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OLD SCHOOL: A RECOMMENDATION FOR THE TREATMENT OF THE DISPOSITION OF PROPERTY EXEMPT FROM LOCAL ZONING ORDINANCES IN KENTUCKY

CHRISTOPHER J. RYAN, JR. *

I. INTRODUCTION

A Sunday drive on any of Kentucky's less-traveled byways reveals the natural beauty of the Commonwealth: the undulating wilderness in the east, the pastoral horse farms of the Bluegrass, and the majestic lakes and rivers in the west. The bucolic scenes and landscapes that unfold in every corner of the state are worth immeasurably more than the expense of a traveler's outing, even at current fuel prices. However, such a trip might illustrate two issues facing Kentucky communities. First, the counties surrounding Kentucky's largest cities have benefitted from a significant increase in residents over the last few decades.¹ Simultaneously, rural out-migration continues to afflict Kentucky communities, particularly in the state's eastern and extreme western regions.² These changes in population have allowed Kentucky's more urban communities to prosper as a result of intrastate migration, often at the expense of failing rural communities.³ As a result, local governments are beginning to consider the sale of aging and disused public properties, such as schools, in order to avoid further expenditures on the maintenance of deteriorating public facilities.⁴

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¹ See *infra* notes 23-40.

² *Id.*

³ Bill Estep, *Two Kentuckys: Cities Grow While Rural Areas Decline, Census Shows*, LEXINGTON HERALD-LEADER, Mar. 18, 2011, <http://www.kentucky.com/2011/03/18/1674369/kentuckys-urban-areas-growing.html>.

⁴ RACHEL KENNEDY & CYNTHIA JOHNSON, KY. HERITAGE COUNCIL, KENTUCKY HISTORIC SCHOOLS SURVEY: AN EXAMINATION OF THE HISTORY AND CONDITION OF KENTUCKY'S OLDER SCHOOL BUILDINGS 7-8 (2002), available at <http://heritage.ky.gov/nr/rdonlyres/186485d6-1783-488e-acbc-f6e18166f284/0/kyhistoricschoolssurvey.pdf> ("In January 2000, the National Trust for Historic

Second, because population changes inevitably affect the coffers of local governments, which rely in large part upon revenue collected from local property taxes,⁵ rural communities are struggling to come up with funds to maintain outmoded public facilities, while rapid growth in urban communities is forcing municipal governments and planners to find new ways to accommodate the needs of their new residents.⁶ Even though Kentucky boasts the fourth lowest electricity costs in the United States,⁷ rising utility and maintenance costs amid shrinking budgets have precipitated an excess of disused, and even abandoned, public schools across the Commonwealth.⁸

To illustrate this trend on a national scale, consider the inflation of energy and utility costs to schools over a three-year period in recent memory between 2005 and 2008, the national median cost of energy and utilities in K-12 schools rose from \$233.05 per student⁹ to \$295.13 per student.¹⁰ 1,822 primary and secondary public schools closed across the country during the 2009-10 school year.¹¹ In higher education, the national mean maintenance and operations expenditures grew from a total of 9.7% of overall university expenditures in 1998 to 16.4% of total university

Preservation identified older school buildings as endangered community assets, in response to growing public alarm over their rate of demolition, deterioration, and abandonment.”)

⁵ David Wildasin, *Local Government Finance in Kentucky: Time for Reform?* 5 (Inst. for Federalism & Intergovernmental Relations, Working Paper No. 2007-2, 2006), available at http://www.ifigr.org/publication/ifir_working_papers/IFIR-WP-2007-02.pdf.

⁶ See June Hyndman, Roger Cleveland & Tyler Huffman, *Consolidation of Small Rural Schools in One Southeastern Kentucky District*, 37 AM. EDUC. HIST. J. 129, 136-37 (2010). But see Beth Musgrave, *City Officials Explore Possibilities for New Government Center Downtown*, LEXINGTON HERALD-LEADER, Nov. 5, 2013, <http://www.kentucky.com/2013/11/05/2913565/city-officials-explore-options.html>. “The city is spending \$1.6 million annually to run the Government Center, the former Lafayette Hotel, and its other downtown buildings. . . . [T]hose costs are approximately \$668,000 more than the national average. . . . [I]t costs roughly [\$10.00 per] square foot to operate the city’s downtown campus. The benchmark is [\$6.00 to \$6.50 per] square foot. . . . [B]ecause the former hotel is so old – it was built in 1920 – maintenance costs continue to go up and the return on investment continues to go down. . . . [T]he city monopolizes 200 feet of prime Main Street space that could be developed. By selling or leasing some of its buildings, it could greatly offset the cost of building a new government center that would cost less to operate”

⁷ At just over seven cents per hour, Kentucky owes its fourth-lowest electricity costs to its over \$5 billion in annual coal revenues—bringing new meaning to the slogan on many Commonwealth bumper stickers: “Coal keeps the lights on.” See Peter Kelly-Detwiler, *Net Zero Schools in Kentucky: Models for the Future Come from Surprising Places*, FORBES (Dec. 10, 2012, 8:05 AM), <http://www.forbes.com/sites/peterdetwiler/2012/12/10/net-zero-schools-in-kentucky-models-for-the-future-come-from-surprising-places/>.

⁸ KENNEDY & JOHNSON, *supra* note 4, at 7.

⁹ *Coming Up Short: 35th Annual M&O Cost Study*, AM. SCHOOL & U. (Apr. 1, 2006), http://asumag.com/mag/university_coming_short/.

¹⁰ *38th Annual Maintenance & Operations Cost Study for Schools*, AM. SCHOOL & U. (Apr. 1, 2009), <http://asumag.com/Maintenance/school-district-maintenance-operations-cost-study-200904/>.

¹¹ CHEN SU-CHEN, U.S. DEPT. OF EDUC., NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2009-2010 3 (2012), available at <http://nces.ed.gov/pubs2011/2011345rev.pdf>.

expenditures in 2007.¹² Expressed as the average university cost of maintenance and utilities per full time enrolled student, the cost totaled \$1,417.91 per student.¹³ In many states like Kentucky, this dramatic inflation took place amid a backdrop of declining state appropriations for both K-12 public schools and public higher education, which has suffered a loss of one third of its funding since 2008—not as a percentage of education budgets but as a real dollar amount.¹⁴

These figures may not shock the conscience, but they certainly create cause for alarm and underscore the need to seek energy-conscious facility management strategies, such as sustainable design and adaptive reuse.¹⁵ Considering the financial burden on local school districts and state-funded public universities to maintain out-of-date physical plant facilities, it should come as no surprise that selling inefficient and disused facilities helps achieve fiscal solvency and responsible environmental stewardship. Selling school properties, however, presents new complexities as to the legal treatment of such property. Unlike ordinary properties, school properties are exempt from local zoning ordinances¹⁶ and even local tax codes.¹⁷ Thus, the conveyance of the property to a private entity and its later

¹² *37th Annual Maintenance & Operations Cost Study for Colleges*, AM. SCHOOL & U. (Apr. 1, 2008), http://asumag.com/Maintenance/37th_annual_maintenance_colleges/.

¹³ *Id.* Yet energy-saving initiatives at Kentucky universities, such as Eastern Kentucky University's Energy Savings Performance Contract with Siemens Building Technologies, have held utility costs over the last two years relatively unchanged. See *Energy Savings Performance Contract with Siemens Paying Big Dividends*, EKV NEWS (Nov. 13, 2013), <http://www.eku.edu/news/energy-savings-performance-contract-siemens-paying-big-dividends>.

¹⁴ MICHAEL LEACHMAN & CHRIS MAI, CTR. ON BUDGET AND POLICY PRIORITIES, MOST STATES FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION 1 (2013), available at <http://www.cbpp.org/files/9-12-13sfp.pdf>; Ben Weider, *State Higher Ed Funding Support Continues to Decline*, STATELINE (Mar. 6, 2013), <http://www.pewstates.org/projects/stateline/headlines/state-higher-ed-funding-support-continues-decline-85899456679>; At least eighty-six local school districts petitioned the governor and state lawmakers to restore their funding to pre-recession levels. See Valarie Honeycutt Spears, *Kentucky School Districts Mount Campaign for Increase in Funding*, LEXINGTON HERALD-LEADER, Nov. 12, 2013, <http://www.kentucky.com/2013/11/13/2929501/kentucky-school-districts-mount.html>; Op. Ed., *School Boards Should Keep Poking Legislature to Restore Education Funding*, LEXINGTON HERALD-LEADER, Nov. 19, 2013, <http://www.kentucky.com/2013/11/19/2939695/school-boards-should-keep-poking.html>.

¹⁵ In fact, such an initiative was recently codified into Kentucky statutes. KY. REV. STAT. ANN. § 160.325 (West 2010).

¹⁶ Op. Ky. Att'y Gen. 75-108 (1975) (asserting that "school property is not subject to regulation by a zoning board" under KRS § 100.361 and that it was settled under OAG 69-659 that the statute "applies to school districts inasmuch as schools are state institutions and school property is vested in the Commonwealth").

¹⁷ See KY. REV. STAT. ANN. § 132.200 (West 1991) (providing that "[a]ll property subject to taxation for state purposes shall also be subject to taxation in the county, city, school, or other taxing district in which it has a taxable situs."). Over the following 22 subparagraphs, the statute enumerates the properties that are subject state tax only, remaining silent as to school properties or other property subject to use for public purposes. KY. REV. STAT. ANN. § 132.200 (West 1991) is construed to exclude those properties used for public purposes from the state and local tax codes. *Kentucky & West Virginia Power Co. v. Holliday*, 287 S.W. 212, 213-14 (Ky. 1926) (supporting the proposition that the properties exempted from local taxation by KRS § 132.200 are also exempt from school taxes, although school taxes are ordinarily considered to be state taxes); *Gray v. R.J. Reynolds Tobacco Co.*, 252 S.W. 134,

use for non-public purposes subjects the property both to zoning ordinances and tax regulation. But, as a matter of course, should this be the case?

