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Historic Districts: A Look at the Mechanics in Kentucky and a Comparative Study of State Enabling Legislation

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INTRODUCTION

America is currently experiencing a wave of conservativism, harkening back to "good, old-fashioned family values." Many in the population, trapped in a fast-paced, technology-driven urban society, yearn for the essence of traditional, small-town America: a sense of place.[1] In a generation where one shops at the same strip mall, eats at the same fast food restaurant and pumps gas at the same filling station regardless of the city, a sense of place can defeat homogenization by preserving the unique characteristics of small-town community and family life.[2] Larger, more urban cities can stop this "sameness" by preserving the fabric of their distinct neighborhoods and business/shopping areas.

The buildings in an area play a large part in defining the sense of place.[3] For example, there exists a distinct character and flavor to the hotel and cafe architecture in the Art Deco District in Miami Beach, Florida.[4] In Council Grove, Kansas, the wide Main Street with its mid-1800s building facades captures the feeling of the Old West and the Sante Fe Trail. The federal-style buildings and Italianate detailing added later to some buildings in Gratz Park in Lexington, Kentucky embody the social and family fabric of the city during the 1800s. Lexington also boasts some of its own "Painted Ladies," the colorful Victorian homes in the Woodward Heights Historic District downtown.

The historic district is an effective way to protect these non-renewable structures. A municipality can preserve the locale's architecture by designating the area as a historic district.[5] Preservation of the historical resources in these neighborhoods leads to the preservation of a true sense of place for those communities.

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[1] *See generally* GRADY CLAY, REAL PLACES: AN UNCONVENTIONAL GUIDE TO AMERICA'S GENERIC LANDSCAPE (1994).

[2] NORMAN CRAMPTON, THE 100 BEST SMALL TOWNS IN AMERICA 1-7 (1993).

[3] CLAY, *supra* note 1.

[4] *Id.*

[5] *Id. See generally* BARBARA BAER CAPITMAN, DECO DELIGHTS: PRESERVING THE BEAUTY AND JOY OF MIAMI BEACH ARCHITECTURE (1988).

I. THE EVOLUTION OF HISTORIC PRESERVATION LAW IN AMERICA

American land use law, which now validates governmental design controls based on aesthetics as a means to protect historic structures and sites, has slowly evolved throughout the nineteenth and twentieth centuries.[6] Beginning in the mid 1800s, growing numbers of private citizens rallied together, pooling their financial resources to purchase individual structures that they thought possessed historical significance to the nation.[7] Supporters organized efforts to save structures associated with famous American forefathers.[8] The first organized, successful, and widely-publicized effort to save a historic structure rescued Mount Vernon, George Washington's plantation home on the Potomac River, from imminent destruction by developers who intended to erect a hotel on the riverfront.[9] In 1853, Ann Pamela Cunningham of South Carolina started The Mount Vernon Ladies' Association of the Union, a patriotic group of women that successfully garnered enough financial and political support throughout the entire country to enable the group to purchase 200 acres of the estate in 1858 with the intention "to hold and improve" it.[10] This effort established several presuppositions about historic preservation in nineteenth-century America:

> that private citizens, not government, were the proper advocates for preservation; that only buildings and sites associated with military and political figures were worthy of preservation; that such sites must be treated as shrines or icons; and that women would assume a dominant role in the

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[6] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (holding that land use regulation fell within the states' police powers); Welch v. Swasey, 214 U.S. 91(1909) (upholding state supreme court decision that advancing aesthetic goals was a valid legislative purpose).

[7] WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 28 (1993).

[8] *Id.* at 28. The drive to preserve historic structures associated with famous American forefathers centered on the engendering of patriotic fervor and emphasized the larger-than-life figures who led the Colonists toward and through the American Revolution. George Washington, Thomas Jefferson, John Adams, and Benjamin Franklin stood out among the Continental Congresses as the new country's government began to take shape. Although it was women who initiated preservation movements in the mid-1800s, the subjects most often chosen for preservation efforts were the men who had participated in the nascence of the United States. Later, an adopted grandson of Andrew Jackson led the efforts of The Ladies Heritage Association to preserve his home, The Hermitage, in Tennessee. *Id.* at 28-30.

[9] *Id.* at 28.

[10] *Id.* at 205.

acquisition and management of such properties.[11]

While the impetus behind most historic preservation efforts remained largely vested in the private sector as philanthropic endeavors until World War II, the Federal Government did designate a national battlefield in Gettysburg, Pennsylvania in 1896.[12] In *United States v. Gettysburg Electric Railway Co.*,[13] the Supreme Court held that the preservation of a monument important to the country's past was a proper public purpose justifying condemnation of private property.[14] Additionally, Congress passed the Antiquities Act[15] in 1906 to protect archaeological sites on federally owned land and established the National Park Service in 1916. The National Park Service took over administration of the then nine existing national monuments.[16] And, in 1935 Congress enacted the Historic Sites and Buildings Act,[17] embracing for the first time a national historic preservation policy.[18] The national policy articulated in the 1935 Historic Sites and Buildings Act called for the "preserv[ation] for public use [of] historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[19] Further, the Act mandated the documentation, through drawings, plans and photographs, of historic buildings, objects, archaeological sites, and other structures, such as bridges.[20] The Historic American Buildings Survey, the National Historic Landmarks Program, and the Historic American Engineering Record became a part of President Roosevelt's "make-works" program during the 1930s.[21]

Increasingly throughout the late 1800s and the early 1900s, federal and state cases tended to hold that government regulations of private property were properly grounded in the concept of the states' police

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[11] *Id.* at 30.

[12] *See* United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896).

[13] 160 U.S. 668 (1896).

[14] JUDITH L. KITCHEN & SCOT E. DEWHIRST, OHIO HISTORIC PRESERVATION OFFICE, HISTORIC PRESERVATION COMMISSIONS AND DESIGN REVIEW BOARDS 4 (1991).

[15] 16 U.S.C. §§ 431-433 (1994).

[16] MURTAGH, *supra* note 7, at 206.

[17] 16 U.S.C. § 461 (1994).

[18] MURTAGH, *supra* note 7, at 207.

[19] 16 U.S.C. § 461.

[20] 16 U.S.C. § 462(a), (b) (1994).

[21] Historic Sites Act of 1935, 16 U.S.C. §§ 461-67 (1994); *see* SARAH K. BLUMENTHAL, U.S. DEPARTMENT OF THE INTERIOR, FEDERAL HISTORIC PRESERVATION LAWS 2 (1989-90); *see also* MURTAGH, *supra* note 7, at 55.

powers.[22] Land use planning and regulation, therefore, was validated as a constitutional limitation on owners' rights. *Mugler v. Kansas* supported the idea of land use regulation and held that such "power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State."[23] In *Welch v. Swasey*, the city of Baltimore, Maryland promulgated a building code requirement limiting building height to 70 feet or less.[24] When challenged in the state supreme court, the height requirement prevailed on two grounds: lessening fire hazards and advancing aesthetic goals.[25] In *Pennsylvania Coal Co. v. Mahon*, the Court permitted regulation of private property by the government, but held that a "taking" resulted if the regulation was too strict.[26] Finally, in *Village of Euclid v. Ambler Realty Co*,[27] the Court upheld a regulation of private property because the benefits and zoning burdens were distributed to all property owners.

The 1930s witnessed preservation efforts in several states, especially South Carolina, Louisiana, and Texas.[28] Charleston, South Carolina enacted the first local preservation zoning ordinance in 1931 to "preserve and protect historic places and areas in the Old and Historic Charleston District."[29] Significantly, the Charleston ordinance was the first to use the term "district."[30] Thirty-five years later, the National Historic Preservation Act would identify "districts" as one of the entities to be included on the National Register of Historic Places.[31] New Orleans, Louisiana[32] and San Antonio, Texas[33] soon followed suit, enacting their own preservation ordinances in 1936 and 1939, respectively. The Vieux Carre Commission of the City of New Orleans was

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[22] *See* Mugler v. Kansas, 123 U.S. 623 (1887); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

[23] 123 U.S. 623, 661 (1887).

[24] 214 U.S. 91 (1909).

[25] 79 N.E. 745, 746 (Mass. 1907).

[26] 260 U.S. 393 (1922).

[27] 272 U.S. 365 (1926).

[28] MURTAGH, *supra* note 7, at 103-06.

[29] *Id.*

[30] *Id.*

[31] 16 U.S.C. § 470a(a)(1)(A) (1994) ("The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of *districts*, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.") (emphasis added).

[32] MURTAGH, *supra* note 7, at 105.

[33] Henry G. Cisneros, *Bridging America's Visions, in* PAST MEETS FUTURE: SAVING AMERICA'S HISTORIC ENVIRONMENTS 85, 85 (Antoinette J. Lee, ed. 1992).

charged with preserving buildings considered to have either architectural or historical value.[34] In San Antonio, the commitment to historic preservation since 1939 has led to positive economic impact today by combining practical utility and long-term stewardship of historic resources.[35] The potential of preservation has manifested in a thriving tourism market and in a revitalized business area with a concentration on the linkage of its River Walk district and The Alamo through the lobby of a modern hotel.[36]

While the impetus for initial efforts in historic preservation began mostly with private individuals, after World War II the initiative for such efforts shifted to the public sector.[37] The period following World War II saw an increase both in legislation enacted to advance the preservation of historic resources and in case law developed from litigation testing governmental actions which sought to preserve the historical fabric of an area by regulating land use. This trend established a favorable climate for the Historic Sites Act of 1935, which mandated the preservation *for public use* of historic resources.[38] Federal, state and local governments now had the responsibility to maintain and repair their historic buildings for use as offices, courthouses, fire and police stations and other public uses.[39] Congress created the National Trust for Historic Preservation in 1949,[40] and the National Parks Service implemented the National Historic Landmarks Program in 1960.[41]

The federal legislative preservation scheme affords only limited

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[34] MURTAGH, *supra* note 7, at 103.

[35] Cisneros, *supra* note 33, at 85.

[36] David Lowenthal, *A Global Perspective on American Heritage, in* PAST MEETS FUTURE: SAVING AMERICA'S HISTORIC ENVIRONMENTS 157, 163 (Antoinette J. Lee, ed. 1992).

[37] MURTAGH, *supra* note 7, at 61:

> The government's involvement with preservation, even as it increased in professionalism, was predominately male, a sharp contrast with the highly visible role of women in the private sector throughout the decades leading up to the founding of the National Trust [in 1949]. Indeed, if the creation of the Trust did nothing more, it provided a platform on which the private sector and government could interact, bringing the monied interests of one into closer interaction with the professionalism of the other.

The modern trend is toward an emphasis on partnerships between the public and private sectors in organizing preservation projects. *Id.*

[38] 16 U.S.C. §§ 461-67.

[39] 16 U.S.C. § 462 (e), (f), (h). These subsections require governmental bodies to consider acquiring historic structures for office or other public use and to restore and maintain such structures; *see* BLUMENTHAL, *supra* note 21, at 2-3.

[40] MURTAGH, *supra* note 7, at 42.

[41] *Id.* at 62.

protection to historic resources.[42] The 1966 National Historic Preservation Act (NHPA) calls for a review and a mitigation process for federal and federally-funded projects, as well as private projects that are subject to federal licensing or permitting, when such projects threaten historic resources.[43] The NHPA established the National Register of Historic Places,[44] and requires federal agencies to evaluate the effect federally-funded, licensed, or permitted actions may have on properties listed on or eligible for the National Register.[45] The statute also requires consideration of mitigation measures recommended by the federal Advisory Council on Historic Preservation (ACHP) for projects which may harm these nonrenewable historic resources.[46] However, while the Act attempts to ensure that federal agencies will not proceed too hastily, it cannot prevent harmful action unless the ACHP, as well as the relevant State Historic Preservation Officer and federal agency, signs a Memorandum of Agreement (MOA).[47] An MOA would set forth the projected impact on the historical resource at the center of the project, as well as any construction or rehabilitation conditions which the project organizers must meet and any mitigation measures required.[48] In reality, unfortunately, most reviews of such projects do not involve the ACHP because the parties involved maintain that their project will have "no effect" on historic resources.[49] The ACHP is, after all, only an advisory body, and cannot require that projects be submitted to it.[50] Additionally, among those projects which do come under the ACHP's authority to require an MOA, most undertakings receive a finding that they have "no adverse effect" on the historic resources involved.[51]

Another review and mitigation process lies in the National Environmental Policy Act (NEPA) of 1969.[52] NEPA requires preparation of an Environmental Impact Statement for all "major federal actions

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[42] National Historic Preservation Act, 16 U.S.C § 470 (1994); interview with Jane Cassady, Community Preservation Coordinator, Kentucky Heritage Council, in Frankfort, Kentucky (Summer 1994).

[43] 16 U.S.C. §§ 470a, 470h-2(d) to (f) (1994).

[44] *Id.*

[45] *Id.*

[46] 16 U.S.C. § 470f (1994).

[47] 16 U.S.C. §§ 470f, 470h-2(*l*); Interview with Jane Cassady, *supra* note 42.

