Preservation of Historic Properties' Environs: American and French Approaches

Francois Quintard-Morenas
I. Introduction

ECONOMIC GROWTH AND DEVELOPMENT PRESSURE increasingly threaten the environmental settings of historic properties.¹ New construction, additions, and demolition may adversely affect nearby protected historic properties by destroying or compromising their integrity and harmony.² The sense of time, place, and community associated with a

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²Historic preservation “is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.” Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108 (1978) (citing Robert Stipe, Conference on Preservation Law, Washington, D.C. (May 1, 1971)) (emphasis added). Robert Stipe’s address was subsequently published. See Robert E. Stipe, Why Preserve, 11 N.C. CENT. L.J. 211, 212 (1980); see also Richard Moe, Message from the President, in WITH HERITAGE SO RICH 6 (National Trust for Historic Preservation ed. 1999) (1966) (“Preservation today is more than just buildings. It’s about creating and enhancing environments that support, educate and enrich the lives of all Americans.”), “Historic properties” must be understood here to include individual historic buildings and historic districts.

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historic property may progressively be lost by incongruous or incompatible structures affecting the property’s historical setting or context.

These considerations have received greater attention among preservationists and the public in general. The environmental setting of historic properties is often an important contributor to their overall character, and the preservation of historic properties’ environs is increasingly recognized as a means of protecting the historic properties themselves.

The control of neighboring property in connection with the preservation of individual historic buildings was established in France sixty years ago. Any new construction, deforestation, alteration, or demolition of buildings located within 500 meters of a historic landmark and within its field of visibility requires a specific authorization. Even if controversial, this legislation environs or abords is considered one of the great strengths of the French preservation legislation and has proved effective in the preservation of the environmental setting of historic landmarks.

The notion that historic properties cannot be considered in isolation from their immediate environment is not new in the United States.

3. ARDEN H. RATHKOPF, 2 THE LAW OF ZONING AND PLANNING § 19:13 (4th ed. 2002) (“They reason that it does little good to protect a landmark if the area around it destroys the historic atmosphere.”); see also http://www.co.frederick.md.us/planning/CompPlan/cpapp_c.html (last visited Dec. 9, 2003) (in a Planning and Land Use Issues survey prepared by the Frederick County’s Department of Planning and Zoning in 1997, 70% of the respondents indicated that Frederick County, Maryland, should define scenic areas to preserve, in particular, the “environs surrounding various historic structures.”).


6. Act of February 25, 1943, J.O. Etat français, Mar. 4, 1943. This act amended the act of December 31, 1913 on Monuments Historiques, which initially provided that the designation as monument classé could extend to buildings or vacant lots located within the environs of a monument classé. However, the obligation to use the complex procedure of classement limited the act’s efficacy. See Christelle Devos-Nicq, L’Architecte des Bâtiments de France [The Official Heritage Inspector], A.J.D.I. 5, 6 (1999); see also Jacques Houlet, Point d’interrogation [Question Mark], in Les abords des monuments historiques [Historic Landmarks’ Environs], 81 LES CAHIERS DE LA LIGUE URBAINE ET RURALE 9 (1983).

7. 500 meters is the equivalent of 1,640 feet.


9. Miller, supra note 5, at 1019 (“The issue of compatible development is not a new concern . . . . While solutions have varied, the need to protect areas surrounding a resource as a means of protecting the resource itself has never been questioned.”); see also Barbara G. Anderson, Protecting the Environs of Historic Kansas Properties: Past, Present and Future, Address in Lawrence, Kansas (Aug. 3, 1996) (“30 years ago: 1) the leaders in the preservation movement knew that it was important to preserve the environment of historic properties; 2) the National Park Service policy was to encourage the maintenance of the environment of historic areas; and 3) the Advisory Council on
Preservation ordinances usually provide for the creation of historic districts as well as the designation of individual landmarks. All contributing buildings located within a historic district, even if not historically or architecturally significant, are subject to a compatibility test. This rule, described by the French expression “
tout ensemble doctrine,”
implies a consideration of both the individual building and its setting. When an individual landmark is isolated and not included within a historic district, however, the preservation of its environmental context is far more challenging. Another difficulty is the preservation of historic districts beyond their boundaries. States and cities in the United States increasingly protect the environment of individual historic buildings and historic districts through various preservation mechanisms, including the creation of buffer areas, viewsheds, overlay districts, conservation easements, or protection areas. Interestingly, one state, Kansas, has adopted a legislation environs similar to the French abords legislation. The Kansas preservation legislation, considered one of the strongest statutory protections for historical resources in the United

Historic Preservation considered isolation or alteration of the surrounding environment of a historic property to cause an adverse effect on the historic property.

10. See, e.g., Faulkner v. Town of Chestertown, 428 A.2d 879 (Md. 1981); see also Miller, supra note 5, at 1012–13 (“Traditionally, local governments have dealt with the issue of incompatible development through the establishment of historic districts. This is accomplished by regulating both ‘contributing’ or historic structures as well as ‘non-contributing’ structures within a specific area.”).

11. City of New Orleans v. Pergament, 5 So. 2d 129, 131 (1941); see also Dist. Intown Properties Ltd. P’ship v. District of Columbia, 23 F. Supp. 2d 30, 38 (D.C. 1998); City of New Orleans v. Bd. of Dir. of La. State Museum, 739 So. 2d 748, n.15 (La. 1999) (“The tout ensemble describes the concept that preservation efforts must be directed not only at the antiquity of the buildings of the French and Spanish quarter, but also at the sum total effect of the Vieux Carré, buildings plus environment.”).

12. See, e.g., Christopher Tunnard, Landmarks of Beauty and History, in WITH HERITAGE SO RICH 131, 133 (National Trust for Historic Preservation ed. 1999) (1966); NICHOLAS A. ROBINSON, REHABILITATING HISTORIC PROPERTIES 112 (PLI ed. 1984) (“Districts have a visual unity that would suffer if any single element were to be removed or altered in a way insensitive to the surroundings.”).

13. JESSICA L. DARRABY, 2 ART, ARTIFACTS, AND ARCHITECTURE LAW § 14:3 (2002) (“[U]nlike area designation where some properties are historically significant and others are not, landmark law only regulates significant properties. In other words, landmark laws cannot apply a tout ensemble rule to properties contiguous or adjacent to landmarks; the property landmarked is the significant parcel, not the one next door or across the street.”).

14. Miller, supra note 5, at 1012.

15. Miller, supra note 5, at 1012.

States, has encountered skepticism and criticism. It is, however, an effective preservation tool that adds a third level of protection to the traditional historic landmark/historic district dichotomy.

This article argues that the environs of historic properties in the United States can be efficiently protected through carefully drafted local preservation ordinances defining tailored protective perimeters equivalent to conservation areas around historic properties and taking into account the rights of neighboring property owners. Part II details the historical background of the preservation movement in the United States and France. Part III examines the French legislation protecting historic landmarks’ environs, its controversy, and the flexibility achieved through recent legislative reforms. Part IV describes the protection of historic properties’ environs in the United States at the federal, state, and local levels, with an emphasis on the Kansas environs legislation. Finally, Part V analyzes the lessons of the French and American experiences in the preservation of historic properties’ environs.

II. Historical Background

Both France and the United States have adopted preservation tools that consider visual and physical encroachments of historic properties. Historic preservation in France has evolved from the protection of historic landmarks or monuments historiques to the creation of conservation areas. Initially centralized at the government level, the protection of French cultural resources has progressively been transferred to local authorities.

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17. A HANDBOOK ON HISTORIC PRESERVATION LAW 161 (Christopher J. Duerksen ed., 1983); see also MARGARET DAVIS, PRESERVATION POLICY RESEARCH: STATE SYSTEMS FOR DESIGNATING HISTORIC PROPERTIES AND THE RESULTS OF DESIGNATION 72 (National Trust for Historic Preservation ed. 1987).

18. Cathy Ambler, Public Opinion Sought Regarding Preservation Laws, 2 KAN. PERS. (KSHS, Topeka, Kan.) Mar.-Apr. 2000, at 15. “In summary, the environs review process is applauded by some as protecting listed historic structures and criticized by others as a control device that is arbitrary, unreasonable, and undefined.” Id.; see also Lisa Elliott, Register Designation Has Positives, Negatives, NEWTON KANSAN ONLINE NEWSPAPER, June 11, 1999, available at http://thekansan.com/stories/061199/fro_0611990003.shtml (last visited Dec. 9, 2003) (“Kansas’ environs law . . . can be viewed as both a positive and a negative.”).

19. See infra Part IV.B.


22. Id. at 92 (It is no longer true to state that “[l]ittle is left to the [French] local authorities except the privilege of disagreement’’); see Grace Blumberg, Legal Methods of Historic Preservation, 19 BUFF. L. REV. 611, 627 (1970).
The first measures to protect historic landmarks were taken in the midst of the French Revolution of 1789. In October 1790, the Assemblée Constituante, based on a proposal from Mirabeau and Talleyrand, established a commission to identify and protect the nation’s common heritage, which mainly included churches, abbeys, and castles. However, the commission was often powerless when confronted by the destruction of historic landmarks initiated by private owners or ordered by public officials. The destruction, described as vandalisme by Abbé Grégoire in 1794, was systematic after King Louis XVI tried to escape and was arrested in Varennes on June 20, 1792. Three-fourths of the churches in Paris were destroyed during the Revolution. The protests of poets and writers contributed to create a state of mind favorable to the protection of monuments historiques at the beginning of the nineteenth century. Victor Hugo vehemently denounced the destruction and alteration of historic landmarks. In October 1830, François Guizot, Minister of the Interior under King Louis-Philippe, initiated the creation of an Inspecteur Général des Monuments Historiques, responsible for inventorying and preserving historic landmarks. A commission of historic monuments was created in 1837 to assist the Inspecteur. The first preservation act was enacted on March 30, 1887; however, this act was ineffective because owners’ consent was necessary to protect historic landmarks. Sixteen years later, France passed the Act of 31 December

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23. FRANÇOISE CHOAY, L’ALLÉGORIE DU PATRIMOINE [THE HERITAGE’S ALLEGORY] 76 (Le Seuil 3d ed. 1999). The antiquarian-naturalist Aubin-Louis Millin is believed to have created the expression “monuments historiques” in a report introduced before the Assemblée Constituante on December 11, 1790. Id. at 74.

24. The commission was suppressed on December 18, 1793. Id. at 84.


28. FRIER, supra note 25, at 64 (citing Victor Hugo, Halte aux démolisseurs (La revue des deux mondes 1832), “[t]here are two things in a building: its use and its beauty. Its use belongs to the owner; its beauty to everyone . . . .”).

29. FRIER, supra note 25, at 22. The powers of the Inspecteur were mainly limited to give financial incentives. FRIER, supra note 25, at 65. The function was first held by Ludovic Vitet and then the writer and poet Prosper Mérimée in 1834. See CHOAY, supra note 23, at 108.

30. FRIER, supra note 25, at 65.

1913 on *Monuments Historiques*, which is still in force and governs the preservation of individual historic buildings.\(^\text{32}\)

The Act of 1913 establishes two levels of protection applicable to buildings from any period: *monuments classés*, which include any buildings or parts that the minister responsible for cultural affairs considers to be of public interest from the point of view of history or art, and *monuments inscrits*, which encompass buildings that, according to the minister, are not of public interest but nevertheless present sufficient historical or artistic interest to deserve protection.\(^\text{33}\) Subsequently France enacted legislation protecting natural sites and landscapes in 1930, environs of historic landmarks in 1943, historic districts or *secteurs sauvegardés* in 1962, and conservation areas or *zones de protection du patrimoine architectural, urbain et paysager* in 1983.\(^\text{34}\) As a general rule, any project on historic landmarks, in the environs of historic landmarks, in historic districts, or in conservation areas, requires a specific authorization delivered by the mayor after approval of the prefect of region\(^\text{35}\) and the official heritage inspector or *Architecte des Bâtiments de France*.\(^\text{36}\)

Compared with France, preservation of historic resources in the United States was at the outset mainly undertaken by private organi-
zations and individuals.\textsuperscript{37} It is only recently that the federal government established a national preservation program with the enactment of the National Historic Preservation Act of 1966.\textsuperscript{38} While preservation efforts occur at the federal, state, and local levels,\textsuperscript{39} it is commonly admitted that the strongest protection of historic resources takes place at the local level.\textsuperscript{40}

Early preservation efforts in the United States focused on buildings and sites associated with significant historic figures or events and not on the architectural or aesthetical value of the buildings themselves.\textsuperscript{41} The first historic building to be saved was the Hasbrouck House in Newburgh, New York. The building, which served as George Washington’s headquarters during the American Revolution, was purchased by the State of New York in 1850.\textsuperscript{42} In 1859, the Mount Vernon Ladies Association, a private organization led by Ann Pamela Cunningham, saved George Washington’s house in Mount Vernon.\textsuperscript{43} Thus the preservation movement was launched in the United States.\textsuperscript{44}

\textsuperscript{37} MORRISON, supra note 2, at 2–3; see also Findings and Recommendations, in WITH HERITAGE SO RICH 190 (National Trust for Historic Preservation ed. 1999) (1966) (“The United States, with a short history and an emphasis on its economic growth, has left historic preservation primarily to private interests and efforts. In the older, history-conscious countries of Europe, preservation leadership has been provided primarily by government.”).


\textsuperscript{41} Id. at 17. See also Blumberg, supra note 22, at 596–97 (“[T]he movement did not merely grow out of an appreciation for aesthetics as some may believe today. Rather, early preservationist efforts focused on inspiring a sense of patriotism in people when they viewed old buildings or pieces of land which at one time were occupied by famous historical figures.”).


\textsuperscript{43} MORRISON, supra note 2, at 3; see also Linda Hales, First Ladies of Preservation: The Mount Vernon Story, WASH. POST, Feb. 15, 2003, at C2.

