Louisville's historical preservation ordinance⁵ was recently challenged in the Kentucky Supreme Court. The case of *City of Louisville v. Woman's Club*⁶ arose when the city attempted to save two houses which the Woman's Club wanted torn down for a parking lot. Although the Jefferson Circuit Court dismissed the condemnation action and held the ordinance arbitrary and confiscatory as written,⁷ the Kentucky Supreme Court did not rule on the constitutionality of the ordinance, stating that this issue was irrelevant to the condemnation hearing.⁸ The Court also stated that the trial judge should not have dismissed the condemnation action.⁹

¹ Brief for Appellee at 7, *City of Louisville v. Woman's Club*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

² *Id.* at 9.

³ Brief for National Trust for Historic Preservation, the Neighborhood Development Corporation, and the Preservation Alliance of Louisville and Jefferson County, Inc. as Amicus Curiae at 17, *City of Louisville v. Woman's Club*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976) (quoting from the National Register report on the Old Louisville Area).

⁴ *Id.* at 17-18, (quoting from S. THOMAS & W. MORGAN, *OLD LOUISVILLE: THE VICTORIAN ERA* 72 (1975)).

⁵ LOUISVILLE, KY., ORDINANCE 58, Series 1973 (1973).

⁶ No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

⁷ *City of Louisville v. Woman's Club*, No. 197724 (Jefferson Cir. Ct. Jan. 17, 1976).

⁸ *City of Louisville v. Woman's Club*, No. 76-298, slip op. at 2 (Ky. Sup. Ct. Dec. 17, 1976).

⁹ *Id.*

The Court did not rule on Louisville's power of eminent domain since the issue was not decided in the lower court.¹⁰

Thus the constitutionality of city-enacted historic preservation ordinances has not yet been decided in Kentucky. If Kentucky courts agree with the decision of the circuit court, Kentucky cities will have to rewrite laws designed to protect their historical and cultural heritage. On the other hand, if they find such ordinances constitutional, they will follow the trend of state and federal courts across the country upholding historic preservation laws.¹¹

Historic preservation ordinances are a type of zoning law which focuses on classifying areas or structures according to their historic significance rather than on the basis of such factors as function, size, or height. The ordinances were first enacted in the United States in the 1930's and have become quite common in the last 15 years.¹² The impetus behind these laws is the preservation of the country's heritage, especially in cities where numerous older buildings are being razed for newer, larger structures.¹³ Legal procedures other than zoning may also be utilized to achieve historical preservation.

In order to encourage individuals and organizations to restore structures, various levels of government have passed laws regulating historically significant building and neighborhoods. Some local and state laws directly limit what owners may do with their property by restrictions on changes to the exteriors of buildings, or through tax relief. Federal law, by classifying property as historically significant, provides funds for restoration.¹⁴ Increased tourism¹⁵ and improved living con-

¹⁰ *Id.* at 3.

¹¹ See notes 88-130 *infra* and accompanying text for an analysis of the decisions upholding these laws.

¹² See text accompanying notes 29-31 *infra* for a brief history of these ordinances.

¹³ Note, *Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historic Landmarks*, 1975 *Duke L.J.* 999. "Over half of the 12,000 buildings listed in the Historic Building Survey undertaken by the federal government in 1933 had been razed by 1970." *Id.* at 999 n.1.

¹⁴ See notes 38-50 *infra* and accompanying text for an explanation of methods of historic preservation other than zoning ordinances.

¹⁵ It is questioned by some whether this is a beneficial result; by bringing tourists and businesses to the restored area, the effect is often the opposite of what was originally envisioned.

ditions may also have an indirect function in encouraging restoration.

This comment focuses on various questions raised by the *Woman's Club* case concerning the use of zoning ordinances to effect historical preservation. As a means of addressing the constitutional issues involved in this type of historical preservation law, this comment examines the rationale given by the Jefferson Circuit Court as an example of judicial reasoning on the subject. This decision can be compared with cases dealing with the constitutionality of similar ordinances in other jurisdictions.¹⁶

I. HISTORIC PRESERVATION AS ZONING

Zoning as a valid exercise of police power was first upheld in 1926 in *Village of Euclid v. Ambler Realty Co.*¹⁷ Since *Euclid*, zoning ordinances have been held constitutional as long as they are reasonably related to legitimate public interests.¹⁸ Generally there is a presumption of validity for these legislative enactments,¹⁹ and such regulations will stand unless they are patently arbitrary or unreasonable. However, what is considered appropriate for legislative regulation may depend on prevailing economic and social conditions.²⁰

Zoning ordinances have been justified as measures related

¹⁶ An important book on historic preservation is J.H. MORRISON, *HISTORIC PRESERVATION LAW* (2d ed. 1965). Symposia include: *Historic Preservation Symposium*, 12 WAKE FOREST L. REV. (1976), and *Symposium-Perspectives on Historic Preservation*, 8 CONN. L. REV. (1975-76). A bibliography of articles on preservation law is found at 12 WAKE FOREST L. REV. 175 (1976). Some recent articles on the subject include: Schroder, *The Preservation of Historical Areas*, 62 KY. L.J. 940 (1974); Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. 329 (1971); Note, *supra* note 13, Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME LAW. 379 (1969); and Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611 (1970).

¹⁷ 272 U.S. 365 (1926).

¹⁸ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). See Schroder, *supra* note 16.

¹⁹ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

²⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). "[W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation." *Id.* at 387.

to "public health, safety, morals, or general welfare."²¹ As such, the regulations fall within the state's police power. In Kentucky, zoning ordinances have been upheld by the courts since 1928²² as long as they are reasonably related to the purposes of the police power.²³

Recently, the question has arisen whether zoning ordinances can be upheld on the basis of aesthetics. Originally this justification was rejected as arbitrary and a matter of individual taste rather than public need.²⁴ Other cases justified aesthetic considerations as legitimate interests by relating them to economic ones; by applying some aesthetic standard to a regulated area, property values will be maintained or tourism will be increased, and the public welfare of the community will be benefited.²⁵ With *Berman v. Parker*,²⁶ aesthetic considerations have come to be included as an aspect of public welfare.

