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## Aesthetic Zoning: Preservation of Historic Areas

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## COMMENTS

### AESTHETIC ZONING: PRESERVATION OF HISTORIC AREAS

*Ôtez de nos cœurs cet amour du beau et vous ôtez tout le charme de la vie.*<sup>1</sup>  
—ROUSSEAU, *Emile*.

History tells us that in every civilization the affluent members of society went to great expense to make their homes and properties as beautiful as possible. This was true of life in the United States until the industrial revolution, when American communities were changed substantially. Large numbers of people were forced into crowded and highly industrialized areas. Some of the larger communities became melting pots for people from many different nations, each bringing with them their own concepts of architecture and of attractiveness of construction. These concepts, as well as the need for the protection of health and morals, were subordinated to industrialization and functionalism.<sup>2</sup> Efforts were eventually made to improve the appearance of certain communities. But beauty, being relative, found different expressions among different people.

During the twentieth century most communities endeavored to improve and preserve community appearance along organized lines.<sup>3</sup> Many cities adopted restrictive ordinances or comprehensive zoning laws.<sup>4</sup> Other communities made efforts to preserve certain historic areas by enacting special legislative acts,<sup>5</sup> or by writing specific provisions into existing zoning laws.<sup>6</sup> This comment will discuss the attempts made by these various communities to preserve historic areas in the light of the law as it exists today.

#### THE PROBLEM

That a zoning law, enacted by a municipality pursuant to state enabling statutes, is a legitimate exercise of the police power was clearly recognized by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*<sup>7</sup> Zoning, therefore, finds its validity in the police power.<sup>8</sup> "But what are the police powers of a State?"<sup>9</sup> Chief Justice Taney described them as "nothing more or less than

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1. "Take from our hearts this love of the beautiful and you take away all the charm of life." (Editors' translation).

2. See generally 1 Metzenbaum, *Zoning* 1-11 (2d ed. 1955).

3. The community's awareness of this problem becomes apparent when we discover litigation testing the validity of legislation based on aesthetic considerations. Such litigation first began to appear in the early part of this century. Rodda, *The Accomplishment of Aesthetic Purpose Under the Police Power*, 27 So. Cal. L. Rev. 149 (1954). See also Bard, *Aesthetics and City Planning* 1-9 (Citizens Union Research Foundation 1957).

4. A perusal of the comprehensive plans of numerous cities will indicate that an important, if not primary, motive of these ordinances is to preserve the beauty of the city. See, e.g., Westport, Conn., *Town Plan of Development* (1959); Williamsburg, Va., *Comprehensive Plan* (1953).

5. E.g., New Orleans, La., *Vieux Carre Ordinance* 1453S, March 3, 1937, as amended, June 13, 1940.

6. Philadelphia, Pa., *Zoning & Planning Code* §§ 14-2001 to -2020 (1959).

7. 272 U.S. 365 (1926). See also *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920), where the validity of comprehensive zoning legislation was upheld.

8. See, e.g., *420 Broad Ave. Corp. v. Borough of Palisades Park*, 137 N.J.L. 527, 61 A.2d 23 (Sup. Ct. 1948).

9. *License Cases*, 46 U.S. (5 How.) 504, 582 (1847).

the powers of government inherent in every sovereignty to the extent of its dominions,"<sup>10</sup> limited only by the United States Constitution, particularly the due process clause of the fourteenth amendment.<sup>11</sup> However,

the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.<sup>12</sup>

In reality, then, the police powers are the sum total of a state's legislative power.