\textsuperscript{44} Whitehill, supra note 42, at 140 (“From Mount Vernon sprang the tradition of
At the local level, the first preservation ordinance was enacted by the City of Charleston, South Carolina, in 1931, followed by New Orleans, Louisiana, in 1936 and San Antonio, Texas, in 1939. Since the 1950s, many cities have adopted preservation tools in reaction to the destruction of America’s historic heritage, which was then perceived as an obstacle to modern development. During that same time period, the U.S. Supreme Court recognized “the right of cities to be beautiful.” Today, all fifty states have exercised their police power to enact legislation designed to preserve buildings and areas of historic or aesthetic importance, and more than 2,000 historic preservation ordinances have been passed.

Early manifestations of federal concern with historic preservation were the acquisition of General Lee’s house, Arlington House, in Virginia, in 1864, and the purchase of the Gettysburg battlefield through carefully organized private effort as the means of securing the funds for historic preservation.


47. Francis P. McManamon, An Introduction to Heritage Resources Law: What Are Heritage Resources and Why Are They Protected?, in HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT 25 (National Trust for Historic Preservation, John Wiley & Sons, Inc. ed. 1999). See also Carl Feiss, Our Lost Inheritance, in WITH HERITAGE SO RICH 121 (National Trust for Historic Preservation ed. 1999) (1966) (“Many safeguards have been achieved and much progress has been made in conservation, but it remains a portentious task to stave off a continuation of one of our worst traditions—the heedless destruction of the remains of our past.”).


49. The police power is defined as the “inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” See BLACK’S LAW DICTIONARY 534 (West Pub’g Co. 2d ed. 2001); see also Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (“It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily.”).


52. Whitehill, supra note 42, at 151 (the property was sold at auction for taxes at the initiative of Secretary of War Stanton).
the exercise of the federal government’s eminent domain power that was upheld by the U.S. Supreme Court in 1896. Congress subsequently enacted the Antiquities Act in 1906, the National Park Service Organic Act in 1916, the Historic Sites Act in 1935, an Act chartering the National Trust for Historic Preservation in 1949, and the National Historic Preservation Act in 1966; these measures significantly expanded the federal role in historic preservation.

III. The French Protection of Historic Landmarks’ Environs: A Controversial Mechanism Recently Amended

A. Automatic Protection of Setting Associated with Historic Landmarks

The designation of a building as monument classé or inscrit under the Act of 1913 on Monuments Historiques automatically creates a perimeter preserving the building’s environment. The purpose of this automatic protection is essentially to preserve the historic landmark itself by avoiding incompatible or incongruous development in its surroundings. The Act offers no standards or guidelines for evaluating the

54. 16 U.S.C. §§ 431–433 (2003) (authorizing the President to list historic landmarks, structures, and objects, located on lands controlled by the United States, as national monuments).
55. 16 U.S.C. § 1 (2003) (promoting and regulating “the use of the Federal areas known as national parks, monuments, and reservations.” The purpose is “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”).
56. 16 U.S.C. §§ 461–467 (2003). The preservation for public use of “historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States” was declared a matter of national policy. Id.
57. 16 U.S.C. § 468 (2003). The purpose of the National Trust for Historic Preservation is “to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest.” Id.
60. One of the consequences of the designation of around 41,000 historic landmarks in France is the automatic creation of 41,000 protected perimeters. See Pépin-Marquet, supra note 33, at 400.
61. FRIER, supra note 25, at 178. The author specifies that the Act of 25 February 1943, amending the Act of 1913 on Monuments Historiques to protect environs of historic landmarks, was primarily enacted for tourism purposes. This is only an assumption. In 1943, France was occupied by Germany and the Vichy collaborationist regime had suppressed the parliamentary system. The Act of 1943 was enacted by order without legislative debates. FRIER, supra note 25, at 178.
effects of projects on the environs of historic landmarks.\textsuperscript{62} All parcels of land, built or not, privately or publicly owned, located within 500 meters of a historic landmark and within its field of visibility are regulated.\textsuperscript{63} Therefore, there are two cumulative conditions to the application of the Act: a spatial and a visual condition.

The perimeter of 500 meters consists of a 500 meter-radius starting from any part of a historic landmark.\textsuperscript{64} A surface area of 78.5 hectares is covered.\textsuperscript{65} Depending on the scale of a historic landmark, several circles of 500 meters may apply, which may greatly extend the protected perimeter.\textsuperscript{66} Over one hundred meters long, \textit{Notre Dame de Paris} generates significant control on a wide span of neighboring properties.\textsuperscript{67} The protected perimeter may be extended by order of the Conseil d'État.\textsuperscript{68} This procedure has been used to preserve the Château de Versailles.\textsuperscript{69}

Even if a building is located within 500 meters of a historic landmark, it will only be regulated if it is visible from the historic landmark (\textit{visibilité directe}) or from any other location where the historic landmark is also visible (\textit{covisibilité}).\textsuperscript{70} The purpose is to preserve the view not only from the historic landmark but also of the historic landmark itself.\textsuperscript{71} The Conseil d'État held that the Act applied to situations where only a part of a building was visible from a historic landmark\textsuperscript{72} or where a building was only visible sporadically because of the foliage of trees.\textsuperscript{73}

\textsuperscript{62} Article 13bis of the Act of 31 December 1913 only refers to projects “affecting the aspect” of historic landmarks. This remarkably brief statement, if certainly surprising for common law scholars, is typical of the French legislative style. See, e.g., ÉVA STEINER, FRENCH LEGAL METHOD 15 (Oxford University Press ed. 2002) (“French legal rules commonly take the form of statements of general principle encapsulated in broad language and short sentences. This creates a certain degree of solemnity, with rules of law appearing as common sayings or maxims.”).

\textsuperscript{63} Act of 31 December 1913, art. 1.

\textsuperscript{64} Conseil d’État, Jan. 29, 1971, SCI La Charmille de Montsoult, req. n° 76595.

\textsuperscript{65} FRIER, supra note 25, at 176.


\textsuperscript{67} FRIER, supra note 25, at 177.


\textsuperscript{69} Decree of October 15, 1964, J.O., Oct. 17, 1964. A 5,000-meter radius from the King’s bedroom and a perimeter of 6,000 meters long and 5,500 meters large from the \textit{grand canal} have been established to preserve the view from the King’s bedroom and to prevent the construction of towers near the park. See FRIER, supra note 25, at 177.

\textsuperscript{70} FRIER, supra note 25, at 178.

\textsuperscript{71} FRIER, supra note 25, at 178.

\textsuperscript{72} See, e.g., Conseil d’État, Nov. 4, 1994, Sté de gestion, d’études et de créations immobilières françaises, req. n° 103270.

\textsuperscript{73} Conseil d’État, Feb. 11, 1976, UAP, req. n° 95676.
However, the Act does not apply to buildings adjacent to historic landmarks located underground\textsuperscript{74} or when only interiors of buildings are listed.\textsuperscript{75} A key issue is to determine the location from which the visual condition will be assessed. It is commonly admitted that the visual

\textsuperscript{74} FRIER, supra note 25, at 178 (citing Rép. min. n° 27431, J.O.A.N. Q, July 23, 1990, p. 3499).

\textsuperscript{75} Conseil d'Etat, Sept. 30, 1998, M. Millet, req. n° 153077.
condition must be assessed from a location normally accessible to the public.\textsuperscript{76} Hence, it is not permitted to evaluate the \textit{visibilité directe} from historic landmarks closed to the public\textsuperscript{77} or the \textit{covisibilité} from a helicopter or from the top of the bell-tower of a church.\textsuperscript{78} In addition, nothing in the Act prevents the evaluation of the \textit{covisibilité} from a place located outside the 500-meter radius.\textsuperscript{79} Finally, only the \textit{Architecte des Bâtiments de France} can determine if there is \textit{covisibilité} or not.\textsuperscript{80}

If the spatial and visual conditions are met for a parcel of land, vacant or not, located within the environs of a historic landmark, any new construction, demolitions, deforestations, or alterations affecting that parcel will require specific administrative authorization.\textsuperscript{81} Depending on their nature and volume, the planned works may necessitate a building permit, a demolition permit, or both. In any case, the approval of the \textit{Architecte des Bâtiments de France} must be obtained before the mayor issues the relevant authorization.\textsuperscript{82}

The administrative judge may review the \textit{Architecte des Bâtiments de France}’s decisions, but only in case of an appeal against the mayor’s decision to grant or refuse a permit. The burden of proof that the \textit{Architecte} erroneously opposed a permit application lies with the plaintiff.\textsuperscript{83} The judge usually exercises an intermediate level of scrutiny or \textit{contrôle normal}.\textsuperscript{84} The judge verifies that the spatial and visual conditions are met. He can order an expertise\textsuperscript{85} or organize a visit on site.\textsuperscript{86}

\textsuperscript{76} FRIER, supra note 25, at 178.
\textsuperscript{78} Rép. min. n\^o 51116, J.O.A.N. Q, Jan. 29, 2001, at 690.
\textsuperscript{79} FRIER, supra note 25, at 180.
\textsuperscript{80} Rép. min. n\^o 41085, J.O.A.N. Q, Dec. 4, 2000, at 6892.
\textsuperscript{81} Act of 31 December 1913, art. 13bis.
\textsuperscript{82} \textit{Code Urbanisme} [C. URB.] art. L.421–6 (Fr.) (building permit); art. L.430–1 to L.430–8 (Fr.) (demolition permit). If the planned works, because of their nature and volume, do not require any building or demolition permit, the prefect of region, upon advice of the \textit{Architecte des Bâtiments de France}, will determine if the works can be carried out. \textit{See} Act of 31 December 1913, art. 13ter.
\textsuperscript{83} Dominique Audrerie, \textit{Le champ de visibilité des monuments historiques et la jurisprudence} [Historic Landmarks’ Field of Visibility and Case Law], 40 \textit{Droit et Ville} 37, 50 (1995).
\textsuperscript{84} Emmanuel-Pie Guiselin, \textit{Le contrôle Juridictionel de la Protection Administrative des Abords des Monuments Historiques} [Judicial Control of Administrative Protection of Historic Landmarks’ Environs], C.J.E.G. 361 (1998). There are three degrees of judicial review under French administrative law: maximum control or high-level scrutiny, normal control or intermediate level scrutiny, and minimum control or low-level scrutiny. \textit{See} John Bell et al., \textit{Principles of French Law} 186 (Oxford University Press ed. 1998). The \textit{contrôle normal} implies that the judge reviews the legal classification of facts and determines whether the facts that occurred are sufficient to justify the decision taken. \textit{Id.}
\textsuperscript{85} Conseil d’Etat, Sept. 27, 1989, \textit{M. et Mme Laberguerie}, req. n\^o 67124.
\textsuperscript{86} Conseil d’Etat, Jan. 25, 1989, \textit{Gueti}, n\^o 66471.
Even if the Act offers no guidelines or standards to be followed by the *Architecte des Bâtiments de France*, he or she cannot act arbitrarily.\(^{87}\) The judge controls the evaluation by the *Architecte des Bâtiments de France* of the compatibility of a project with a historic landmark located nearby. The project envisioned cannot adversely affect the historic landmark’s character or environment.\(^{88}\) For instance, the *Conseil d’État* ruled that the painting of a garage façade in blue was incompatible with a listed church located in the vicinity because of the contrast of colors created in the church’s environment.\(^{89}\) Similarly, a project consisting of 13,200 square feet of residential space in a building of 75 feet wide, 230 feet long, and 20 feet high was refused as incompatible with a castle located nearby.\(^{90}\) Even if the *Architecte des Bâtiments de France* is not allowed to issue an opinion intended only to preserve a nonlisted building located nearby a historic landmark,\(^{91}\) the architectural significance of the nonlisted building is often a key factor in the *Architecte*’s ruling. It has been held that the demolition of an architecturally significant villa located within the field of visibility of the Négresco hotel in Nice and in a typical urban area of the late nineteenth century would have an adverse effect on the listed hotel.\(^{92}\) In contrast, the demolition of an eighteenth century building, without architectural significance and whose scale was not in line with the other buildings surrounding a historic landmark, has been authorized.\(^{93}\) The court takes into account the existing density of constructions in the environs of a historic landmark to assess the impact of a project. Hence, the erection of two buildings near a listed church was authorized because of the numerous buildings already surrounding the church.\(^{94}\) The diversity of styles and materials present in the environs of a historic landmark is also considered. The *Architecte des Bâtiments de France* cannot impose the

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\(^{89}\) Conseil d’État, Nov. 8, 1991, Chartron, req. n° 96650.

\(^{90}\) Conseil d’État, Mar. 26, 2001, Secrét. d’État au Logement, req. n° 216936.

\(^{91}\) Conseil d’État, June 1, 1988, Denard, req. n° 72392. In Allen Realty, Inc. v. City of Lawrence, 790 P.2d 948 (Kan. Ct. App. 1990), the Kansas Court of Appeals suggested that the SHPO would act arbitrarily, capriciously, or unreasonably if he or she makes a recommendation to protect a building with historic or architectural significance instead of the listed property located nearby.

\(^{92}\) Conseil d’État, Mar. 4, 1991, Ste Azul, req. n° 96650.

\(^{93}\) Conseil d’État, May 12, 1997, Ville de Nîmes, req. n° 139875.

\(^{94}\) CAA Nancy, June 12, 1997, Ville d’Amiens, req. n° 95NC00494; see also CAA Nantes, Nov. 8, 2000, M. David, Mme Canot, req. n° 97NT02210 & 98NT00379.
The use of specific materials to projects located in an area characterized by a great diversity of style and materials. Moreover, projects whose features are similar to buildings surrounding a historic landmark cannot be prohibited.

Any failure to comply with articles 13bis and 13ter of the Act of 31 December 1913 on Monuments Historiques is punished by a fine that cannot exceed 6,000 euros per square meter of floor space that has been created or 300,000 euros in all other cases. In the case of a repeated offense, a six month imprisonment may be added to the above fine. A reconstruction, restoration, or demolition of an altered building can also be ordered. The owner of a building adjacent to a listed church was ordered to restore the building to its prior appearance within three months because he had failed to comply with the Architecte des Bâtiments de France’s directives. Specifying that its role was not to evaluate the building’s aesthetic, the court simply noted that the owner should have used wood materials instead of polyvinyl, as recommended by the Architecte des Bâtiments de France.