The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²⁷

²¹ *Id.* at 395.

²² *Fowler v. Obier*, 7 S.W.2d 219 (Ky. 1928).

²³ Under the police power, the Kentucky Court of Appeals (predecessor court to the Kentucky Supreme Court) has also upheld the "Junk Yard Act" (Ky. REV. STAT. §§ 177.905-.950 (1971)[hereinafter cited as KRS]) in *Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. 1964) and the "Billboard Act" (KRS §§ 177.830-.890 (1971)) in *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964). In *Jasper* the Court stated that the police power is "as broad and comprehensive as the demands of society make necessary" and "must keep pace with the changing concepts of public welfare." 375 S.W.2d at 711.

²⁴ *Schroder*, *supra* note 16, at 947.

²⁵ *See City of New Orleans v. Levy*, 64 So. 2d 798 (La. 1953), upholding the Vieux Carré Ordinance.

See also State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970). An ordinance of Ladue, a suburb of St. Louis, provided that the Architectural Board had the authority to approve plans for proposed structures to conform with certain architectural standards, including aesthetic ones. The court said that while aesthetic considerations alone were not determinative in upholding the ordinance, the ordinance's effect on property values in the community was important.

²⁶ 348 U.S. 26 (1954).

²⁷ *Id.* at 33. *See also People v. Stover*, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963). In Kentucky, aesthetic considerations are sufficient to justify the exercise of police power. *Jasper v. Commonwealth*, 375 S.W.2d 709, 711 (Ky. 1964); *Moore v. Ward*, 377 S.W.2d 881, 887 (Ky. 1964).

The same justifications given for upholding zoning for aesthetic reasons can be applied to historic preservation zoning, including pragmatic economic considerations such as increases in tourism or property values.²⁸

The first historic preservation ordinance in the United States was passed in 1931, in Charleston, South Carolina.²⁹ Since then, such ordinances have been passed in more than 450 communities,³⁰ including six in Kentucky.³¹ Various communities which have passed historic preservation ordinances have done so by adding provisions to local codes³² or by submitting the proposed ordinances to the voters for approval.³³ In any case, the local ordinances have been adopted pursuant to enabling legislation passed at the state level.³⁴

Authorization for Kentucky municipalities, including Louisville, to enact historic preservation ordinances as zoning comes from the Kentucky legislature.³⁵ Originally historic preservation zoning was based on the general state police power. Since 1966, however, authorization for zoning by cities and

The issue of zoning for aesthetic purposes is a separate inquiry in itself. Some relevant articles include Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Steinberg, Hershman, & Michelman, *Aesthetics vs. Free Enterprise-A Symposium*, 15 PRAC. LAW. 17 (Feb. 1969); and Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 FORDHAM L. REV. 729 (1961).

²⁸ LOUISVILLE, KY., ORDINANCE 58, Series 1973, § 1 c (1973); Schroder, *supra* note 16; Comment, *supra* note 16.

²⁹ Forman, *Historic Preservation and Urban Development Law in Louisiana*, 21 LA. B.J. 197 (1973).

³⁰ Brief for Amicus Curiae, *supra* note 3, at 5.

³¹ *Id.* The cities are Louisville, Covington, Paducah, Maysville, Lexington, and Frankfort.

³² See, e.g., Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20 (App. Div. 1975).

³³ Mayor of Annapolis v. Anne Arundel County, 316 A.2d 807, 809 (Md. 1974).

³⁴ *Id.* The Maryland Code authorizes cities and counties to establish Historic District Commissions and sets out the general procedure which is to be followed. MD. ANN. CODE art. 66B, §§ 8.01-8.15 (1970). Several revisions have been made in the 1976 cumulative supplement which do not change the impact of the Historic Areas Zoning Article.

In Santa Fe, New Mexico, on the other hand, the city's authority to create the historic district ordinance was derived from the state's general grant of zoning power to communities. N.M. STAT. ANN. §§ 14-28-9 to 11 (1953) (current version at §§ 14-20-1, 3 (1976)). City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964). Since 1965 there has also been specific enabling legislation for historic districts, N.M. STAT. ANN. § 14-21-1 to 5 (1976).

³⁵ KRS § 100.201 (1971).

counties in Kentucky has specifically included zoning to protect historical districts.³⁶ Kentucky communities are authorized to create a board to advise the zoning administration on such historic districts.³⁷

II. OTHER METHODS OF HISTORIC PRESERVATION

Other legal procedures for historic preservation include taxation, easements, federal programs, maintenance, and eminent domain.

A. *Taxation*

Various types of tax incentives which encourage landowners to restore and preserve historic property have been adopted in some jurisdictions. These include property tax exemptions, tax credits, abatements, and reduced assessments.³⁸

B. *Easements*

Historic preservation may also be accomplished by the use of easements, particularly scenic easements with respect to the exterior of structures.³⁹ These are generally easements in gross as they benefit not only adjacent landowners but the community in general. Because these easements must be perpetual in order to be effective, they generally run with the land and cannot be assigned.⁴⁰ To insure a perpetual easement, the property owner may convey the easement to a charitable corporation or agency of the state. Through this technique, the property owner is able to retain ownership of the property and the state is guaranteed that the property will not be destroyed or altered.⁴¹

³⁶ KRS § 100.201 (1971); KRS § 100.203(1)(e)(Supp. 1976).

³⁷ KRS § 100.127(3) (Supp. 1976). "[T]he planning agreement may provide for the creation of a . . . board to advise the zoning administrator regarding issuance of permits in such districts . . ."

³⁸ Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334 (1975-76). See also Schroder, *supra* note 16, at 953-54.

³⁹ Freeman, *The Use of Easements for Historic Preservation*, LEGAL TECHNIQUES IN HISTORIC PRESERVATION 28 (National Trust for Historic Preservation 1971).