This Article examines what happens when an exempt piece of property, specifically property used for the purpose of public education, is sold in Kentucky. The Article also makes a recommendation about the disposition of exempt property. Part II of this Article reviews the change in population in the Commonwealth in greater detail and the effect that this change has on the use of public infrastructure, specifically demonstrated by the overabundance of disused public facilities. Part III unpacks the origins and facets of zoning regulation. Part IV discusses nonconforming uses and analogizes exempt properties to nonconforming properties. Part V addresses the current treatment of these kinds of properties in Kentucky and extra-jurisdictional methods for treating the sale of exempt property and properties with nonconforming uses. Finally, Part VI focuses on the central question of how the sale of exempt property should be treated in two prongs: (1) incorporation into zoning ordinances after disposition, and (2) the elements, if any, of exemption that should carry over to the new property, recommending an approach to incentivize the efficient use or sale and adaptive reuse of disused, exempt property.

II. THE CHANGING FACE OF THE COMMONWEALTH

A. Dynamic Populations and the Phenomenon of Intrastate Migration

As Kentucky cities and towns continue to move into the twenty-first century, each community's wants and needs over the past two centuries are most clearly reflected in public facilities—to the extent that a community's public facility is still extant. For instance, the Old Fayette County Courthouse, building for which commenced in 1898 and was completed in 1901, served the county's judicial needs for over a century, but its walls have not heard the clap of a gavel in over a decade.¹⁸ After the construction of two stunning courthouses a block away, the Old Courthouse building housed the Lexington History Center¹⁹ until dangerous levels of lead-based paints forced the building's sudden and indefinite closing in 2012 pending environmental hazard abatement.²⁰

136 (Ky. 1923) (permitting the enjoinder of a collection of a local tax on property exempt from local taxation). *But see* *Am. Tobacco Co. v. City of Bowling Green*, 205 S.W. 570, 572 (Ky. 1918) (holding that provisions granting exemptions from taxation will be strictly construed).

¹⁸ *About the Museum*, LEXINGTON HIST. MUSEUM, <http://lexhistory.org/about> (last visited Feb. 14, 2014).

¹⁹ Tom Eblen, *Short Street Long on Lexington History*, LEXINGTON HERALD-LEADER, Dec. 25, 2011, <http://www.kentucky.com/2011/12/24/2005644/tom-eblen-short-street-long-on.html>.

²⁰ Environmental hazards are a major concern with "vintage" buildings. "Lead-abatement contractors will . . . assess the cost of addressing the lead paint hazards. . . . The building has a number of other problems, including asbestos, some structural issues and possibly mold." Beverly Fortune, *Old*

Thus, while the Old Courthouse still exists, it is merely a non-usable shell until funds are raised to reduce or eliminate the environmental hazards that frustrate its use. In contrast, the Morgan County Courthouse in West Liberty, Kentucky, which served as the county's judicial and social center, was destroyed by a tornado in early March of 2012.²¹ External factors like time, environmental hazards, and natural disasters have a remarkable effect on the way communities construct, utilize, and dispose of public facilities. The most visible factor that illustrates change in the composition of communities across the Commonwealth, however, is population change.

Kentucky's population is in a period of transition. Data from the 2000 and 2010 censuses demonstrates that counties surrounding the urban landscape of two of the Ohio River region's largest cities, Cincinnati and Louisville, have experienced substantial growth due to a trend in urban population stagnation or out-migration from those cities.²² For example, the population of Boone County, home of the Cincinnati/Northern Kentucky International Airport, increased 38.2% in the decade between the 2000 and 2010 censuses.²³ Outside of Louisville, the population of the citizens in Bullitt,²⁴ Nelson,²⁵ Oldham,²⁶ Shelby,²⁷ and Spencer²⁸ counties grew at an

Fayette County Courthouse Is Closed Because of Lead-Based Paint, LEXINGTON HERALD-LEADER, July 13, 2012, <http://www.kentucky.com/2012/07/13/2257835/old-fayette-county-courthouse.html>.

²¹ Mike Wynn & Peter Smith, *Morgan County Courthouse, Judicial Center Lost to Tornado*, LOUISVILLE COURIER J., March 7, 2012, <http://www.courier-journal.com/article/20120306/NEWS01/303060035/Morgan-County-courthouse-judicial-center-lost-tornado>.

²² MICHAEL PRICE ET AL., U. LOUISVILLE URBAN STUD. INST., KENTUCKY MIGRATION: CONSEQUENCES FOR STATE POPULATION AND LABOR FORCE (2004), available at [http://www.e-archives.ky.gov/pubs/Data_ctr/kentucky_migration\(2004\).pdf](http://www.e-archives.ky.gov/pubs/Data_ctr/kentucky_migration(2004).pdf).

²³ *Compare State & County QuickFacts for Boone County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21015.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Boone County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 14, 2014).

²⁴ *Compare State & County QuickFacts for Bullitt County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21029.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Bullitt County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

²⁵ *Compare State & County QuickFacts for Nelson County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21179.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Nelson County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

²⁶ *Compare State & County QuickFacts for Oldham County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21185.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Oldham County Kentucky 2000 Census*, U.S. CENSUS BUREAU,

astounding rate—between 15.9% and 45%—from 2000 to 2010. The central Kentucky cities of Lexington and Bowling Green, as well as the counties and communities surrounding those cities, continue to expand because of a concurrent trend in rural out-migration.²⁹ Surrounding Lexington, the population of residents in the counties of Fayette,³⁰ Jessamine,³¹ Madison,³² and Scott³³ increased between 13.5% and 42.7% from 2000 to 2010. The population of residents in Warren County,³⁴ where Bowling Green is the county seat, grew 23% over the same decade. The decade between 2000 and 2010 saw large numbers of eastern Kentuckians

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1
(last visited Feb. 24, 2014).

²⁷ *Compare State & County QuickFacts for Shelby County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21211.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Shelby County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

²⁸ *Compare State & County QuickFacts for Spencer County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21215.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Spencer County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

²⁹ See PRICE ET AL., *supra* note 22, at 12-15.

³⁰ *Compare State & County QuickFacts for Fayette County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21067.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Fayette County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

³¹ *Compare State & County QuickFacts for Jessamine County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21113.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Jessamine County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

³² *Compare State & County QuickFacts for Madison County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21151.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Madison County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

³³ *Compare State & County QuickFacts for Scott County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21209.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Scott County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

³⁴ *Compare State & County QuickFacts for Warren County, Kentucky 2010 Census*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21227.html> (last visited Feb. 14, 2014), with *Profile of General Demographic Characteristics Warren County Kentucky 2000 Census*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

leave home; Breathitt,³⁵ Clay,³⁶ Floyd,³⁷ Harlan,³⁸ Knott,³⁹ and Leslie⁴⁰ counties all lost between 7% and 13.8% of their respective resident population during that decade. Changes in population are not without consequence, and their effect is particularly strong at the local level.

B. Changing Needs in the 21st Century

As the United States Supreme Court declared in 1954, “education is perhaps the most important function of state and local governments.”⁴¹ To carry out the indispensable public function of providing public education, local governments require certain assets and funding mechanisms to

³⁵ Compare State & County QuickFacts for Breathitt County, Kentucky 2010 Census, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21025.html> (last visited Feb. 14, 2014), with Profile of General Demographic Characteristics Breathitt County Kentucky 2000 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

³⁶ Compare State & County QuickFacts for Clay County, Kentucky 2010 Census, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21051.html> (last visited Feb. 14, 2014), with Profile of General Demographic Characteristics Clay County Kentucky 2000 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1 (last visited Feb. 24, 2014).

³⁷ Compare State & County QuickFacts for Floyd County, Kentucky 2010 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410133578174 (last visited Feb. 24, 2014), with Profile of General Population and Housing Characteristics for Floyd County, Kentucky 2000 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410132629199 (last visited Feb. 24, 2014).

³⁸ Compare State & County QuickFacts for Harlan County, Kentucky 2010 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410134936717 (last visited Feb. 24, 2014), with Profile of General Population and Housing Characteristics for Harlan County, Kentucky 2000 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410135309219 (last visited Feb. 24, 2014).

³⁹ Compare State & County QuickFacts for Knott County, Kentucky 2010 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410135634777 (last visited Feb. 14, 2014), with Profile of General Population and Housing Characteristics for Knott County, Kentucky 2000 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410135783669 (last visited Feb. 24, 2014).

⁴⁰ Compare State & County QuickFacts for Leslie County, Kentucky 2010 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410179470532 (last visited Feb. 24, 2014), with Profile of General Population and Housing Characteristics for Leslie County 2010 Census, U.S. CENSUS BUREAU, http://factfinder2.census.gov/rest/dnldController/deliver?_ts=410179679764 (last visited Feb. 24, 2014).

⁴¹ Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). For commentary on why education should be under the purview of the federal government, specifically the U.S. Constitution, in place of state and local governments, see Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education*, ATLANTIC (Oct. 16, 2013, 8:42 AM), <http://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/>. But see Christopher J. Ryan, Jr., *Something Corporate: The Case for the Treatment of Proprietary Education Institutions as Corporations*, 40 J.C. & U.L. (forthcoming 2014). “By acknowledging the priority of education as function of state and local government, the Supreme Court [in Brown v. Bd. of Educ.] implicitly deferred to the states and municipalities with regard to education.”

establish and support a comprehensive educational system. In Kentucky, local boards of education of county and independent school districts are vested with tax-levying authority.⁴² The majority of local school districts receive state funds through a sophisticated funding system, called the “Support Education Excellence in Kentucky” (“SEEK”) funding formula,⁴³ which was enacted as part of the Kentucky Education Reform Act (“KERA”).⁴⁴ Most of Kentucky’s aggregate school district revenues comes from the SEEK funding formula, but most local school district revenue is derived from local taxes, such as property taxes.⁴⁵ Thus, when a community’s population declines, the number of students educated in the local schools and a portion of the funding for its schools, are adversely affected. Conversely, when a community grows, its revenues generated

⁴² KY. REV. STAT. ANN. § 160.455 (West 2013); *id.* § 160.460; *id.* § 160.597.

⁴³ 702 KY. ADMIN. REGS. 3:270 (2014).