Despite the fact that the Supreme Court has described the police power in such broad terms, state courts have held that the state's police power may be exercised only to protect and promote the safety, health, morals and general welfare of a community.<sup>13</sup> In enumerating the legitimate objectives of the power, state courts have consistently excluded aesthetics, and have been hesitant to sustain any zoning ordinance having as its sole purpose the preservation of community appearance. Although it has never ruled squarely on the validity of aesthetic zoning,<sup>14</sup> the Supreme Court has suggested, in a broad dictum, that aesthetic considerations represent a public purpose and are therefore a valid consideration in exercising the power of eminent domain.<sup>15</sup>

#### *Billboard and Sign Restrictions*

The most common cases touching upon the matter of aesthetics were those involving signs and billboards. Typical of the judicial reaction to legislation curtailing such signs was *City of Passaic v. Paterson Bill Posting Co.*,<sup>16</sup> which held that an ordinance forbidding the construction of billboards within ten feet of the street could not be justified as an exercise of the police power. The court said:

no case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.<sup>17</sup>

It was on this type of reasoning that many of the earlier restrictions were struck down.<sup>18</sup>

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10. *Ibid.*

11. *Nebbia v. New York*, 291 U.S. 502 (1934).

12. *Id.* at 525.

13. *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 137 N.J.L. 81, 58 A.2d 104 (Sup. Ct. 1948), *rev'd*, 1 N.J. 509, 64 A.2d 347 (1949); *420 Broad Ave. Corp. v. Borough of Palisades Park*, 137 N.J.L. 527, 61 A.2d 23 (Sup. Ct. 1948).

14. See *Incorporated Village of Brookville v. Paulgene Realty Corp.*, 24 Misc. 2d 790, 200 N.Y.S.2d 126 (Sup. Ct. 1960). See also *Opinion of the Justices*, 234 Mass. 597, 127 N.E. 525 (1920).

15. *Berman v. Parker*, 348 U.S. 26 (1954).

16. 72 N.J.L. 285, 62 Atl. 267 (Ct. Err. & App. 1905).

17. *Id.* at 287, 62 Atl. at 268.

18. E.g., *Varney & Greene v. Williams*, 155 Cal. 318, 100 Pac. 867 (1909); *City of*

A change in judicial thinking was certain to come if only because of the sprawling growth of billboard advertising. Later cases, sustaining legislative restrictions on billboards and other highway advertising, found the municipalities to be protecting the safety, health, and morals, or promoting the general welfare of the citizens.<sup>19</sup> Billboards were declared a source of danger because they were poorly constructed or because they obscured the automobile driver's vision, or declared a menace to public morals because they provided a concealed place for the commission of immoral and criminal acts, or branded a threat to public health because the area behind the billboard became a dumping or collecting ground for debris.<sup>20</sup> In no case, however, did any court go so far as to sustain billboard zoning or billboard restrictions on the theory that they were objectionable purely because they constituted an eyesore.<sup>21</sup>

In several cases the matter of aesthetics, though not controlling, was found pertinent, but was to be considered only in conjunction with other factors.<sup>22</sup> The New York Court of Appeals put this reasoning in rather lyrical language:

Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency.<sup>23</sup>

In the famous Massachusetts Billboard Cases,<sup>24</sup> the court went further and said that if no other grounds existed to sustain an ordinance restricting outdoor advertising, it could be upheld on aesthetic grounds alone.<sup>25</sup> There is language in other cases which indicates that some courts might look more favorably upon aesthetic considerations.<sup>26</sup> Moreover, the President of the United States recently called upon the Congress for further legislation on the matter of billboard control.<sup>27</sup> The President's message was in the nature of a plea to preserve the natural beauty of the country.<sup>28</sup>

Chicago v. Gunning Sys., 214 Ill. 628, 73 N.E. 1035 (1905); People ex rel. M. Wineburgh Advertising Co. v. Murphy, 195 N.Y. 126, 88 N.E. 17 (1909).

19. Comment, 35 Marq. L. Rev. 365 (1952).

20. Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944).

21. Incorporated Village of Brookville v. Paulgene Realty Corp., 24 Misc. 2d 790, 260 N.Y.S.2d 126 (Sup. Ct. 1950).

22. General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 369 (1930). Accord, Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932).

23. Perlmutter v. Greene, supra note 22, at 327, 182 N.E. at 6.

24. General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935).

25. Id at 187, 193 N.E. at 816. Accord, Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940).

26. See, e.g., Town of Lexington v. Govonar, 295 Mass. 31, 3 N.E.2d 19 (1936); Commonwealth v. Trimmer, 34 Munic. Law Rep. 37 (Pa. 1942).