[48] MURTAGH, *supra* note 7, at 67.

[49] Interview with Jane Cassady, *supra* note 42.

[50] Interview with Jane Cassady, *supra* note 42.

[51] Interview with Jane Cassady, *supra* note 42 ("And unfortunately, only a few of the projects that have a finding of adverse effect have MOAs.").

[52] 42 U.S.C. § 4332 (1994).

significantly affecting the quality of the human environment."[53] In addition to consideration of the impacts to the natural environment, NEPA mandates consideration of the impacts on "urban quality, historic and cultural resources, and the design of the built environment."[54] Congress provided stricter requirements in § 4(f) of the 1966 Department of Transportation Act.[55] This Act, known by preservation professionals as "4(f)," prevents federally-funded transportation projects from damaging historic areas unless there is "no prudent or feasible alternative" to using the site.[56] Further, in the event that no such alternative exists, § 4(f) mandates comprehensive noise, pollution, and traffic mitigation procedures.[57]

While the NHPA, § 4(f), and NEPA provide protective measures for historic resources in a federal context, America's tax laws have created incentives for the rehabilitation of income-producing[58] historic property when state or local governments and/or private individuals or groups initiate the project. Prior to 1976, tax laws favored new construction over rehabilitation through the granting of significant tax credits.[59] Because of the available tax credits, it was more profitable to raze and replace the existing building stock with new, modern structures than to rehabilitate and modernize (and to bring an older building "up to code," or into compliance with the current building and fire codes).[60] The Tax Reform Act of 1976 placed rehabilitation an equal footing with new construction by balancing the economic incentives and disincentives between the two alternatives.[61] The Economic Recovery Tax Act of

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[53] 42 U.S.C. § 4332(2)(C).

[54] Paul Edmondson, *Legislation, in* LANDMARK YELLOW PAGES 63, 63-4 (Pamela Dwight, ed. 1993).

[55] The Department of Transportation Act of 1966 § 4(f), 49 U.S.C. § 303(c)(1) (1994).

[56] *Id.*

[57] Edmondson, *supra* note 54, at 56.

[58] A commercial storefront or a bed and breakfast, for example. Many preservationists hope to lobby the U.S. Congress for a historical home owners' tax credit which would not require that the property be income-producing. *See* George Abney, *Tax Incentive for Homeowners Gains Bipartisan Support*, PRESERVATION NEWS, July/Aug. 1995, at 21. Meanwhile, the Virginia Legislature passed a Bill during its most recent session which provides a historic rehabilitation tax credit for owners of historic homes. Under this new law, the property does not have to be income-producing (i.e. it can be a primary owner occupied residence). VA. CODE ANN. §§ 58.1-339.2 (Michie 1996).

[59] MURTAGH, *supra* note 7, at 74. Accelerated depreciation favored new construction. Telephone interview with Frank Gilbert, Senior Field Representative, National Trust for Historic Preservation, Washington, D.C. (Winter 1997).

[60] MURTAGH, *supra* note 7, at 74.

[61] *Id.* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended at 26 U.S.C. § 280B (1994)).

1981[62] offered two alternatives.[63] First, it increased to 25% the investment tax credit for rehabilitation projects in National Register[64] districts or state and locally recognized historic districts as long as the building contributed to the historic significance of the district.[65] Second, this Act also made possible a 20% investment tax credit for buildings at least 40 years old, as well as a 15% investment tax credit for buildings at least 30 years old—regardless of whether such buildings were listed on the National Register.[66] Unfortunately, Congress revised the tax laws in 1986. As a result, the available investment tax credit was reduced to 20% for historic buildings and 10% for nonresidential historic buildings at least fifty years old.[67] The Tax Reform Act of 1986[68] greatly diminished the amount of preservation-driven rehabilitation projects.[69]

While the federal laws are mostly procedural in nature (they require review of impact and consideration of mitigation methods, for example), local preservation laws provide greater substantive safeguards. Local ordinances designating historic structures as landmarks or as parts of historic districts provide the strongest protections. Historic preservation ordinances provide limits at the local level to the amount and types of changes owners can make to the exterior of their buildings.[70] Owners making any significant exterior change to their historic structure, except for ordinary repair and maintenance, generally must first appear before the local planning body or design review board.[71] For example, an owner wishing to add a front porch to, or in some districts, paint the exterior of, his historic home must apply to the local planning body for a Certificate of Appropriateness before the changes may be made.[72]

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[62] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified at scattered sections of 26 U.S.C. (1994)).

[63] MURTAGH, supra note 7, at 74.

[64] To be eligible for the National Register, a historic building must have achieved significance at least 50 years ago as well as meet other criteria. *See* INTERAGENCY RESOURCES DIVISION, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL REGISTER BULLETIN 16A (1991).

[65] MURTAGH, *supra* note 7, at 112. The '76 Act created a 20% investment tax credit for historic rehabilitation projects; the '81 Act strengthened the '76 Act. Interview with Frank Gilbert, *supra* note 59.

[66] MURTAGH, *supra* note 7, at 112.

[67] *Id.*

[68] Tax Reform Act of 1986, Pub. L. No. 99-509, 100 Stat. 1951, 1964, 1965, 1995 (codified as amended in scattered sections of 26 and 42 U.S.C.).

[69] MURTAGH, *supra* note 7, at 112.

[70] *See, e.g.*, LEXINGTON, KENTUCKY, PLANNING AND ZONING CODE, art. 13 (1990).

[71] *Id.*

[72] In emergency situations, however, expedited processes are available. For example, during the March, 1994 ice storms in Lexington, Kentucky, many owners of historic buildings in the Ashland Park area experienced damaged roofs and box gutters that exposed their houses to extensive

Also, owners may not alter or demolish these structures without local governmental approval.[73] Often, local governments regulating historic property in designated districts meet heated opposition from individuals promoting private property rights.[74]

As the nation's population boomed following World War II and urban centers increased in size, the need for effective land use planning also increased.[75] Such planning has involved not only traditional use-zoning, but also (and more increasingly) the preservation of green space and historic structures and sites that embody the character of the of the locale.[76] The U.S. Supreme Court upheld the use of aesthetic regulation by government action for the first time in *Berman v. Parker*.[77] The court in *Berman* held that

> the concept of the public welfare is broad and inclusive. . . . The values it represents are . . . aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[78]

Local historic district ordinances are the vehicle for regulation of

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water damage. Most owners were able to act quickly in making their repairs and to stop further damage simply by notifying the Historic Preservation Office of the Lexington-Fayette Urban-County Government. However, some preservationists and homeowners feel that the emergency measures permitted still do not enable owners to act as quickly as possible to stop and to mitigate damage. Interview with Mary Breeding, Historic Preservation Consultant, in Lexington, Kentucky (Summer 1994); interview with Bettie Kerr, Historic Preservation Officer, Lexington Historic Preservation Office, in Lexington, Kentucky (Summer 1994). (Ms. Breeding is currently a private preservation consultant leading efforts at Perryville Battlefield in Perryville, Kentucky). *See* LEXINGTON, KENTUCKY, ZONING & PLANNING CODE, art. 13 (1990).

[73] KITCHEN & DEWHIRST, *supra* note 14, at 3-4.

[74] For example, take the case of the "round versus square columns" on Main Street in Lexington, Kentucky in which a local citizen wanted to replace structurally unsound but original round columns on his front porch with less expensive and easier to install square columns. The Board of Architectural Review (BOAR) refused to issue a Certificate of Appropriateness (COA) because the original columns were round; the structure was within the Bell Court Historic District, and houses of that period in that style usually had round columns. The citizen maintained that *some* houses of that period and style had square columns. However, he has failed to obtain a COA through the appeals process. At this time, his front porch is supported by thin steel (round) poles painted in an American flag motif. In the front yard, a large sign refers to the founding of this nation as being based on "no taxation without representation" and he maintains that the BOAR regulates individuals without representation. Interview with Bettie Kerr, *supra* note 72.

[75] MURTAGH, *supra* note 7, at 64.

[76] MURTAGH, *supra* note 7, at 64.

[77] 348 U.S. 26 (1954).

[78] *Id.* at 33 (citations omitted).

aesthetic elements within the district. By requiring homeowners to appear before a design review board before exterior changes are made, the government can take action to ensure that the buildings within that district retain the design elements (exterior materials, window or door styles, or even paint color) that make those structures unique as a group and that contribute to the character of the district.

In 1978, the Supreme Court upheld the constitutionality of New York City's preservation ordinance because the regulation did not amount to a taking.[79] *Penn Central* involved a denial by the Landmarks Preservation Commission of proposed facade alterations and an addition of a 53-story tower to New York City's Grand Central Station. The Commission stated in its deliberations that "Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept."[80] The Commission sought to "protect, enhance, and perpetuate the original design rather than overwhelm it."[81] The Court upheld the validity of the Commission's findings and actions. Just as important, the *Penn Central* Court maintained that "in a number of settings . . .States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ."[82] The decision in *Penn Central* validates efforts of local preservation ordinances to protect the integrity of America's historic structures and areas.

II. ENABLING LEGISLATION IN KENTUCKY

State law in Kentucky provides three avenues for protecting historic resources. The Home Rule powers of municipalities, discussed in Part II A below, is one of those mechanisms.[83] Traditionally, municipalities in Kentucky could only exercise those powers and duties specifically

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[79] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133 (1978).

[80] *Penn Central*, 438 U.S. at 118 (quoting New York City's Landmarks Preservation Commission); CHARLES M. HAAR & JEROLD S. KAYDEN, LANDMARK JUSTICE: THE INFLUENCE OF WILLIAM J. BRENNAN ON AMERICA'S COMMUNITIES 160 (1989).

[81] *Penn Central*, 438 U.S. at 118.

[82] *Id.* at 129 (citations omitted); Julia Hatch Miller, *Court Cases*, *in* LANDMARK YELLOW PAGES 75-78 (Pamela Dwight, ed. 1992).

[83] *See* KY. REV. STAT. ANN. § 83.410 (Michie/Bobbs-Merrill 1995) for cities of the first class (i.e., Louisville), as well as KY. REV. STAT. ANN.§ 82.082 for all other cities, including urban-county governments, and KY. REV. STAT. ANN. § 67.083(3) for county governments. According to Kentucky Attorney General Opinion 80-502 urban-county governments possess the powers of the city of the highest class within the county. 80 Ky Op. Att'y Gen 502 (1980). Therefore, § 82.082 applies to urban-county governments.

granted to local governments by state statutes.[84] Under Home Rule, however, local governments are granted much broader powers, including the general power to exercise duties and acts necessary to self-governance.[85] Zoning powers are a second mechanism, and are included in the concept of self-governance; therefore, the ability to designate historic districts through zoning is rooted in the Home Rule powers as well.[86] The creation of historic districts through zoning will be explained in Part II B. This includes not only traditional use-zoning, designating certain areas for specific types of similar uses, but also overlay zoning, an additional design requirement supplementing existing use-zoning. Finally, Part II C will examine protection of historic resources through the Certified Local Government program which enables cities to qualify for certain government-funded grants when National Parks standards for historic districts are met.

A. Home Rule

The Home Rule concept[87] gives local municipalities the power to govern themselves. Traditionally, municipalities only possessed powers specifically outlined by the Kentucky General Assembly.[88] Therefore, cities and counties could exercise only powers expressly and implicitly granted by the Kentucky Constitution and by federal and state statutes.[89] Statutes had to be narrowly tailored and had to be specific in granting powers.[90] This resulted in a cumbersome system for determining the actual powers municipalities had authority to carry out. The 1980 General Assembly sought to alleviate this problem by promulgating general powers enabling statutes.

The Kentucky Home Rule statutes expressly allow local governments to exercise any powers necessary to operate as long as such powers do not conflict with the Constitution or any state or federal laws.[91] This follows the long-held tradition of governmental hierarchy that local ordinances are subordinate to state law.[92] The statutory

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[84] *See* KY. REV. STAT. ANN. §§ 83.410; 82.082; and 67.083(3).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] LEGISLATIVE RESEARCH COMMISSION, KENTUCKY MUNICIPAL STATUTORY LAW, INFORMATION BULLETIN NO. 145, 3 (1991).

[89] *Id.* at 4.

[90] *Id.* at 2.