B. A Controversial Mechanism

The French environs legislation has been the subject of significant criticism. The automatic imposition of the protection may lead to absurd results. The systematic creation of a protected perimeter of 500 meters around modest and isolated historic landmarks such as fountains or porches may appear disproportionate and unduly burdensome for neighboring properties. In small villages, the designation of a single church often engenders an administrative control of the entire rural community. The absence of notification of property owners that a nearby building is listed or is in the process of being listed has exacerbated the criticism. In addition, the legislation does not prevent the
erection of high structures beyond the protected perimeter of 500 meters.\textsuperscript{102} This construction may also adversely affect nearby historic landmarks. The strongest criticism was directed against the \textit{Architecte}, who was accused of being arbitrary and capricious.\textsuperscript{103} It is not contested that the \textit{Architecte des Bâtiments de France} has the discretionary (some say the exorbitant) power to decide whether a project is compatible with a nearby historic landmark. No project can be performed without the prior approval of this civil servant. Such power, equivalent to a veto right,\textsuperscript{104} has infuriated many mayors and property owners throughout the country.\textsuperscript{105} The lack of standards and guidelines for evaluating the effects of a project on the environs of a historic landmark has also contributed to the mistrust of the \textit{Architecte’s} decisions.\textsuperscript{106}

Nevertheless, the denunciation of the \textit{Architecte des Bâtiments de France’s} power is relatively unfair. One must not disregard the fact that the \textit{Architecte’s} decisions are not immune from judicial review.\textsuperscript{107} Elected officials willing to fully control what they believe is their territory have often led the charge against the \textit{Architecte des Bâtiments de France}.\textsuperscript{108} It is often when the \textit{Architecte} refuses to authorize a project that he or she is accused of being arbitrary and capricious, not when a project is approved.\textsuperscript{109} Overall, the \textit{Architectes des Bâtiments de France} have performed their mission with competence and cleverness and the environs of historic landmarks have been properly preserved.\textsuperscript{110}

Even if the \textit{Architectes des Bâtiments de France’s} decisions can be judicially challenged, criticism has persisted especially with regard to the automatic protection engendered by the designation of historic buildings. Recent legislative reforms have corrected some imperfections in the environs legislation.
C. Flexibility Achieved Through Recent Legislative Reforms

The first legislative reform was an attempt to suppress the protected perimeter of 500 meters through the creation of conservation areas or zones de protection du patrimoine architectural, urbain et paysager (Z.P.P.A.U.Ps). Under the Decentralization Act of 7 January 1983, conservation areas may be created around historic landmarks by order of the prefect of region, assisted by the Architectes des Bâtiments de France and the regional heritage and sites commission or commission régionale du patrimoine et des sites, upon proposition or approval of the mayor. The creation of a conservation area supersedes the protected perimeter of 500 meters and replaces it with a more appropriate and tailored perimeter depending on the architectural, historical, or aesthetical resources to preserve. The heritage of a particular area and its diversity is identified and carefully evaluated. The Architect des Bâtiments de France is still involved in the process but his or her power is more clearly defined. For instance, the Architect des Bâtiments de France is bound to comply with a conservation plan pre-approved by the mayor, which set out standards and guidelines for


112. Act of January 7, 1983, art. 70 to 72, J.O., July 24, 1983. This act introduced a provision in the French Planning Code stating that “[t]he French territory is the common heritage of the nation.” See C. URB. art. L.110 (Fr.).


114. FRIER, supra note 25, at 186; see also Designated Zones for the Conservation of the Architectural, Urban and Landscape Heritage ZPPAUP, supra note 111, at 6 (“According to local circumstances, the perimeter of the zone may be continuous or discontinuous; it can encompass a central area and outlying zones, corresponding with a detailed appraisal of the territory’s special characteristics.”). The suppression of a conservation area automatically reestablishes the protected perimeter of 500 meters. See Robert Brichet, Monuments historiques [Historic Landmarks], J.-Cl. Adm. fasc. 465–10, at 178 (2001).

115. Designated Zones for the Conservation of the Architectural, Urban and Landscape Heritage ZPPAUP, supra note 111, at 6 (“The study of the heritage begins with its clear identification; it may be built or non-built, urban or rural, old or recent, exceptional or ordinary, dense or dispersed, homogeneous or heterogeneous; it may or may not comprise a protected historic monument. As well as the intrinsic qualities of these elements, the study must also analyze the role they play and the relations between them. Like an X-ray photograph, it must draw attention to the diversity of the heritage and to the characteristics, which will underpin a hierarchical assessment of values: the heritage elements worth keeping, those, which can be altered, those, which deserve rehabilitation or even restitution. This evaluation implies informed choices which must be shared by local authority and the State.”).
evaluating the effects of a project on a historic landmark or its environment.\textsuperscript{116} Moreover, the mayor may appeal to the prefect of region in the event of a disagreement with the Architecte des Bâtiments de France.\textsuperscript{117} Once approved, the conservation plan is attached to the local zoning plan.\textsuperscript{118} The provisions of the conservation plan are only complementary with those of the local zoning plan.\textsuperscript{119} Both regulations are autonomous, and the revision of a local zoning plan does not modify the conservation plan.\textsuperscript{120} Only 277 conservation areas have been created since 1983,\textsuperscript{121} mainly because of a complex implementation procedure and lack of public funds.\textsuperscript{122} As a result, the Act of 31 December 1913 on Monuments Historiques remains the primary tool designed to preserve historic landmarks’ environs.\textsuperscript{123}

An administrative appeal against the Architecte des Bâtiments de France’s decisions was established in 1997.\textsuperscript{124} The Act of 1913 was amended to provide that the mayor could appeal to the prefect of region if he or she contested the Architecte’s decision.\textsuperscript{125} After consultation with a regional heritage and sites commission or commission régionale du patrimoine et des sites,\textsuperscript{126} the prefect of region issues an opinion that replaces the Architecte’s prior ruling. The Ministry of Culture may also review the Architecte’s decision. However, the appeal procedure was not opened to property owners.\textsuperscript{127}

\textsuperscript{116} Brichet, supra note 114, at 233; see also Designated Zones for the Conservation of the Architectural, Urban and Landscape Heritage ZPPAUP, supra note 111, at 17 (“In order to assure the sound management and interpretation of the heritage elements thus identified and classified, a set of rules must be drafted, their contents approved by both the commune and the State. These rules concern architectural appearances, materials, the setting of buildings, their volumes, height, the planting of trees, etc.”).

\textsuperscript{117} Périnet-Marquet, supra note 33, at 402.

\textsuperscript{118} The local zoning plan, or Plan Local d’Urbanisme (PLU), is a document regulating the use of land at the town level. See C. URB. art. L.121–1 (Fr.).

\textsuperscript{119} See Designated Zones for the Conservation of the Architectural, Urban and Landscape Heritage ZPPAUP, supra note 111, at 13.

\textsuperscript{120} See Designated Zones for the Conservation of the Architectural, Urban and Landscape Heritage ZPPAUP, supra note 111, at 13.

\textsuperscript{121} STATISTIQUES DE LA CULTURE [STATISTICS OF CULTURE], supra note 33, at 33. The creation of 538 additional conservation areas is under study. Id.

\textsuperscript{122} Patrick Le Louarn, La loi SRU et le Patrimoine Environnemental: Renouveau ou Simple Ajustement? [SRU Law and Environmental Heritage: Revival or Simple Adjustment?], 2 DR. ADM. 12, 16 (2001); see also Devos-Nicq, supra note 6, at 15.

\textsuperscript{123} FRIER, supra note 25, at 185.

\textsuperscript{124} Act No. 97–179 of February 28, 1997, J.O., Mar. 1, 1997, at 3320. A decree of 9 May 1995 provided that the mayor or the prefect of region could appeal to the Ministry of Culture in case of disagreement with the Architecte’s decision to refuse to agree to a planned project subject to building permit. However, this procedure has been rarely used and its existence is jeopardized by the procedure established in 1997. See Devos-Nicq, supra note 6, at 16.

\textsuperscript{125} Devos-Nicq, supra note 6, at 16.


\textsuperscript{127} Devos-Nicq, supra note 6, at 16.
A major legislative reform occurred in 2000. The protected perimeter of 500 meters has not been suppressed but it is now possible to reduce or expand it through the creation or the revision of a local zoning plan. An agreement between the Architecte des Bâtiments de France and the commune is necessary to modify the perimeter. The objective is to determine the parcels of land, vacant or not, that contribute to the historic landmark and its environment on a case-by-case basis and through a cooperative process between state agents, local officials, and the public. One of the advantages of this procedure is that it replaces the 500-meter radius, often perceived as arbitrary, with a thoughtful evaluation of the historic landmarks’ environs. It also avoids the application of the visibilité directe and covisibilité rules. It permits a control of an entire ensemble, comprised of streets, façades, vacant lots, gardens, and parks, without having to determine whether these elements are visible from the historic landmark or from any other location where the historic landmark is also visible. Therefore greater flexibility has been achieved in the preservation of historic landmarks’ environs. Finally, in 2002, property owners were granted the right to appeal to the prefect of region in case of disagreement with the Architecte des Bâtiments de France’s decisions.

The French environmental approach of historic preservation echoes Professor Robert E. Stipe’s concern that historic properties should not be divorced from their environmental settings, and that a new preservation approach was necessary. The merit of the French environs legislation as amended is to link the preservation of historic properties’ environs to the local zoning plan. Almost all of the 36,000 cities in

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129. See C. URB. art. L.121–1 (Fr.).
130. Act of December 31, 1913 art. 1.
133. Robert E. Stipe, A Decade of Preservation and Preservation Law, 11 N.C. CENT. L.J. 214, 229 (1980). “It is perhaps unfortunate that the legislation itself has always focused on architectural detail in the search for ‘congruity’ on a building-to-building basis, since this emphasis tends to obscure the importance of dealing in a more creative way with larger environmental design issues that go beyond mere regulation and the individual structure and its ‘fit.’” Id. See also Tersh Boasberg, A New Paradigm for Preservation, in PAST MEETS FUTURE: SAVING AMERICA’S HISTORIC ENVIRONMENT 145, 147 (Antoinette Lee ed., 1992) (“[W]e must be willing to consider the merits of conservation zones and other protective devices that focus more on the environment, character, and visual qualities of a district than they do on its history or architecture... Professor Robert E. Stipe is ahead of the rest of us in predicting this dual approach.”).
France have adopted local zoning plans regulating the use of land. To adequately protect the environmental setting of their historic resources, the local authorities only have to amend their zoning plan. The decision to include local residents in the process of defining these tailored protective perimeters is also valuable. The new challenge, however, is for the city to determine with the *Architecte des Bâtiments de France* standards and guidelines to create and manage these mini-conservation zones.

**IV. The American Protection of Historic Properties’ Environs:**

**Protection at the Federal, State, and Local Levels**

**A. Protection of Historic Properties’ Environs at the Federal Level**

At the federal level, the protection of historic properties’ environs is provided by the National Historic Preservation Act (NHPA), 134 the National Environmental Policy Act (NEPA), 135 and section 4(f) of the Department of Transportation Act (DOTA). 136 Whereas DOTA imposes substantive requirements, 137 NHPA and NEPA are essentially procedural safeguards that do not ultimately control the preservation of historic properties. 138 These statutes are often combined in the review of federally funded projects. 139

Enacted to preserve historic resources “in order to give a sense of orientation to the American people” 140 and “to ensure future generations a genuine opportunity to appreciate and enjoy the rich heritage” of the United States, 141 NHPA requires that any agency “take into account the

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137. See infra note 176.
138. See infra notes 154, 167.
139. See, e.g., Preservation Coalition of Erie County v. FDA, 129 F. Supp. 2d 551, 555–56 (W.D.N.Y. 2000). See also 36 C.F.R. §§ 800.2(a)(4), 800.8 (stating that agencies should coordinate NHPA compliance with the separate requirements of NEPA and other statutes). For a comprehensive study of historic preservation regulations in the United States, see TERSH BOASBERG ET AL., HISTORIC PRESERVATION LAW & TAXATION (Transnational Juris Publications, Inc. ed. 1989).
effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.” An undertaking is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” The review process is termed “section 106” in reference to its numbering in the National Historic Preservation Act of 1966. Federal undertakings affecting National Historic Landmarks (NHL) are also regulated. 16 U.S.C. § 470(a)(1)(A). There are approximately 75,000 properties listed on the National Register. See http://www.cr.nps.gov/places.htm (last visited Dec. 12, 2003). The criteria for National Register’s eligibility are set forth in 36 C.F.R. § 60.4. A property must be at least 50 years old to be eligible for the National Register. See 36 C.F.R. § 60.4(d) (listing on the National Register is essentially honorific and has no effect on private property owners), 36 C.F.R. § 60.2; see also Preservation Law Summary: Impact of National Register Listing on Privately-Owned Property, 18 Pres. L. Rep. 1129 (1999).

The SHPO is “the official appointed or designated to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.” 36 C.F.R. § 800.4 (2000). An area of potential effects is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” See 36 C.F.R. § 800.4 (2000).

“Adverse effect” is defined as an “undertaking that may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” See 36 C.F.R. § 800.4 (2000).
Preservation of Historic Properties’ Environments

“of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance”\(^{149}\) and the introduction “of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.”\(^{150}\) The Advisory Council on Historic Preservation (ACHP)\(^{151}\) must have a reasonable opportunity to comment.\(^{152}\) If the project is likely to have an adverse effect on historic properties, the agency must consult with the SHPO, the ACHP, and the public to develop and evaluate alternatives that could avoid or mitigate the adverse effect.\(^{153}\) Nevertheless, the agency is not required to engage in any specific preservation activities.\(^{154}\) For instance, the decision of the United States Army Corps of Engineers to issue a permit for the construction of a major electric generation facility in the scenic Hudson River Valley was upheld, notwithstanding the potential degradation of vistas from historic properties listed on the National and State Registers.\(^{155}\) Economic interests\(^{156}\)

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\(^{150}\) 36 C.F.R. § 800.5(a)(2)(v) (2000). A court held that an agency “must consider more than the individual buildings and structures in an historic district when analyzing the impact of a project.” Elements that are important to the integrity of a historic district, such as “streetscapes and layouts,” must also be taken into account. See Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 697 (3d Cir. 1999). The court specified that “[w]hile the term ‘streetscape’ does not appear in the NHPA or in the regulation promulgated thereunder, it is useful in a section 106 analysis. We take it to refer to the visual impact of, and the interplay between, the natural and architectural elements that comprise the affected area.” Id. at n.7.