27. N.Y. Times, March 1, 1961, p. 16, col. 8. President Kennedy urged that § 122 of the Federal-Aid Highway Act of 1958, 72 Stat. 900, 23 U.S.C. § 122 (1958), be amended and then extended past its June 1961 expiration date. This section in effect provides incentive payments to various states complying with federal billboard control policy.

28. N.Y. Times, supra note 27.

*Other Restrictions*

While the billboard regulations have in many instances provided the test cases for restrictions based on aesthetic considerations, they are but a small part of a comprehensive zoning plan to beautify the community. With an eye on aesthetics, many communities have passed ordinances providing for minimum floor space requirements,<sup>29</sup> minimum cubic foot requirements,<sup>30</sup> and maximum height of buildings.<sup>31</sup> Frequently, ordinances require that buildings be set back a certain number of feet from the street line.<sup>32</sup> Some comprehensive zoning plans have prohibited the building of apartment houses in certain areas,<sup>33</sup> while others have set up separate zones for two family dwellings and single residences.<sup>34</sup> Most cities refuse to permit commercial buildings in specified residential areas,<sup>35</sup> while many others prohibit businesses from all but one or a few districts.<sup>36</sup> Several communities have even passed ordinances prohibiting the removal of topsoil.<sup>37</sup> In all of the enumerated instances, the ordinances met the test of a "public welfare" purpose.

More recently, several communities enacted ordinances which at first glance would appear to stand on aesthetic considerations or not stand at all. In *City of West Palm Beach v. State ex rel. Duffey*,<sup>38</sup> the ordinance provided that in every new instance the completed appearance of every new building or structure must substantially equal that of the adjacent building or structures in the subdivision in appearance, square foot area and height.<sup>39</sup> The court held the

29. In *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953), the court held such regulation valid and spoke favorably of aesthetic considerations.

30. In *Elizabeth Lake Estates v. Waterford Township*, 317 Mich. 359, 26 N.W.2d 788 (1947), the court held that the ordinance could not be sustained as a valid exercise of the police power, stating that its sole purpose was to preserve property values and that it was not reasonably related to the protection and promotion of public health and safety. The court assumed, of course, that "the conservation of property values is not by itself made a proper sole objective for the exercise of the police power under the statute." *Id.* at 369, 26 N.W.2d at 792. But see *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

31. *Welch v. Swasey*, 214 U.S. 91 (1909), where the statute limiting the height of buildings was held valid as a legitimate exercise of the police power in protecting the health and safety of the public. See also *Brougher v. Board of Pub. Works*, 107 Cal. App. 15, 290 Pac. 140 (Dist. Ct. App. 1930). But see *122 Main St. Corp. v. City of Brockton*, 323 Mass. 646, 84 N.E.2d 13 (1949).

32. *E.g.*, *Gorieb v. Fox*, 274 U.S. 603 (1927), where the ordinance was upheld because it promoted public safety and health.

33. *E.g.*, *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925).

34. *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

35. *E.g.*, *Ware v. City of Wichita*, 113 Kan. 153, 214 Pac. 99 (1923).

36. *E.g.*, *Delmar v. Town of Milford*, 19 Conn. Supp. 21, 109 A.2d 604 (C.P. 1954). The court upheld the zoning board's refusal to grant petitioner an application to run an automobile junkyard in a well cared for, heavily industrialized zone.

37. *E.g.*, *Krantz v. Town of Amherst*, 192 Misc. 912, 80 N.Y.S.2d 812 (Sup. Ct. 1948).

38. 158 Fla. 863, 30 So. 2d 491 (1947).