[91] *Id.*

[92] *Id.*

scheme[93] includes two other limitations: the functions carried out by local governments must be completed within the boundaries of the city and such functions must further a public purpose of the city. Historic districting as a part of zoning falls within the boundaries of a city,[94] and case law demonstrates that government land use regulation based on aesthetics is a valid exercise of police powers because it furthers the quality of life enjoyed by the local public.[95]

The public purpose requirement changed prior law.[96] Previously, when a statute granted a power, it was presumed to be in furtherance of a public purpose. However, pursuant to the 1980 changes, the Home Rule statutes require an analysis as to whether a municipality's actions further public purposes.[97]

Because the Kentucky legislature considered the urban problems faced by large cities to be unique, Kentucky Revised Statutes section 83.410 states that "the most effective agency for the solution of these problems is the government of a city of the first class."[98] Thus, section 83.410 grants to Louisville "complete home rule" which the statute mandates should be "broadly construed."[99] The Home Rule concept also includes the authority to create planning and zoning laws.[100] Designation of historic districts through zoning devices, then, is a power carried out through the authority of Home Rule.[101]

In counties, the fiscal court possesses the power to carry out governmental functions which are necessary for the operation of that county.[102] Planning, zoning and subdivision control,[103] as well as the preservation of historic structures,[104] are specifically included by statute as permissible public functions. However, the power of counties to preserve historic structures[105] is limited by the owner consent requirement.[106] Thus, any agency of a county acting to preserve a historic

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[93] *See supra* note 83.

[94] LEGISLATIVE RESEARCH COMMISSION, *supra* note 88, at 135.

[95] *See* Berman v. Parker, 348 U.S. 26 (1954); *supra* notes 12-27, 79-82 and accompanying text.

[96] LEGISLATIVE RESEARCH COMMISSION, *supra* note 88, at 111.

[97] *Id.*

[98] KY. REV. STAT. ANN. § 83.410(4) (Michie 1995).

[99] *Id.* § 83.410(3).

[100] Fowler v. Obier, 7 S.W.2d 219, 223 (1928).

[101] *Id.*

[102] KY. REV. STAT. ANN. § 67.083(3) (Michie 1994).

[103] *Id.* § 67.083(3)(k).

[104] *Id.* § 67.083(3)(y).

[105] *Id.*

[106] KY. REV. STAT. ANN. § 67.083(9) (Michie 1994).

structure must "obtain the *voluntary written consent* of the owner of the structure."[107] In addition, governmental agencies must advise owners of historic resources about advantages and disadvantages of the government's action to preserve the historic structure.[108] Although educating the public is certainly a worthy goal, in practice the owner consent provision results in fewer preservation successes.[109] The requirement often frustrates the purpose of historic preservation by severely limiting the authority of government officials to act in saving nonrenewable historic structural resources.[110]

B. Planning & Zoning

The planning and zoning process is the second vehicle through which governments may protect historic structures and areas.[111] Two types of zoning exist: use zoning and overlay zoning. This section deals with use zoning.[112] Governments can implement permanent land use regulations to "facilitate orderly and harmonious development and the visual or historical character. . ." of their jurisdictions.[113] Further, "[l]and use and zoning regulations may . . . be employed to protect . . . historical districts. . . ."[114] In this way, governments may regulate land use by designating zones according to the use permitted in each zone. Cities and counties may draft zoning regulations which contain "[d]istricts of special interest to the proper development of the community, including, but not limited to exclusive use districts, historical districts, planned business districts . . . rehabilitation and conservation districts; planned neighborhood and group housing districts."[115]

In addition, governments may use zoning to ensure that the "fringe areas" of such a district be developed or preserved in a manner which is

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[107] *Id.* (Emphasis added).

[108] *Id.* Interview with Bettie Kerr, *supra* note 72; interview with Mary Breeding, *supra* note 72; interview with Richard Jett, Kentucky Heritage Council, in Frankfort, Kentucky (Spring 1995). During these informational interviews, these preservation professionals repeatedly emphasized the limiting effect of the owner-consent provision.

[109] *See supra* note 107 and accompanying text.

[110] *See supra* note 107 and accompanying text.

[111] The authority for planning & zoning stems from KY. REV. STAT. ANN. § 100.201 (Michie 1993 & Supp. 1996), KY. REV. STAT. ANN § 100.203 (Michie 1993), and KY. REV. STAT. ANN § 100.127(3) (Michie 1993). While § 100.201(1) &(2) pertain to counties, cities, and other local units, § 100.203(8) refers specifically to urban-county governments.

[112] *See infra* Part II C for information regarding overlay zoning.

[113] KY. REV. STAT. ANN. § 100.201(2).

[114] *Id.*

[115] KY. REV. STAT. ANN. § 100.203(1)(e).

"compatible with neighboring districts."[116] Further, historical areas which qualify as "places having unique interest or value . . . and other places having a special character"[117] enjoy an added opportunity for potential protection. Thus, the planning and zoning scheme expressly allows for the establishment of historic districts in order to regulate the use of land and structures within the districts. The provisions referring to fringe areas and places having special character relate well to preservation easements, historic corridors, and historical downtown business districts (i.e., Main Street towns).[118]

The establishment of historic districts, as well as the regulation of aesthetic elements (overlay zoning) and use of historic structures tends to be a specialized area of expertise. Therefore, local governments create boards, composed of three to five members, to advise their zoning staff.[119] The advisory board then assesses the feasibility of projects within historic districts for which permits should be issued and the compatibility of the project with the historical character of the entire district as well as the structure itself.[120] As an added incentive to establish historic preservation commissions or other advisory boards to protect historic resources, cities operating in tandem with such boards can qualify for special historic preservation funding from the federal government.[121] Pursuant to the Certified Local Government program,[122] cities may supplement the traditional use zoning with overlay zoning. The overlay adds a second layer of design element regulation to the existing use regulation of properties in a designated area.[123]

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[116] *Id.* § 100.203(1)(f).

[117] *Id.* § 100.203(1)(g).

[118] The National Main Street Center of the National Trust for Historic Preservation provides technical assistance and grant funding to small towns across America. In Kentucky, the State Historic Preservation Office (SHPO), the Kentucky Heritage Council, administers the Kentucky Main Street Program. *See infra* Part III F and note 133.

[119] KY. REV. STAT. ANN. § 100.127(3) authorizes the creation of such advisory boards (often called historic district commissions or boards of architectural review). To qualify for an advisory board, members must possess professional or personal expertise in preservation-related fields such as architecture or law.

[120] *Id.* Such boards assess proposed changes to structures within historic, business, or conservation districts drawn pursuant to KY. REV. STAT. ANN. § 100.201 (Michie/Bobbs-Merrill 1990) and KY. REV. STAT. ANN § 100.203.

[121] Pursuant to KY. REV. STAT. ANN. § 82.026 (Michie/Bobbs-Merrill 1995), cities with a qualified historic preservation ordinance in operation qualify as Certified Local Governments and may qualify for federal funding through the National Parks Service.

[122] *See infra* note 130.

[123] KY. REV. STAT. ANN. § 82.026.

C. Certified Local Governments & Overlay Zoning

The Certified Local Government (CLG) program came into existence following the 1980 amendments to the National Historic Preservation Act; it permits cities to qualify for federal historic preservation funding.[124] In Kentucky, as in every state, CLGs (as a group) must receive at least 10% of the funds allocated to the state for purposes of historic preservation by the federal government.[125] Because access to adequate preservation project funding is so limited, participation in the CLG program gives local governments an edge in the competition for grants.[126] These grants can fund historic building surveys, National Register nominations, staffing for CLG preservation commissions, development of design guidelines used in review of new construction and alterations within historic districts, drafting of preservation ordinances, and public preservation education events.[127]

Cities are eligible for participation in the CLG program once they set up a system to survey and inventory historic building stock, create a preservation program to educate the public and encourage participation in programs like the National Register of Historic Places, and provide for enforcement of state and local legislation designed to designate and protect historic properties.[128] This nationwide program offers financial and technical assistance to help preserve historic properties.[129] The State Historic Preservation Officer must "certify" that a local government has complied with all the necessary statutory requirements, as well as any state or federal requirements, before the city can receive any federal funding.[130]

Usually, CLG cities enact local historic preservation ordinances designating historic districts and add overlay zoning to supplement the historic use in an historic district.[131] Overlay zoning may also be implemented to regulate design elements in other use zones, like a

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[124] ROBERT MOYER & PAMELA THURBER, NATIONAL TRUST FOR HISTORIC PRESERVATION, STATE ENABLING LEGISLATION FOR LOCAL PRESERVATION COMMISSIONS 48 (1984). *See also* interview with Richard Jett, *supra* note 108; interview with Frank Gilbert, *supra* note 59.

[125] MOYER & THURBER, *supra* note 123, at 48.

[126] Interview with Richard Jett, *supra* note 108.

[127] KENTUCKY HERITAGE COUNCIL, CERTIFIED LOCAL GOVERNMENTS IN THE NATIONAL HISTORIC PRESERVATION PROGRAM 3 (1993).

[128] KY. REV. STAT. ANN. § 82.026(1)-(3).

[129] KY. REV. STAT. ANN. § 82.026.

[130] *Id.*

[131] *Id.* The CLG program requires that cities enact historic district ordinances before they are eligible to receive federal grant money under the program. *Id.*

business district, for example.[132] This enables local governments to not only regulate land use within specific districts, but also to impose restrictions on aesthetic elements within the districts, such as dictating the type of signage and/or awnings allowed on Main Street business facades.[133] Normally, planning and zoning relates to the use of the property within a zone. An overlay district, on the other hand, represents a second level of regulation which governments may impose on a property owner before development within that region may begin."[134]

To qualify for historic overlay zoning, an area must have "historical, architectural, natural, or cultural significance that is suitable for preservation or conservation."[135] Alternatively, an area may qualify if it is situated near "a body of water or along an established commercial corridor that has a special character related to the location that is suitable for conservation."[136] Several requirements for creating an overlay district by local government are set forth by statute.[137] A city legislative body may enact a local ordinance which must provide an accurate description of the district's boundaries and an explanation of the distinctive historical or architectural elements of the district.[138] In addition, the

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[132] Cities, excluding urban-county governments, can establish this second level of regulation through overlay zoning pursuant to KY. REV. STAT. ANN. § 82.660 (Michie/Bobbs-Merrill 1995). Also, under § 100.203, urban-county governments enjoy the same powers to enact zoning regulations as do cities and counties. Further, § 100.203(8)(b) & (c) grant them supplementary powers to "[i]mpose architectural or other visual requirement or restrictions upon the development in areas zoned historic; and . . . [i]mpose screening and buffering restrictions upon the subject property." *Id.*

[133] These are design elements commonly regulated in Main Street towns where the downtown revitalization strategy includes four points: 1) organization (fundraising and volunteers), 2) promotion (special events), 3) economic restructuring (supporting existing businesses with educational seminars and special retail promotions and recruiting new businesses appropriate for the cluster mix), and 4) design (maintaining and rehabilitating the historic downtown building stock). New Main Street Managers Training, Council Grove, Kansas, 1992. This is the "four point" approach recommended by the National Trust for Historic Preservation's National Main Street Center for implementation by local Main Street towns. In Kentucky, the Kentucky Heritage Council administers the Main Street Program and grant funding for Kentucky Main Street towns.

[134] *See* KY. REV. STAT. ANN. § 82.660(2) ("Upon the establishment of an overlay district, development within the area shall conform to all zoning regulations applicable to the area *and* shall also conform to all overlay district regulations") (emphasis added).

[135] KY. REV. STAT. ANN. § 82.660(1)(a).

[136] *Id.* § 82.660(1)(b). Being situated along a transportation corridor, such as a river or federal highway, enables historic preservation projects to qualify for funding under the Intermodal Surface Transportation Efficiency Act, 49 U.S.C. §§ 5501-5504, 5561-5568 (1994) (ISTEA, pronounced "ice tea"). In Kentucky, the Perryville Civil War Battlefield and Merchants' Row received a multi-million dollar grant in 1993 to rehabilitate several structures fronting Highway 150 and to purchase additional battlefield land and conservation easements on land bordering the battlefield.

[137] KY. REV. STAT. ANN. § 82.660(1)(a), (b).

[138] *Id.* § 82.660(3)(a), (b).

ordinance must delegate the administration of the overlay regulations to a department or agency of the government.[139] This entity is also responsible for development of design guidelines and design review procedures for evaluating major structural changes and ordinary repairs within the district.[140] The effect of instituting an overlay district is to require pre-approval by the administering entity for any major structural change or ordinary repair[141] to a building within the district.[142]

In Lexington, Kentucky the local preservation ordinance is found in Article 13 of the Planning and Zoning Code. It provides that exterior changes to property be approved by the Board of Architectural Review (BOAR) in order to help ensure that exterior changes are compatible within the historic district. Nine criteria exist as prerequisites for designation as an H-1 protected overlay zone.[143] Property owners within an overlay district who wish to make changes, including exterior changes, new construction, or demolitions, to their historic building or site must apply for a Certificate of Appropriateness (COA). This process requires preliminary evaluations with the Historic Preservation Office of

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[139] *Id.* § 82.660(3)(c).

[140] KY. REV. STAT. ANN. § 82.660. KY. REV. STAT. ANN § 82.650 (Michie 1995) defines "major structural change" as structural alterations and repairs made within any twelve month period that cost more than fifty percent of the physical value of the structure. It defines "ordinary repairs" as nonstructural renovations that do not alter the use or access of the location.

[141] KY. REV. STAT. ANN. § 82.660.

[142] KY. REV. STAT. ANN. § 82.670(3) (Michie/Bobbs-Merrill 1995) provides for an appeal process which may include an appeal to the city legislative body, but will ultimately allow an appeal to the judicial system, beginning with the Circuit Court.