⁴⁴ H.B. 940 (Ky. 1990). The Kentucky Education Reform Act was the Kentucky General Assembly’s response to the Kentucky Supreme Court case *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). KERA was passed, ostensibly, to achieve educational policy goals—such as helping ease the funding disparity among Kentucky’s school districts—which are not the focus of this Article. While this Article does not fully contemplate the SEEK Formula, it has come under recent scrutiny, even from the top levels of the Commonwealth’s Education brass: “The Office of Education Accountability reports that the gap narrowed until about 2005 but has gradually increased. Its latest report shows that, when adjusted for inflation, the wealthiest districts had about \$1,206 more per pupil compared to poor districts in 2010. In 2005, the gap was only about \$912 per pupil. Rural districts also have lost SEEK funding—which allocates money to schools based on attendance—as families have moved to urban areas to look for jobs, [Hiren Desai, Associate Commissioner for the Kentucky Department of Education] said. ‘All of these things are happening so quickly that the system can’t adjust.’” Mike Wynn, *Kentucky School Districts Turn to Local Taxes in Search of Funds, Boards Find They Are Backed Into a Political Hot Seat as Cuts Force Their Hand*, LOUISVILLE COURIER-J., Oct. 21, 2013, available at: <http://www.courier-journal.com/article/20131021/NEWS0105/310210021/Kentucky-school-districts-turn-local-taxes-search-funds?gcheck=1>. Recently, The Council for Better Education, a non-profit corporation representing nearly all of Kentucky’s school districts, is planning a study to demonstrate to lawmakers the failure of the SEEK formula and the need for restoration of greater state funding of education. See Valarie Honeycutt Spears, *Kentucky School Districts Pay for Study to Push Lawmakers to Restore Funding*, LEXINGTON HERALD-LEADER, Nov. 7, 2013, <http://www.kentucky.com/2013/11/07/2917787/kentucky-school-districts-join.html>. For a full discussion of the Kentucky Education Reform Act and its economic impact, see William H. Hoyt, *An Evaluation of the Kentucky Education Reform Act*, CENTER FOR BUS. & ECON. RESEARCH, available at http://cber.uky.edu/Downloads/kentucky_education_reform_act.htm; Deborah A. Verstegen, Teresa S. Jordan, & Paul Amador, *A Quick Glance at School Finance: A 50 State Survey of School Finance Policies - Kentucky*, <http://education.unlv.edu/centers/ceps/study/documents/Kentucky.pdf> (last visited Feb. 17, 2014).

⁴⁵ LEGISLATIVE RESEARCH COMM’N OFFICE OF EDUC. ACCOUNTABILITY, UNDERSTANDING HOW TAX PROVISIONS INTERACT WITH THE SEEK FORMULA: RESEARCH REPORT NO. 354 (2007), available at <http://www.lrc.ky.gov/lrcpubs/rr354.pdf>. KY. REV. STAT. ANN. § 160.593 permits school districts to levy authorized school taxes after compliance with the public hearing requirement contained in KY. REV. STAT. ANN. § 160.603. Taxes levied under KY. REV. STAT. ANN. § 160.593 are limited to the territory of the school district, or, in the case of an agglomerate school tax or district merger, school districts. KY. REV. STAT. ANN. § 160.470(1) provides the statutory requirements for the rate limit of a tax levied by a local school district board of education, prohibiting a tax “which will produce more revenue, exclusive of revenue from net assessment growth as defined in [KY. REV. STAT. ANN. §] 132.010, than would be produced by application of the general tax rate that could have been levied in the preceding year to the preceding year’s assessment.”

from property taxes increase along with its greater financial commitment to educate school-age children.

Fayette County,⁴⁶ Scott County,⁴⁷ and Shelby County,⁴⁸ which, as has been shown, have each experienced tremendous growth over the last decade, are expanding existing school buildings and constructing new buildings to keep up with demands of educating the increasing school-age student population. Many more Kentucky communities, however, must face the grim realities of budget constraints, declining populations, and disused facilities. Prestonsburg Elementary School, a Floyd County landmark and heralded depression-era building modeled after designs from the 1934 Chicago World's Fair and erected by the Works Progress Administration, fell into disuse after its doors closed in 2007.⁴⁹ Later that year, the school board sold the school and its grounds to Roland Gray, a process which has taken six years to finalize.⁵⁰ The tenuous and lengthy disposition of the property illustrates the very problem that this article considers. As of the writing of this article, the property is still mired in contention over its potential use.⁵¹ Future plans for the property are forthcoming.⁵² In Carter County, a disused public high school was purchased from the school board by a private individual, restored by a local community's historic preservation society, and conveyed to a private, religious school.⁵³ In Bullitt County, which experienced marked population growth between 2000 and

⁴⁶ Jim Warren, *Four More Fayette County Schools in Line for Renovation*, LEXINGTON HERALD-LEADER, Feb. 20, 2012, <http://www.kentucky.com/2012/02/20/2076249/fayette-board-of-education-to.html>.

⁴⁷ Jim Warren, *Scott County Superintendent to Organize Group to Explore New High School*, LEXINGTON HERALD-LEADER, Feb. 17, 2012, <http://www.kentucky.com/2012/02/17/2073168/scott-superintendent-to-organize.html>.

⁴⁸ Todd Martin, *Shelby County School Board: Status of New Schools Up for Review*, SENTINEL-NEWS, Feb. 8, 2012, <http://www.sentinelnews.com/content/shelby-county-school-board-status-new-schools-review>.

⁴⁹ Jack Latta, *Prestonsburg Elementary to be Demolished*, FLOYD COUNTY TIMES, July 16, 2013, at A1.

⁵⁰ Jack Latta, *Old School Sells for Half-Million*, FLOYD COUNTY TIMES, July 16, 2013, http://www.floydcountytimes.com/view/full_story/16012882/article-old-school-sells-for-half-million.

⁵¹ *Id.*; Ralph B. Davis, *Community Center Compromise May Be Emerging*, FLOYD COUNTY TIMES, Oct. 15, 2013, <http://www.floydcountytimes.com/news/news/2649822/Community-center-compromise-may-be-emerging>. Gray has generously offered to sell back the property to the city for \$1 million—merely double the price for which he purchased the property.

⁵² Latta, *supra* note 49. Admittedly, the property is also mired in environmental concerns: "The council began discussing the center after receiving a report on core samples taken at the old Prestonsburg Elementary property After learning that [the property] would require substantial fill to raise the proposed center out of the floodplain, council members began discussing whether they need to take an additional step in ordering studies . . . to gauge potential site prep costs." Davis, *supra* note 51.

⁵³ Leeann Akers, *Hitchins High School Alumnus Raises Questions*, GRAYSON J. TIMES, Jan. 11, 2012, <http://journal-times.com/local/x2146229536/Hitchins-High-School-alumnus-raises-questions>. For a historical account of the school, listed as the Olive Hill School, see KENNEDY & JOHNSON, *supra* note 4, at 77-78.

2010, the local school board has placed a disused public school on the market, but at present, the property has not been sold.⁵⁴

However, even the Kentucky communities experiencing growth cannot keep pace with external economic obstacles. In October 2013, Jefferson, Oldham, and Bullitt Counties—three of Kentucky’s most populous counties in the Louisville metropolitan area—were among the eighty-one districts of the one hundred seventy-three districts in the Commonwealth to have adopted local property tax rate increases to compensate for budget shortfalls.⁵⁵ Kentucky law gives local school boards options when setting annual property taxes: local school boards may choose to adopt a “compensate rate”—designed to provide the same amount of revenue as the prior year⁵⁶—or a rate designed to generate a four percent increase in revenue,⁵⁷ however, four percent is the highest rate property taxes may be increased without being subject to a recall vote.⁵⁸ The local property tax rates are inversely related to property assessments, meaning that school boards can increase revenue without raising property tax rates when property values rise, but under this current funding system, school boards often must increase tax rates to maintain the same amount of revenue when property values fall or remain flat.⁵⁹ For Kentucky communities with changing populations, there is no getting around the constant shift of public needs, but in the modern context of tighter federal, state, and local budgets, it is imperative for all communities to efficiently utilize their assets.

Kentucky’s public universities are also reeling from state budget cuts that reduced state funding to public universities by more than \$50 million⁶⁰ At the Commonwealth’s flagship school, the University of Kentucky, the state mandated general fund was cut by 6.4%, or nearly \$20

⁵⁴ Sara Cunningham, *Bullitt County Has Possible Buyer for School*, LOUISVILLE COURIER J., Feb. 15, 2012, <http://www.courier-journal.com/article/20120215/ZONE10/302150009/-1/ZONE/brooks-elementary-school-bullitt?odyssey=mod|newswell|text|Neighborhoods|s>.

⁵⁵ Mike Wynn, *Kentucky School Districts Turn to Local Taxes in Search of Funds*, LOUISVILLE COURIER J., Oct. 21, 2013, <http://www.courier-journal.com/article/20131021/NEWS0105/310210021/Kentucky-school-districts-turn-local-taxes-search-funds?gcheck=1>.

⁵⁶ KY. REV. STAT. ANN. § 132.010(6) (West 2013).

⁵⁷ *Id.* § 160.470(3)(c).

⁵⁸ *Id.* § 160.470(8)(a).

⁵⁹ Wynn, *supra* note 55.

⁶⁰ Daniel Luzer, *Kentucky’s Puzzling Budget Woes*, WASH. MONTHLY (Jan. 23, 2012, 6:32 PM), http://www.washingtonmonthly.com/college_guide/blog/kentuckys_puzzling_budget_woes.php. The Commonwealth of Kentucky is dealing with a shortfall in federal appropriation. Kentucky received \$161 million in federal grant funding in 2013, a 1.7% funding decrease, which is the eighth largest budget cut in the United States. Rebecca Theiss, *What Do Current Federal Funding Levels in the Wake of Sequestration Mean for State Budgets?*, ECON. POL’Y INST. ISSUE BRIEF, May 29, 2013, available at <http://www.epi.org/publication/ib363-sequestration-and-state-budgets/>.

million, for Fiscal Year 2012-2013.⁶¹ Since 2007, the university's operating budget has been cut by \$50 million.⁶² A steadily shrinking budget is likely the root of the more than \$200 million in deferred maintenance of the university's outdated residence halls.⁶³ As a result, at the time of the writing of this article, the University has finalized a deal with Education Realty Trust, Inc., a private development company, to shift its student housing development and maintenance to the care of the private entity and completed construction on several new student dormitories, with more to be constructed in the coming months.⁶⁴ While several universities, including the University of Louisville,⁶⁵ have entered into public-private contracts to replace a portion of their student housing, the University of Kentucky may be the first to turn over its student housing entirely to a private firm, giving UK the ability to put the savings elsewhere, such as covering its operating budget shortfall.⁶⁶ Such a bold plan carries consequences for the property and its treatment under Kentucky law.