⁴⁰ *Id.* at 28-29.

⁴¹ *Id.* See also Wilson & Winkler, *supra* note 16; Comment, *supra* note 16; Comment, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383 (1975-76).

C. *Federal Programs*

On the national level, legislation has been passed for the preservation and maintenance of significant historic sites. The National Historic Preservation Act of 1966 expanded the National Register of Historic Places and provides financial assistance for the preservation of property listed on the Register.⁴² The National Environmental Policy Act requires federal agencies to prepare impact statements for actions significantly affecting the quality of the human environment.⁴³

D. *Maintenance Regulations*

Some ordinances, including that of Louisville, require that the property owner maintain the registered structures to prevent deterioration.⁴⁴ While this puts a burden on the landowner greater than that normally required by city ordinances for maintenance of buildings,⁴⁵ the ordinance is not invalid.⁴⁶

E. *Eminent Domain*

Another possible procedure for historic preservation is eminent domain, where the government is directly involved through the condemnation of property for public uses. This procedure requires the payment of just compensation to the property owner.⁴⁷ Eminent domain powers have been used by local, state, and federal governments. The first major case involving condemnation of historic property for public use was *United States v. Gettysburg Electric Railway Co.*,⁴⁸ in which

⁴² National Historic Preservation Act of 1966, 16 U.S.C. § 470-470b, 470c-470n (1970). See Schroder, *supra* note 16; Shull & Shull, *New Inroads for Historic Preservation*, 26 AD. L. REV. 357, 359 (1974).

⁴³ National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1970). See Shull & Shull, *supra* note 42, at 362.

Other federal legislation includes the Demonstration Cities and Metropolitan Development Act of 1966, 16 U.S.C. § 470b-1 (1970) and the Department of Transportation Act, 49 U.S.C. §§ 1651-1659 (1970), cited in Schroder, *supra* note 16, at 961-62.

⁴⁴ LOUISVILLE, KY., ORDINANCE 58, Series 1973, § 10a (1973); New York, N.Y., ADMINISTRATIVE CODE ch. 8-A, § 207-10.0 (1976); *Maier v. City of New Orleans*, 516 F.2d 1051, 1066 n.85 (5th Cir. 1975).

⁴⁵ Comment, *supra* note 16, at 619.

⁴⁶ *Maier v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

⁴⁷ U.S. CONST. amend. V; KY. CONST. arts. 13, 242.

⁴⁸ 160 U.S. 668 (1896). The use of property for the inspiration of patriotism in

the Supreme Court determined that the federal government had the authority to condemn property for the preservation of the Gettysburg battlefield area. In *Roe v. Kansas ex rel. Smith*,⁴⁹ the Supreme Court held that Kansas had the authority to condemn the historic site of Shawnee Mission, the establishment of historical sites being a public use.

In Kentucky the issue of public use in an eminent domain action recently arose with respect to the Mary Todd Lincoln House in Lexington. The state's condemnation was upheld; even though the property is managed by a private organization, the state owns the historic site.⁵⁰ The issue of eminent domain is now the primary issue before the Jefferson Circuit Court in the Louisville condemnation action.

III. LOUISVILLE'S HISTORIC PRESERVATION ORDINANCE

Louisville's historic preservation ordinance was passed in 1973 as a means of saving and maintaining the city's historical and cultural heritage⁵¹ for various economic, educational, and aesthetic reasons.⁵²

The ordinance provides for the establishment of the Louisville Historic Landmarks and Preservation Districts Commission,⁵³ which has the authority to make a study of Louisville neighborhoods and structures to determine which are of significant historic, cultural, aesthetic, architectural, or archaeological interest.⁵⁴ After a public hearing the Commission can desig-

United States citizens was considered to be a public use in this case.

⁴⁹ 278 U.S. 191 (1929). See also *Flaccomio v. Mayor of Baltimore*, 71 A.2d 12 (Md. 1950) in which the condemnation of property by the City of Baltimore for the Star Spangled Banner Flag House was upheld as a public use. Even though the site was operated by a private group, the city held title to the property.

⁵⁰ *Coke v. Commonwealth*, 502 S.W.2d 57 (Ky. 1973).

⁵¹ LOUISVILLE, KY., ORDINANCE 58, Series 1973 (1973). "An Ordinance Establishing an Historic Landmarks and Preservation Districts Commission and Relating to Guidelines and Procedures for Construction and Demolition within Such Districts." The stated policy considerations of the ordinance are set out in section 1b.

⁵² *Id.* § 1c(1)-(7).

⁵³ The eleven members of the Commission include eight people chosen by the mayor, including at least one architect, one historian, one realtor, and one attorney; the City's Director of Building and Housing Inspection; the Executive Director of the Louisville and Jefferson County Planning Commission; and a member of the City Board of Aldermen. *Id.* § 2a.

⁵⁴ *Id.* § 3a(1).

nate landmarks, landmark sites, and preservation districts.⁵⁵ The designation of these sites is not arbitrary, but is based on a number of criteria which can be applied to the sites in question.⁵⁶ Once an area or building is so designated, the Commission appoints an Architectural Review Committee⁵⁷ for the site and files a copy of the designation with various city agencies.⁵⁸ Once a site is designated as a landmark, the ordinance limits what may be done to it. One cannot "construct, reconstruct, alter or demolish"⁵⁹ any structure without permission from the Architectural Review Committee appointed for that site.⁶⁰ Persons affected must also keep the structures in good repair.⁶¹

Property owners who wish to make changes to their property must first apply to the Committee for a "certificate of no exterior effect." Permission to make any alterations will be granted if the proposed change does not affect any "exterior architectural feature" of the structure.⁶² If the permit is denied, the property owner can then apply to the Committee for a "certificate of appropriateness." The standard involved for the approval of architectural changes is "whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this Ordinance."⁶³ The Committee has 30 days to recommend approval or disapproval to the Commission of the application or to serve notice of a public hearing.⁶⁴ The Commission then decides whether or not to approve the request. If there was no hearing at the Committee stage, one is held by the Commission.⁶⁵

If the Commission denies the application, it has the power to impose a 3-month waiting period during which it conducts negotiations with the owner in order to find a way to preserve

⁵⁵ *Id.* § 4a.