[143] *See* LEXINGTON, KENTUCKY, PLANNING & ZONING CODE, art. 13, § 3 g) (1990). The Code defines "Historic District and Landmark" as:

> An area, neighborhood, place, building, structure, site or improvements meeting *one or more* of the following criteria and designated by the Urban County Council as a zone protected by an H-1 overlay:
>
> (1) It has value as a part of the cultural or archaeological heritage of the county, state or nation; (2) Its location is a site of a significant local, state or national event; (3) It is identified with a person or persons or famous entity who significantly contributed to the development of the county, state or nation; (4) It is identified as the work of a master builder, designer, or architect whose individual work has influenced the development of the county, state or nation; (5) It has value as a building that is recognized for the quality of its architecture and that retains sufficient element showing its architectural significance; (6) It has distinguishing characteristics of an architectural style valuable for the study of a period, method of construction, or use of indigenous materials; (7) It has character as a geographically definable area possessing a significant concentration of buildings or structures united by past events or by its plan or physical development; (8) It has character as an established and geographical definable residential neighborhood, agricultural area, or business district, united by culture, architectural style or physical plan and development; or (9) It is the place or setting of some unique geological or archaeological location.

Id. (emphasis added).

the Lexington-Fayette Urban-County Government and application to the BOAR for a COA. The BOAR makes recommendations to the Planning Commission to approve or deny, and the Urban-County Council makes the final decision. Each step in the process, excluding the initial advice from Historic Preservation Office staff, is accompanied by a public hearing.[144]

III. A COMPARISON OF ENABLING LEGISLATION AND ADDITIONAL PRESERVATION TOOLS USED IN OTHER STATES

While Kentucky provides several sources of authorization for historic districting, the statutory scheme in Kentucky is cumbersome and can be confusing because the historic preservation-related statutes are located in different sections of the text of the Kentucky Revised Statutes.[145] This section will give a brief overview of several other states' constitutions or enabling legislation for historic preservation, as well as additional tools used in other states to accomplish preservation goals. Effective preservation tools used successfully in other states include conservation and facade easements, restrictive covenants, building codes, funding mechanisms such as investment tax credits, and districting of downtown business and rural landscape areas.

A. State Constitutions & Enabling Schemes

States that enact historic preservation-related enabling legislation usually include some common items in their statutes.[146] Such legislation articulates a public policy which prefers historic structures over modern buildings for use by state agencies. It authorizes local governments to establish entities such as Historic Preservation Commissions, which then carry out the state-mandated duties of completing surveys and inventories of historic resources and administering some type of on-going design

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[144] *Id.* § 13.

[145] *See supra* notes 98-9, 102-05, 111, 113-26, 132,136-41.

[146] *See generally* LEGISLATIVE RESEARCH COMMISSION, *supra* note 88.

review.[147] Conflicts of law[148] and remedies,[149] topics of widespread concern, are not usually addressed specifically in preservation-related enabling legislation. However, some states have taken action to add "teeth" to their historic preservation enabling legislation by expressly addressing these issues in ways favorable to preservation interests.[150]

Massachusetts has established as a statewide policy that historic buildings should receive first consideration when a state agency requires office space.[151] This imperative extends to state and local landmarks, as well as buildings listed on the National Register of Historic Places.[152] Such agencies must acquire historic buildings for their use unless using a historic building would not be feasible due to high costs of maintenance.[153]

North Carolina enacted a comprehensive scheme for protecting historic properties in 1989.[154] Although previous historic district legislation was repealed, certificates of appropriateness[155] granted under prior law remain effective. The new scheme sets forth a strong state policy of preserving historical resources.[156] It allows cities and counties to "safeguard [their] heritage" through designating historic districts and landmarks, thereby validating the regulation of aesthetic elements of historic resources in order to promote public "education, pleasure and enrichment."[157] An important feature of the law is that it expressly renders the State of North Carolina, its political subdivisions, and agencies subject to the historic preservation-related legislation, including

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[147] *Id.*

[148] *See* N.C. GEN. STAT. § 160A-400.10 ("Whenever any ordinance adopted pursuant to this Part requires a longer waiting period or imposes other higher standards with respect to a designated historic landmark or district than are established under any other statute, charter provision, ordinance or regulation, this Part shall govern.").

[149] *See* N.C. GEN. STAT. §160A-400.11 ("the city or county, the historic preservation commission, or other party aggrieved by such action may institute any appropriate action or proceedings to prevent such unlawful demolition, destruction, material alteration, remodeling or removal, to restrain, correct or abate such unlawful demolition, destruction, material alteration, remodeling or removal. . .").

[150] *See* N.C. GEN. STAT. § 160A-400.10, .11. *See infra* text accompanying notes 164-65.

[151] MASS. LAWS ANN. ch. 7, § 40F (Law. Co-op 1988 & Supp. 1996).

[152] *Id.*

[153] *Id.*

[154] *See* N.C. GEN. STAT. § 160A-400.1-14 (Michie 1994).

[155] *See supra* text accompanying notes 144-45 regarding certificates of appropriateness.

[156] "The historical heritage of our State is one of our most valued and important assets. The conservation and preservation of historic districts and landmarks stabilize and increase property values in their areas and strengthen the overall economy of the State." N.C. GEN. STAT§ 160A-400.1.

[157] *Id.* § 160A.400.1(2).

the provisions preferring preservation of historic structures over new construction.[158] State entities are required to comply with the design review process regarding construction, alteration, moving, or demolition of historic properties.[159] Most states that have historic district legislation make it state policy to preserve their historical resources. However, policies do not always have the force of law, and are not always followed. North Carolina has taken its commitment to its historic resources seriously by deciding to enforce the law on state entities.[160]

Georgia, too, has declared a state public policy of "encourag[ing] the preservation of historic properties which have historical, cultural, and archeological significance to the state."[161] Georgia places more emphasis, however, on cooperative planning than on coercive preservation mandated by the state and imposed on its own agencies. In its general historic preservation statutes, Georgia grants to the Historic Preservation Section of its Department of Natural Resources the power to prepare comprehensive state-wide and regional historic preservation plans and to cooperate with federal agencies, local governments, and private individuals to further the goal of ensuring the consideration of the importance of historic properties in all levels of planning and development.[162]

The North Carolina legislature gave local governments the option to bestow the charge of protecting historic resources upon a historic district commission created separately, a planning agency, or a community appearance commission (i.e., Board of Architectural Review).[163] Regional partnerships enabling cooperation in planning for and protection of historic resources are encouraged.[164] Although local governments possess unlimited discretion as to whether historic districts will be established, the methods of establishment and administration of a historic district and its enabling ordinance are governed specifically by North Carolina's statutory scheme. Two methods of establishing historic districts exist in the statutes: local governments can either implement a historic district as its own separate use district or append a historic

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[158] *See* N.C. GEN. STAT. § 160A-400.9(f) (Michie 1994).

[159] *See id.*§ 160A.400.9

[160] N.C. GEN. STAT.§ 160A-400.9(f).

[161] GA. CODE ANN. § 12-3-50.1(a) (Michie 1996).

[162] GA. CODE ANN. §§ 12-3-50.1(c) (Michie 1996).

[163] N.C. GEN. STAT. §§ 160A.400.7.

[164] *Id.* (providing for joint preservation commissions between multiple cities within a county).

overlay district to an existing zoning district.[165] If a government utilizes the historic district as a separate use district, it is free to "include as uses by right or as conditional uses those uses found by the Preservation Commission *to have existed during the period sought to be restored or preserved*, or to be compatible with the restoration or preservation of the district."[166] This specifically promotes the philosophy of the living history museum and protects places such as Old Salem, an original Moravian settlement in downtown Winston-Salem, North Carolina which is similar to Mercer County's Shakertown in Kentucky, and Latta Plantation, an antebellum village outside of Charlotte, North Carolina, from urban encroachment.

Historic districts that "possess integrity of location, design, setting, materials, workmanship, feeling, and association" are to be included in the inventory of historic sites and structures required by the Georgia Register of Historic Places.[167] In addition, the Georgia statute establishes a state historic preservation review board and an office for a state archaeologist.[168] A problem cited by regional planners[169] is the risk encountered by building inspectors and other individuals completing inventories and surveys of historic districts when confronted by sometimes suspicious and irate building owners.[170] North Carolina addresses this problem by conferring on Historic Commissions the express power to enter onto private lands, at reasonable times and in its official capacity, to conduct such information gathering activities.[171] Entry into private buildings, on the other hand, is subject to owner consent.[172] These actions fall under the concept of Home Rule in that

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[165] Although Kentucky does authorize both use zoning and overlay zoning, North Carolina's scheme is much easier to apply in practice because the enabling legislation is located in one place. In Kentucky, the enabling legislation is found in sections dealing with zoning & planning, in addition to separate sections for cities, counties, and urban-county governments. North Carolina's legislation, then, is more streamlined, and as such, it facilitates preservation-motivated governments and individuals in accomplishing preservation goals. *See* N.C. GEN. STAT. 160A-400.4 (1994).

[166] N.C. GEN. STAT. § 160A-400.4 (emphasis added).

[167] GA. CODE ANN. § 12-3-50.2(a)(1)(B) (Michie 1996).

[168] *Id.* §§ 12-3-50.2(c), 12-3-53. Every state has in place a body which reviews National Register nominations. Interview with Frank Gilbert, *supra* note 59.

[169] Interview with Merideth Hildreth, Lexington-Fayette Urban County Government Planner, in Lexington, Kentucky, (Spring 1995); interview with Susan Brazelton, Kentucky Heritage Council, in Frankfort, Kentucky (Summer 1994) (Ms. Brazelton is currently a planner with the Civil War Trust, Washington, D.C.). Hildreth and Brazelton were interviewed regarding this and other issues contained in this paper.

[170] Interview with Merideth Hildreth, *supra* note 169; interview with Susan Brazelton, *supra* note 169.

[171] N.C. GEN. STAT. § 160A-400.8(8).

[172] *Id.*

entry on private lands is necessary to completing a duty prescribed by state law.[173] Because planners must obtain owner consent to enter private buildings, and because entry on land is limited to reasonable times and is permitted only when planners are acting in their official capacity, constitutional problems are mitigated.[174]

Design review processes differ in emphasis from state to state. North Carolina's preservation legislation regarding the traditional duties of historic preservation commissions is extremely progressive in that it not only extends design review to building exteriors, but also to some building interiors.[175] The interior jurisdiction encompasses "specific interior features of architectural, artistic or historical significance in *publicly owned landmarks*," as well as privately-owned landmarks for which owner consent is given.[176] North Carolina's definition of "building exterior" is comprehensive as well. In addition to such traditionally regulated exterior architectural elements as windows, doors, light fixtures, and signs, it regulates significant landscape features and the paint color used on exteriors.[177]

Perennial problems faced by historic preservation commissions include the scope of the design review process,[178] set-backs and other size restrictions[179] affecting the scale of the district, and "demolition-by-neglect."[180] The North Carolina statutes seek to safeguard historic

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[173] Interview with Jane Cassady, *supra* note 42.

[174] *Id.*

[175] *See* Sanford Johnson et al., *Getting Neighborly About Preservation Regulations: A Rx for Historic District Anxiety*, THE OLD-HOUSE JOURNAL, November/December 1996, at 25-26. Local historic districts generally limit their regulations to the house's exterior, and usually only the facade or areas visible from the public highway. *Id.*

[176] N.C. GEN. STAT. § 160A-400.9(b) (Emphasis added).

[177] *Id.* § 160A-400.9(a), (b).

[178] For example, does it extend to interiors as well as exteriors? Does it extend only to those parts of a structure that can be viewed from a public right-of-way or does it include the entire structure?

[179] Historic district commissions implement size and siting requirements to ensure that future additions and modifications to structures in a district remain within a similar scale as the original historic building stock of the area. A "set back" requirement is one of the most common types of siting requirements which mandates that new construction and/or additions be set back a certain amount of footage from the street. Thus, the overall feel of the neighborhood and the spacing relationships between the street and the houses remain sympathetic to the original scale of such relationships, which defined the original historical character of the district. A common size requirement is one which dictates a height limit for any additions or new construction. This, again, tends to preserve the original scale of the neighborhood.

[180] "Demolition-by-neglect" occurs when an owner who does not want to spend the funds necessary to maintain an historic building allows it to fall into such disrepair that the building inspectors declare it dangerous. At that point, either the owner demolishes the structure or the government condemns it and tears it down itself, thereafter billing the owner for the expense.

landmarks through protective designation which institutes a mandatory waiting period before an owner can demolish a landmark.[181] The waiting period takes effect automatically, so owner consent in this context is not as pressing an issue. Even though an owner could conceivably wait out the waiting period and then proceed with demolition, the mandatory stay on immediate action gives preservationists leverage in negotiating and lobbying for an alternative. Additionally, in the context of designating historic landmarks, North Carolina effectively circumvents a recurrent owner consent problem.[182] Local governments may, in publicizing historic landmarks, place suitable signage indicating the property's landmark status on a nearby public right-of-way if an owner refuses his consent to placing the sign directly on the landmark property.[183] Thus, North Carolina addresses the issues of "demolition-by-neglect" and "owner consent."[184] Although North Carolina does not completely solve these issues, its policies and laws represent a middle ground on the continuum between having no waiting period and allowing governments to unequivocably halt all demolitions.