III. ZONING REGULATION

A. A Brief Overview of Zoning Regulation Mechanisms

Despite the historical instances of governments and individuals regulating the use of land dating back to antiquity, land use planning laws did not emerge as a discrete field of law in America until the early part of the twentieth century.⁶⁷ Zoning regulations continue to be the primary regulatory tool used by local governments to manage and control land use and development.⁶⁸ Zoning, which evolved out of urban reform movements as a response to overcrowding, gained traction with the widespread state

⁶¹ President Eli Capilouto, *Update on the Budget for 2012-2014*, UKNOW - U. KY. NEWS (Apr. 20, 2012), <http://uknow.uky.edu/content/update-budget-outlook-2012-14>.

⁶² *Id.*

⁶³ Dawn Wotapka, *University of Kentucky Opens Door to Leaving Dorm Management*, WALL ST. J. (Feb. 22, 2012, 1:16 PM), <http://blogs.wsj.com/developments/2012/02/22/university-of-kentucky-opens-door-to-leaving-dorm-management/>; Office of President, *Frequently Asked Questions About the Housing Development Plan* (Apr. 2, 2013), http://www.uky.edu/President/campus_framework.html ("The deferred maintenance on [University of Kentucky] facilities exceeds \$205 million.").

⁶⁴ Linda Blackford, *University of Kentucky Moves Forward with 3 More Dorms Holding 1,610 Beds*, LEXINGTON HERALD LEADER, May, 14, 2013, <http://www.kentucky.com/2013/05/14/2639791/university-of-kentucky-moves-forward.html>; Wotapka, *supra* note 63; Interview with Dr. Robert Mock, Vice President of Student Affairs, University of Kentucky, in Lexington, Ky. (Apr. 13, 2012).

⁶⁵ Telephone Interview with Anthony W. Logsdon, Accountant, University of Louisville Foundation (Apr. 20, 2012).

⁶⁶ Wotapka, *supra* note 63.

⁶⁷ JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 1.1 (2d ed. 2007).

⁶⁸ *Id.* § 3.1.

adoption of the Standard State Zoning Enabling Act (“SZE”) in 1924 as well as the United States Supreme Court’s decision to uphold the power of local government to regulate and restrict property use in *Village of Euclid v. Ambler Realty Co.*⁶⁹

As a technique to control land use and development, zoning is used to classify and regulate the “location, type, and density of development within a community through the delineation of one or more zones or zoning districts, as depicted on a zoning map.”⁷⁰ Functionally, zoning regulations serve the purpose of providing a community with predictability in its future development. As a result, traditional zoning involves the “comprehensive division of a city into different use zones”⁷¹ which effectively dictates permitted uses of properties within the jurisdiction of the local government. Local planning boards may also utilize other restrictions under the zoning umbrella including: height, bulk, setback and floor-area ratio controls.⁷²

B. Zoning in Kentucky

Historically, Kentucky’s counties serve vital roles as administrative units of government by providing public services.⁷³ The Kentucky General Assembly appears to have accepted the idea of SZE and the *Village of Euclid* decision by enacting Chapter 100 of the Kentucky Revised Statutes in 1928, which devolved zoning powers to local governments.⁷⁴ In Fayette County, the first zoning ordinances for residential districts were implemented the same year.⁷⁵ Since then, Lexington has been a leader in future-focused town planning, enacting its first comprehensive plan in 1931 and creating the first urban services boundary in the nation in 1958.⁷⁶

A primary example of use zoning, the urban services boundary was enacted as a means of providing predictability and consistency in areas that were developed or zoned for development within Lexington while preserving the beauty of the horse farms that define the Bluegrass Region.⁷⁷

⁶⁹ VERMONT LAND USE EDUCATION & TRAINING COLLABORATIVE, IMPLEMENTATION MANUAL: ZONING REGULATIONS 30-1 (2007), available at <http://www.vpic.info/Publications/Reports/Implementation/Zoning.pdf>; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁷⁰ VERMONT LAND USE EDUCATION & TRAINING COLLABORATIVE, *supra* note 69, at 30-2.

⁷¹ JUERGENSMEYER & ROBERTS, *supra* note 67, § 4.2.

⁷² *Id.* §§ 4.1, 4.13.

⁷³ James T. Fleming, *The Story of Kentucky’s Constitution: An Explanatory Essay*, in THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY, INFORMATIONAL BULLETIN NO. 59 1, 11 (Laura Hromyak Hendrix ed., 2013), available at <http://www.lrc.ky.gov/lrcpubs/ib59.pdf>.

⁷⁴ *Chronology of Major Planning and Growth Management Actions in Lexington, Ky.*, LEXINGTONKY.COM, <http://www.lexingtonky.gov/index.aspx?page=608> (last visited Feb. 19, 2014).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Purchase of Development Rights*, LEXINGTONKY.GOV, <http://www.lexingtonky.gov/index.aspx?page=497> (last visited Feb. 19, 2014).

The local urban county government was able to enact this visionary land use regulation as a direct result of the planning authority granted to local governments by the state legislature in Chapter 100 of the Kentucky Revised Statutes.⁷⁸ The state recognized in the enabling act of KRS Chapter 100 that the local governments were in a better position to make determinations about the appropriate planning and development of their localities and should be given the authority to make decisions that encourage or restrict development and protect public necessities.

IV. "LOOPHOLES" IN LAND USE REGULATION

A. Nonconforming Uses: Not "Loopholes" at All

Nonconforming uses are more of a wormhole than a loophole. They are links to the past that, in theory, eventually close up after enough time has elapsed or the property is conveyed.⁷⁹ Nonconforming uses arise when a property existing at the time of the adoption of a zoning ordinance regulating the property's use renders its use invalid under the new ordinance.⁸⁰ For example, a roller rink built in a lot zoned for commercial use before the passage of an ordinance removing roller rinks from the permitted uses of a commercial zoned property would constitute a nonconforming use of the land. It would be ludicrous to think that the passage of the ordinance would mean that the owner's mere possession of the roller rink was in violation of the ordinance or to think that the passage of the ordinance would mean that the owner must cease the property's use as a roller rink. If the ordinance did have restrictive implications for the property, such an act might very well raise the question whether a taking had occurred without just compensation, but this article does not contemplate that question.

Still, the expressed policy interest of the local lawmaking body in removing roller rinks from the permitted uses of commercial zoned property must be taken into account. Local zoning plans are drafted in

⁷⁸ KY. REV. STAT. ANN. § 100.201(1)-(2) (West 2013) (maintaining in pertinent part that "when all required elements of the comprehensive plan have been adopted in accordance with the provisions of this chapter, then the legislative bodies and fiscal courts within the planning unit may enact permanent land use regulations, including zoning and other kinds of growth management regulations to promote public health, safety, morals, and general welfare of the planning unit, to facilitate orderly and harmonious development and the visual or historical character of the unit, and to regulate the density of population and intensity of land use in order to provide for adequate light and air. In addition, land use and zoning regulations may be employed to . . . protect . . . public facilities, schools . . . and to protect other specific areas of the planning unit which need special protection by the planning unit."); see Kathryn L. Moore, *The Lexington-Fayette Urban County Board of Adjustment: Fifty Years Later*, 100 KY. L. J. 435, 493-94 (2012).

⁷⁹ Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R. 5th 391 § 2[a] (1992).

⁸⁰ KY. REV. STAT. ANN. § 100.253 (West 2013).

accordance with a future vision for a community and are thus subject to the often meticulous discretion of local zoning authorities.⁸¹ As a result, relief from the strictures of a zoning ordinance or overall plan may be granted when the plan is not greatly disturbed.⁸² Nonconforming uses, on the other hand, pose more of a problem because they are not forward-looking. While constitutionally permissible, nonconforming uses represent a holdover that is often at odds with the future vision of a community as revealed in the local zoning plan.⁸³ Even though the purpose of permitting a nonconforming use is to ensure that the use will gradually disappear so that all uses in an area will conform, nonconforming uses tend to persist and even thrive.⁸⁴ The removal of the use from the permitted uses of a zoning ordinance can result in the nonconforming property owner's monopoly of the nonconforming use.⁸⁵

B. Nonconforming Uses in Kentucky

KRS § 100.253 regulates nonconforming uses in Kentucky. When answering the question of what Kentucky municipalities should do with disused public property, this statute provides an initial lens. KRS § 100.253 expressly allows the lawful use of a building or premises, made nonconforming by the passage of a zoning ordinance, to continue.⁸⁶ The statute divests the state legislature of the power to regulate nonconforming uses, placing this authority with local boards of adjustment.⁸⁷ The law also forbids a nonconforming use from being enlarged or extended beyond the "scope and area of its operation" at the time of the adoption of the regulation which renders its use nonconforming.⁸⁸ Most pertinent to this Article is KRS § 100.253, which restricts the local board of adjustment from permitting a change from one nonconforming use to another "unless the new . . . use is in the same or a more restrictive classification".⁸⁹ This

⁸¹ Zitter, *supra* note 79, § 2[a].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*; see also *Grant v. Baltimore*, 129 A2d 363 (Md. 1957); *Lachapelle v. Goff*, 225 A2d 624 (N.H. 1967).

⁸⁶ KY. REV. STAT. ANN. § 100.253(1) (West 2013).

⁸⁷ *Id.* § 100.253(2).

⁸⁸ *Id.* For an academic discussion of the history of this provision, see generally Moore, *supra* note 78.

⁸⁹ § 100.253(2). As an interesting side note, this same subparagraph allows a truer "loophole" for what surely only applies to the Lexington or Louisville boards of adjustment in dealing with properties such as the Kentucky Horse Park, Keeneland, or Churchill Downs when it provides that "the board of adjustment may grant approval, effective to maintain nonconforming-use status, for enlargements or extensions, made or to be made, of the facilities of a nonconforming use, where the use consists of the presenting of a major public attraction or attractions, such as a sports event or events, which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of a public tradition,

provision clarifies the narrow legislative intent to allow the nonconforming use to be phased out over time through a change to more restrictive classification of use.⁹⁰

C. Elements of Nonconforming Uses as (Mis)Interpreted by Kentucky Courts

Because state courts interpret statutory constructions when reviewing local planning board decisions on appeal, the judicial branch's construction of the facets of nonconforming uses must be given due consideration as well. In *Prewitt v. Johnson*, the Kentucky Court of Appeals investigated whether nonconforming uses may be altered and still preserved.⁹¹ The property in question had previously been used as an automobile service station, and the new property owner wished to use the property as a used car lot.⁹² On appeal from the Bourbon Circuit Court, the court of appeals was asked to consider the neighboring property owners' objections to the City of Paris Board of Adjustment's decision to grant a nonconforming use permit to the property owner.⁹³ Relying on the plain

contributing substantially to the economy of the community and state, of which prestige and status the site is an essential element, and where the enlargement or extension was or is designed to maintain the prestige and status by meeting the increasing demands of participants and patrons." *Id.* The latitude accorded to local planning boards with regard to enlarging or extending non-conforming uses associated with the equine industry is not to be overlooked. Perhaps, this monopoly over a land use loophole is the direct result of a good lobbying presence in Frankfort, or more likely, deference to the Commonwealth's largest agricultural cash crop—the equine industry. See Holly Wiemers, *Study Shows State's Equine Industry Has \$3 Billion Economic Impact*, UK AG. NEWS, Sept. 6, 2013, available at <http://news.ca.uky.edu/article/study-shows-state's-equine-industry-has-3-billion-economic-impact>.