\(^{151}\) The ACHP is an independent federal agency with only an advisory role in historic preservation. See 16 U.S.C. § 470(i) (2000).

\(^{152}\) 16 U.S.C. § 470(f). The agency must take into account the ACHP’s comments. See 36 C.F.R. § 800.7(c)(4) (2000).

\(^{153}\) 36 C.F.R. § 800.6 (2000).


\(^{155}\) Pogliani v. U.S. Army Corps of Engineers, 166 F. Supp. 2d 673 (N.D.N.Y. 2001). One of the historic properties was the Olana Mansion, “the home and studio of nineteenth century painter Frederick Edwin Church. . . . The panoramic views from Church’s hilltop estate were the inspiration for some of his most important paintings.” Id. at 678 n.3. The ACHP had determined that the construction would have an adverse effect on the Olana Mansion and other historic properties. Id. at 681. Curiously, the court emphasized that there was no evidence that any historic resources would be “physically destroyed,” as if NHPA was primarily limited to the review of projects directly affecting historic properties. Id. at 701.

\(^{156}\) Purely economic interests do not fall within the zone of interests to be protected by NHPA and NEPA. See Presidio Golf Club v. Nat’l Park Serv., 155 F.3d 1153, 1157–58 (9th Cir. 1998). In this case, the owner of a near century-old private clubhouse challenged the project of the National Park Service to build a public clubhouse nearby. After stating that the owner’s interests in maintaining its historic clubhouse and the surrounding environment in a fashion suitable for the game of golf were within the zones of interests protected by NHPA and NEPA, the court held that the National Park Service complied with NHPA in determining that the project would not isolate the
and the necessities of modern life\textsuperscript{157} often prevail over historic and environmental preservation interests. A project consisting of the restoration of the “largest nineteenth century beach-front hotel remaining in the City of Cape May, New Jersey,” a property located within the Cape May National Historic Landmark District, and the use of the hotel lawn for parking 202 vehicles was approved, although local residents argued that the use of the hotel lawn, a “vital feature of the hotel,” would undermine the hotel’s integrity and ambiance. The court stressed that “plaintiffs’ romantic vision of the Hotel” should be “reconciled with the realities of the twenty-first century.”\textsuperscript{158}

One of the main purposes of NEPA is to “preserve important historic, cultural, and natural aspects of our national heritage.”\textsuperscript{159} Compared with NHPA, which regulates all federal undertaking, NEPA is limited to “major Federal actions.”\textsuperscript{160} However, NEPA applies to all historic and cultural resources whereas NHPA is limited to historic sites on or eligible for the National Register.\textsuperscript{161} NEPA extends to natural as well as urban environments.\textsuperscript{162} Any agency that proposes a major federal action “significantly affecting the quality of the human environment” must prepare an Environmental Impact Statement (EIS) providing a comprehensive analysis of the potential environmental impacts of the proposed action.\textsuperscript{163} The term “federal action” includes projects implemented by private entities that use federal funding or licensing.\textsuperscript{164} The agency must consider whether its “action may adversely affect districts,
sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources, and whether alternatives are available. NEPA imposes duties upon agencies that are essentially procedural. Once an agency has complied with NEPA’s procedural requirements and considered the environmental consequences of its proposed project, it has discretion as to the action to be taken. A federally funded project consisting of the construction of a 350-room hotel and 500-vehicle garage in the Penn’s Landing area of Philadelphia was upheld, even though the residents living in the historic district adjacent to, and included within, Penn’s Landing claimed that the project would have a detrimental effect on the ambience of their historic neighborhood.

The preservation of “the natural beauty of the countryside . . . and historic sites” requires that a federal transportation project that adversely affects a historic site cannot be approved unless the agency shows that there is “no prudent and feasible alternative” to the use of the site and that it has done “all possible planning to minimize harm” to the site. Section 4(f) of DOTA applies only to historic sites on or eligible for the National Register unless the agency determines that another application of the act is appropriate. The agency must identify with the SHPO all properties on or eligible for the National Register and evaluate feasible and prudent alternatives. Compared with

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165. 40 C.F.R. § 1508.27(b)(8) (2000).
166. 40 C.F.R. § 1502.14 (2000) (stating that the discussion of alternatives is “the heart of the environmental impact statement.”).
168. Strycker’s Bay v. Karlen, 444 U.S. 223, 227–28 (1980); see also Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996) (“NEPA exists to ensure a process, not to ensure any result.”).
169. Soc’y Hill. Towers Owners’ Ass’n v. Rendell, 210 F.3d 168 (3d Cir. 2000). The residents had alleged “concrete and particularized injury in the form of increased traffic, pollution, and noise.” Id. at 176. The Philadelphia Historical Preservation Officer nevertheless determined that existing construction obstructed the view of the proposed hotel and garage from the historic district and that the project would have no impact on the historic district because of this “visual barrier.” Id. at 185. The court concluded that these findings were not “clearly erroneous.” Id. at 186.
171. The term “feasible” is understood as “sound engineering.” See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411 (1971). An alternative is “prudent” if it does not present “unique problems.” Id. at 416. “Only the most unusual situations are exempted.” Id. at 411; see also Friends of Pioneer St. Bridge Corp. v. FHWA, 150 F. Supp.2d 637, 654 n.17 (D. Vt. 2001).
174. Id.
and NEPA, the requirements of DOTA are substantive.\(^{176}\) There is no guarantee, however, that the environs of historic properties will be adequately preserved under section 4(f). Although the Federal Highway Administration (FHWA) had found, under section 106 of NHPA, that a bypass would disturb the tranquil rural setting that was the contributing factor to an “intact model of a Depression-era farm” eligible for the National Register, a district court nevertheless concluded that a finding of adverse effect under section 106 did not necessarily equate to a finding of constructive use under section 4(f),\(^{177}\) and that the FHWA was not arbitrary and capricious in finding that there was no constructive use of the property because the visual and audible impacts did not “substantially diminish” the protected attributes of the farm.\(^{178}\)

This overview of the main federal legislation dealing with the protection of historic resources confirms that they are not the most effective tools for preserving historic properties’ environs.

**B. Protection of Historic Properties’ Environs at the State Level: The Kansas Environs Legislation**

Even though all fifty states have enacted laws to preserve their historic heritage, only a few address the issue of incompatible development adjacent to historic properties.\(^{179}\) Kansas has adopted a statute auto-

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176. Volpe, 401 U.S. at 411; see also Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 693 (3d Cir. 1999) (“Section 4(f) mandates that the protection of historic properties . . . be given paramount importance in transportation planning.”).


178. Id. Constructive use occurs “when the transportation project does not incorporate land from a section 4(f) resource, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.” See 23 C.F.R. § 771.135(p)(2) (2000). The court also found reasonable the determination by the FHWA that the bypass would not significantly diminish the protected attributes of a house and its surrounding five-acre landscaped parcel “representative of the twentieth-century rural development context.” The proposed bypass was “800 feet from the house and 600 feet from the five acre parcel.” See Piedmont Envtl. Council v. U.S. Dep’t of Transp., 159 F. Supp. 2d at 285.

179. Miller, supra note 5, at 1016. For instance, Maryland’s enabling law provides authority to regulate both the historic resource and its environmental setting. Miller, supra note 5, at 1017; see also Maryland Trial Court Upholds Denial of Applications to Build on Side Lots of Victorian House, 9 PRES. L. REP. 1046 (1990). However, many local jurisdictions within the state interpret “environmental setting” as including, at most, only the land owned by the historic property’s owner. See E-mail from Julia H. Miller, National Trust for Historic Preservation (Mar. 31, 2003, 10:39 am EST) (on file with author). This interpretation is corroborated by a provision of the Maryland’s enabling law stating that “the local legislative body of every local jurisdiction may, by ordinance or resolution, regulate: . . . (iii) The appurtenances and environmental settings of sites and structures within their limits.” See MD. CODE art. 66B, § 8.01(b)(2)(iii)


matically preserving the contextual setting or “environs” of historic properties listed on the National Register or the State Register. The
statute applies not only to public projects, but also to private activities involving the issuance of permits.\footnote{181} This preservation tool, quite unique in the United States,\footnote{182} is similar in spirit to the French enevrons legislation. Kansas acknowledges that historic properties cannot be considered in isolation from their immediate environment and that the preservation of historic properties’ environs adds cachet to the historic properties themselves.\footnote{183}

1. THE KANSAS HISTORIC PRESERVATION ACT: AN AUTOMATIC PROTECTION OF THE ENVIRONS OF HISTORIC PROPERTIES LISTED ON THE NATIONAL OR STATE REGISTER

The Kansas Historic Preservation Act was enacted in 1977,\footnote{184} to meet the requirement by the National Historic Preservation Act of 1966 that each state implements a preservation program.\footnote{185} The purpose of the
Act, which goes beyond the NHPA’s requirements, is to prevent arbitrary actions that may adversely affect not only historic properties, but also their environment. Recognizing that the heritage of Kansas is “an important asset of the state and that its preservation and maintenance should be among the highest priorities of government,” the Act states that no governmental entity may undertake a project that will encroach upon, damage, or destroy any historic property included in the National Register of Historic Places or the Register of Historic Kansas Places or its “environs” until the State Historic Preservation Officer (SHPO) has been given notice. The SHPO must initiate an investigation of the project within thirty days from the date of receipt of the notice. If the SHPO fails to do so, the project is deemed to be approved. The SHPO may delegate its authority to review projects to local historic preservation committees of cities, counties, and the Board of Regents or any Regents institution. In the case of cities and counties, the SHPO retains final authority. Local historic preservation committees may only review projects within their boundaries. Projects that straddle boundary lines must be reviewed by the SHPO, unless the parties agree otherwise. If the SHPO determines that the project will have an adverse effect on the historic property or its environs, the project may not proceed until (1) the governor, in the case of a state project, or the local governing body, finds, after consideration of all relevant factors, that “there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to mini-


186. Ambler, supra note 18, at 15.
189. “Historic property” is defined as “any building, structure, object, district, area or site that is significant in the history, architecture, archeology or culture of the state of Kansas, its communities or the nation.” See Kan. Stat. Ann. § 75–2716(b).
190. As at April 4, 2003, Kansas had 797 properties listed on the National Register and 103 properties listed on the State Register. See http://www.kshs.org/resource/registerlist.htm (last visited Dec. 16, 2003).
194. Id.
196. Id.
197. Concerning the authority of the SHPO under the Act, “[t]here is little question but that the language of the statute in that respect is quite sweeping,” Allen Realty, Inc. v. City of Lawrence, 790 P.2d 948, 952 (Kan. Ct. App. 1990). “[T]he SHPO is permitted to make a determination publicly or privately at the SHPO’s discretion and is not required to seek input from any interested party or entity.” Id.
mize harm . . .” and (2) five days notice of such determination has been given to the SHPO by certified mail. The ultimate determination of an adverse effect remains in the hands of political entities. Projects adversely affecting historic properties are not totally prohibited and may proceed after the relevant authority makes the required findings. Any person aggrieved by the determination of the governor or the local governing body may appeal to the district court having jurisdiction in the county where the affected historic property is located.

The Act raised a number of issues shortly after its enactment. The first issue was the meaning of the word “project” that the Act did not define. The Attorney General of Kansas, Robert T. Stephan, accurately described the problem:

Since the proscriptions of the statute apply to units of government, private enterprise and projects of individuals are not constrained directly by the Act. Where the construction or destruction of the physical environment is conducted, paid for or supervised by a city or county government, there can be little question that such activity constitutes a “project” within the meaning of the Act. The difficulty arises when the participation by the governmental unit is not that of a principal developer or builder but is limited to authorizing building and development activities by the private sector.

A difficulty arose when the owner of a Wichita bank requested city rezoning approval to demolish residential properties. The issue was whether the proposed rezoning (that arguably affected historic buildings) constituted a “project” of the city within the meaning of the Act thus requiring the SHPO to comment. After reviewing other states case law

198. The quoted language “prescribes a rather exacting standard which must be observed before any project which would damage an historic site may be approved.” See Kan. Op. Att’y Gen. No. 78–126 (1978), available at 1978 WL 33418. This provision is similar to section 4(f) of the federal Department of Transportation Act. See A HANDBOOK ON HISTORIC PRESERVATION LAW, supra note 17, at 161; see also Allen Realty, 790 P.2d at 956 (“the language of K.S.A. 75–2724(a), directing the governing body to consider all relevant factors in its determination of whether there is a feasible and prudent alternative to a proposed project, was included to prevent a possible hardship or injustice. That provision authorizes the governing body to lift the restraint imposed by 75–2724 when appropriate.”).
199. KAN. STAT. ANN. § 75–2724(a) (2002).
200. Bradley J. Smoot, Local Governments Have Obligations to Protect Historic Properties, 4 KAN. PRES. (KSHS, Topeka, Kan.), May-June 1988, at 5, 6. For instance, Governor Bill Graves ruled that the University of Kansas could tear down three century-old houses to build a scholarship hall, notwithstanding the SHPO’s finding that the demolitions would adversely affect the historic environs of a nearby house occupied by the Beta Theta Pi fraternity and listed on the National Register. See Joel Mathis, Historic Houses in Lawrence, Kan., Neighborhood Win Reprieve, KNIGHT-RIDER TRIB. BUS. NEWS, Mar. 16, 2002, available at 2002 WL 17182692; see also Opponents of KU’s Attempt to Raze Historic Homes Go to Plan B, ASSOCIATED PRESS NEWSWIRES, Sept. 6, 2002.
201. KAN. STAT. ANN. § 75–2724(b) (2002).
203. Smoot, supra note 200, at 8.
and preservation tools, the Attorney General of Kansas concluded that the
Act contained no identifiable references to the regulation of private
interests that would have implied a reading of “project” to include private
activities authorized by public entities acting as regulatory bodies.
Accordingly, the enactment or amendment of a municipal zoning ordinance
did not fall within the Act. The Kansas Historic Preservation Act was
subsequently amended to expressly cover private activities involving the
issuance of permits or other authorizations. The impact of this modi-
fication of the Act would prove to be tremendous.