In Massachusetts, once a historic district becomes established, the statutory scheme works similarly to other states' schemes. However, there are a few limitations on the commission's authority that protect private property rights while furthering the goals of historic preservation. Massachusetts, therefore, seems to have been fair in balancing the public's right to enjoyment of the state's historical resources with the

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Take for example the Ben Snyder block in Lexington, Kentucky. Almost an entire block of historic building stock was left open to the elements after asbestos removal efforts were abandoned. Roof leaks caused such damage that restoration was deemed too costly by the owner. The buildings were demolished. Ironically, the owner was the Lexington Fayette Urban-County Government (LFUCG). The vacant lot now serves as a temporary downtown green space while the Commonwealth of Kentucky and Lexington renegotiate their original agreement in which the State granted funds to Lexington to purchase the property in order to construct an arts and cultural center. On May 22, 1995, then Governor Brereton Jones sued the LFUCG to force the city to either pay back the multi-million dollar loan it received to purchase the Ben Snyder Block or to build an arts and cultural center, a contingency of the original loan. Eventually, the state and the city arrived at a mutual agreement that did not require LFUCG to pay back the loan money, but required it to invest a like amount (minus the amount paid for the Ben Snyder Block) into downtown rehabilitation projects to provide venues for a new Justice Center and several arts and cultural groups. Emily Kaiser, *Lexington Leaders Unruffled by Jones' Suit*, LEXINGTON HERALD-LEADER, May 24, 1995, at B1.

[181] N.C. GEN. STAT. § 160A-400.14(a) provides that the effective date of an approved certificate of appropriateness can be delayed for up to 365 days from the date of approval unless the owner "would suffer extreme hardship or be permanently deprived of all beneficial use of or return from such property by virtue of the delay." *Id.*

[182] *Id.* § 160A-400.5.

[183] *Id.*

[184] Lexington, Kentucky does not effectively address these issues. *See supra* note 181 regarding the Ben Snyder Block in Lexington, Kentucky.

private individual's right to make decisions about his own property. One major limiting factor is that historic district commissions can review actions meant to alter or demolish historic structures *only* if the exterior architectural feature to be so changed is open to view from a public street.[185]

Another limiting factor common to historic district commissions is the possibility of a property owner avoiding compliance with the design review standards because of hardship.[186] Massachusetts deals with this issue in the usual manner, setting out a balancing test for the commission to implement.[187] If conditions exist specifically affecting the building in question, but not the rest of the historic district (i.e., one building in disrepair among an otherwise restored district), the commission must balance the risk of substantial hardship to the single property owner if required to comply with the potential detriment to the public welfare in the event a hardship exemption is granted.[188] Further, Massachusetts provides for specific exclusion of a long list of items from the commission's design review authority, at the option of local governments. Exclusions include, but are not limited to: paint color, certain signage, walls and fences, and storm doors.[189] Landscaping, ordinary maintenance and repairs, as well as requirements of public safety are exempt from design review.[190]

Massachusetts also employs a couple of other important mechanisms to further the goals of preservation, one of which particularly carries some teeth.[191] In determining whether to grant an application for

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[185] *See* MASS. ANN. LAWS ch. 40C, § 5 (Law. Co-op 1993). Lexington's local historic district ordinance follows this philosophy, but it is a significant limitation on historic district commissions' power to determine whether proposed changes are harmful to the character of such a district.

Mary Breeding, a Lexington preservation consultant, wrote the Lexington ordinance with Gloria Martin, a Lexington Fayette Urban County Council Member. Some preservationists believe in granting commissions power over all exterior architectural features, regardless of whether such features are open to view from a public street. The requirement limiting design review to only those exterior structural elements visible from a public street negatively impacts a historic district commission's ability to ensure the preservation of the architectural qualities which make a district unique because an unsympathetic addition is, by definition, out of character and incompatible architecturally with the rest of the structure, regardless of whether it can be seen from the street. Thus, such a limitation enables historic district commissions only to uphold the letter of the law instead of the spirit of the historic preservation ordinance. Interview with Mary Breeding, *supra* note 72.

[186] *See* MASS. ANN. LAWS. ch. 40C, §§ 6, 10(c) (Law. Co-op 1993).

[187] MASS. LAWS ANN. ch. 40C, § 6.

[188] MASS. LAWS ANN. ch. 40C, §§ 6, 10(c).

[189] *Id.* ch. 40C, §§ 8, 9 (Law. Co-op 1993).

[190] *Id.*

[191] *Id.* ch. 40C, § 7 (Law. Co-op 1993).

a certificate of appropriateness, a Massachusetts local government's historic district commission evaluates the proposed new construction or alteration according to the "appropriateness of its size and shape in relation to the land area upon which the building . . . is situated and to buildings and structures in the vicinity."[192] Thus, commissions may impose dimensional and set-back requirements which are in addition to the dimensional[193] and set-back[194] requirements dictated by the applicable use ordinance.

Other problems often encountered in applying historic preservation ordinances include inadequacy of available remedies in case of a violation and the preservation-motivated requirements being rendered ineffective because they possess a lower priority than other municipal or state laws. The North Carolina legislation contains a conflict of laws provision which requires that whenever the historic district law conflicts with any other statute or regulation as to length of waiting period or degree of standard, the law which requires the longer waiting period or the higher standard applies.[195] Massachusetts has granted additional powers to historic district commissions regarding design review in that the legislature has extended priority to any statute, ordinance, or bylaw regulating a historic district over any conflicting provision of the state building code.[196] This priority designation is a helpful tool in protecting the historical character of a building in a situation in which rehabilitation has triggered the state building code and the code requires measures which would compromise the integrity of the historic structure. Enforcement of the building code in Kentucky can pose problems for preservationists, as it can in most states, because most decisions are at the discretion of the local building code official and such decisions may be inconsistent within a county and among counties within a state.[197]

One of the most effective tools Massachusetts uses to further its preservation policy is its remedy to the courts.[198] The superior court sitting in the county in which the town is located has jurisdiction to enforce the preservation ordinance.[199] The court may issue injunctions, require removal of any new construction or alteration completed in

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[192] *Id.*

[193] *See supra* note 180.

[194] *See supra* note 180.

[195] N.C. GEN. STAT § 160A-400.10.

[196] MASS. LAWS ANN. Ch. 143, § 3A (Law. Co-op 1981).

[197] Interview with Bettie Kerr, *supra* note 72.

[198] MASS. LAWS ANN. ch. 40C, § 13 (Law. Co-op 1993).

[199] *Id.*

violation of design review process or standards,[200] and require the restoration of any portion of a building altered or destroyed in violation of the design review process or standards.[201] Most importantly, a violation of the historic district legislation in Massachusetts is punishable by a fine ranging from $10 to $500, at the court's discretion. Each day that the violation continues constitutes a separate offense for which additional fines may be imposed.[202]

B. Conservation, Preservation, and Facade Easements

"Historic preservation easements protect the historic character of privately owned buildings."[203] Typically, such easements are negative; they limit the owner's activity on the land in some way consistent with historic preservation goals. For example, a negative historic preservation easement could foreclose an owner from altering exterior structural elements.[204] The owner, then, would not be able to remodel the building's exterior in a manner inconsistent with the historic design standards. Such a limitation on use can be combined with affirmative rights vested in the easement holder. For example, a governmental body holding the easement could have the right (or even affirmative duty) to periodically inspect the building for compliance with the terms of the preservation easement.[205]

Facade easements are a category of historic preservation easements.[206] "Facade easements represent a preservation tool complementary to historic district zoning."[207] Facade easements are frequently used in downtowns to encourage private owners to maintain their buildings in a preservation-minded manner.[208] The front, or facade, of the building can thus be maintained in good repair, as well as in a

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[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 11.03, at 11-5 to 11-7 (1988).

[204] From this preservationist's point of view, requiring maintenance of a historic building's exterior features is an affirmative obligation, not the negative limitation to which some individual property owners object.

[205] *Id.* at 11-7.

[206] Henry R. Lord, The National Trust for Historic Preservation, *The Advantages of Facade Easements, in* LEGAL TECHNIQUES IN HISTORIC PRESERVATION 33 (1971).

[207] *Id.*

[208] Main Street Programs often use this tool in encouraging rehabilitation and maintenance of downtown building stock.

historically appropriate way.[209] These easements enable governments to avoid the inherent expenses, problems, and responsibilities of purchasing a building outright while retaining the value of the property as part of the municipality's tax base by allowing the building to remain in private ownership.[210]

Conservation easements are intended to protect the natural landscape so that it remains undeveloped. These are often used along scenic byways or other transportation corridors such as rivers or abandoned railways now converted to hiking or biking trails to preserve the natural, as well as the historical viewsheds.[211]

The state of Georgia has enacted special legislation for the establishment of conservation easements, the definition of which includes "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include . . . preserving the historical, architectural, or cultural aspects of real property."[212] The statute further provides that such easements do not attach to the real property interest so as to bind future owners unless the owner at the time of the creation of the easement "is a party to the conservation easement or consents to it."[213] The Georgia legislature apparently intended that conservation easements be upheld because it mandated that such easements would be valid despite the existence of certain factors.[214] One of these factors, that the easement "not [be] of a character that has been recognized traditionally at common law,"[215] refers perhaps to the fact that the validity of regulating aesthetics has evolved slowly and the Georgia legislature wanted to ensure that the tools it established for the preservation of historical resources (which is centered on architectural design review) would be enforceable.

Perhaps the most important part of Georgia's historic preservation legislation is the Heritage Trust Program, first enacted in 1972.[216] The legislature recognized the danger of losing irreplaceable historical resources and sought to prevent the insensitive alteration of such historic resources and to preserve Georgia's heritage for the use and enjoyment of the present and future generations.[217] The Governor and the

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[209] Lord, *supra* note 206, at 33.

[210] *Id.*

[211] *See infra* note 228 and accompanying text.

[212] GA. CODE ANN. § 44-10-2(1) (Michie 1982 & Supp. 1996).

[213] *Id.* § 44-10-3(d).

[214] *Id.* § 44-10-5.

[215] *Id.* § 44-10-5(3).

[216] GA. CODE ANN. § 12-3-70 (Michie 1996).

[217] *Id.* § 12-3-71.

Department of Natural Resources are responsible for the Heritage Trust Program, but take action based on the recommendation of the Heritage Trust Commission, an advisory body.[218] While a "heritage area" refers to an area identified as having "significant historical, natural, or cultural value," a "heritage preserve" is a heritage area owned by the state and dedicated under this Trust program.[219] Becoming "dedicated" means that the "best and most important use"[220] for such property is recommended for the property by the Heritage Trust Commission.[221] Once acquired, heritage preserves are then held in trust for public benefit and put to their "best and most important use" unless the state General Assembly statutorily approves some other use for the heritage preserve at the express written request of a state agency.[222] The agency must advocate that its preferred alternative use for the property is an "unavoidable necessity."[223] Public hearings as to the proposed alternative use shall be conducted and a recommendation made to the General Assembly by the Heritage Trust Commission.[224]

The state of Massachusetts boasts several types of easements or restrictions, which are specific to conservation, preservation, agricultural preservation, and watershed protection.[225] The preservation restriction is a right in any property which serves to further the goals of preservation and which "forbids or limits any or all (a) alterations in exterior *or interior* features of the structure, (b) changes in appearance or condition of the site, uses not historically appropriate, . . . or (e) other acts or uses detrimental to appropriate preservation."[226] Such a restriction will continue to apply to the property even after sale of the land.[227]

Easements can also be used to preserve the scenic viewsheds along

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[218] *Id.* § 12-3-73.

[219] *Id.* § 12-3-72.

[220] The idea is that the best and most important use is one which allows the historic structure and landscape to remain intact. The Kentucky Nature Preserves Commission provides similar protection to significant natural areas throughout the state. Dedication as a Kentucky Nature Preserve means that the highest and best use of that land is in its natural state. Such "highest and best use" status enjoys priority over all other uses, even condemnation by a government. Kentucky does not extend this concept to include heritage areas.

[221] GA. CODE ANN. §12-3-76.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] MASS. LAWS ANN. ch. 184 § 31 (Law. Co-op 1996).

[226] *Id.* (emphasis added).