⁵⁶ *Id.* § 4b(1) - (9).

⁵⁷ *Id.* § 4c.

⁵⁸ *Id.* § 4d.

⁵⁹ *Id.* § 6a.

⁶⁰ *Id.*

⁶¹ *Id.* § 10.

⁶² *Id.* § 7a.

⁶³ *Id.* § 8a. See note 87 *infra* and accompanying text for a further explanation of this standard.

⁶⁴ *Id.* § 8a, b.

⁶⁵ *Id.* § 8d.

the property.⁶⁶ If demolition or construction is involved, the Commission can extend the period to 6 months.⁶⁷ If no agreement is reached during the waiting period, the Commission issues a notice or right to proceed,⁶⁸ and the owner can make the proposed changes to the property. Penalties are imposed for violation of any provision of the ordinance.⁶⁹

IV. THE JEFFERSON CIRCUIT COURT DECISION

Events leading up to the circuit court's decision in the Louisville case are, briefly, as follows.⁷⁰ In 1974, the Woman's Club of Louisville, which already owned a club house in the Old Louisville Historic Preservation District, purchased two neighboring lots. The Club wanted to demolish the 19th-century Victorian structures located on the lots in order to create a parking area. After negotiations regarding alternative parking failed, the Club applied to the Commission for a certificate of appropriateness. The certificate was denied after hearings by the Architectural Review Committee. During the 6-month waiting period, the Woman's Club met with city officials a number of times, but the parties failed to reach an agreement.

By the terms of the ordinance, the Commission's authority over the property expired March 4, 1975. In order to save the houses, the City's Board of Aldermen filed a condemnation resolution on the same day and obtained a temporary restraining order in Jefferson Circuit Court.⁷¹ When the Woman's Club contested the restraining order, the court ruled that the Historic Preservation Ordinance was unconstitutional and dis-

⁶⁶ *Id.* § 8e.

⁶⁷ *Id.* § 8e (2).

⁶⁸ *Id.* § 8f.

⁶⁹ *Id.* § 12. Penalties include a fine of \$15 to \$100 and/or imprisonment of up to 50 days for each offense. Each day of continued violation constitutes a separate offense.

⁷⁰ Information regarding the facts of this case came from the briefs submitted by both parties as well as the Brief Amicus Curiae in *City of Louisville v. Woman's Club*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

⁷¹ The city filed under KRS §§ 416.410-.530 (1971). These sections were repealed in 1976 and replaced by KRS §§ 416.540-.680 (1976). Section 416.550, as revised, provides for any authorized person or entity to condemn private property for a public purpose after the condemnor is unable to reach an agreement with the property owner. All fact questions pertaining to the amount of compensation due the owner are triable by jury, KRS § 416.620.

solved the restraining order.⁷² The City appealed the decision to the Kentucky Supreme Court and obtained a temporary injunction preventing the Club from demolishing or altering the houses pending the appeal.⁷³ The Supreme Court eventually reversed the lower court, held that the constitutionality of the ordinance was not an appropriate issue for the condemnation hearing, and remanded the case to the Jefferson Circuit Court for consideration of the eminent domain issue.⁷⁴

⁷² *City of Louisville v. Woman's Club*, No. 197724 (Jefferson Cir. Ct. Jan. 17, 1976).

⁷³ Brief for Appellant, *City of Louisville v. Woman's Club*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

⁷⁴ *City of Louisville v. Woman's Club*, No. 76-298 (Ky. Sup. Ct. Dec. 17, 1976).

The Kentucky Supreme Court dealt with the question of whether the Jefferson Circuit Court had jurisdiction to consider the constitutionality of the Louisville ordinance and decided that the lower court did not. The case was brought to the circuit court by the City of Louisville as a condemnation proceeding under KRS §§ 416.410-.530 (1970) (*see note 71 supra*) after the Board of Aldermen voted to condemn the two houses through their power of eminent domain. This proceeding by the City was independent of the actions by the Historic Preservation Commission. The Woman's Club argued that the condemnation proceeding was so closely tied to the Historic Preservation Ordinance that the court did have jurisdiction over the question of the constitutionality of the ordinance. Brief for Appellee, *supra* note 1, at 13-14. The City argued that the question was moot since the authority of the Commission over the controversy ended with the expiration of the 6-month period. Brief for Appellant, *supra* note 73, at 9.

The question on remand to the circuit court is whether the city has authority to use its powers of eminent domain to condemn these two houses. Governments have traditionally had the power to condemn property for public use if they pay the owner just compensation. What is included in the concept of "public use" has changed over time, so that now governments do not have to maintain ownership of the property in order to condemn it, so long as the public is benefited by the action. KRS § 58.010 (1971) defines public projects, and KRS § 83.420 (1976) provides that first-class cities may "acquire property for municipal purposes by purchase or otherwise."

Thus, one option for the City of Louisville is to resell the condemned houses to private persons who will restore and maintain the houses. The public purpose involved here is the preservation of the historic neighborhood for the cultural and economic benefit of the city. *See notes 98-102 infra* and accompanying text. In a manner similar to urban renewal projects, the City does not have to retain title to the property in order for the eminent domain proceeding to be valid. Rather it "may use, manage, improve, sell and convey, rent or lease its property." KRS § 83.420 (Supp. 1976). Reply Brief for Appellant at 4-5, *City of Louisville v. Woman's Club*, No. 76-2998 (Ky. Sup. Ct. Dec. 17, 1976).