Another issue was the meaning of the term “environs.” The Act
provided no definition of the boundaries of the environs of historic
properties. Many local governing bodies were unsure when they had
to give notice to the SHPO for environs review. In 1987, the City of
Lawrence, Kansas, without notifying the SHPO, approved a zoning
change for six lots across the street from the east boundary of the Old
West Lawrence Historic District and issued demolition permits. In
the absence of definition of “environs” in the Act, the issue was to
determine whether the project, surrounding a historic district but not

207. KAN. STAT. ANN. § 75–2716(c) (L. 1981, ch. 332, § 1). A “project” is defined
as (1) any activity directly performed by the state or local governing bodies; (2) any
activity performed by individuals, firms, associations, corporations, etc. that receive
financial assistance from the state or local governing bodies; and (3) any activity in-
volving the issuance of a lease, permit, license, certificate or other authorization for
use by the state or any local governing bodies. Id. On the basis of this provision, the
Attorney General of Kansas ruled in 1987 that the amendment of a municipal zoning
ordinance and the issuance of demolition permits constituted a “project” within the
1987 WL 290354.
208. Anderson, supra note 9, at 5–6 (commenting that “[t]he interpretation of ‘proj-
ects’ to include issuance of leases, permits, licenses, etc. substantially expanded the
scope of projects requiring review and fundamentally changed the State’s role in his-

toric preservation regulation. . . . This change in interpretation of what projects were
reviewed under the state law took Kansas completely out of step with the other states.
No other state provided review of private projects unless financial incentives were
involved. No other states reviewed the impact of projects within the environs of a listed
property. Neither the State Attorney General nor the State Historic Preservation Office
foresaw the ramifications of this broad sweeping change in interpretation of the law.”).
It is worth noting that South Dakota, which enacted a statute similar to the Kansas
Historic Preservation Act in 1987, was very close to adopt the Kansas’ definition of
“project” in 2001. See supra discussion in note 182.
209. Anderson, supra note 9, at 5–6 (“[T]here was a great deal of concern on the
part of local governments about how to decide when a project needed to be forwarded
to the State Historic Preservation Officer for environs review. . . . Local governments
were saying that they had no choice but to send every request for permit, etc. to the
State Historic Preservation Officer for review regardless of how far the proposed
projects were from a listed property because they had no way of knowing what the
State Historic Preservation Officer considered the environs of their listed properties.”).
adjacent to it, should have been submitted to the SHPO for review. In an opinion issued the same year, the Attorney General of Kansas ruled that the term “environs,” as used in the Kansas Historic Preservation Act, could include property surrounding a designated historic site even though said properties were not adjoining.\footnote{211} Worried by the Attorney General’s broad definition of the term “environs,” the League of Kansas Municipalities requested an amendment to the Act.\footnote{212} The League suggested defining the term “environs” as “the property adjoined the historic property, excluding public right-of-way.”\footnote{213} The legislature eventually agreed to the proposition of the Kansas State Historical Society (KSHS)\footnote{214} to introduce “distances already recognized in state law for zoning purposes.”\footnote{215} The Act was amended in 1988 to provide that notice must be given to the SHPO when the proposed project, in whole or part, is located within 500 feet of a historic property located in a city or within 1,000 feet in rural areas.\footnote{216} This provision evokes the protected perimeter of 500 meters existing under the French environs legislation.\footnote{217} The 1988 amendment also extended the SHPO’s scope of review by providing that the Act did not prevent the SHPO from reviewing and commenting on projects that affect historic properties but are located beyond the distances of 500 feet and 1,000 feet for which he has not received notice.\footnote{218} Such broad review is expected to be exceptional.\footnote{219} The Kansas Historic Preservation Office (KHPO) has recommended that notice be submitted to the SHPO for all projects that may possibly affect historic properties in any way.\footnote{220}

Recognizing the environs of each historic property “as a physical record of its time, place, and use,” the KSHS published standards and

\footnote{211} Kan. Op. Att’y Gen., \textit{supra} note 207, at 5. The Attorney General specified that the “legislature’s choice of the term ‘environs’ should be read to effectuate the purpose of the Act, namely the protection of historic properties from unnecessary destruction, damage or encroachment.”

\footnote{212} Smoot, \textit{supra} note 200, at 6–7.

\footnote{213} Smoot, \textit{supra} note 200, at 7.

\footnote{214} The Kansas State Historical Society is both a nonprofit organization and a specially recognized society supported by state appropriations. \textit{See} http://www.kshs.org/aboutkshs/history.htm (last visited Dec. 15, 2003). Among other activities, the KSHS plays an important role in historic preservation. \textit{See}, e.g., Reiter v. Beloit, 947 P.2d 425, 435 (Kan. 1997) (“[t]he Kansas State Historical Society occupies a unique position and plays a major role in the preservation of Kansas historic property and its environs.”).

\footnote{215} Smoot, \textit{supra} note 200, at 6–7.


\footnote{217} \textit{See supra} Part III.A.


\footnote{219} Smoot, \textit{supra} note 200, at 8.

guidelines for evaluating the effect of projects on historic properties’ environs in 1998.\textsuperscript{221} On this basis, the SHPO adopted regulations for the Review of Projects Affecting Historic Properties and Their Environ\textsuperscript{s}.\textsuperscript{222} This contrasts with the complete lack of standards and guidelines in the French environs legislation, where the Architecte des Bâtiments de France, in charge of reviewing the compatibility of projects with historic landmarks’ environs, is often accused of being arbitrary and capricious.\textsuperscript{223} The SHPO’s regulations expressly provide that a project need not be adjacent to a historic property for it to be in the historic property’s environs.\textsuperscript{224} The term “environs” has been defined as “the historic property’s associated surroundings and the elements or conditions that serve to characterize a specific place, neighborhood, district, or area.”\textsuperscript{225} The SHPO must review projects within the environs of historic properties using the KSHS’ standards and guidelines.\textsuperscript{226} According to these standards and guidelines, projects involving new constructions, additions, exterior alteration, or demolition should not radically change, obscure, or destroy character-defining buildings, structures, landscape features, or spatial relationships that characterize the environs of a historic property.\textsuperscript{227} These projects are mainly subject to an incompatibility/inconsistency test.\textsuperscript{228} The purpose is to retain and preserve the distinctive character of historic properties’ environs. Personal opinions based on the aesthetics of a proposed project are not considered relevant.\textsuperscript{229}
These standards and guidelines contain specific visibility rules. It is acknowledged that the “line of sight” between a historic property and a proposed project is often directly related to the impact of a project on the historic property. Accordingly, new construction and additions that obstruct views or vistas from or to the listed property are not recommended. This is quite similar to the visibilité directe and covisibilité rules existing under the French environs legislation. Another common feature with the French environs legislation is the regulation of the vegetation surrounding historic properties. It is not recommended to remove the vegetation, such as “trees on lot lines or along the street and open spaces” that characterize the environs of a historic property. Moreover, new constructions on planned or traditional open spaces that define the environs of a historic property are discouraged. Finally, signs, rezoning, and parking should not be incompatible and/or inconsistent with the character of the historic property’s environs.

As with many preservation regulations, the enforcement of the Kansas Historic Preservation Act remains an issue. A lack of cooperation from government entities was rapidly observed. In addition, several private owners demolished properties without facing any major sanctions. In response, the Act was amended in 1988 to clarify the term “environs” in order to specify when it applies, and to introduce a civil penalty of up to $25,000 for each violation. Despite these amendments, the Kansas State Historical Society has noted that there is still much confusion about the Act. Many property owners and
local governing bodies remain unaware of the provisions of the Act. 242

Recent applications of the Act include the proposed demolition of two downtown Topeka buildings, 243 the relocation of a Sears store 244 and the planned demolition of a century-old house in Pittsburg, 245 the plan by the University of Kansas to tear down three century-old houses in Lawrence, 246 and the proposed removal of a mansion in Topeka. 247 All these projects were located within 500 feet of buildings listed on the National Register, except the century-old house in Pittsburg, which lay just beyond the 500-foot limit.

The constitutionality of the Kansas Historic Preservation Act was upheld in *Allen Realty, Inc. v. City of Lawrence*. 248 The plaintiff, Allen

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242. *Id.*

243. A developer proposed to demolish two vacant buildings believed to be the site of Constitution Hall in Topeka. The buildings were located within the environs of the German-American State Bank, a National Register property. The SHPO found that the proposed demolition would adversely affect the historic property. After a public hearing, the Topeka City Council voted 6 to 3 that there was no feasible and prudent alternative to the demolition. An agreement was subsequently signed with the developer to buy and restore the buildings. See Richard Pankratz, *Proposed Demolitions Stir Topeka Preservationists*, *6 Kan. Pres.* (KSHS, Topeka, Kan.), Nov.–Dec. 1997, at 3–5.

244. The Pittsburg Sears store is a pre-engineered metal building located within 500 feet of the Hotel Stilwell, a building listed on the National Register. The owner of the store put a façade that matched that of Ryan’s Cleaners, which had been approved by the Kansas State Historical Society. See Jack Dimond, *Sears Moving Downtown*, *Pittsburg Morning Sun*, July 26, 2001.

245. A group named the Citizens for the Preservation of Historic Crawford County filed an appeal in district court to stop the county’s plan to demolish the Lanyon-Mousney House in Pittsburg. The unlisted building was located just beyond the 500-foot limit from the Hotel Stilwell, a building listed on the National Register. The organization argued that the historical preservation office had the option of reviewing construction beyond the 500-foot limit. See Harold Campbell, *Group Makes Last-Minute Attempt to Save Home*, *Pittsburg Morning Sun*, Sept. 11, 2001. The appeal was denied and the house demolished. See Harold Campbell, *Historic House Soon Will be History*, *Pittsburg Morning Sun*, Mar. 22, 2002.

246. See Mathis, supra note 200.


248. 790 P.2d 948 (Kan. Ct. App. 1990); see also *Kansas Court Upholds City’s Denial of Permit to Demolish Church Located in “Environs” of National Register*.
Realty, Inc., applied to the City of Lawrence for a permit to demolish a building known as the English Lutheran Church that was near the Douglas County Courthouse, a property listed on the National Register. In accordance with the Act, the city notified the SHPO of the plaintiff’s application. The SHPO found that the demolition would affect the environs of the courthouse, mainly because of the English Lutheran Church’s historical value and recommended that the demolition permit be denied. Following a hearing, the city denied the plaintiff’s application for a demolition permit on the ground that the plaintiff had failed to demonstrate that there were no feasible and prudent alternatives to demolition. Citing Penn Central, the court held that the SHPO’s recommendation and the city’s decision did not result in a taking of the plaintiff’s property. The court also specified that while it was proper for the owner to carry the burden of proving that there were no viable alternatives to demolition, he or she is not required to dispel all suggested alternatives to a proposed project, but only those supported by sufficient factual information. On remand, the city held a new hearing on the plaintiff’s application and granted the demolition permit. After the KSHS and the Lawrence Preservation Alliance

Property, 8 PRES. L. REP. 3075, 3077 (1989). “The court’s decision in Allen Realty, Inc. v. City of Lawrence is an important step in preservation law. In upholding a statute which regulates buildings located within the environs of an historic structure, the court has recognized the protection of historic settings as a valid public purpose.” Id. 249. Allen Realty, 790 P.2d at 950.

250. Id.

Id. at 954–55. (“Both buildings are constructed of native limestone, and both buildings clearly project separate and shared historic images of the downtown Lawrence community. Within five hundred feet of the courthouse stand other buildings slated for demolition; those other buildings lack the historical associations and architectural integrity of the English Lutheran Church.”) See also Anderson, supra note 9, at 7 (stating that the SHPO’s decision “resulted in the public perception that the environs review process could and should be used to protect unlisted historic properties in the area surrounding listed historic properties.”).

252. Allen Realty, 790 P.2d at 953 (“[t]he language of K.S.A. 75–2724 indicates that the legislature took pains to preclude a taking of property by its implementation. The restriction of the statute is by its own terms effective only until a landowner can demonstrate that there is no feasible and prudent alternative to the restrained use. A taking cannot be established by showing that a historic preservation statute prevents a landowner from making a particular use of property that would be more beneficial or profitable than its current use.”) (emphasis added).

253. Id. at 955–56. See also Lawrence Pres. Alliance, Inc. v. Allen Realty, Inc., 819 P.2d 138, 141 (Kan. Ct. App. 1991) (the “pertinent rulings in Allen I were: (1) The proponent of a project has the burden to prove no acceptable alternative exists; (2) a potential alternative is not a ‘relevant factor’ unless it is supported by evidence to indicate it is both feasible and prudent; and (3) the proponent does not have to refute a potential alternative unless it is proven to be a ‘relevant factor.’”).