39. *Id.* at 864, 30 So. 2d at 492.

ordinance an unreasonable exercise of the police power and invalid for the further reason that it did not set sufficiently definite standards. In *State ex rel. Saveland Park Holding Corp. v. Wieland*,<sup>40</sup> however, a Wisconsin court found a similar ordinance<sup>41</sup> valid, stating:

the protection of property values is an objective which falls within the exercise of the police powers to promote the "general welfare," and . . . it is immaterial whether the ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives.<sup>42</sup>

The reasoning in *Wieland* has been followed, the regulations being generally sustained as a legitimate exercise of the police power serving to protect the market value of property.<sup>43</sup>

#### PRESENT STATUS OF THE LAW

The Supreme Court has, as noted, defined the police power of a state as the sum total of the state's legislative powers exercised within the constitutional limits of due process of law.<sup>44</sup> Under the Court's definition, a municipal zoning ordinance would be valid if it is not "unreasonable, arbitrary, or capricious," and if the means selected to carry it into effect "have a real and substantial relation to the object sought to be attained."<sup>45</sup> There appears to be no valid reason why a zoning ordinance based solely on aesthetic considerations could not satisfy the test of reasonableness.

Yet the question may well be academic because any zoning ordinance protecting the aesthetic appearance of the community necessarily protects the market value of the properties affected. Such statutes need not seek their justification in aesthetics alone. They can be sustained for economic reasons,<sup>46</sup> and no one would question the right of the state to protect the economy of its communities. There may be a necessary nexus between aesthetic considerations

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40. 269 Wis. 262, 69 N.W.2d 217 (1955).

41. The ordinance required that before a building permit could be issued, the village building board would have to find that the architectural appeal and functional plan of the proposed structure would not be so at variance with those of the other structures in the immediate neighborhood as to cause substantial depreciation of property values. *Id.* at 271, 69 N.W.2d at 222.

42. *Id.* at 270, 69 N.W.2d at 222. The court in *Wulfsohn v. Burden*, 241 N.Y. 233, 293, 150 N.E. 120, 122 (1925), stated that "the [police] power is not limited to regulations designed to promote public health, public morals or public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity." See also *Bacon v. Walker*, 204 U.S. 311 (1907); *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923); *Ayer v. Cram*, 242 Mass. 30, 136 N.E. 388 (1922); *City of St. Louis v. Friedman*, 216 S.W.2d 475 (Mo. 1948); *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952); *Niday v. City of Bellaire*, 251 S.W.2d 747 (Tex. Civ. App. 1952).

43. Comment, 39 Marq. L. Rev. 135 (1955).

44. See notes 9-12 *supra*.

45. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

46. See cases cited in note 42 *supra*.

and economic considerations. That this may be true is best illustrated by the many instances of zoning laws enacted for the purpose of preserving historic sites. To preserve or restore historic areas is to restore or preserve the appearance of the community. When historic areas are restored, there is also a double economic gain. Property values within the area itself and in surrounding areas are protected and increased; and in addition, the community's economy is augmented by the attraction of tourist trade. There have been many interesting instances of such zoning in recent years.

### ZONING OF HISTORIC AREAS

#### *New Orleans*

The City of New Orleans, Louisiana, located on the Mississippi River, 107 miles from the river's mouth,<sup>47</sup> was founded, circa 1718, by the French, and ceded to Spain in 1762.<sup>48</sup> Because its heritage is so steeped in French and Spanish tradition, New Orleans, in many respects, resembles more a continental European city than a typical city in the United States. For this reason it has become one of the great tourist meccas.<sup>49</sup>

The focal point of tourist interest in the city is the French quarter,<sup>50</sup> the Vieux Carre.<sup>51</sup> As the first step in an effort to preserve "the architectural and historical value" of this section, a provision of the state constitution was proposed and ratified by popular referendum in 1936.<sup>52</sup> This provision gave the Commission Council of the City of New Orleans the authority to create the Vieux Carre Commission for the purpose of preserving

such buildings in the Vieux Carre section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, and which buildings should be preserved for the benefit of the people of the City of New Orleans and the State of Louisiana. . . .<sup>53</sup>

The provision also declared that preservation of buildings in the section was a public purpose and authorized the City of New Orleans to acquire land by eminent domain to effect that purpose.<sup>54</sup> The amendment expressly recited that the commission would function "for the public welfare in order that the quaint and distinctive character of the Vieux Carre section . . . may not be seriously affected. . . ."<sup>55</sup> A "public welfare" recital is quite common in statutes and

47. 16 Encyclopedia Britannica 321 (1954).

48. *Id.* at 323.