The Woman's Club argues that the condemnation by Louisville is not for a public use but a private one. In support of its point, it cites a statement from a speech given by Mayor Harvey Sloane to the Woman's Club on January 29, 1975: "I am confident that if we are forced to take such an action, the homes can be resold to private groups or persons who will agree to maintain and reuse them for the benefit of the neighbor-

The circuit court's holding that the ordinance was unconstitutional was based on three factors: The ordinance does not provide any appeals provision; it is arbitrary; and the waiting period results in a taking of the owner's property without compensation.⁷⁵

A. *The Lack of an Appeals Provision*

The Jefferson Circuit Court held that the ordinance was unconstitutional because it does not "grant any right of appeal from what may be an arbitrary or capricious denial of the certificate."⁷⁶ In Kentucky, the legislature can grant or alter appeal rights⁷⁷ unless a constitutional provision is involved. Thus, unless a constitutional provision requires otherwise, it appears that an administrative agency may be established without specifically providing for appeal.⁷⁸

If, however, a constitutional question is involved, there is an inherent right of appeal from an administrative action.⁷⁹ A charge of arbitrary determinations on the part of the agency would raise constitutional issues, since the Kentucky Constitution prohibits arbitrary governmental control over a person's life, liberty, and property.⁸⁰ Furthermore, the Kentucky Constitution grants citizens access to the courts for any injury to

hood." Brief for Appellee, *supra* note 1, at 10.

The City's reply is that the possibility of a sale by the city to private parties is speculative and that it would be on the condition that the buyer "maintain and reuse them for the benefit of the neighborhood." Reply Brief for Appellant, *supra* at 5.

In the upcoming case, the Woman's Club has also raised the issues of whether the creation of the historic district by the Commission, rather than the Board of Aldermen, is legal and whether there is in fact a general plan under which the city is operating. Telephone interviews with W. Scott Miller, Jr., counsel for Woman's Club, and Carson Porter, counsel for City of Louisville,

The trial in the circuit court has been set for June 8, 1977.

⁷⁵ *City of Louisville v. Woman's Club*, No. 197724 (Jefferson Cir. Ct. Jan. 17, 1976).

⁷⁶ *Id.*

⁷⁷ Ky. CONST. § 127; *East Jefferson Improvement Ass'n v. Louisville & Jefferson County Planning & Zoning Comm'n*, 285 S.W.2d 507, 509 (Ky. 1955).

⁷⁸ *See State Racing Comm'n v. Latonia Agricultural Ass'n*, 123 S.W. 681 (Ky. 1909). The courts "cannot review on appeal purely ministerial discretion. Nor can such power be conferred on them by legislation." *Id.* at 688.

⁷⁹ *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964).

⁸⁰ KY. CONST. art. 2.

“lands, goods, person, or reputation.”⁸¹

According to Kentucky case law, judicial review is warranted in situations where there is “action in excess of granted powers, . . . lack of procedural due process, and . . . lack of substantial evidentiary support . . . ,”⁸² all of which are aspects of “arbitrariness” on the part of the administrative agency.⁸³ It follows, then, that even though an appeals provision has not been written into the Louisville ordinance, it is not necessarily unconstitutional,⁸⁴ as review may still be obtained.

B. *The Question of Arbitrariness*

The court also held that the ordinance was invalid because it allowed arbitrary actions on the part of the Committee.⁸⁵ The question of arbitrariness revolves around the amount of discretion the Committee has to designate structures or sites as landmarks and to decide whether to grant permits for the alteration or demolition of structures on the landmark list.

Attacks on an historic preservation commission’s discretion have centered on the delegation of authority from a legislative body to the commission and the accountability of the commission to a higher authority. If a commission is given generalized authority to enact its own regulations, there is a possibility of arbitrary decisions. However, if stringent regulations are imposed on the commission, it would lack the necessary discretion for fairness in specific cases.⁸⁶

The Louisville ordinance lists four factors which the Committee must consider before it will grant a certificate of appropriateness.⁸⁷ One major consideration is the effect of the pro-

⁸¹ KY. CONST. art. 14.

⁸² *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964).

⁸³ *Id.*

⁸⁴ The Brief for Amicus Curiae, *supra* note 3, notes that the lack of appeals provisions has not been raised in other cases challenging such ordinances and lists several ordinances which do not provide for judicial review yet which have been upheld.

⁸⁵ See text accompanying note 76 *supra* for the pertinent quote from the opinion.

⁸⁶ *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970).

⁸⁷ The four factors to be considered by the Committee are:

(1) The effect of the proposed work in creating, changing, destroying or affecting the external architectural features of the improvements upon which such work is to be done;

(2) The relationship between the results of such work and the external archi-

posed work on the exterior architecture of the structure and on the character of the preservation district where it is located. These factors do not indicate a precise focal point for committee determination but do provide general guidelines.

Other historic preservation ordinances which include equally general guidelines have been upheld on the ground that they were adequate to prevent arbitrary decisions by giving the commissions some workable standards. In *City of Santa Fe v. Gamble-Skogmo, Inc.*⁸⁸ the court found Gamble-Skogmo in violation of the city's historic zoning ordinance for failure to comply with the requirement that window panes on structures in the historic district be no more than 30 inches square. This requirement was one of a number in the statute which referred specifically to the "Old Santa Fe Style."⁸⁹ Structures in the Santa Fe historic district must conform to these statutory requirements. The defendants challenged the ordinance establishing these requirements as being an arbitrary and unreasonable use of police power, and as an attempt by the city to impose aesthetic details on buildings.⁹⁰ The New Mexico Supreme Court rejected this argument, stating that the various stylistic requirements were necessary to preserve the historic "Old Santa Fe Style" and that the maintenance of the historic zone was a valid use of police power for the general economic and cultural welfare of the community.⁹¹ The court further found that since decisions of the style committee, which applied the provisions of the ordinance to proposed changes, were subject to review by the city planning commission, and decisions of the planning commission were subject to review by the city council, the city had not delegated unrestricted or arbi-

tectural features of other improvements on such site or in such preservation district;

(3) The effect of the proposed work upon the distinctive character or special historic, aesthetic, architectural, archaeological or cultural interest or value of the landmark, landmark site or preservation district; and

(4) The effects of such work upon the preservation, protection, perpetuation and use of the landmark, landmark site or preservation district.