"Kentucky's equine industry had a total economic impact of almost \$3 billion and generated 40,665 jobs [in 2012] . . . The tax contribution of the equine industry to Kentucky was approximately \$134 million." Whatever the cause, the only venues that could reasonably seek enlargement or extension of a nonconforming use under KRS § 100.253(3) are horse showing and racing venues, because—with all due respect for the Wildcat and Cardinal basketball traditions—no other sporting venue in the Commonwealth has been home to a sporting event "at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of a public tradition." § 100.253(2); Moore, *supra* note 78, at 496 (contending that the provision was made exclusively for Churchill Downs but has a larger application). "This provision was added in 1978 to permit the expansion of Churchill Downs, a nonconforming racetrack located in a residential zone. Although the Kentucky Constitution prohibits 'special legislation' 'where a general law can be made applicable,' the exception does not appear to run afoul of that Constitutional prohibition because the exception expressly applies not just to Churchill Downs, but to any use that is 'a major public attraction, . . . which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of public tradition.'"

⁹⁰ However, local zoning ordinances contravene this legislative purpose. For instance, the Lexington-Fayette Urban County Government Zoning Ordinance, which once required nonconforming uses to cease, now permits all nonconforming uses and structures to continue so long as they otherwise remain lawful. LEXINGTON-FAYETTE URBAN CNTY. GOV'T, KY., ZONING ORDINANCE art. 4-3 to -4 (2013).

⁹¹ *Prewitt v. Johnson*, 710 S.W.2d 238, 239 (Ky. Ct. App. 1986).

⁹² *Id.* at 238.

⁹³ *Id.* at 239.

language of KRS § 100.253(2), the court held that change in a nonconforming use from an automobile service station to an automobile sales business was statutorily permissible because the change placed the new use in the same or more restrictive class of uses.⁹⁴

The essential implication of this holding is not only that new nonconforming uses are not required to be incidental to the original use, but more importantly, when the new use does not place an unacceptable burden on neighboring property and the new use belongs to the same or more restrictive class, the new use is permissible.⁹⁵ This holding is intuitive, ostensibly following the guidance of KRS § 100.253 for how local boards should treat changes in use. The rationale underlying the court's decision—balancing public and private considerations—may be at odds with the statute, however. Still, Kentucky courts reviewing planning decisions employ this rationale, despite its possible conflict with KRS § 100.253.

Addressing a similar issue in *Franklin Planning and Zoning Commission v. Simpson County Lumber Company*, the Kentucky Court of Appeals dealt with the question of a nonconforming use enlargement.⁹⁶ The court held that the storage of wood logs on land zoned for residential use did not constitute an enlargement of a nonconforming use for the storage of bricks on the land prior to the enactment of an ordinance that placed the area to a residential zone.⁹⁷ In making this determination, the court strayed from a nuanced approach, looking to the similarity between earthen bricks and wood logs as not constituting an enlargement but rather a substitution.⁹⁸ Furthermore, the court decided that an injunction to halt city interference would issue where the log pile did not obstruct the owner's view or impede the natural flow of air.⁹⁹ The court relied on an important facet of city planning—whether or not a use or development is objectionable or obnoxious to existing development of the property or surrounding area.¹⁰⁰ Applying this standard to the facts, the storing of wood on property zoned for residential use is quite clearly no more obnoxious or objectionable to neighbors than storing bricks on the same property and does not rise to the level of enlarging the nonconforming use. The lesson from this case is that local planning boards must consider this standard and square it with state statute as well as the local comprehensive plan.

The eventual termination of the nonconforming use, however, is vital to mitigating the monopolistic effect that nonconforming uses can

⁹⁴ *Id.* at 240.

⁹⁵ *Id.*

⁹⁶ *Franklin Planning & Zoning Comm'n v. Simpson Cnty. Lumber Co.*, 394 S.W.2d 593, 594 (Ky. 1965).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

have in a community. In *Smith v. Howard*, the court explored the possibility of termination of a nonconforming use.¹⁰¹ The court held that in the absence of evidence of intention to abandon the light industry nonconforming use, the property owner did not forfeit his right to continue the nonconforming use of his property by his inability to lease it for approximately one year.¹⁰² This decision overrode the plain language of the ordinance, which provided that the nonconforming use would not be reestablished after it had been discontinued for one year.¹⁰³ This case demonstrated that the court again gave great deference to an efficient outcome, even at the expense of legislative intent.

Conversely, in *Attorney General v. Johnson*, four years prior to its decision in *Smith*, the Court of Appeals probed the same question: the termination of a nonconforming use.¹⁰⁴ The court held that the operation of a coin-operated laundry in a residential district, which was opposed by the University of Kentucky, an adjoining landowner, could not be permitted, because the prior nonconforming use as a grocery store had voluntarily been abandoned for almost five years.¹⁰⁵ Like *Smith*, this case has implications in determining the termination of nonconforming use, but unlike its decision in *Smith*, the court applied greater deference to the spirit of the zoning ordinance.¹⁰⁶ Underscoring the importance of diminishing nonconforming uses, the court based its decision on the policy of the Commonwealth's zoning laws, which "ordains the gradual elimination of nonconforming uses and the general intent of the ordinances dealing with the subject matter is to hold nonconforming uses within strict limits . . ." ¹⁰⁷

The disparity of these two cases, decided by the same court only a few years apart, demonstrates the lack of uniformity in judicial approaches to dealing with abnormal properties, despite legislative guidance. Perhaps legislative strictures on nonconforming uses ought to be loosened to allow both local planning boards and courts to make determinations on the basis of efficiency, which seems to be the underlying basis of their determinations to date in Kentucky.

¹⁰¹ *Smith v. Howard*, 407 S.W.2d 139, 141 (Ky. 1966).

¹⁰² *Id.* (maintaining that the property owner who had leased property for 20 years to a business involving reconstruction and repair of tractors, then leased the premises to a plumbing supply business upon termination of the tractor business lease, and last, leased the property to a screw company exercised due diligence to lease the property and had not intended to abandon the nonconforming use).

¹⁰³ *Id.* at 140.

¹⁰⁴ *Attorney General v. Johnson*, 355 S.W.2d 305, 308 (Ky. 1962).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 307.

¹⁰⁷ *Id.*

D. Exempt Uses: The Real “Loopholes” in Zoning Ordinances

Ostensibly, nonconforming uses are *sui generis*, but upon closer examination, they bear a striking resemblance to properties that are exempt from local ordinances, especially upon their disposition. Just as the Supremacy Clause of the United States Constitution prevents the application of state or local law to the federal government, state zoning laws in Kentucky allow the higher governmental body, the state legislature, to carve out a provision to secure its superiority over lower bodies of government.¹⁰⁸ This ensures that the higher body is “immune from control by subordinate units of government.”¹⁰⁹ In the same way, local planning and zoning decisions do not bind state instrumentalities.¹¹⁰ In fact, KRS § 100.361 explicitly provides that no planning provision “shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions.”¹¹¹ KRS § 100.361 guarantees that some properties, specifically those owned and used by the state for a governmental purpose, and the purpose for which they are used will never be contemplated by local zoning ordinances because the local governmental body does not have authority over them.¹¹² These “exempt” properties operate outside of the sphere of adherence to and regulation by local zoning ordinances.

In Kentucky, the authority of the state to be exempt from local zoning ordinances is mainly rooted in judge-made law. In *City of Louisville Bd. of Zoning Adjustment v. Gailor*, the Kentucky Court of Appeals interpreted KRS § 100.361¹¹³ to mean that a local government is an “instrumentality of state government, and as such, is immune from complying with zoning regulations.”¹¹⁴ Kentucky is not alone in this approach; most ordinances throughout the country allow public schools to locate and operate beyond the scope of zoning regulations as a matter of right.¹¹⁵ This is because public schools are nearly universally construed as an extension of a state governmental function and thereby qualified for the exemption from local zoning ordinances that the other branches of state government receive.

¹⁰⁸ JUERGENSMEYER & ROBERTS, *supra* note 67, § 4.23.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ KY. REV. STAT. ANN. § 100.361(2) (West 2013).

¹¹² *Id.*

¹¹³ *City of Louisville Bd. of Zoning Adjustment v. Gailor*, 920 S.W.2d 887, 888 (Ky. Ct. App. 1996) (citing its decision in *Edelen v. Nelson Cnty.*, 723 S.W.2d 887 (Ky. Ct. App. 1987)); *see also* § 100.361(2) (containing in pertinent part that “any proposal affecting land use by any . . . instrumentality of state government shall not require approval of the local planning unit. However, adequate information concerning proposals shall be furnished to the planning commission. . .”).

¹¹⁴ *Edelen v. Nelson Cnty.*, 723 S.W.2d 887, 889 (Ky. Ct. App. 1987).

¹¹⁵ JUERGENSMEYER & ROBERTS, *supra* note 67, § 4.27(b) (citing Osborne M. Reynolds, Jr., *Zoning Private and Parochial Schools—Could Local Governments Restrict Socrates and Aquinas?*, 24 URB. LAW. 305, 339 (1992)).