49. Louisiana was one of the first states to enact a statute authorizing comprehensive zoning. The zoning ordinance of New Orleans, enacted under this statute, was upheld in *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923).

50. 16 Encyclopedia Britannica 321 (1954).

51. New Orleans, La., Vieux Carre Ordinance 14538, § 2, March 3, 1957, defines the physical boundaries of this section.

52. Letter from New Orleans, La., City Planner to Fordham Law Review, March 1, 1961.

53. La. Const. art. 14, § 22A.

54. *Ibid.*

55. *Ibid.*

ordinances designed to preserve historic areas.<sup>56</sup> Apparently, it is done to avoid judicial scrutiny.

The Commission Council of the City of New Orleans in turn adopted the Vieux Carre Ordinance,<sup>57</sup> creating the nine member Vieux Carre Commission. The ordinance required issuance of a permit "before the commencement of any work in the erection of any new building, or repairing or demolishing of any existing building, any portion of which is to front on any public street or alley in the Vieux Carre. . . ."<sup>58</sup> The application for the permit has to be accompanied by the full plans and specifications of the exterior "so far as they relate to the proposed appearance, color, texture or materials and architectural design. . . ."<sup>59</sup> The commission is required to make its findings and recommendations and send the same to the City Engineer who is empowered to decide whether or not a permit should issue.<sup>60</sup> The City Engineer and any authorized agent or officer of the commission have the authority to halt any work attempted to be done without or in violation of the permit and they have the power to prosecute those who violate the ordinance.<sup>61</sup>

The ordinance further provides that no sign shall be erected in the Vieux Carre without a permit.<sup>62</sup> Subsequent sections state that signs must be for bona fide businesses,<sup>63</sup> must not project more than a certain number of inches,<sup>64</sup> must not have more than a prescribed area,<sup>65</sup> and must not be placed "in any manner whatsoever so as to disfigure or conceal any architectural features or details of any building."<sup>66</sup>

56. E.g., Mass. Acts & Resolves 1955, ch. 601.

57. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, June 13, 1940.

58. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, § 3, June 13, 1940.

59. *Ibid.*

60. If the applicant refuses to accede to the changes recommended by the commission, or if the commission disapproves of any application, or if the commission's recommendations are not in accord with the ordinance, the City Engineer shall forward the application to the Commission Council of New Orleans for a full hearing of all interested parties. *Ibid.*

61. *Ibid.*

62. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, § 6, June 13, 1940. This section does not apply to theaters changing the features on already approved frames or to commercial establishments changing their wares and prices on previously approved signs.

63. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, § 7, June 13, 1940.

64. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, § 9, June 13, 1940.

65. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, § 10, June 13, 1940.

66. New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended by Ordinance 15085, § 12, June 13, 1940. Section 12 of the ordinance regulates illuminating signs.



Several cases have sustained the Vieux Carre Ordinance, but particularly noteworthy was *City of New Orleans v. Levy*,<sup>67</sup> which said:

Perhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in Vieux Carre Commission Ordinance. But, as pointed out in the *Pergament* case, this legislation is in the interest of and beneficial to inhabitants of New Orleans generally, the preserving of the Vieux Carre section being not only for its sentimental value but also for its commercial value, and hence it constitutes a valid exercise of the police power.<sup>68</sup>

The Louisiana court has not attempted to base its decisions on aesthetic considerations but has relied on solidly established economic grounds.

#### *Nantucket*

The island of Nantucket, located off the coast of Cape Cod, Massachusetts, has a year round population of approximately 4,000 persons but attracts over 125,000 visitors in the months of June, July, August and September.<sup>69</sup>

It is a town which largely needs no restoration; an island world serving as a perfect example of how its 18th and 19th century forebears lived in their day in the "Maritime Worlds" of our country. . . .<sup>70</sup>