LOUISVILLE, KY., ORDINANCE 58, Series 1973, § 8a(1)-(4)(1973).

⁸⁸ 389 P.2d 13 (N.M. 1964).

⁸⁹ *Id.* at 17.

⁹⁰ *Id.*

⁹¹ *Id.* at 18.

trary power to the style committee or the planning commission.⁹²

Similarly, in New Orleans the Vieux Carré Ordinance⁹³ established the Vieux Carré Commission, which issues permits to property owners who wish to build, alter, or demolish structures in the Vieux Carré section of the city. In *Maher v. City of New Orleans*⁹⁴ the petitioner, who wanted to tear down a cottage in the historic district, challenged the constitutionality of the ordinance. The court of appeals upheld the statute against an attack that it was arbitrary, even though there were no official regulations directing the Commission's decisions.⁹⁵ Earlier cases in New Orleans also upheld the Vieux Carre Ordinance against charges of vagueness as it applied to the regulation of the size and character of signs.⁹⁶

The Massachusetts Supreme Court has also determined that proposed acts establishing historic districts in the town of Nantucket and in the Beacon Hill section of Boston were not unconstitutional because of vagueness.⁹⁷ The ordinances in these cases were not arbitrary even though the historic commissions involved had discretionary powers with respect to the impact of the regulations on the modification or destruction of historic structures.

The Louisville ordinance does not provide for city council review of Committee decisions and as such can be distinguished from the Santa Fe and New Orleans ordinances. Nev-

⁹² *Id.* at 18-19.

⁹³ NEW ORLEANS, LA., CODE ch. 65 (Ordinance No. 14,538).

⁹⁴ 516 F.2d 1051 (5th Cir. 1975).

⁹⁵ *Id.* at 1062-63. Reasons given by the court to support its holding that the power of the Commission was not arbitrary include the specifically limited territory over which the Commission had authority, the composition and selection of members of the Commission who have experience in the subject matter, the review procedure by which the City Council can check Commission decisions, and the documented information relating to the architecture and history of the Vieux Carré section of New Orleans.

⁹⁶ *City of New Orleans v. Levy*, 64 So. 2d 798 (La. 1953); *City of New Orleans v. Pergament*, 5 So. 2d 129 (La. 1941). See Forman, *supra* note 29.

⁹⁷ Opinion of the Justices to the Senate, 128 N.E.2d 563 (Mass. 1955); Opinion of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955). Other cases in which statutes were upheld as not being arbitrary include: *Bohannon v. City of San Diego*, 106 Cal. Rptr. 333 (Ct. App., 1973); *M & N Enterprises, Inc. v. City of Springfield*, 250 N.E.2d 289 (Ill. App. 1969); *Rebman v. City of Springfield*, 250 N.E.2d 282 (Ill. App. 1969); *Mayor of Annapolis v. Anne Arundel County*, 316 A.2d 807 (Md. 1974); and *Town of Deering ex rel. Bittenbender v. Tibbetts*, 202 A.2d 232 (N.H. 1964).

ertheless, there are provisions in the statute which prevent the Architectural Review Committee from exercising unlimited or arbitrary power. Individuals who have interests and expertise in the field are chosen as members.⁹⁸ There must be a public hearing for each application for a certificate of appropriateness. Most importantly, if the Committee and the Commission reject the application, there is a 3- or 6-month period of negotiation, after which the Commission no longer has authority to prevent alteration. Further, the property owner has an inherent right of appeal if a constitutional question is involved.⁹⁹

C. *The Issue of Confiscation or "Taking"*

The Jefferson Circuit Court held that the ordinance constituted a taking because: "During the 3- or 6-month period invoked by the commission, the property owner remains in a state of suspended animation, unable to sell, alter, or remodel, and in some extreme situations, even to occupy his property, yet his taxes march ever onward."¹⁰⁰

Historic preservation ordinances, like other zoning ordinances, affect the use of property. In order to be valid, zoning laws must not place such a heavy burden on the use of property as to amount to confiscation or a taking of the property. Zoning ordinances, unlike eminent domain statutes, do not require compensation for the property owner for the restrictions.¹⁰¹ The

⁹⁸ LOUISVILLE, KY., ORDINANCE 58, Series 1973, § 4c. At least two of the five members of an Architectural Review Committee serving a preservation district are owner-residents of property in the district, and another member must be the City's Chief Building Inspector.

Not all ordinances providing for review by interested parties are constitutional, since there must be some workable standard. In *Washington ex rel. Seattle Title Trust Co. v. Roberge*, a zoning ordinance which required the approval of two-thirds of the neighbors for construction of a philanthropic home was held to be unconstitutional since the neighboring owners had unchecked discretion in that they were not subject to any standards or review. 278 U.S. 116 (1928).

⁹⁹ See notes 79-84 *supra* and accompanying text for an explanation of this inherent right of appeal.

¹⁰⁰ *City of Louisville v. Woman's Club No. 197724* (Jefferson Cir. Ct. Jan. 17, 1976).

¹⁰¹ Eminent domain also differs from zoning ordinances in that the government acquires title in the property; it purchases the property from the landowners, paying just compensation for a public use. U.S. CONST. amends. V, XIV. See notes 47-50 and 74 *supra* and accompanying text for a discussion of the issues involved in an eminent domain procedure.

test of a zoning ordinance's validity is not one involving diminution of the property's value; rather, the test is that as long as there is some economic benefit accruing to the property, the regulation is not a taking. The property need not be applied to its best use but only to a legal use. "If [an] ordinance is otherwise a valid exercise of the town's police power, the fact that it deprives the property of its most beneficial use does not render it less constitutional."¹⁰²

An otherwise constitutional ordinance may be unconstitutional in its application. Due process requires not only that the general zoning ordinance have a reasonable relation to the general welfare, but also that its application to a particular piece of property be related to the general purpose of the ordinance and that its effect not be confiscatory.¹⁰³ Due process also prohibits the ordinance from depriving the owner of *reasonable* use of the property and guarantees the owner notice of an historic preservation commission's deliberations and an opportunity to be heard. Generally, the historic preservation ordinances, including that of Louisville, provide for such hearings before a stated administrative board.¹⁰⁴

In *Maher v. City of New Orleans*, the court held that there was no taking since Maher could not show that the value of his property had decreased to nothing. In particular, "Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of re-

¹⁰² *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962). See *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975). See also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) in which the Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

There are several tests for what constitutes a taking. These include the *Mahon* "diminution-in-value" test; the "physical invasion" test; the *Goldblatt* "noxious use" test; and the "arbitral-enterprise" test. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1974); Note, *supra* note 13.