[227] *Id.*

a road.[228] Such scenic transportation corridors can include not only environmental resources, but also historic resources.[229] While the state highway department of any state may acquire land for roads by eminent domain, Massachusetts provides that when land acquired by the state for such purpose is part of a historic site, the highway department may acquire other land by the same means to replace that taken from the historic site.[230] In addition, states may acquire by eminent domain land adjacent to federally-funded highways expressly "for the purpose of restoring, preserving and enhancing scenic beauty, historic or archaeological sites."[231] The federal grant program entitled the Intermodal Surface Transportation Efficiency Act (ISTEA)[232] provides additional funding for highway enhancements such as restoration of railway depots which serve as tourist information centers. Massachusetts further provides aid to historic preservation by allowing directional signage for historic attractions adjacent to highways where no other non-directional signage is permitted.[233]

C. Restrictive Covenants

Restrictive covenants closely resemble negative easements in that the owner of the property involved is prevented from doing some act on that land that he would be able to do in the absence of the covenant.[234] The idea of restrictive covenants supports the concept of freedom of contract while it runs afoul of the general policy against restrictions on land.[235] A policy disfavoring such restrictions exists for the protection of the free alienability of the land. Restrictions attached and "running with the land" bind future owners of the property, and thus affect the land's marketability.[236] However, the use of restrictive covenants to attain preservation goals can be justified for efficiency and certainty

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[228] CHARLES E. LITTLE, GREENWAYS FOR AMERICA 193 (1990). "Land for the corridor need not be conveyed in fee .... A negative, conservation easement may be all that is necessary for corridor areas not actually open to the public ... for example, the view involved in a scenic route." *Id.* at 93.

[229] For example, consider Cades Cove, North Carolina which is a scenic drive with pull-off attractions featuring natural or wildlife areas, as well as a historic church and a log cabin.

[230] MASS LAWS ANN. ch. 81, § 7M (Law. Co-op 1991).

[231] *Id.* Ch. 81, § 13B.

[232] 49 U.S.C. §§ 5501-5504, 5561-5568 (1994). Pronounced "Ice tea."

[233] MASS. LAWS ANN. ch. 93D, § 2(a) (Law.Co-op 1994).

[234] GEROLD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 2.02, at 7 (1990).

[235] *Id.* § 8.02, at 254-61.

[236] *Id.*

reasons, as well as for reasons of moral obligation and freedom of choice.[237] It is often more efficient and cost-effective for a government to negotiate a restrictive covenant with a property owner to protect the historic resources located there than to purchase the land outright.[238] In such a case, the goals of historic preservation will be guaranteed some certainty despite changing political goals within new government leadership. Also, preservation advocates often emphasize the moral obligation of owners of historic resources to serve as stewards of the public heritage.[239] Finally, freedom of choice supports the voluntary agreements of the parties to enter into a restrictive covenant.[240]

In North Carolina, state legislation grants to local historic preservation commissions broad powers, including the specific power to acquire a "fee or any lesser included interest" to properties within historic districts in order to "hold, manage, preserve, restore and improve the same."[241] The list continues, granting commissions the ability to sell or lease such property, as well as the authority to subject such transfers to "covenants or other legally binding restrictions which will . . . promote the preservation of the property."[242] Although most commissions in many other states possess these powers, North Carolina differs from most states in that state legislation rather than local bylaws grants commissions such power. This promotes uniformity and consistency in applying preservation law in North Carolina; whereas in states like Kentucky in which the local preservation entity must enact its own bylaws, the standards and guidelines for commission action are not always consistent and commissions are known mostly for their design review function. In North Carolina, design review is only one subsection of legislation containing eleven enumerated powers and duties of historic preservation commissions. North Carolina authorizes historic commissions to conduct design review over privately-owned interior spaces if the owner consents to the commission's jurisdiction.[243] Significantly, once owner consent is given, such consent to interior review binds all future owners and successors in title as long as the consent was filed in the appropriate county's office of the register of deeds.[244]

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[237] *Id.*

[238] *Id.*

[239] Korngold, *supra* note 233, § 8.02, at 254-61.

[240] *Id.*

[241] N.C. GEN. STAT. § 160A-400.8(3).

[242] *Id.*

[243] *Id.* § 160A-400.9(b).

[244] *Id.*

D. Building Codes

Building and safety codes contain minimum structural standards for new construction projects. Compliance with building and safety codes (i.e., the fire code, electrical code, etc.) places great challenges on historic preservationists seeking to rehabilitate their historic structures because any new construction (i.e., a modern addition that is sympathetic with its historic main building) triggers modern building and safety codes.[245] These codes are geared toward new construction; therefore, it is often difficult for historic buildings to reach compliance because of conflicts between existing physical conditions and new construction requirements.[246] For example, a historic building might consist of wood frame and siding, but the codes might now require steel structural framing. Owners cannot substantially rehabilitate their buildings without triggering the new code provision, and the requirement for steel framing might irreparably damage the historical integrity of the building.[247] Also, building codes now require elevator installation for handicap accessibility in buildings of certain specifications.[248] Not only is the cost of installing an elevator in a historic building prohibitive, but the owner must also address the problem of designing the elevator shaft so that it is compatible with the historic building.

State preservation professionals have approached the challenges presented by building and safety codes in different ways. Most embark on an education campaign to make the code officials more aware of the particular problems faced by historic building owners. It is essential that preservationists understand that these codes are intended for the protection of the health, safety, and welfare of the building's users.[249] However, not all code provisions are absolute; in many instances, there exists a range of discretion within which the code official makes

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[245] *See* THE NATIONAL TRUST FOR HISTORIC PRESERVATION, INFORMATION BULLETIN #57; SAFETY, BUILDING CODES AND HISTORIC BUILDINGS 1, 1 (1992) (noting that "in the 1970s, large numbers of historic properties were substantially rehabilitated, usually under the *requirement* that existing safety and building codes be met," and that "[m]ost of these [building] codes are written with new construction in mind, making it difficult for historic buildings to comply.") (emphasis added).

[246] *Id.* at 5.

[247] Requiring steel framing would require such a major rehabilitation that the building would practically have to be reconstructed, seriously compromising the historical fabric of the building and making the cost prohibitive to the owner.

[248] *See, e.g.*, 815 KY. ADMIN. REGS. 100:30 (1996).

[249] MARILYN K. KAPLAN, THE NATIONAL TRUST FOR HISTORIC PRESERVATION, WORKING WITH THE CODE OFFICIAL 1-88 (1993).

judgments.[250] The best bet for preservationists is to maximize their opportunities for communication with the code officials so that the code officials understand the problems unique to historic structures and are more likely to exercise their discretion in favor of the historic structure.[251] Preservationists can also utilize administrative or governmental variances or appeals boards.[252]

In 1984, Georgia adopted a state-wide building code which offered the use of "compliance alternatives in existing buildings and historical buildings when complete code compliance was not feasible."[253] "The purpose of the compliance alternatives is to provide equal safety by overcompensating on one requirement to balance the failure to meet another requirement."[254] This building code contained a special section on "landmark museum buildings,"—those open to the public where the intent is to "exhibit the building itself."[255] These buildings are exempted from most of the building and safety codes; however, every landmark museum must have a fire extinguisher, a smoke detector with a sound alarm, exit signs, manual fire alarms above the first floor, emergency lighting, occupant loads approved by an engineer, lower occupancy on floors having only one means of egress, and regular inspections of the electrical heating and mechanical systems.[256]

North Carolina adopted a new building code in 1995 which includes a chapter on Historic Structures.[257] The North Carolina building code chapter on Historic Structures contains provisions for historic museum buildings similar to Georgia's landmark museum alternatives.[258] It also applies to "historic commercial buildings or structures constructed prior to 1936 and to historic dwellings used for commercial purposes constructed prior to 1972."[259] The special chapter for Historic Structures is triggered whenever strict adherence to the regular building code would require destructive alteration or demolition of building features which contribute to the historical significance of a building.[260]

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[250] *Id.* at 1-88 to 1-89.

[251] *Id.*

[252] *Id.* at 1-89.

[253] *See* MICHAEL HUMPHREY & GREGORY B. PAXTON, THE GEORGIA TRUST FOR HISTORIC PRESERVATION, THE APPLICATION OF BUILDING AND FIRE CODES TO EXISTING BUILDINGS 1(1990).

[254] *Id.* at 7.

[255] *Id.*

[256] *Id.*

[257] NORTH CAROLINA BUILDING CODE COUNCIL AND NORTH CAROLINA DEPARTMENT OF INSURANCE, NORTH CAROLINA STATE BUILDING CODE, ch.3, (1995).

[258] *Id.*

[259] *Id.*

[260] *Id.*

E. Funding Mechanisms

The state of North Carolina provides a strong incentive to owners to designate their property as a historic structure, site, or landmark.[261] The statute creates a tax deferral for real property so designated; owners are only required to pay taxes amounting to 50% of the true value of the property.[262] Not only does this statute encourage owners of historic structures to initiate the designation process, but it also promotes continued maintenance of the historic property because the deferred portion of the taxes becomes a lien on the property.[263] In the event that the property enjoying the tax deferral loses its eligibility for the benefit of the special taxing classification created by the statute, the deferred taxes for the preceding three fiscal years, as well as the deferred taxes for the year in which a disqualification takes place, together with the interest on those taxes, becomes due immediately.[264] Hence, North Carolina uses this statute to discourage property owners from making changes in their historic structures which would substantially impair or cause them to completely lose their designation as historic sites.[265]

Georgia has also stated its legislative intent to preserve its heritage based on the police powers of health and welfare. But, where North Carolina seems truly interested in protecting historical resources for their intrinsic value to the character of its historic districts, Georgia is motivated by a drive to revitalize downtowns, promote profitable heritage tourism, and stimulate the economy. With this economic goal in mind, Georgia has encouraged using the federal tax deduction for rehabilitation of historic structures,[266] as well as using conservation easements for their tax benefits and seeking out state and federal grant monies for historic preservation purposes.[267] When property owners in Georgia establish conservation easements on their property, they are entitled to a revaluation of their property for tax purposes.[268] Because it is encumbered with the easement, such property often experiences a decrease in assessed value for tax purposes, and the property owner pays

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[261] *See* N.C. GEN. STAT. §160A-400.5 for designation criteria for historic structures, sites, and landmarks.

[262] N.C. GEN. STAT. § 105-278(a) (Michie 1995).

[263] *Id.* § 105-278(b)

[264] *Id.*

[265] *Id.*

[266] GA. CODE ANN. § 44-10-25(6).

[267] *Id.* § 44-10-25(6), (9).

[268] GA. CODE ANN. § 44-10-8.

fewer taxes.[269] Such revaluation may act as an added incentive to owners to voluntarily restrict the use of their property to uses consistent with its historical character.[270]

Georgia also provides an incentive to owners to rehabilitate their historic properties.[271] An owner who embarks on a rehabilitation project can qualify a building for certification as a "rehabilitated historic property," and, in so doing may avoid for up to two years an increase in the assessed fair market value of the property during the rehabilitation period.[272] The property must be eligible for listing on the Georgia Register of Historic Places.[273] The Georgia Department of Natural Resources makes recommendations on the eligibility of properties to receive certification for tax incentives and other programs and grants offered by the state of Georgia.[274] Owners must increase the fair market value of their owner-occupied buildings by at least 50%.[275] The fair market value of income-producing property must be increased at least 100% while property used in combination for residential and commercial purposes must experience an increase in fair market value of at least 75%.[276] In addition, the rehabilitation work must meet the standards set out by the Georgia Department of Natural Resources.[277] Thus, owners who begin rehabilitation projects and who receive preliminary certification from the Georgia Board of Natural Resources are taxed at a rate based on the fair market value of the property before rehabilitation work started.[278] Further, although this frozen tax assessment only applies while rehabilitation work is progressing (not to exceed two years),[279] upon completion of the work, the building can receive a final certification that then entitles the property owner to continued preferential tax treatment for up to *nine* more years.[280] This property tax assessment extends not only to the historic structure itself, but also to the real property on which it is located, as well as up to two acres of real property surrounding the historic structure.[281] In addition, local

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269 *Id.*
270 *Id.*
271 GA. CODE ANN. § 48-5-7.2 (Michie 1995).
272 *Id.*
273 *Id.* § 48-5-7.2(a)(1)(A).
274 *Id.* § 48-5-7.2(a)(1)(D).
275 *Id.* § 48-5-7.2(a)(1)(B).
276 GA. CODE ANN. § 48-5-7.2(a)(1)(B).
277 *Id.* § 48-5-7.2(a)(1)(C).
278 *Id.* § 48-5-7.2(b), (c).
279 *Id.* § 48-5-7.2(c).
280 *Id.* § 48-5-7.2(g)(3).
281 GA. CODE ANN. § 48-5-7.2(2).

governments may adopt an ordinance which extends this tax incentive to landmarks as well as historic property.[282] However, no single property may receive the preferential tax treatment under both its status as a historic structure and its status as a landmark.[283] In this way, Georgia not only encourages its property owners to take advantage of federal tax incentives to rehabilitate historic structures, but actively encourages its owners to restore their properties based on strong state-sponsored tax incentives. Georgia strengthens and enhances the opportunities offered by the federal system.