254. Lawrence Preservation Alliance, 819 P.2d at 148.
sought review of the city’s decision, the court held that the city acted arbitrarily and capriciously in failing to notify preservation groups of the hearing and in refusing to continue the hearing for full exposure of relevant factors and prudent and feasible alternatives. 255 The English Lutheran Church was subsequently listed on the National Register. 256

In 1997, the Kansas Supreme Court upheld the determination of the City of Beloit that there was no feasible and prudent alternative to the construction of a store within the environs of a home listed on the National Register, and that all possible plans were considered to minimize harm to the historic property. 257 This decision has caused concern among preservationists. 258 Mrs. Reiter owned the Perdue House in Beloit, a property listed on the National Register shortly after the enactment of the Kansas Historic Preservation Act. 259 The Perdue House was surrounded by a fast food restaurant, a car wash, and single-family dwellings. 260 Casey’s General Stores, Inc., the owner of a vacant lot adjacent to the historic property, applied for a zoning change, variance, and building permit to construct a convenience store. 261 Using the Secretary of the Interior’s Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings as a guide to evaluate the impact of the project, the SHPO determined that the store would be “visually incompatible” with the Perdue House and would “destroy the historic relationship within the neighborhood.” 262 The director of store development for Casey’s argued that it had considered all the potential commercial sites in Beloit on which to build a store, taking into account the traffic counts, potential contamination, and the size and location of the lot. 263 He concluded that there was no feasible and prudent alternative to the site adjacent to Mrs. Reiter’s house. 264 He also specified

255. Id. at 147–48. Even if the Kansas Historic Preservation Act does not expressly require that the governing body gives notice of hearing to preservation groups when it determines whether there is no feasible and prudent alternative to a proposed project, the court held that “it is incumbent upon the City to provide a full and fair hearing to all interested parties, with adequate notice and the opportunity to develop and present relevant information.” Id. at 148.


259. Reiter, 947 P.2d at 427.

260. Id. at 431.

261. Id. at 427.

262. Id.

263. Id. at 428.

that all possible plans had been considered to minimize harm to the
Perdue House, in particular the store would not face the historic prop-
erty, the existing line of evergreen trees would shield the store from the
historic property, and problems caused by noise, light, and litter asso-
ciated with the store had been reduced through proper design.265 After
a public hearing, the City of Beloit approved the rezoning, variance
and building permit applications and imposed several conditions on
Casey’s to minimize the harm to the historic property, such as the con-
struction of a six-foot wooden fence and the underground storage of
petroleum products.266 The Kansas Supreme Court ruled that the city’s
decisions were not arbitrary and capricious.267 The court stated that the
“relevant factors” to take into consideration were not necessarily lim-
ited to proposed alternatives, but also included factors to be considered
in any zoning change, such as the character of the neighborhood, the
gain to the public health, safety, and welfare, and the compliance with
the master plan.268 The court specified that the SHPO’s report was an-
other relevant factor, but refused to give credit to the SHPO’s deter-
mination on the ground that it used inappropriate standards and guide-
lines.269 The court regretted that the SHPO had not adopted rules and
regulations to implement the Kansas Historic Preservation Act.270 The
solution could have been different if the SHPO had already adopted its
regulations for the Review of Projects Affecting Historic Properties and
Their Environs.271 The court also admonished the SHPO for not seeking
the advice of the Historic Sites Board and Review, and for not holding
any public hearings on the suitability of the project.272 Finally, the court
held that the words “feasible and prudent alternative,” as used in the
Act, are to be given “their natural and ordinary meaning,” and that the
ultimate issue was “whether the governing body took a hard look at all
relevant factors and, using plain common sense, based its determination
upon the evidence.”273 Although construction of statutes in Kansas must

265. Id.
266. Id. at 430.
267. Id. at 439.
268. Id. at 436.
269. Reiter, 947 P.2d at 437–38. The court emphasized that the SHPO used a guide-
line only applicable to historic districts or historic neighborhoods. Id.
270. Id. at 437–38. “Guidance provided by the adoption of rules and regulations
implementing the provisions of K.S.A. 75–2724 would be invaluable to all interested
parties involved in any project in this state affecting historic property. However, no
such rules or regulations have to date been adopted.” Id. at 438.
272. Reiter, 947 P.2d at 437.
273. Id. at 438. The court refused to adopt the definition of “feasible and prudent
alternative” set out by the U.S. Supreme Court in Citizens to Preserve Overton Park
not be “inconsistent with the manifest intent of the legislature or repugnant to the context of the statute,” the court nevertheless concluded that historic preservation was only one factor among others to consider in determining whether there are “feasible and prudent alternatives” to a project. This is inconsistent with the purpose of the Kansas Historic Preservation Act that states that historic preservation in Kansas is a matter of “public policy,” and that the preservation and maintenance of Kansas’ historical resources “should be among the highest priorities of government.” However, the fact that the setting of the Perdue House had already been altered by the construction of a nearby fast food restaurant and car wash could explain the court’s decision.

2. A CONTROVERSIAL LEGISLATION

The Kansas Historic Preservation Act has generated much controversy. The protected perimeter of 500 feet in a city or 1,000 feet in rural areas is perceived as an arbitrary circle. Property rights advocates, the Kan-

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275. Kansas Supreme Court Weakens State Historic Preservation Act; Upholds Decision Allowing Construction of Convenience Store Adjacent to Historic House, 17 PRES. L. REP. 1048, 1055 (1998). Construing section 4(f) of the Department of Transportation Act, one court, citing Volpe, has clearly stated that historic preservation is a major factor to consider in assessing impacts of projects. See Stop H-3 Ass’n v. Coleman, 533 F.2d 434, 437–38 (9th Cir. 1976) (“In section 4(f), Congress has determined that historic preservation should be given major consideration... If there is no ‘feasible and prudent’ alternative, the Secretary may approve the project only if there has been ‘... all possible planning to minimize harm... ’ to the historic site... The requirements are stringent. Congress clearly reflected its intent that there shall no longer be reckless, ill-considered, wanton desecration of natural sites significantly related to our country’s heritage.”).
sas Association of Realtors being among them, have raised concerns about the automatic control of private properties located within the environs of a historic property. They complain about the absence of notification and right to be heard each time a building is listed or in the process of being listed on the National Register or the State Register. They also argue that the environs legislation discourages property owners from listing their homes out of fear of adversely affecting their neighbors. Another concern is the use of the Act as a tool to protect unlisted properties near listed ones or to control unwanted private or public projects. Finally, some property owners criticize the standards and guidelines for review as being vague and involving too much bureaucratic control. On the other hand, preservationists contend that the Kansas environs legislation has been very effective in the preservation of historic properties’ contextual settings. Acknowledging that the environs legislation raised several issues of concern, the Kansas State Historical Society announced in 2000 that it was willing to conduct focus group meetings across the state to listen to Kansans’ opinions about the effectiveness of the environs legislation. In a pilot survey conducted in November 2000, the KSHS invited twenty-four participants to the annual conference of the Kansas Museum Association to give their thoughts about the Kansas Historic Preservation Act. Sixty-seven percent said that property owners seeking to list

278. Id. See also State Reviewing Preservation Laws, ASSOCIATED PRESS NEWSWIRES, Oct. 7, 2002 (on file with author).
279. Ambler, supra note 18, at 14.
280. Ambler, supra note 18, at 14.
281. See, e.g., Pankratz, supra note 243, at 3; see also Ambler, supra note 18, at 14–15; Anderson, supra note 9, at 7 (discussing “[s]ince 1990, there have been many attempts to protect unlisted historic properties through the environs review process.”).
283. Ambler, supra note 18, at 15.
284. State Reviewing Preservation Laws, ASSOCIATED PRESS NEWSWIRES, Oct. 7, 2002 (on file with author) (quoting University of Kansas Professor Michael Shaw: “The environs legislation has been extremely beneficial . . . [w]ithout it, you end up with one historic property in a sea of parking lots.”); see also Davis, supra note 17, at 72 (citing SHPO Richard Pankratz: “[O]verall, the provisions were effective.”).
285. Ambler, supra note 18, at 14–15. “While the environs review is a well-intentioned process, the staff will be asking the focus groups if this part of the Kansas law serves greater preservation goals or if the public views it as punitive. Are the environs important and has the environs law been successful in Kansas? Do we need the law that allows the SHPO’s office to review projects within the environs of all listed properties? Does the idea of environs translate well to local interests? Should it be up to local governmental units to decide how far to go in the stringency of preservation rules and regulations?” Id. The survey was not completed because Cathy Ambler left the KSHS in 2000. See E-mail from Christy Davis, Assistant Division Director, Kansas State Historical Society (Apr. 7, 2003, 06:10 pm CET) (on file with author).
286. E-mail from Davis, supra note 285.
their homes should be required to notify neighbors within the environs of their intention, but only 33 percent said that neighbors within the environs should be allowed to prevent the listing of historic properties if they object to the restrictions imposed. The participants were split on the issue of using the Act as a tool to control unwanted projects within the environs. Forty-six percent said that property owners should not be allowed to list a property to control what their neighbors can do in the environs of their homes, and 42 percent said the property owners should be allowed to control environs through listing. However, 54 percent said that property owners should be allowed to list a property to prevent a convenience store from being built nearby. Finally, 46 percent said that the environs review should ultimately be a local decision.

From 1999 to 2002, 1,070 projects within the environs of National or State Register properties were reviewed in accordance with the Act. Of these projects, 1,049 were approved outright and twenty-one were determined to have an adverse effect. Thirteen of these adverse effect determinations were ultimately overturned.

On February 4, 2003, the House Committee on Agriculture introduced a bill that would have conditioned the listing of a property on the National or State Register to the owner’s consent, and that would have provided for the notification of property owners within 500 feet of any property to be nominated on the National or State Register. In addition, neighboring property owners would have been exempted from 1999 to 2002, 1,070 projects within the environs of National 

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287. E-mail from Christy Davis, Assistant Division Director, Kansas State Historical Society (Apr. 30, 2003, 09:37 am CET) (on file with author).
288. It is difficult to assess how many of these projects were approved because they ultimately complied with the environs review standards and guidelines.
289. See E-mail from Davis, supra note 287. During the same period, 126 projects directly affecting buildings listed on the National or State Register were reviewed. All of them were approved outright except two. The SHPO reviewed 490 environs projects out of 1,070 and determined 12 adverse effects. The other projects were reviewed by the following cities: Hutchinson (89 projects), Lawrence (169 projects), Leavenworth (11 projects), Salina (40 projects), and Wichita (271 projects). Hutchinson determined 0 adverse effects, Lawrence 3, Leavenworth 1, Salina 1, and Wichita 4. See E-mail from Davis, supra note 287. These cities have concluded an agreement with the SHPO to conduct environs review. The SHPO retains final authority. See infra Part IV.C.
290. H.R. 2168, 80th Leg., Reg. Sess. (Kan. 2003), available at http://www.kslegislature.org/bills/2004/2168.pdf (last visited Dec. 10, 2003). The bill would have required notification to neighboring property owners at least 30 days prior to any board meeting in which approval of a nomination is made. Id. The KSHS indicated that the passage of the bill would involve staff time to track down names and addresses of property owners and postage expenditures. It estimated that the notification requirement would cost it $25,000 to $30,000 per year. See Duane A. Goossen, Fiscal Note for HB 2168 by House Committee on Agriculture, available at http://www.kslegislature.org/fiscalnotes/2004/2168.html (last visited Dec. 20, 2003).
from environs review, provided that their projects are consistent with generally accepted agricultural practices. After a meeting with the KSHS, which indicated that the bill would be contrary to federal law, a proposed substitute for the bill was discussed during a hearing held on February 10, 2003. Surprisingly, the new bill provided for a total suppression of the Kansas environs legislation. During the hearing, several property owners and associations, including the Kansas Association for Realtors, testified against the environs legislation. The SHPO herself indicated that she would support the bill. Upon pressure of the Kansas Preservation Alliance, the House Committee on Agriculture voted unanimously on February 24, 2003, to postpone the issue until 2004. On March 21, 2003, the Senate Committee on Nat-

291. H.R. 2168, supra note 290.
294. Among these property owners was a Douglas County landowner whose property was adjacent to a battlefield being considered for nomination on the Kansas Register. Id.; see also Property Rights Fuel Battlefield Skirmish: Legislature Considers Changes to State’s Historic Sites Law, LAWRENCE J-WORLD, Feb. 13, 2003 (on file with author) (“Our main concern is that we want to be able to continue in our farming operation the way it is today, and even expand that operation if we so choose,’ Kermit Kalb told the House Agriculture Committee earlier this week. . . . ‘With the current environs regulations, this will require more paperwork and headaches for us to deal with if we do expand our operation,’ he said.”).
295. Bill Yanek, Director of Governmental Relations for the Kansas Association of Realtors, testified that the suppression of the environs provisions would relieve the KSHS of the burden of environs enforcement, and that Kansas was the only state that had an environs law. This statement is inaccurate. South Dakota passed an act similar to the Kansas environs legislation in 1987. See S.D. STAT. 1–19A-11.1 (1987). The other associations supporting the bill were the Kansas Livestock Association and the Kansas Farm Bureau. See Preservation of Historic Property Consistent with Farming and Ranching Operations: Hearing on H.R. 2168 Before the House Committee on Agriculture, 80th Leg., Reg. Sess. (Kan. 2003). On its web site, the Kansas Farm Bureau has listed the bill as a “key” bill and asked Kansans to support the bill seeking “to protect property rights of those adjacent to registered historic sites.” By entering its zip code, each Kansan has the opportunity to send a message to his or her representative. See http://capwiz.com/kfb/issues/bills/?bill=1780796 (last visited Dec. 20, 2003).
297. The Kansas Preservation Alliance is a private, nonprofit organization committed to further the work of historic preservation in Kansas. See Preservation Organization Serves Kansans, 1 KAN. PRES. (KSHS, Topeka, Kan.), Nov.-Dec. 1983, at 5.
298. E-mail from Sally Hatcher, President, Kansas Preservation Alliance (Apr. 1, 2003, 11:03 pm CET) (on file with author).
ural Resources proposed to exempt owners of agricultural land from the civil penalty of $25,000 during the discussion of a bill introduced by the House Committee on Environment. The Senate Committee of the Whole subsequently deleted this amendment.

C. Protection of Historic Properties’ Environs at the Local Level

Cities have only recently initiated protection of the environs of their historic properties. This has mainly been accomplished through carefully drafted preservation ordinances. Inspired by the Kansas Historic Preservation Act, more cities in Kansas conduct environs reviews.