While Kentucky courts have applied the state exemption from local zoning ordinances to other functions of state government, it appears as though it would be a matter of first impression for Kentucky courts to make this application to public schools.¹¹⁶ To support the position that public schools should be construed as exempt from local zoning ordinances, under KRS § 162.060, the chief state school officer, in accordance with the rules and regulations of the Kentucky Board of Education, must approve plans for public school buildings.¹¹⁷ Public school plans are not subject to the approval of the local board of adjustment under the statute.¹¹⁸ Correspondingly, public schools are not expressly contemplated by many local ordinances, such as the Lexington-Fayette Urban County Government Zoning Ordinances.¹¹⁹ The reason for this is clear: exempt properties co-exist within local zoning plans but are also by their nature not in agreement with the local plan. As such, their treatment must uniquely serve the interest of furthering the plan while providing an essential function that removes them from contemplation of zoning ordinances. In this way, exempt properties bear a stronger resemblance to nonconforming uses than any other land use classification.

V. PRECEDENT FOR TREATMENT OF PREVIOUSLY EXEMPT PROPERTY

A. Treatment of the Disposition of Public Primary and Secondary School Property

Properties of the same classification are often codified together in local zoning ordinances to help boards of adjustment make determinations regarding the appropriateness of changes in a property's use. Because they are not contemplated by the ordinance, however, it is unclear how properties exempt from the ordinance may change in use. More often than not, after sitting on the market for a while, an exempt public property is sold to a private developer. This creates a question as to the property's status relative to state statutes and local land use ordinances. In the case of Prestonsburg Elementary School, the school stands a reasonable chance of being demolished.¹²⁰ The purchaser of Hitchins High School, however, undertook the renovation of the school along with a historic preservation

¹¹⁶ *Id.* § 4.23; *see also* Op. Ky. Att'y Gen. 75-108 (Jan. 6, 1975) (supporting the position that "school property is not subject to the regulation by a zoning board"); Op. Ky. Att'y Gen. 73-209 1 (Mar. 5, 1973) (positing that "school facilities, being state property, are exempt from local planning and zoning regulations"); Op. Ky. Att'y Gen. 69-659 (indicating that "school facilities, being state property, are exempt from local planning and zoning regulations under KY. REV. STAT. ANN. § 100.361").

¹¹⁷ KY. REV. STAT. ANN. § 162.060 (West 2013).

¹¹⁸ *Id.*

¹¹⁹ LEXINGTON-FAYETTE URBAN CNTY. GOV'T, KY., ZONING ORDINANCE art. 4-3 to -4 (2013).

¹²⁰ Latta, *supra* note 49.

society and has donated his efforts as well as the improvements to the property to the new owners of the school—Carter Christian Academy.¹²¹

Not only does demolition or historic preservation of such properties carry environmental consequences,¹²² but the new use of each property distinguishes one from the other. While the future use of the Prestonsburg school property is unclear, the local school board, having sold the property to a private individual, can no longer use the property for public educational purposes without repurchasing the property. On the other hand, the aforementioned public school in Carter County that was sold to a private individual who conveyed the property to a private educational institution, will continue to be used for educational purposes. However, because the school's new use is not public and it is no longer owned by a state instrumentality, for which it was exempt from the City of Grayson's local zoning ordinances, the private school property is subjected to regulation under the zoning ordinance as a conditional use.¹²³

These instances merely scratch the surface of the problems associated with inconsistent treatment of the disposition of disused property exempt from ordinances. In one example, the Lexington-Fayette Board of Adjustment considered whether an existing building, formerly occupied as a public elementary school, could be used as an antique retail establishment with an accessory restaurant.¹²⁴ An exempt use need not comply with the statutory requirements regulating a nonconforming use.¹²⁵ Upon examination of the requirement in KRS § 100.253(2) that a nonconforming use not be changed to another use unless that use is the same or more restrictive,¹²⁶ however, the commercial use of the property in question seems incongruous and less restrictive when compared with the former use as a school. In fact, the staff addressed this very point when making their recommendation to the board of adjustment. The staff reiterated that public schools are exempt from the zoning ordinances and clarified that exempt uses need not comply with “all of the restrictions that would apply to a use

¹²¹ Edward W. Isaacs, Letter to the Editor, *Thoughts on Hitchins High School*, GRAYSON J. TIMES, Feb. 8, 2012, <http://www.journal-times.com/letters/x2063983685/Thoughts-on-Hitchins-High-School?frTabToTaber=welcomeHome>.

¹²² Federal Emergency Management Administration, *Environmental and Historic Preservation Fact Sheet: Property Acquisition and Structure Demolition for Open Space*, http://www.fema.gov/media-library-data/20130726-1909-25045-9502/3_property_acquisition_and_structure_demolition_final_clean_11_12.pdf (last visited Feb. 21, 2014). For a comparison of different strategies of demolition waste management, see Nicolas Roussat, Christiane Dujet & Jacques Méhu, *Choosing a Sustainable Demolition Waste Management Strategy Using Multicriteria Decision Analysis*, 29 WASTE MGMT. 12 (2009).

¹²³ GRAYSON, KY., ZONING REGULATIONS, art. 8-9 (2010).

¹²⁴ Lexington-Fayette Urban Cnty. Bd. of Adjustment Staff Case Report, A-2008-6: Athens Schoolhouse Partners, LLC at 2 (Jan. 18, 2008).

¹²⁵ *Id.* at 3.

¹²⁶ *Id.*

that is not exempt.”¹²⁷ All the same, the staff relied upon the comprehensive plan in keeping with the surrounding area.¹²⁸ In this case, two of the three parcels immediately adjacent to the school carry an agricultural or farm property designation, which is the lowest intensity property use under the local zoning regulations.¹²⁹

Ultimately, the staff recommended approval, finding that an antique shop with an accessory restaurant is essentially within the same classification as a public elementary school.¹³⁰ In making its decision, the staff acknowledged the fact that the antique mall actively engaged in the preservation of the school by maintaining the grounds and displaying artifacts of inherently historical and cultural significance.¹³¹ The staff placed perhaps the greatest weight to the limitation of the weekend only operation of the mall, giving the property a new use no more obnoxious or objectionable than the previous use.¹³² Like the Court of Appeals decisions regarding nonconforming uses in Part IV of this Article, the recommendation of the staff in this matter may seem incongruous with established notions of the purpose of land use regulation because on its face, the property’s use as a public school seems so dissimilar from the property’s use as an antique mall that the decision may seem absurd. The reasoning behind the decision, however, stakes out a boldly efficient position that local governments ought to consider adopting when faced with the responsibility of the physical and fiscal maintenance of deteriorating and disused facilities.

At its core, the staff’s decision rested on the question of “whether or not the proposed use would have an adverse effect on existing or future development of the property or the surrounding area.”¹³³ Here, the new use allowed an existing building of historical significance to be preserved and maintained and that such preservation, “with continued public access, and associated maintenance of the adjoining grounds, should generally be beneficial to all”¹³⁴ Most importantly, this recommendation sent a message that encouraged both preservation and in-fill, a conscious conservation and development of properties and facilities that already exist in place of wasteful, sprawling development. While the staff’s determination in this case is forward-thinking and ought to serve as a guide

¹²⁷ *Id.* at 2.

¹²⁸ *Id.* at 6.

¹²⁹ *Fayette County Parcel Map for 6270 Athens Walnut Hill Pike*, FAYETTE CNTY. PROP.

VALUE ADM’R,
http://qpublic9.qpublic.net/qpmap4/map.php?county=ky_fayette&parcel=04025040&extent=1604457+162772+1608292+164732&layers=parcels+parcel_sales+roads+streetnum (last updated Mar. 7, 2014).

¹³⁰ Lexington-Fayette Urban Cnty. Bd. of Adjustment, *supra* note 124, at 6-7.

¹³¹ *Id.* at 7.

¹³² *Id.* at 6.

¹³³ *Id.* at 5.

¹³⁴ *Id.*

for other planning boards faced with the same question, the staff construed the treatment of an exempt use as a nonconforming use against the intent of KRS Chapter 100.¹³⁵ The outcome of the staff's decision to encourage thoughtful development of disused exempt properties is the very result that this article encourages. But this decision, like the Court of Appeals decisions in Part V, creates inconsistent precedent and unpredictable application of land use regulation. Treating exempt properties like nonconforming uses upon their disposition is a policy that should be followed by other local governments faced with the disposition of similarly situated property. However, the rules governing nonconforming uses must be relaxed to allow decision-making bodies to make determinations on the basis of efficiency—the rationale already employed by local planning boards and state courts—without being in direct conflict with the law.

B. Town-and-Gown: Property-Based Interaction Between Local Governments and Public Higher Education Institutions

Public universities are regularly subject in some way to the regulatory authority of one or more local government entities, usually without much disagreement.¹³⁶ For instance, a university's compliance with local fire and safety codes, relatively non-controversial regulations, ensures campus safety, an objectively important goal.¹³⁷ Local land use and zoning regulations on public universities, however, often cause controversy.¹³⁸ Because local governments are limited only to the powers given to them by state governments and public universities are important state instrumentalities, public universities usually operate outside the strictly construed regulation of local governments.¹³⁹ In Kentucky, courts have construed local government authority that seeks to regulate a public university, such as the Commonwealth's flagship university, as *ultra vires*—beyond the scope of the local government's authority.¹⁴⁰

For example, in *Lexington-Fayette Urban County Board of Health v. Board of Trustees of the University of Kentucky*, the local Board of Health sought to require that the university adhere to local health code regulations in the construction of a "spa pool" in a university sports facility.¹⁴¹ The Kentucky Supreme Court held that the Board of Health, as

¹³⁵ Moore, *supra* note 78, at 507.

¹³⁶ WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 593 (Jossey Bass ed., 4th ed. 2007).

¹³⁷ *Id.*

¹³⁸ *Id.* at 594.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Lexington-Fayette Urban Cnty. Bd. of Health v. Bd. of Trs. of the Univ. of Ky.*, 879 S.W.2d 485 (Ky. 1994).

the enforcement agent of the state Cabinet for Human Resources, had the authority to inspect and impose compliance with state health laws and regulations against the university but that the legislature did not intend for the Board of Health to enforce local health laws and regulations against state agencies.¹⁴² This holding reaffirms the exemption that the University of Kentucky enjoys by its status as a public university and instrumentality of state government. As it relates to town-and-gown relations, however, this holding obviously complicates the relationship that the University of Kentucky enjoys with Lexington, because it allows the “owner” and “occupant” of a significant portion of the city of Lexington to flout local rules.