While the North Carolina legislature subjects the state, its political subdivisions, and its agencies to its own laws regarding state-owned historic structures and their alteration or demolition,[284] the Georgia legislature encourages respectful rehabilitation of property owned by municipalities through authorization of grant monies to be funneled from the state to local governments. If a local government owns and maintains, with local funding, a building which has been deemed by a resolution of the Georgia legislature as having "historical value to the state," then annual grants from the state treasury for specific repairs may be secured by the local government in an amount equal to one-fourth the amount of local funds spent on repairs for the building.[285] This grant is available only if such repairs are reasonably estimated to cost more than $5 million and to require more than one year to complete.[286]

F. Main Street Programs & BIDs; Rural Conservation

Main Street Programs and Business Improvement Districts (BIDs) are aimed at improving commercial profitability in downtowns and central business districts. They can be effective tools to foster rehabilitation of historic structures within their designated areas. Often such areas experience a rebirth spurred by infrastructure improvements funded by city, state, and federal grants, thus triggering further revitalization of the businesses along these newly designed historic urban spaces. In Georgia, the legislation setting up central business districts includes a millage, or tax, assessed on real property within the district to fund "supplemental services" such as promotion, advertising, and

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[282] *Id.* § 48-5-7.3(3).
[283] *Id.* § 48-5-7.3(g).
[284] N.C. GEN. STAT. § 160A-400.1.
[285] GA. CODE ANN. § 36-40-1 (Michie 1993).
[286] *Id.* § 36-40-1(a).

business recruitment to these areas.[287] Most businesses seeking to relocate to a downtown or urban area want to be assured of the health of the central business district—the "heart" of the town. This includes the health of a town's building stock. Georgia provides the governing authority of any municipality utilizing a BID to "mandate design and rehabilitation standards for buildings located within the district subject to any existing or established historic preservation requirements or ordinances."[288] The statute further states that such standards serve to "prevent or eliminate blight, to establish and improve property values, and to foster economic development within districts."[289] Local governments possess the power to make compliance with these design standards mandatory on building owners; and governments may establish deadlines by which owners must have completed substantial compliance.[290]

Preservation professionals are now heavily emphasizing rural conservation.[291] By adopting tools already used for historic preservation and historic districts, as well as tools (such as land trusts) traditionally used to protect natural areas and open spaces, the rural historic landscape can be effectively protected. To accomplish the goals of rural conservation, Massachusetts has a recognition mechanism for historic homesteads.[292] A homestead or tract of land that has remained in the possession of one family for 100 years or more is eligible to be listed on a special register and to receive a plaque.[293] Kentucky instituted a similar program recognizing farms owned by the same family for at least 100 years, but it was specifically geared to Kentucky's bicentennial as a state and it did not continue past 1993. Unfortunately, as with most plaques

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[287] GA. CODE ANN. § 36-43-4 (Michie 1993).

[288] *Id.*

[289] *Id.* § 36-43-8.

[290] *Id.*

[291] For example, the Kentucky General Assembly created the Pace Program during the 1994 regular session. Its goal is to purchase agricultural conservation easements so that the rural Kentucky landscape is preserved while encouraging farmers to keep their land in agri-business rather than sell to developers. Former Kentucky first lady, Libby Jones, is a vice chairman of the Pace Board. In Lexington, Kentucky, the Lexington Fayette-Urban County Government hired Chicago land use lawyer Charles Siemon to help Lexington plan for growth while maintaining and protecting the region's prime farmland and green space. In addition, negotiations are currently taking place regarding the purchase of easements both along Old Frankfort Pike near Lexington and around the Perryville Battlefield near Perryville, Kentucky. The Frankfort Pike and Perryville projects are being funded by ISTEA grants. Further, as work gets underway to widen Paris Pike near Lexington, efforts are being made to preserve the historic stone fences on the farms lining the corridor.

[292] Mass. Laws Ann. ch.9, § 27D (West 1996).

[293] *Id.*

and recognition awards, such designation and listings do not afford historic properties any protection, but only serve to educate the public and make such properties eligible for certain types of funding.[294] However, because Kentucky boasts many family farms and has many counties in which the economy is based on agriculture, this is a tool which can be further developed to achieve preservation goals for rural conservation districts.

CONCLUSION

Although Kentucky possesses enabling legislation providing for the protection of the state's nonrenewable historical resources, better models for enabling legislation furthering historic preservation goals exist in other states. While both use zoning and overlay zoning exist, the goals of historic districting in Kentucky would be further advanced by the increased use of overlay zoning to protect historic design elements on structures located in every use zone. The collection of effective preservation tools established and utilized in other states could be successfully implemented in Kentucky. Adding a special section to the Kentucky Building Code for historic structures would serve to protect historic resources while also maintaining the existing level of safety. Facade and conservation easements could be used more often. Kentucky's status as a rural state makes is essential that principles of rural conservation be adopted. Extending the historic district concept to the rural landscape by implementing heritage area legislation would effectively protect more of Kentucky's historic fabric.[295]

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[294] *Id.*

[295] Currently, the Kentucky Heritage Council does accept easements. For information on the Kentucky Heritage Council, *see infra* note 296.

APPENDIX:
A MODEL LOCAL HISTORIC PRESERVATION ORDINANCE[296]

AN ORDINANCE ESTABLISHING A _____ HISTORIC PRESERVATION COMMISSION AND PROVIDING FOR A DECLARATION OF PURPOSE AND PUBLIC POLICY ON THE PRESERVATION OF HISTORIC DISTRICTS AND BUILDINGS IN THE CITY OF _____; PROVIDING FOR DEFINITIONS TO BE USED IN THE ORDINANCE; PROVIDING FOR MEMBERSHIP AND OFFICERS OF THE HISTORIC PRESERVATION COMMISSION; PROVIDING FOR THE POWERS AND DUTIES OF THE PRESERVATION COMMISSION; PROVIDING FOR THE CITY'S PARTICIPATION IN THE NOMINATIONS TO THE NATIONAL REGISTER OF HISTORIC PLACES; PROVIDING FOR THE DESIGNATION OF CITY LANDMARKS AND LANDMARK SITES AND PROPERTY IN HISTORIC DISTRICTS; PROVIDING FOR THE APPROVAL OF CHANGES TO LANDMARK AND LANDMARK SITES AND PROPERTY IN HISTORIC DISTRICTS; PROVIDING FOR CONFORMITY OF WORK TO CERTIFICATES OF APPROPRIATENESS THAT ARE ISSUED; PROVIDING FOR THE MAINTENANCE AND REPAIR OF LANDMARKS AND LANDMARK SITES AND PROPERTY IN HISTORIC DISTRICTS; PROVIDING FOR PENALTIES FOR VIOLATION OF THIS ORDINANCE; PROVIDING FOR THE SEPARABILITY OF EACH SECTION OF THIS ORDINANCE; AND PROVIDING FOR AN EFFECTIVE DATE FOR THIS ORDINANCE.

BE IT HEREBY ORDAINED BY THE CITY OF _____, KENTUCKY AS FOLLOWS:

Section 1. Declaration of Purpose and Public Policy

a. The City Council finds that buildings and neighborhoods having historic, architectural, aesthetic or cultural interest and value have been neglected, altered or destroyed notwithstanding the feasibility and desirability of preserving and continuing the use of such buildings and

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[296] This Ordinance was prepared in the 1980s in connection with work for the Kentucky Heritage Council by Frank B. Gilbert, Senior Field Representative for the National Trust for Historic Preservation in Washington, D.C. and is currently under revision. It is available from the Kentucky Heritage Council, 300 Washington Avenue, Frankfort, KY 40601.

neighborhoods and without adequate consideration of the irreplaceable loss to the public.

b. The Council finds that the historic character of _____ is of vital importance in maintaining the economy of the City and that its historic buildings and neighborhoods can be preserved, improved and used by means of appropriate changes.

c. The Council finds that _____is a historic community known for its role in the history of Kentucky and that the history of the City is shown today through buildings representing the activities and events during its growth. The Council finds that the City has buildings, historic sites and areas that represent the persons who live and work or who have lived, worked or _____ in _____ during a period of more than one hundred fifty (150) years. It is the finding of this City Council that the distinctive and significant character of this City can only be maintained by protecting and enhancing its historic, architectural, aesthetic and cultural heritage, and by preventing unnecessary injury or destruction of its landmarks and historic districts which are civic and community assets.

d. The Council finds that the Federal and Kentucky governments have passed laws to protect and preserve landmarks and historic districts, that some of these laws provide incentives for historic preservation, and that the National Historic Preservation Act was amended in 1980 to establish a Certified Local Government program creating a new federal-state-local partnership the encourage the efforts by the cities to protect and preserve their landmarks and historic districts.

e. The Council finds that this Ordinance benefits all the residents _____ and all the owners of property.

f. The City Council declares as a matter of public policy that the preservation, protection and use of landmarks and historic districts is a public necessity because they have a special character are a special historic, architectural aesthetic of cultural interest and value and thus serve as visible reminders of the history and heritage of this City, state and nation. The Council declares as a matter of public policy that this Ordinance is required in the interest of the health, prosperity, safety, welfare and economic well-being of the people.

g. The purpose of this Ordinance is to effect the goals as set forth in the

above findings and declarations of public policy and specifically, but not exclusively, to:

(1) Accomplish the preservation, protection and use of historic districts, landmarks and landmarks sites having a special character or special historic, architectural , aesthetic or cultural interest and value to this City, state and nation;

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

(3) Stabilize and improve property values in such districts and in the City as a whole;

(4) Foster civic pride in the value of notable accomplishments of the past;

(5) Strengthen the economy of the City;

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

(7) Enhance the visual and aesthetic character, diversity and interest of the City.

Section 2. Definitions

As used in this Ordinance, the following terms shall mean:

a. "Certified Local Government." A government meeting the requirements of the National Historic Preservation Amendments Act of 1980 (P.L. 96-515) and the implementing regulations of the U.S. Department of the Interior and the Kentucky Heritage Council.

b. "Commission." The _____ Historic Preservation Commission.

c. "Demolition." Any act that destroys in whole or in part

a landmark or a building or structure in a historic district or on a landmark site.

d. "Historic District." An area meeting one or more of the criteria contained in Section 6(d) of this Ordinance.

e. "Landmark." A building, structure or site meeting one or more of the criteria contained in Section 6(d) of this Ordinance.

f. "Landmark Site." The land on which a landmark and related buildings and structures are located and the land that provides the grounds, the premises or the setting for a landmark.

Section 3. Historic Preservation Commission

a. There is hereby established the _____ Historic Preservation Commission. The Commission shall consist of five members appointed by the Mayor and approved by the City Council. The members shall have demonstrated interest in historic preservation, and at least two members shall have training or experience in a preservation-related profession, architecture, history, archeology, architectural history, planning or related fields. When one or two professional members are not available, the Mayor may appoint other persons interested in historic preservation to serve. When the Commission reviews an issue that is normally evaluated by a professional member and that field is not represented on the Commission, the Commission shall seek expert advice before rendering its decision. In making appointments, the Mayor shall seek to include a member who is active in real estate. Members of the Commission shall serve without compensation, but they shall be reimbursed for expenses incurred in the performance of their duties in accordance with the rules adopted by the Commission.

b. The terms of office of the members shall be three years, except the terms of two members of the original Commission shall expire after two years and the terms of two members of the original Commission shall expire after one year. Each member shall serve until the appointment and qualification of his successor. Vacancies on the Commission shall be filled within sixty (60) days. When a vacancy occurs during a term of office, it shall be filled within sixty (60) days, and the person selected

shall be appointed for the unexpired portion of the term.

c. The Commission shall each year elect members to serve as Chairman, Vice Chairman and Secretary. The Chairman shall preside at the meetings of the Commission and shall be the spokesman for the Commission. In his absence, the Vice Chairman shall perform these duties. The Secretary shall prepare the minutes of the Commission's meetings which shall be available for public inspection.

d. No member of the Commission shall vote on any matter that may affect the property, income or business interest of that member.

Section 4. Powers and Duties of the Commission

a. In addition to the powers and duties stated elsewhere, the Commission shall take action necessary and appropriate to accomplish the purpose of this Ordinance. These actions may include, but are not limited to, conducting a survey of historic buildings and areas and preparing a plan for their preservation, recommending the designation of historic districts and individual landmarks and landmark sites, regulating alterations visible to the public that are proposed for designated property, regulating demolitions, relocations, and new construction involving designated property, working with and advising the federal, state and county governments and other parts of city government, and advising and assisting property owners and other persons and groups including neighborhood organizations who are interested in historic preservation.

b. The Commission may initiate and encourage plans for the preservation and rehabilitation of individual historic buildings and shall undertake educational programs including the preparation of publications and the placing of historic markers. The Commission shall, on a regular basis, give recognition to owners and tenants who maintain or rehabilitate their historic buildings with care and thus contribute to the preservation of the history of _____.

c. In making its survey of historic buildings and areas, the Commission shall conduct this work in accordance with the guidelines of the Kentucky Heritage Council. The Commission shall provide that its survey and preservation plan shall be maintained and continued. The Commission shall use the preservation plan to assist the City and _____ County in their overall planning efforts.

d. The Commission shall adopt and make public rules for the transaction of its business and shall hold monthly public meetings and special public meetings, when necessary. All meetings shall have a previously available agenda and shall comply with the Kentucky Open Meeting Statute, KRS 61.805. A simple majority of the membership shall be required for decisions involving historic buildings and areas.

e. The Commission shall prepare and keep on file, available for public inspection, a written annual report of its activities, cases, decisions, qualifications of members and other work.

f. The Commission, in addition to any appropriations made by the City of _____, shall have the right to receive, hold and spend funds which it may legally receive from any and every source both in and out of the Commonwealth of Kentucky for the purpose of carrying out the provisions of this Ordinance.

g. In the development of the Certified Local Government program, the City may ask the Commission to perform other responsibilities that may be delegated to the City under the National Historic Preservation Act.

h. The Commission shall receive assistance in the performance of its responsibilities from a City staff member. In addition, the City shall, on a regular basis, obtain assistance on preservation matters from a professional with expertise in historic preservation or a closely related field. The City may contract with another government in order to obtain the needed professional assistance.