On the basis of section 75–2724(e) of the Kansas Historic Preservation Act, several cities have entered into an agreement with the SHPO to conduct review of projects affecting historic properties included in the National Register or the Kansas Register or the environs of such properties. Three of these cities, Wichita, Lawrence, and Leavenworth, have incorporated into their preservation ordinances provisions dealing with the review of projects affecting listed properties’ environs. Compared with Leavenworth, whose environs review is lim-

301. Id.
302. Miller, supra note 5, at 1013.
303. Miller, supra note 5, at 1013 (“Probably the simplest method of protecting historic property from adverse development of adjacent property is through a carefully-drafted historic preservation ordinance. This can be accomplished by including the surrounding area in the designation itself or by creating distinct buffer areas accompanied by special design controls.”). For instance, the preservation ordinance of Augusta, Georgia, regulates new construction adjacent to a historic property. Miller, supra note 5, at 1014. In the same way, the preservation ordinance of Boston, Massachusetts, provides for the creation of protection areas designed to preserve the historic property and its environment. Miller, supra note 5, at 1014–15.
304. Kan. Stat. Ann. § 75–2724(e) (1993) (“(1) The state historic preservation officer may enter into an agreement authorizing a city or county to make recommendations or to perform any or all responsibilities of the state historic preservation officer under subsections (a), (b) and (c) if the state historic preservation officer determines that the city or county has enacted a comprehensive local historic preservation ordinance, established a local historic preservation board or commission and is actively engaged in a local historic preservation program.”).
305. The cities having concluded an agreement with the SHPO that provides for an environs review are Hutchinson, Lawrence, Leavenworth, Salina, and Wichita. See Board Asks Commission For Certified Local Government Program, Manhattan Free Press, Dec. 13, 2001, available at http://www.kansas.net/~freepress/12-13-01-1.html (last visited Dec. 20, 2003). The Historic Resources Board of the City of Manhattan has recommended that the environs review be not assumed by the city at this time, mainly because of fiscal constraints and a lack of staff trained in historic preservation issues. The responsibility for the environs review in Manhattan remains with the SHPO. Id.
In 1998, the City of Leavenworth, Kansas, enacted a preservation ordinance "to identify and promote the City’s prehistoric, historic and cultural heritage” so as to “enhance the attractiveness of the City, thereby promoting business and tourism." The ordinance regulates both private and public properties. In addition to the regulation of landmarks and historic districts, the ordinance provides for a review of projects within 300 feet of a National or Kansas registered property.

306. **Leavenworth, Kan., Historic Resources Preservation Ordinance** §§ 1-8 (1998 & Supp. 1999). See also E-mail from John P. Krueger, Director, Planning & Community Development (Apr. 21, 2003, 12:48 p.m. CET) (on file with author) ("Locally listed properties do not require an environs review."). After much debate, Leavenworth decided not to conduct review of projects within the environs of properties listed on the Leavenworth Landmarks Register because of the negative perception of the environs review, and the fact that the most significant of Leavenworth’s historic properties were already listed on the National Register. Id. As at April 21, 2003, Leavenworth had 74 historic properties listed on the Leavenworth Landmarks Register. Among these properties, 39 were located within a historic district listed on the National Register. Id.

309. Leavenworth was the first city established in Kansas after it was opened for settlement in 1854.
Beyond 300 feet but no further than 500 feet, projects are only reviewed if they are “intervisible”\(^\text{313}\) with a National or Kansas registered property. The purpose is to avoid reviewing projects that have absolutely no impact on a historic property.\(^\text{314}\) The “intervisibility” is determined “by standing at the main entrance of the registered property and looking in all directions for a distance of up to 500 feet.”\(^\text{315}\) The introduction of an intervisibility standard makes the Leavenworth ordinance very similar to the French environs legislation.\(^\text{316}\) In practice, projects on contributing properties\(^\text{317}\) or projects that may affect the historic character of the environs are reviewed, even if they are not intervisible with a registered property.\(^\text{318}\) Property owners that want to demolish, alter, or expand a property within 300 or 500 feet of a registered property must send an application to the Planning and Community Development Department.\(^\text{319}\) Upon receipt of an application, the Development Department and the Leavenworth Landmarks and Appeals Board\(^\text{320}\) determine if the proposed projects are appropriate.\(^\text{321}\) Depending on the effect of a project, a minor or major certificate of appropriateness may be issued.\(^\text{322}\) Normal property maintenance is not regulated.\(^\text{323}\) Minor

\(^{313}\) “Intervisible” is defined as “the condition of being able to see one point from another without physical, permanent obstruction.” See Leavenworth, Kan., Historic Resources Preservation Ordinance § 1.04. Brigadier General Stanley F. Cherrie, a military commander from the Kosovo expedition, composed this definition. See Letter from John P. Krueger, Director, Planning & Community Development (Apr. 11, 2003) (on file with author).

\(^{314}\) See Letter from Krueger, supra note 313.

\(^{315}\) Leavenworth, Kan., Historic Resources Preservation Ordinance § 1.04.

\(^{316}\) See supra Part III.A.

\(^{317}\) Contributing property is defined as a “building, site, structure or object which adds to the architectural qualities, historic association or archeological values of historic register property for which a property is significant because: (a) it was present during the pertinent historic time; (b) it possesses integrity and reflects its significant historic character or is capable of yielding important information about the pertinent historic period or (c) it independently meets the standards and criteria of this ordinance.” See Leavenworth, Kan., Historic Resources Preservation Ordinance § 1.04.

\(^{318}\) E-mail from Krueger, supra note 306.

\(^{319}\) Leavenworth, Kan., Historic Resources Preservation Ordinance § 5.

\(^{320}\) The Leavenworth Landmarks and Appeals Board is comprised of 7 Leavenworth residents appointed for 3 years by the mayor with concurrence of the city commission. The board must at least include one architect, one real estate professional, one planning commissioner, and one historian as well as members at large. See Leavenworth, Kan., Historic Resources Preservation Ordinance § 2.02.

\(^{321}\) Leavenworth, Kan., Historic Resources Preservation Ordinance § 5.

\(^{322}\) Leavenworth, Kan., Historic Resources Preservation Ordinance § 5.01.

\(^{323}\) Leavenworth, Kan., Historic Resources Preservation Ordinance § 5.08. Normal property maintenance “includes all work performed by a property owner which does not require a permit as prescribed by the City’s development regulations.” See Leavenworth, Kan., Historic Resources Preservation Ordinance § 1.04.
certificates must be issued for “demolition of non-contributing structures”\(^{324}\) and “exterior improvements to contributing properties” within the environs of registered properties, if the property owners demonstrate that the projects will have no “adverse effect” on the registered properties,\(^{325}\) and for “changes to signs, fences, public walkways, public streets, public alleys, public retaining walls and public utilities that do not contribute to the historic character” of a registered property.\(^{326}\) The Development Department issues these certificates within twenty-four hours of receipt.\(^{327}\) A report is sent monthly to the board and the city commission.\(^{328}\) If a project is considered inappropriate, the applicant may either comply with the Development Department’s requirements or appeal to the board.\(^{329}\) The alteration, expansion, or demolition of any contributing structure within the environs of a registered property requires a major certificate of appropriateness.\(^{330}\) Only the board may issue a major certificate of appropriateness.\(^{331}\) Upon receipt of an application, the Development Department notifies the applicant within twenty-four hours that a formal review is required.\(^{332}\) Notice of public hearing is published in the local newspaper at least twenty days prior to the hearing.\(^{333}\) In addition, property owners within an affected historic district are notified by regular mail.\(^{334}\) The board conducts the public hearing and determines if the major certificate of appropriateness can be issued within ten days.\(^{335}\)

\(^{324}\) Noncontributing structure is defined as a “building, site, structure or object that does not add to the architectural quality, historic association or archeological values for a landmark or historic district because it was not present historically, or, has been altered or changed which has destroyed its historic integrity and it is incapable of being restored, or, it cannot independently meet the criteria for landmark designation.” See LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 1.04.

\(^{325}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 5.02.

\(^{326}\) Id.

\(^{327}\) Id.

\(^{328}\) Id. The city commission is comprised of 5 elected members. See LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 1.04.

\(^{329}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 7.02.03; see also E-mail from John P. Knueger, Director, Planning & Community Development (Apr. 15, 2003, 10:57 am CET) (on file with author).

\(^{330}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 5.03; see also LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 7.02.

\(^{331}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 5.03.

\(^{332}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 7.02.01.

\(^{333}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 7.02.03.

\(^{334}\) Id.

\(^{335}\) LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 7.02.04.
mal meeting with the applicant before the hearing. It allows the applicant to modify his or her project so as to comply with the standards and guidelines prescribed by the board. If the board determines that it is inappropriate to issue a certificate, the appellant may appeal to the city commission within seven days. The city commission holds a regularly scheduled meeting and issues its decision to the applicant. All decisions by the city commission are final and binding between the parties unless appealed to, and overturned by, the district court. Any person violating any of the ordinance’s provisions is guilty of a misdemeanor and may face an imprisonment term up to one year and/or a fine of no more than $2,500.

From 1999 to 2002, the City of Leavenworth conducted eleven environs reviews and determined one adverse effect on a nearby historic property. This adverse effect determination was not overturned on appeal.

Recognizing in particular the importance of “[c]onserving and improving the value of property in and around designated landmarks, historic districts, and within the community,” the City of Lawrence, Kansas, adopted a preservation ordinance in 1988. If the ordinance typically provides for the designation of historic landmarks as well as the creation of historic districts, its originality comes from the preservation of historic landmarks and historic districts’ environs.

The City of Lawrence was founded after the Kansas-Nebraska Act opened the Kansas Territory for settlement in 1854. The city-building period started after the extension of the Kansas Pacific Railroad to Lawrence in 1864. The vast majority of the surviving buildings in

336. E-mail from Krueger, supra note 306.
337. LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 7.02.04.
338. LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE §§ 7.02.05–7.02.06.
339. LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 3.08.
340. LEAVENWORTH, KAN., HISTORIC RESOURCES PRESERVATION ORDINANCE § 3.07.
341. E-mail from Davis, supra note 287.
342. E-mail from Davis, supra note 287.
345. Nimz, supra note 344, at 71.
Lawrence was built from 1864 to 1873. The development of the city continued after 1945. Historic resources in Lawrence are mainly historic residences that range from Italianate villas and Queen Anne style mansions to bungalows and Prairie style houses.

The enactment of a historic preservation ordinance in Lawrence was advocated as early as 1973, before the State of Kansas passed its preservation Act. Until 1988, the preservation of Lawrence’s historic resources was mainly accomplished through zoning regulations, local building code, and listings on the National Register or the State Register. These preservation tools, although quite effective, have not been sufficient to fully preserve Lawrence’s historic resources. Interestingly, the diversity of architectural styles representing different historical periods has long been perceived as an obstacle to the implementation of historic districts in Lawrence. Propositions have ranged from the absence of controls of buildings and districts to the enactment of a landmark ordinance. The demolition of eight houses adjacent to Old West Lawrence, a district listed on the National Register, by a Lawrence bank in 1987 hastened the enactment of a preservation ordinance.

The City of Lawrence’s preservation ordinance applies to any structure.

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347. Nimz, supra note 344, at 71.
348. Nimz, supra note 344, at 15.
350. Id. at 26.
351. Id. at 26–27.
352. Nimz, supra note 344, at 46 (“The city’s historic resources are not so uniform in character or so concentrated that definition of a number of special districts is practical.”). See also Zingg, supra note 349, at 34 (commenting that the “[o]ld West Lawrence is not an area in which uniformity of treatment is desired. Indeed, much of its significance as a district lies in the fact that it is a beautiful illustration of architectural style in transition over a period of fifty or so years.”).
353. Nimz, supra note 344, at 46 (the “[i]mposition of strict controls to preserve buildings and districts in Lawrence does not appear to be an appropriate measure at this time. . . . Instead of controls, what is needed is specific information to guide and strengthen the ongoing process of conservation.”).
354. Zingg, supra note 349, at 34.
355. Robbins, supra note 343.
356. “Structure” is defined as “[a]nything constructed or erected, the use of which requires permanent or temporary location on or in the ground, including, but without limiting the generality of the foregoing: buildings, fences, gazebos, advertising signs, billboards, backstops for tennis courts, radio and television antennae, including supporting towers, and swimming pools.” See LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–107(C).
object,\textsuperscript{357} or site\textsuperscript{358} that directly contributes to the architectural and/or historical significance of a landmark or historic district and that is located, in whole or in part, within 250 feet of the boundaries of a landmark or historic district listed on the Lawrence Register of Historic Places.\textsuperscript{359} The Lawrence Historic Resources Commission (HRC) is responsible for implementing both the ordinance and the Kansas Historic Preservation Act.\textsuperscript{360} A certificate of appropriateness must be obtained prior to any new construction, alteration, removal, or demolition in whole or in part requiring a permit from the city that may affect the exterior architectural appearance of a property listed on the National, Kansas, and/or Lawrence Register or located within their environs.\textsuperscript{361} The HRC must review the projects on the basis of standards and design criteria defined in the ordinance.\textsuperscript{362} As an alternative to the certificate of appropriateness, any interested person may apply for a certificate of economic hardship.\textsuperscript{363} The HRC may allow a project to proceed if it determines that the denial of the application would deprive the owner of “reasonable use of, or reasonable economic return on, the property.”\textsuperscript{364}

\textsuperscript{357} “Object” is defined as “[t]hose physical items that have functional, aesthetic, cultural, historical or scientific value and are relatively small in scale and simply constructed. While an object may be, by nature or design, movable, it should be located in a specific setting or environment appropriate to its significant historic use, role or character. Objects include sculptures, monuments, street signs, fence posts, hitching posts, mileposts, boundary markers, statuary, and fountains.” See LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–106(C).

\textsuperscript{358} “Site” is defined as “[t]he location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined or vanished, where the location itself possesses historic, cultural or archeological value regardless of the value of any existing structure. Examples of sites include habitation sites, burial sites, village sites, hunting and fishing sites, ceremonial sites, battlefields, ruins of historic buildings and structures, campsites, designed landscapes, natural features, springs, and landscapes having cultural significance.” See LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–106(Y).


\textsuperscript{360} LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–201.

\textsuperscript{361} LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–501(B)(1)-(2). See also The Design Review Process for Historic Properties Lawrence, Kansas, supra note 359.