Returning to the land use questions arising from the relationship between universities and the cities in which they are located, a local government’s enforcement of its tax powers against the university, especially when the university is taxed on the basis of an activity it considers educational in nature, can be cause for great concern in the world of higher education.¹⁴³ The University of Kentucky’s recent deal to turn over its student housing facilities incrementally to Education Realty Trust, a private company, presents many questions about the status of the new residence halls under local zoning laws and tax codes that have yet to be sorted out.¹⁴⁴ As part of the deal, the University will lease the ground to Education Realty Trust, which will bear the bulk of the cost to build and maintain the student housing facilities over the next fifty years.¹⁴⁵ The Fayette County Property Value Administrator has already expressed a desire to impose local taxes on the properties, citing precedent for taxing privately owned buildings that sit on property owned by the University, such as the private commercial office space at the University-owned Coldstream Research Park.¹⁴⁶ Given that Education Realty Trust has negotiated a deal that greatly favors the University, it would be wise for the University to impress upon the Fayette County Property Value Administrator that student housing is an essential educational function of the University and should not be taxed, because the students, not the company, would bear the burden of the tax through a increase in room and

¹⁴² *Id.* at 486 (“Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not barrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies unless the intention of the legislatures to effect this object is clearly expressed.”).

¹⁴³ KAPLIN & LEE, *supra* note 136, at 594.

¹⁴⁴ Linda K. Blackford, *University of Kentucky Dorm Deal Could Be a Tax Boon for School System*, LEXINGTON HERALD-LEADER, Feb. 19, 2012, <http://www.kentucky.com/2012/02/19/2075191/university-of-kentucky-dorm-deal.html>.

¹⁴⁵ University of Kentucky, *Draft Ground Lease Agreement between Univ. of Ky. And EDR Lexington I LLC*, §§ 2.01, 7.01, <http://online.wsj.com/public/resources/documents/ukgroundlease22012.pdf> (last visited Feb. 11, 2014).

¹⁴⁶ Blackford, *supra* note 144.

board costs.¹⁴⁷

Far less guidance has been offered in terms of classifying the new residence halls under a local zoning plan. The University of Louisville also has a contract with Education Realty Trust to operate two of its dormitories and, like the University of Kentucky deal, the ground is owned by the University of Louisville Foundation and leased to Education Realty Trust for the management of the two residence halls.¹⁴⁸ Despite the fact that the housing contract that Education Realty Trust has with the University of Louisville encompasses two nearly identical residence halls that perform the same function, the zoning classification of these buildings is not uniform.¹⁴⁹ One is zoned for high-density residential use, while the other is zoned for commercial use.¹⁵⁰ On a campus with only two residence halls not fully owned and operated by the University, the uniform treatment of the irregular property is less consequential. On the University of Kentucky campus, however, where all residence halls may eventually be ceded to the private firm, the uniform treatment of the properties is absolutely vital to achieving internal consistency for campus planning and agreement with the comprehensive plan.

C. Persuasive Precedent Outside the Jurisdiction of Kentucky

Jurisdictions outside Kentucky provide slightly more legal guidance on the topic of classifying new uses of property that were formerly used by governmental instrumentalities. For example, in *Town of Coventry v. Glickman*, the Rhode Island Supreme Court dealt with the issue of whether property used by the federal government can be considered nonconforming.¹⁵¹ Noting that the United States and its “various instrumentalities are exempt from . . . local restrictions,”¹⁵² the Rhode Island Supreme Court determined that the prior use of property for military housing did not prevent that use from being considered as nonconforming.¹⁵³ The court held that the evidence failed to establish that the federal government intended to abandon its legal nonconforming use of the property and the vested rights associated with that use.¹⁵⁴ Furthermore,

¹⁴⁷ *Id.*; see also Chris Ware, *Dorm Rates Over Time*, LEXINGTON HERALD-LEADER, Feb. 19, 2012, at A1.

¹⁴⁸ *Financing for Education Realty Trust Housing at Louisville Complete*, GLOBAL NEWSWIRE (Aug. 26, 2005), <http://globenewswire.com/news-release/2005/08/26/332315/84657/en/Financing-for-Education-Realty-Trust-Housing-at-Louisville-Complete.html>.

¹⁴⁹ Telephone Interview with Anthony Logsdon, *supra* note 65.

¹⁵⁰ *Id.*

¹⁵¹ *Town of Coventry v. Glickman*, 429 A.2d 440 (R.I. 1981).

¹⁵² *Id.* at 442.

¹⁵³ *Id.* at 444.

¹⁵⁴ *Id.* at 442.

it held that the sale of lots to private parties, rather than to a public entity or employee, would not improperly enlarge the scope of the nonconforming use.¹⁵⁵

While this case is distinct from the situation in Kentucky in that the Rhode Island property was owned by the federal government and contemplated by local zoning ordinances, this guidance speaks to the determination that property used for a public purpose is more or less reincarnated when purchased by a private party. Also integral to understanding the holding in this case is the assertion that subdivision regulations were not applicable to the property, because the government had already developed the property prior to selling it.¹⁵⁶ The Rhode Island Supreme Court correctly recognizes that some form of development and use by the government entity when the property was exempt extends to the property in its new use—a basic principle of the nonconforming use carry over.¹⁵⁷

Along the same lines, other jurisdictions have struggled with the implication of the “same classification” requirements for nonconforming uses. In *Tausch v. Parker*, the Supreme Court of Westchester County, New York also examined whether prior exempt uses can be considered as nonconforming.¹⁵⁸ The court in this case held that a proposed general or retail stationary store was of the “same classification” as the post office, formerly owned and operated by the federal government.¹⁵⁹ Like the Kentucky nonconforming use statute, the ordinance in this case allowed the board of appeals to grant a change from the existing nonconforming use to another use of the same or higher classification.¹⁶⁰ The essential question in the case was the interpretation of the “same classification” in the context of intensification restrictions of an exempt property purchased by a private party. Much like the staff in *Athens Schoolhouse*, the court here took a liberal view of what use in the “same classification” meant. In doing so, it similarly encouraged preservation, in-fill, and efficient use of a pre-existing public facility, all of which greatly advantage the local community.

Similarly, Kentucky governmental entities must treat exempt properties upon their disposition in the same way to realize the economic advantage of allowing those positioned to more fully utilize disused public facilities for the benefit of the community to do so. These cases illustrate two extra-jurisdictional approaches to a question similar to the one facing Kentucky: what should be done about government-owned, disused property? The courts in this case made determinations resulting in efficient

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 443-44.

¹⁵⁷ *Id.* at 442.

¹⁵⁸ *Tausch v. Parker*, 217 N.Y.S.2d 953, 954 (N.Y. 1961).

¹⁵⁹ *Id.* at 956.

¹⁶⁰ *Id.*

use, and the outcome benefitted the community. Legislatures and municipal governing bodies are also capable of making decisions that affect development. For instance, the Vermont Legislature's municipal and regional development statute underscores a host of considerations for local planning boards to contemplate when making decisions about zoning that encourage in-fill development, incentivize adaptive uses, and inure to the protection and preservation of historic buildings and farmland.¹⁶¹

VI. RECOMMENDATIONS

A. An Argument for Treating Exempt Property Like a Nonconforming Use

Typically, when a property is sold or otherwise disposed of, the new owner receives the property, which must conform to the local planning board's classification of the property. Because local zoning ordinances and state statutes are largely silent as to the treatment of exempt properties, an analogy must be drawn between exempt properties and similar land use classifications for guidance as to the proper treatment of the disposition of exempt property.

As Part IV explored, exempt properties have more in common with nonconforming uses than they do not have in common. Part V acknowledged the lack of uniformity and guidance in the current treatment of the disposition of exempt property and examined nonconforming uses as a possible guidepost for streamlining the incorporation of formerly exempt property into local zoning ordinances. This section builds on the earlier parts to make a recommendation as to how the disposition of exempt property should be treated in Kentucky.

To begin, many boards of adjustment and state courts must make decisions about changes in use that place greater emphasis on a burden and benefit analysis than on the "same or more restrictive class" standard required by statute. Additionally, most public facilities are large in size and scale, which has a limiting effect on the resultant use of a developmental project to repurpose the facility. Naturally, even private purchasers and developers of previously exempt properties tend to repurpose and create adaptive uses for the property that serve inherently public functions. For instance, AU Associates, Inc., a commercial development company that repurposes neglected public buildings to create affordable housing for senior citizens, has given new life to six formerly disused schools in central and eastern Kentucky by transforming the school buildings into affordable and attractive dwellings for the local communities' elderly.¹⁶² These

¹⁶¹ VT. STAT. ANN. tit. 24, § 4302(a) (West 2013).

¹⁶² See *AU Associates Portfolio*, http://auassociates.com.s157318.gridserver.com/?page_id=14 (last visited Feb. 24, 2014). Among these projects is the Midway School Apartments, which gave

restorative measures accomplish the same goals in Kentucky that the Vermont legislature has codified into its laws.¹⁶³ However, the preservation and thoughtful repurposing of former schools that developers like AU Associates are performing is a mere glimpse of what could be if the same legislation that championed this effort were enacted in Kentucky—fitting with the legislature’s mandate for sustainable and energy efficient design in Kentucky’s public facilities.¹⁶⁴

The answer is simple and two-pronged: first, relax the “same or more restrictive classification” strictures on nonconforming uses, and second, treat exempt properties as nonconforming uses upon their disposition. When the “same or more restrictive classification” limitation on nonconforming uses is loosened by including provisions in legislation that discourage urban sprawl while also encouraging in-fill development and preservation of historic structures, Kentuckians will be able to realize the benefits of disused and forgotten public facilities that are given new life. Applying the test that the highest court in Kentucky first articulated in *Franklin Planning and Zoning Commission*, whether or not a use or development is objectionable or obnoxious to existing development of the property or surrounding area,¹⁶⁵ would seem to support a broader possible use for previously exempt properties. Especially in cases where the new use of a formerly exempt property presents a benefit or even no tangible loss, it is appropriate for a local board to approve the new development or use.

Handling the disposition of exempt properties like nonconforming uses may be the simplest approach to incorporating the property’s new incarnation into local zoning ordinances. Furthermore, both state statute and local zoning ordinances explicitly establish laws regarding the treatment of nonconforming uses. By utilizing the same, clear guideposts used for the treatment of nonconforming uses on the disposition of exempt properties, local government decision-making processes can be streamlined, and a greater number of properties can be brought into agreement with the local comprehensive plan. Where nonconforming uses are attractive because of the monopoly of the use that can be created by approving the

new life to the Midway School in Woodford County. Built in 1924 and used until it closed in 1994 due to overcrowding and asbestos, the building reopened in 1998 as a mixed-income housing apartment for senior citizens. KENNEDY & JOHNSON, *supra* note 4, at 76. “The Midway School project has attained national status as an excellent adaptive reuse project . . . [winning] a statewide AIA award for excellence in architectural design. The project was funded through various incentives, including Historic Preservation Tax Credits administered by the Heritage Council, and low-income tax credits and HOME funds from the Kentucky Housing Corporation.” *Id.* at 77.