Section 5. Nomination to the National Register of Historic Places

a. To participate in the Certified Local Government program, the City shall initiate all local nominations to the National Register of Historic Places and shall request the Mayor and the Commission to submit recommendations on each proposed nomination to the National Register. The Mayor and the Commission shall obtain comments from the public that shall be included in their National Register recommendations. Within sixty (60) days of the receipt of a nomination from a private individual or the initiation of a nomination by the City, the City shall inform the Kentucky Heritage Council and the owner of the property of the two recommendations regarding the eligibility of the property. If the Mayor and the Commission do not agree, both opinions shall be forwarded in the City's report. If both the Mayor and the Commission

recommend that a property not be nominated, the Kentucky Heritage Council shall inform the property owner, the Kentucky Historic Preservation Review Board and the State Historic Preservation Officer, and the property will not be nominated unless an appeal is filed with the State Historic Preservation Officer.

b. If the Mayor and the Commission agree that a property should be nominated or if either of them feel that a property should be nominated, the nomination will receive a preliminary review by the Kentucky Historic Preservation Review Board. The Review Board shall make a recommendation to the State Historic Preservation Officer who decides whether to forward the nomination to the U.S. Secretary of the Interior who shall make the decision on listing the property on the National Register. The Mayor, the Commission or the property owner may appeal the final decision by the State Historic Preservation Officer.

Section 6. Designation of Landmarks and Landmark Sites and Historic Districts

a. The City Council may request the Commission to study a building or an area in order to make a recommendation on whether it qualifies for designation as a landmark and landmark site or a historic district. The owner of a property may request the Commission to study his building in order to make a recommendation on whether it qualifies for designation as a landmark and landmark site. Each designation of a landmark shall include the designation of a landmark site.

b. The Commission shall assemble information about a property or district being considered for designation and shall schedule a public hearing on the proposed designation. Advertised notice of the hearing shall be given, including conspicuous posting on the property or in the proposed district for fourteen (14) days immediately prior to the hearing. Notice of the hearing shall be given at least fourteen (14) days in advance of the hearing by certified letters to the owners of property under consideration and the owners of all adjoining property. Written notice shall be considered sufficient when it is mailed to the person listed in the records maintained by the Property Valuation Administrator.

c. Before its first public hearing on a designation the Commission shall adopt general guidelines that will apply to _____'s landmarks and historic districts and will assist owners in the preservation and rehabilitation of their property. The general guidelines shall include the

Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings and may include other guidelines that will apply to all designated property in the City. In its guidelines and in its decisions the Commission shall not limit new construction to any one architectural style but shall seek to preserve the character and integrity of the landmark or the historic district. The Commission may expand or amend the guidelines it has adopted provided it holds a public hearing on the changes and submits the proposed changes to the _____ County Planning and Zoning Commission and the City Council for their comments.

d. A landmark or historic district shall qualify for designation when it meets one or more of the following criteria which shall be discussed in a Commission report making its recommendations to the City Council:

(1) Its value as a reminder of the cultural or archeological heritage of the City, state or nation;

(2) Its location as a site of a significant local, state or national event;

(3) Its identification with a person or persons who significantly contributed to the development of the City, state or nation;

(4) Its identification as the work of a master builder, designer, or architect whose individual work has influenced the development of the City, state or nation;

(5) Its value as a building that is recognized for the quality of its architecture and that retains sufficient elements showing its architectural significance;

(6) Its distinguishing characteristics of an architectural style valuable for the study of a period, method of construction, or use of indigenous materials;

(7) Its character as a geographically definable area possessing a significant concentration of sites, buildings, or structures united by past events or aesthetically by plan or physical development; or

(8) Its character as an established and geographically definable

neighborhood, united by culture, architectural style or physical plan and development.

e. After evaluating the testimony at its public hearing, survey information and other material it has assembled, the Commission shall make its recommendation to the City Council with a written report on the property or area under consideration.

f. The _____ County Planning and Zoning Commission shall report on the relationship between the proposed designation and existing and future plans of the development of the City. If the Planning and Zoning Commission approves of the proposed designation, it shall amend the Comprehensive Plan to include the proposed designation and shall recommend a change in the zoning map to show the proposed historic designation. The Planning and Zoning Commission shall forward its comments, the Comprehensive Plan amendment, and the zoning map change to the City Council. If the Planning and Zoning Commission does not approve of the proposed designation, it shall forward its comments to the City Council.

g. The City Council shall approve, modify or disapprove the proposed designation within sixty (60) days after receiving the recommendation of the Commission and the material from the Planning and Zoning Commission. If the City Council decides to make a designation and no Comprehensive Plan amendment has been adopted and no zoning map change has been recommended, the City Council shall request the Planning and Zoning Commission to reconsider its earlier decisions and shall provide that the designation shall take effect after these preliminary steps have been approved.

h. The Commission shall notify each owner of the decision relating to his property and shall arrange that the designation of a property as a landmark or as a part of a historic district be recorded in the land records of the County. The Commission shall also give notice of the decision to the government offices in the City and County which shall retain them for future reference.

I. The amendment or rescission of any designation shall be accomplished through the same steps as were followed in the original designation.

Section 7. Approval of Changes to Landmarks, Landmark Sites, and

Property in Historic Districts

a. A Certificate of Appropriateness from the Commission shall be required before a person may undertake the following actions affecting a landmark, a landmark site, or a property in a historic district:

(1) Alteration of the exterior part of a structure that is visible to the public,

(2) New construction,

(3) Demolition, or

(4) Relocation.

b. When a person wishes to undertake an exterior alteration visible to the public affecting a landmark, a landmark site, or a property in a historic district or to undertake new construction, a demolition or a relocation affecting a landmark, a landmark site or a property in a historic district, that person shall apply to the Commission for a Certificate of Appropriateness. The applicant shall provide, where applicable, drawings of the proposed work, photographs of the existing building, structure or site and adjacent properties, and information about the building to be used.

c. In the event work is being performed without the required Certificate of Appropriateness, the City shall issue a Stop Work Order. All work shall cease on the designated property. No additional work shall be undertaken as long as such Stop Work Order shall continue in effect. The City may apply in Circuit Court for an injunction to enforce the Stop Work Order.

d. The Commission shall hold a public hearing on each Certificate of appropriateness within thirty (30) days after a completed application is received by the Commission. The Commission shall make a decision on the application within forty-five (45) days after the receipt of a completed application provided that the Commission may extend the time for decision an additional sixty (60) days when the application is for a demolition or new construction. The Commission shall approve or disapprove each application, and it shall give its reasons for its decision using the criteria contained in this section and in its guidelines. The Commission may suggest modifications to an application and may then

approve a Certificate of Appropriateness providing for revisions in the plans submitted. If the Commission fails to decide on an application within the specified time period, the application shall be deemed approved. Applicants shall be given notice of the public hearings and meetings relating to their application and shall be informed of the Commission's decision. When an application has been approved, the applicant shall be given a Certificate of Appropriateness. Advertised notice of the public hearing shall be given, including conspicuous posting on the property.

e. In making a decision on an application, the Commission shall use its guidelines. The Commission shall consider: (1) the effect of the proposed work on the landmark or the property upon which such work is to be done; and (2) the relationship between such work and other structures on the landmark site or other property in the historic district. In evaluating the effect and the relationship, the Commission shall consider historical and architectural significance, architectural style, design, texture, materials and color. The Certificate from the Commission shall not relieve the property owner from complying with the requirements of other state and local laws and regulations.

f. In making a decision on an application, the Commission shall be aware of the importance of finding a way to meet the current needs of the applicant. The Commission shall also recognize the importance of approving plans that will be reasonable for the applicant to carry out. Before an applicant prepares his plans, he may bring a tentative proposal to the Commission for its comments. The Commission shall prepare a list of routine alterations that shall receive immediate approval without a public hearing when an applicant complies with the specifications of the Commission. The list shall include paint colors appropriate for different types of buildings.

g. When an applicant wishes to demolish a landmark, a building or structure on a landmark site, or a building or structure in a historic district, the Commission shall negotiate with the applicant to see if an alternative to demolition can be found. The Commission may ask interested individuals and organizations for assistance in seeking an alternative to demolition and in obtaining estimates on rehabilitation costs for the threatened building. After its public hearing, the Commission may decide that a building or structure in a historic district or on a landmark site may be demolished because it does not contribute to the historic district or to the landmark. On all other demolition

applications, the Commission shall study the question of economic hardship for the applicant and shall determine whether the landmark or the property in the historic district can be put to reasonable beneficial use without the approval of the demolition application. In the case of an income-producing building, the Commission shall also determine whether the applicant can obtain a reasonable return from his building. The Commission may ask applicants for additional information to be used in making these determinations. If economic hardship or the lack of a reasonable return is not proved, the Commission shall deny the demolition application unless the Commission finds grounds to grant the demolition application under the points contained in Section 7(e).

h. When the applicant wishes to move a landmark, a building or structure on a landmark site, or a building or structure in a historic district or when the applicant wishes to move a building or structure to a landmark site or to a property in a historic district, the Commission shall consider: (1) The contribution the building or structure makes to its present setting; (2) whether there are definite plans for the site to be vacated; (3) whether the building or structure can be moved without significant damage to its physical integrity; and (4) the compatibility of the building or structure to its proposed site and adjacent properties. These conditions shall be in addition to the points contained in Section 7(e).

i. The applicant shall have an appeal to the Circuit Court from a decision of the Commission on an application for a Certificate of Appropriateness.

Section 8. Conformity with the Certificate of Appropriateness

All work performed pursuant to a Certificate of Appropriateness shall conform to the provisions of such Certificate. It shall be the responsibility of the Commission to inspect from time to time any work being performed to assure such compliance. In the event work is being performed which is not in accordance with such Certificate, the City shall issue a Stop Work Order. All work shall cease on the designated property. No additional work shall be undertaken as long as such Stop Work Order shall continue in effect. The Commission shall meet with the owner or tenant to resolve the problem. The City may apply in Circuit Court for an injunction to enforce its Stop Work Order.

Section 9. Maintenance and Repair of Landmarks and Landmark Sites and Property in Historic Districts

a. Every person in charge of a landmark and a landmark site or a property in a historic district shall keep in good repair: (1) all of the exterior portions of such buildings or structures; and (2) all interior portions thereof which, if not so maintained, may cause such buildings or structures to deteriorate or to become damaged or otherwise to fall into a state of disrepair. The purpose of this section is to prevent a person from forcing the demolition of his building by neglecting it and by permitting damage to the building because of weather or vandalism. No provision in this Ordinance shall be interpreted to require an owner or tenant to undertake an alteration or to restore his building to its original appearance.

b. Ordinary repairs and maintenance may be undertaken without a Certificate of Appropriateness provided this work on a landmark, a landmark site or a property in a historic district does not change its exterior appearance that is visible to the public.

c. An owner shall immediately notify the City of emergency conditions dangerous to life, health or property affecting a landmark, a landmark site, or property in a historic district, and the owner shall immediately start and complete the work required to make his property safe. In any case where the City determines that there are emergency conditions dangerous to life, health or property in a historic district, the City shall order the remedying of these conditions without the approval of the Commission. The City shall promptly notify the Chairman of the Commission of the action being taken.

d. The Commission shall request a meeting with a property owner when his landmark or his building in a historic district is in poor repair, and the Commission shall discuss with the owner ways to improve the condition of his property.

e. The provisions of this section shall be in addition to all other provisions of the Kentucky Building Code requiring buildings and structures to be kept in good repair.

Section 10. Penalty

Any person violating any of the provisions of this Ordinance shall be fined not less than fifty ($50) dollars nor more than five hundred ($500) dollars for each offense. Each day's violation constitute a separate offense.

Section 11. Separability

If any section of this Ordinance shall be declared void or unconstitutional, the remaining provisions shall continue to have full force and effect.

Section 12. Effective Date

This Ordinance shall take effect immediately upon passage by the City of _____.