¹⁰³ U.S. CONST. amends V, XIV, § 1. See also *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); Opinion of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955); Opinion of the Justices of the Senate, 128 N.E.2d 563 (Mass. 1955); *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

¹⁰⁴ LOUISVILLE, KY., ORDINANCE 58, Series 1973, § 8 b, c, d. See *Mayor of Annapolis v. Ann Arundel County*, 316 A.2d 807 (Md. 1974). See also *First Presbyterian Church v. City Council of York*, 360 A.2d 257 (Pa. Comm. 1976); NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8-A, § 207-12.0 (1976).

turn, or that other potential use of the property was foreclosed.¹⁰⁵

In San Diego, an ordinance establishing and protecting the "Old San Diego Planning District" regulated the construction and remodeling of buildings in that neighborhood to preserve the appearance of the pre-1871 area.¹⁰⁶ The ordinance was upheld by the California Court of Appeals, which held that the requirements imposed on buildings and signs in the area did not reduce their value to the extent of being a taking.¹⁰⁷

The New York City Landmarks Preservation Law,¹⁰⁸ which has been challenged on several occasions, has likewise been upheld. This law establishes the Landmarks Preservation Commission which has the power to designate historic landmarks and historic districts after holding public hearings.¹⁰⁹ If the owner of a designated site wishes to make any alterations, demolition, or construction on the site, he must apply to the Commission for permission.¹¹⁰ The applicant may apply for a certificate of no exterior effect¹¹¹ or a certificate of appropriateness.¹¹² If the Commission denies the former, the applicant can request the latter type of certificate;¹¹³ the Commission holds a public hearing before it determines the latter.¹¹⁴ If the owner can show economic hardship as defined by the ordinance, he is provided with several methods of relief.¹¹⁵

¹⁰⁵ 516 F.2d 1051, 1066 (5th Cir. 1975).

¹⁰⁶ *Bohannon v. City of San Diego*, 106 Cal. Rptr. 333 (Ct. App. 1973).

¹⁰⁷ *Id.*

¹⁰⁸ NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8-A (1976).

¹⁰⁹ *Id.* § 207-2.0. See *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) and *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20 (App. Div. 1975).

¹¹⁰ NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8-A, § 207-4.0.

¹¹¹ *Id.* § 207-5.0. One applies for a certificate of no exterior effect if the planned alteration will not change the exterior architectural features of a structure or if the new construction will be in harmony with existing structures.

¹¹² *Id.* § 207-6.0. One applies for a certificate of appropriateness if there will be some effect on the exterior of the structure. General standards which the Commission considers are set out in this provision.

See also *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20 (App. Div. 1975).

¹¹³ NEW YORK, N.Y. ADMINISTRATIVE CODE ch. 8-A, § 207-5.0a(3) (1976).

¹¹⁴ *Id.* § 207-7.0.

¹¹⁵ *Id.* § 207-8.0. Relief includes tax exemptions, assistance in obtaining a purchaser, or condemnation. See *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

The New York Law was challenged in *Trustees of Sailors' Snug Harbor v. Platt*,¹¹⁶ in which trustees of a home for retired sailors wanted to demolish some 19th-century Greek revival structures. The court formulated a test, similar to the one used for commercial property,¹¹⁷ by which the Preservation Law could be applied to charitable property. Charitable owners can obtain relief "where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."¹¹⁸

In 1974, the New York Preservation Law was again challenged on constitutional grounds. The plaintiff in *Lutheran Church in America v. City of New York* wanted to demolish a residential structure once owned by J. P. Morgan, Jr.¹¹⁹ The church had been using the building as office space for the last 20 years but currently found it to be inadequate for this purpose. Because the church was a charitable institution, the *Sailors' Snug Harbor* test was applicable. The question of whether the law was confiscatory as applied was answered in the affirmative.¹²⁰

The most recent challenge to the New York City Law was by the Penn Central Transportation Co.,¹²¹ which wanted to make significant changes to the exterior of Grand Central Terminal.¹²² The court held that the Commission's denial of a certificate was not a taking. Since the building is not used for a charitable purpose, the applicable test was whether Penn Central could "[demonstrate] that the regulation in issue deprives them of all reasonable beneficial use of their property."¹²³ Even though Penn Central may have been losing money at the station, they could not show that they were "incapable of obtain-

¹¹⁶ 288 N.Y.S.2d 314 (App. Div. 1968).

¹¹⁷ *Id.* at 316. The test for relief to owners of commercial property is that "the continuance of the landmark prevents the owner from obtaining an adequate return."

¹¹⁸ *Id.*

¹¹⁹ *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). See also Note, *Urban Landmarks: Preserving our Cities' Aesthetic and Cultural Resources*, 39 ALBANY L. REV. 521 (1975) and Note, *Environmental Control—Land Use—Historical Preservation*, 1975 WIS. L. REV. 260 (1975).

¹²⁰ 316 N.E.2d 305, 312, 359 N.Y.S.2d 7, 16 (1974).

¹²¹ *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20 (App. Div. 1975).

¹²² *Id.* at 26. The architect's plans also called for a fifty-story tower over the Terminal.