¹⁶³ VT. STAT. ANN. tit. 24, § 4302(a) (West 2013).

¹⁶⁴ KY. REV. STAT. ANN. § 160.325 (West 2013) (superseding Exec. Ord. 2006-1297); *id.* § 157.450; *see also Kentucky Energy Efficiency Program for Schools*, KY. RES. CTR. FOR ENVR. SUSTAINABILITY, available at <https://louisville.edu/kppc/keeps> (last visited Feb. 14, 2013).

¹⁶⁵ *Franklin Planning & Zoning Comm’n v. Simpson Cnty. Lumber Co.*, 394 S.W.2d 593, 594 (Ky. 1965).

nonconforming use, exempt properties have an equally attractive trait—their essential exemption—that should be used to incentivize preservation and to eliminate waste and disuse.

B. An Argument for Extending Tax Amortization Provisions to the Purchasers and Developers of Formerly Disused Exempt Property

Like their classification under the rest of the body of law in Kentucky, exempt properties are anomalous entities for tax purposes. KRS § 132.200, which subjects all property to school taxes except the properties enumerated in the statute, is silent on the position of imposing tax liability on exempt property.¹⁶⁶ It would be counterproductive to impose a public tax on property owned by the public. The sale of exempt property to a private owner would surely alter the property's tax-exempt status.

The previous section took the position that treating exempt property like a nonconforming use has benefits, but not all states treat nonconforming uses the same. As such, a persuasive extra-jurisdictional approach must fit within the context of the other sources of Kentucky law governing land use principles to be viable in this state. For instance, Kentucky does not utilize an amortization process for nonconforming uses, yet many jurisdictions have taken the position that amortization provisions are “valid where reasonable and do not constitute the taking of property without compensation.”¹⁶⁷ However, the Kentucky's highest court accepted the proposition that reasonable provisions for amortization for nonconforming uses are valid in *Gates v. Jarvis, Cornette & Payton*.¹⁶⁸ Typically, courts measure the reasonableness of the amortization by balancing the public gain against the private loss.¹⁶⁹ Hypothetically, then, a provision which “amortizes” the tax exemption of a formerly exempt property in the hands of the new owner, so that over a term the owner pays gradually more local property tax, eventually reaching the full assessable tax rate at the end of the amortized term, seems to suggest a win-win scenario. In this case, there is no measurable private loss and only public gain; where a local government is sitting on disused public property on which it cannot collect a tax, the very conveyance of the property is automatic revenue for the government entity and a relief from the financial burden of maintaining the disused property. Any additional revenue collected on the property, for example in the form of taxes, is above and beyond what the governmental entity was able to collect before the

¹⁶⁶ KY. REV. STAT. ANN. § 132.200 (West 2013).

¹⁶⁷ Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R.5th 391 (1992).

¹⁶⁸ *Gates v. Jarvis, Cornette & Payton*, 456 S.W.2d 278, 279 (Ky. 1971).

¹⁶⁹ Zitter, *supra* note 167, § 3[a].

conveyance.

This scenario suggests that local governments struggling to maintain and dispose of disused exempt property may want to consider extending added incentives to a potential property purchaser or developer in the form of an attractive and mutually beneficial amortized tax exemption. Disused property exempt from local ordinances and local tax codes does not make money for local government entities; rather, these properties cost the public in maintenance and upkeep. Furthermore, they do not bring in tax revenue as a public facility. Local governments should not let their desire for solvency overpower a potentially important opportunity to encourage needed job growth and a stimulus to local economy by demanding tax revenue upon conveying exempt property. In fact, by amortizing the tax exemption over five years,¹⁷⁰ local governments can still collect “gravy money”—revenue it would not have received if the property were not conveyed and taxed—and the new owner is conferred an economic benefit that can be used to improve the property. Finally, the proposed solution in this article considers the important environmental impact that can be mitigated or abated by preservation of historic public spaces. In the current economic climate, it is essential for governments to utilize their resources more efficiently, and this recommendation presents a viable solution to the overabundance of disused public property.

VII. CONCLUSION

The author undertook this Article as the result of having been contacted by a state legislator regarding a dilemma his district faced in disposing of two condemned and disused school properties.¹⁷¹ After having closed the schools, the local school board in this district learned that it would cost substantially more to demolish the improvements to the property in a manner that would not release asbestos that was discovered in the construction of each building.¹⁷² This situation is not unique and illustrates the important considerations in the disposition and ultimate use of these properties. The preservation or demolition calculus is fraught with economic and environmental concerns. Of course, the preservation of the more than 150 historic school buildings throughout the Commonwealth,¹⁷³

¹⁷⁰ For example, if the new owner of the previously exempt property pays no local property tax in year 1, 20% of the assessed property tax in year 2, 40% in year 3, 60% in year 4, 80% in year 5, and 100% of the assessed property tax every year after the fifth year of ownership, the owner would have the ability to inject these savings into greater capital improvements of the development for the benefit of the local community.

¹⁷¹ Telephone interview with [Name Redacted for Confidentiality], Representative – House District [Number Redacted for Confidentiality] (Nov. 7, 2011).

¹⁷² *Id.*

¹⁷³ This is a conservative estimate. In 2001, 196 local school boards reported maintenance of over 160 historical school buildings. See KENNEDY & JOHNSON, *supra* note 4, at 9. For purposes of the

serves preservation as well as environmental purposes. After all, the greenest building is the one that is already built.¹⁷⁴

Recent external factors such as population migration, the recovering national economy, and tighter budgets have created a pressing need for governments to rein in their expenditures in order to meet budget expectations. School officials across the Commonwealth in primary, secondary, and higher education are faced with dilapidated facilities and diminished coffers. Administrative bodies seeking to reduce expenditures by utilizing public facilities more efficiently, including selling or offloading those facilities, which require great expense to maintain, should be aware of the legal implications of the disposition of such property in this manner. Educating governing bodies like school boards and local governments on how to use or dispose of properties that have fallen into disuse is essential to economic solvency and utility in Kentucky's current economic climate. Furthermore, as other commentators have suggested, lawmakers must craft innovative, flexible regulation and the courts must give deference to zoning

survey, "historical" refers to a school building constructed over fifty years or more before the time of the survey.

¹⁷⁴ Carl Elefante, *The Greenest Building Is . . . One That Is Already Built*, 21 J. NAT'L TRUST FOR HISTORIC PRESERVATION 4 (2007), available at http://www.ipedinc.net/referencematerials/Article_The_Greenest_Building_Is_One_That_Is_Already_Built_by_Carl_Elefante_AIA_LEED_AP_Forum_Journal_Summer_2007.pdf. For examples of economic consequences, see, e.g., Ky. Heritage Council, *Historic Preservation in Kentucky's 1st Congressional District*, (Feb. 2013), <http://heritage.ky.gov/NR/rdonlyres/97B583EE-6A70-4B36-BB7E-B669D46A9D12/0/1stDistrict2013FINAL.pdf> (citing over \$38 million invested in Kentucky Main Street programs through 2012 in Kentucky's first congressional district, resulting in the rehabilitation of over 100 historical downtown buildings and creating 150 jobs in main street districts); Ky. Heritage Council, *Historic Preservation in Kentucky's 2nd Congressional District*, (Feb. 2013), <http://heritage.ky.gov/NR/rdonlyres/D6345A5B-241F-4309-85CA-EC88D27027D6/0/2ndDistrict2013FINAL.pdf> (citing over \$16 million invested in Kentucky Main Street programs through 2012 in Kentucky's second congressional district, resulting in the rehabilitation of over 53 historical downtown buildings and creating 132 jobs in main street districts); Ky. Heritage Council, *Historic Preservation in Kentucky's 3rd Congressional District*, (Feb. 2013), <http://heritage.ky.gov/NR/rdonlyres/33D4A958-E7DE-4A40-B132-82593AF25BCD/0/3rdDistrict2013FINAL.pdf> (citing over \$129 million invested in Kentucky Main Street programs through 2012 in Kentucky's third congressional district, resulting in the rehabilitation of over 300 historical downtown buildings and creating 1,234 jobs in main street districts); Ky. Heritage Council, *Historic Preservation in Kentucky's 4th Congressional District*, (Feb. 2013), <http://heritage.ky.gov/NR/rdonlyres/FC0E9E37-3C67-4C73-AE0F-229A761EF516/0/4thDistrict2013FINAL.pdf> (citing over \$25 million invested in Kentucky Main Street programs through 2012 in Kentucky's fourth congressional district, resulting in the rehabilitation of over 77 historical downtown buildings and creating 312 jobs in main street districts); Ky. Heritage Council, *Historic Preservation in Kentucky's 5th Congressional District*, (Feb. 2013), <http://heritage.ky.gov/NR/rdonlyres/F48D83BC-B0B7-4724-8017-05B4EA6AB945/0/5thDistrict2013FINAL.pdf> (citing over \$38 million invested in Kentucky Main Street programs through 2012 in Kentucky's fifth congressional district, resulting in the rehabilitation of over 39 historical downtown buildings and creating 616 jobs in main street districts); Ky. Heritage Council, *Historic Preservation in Kentucky's 6th Congressional District*, (Feb. 2013), <http://heritage.ky.gov/NR/rdonlyres/ABC17BE6-5975-4100-AD31-18F725C78915/0/6thDistrict2013FINAL.pdf> (citing over \$8 million invested in Kentucky Main Street programs through 2012 in Kentucky's sixth congressional district, resulting in the rehabilitation of over 53 historical downtown buildings and creating 28 jobs in main street districts).

regulation forged accordingly.¹⁷⁵ Creating incentives for those brave enough to take the risk of bringing new life to disused exempt property, local communities in Kentucky will reclaim and realize the benefits of the public property that time has forgotten.

¹⁷⁵ Charles M. Haar & Michael Allan Wolf, *Yes, Thankfully, Euclid Lives*, 73 FORDHAM L. REV. 771, 772 (2004).