\textsuperscript{362} LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, §§ 22–505–22–506.

\textsuperscript{363} Id.

\textsuperscript{364} LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–603.
The HRC has forty-five days upon receipt of an application permit to issue or deny the certificate of appropriateness or the certificate of economic hardship. If the HRC denies either certificate, any person may appeal to the city commission within fifteen days of the determination’s notification date. The city commission must issue its decision within thirty days of receipt and must hold a public hearing. All decisions made by the city commission may be appealed to the district court.

It is unclear whether the city commission has the authority to determine if there are feasible and prudent alternatives, and if all possible planning has been done to minimize harm to a landmark or historic district listed on the Lawrence Register. The Lawrence preservation ordinance is silent on this point, but a brochure edited by the Lawrence/Douglas County Metropolitan Planning Office recognizes such authority of the city commission. It could be argued that the city commission can only rely on the standards and design criteria set forth in the ordinance, and that the agreement concluded with the SHPO, which provides for the determination of “feasible and prudent alternatives,” only applies to projects affecting properties included in the National Register or the State Register or their environs.

Several provisions of the Lawrence preservation ordinance significantly limit the scope of the environs review process. First, the ordinance states that the environs area “is not an extension of the boundaries of an historic district or landmark.” Accordingly, the “least stringent scrutiny” is applied to the review of projects within the environs of a

365. LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, §§ 22–503(C), 22–603.
366. LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, §§ 22–504(B), 22–604.
367. Id.
368. LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–205(A).
369. See The Design Review Process Brochure, supra note 359. Discussing the impact of a project within the environs of the Castle Tea Room, a property listed on the Lawrence Register, the Lawrence City Commission stated the following: “Under the state statute, the City Commission is required to hold a public hearing to determine if there are any ‘feasible or prudent alternatives’ and whether all possible planning is done to mitigate the effects on the listed property or its environs. While the HRC’s determination is narrowly focused with regards to following the guidelines for evaluation of projects within the environs, the City Commission’s focus is more broad and could consider all the relevant factors including design, technical, and economic issues as well as comprehensive planning issues.” See City Commission Meeting Minutes, Sept. 17, 2002, available at http://web.ci.lawrence.ks.us/pipermail/e-minutes/Week-of-Mon-20020916/000004.html (last visited Dec. 21, 2003).
370. See Board Asks Commission For Certified Local Government Program, supra note 305.
371. LAWRENCE, KAN., CONSERVATION OF HISTORIC RESOURCES CODE ch. 22, art. 1, § 22–105(E).
landmark or historic district. The presumption is that the certificate of appropriateness should be approved “unless the proposed construction or demolition would significantly encroach on, damage, or destroy the landmark or historic district.” In addition, there can be no interim controls on projects within the environs of a designated landmark or historic district, and projects that do not require a permit from the city may proceed without a certificate of appropriateness even if they affect the appearance of a property within the environs of a landmark or historic district. Finally, no criminal sanctions seem to apply in the case of noncompliance with the environs provisions of the ordinance. Only civil action is possible against the offender.

The result is that the environs of historic properties listed on the National and/or State Register are theoretically better protected than the environs of historic properties listed on the Lawrence Register. In practice, however, most of the properties listed on the Lawrence Register are also listed on the National and State Registers, which trigger the environs review set out in the Kansas Historic Preservation Act. For the properties that are only listed on the Lawrence Register, their environs can nevertheless be efficiently preserved if they are included within the protected perimeter of 500 feet generated by nearby National or State Register properties.

From 1999 to 2002, the City of Lawrence conducted 169 environs

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372. Id.; see also Lawrence, Kan., Conservation of Historic Resources Code ch. 22, art. 1, § 22–505(A)(4) (“The least stringent evaluation is applied to the environs area of a landmark or historic district.”).


376. Lawrence, Kan., Conservation of Historic Resources Code ch. 22, art. 1, § 22–1301 (“Any person who undertakes or causes an alteration, construction, demolition, or removal of any nominated or designated landmark or property within a nominated or designated historic district in violation of this Chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $500. Every day each such violation shall continue to exist shall constitute a separate violation.”). Projects affecting the environs of a landmark or historic district are not mentioned by section 22–1301.

377. Lawrence, Kan., Conservation of Historic Resources Code ch. 22, art. 1, § 22–1302 (“Any person who willfully constructs, reconstructs, alters, restores, renovates, relocates, stabilizes, repairs or demolishes any building, object, site, or structure in violation of this Chapter shall be required to return the building, object, site, or structure to its appearance and setting prior to the violation.”).

reviews and determined three adverse effects on nearby historic properties. Two of these adverse effect determinations were ultimately overturned.379

The controversial experimentation in Kansas in terms of preservation of historic properties’ environs illustrates the importance of information and education in historic preservation, especially when the property owners targeted are those living near historic properties. Although statistics show that the quasi-totality of projects within the environs of historic properties were approved outright, property rights advocates almost succeeded in repealing legislation that has the merit to closely associate historic preservation and the environment. The Kansas environs legislation is of course perfectible, in particular regarding the notification of neighboring property owners and the definition of appropriate protected perimeters around historic properties. A total suppression of this unique legislation, however, would represent a major defeat, not only for Kansans, but also for the preservation movement in general.

V. Lessons from the French and American Experiences in the Preservation of Historic Properties’ Environs

In 1981, Professor Robert E. Stipe wrote that there was much to be learned from the preservation experience of European countries.380 The controversy that France experienced with its environs legislation along with the recent legislative intervention to correct some of its imperfections should give some hints to Kansas and other American states as to the appropriate way to preserve the contextual setting of their historic resources.

The genius of the Kansas environs legislation was to link environmental protection and listing on the National or State Register. But the automatic imposition of a fixed protective perimeter (either 500 feet or 1,000 feet) around historic properties, if certainly appealing, is ultimately perceived as arbitrary and unable to thoroughly preserve historic properties’ environs.381 The creation of conservation areas at the local level appears more appropriate. A difficult question is the role that the state should continue to play in the conduct of environs review. In both Kansas and France the decision to protect the environs of historic properties came directly from the state through the legislative process.

379. E-mail from Davis, supra note 287.
381. See Ambler, supra note 18, at 15. The 500-meter radius in the French environs legislation has been similarly criticized.
If this was no surprise for the historically centralized France, it was rather unusual in the United States, where the protection of historic resources commonly takes place at the local level. The intervention of the SHPO was understandable when only governmental projects were targeted; however, its role in the control of private projects within the environs of a property listed on the National or State Register is more problematic and often negatively perceived. Even though the SHPO increasingly delegates its power locally to conduct environs review, the SHPO still retains final authority in the case of delegation to cities and counties.\(^{382}\) It is tempting to plead for a total delegation of powers to municipalities. A minimum amount of dialogue between the SHPO and local authorities seems, nevertheless, indispensable, if only for education and information of local authorities in historic preservation matters.

To ensure consistency in the preservation of historic properties’ environs within the state, the listing of a property on the National or State Register should still trigger a protective perimeter, but it is essential that this perimeter be ultimately tailored to take into account the specificity of local situations in terms of historic resources. As in France, each city should have the possibility to define perimeters that it considers suitable and workable in its jurisdiction, after consultation with the SHPO and the neighboring property owners. This could be easily done through carefully drafted preservation ordinances.

It is critical to maintain in the Kansas Historic Preservation Act a provision defining a protected perimeter. The idea is not to be specific but to define a starting point, inevitably subjective, in the environmental review of historic properties. For this reason, the actual definition of two protective perimeters, depending on whether the project is located in an urban or rural area,\(^{383}\) should be replaced by a unique perimeter, and the provision authorizing the SHPO to review and comment on projects located beyond the defined perimeters\(^{384}\) should be suppressed. The Act should still provide that notice must be given to the SHPO each time a project is located within the environs of a property listed on the National or State Register,\(^{385}\) but municipalities should have the right to delineate tailored conservation areas and to conduct their own environs review, provided that a consensus exists between the municipalities, the SHPO, and neighboring property owners as to the boundaries of the conservation areas. Section 75–2724(e) of the Act, which


\(^{384}\) Id.

\(^{385}\) Id.
authors the SHPO to delegate his or her power to conduct environs review to local authorities if certain conditions are met. Should be amended in this respect. The environs review should then be conducted objectively by individuals well trained in historic preservation issues, and on the basis of appropriate standards and guidelines. Cities should also decide whether tax incentives to neighboring property owners could ease the legitimate tension engendered by the environs legislation. However, the potential lack of public funds and staff trained in preservation issues could be an obstacle to the prompt implementation of such a program.

Another important issue is the degree of political control that local governing bodies should ultimately exercise. This issue, not new in historic preservation, has particular importance when the environs of historic properties are to be protected. The political review of preservation decisions issued by non-elected experts is a common feature of French and American preservation legislation. Because preservation decisions are “steeped in politics,” the intervention of elected officials is unavoidable. The difficulty is to shield political bodies from the influence of powerful local interests unsympathetic to preservation issues. Compared with France, where the political entity in charge of reviewing the Architecte des Bâtiments de France’s decisions must consult a specific heritage commission before issuing its decision, the Kansas environs legislation allows non-expert political bodies to ultimately decide whether the environs of a historic property are worth preserving. From 1999 to 2002, more than 50 percent of the adverse effect determinations were ultimately overturned by either the governor or city commissions. During 2002, all of the projects determined by the SHPO to have an adverse effect on historic properties’ environs were ultimately overturned on the ground that no feasible and prudent alternatives existed and that all possible planning to minimize harm had

387. Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473, 518 (1981) (“[T]he physical surroundings may have a political impact in themselves, and hence decisions about preserving structures necessarily carry political consequences for the community.”).
388. Id.
389. It is not unusual for members of city councils to receive “compensations” based on their votes on sensitive projects. For instance, five members of the Topeka City Council who voted for the removal of the Fleming Mansion (see supra note 247) received financial contributions from the developers as part of their reelection campaign. See Mike Hall, Campaign, Topeka Cap.-J., Mar. 27, 2003, at A1, available at 2003 WL 6857430.
390. E-mail from Christy Davis, Assistant Division Director, Kansas State Historical Society (Apr. 30, 2003) (on file with author).
been considered. The “feasible and prudent alternative” standard adopted by the Kansas legislature is not satisfactory. It imposes a heavy burden on opponents to environs projects and gives political bodies sufficient leeway to overlook preservation issues. In exercising their review, governing bodies should be required to consult experts in the field and to rely on the same standards and guidelines used by the SHPO and local preservation boards since 1998. The existence of a double standard of review has no logical basis and weakens the Kansas environs legislation. In Allen Realty, Inc. v. City of Lawrence, the Kansas Court of Appeals held that the “feasible and prudent alternative” standard was inserted in the Kansas Historic Preservation Act to prevent “possible hardship or injustice.” The legislative history is silent on this point. The only certainty is that projects adversely affecting historic properties’ environs are increasingly authorized in situations when the absence of feasible and prudent alternatives is clearly debatable. In 1977, the Kansas legislature solemnly declared that historic preservation “should be among the highest priorities of government.” As long as the Kansas Historic Preservation Act is not amended, the promise made by the Kansas legislature will not be fulfilled.

European countries also have much to learn from the preservation experience in the United States. The total lack of standards and guidelines in the French environs legislation contrasts with the efforts made in Kansas and other American states to balance rights of property owners and preservation interests. In 1996, Barbara G. Anderson, a professor at Kansas State University, proposed four philosophical concepts to guide the preservation of historic properties’ environs. Among

391. E-mail from Christy Davis, Assistant Division Director, Kansas State Historical Society (Apr. 30, 2003) (on file with author). These projects consisted of 4 demolitions, 1 removal, and the construction of a convenient store/McDonald’s within the environs of historic properties.
393. The plaintiffs’ attorney in the Fleming mansion case mentioned that the necessity for an opponent to a project to ultimately prove that there are feasible and prudent alternatives could be particularly burdensome, especially when you have to hire engineers, economists, or planning experts. Telephone Interview with Benoit M. J. Swinnen, Partner, Schroer Rice (Apr. 22, 2003).
394. See Allen Realty, 790 P.2d at 956.
395. Anderson, supra note 9. These four principles are the following:
1. “Environ review should protect the character of the area surrounding the listed property so that the listed property, whether it is a district or individually listed property, will continue to be perceived in a physical context that is consistent with the historic character present during the listed property’s period of significance.”
2. “Environ review should not attempt to return the environment of a listed property to an appearance it had at an earlier time.”
3. “Environ review should not attempt to create an appearance that meets current
these concepts, one thoroughly described the way to assess historic properties’ environs. Two years later, Kansas adopted standards and guidelines for the evaluation of projects in the environs of historic properties. At a time when French preservationists are struggling to implement the new environs legislation, these standards and guidelines present an undeniable interest.

Finally, the Kansas environs legislation could serve as inspiration for other American states willing to preserve the contextual setting of their historic resources. The preservation boards existing throughout the United States under local ordinances could perform environs review in addition to their traditional mission of reviewing projects on historic landmarks or within historic districts, provided that the state’s enabling act authorizes such review.

VI. Conclusion

The control of neighboring properties for the sole purpose of preserving historic properties’ environs is particularly sensitive, both in France and in the United States. It generates mixed reactions that are sometimes aggravated by a subtle dosage of disinformation. It also engenders fundamental questions, such as the relevance of protecting the environmental setting of historic properties, the role that states and local jurisdictions should play in the preservation of historic properties’ environs, or the rights of neighboring property owners.

Overall, the French and Kansas environs legislation have proved to be effective in the preservation of historic properties’ environs. The contextual setting of many historic properties has been preserved for the benefit of entire communities. This environmental approach to historic preservation should be pursued. Environmental settings of historic properties are often a key factor in their enjoyment. To allow the destruction of historic properties’ environs would ultimately render many preservation efforts meaningless.

4. “Environ review should not be used to protect unlisted historic properties in the environs of a listed property, thus material preservation of properties within the environs of a listed property is unnecessary.”

Anderson, supra note 9.