¹²³ *Id.* at 28.

ing a reasonable return from Grand Central Terminal operations"¹²⁴

In Annapolis, Maryland, the denial of a permit to the county for demolition of a 19th-century church was held not to be a taking since there was no confiscation of the property. The court held the county was not "deprived of *all reasonable use* of the site . . . [which is] the requirement for a finding of confiscation by traditional zoning laws [I]ts *use* was not disturbed at all."¹²⁵

In *First Presbyterian Church v. City Council of York*,¹²⁶ the church applied for a permit to demolish York House, a 19th-century structure in the city's historic district. The permit was denied after a hearing by the Board of Historical and Architectural Review, and the church appealed. The court distinguished the tests of *Sailors' Snug Harbor*, which applied to individual property designated as landmarks,¹²⁷ and *Maher*, which applied to historic districts.¹²⁸ So, although the church is a charitable organization, the court applied the *Maher* test, stating that the denial did not "preclude the use of York House for any purpose for which it was reasonably adapted"¹²⁹ and that the church had not made any attempts to sell, rent, or otherwise utilize the structure.¹³⁰

Turning to the Louisville case, if one applies the *Maher* test as interpreted by the *York* court,¹³¹ the Woman's Club would have to show that the effect of the ordinance was to diminish the property value to nothing and that the ordinance precluded any reasonable use of the property. It can be argued that the club has not shown this. It purchased the houses in 1974 for \$125,000; in 1975, when the city began eminent domain proceedings, appraisers set the value of the houses at

¹²⁴ *Id.*

¹²⁵ *Mayor of Annapolis v. Anne Arundel County*, 316 A.2d 807, 822 (Md. 1974).

¹²⁶ 360 A.2d 257 (Pa. Comm. Ct. 1976).

¹²⁷ See notes 116-118 *supra* and accompanying text for an explanation of this decision.

¹²⁸ See note 105 *supra* and accompanying text for an explanation of this decision.

¹²⁹ *First Presbyterian Church v. City Council of York*, 360 A.2d 257, 261 (Pa. Comm. Ct. 1976). As in the *Woman's Club of Louisville* case, the church in *York* wanted to build a parking lot where the building was located.

¹³⁰ *Id.*

¹³¹ The *Maher* test is used because the two houses in question are located in the Old Louisville Historic District.

\$140,000.¹³² There are probably sources of federal funds to restore the houses since they are on the National Register.¹³³ Further, the club has not attempted to derive an income from the houses but has boarded them up and evicted the tenants.¹³⁴

The Jefferson Circuit Court held that the 3- or 6-month negotiation period which follows denial of the application by the Commission constitutes a taking. This provision in the Louisville ordinance is much less stringent than those in other laws. In Louisville, the Commission has no authority over the property after 6 months if the parties cannot reach an agreement, while other ordinances provide for permanent restrictions of the use of property¹³⁵ or for restrictions on when a party may reapply for a permit.¹³⁶ The restriction in Louisville concerns the alteration or demolition of property for only a limited period. Further, the ordinance does not restrict the owner from occupying, renting, or selling the property. Even if the test of *Sailors' Snug Harbor* is applied to the Woman's Club as a charitable organization, it is doubtful that the maintenance of the houses "seriously interferes" with the club's charitable purposes.¹³⁷

CONCLUSION

The preservation of the two houses in Louisville is not simply a matter of saving two structures from the wrecking ball; it involves the preservation of an entire historic district.

¹³² Brief for Appellee, *supra* note 1, at 5. Brief for Amicus Curiae, *supra* note 3, at 20.

¹³³ Brief for Amicus Curiae, *supra* note 3, at 20-21. Funds are available from HUD or the National Trust. The Old Louisville Residential District is listed on the National Register of Historic Places, 41 Fed. Reg. 5951 (1976). The Amicus Brief also stated that the Woman's Club may not be able to build its proposed parking lot due to the present zoning law.

¹³⁴ Brief for Amicus Curiae, *supra* note 3, at 20.

¹³⁵ *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975).

¹³⁶ *Mayor of Annapolis v. Anne Arundel County*, 316 A.2d 807 (Md. 1974). The Annapolis ordinance is similar to that of Louisville in that it provides a 90-day negotiation period. But if the application is rejected, the property owner must wait 1 year before reapplying. *Id.* at 818.

¹³⁷ Brief for Amicus Curiae, *supra* note 3, at 22 notes that alternative parking proposals were offered to the Woman's Club and were rejected as non-permanent. Although it is not known how *Sailors' Snug Harbor* fared in later court proceedings, a fall 1976 CBS television news report mentioned that the home has moved from its New York location to a rural site in the South.

Even if the houses are not themselves of particular historical significance, the fact that they are an inherent part of the Old Louisville Historic District is important. Destruction of these two houses will affect the cohesiveness of the entire neighborhood¹³⁸ which had been recognized as an important historic area.

The issue of the constitutionality of Louisville's historic preservation ordinance will not be raised again with respect to these two houses, but the question of the City's power of eminent domain is still pending. It is hoped that if the constitutional issue is raised in the future, the courts will uphold the preservation statute for the protection of Louisville's and Kentucky's heritage.¹³⁹

Dale Deborah Brodkey

¹³⁸ This same neighborhood approach was used in *City of New Orleans v. Pergament*, 5 So. 2d 129, 131 (La. 1941): "The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve that antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism."

¹³⁹ I wish to thank the following attorneys for providing their briefs to the Kentucky Supreme Court and information on current developments in this case: Thomas Crumplar, former counsel for Amicus Curiae; W. Scott Miller, Jr., counsel for Woman's Club of Louisville; and Carson Porter, counsel for City of Louisville.

Editor's Note. Since this comment was written, the City has deposited \$140,000 into the court for the houses. A jury trial was scheduled for September 21, 1977, on the issue of valuation. The court has decided, in an opinion to a motion, that there was a valid public use. Telephone interviews with Carson Porter, attorney for City of Louisville, June 27, 1977 and W. Scott Miller, Jr., attorney for Women's Club, June 22, 1977.