Most of the businesses in the town are conducted by residents either from their homes or from shops in the rear of their property.<sup>71</sup> Nantucket has never had a zoning ordinance.<sup>72</sup> However, in 1955, in order to guarantee the preservation of Nantucket's antiquity, the Massachusetts Legislature passed an act "establishing an historic districts commission . . . defining its powers and duties, and establishing historic districts in the Town of Nantucket."<sup>73</sup> In February 1956, the act was unanimously accepted by the voters of the town.<sup>74</sup> The Massachusetts act is similar to the provision in the Louisiana Constitution<sup>75</sup> in that there is a recital that the "act is to promote the general welfare."<sup>76</sup> But unlike the Louisiana enactment, it states that the public welfare of Nantucket depends to a large extent on the tourist trade.<sup>77</sup>

At the present time, no building or structure can be "erected, reconstructed, altered, restored<sup>78</sup> or razed"<sup>79</sup> until an application for a permit to do so is

67. 223 La. 14, 64 So. 2d 798 (1953). See also *City of New Orleans v. Impastato*, 198 La. 206, 3 So. 2d 559 (1941); *City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941).

68. 223 La. at 28-29, 64 So. 2d at 802-03 (1953).

69. Nantucket, Mass., Historic Dists. Comm'n Rep. (1958).

70. *Ibid.*

71. Historic Districts Commission Memorandum re Establishing the Nantucket Historic Districts Commission (undated post 1957 memorandum).

72. *Ibid.* Nantucket is similarly void of a building code.

73. Mass. Acts & Resolves 1955, ch. 601.

74. Nantucket, Mass., Historic Dists. Comm'n Rep. (1960).

75. La. Const. art. 14, § 22A.

76. Mass. Acts & Resolves 1955, ch. 601, § 1.

77. *Ibid.*

78. Mass. Acts & Resolves 1955, ch. 601, § 4.

79. Mass. Acts & Resolves 1955, ch. 601, § 5.

approved by the Historic Districts Commission. The commission has the function and duty "to pass upon the appropriateness of exterior architectural features of buildings and structures . . . wherever such exterior features are subject to public view from a public street or way."<sup>80</sup> However, unlike the New Orleans ordinance, the legislature has expressly declared that the commission cannot consider the relative size of buildings, detailed designs, interior arrangement, nor any feature of a structure not subject to public view.<sup>81</sup> A person violating the act is guilty of a misdemeanor,<sup>82</sup> but has leave to appeal to the board of selectmen,<sup>83</sup> and eventually "to the superior court sitting in equity."<sup>84</sup>

The constitutionality of this statute has never been in doubt. Immediately before its enactment the Justices of the Supreme Judicial Court of Massachusetts, in an advisory opinion given to the legislature, found the proposed statute constitutional.<sup>85</sup> The court noted that the act contained sufficient standards, was limited to exterior features, and was necessary to insure that Nantucket will continue to exist as an attraction for tourists.

Soon after the Nantucket act was passed, the legislature enacted special acts for the Beacon Hill section of Boston, Lexington, Falmouth, Salem, Concord and other cities and towns in the Commonwealth.<sup>86</sup> In 1960, however, the legislature passed a state enabling act,<sup>87</sup> authorizing any municipality to adopt historic district ordinances without the need of special legislative permission. The enabling act provides that in passing upon the issue of appropriateness, the commissions shall consider the relation of the proposed exterior features to similar features of buildings and structures in the immediate surroundings, a provision not found in the Nantucket statute.<sup>88</sup>

### *Williamsburg*

The project undertaken in Williamsburg, Virginia, differs from that undertaken in other municipalities in two important aspects: it was a restoration project rather than one of preservation, and the restoration was conducted by private groups rather than by the municipality.

Eighteenth century "colonial Williamsburg" has been accurately restored, mainly, if not entirely, through the gifts of John D. Rockefeller, Jr.<sup>89</sup> The

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80. Mass. Acts & Resolves 1955, ch. 601, § 8a. Section 6 of the act regulates the erection of occupational signs.

81. Mass. Acts & Resolves 1955, ch. 601, § 8c.

82. Mass. Acts & Resolves 1955, ch. 601, § 9.

83. Mass. Acts & Resolves 1955, ch. 601, § 10.

84. Mass. Acts & Resolves 1955, ch. 601, § 11.

85. Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955).

86. Nantucket, Mass., Historic Dists. Comm'n Rep. (1960).

87. Mass. Gen. Laws Ann. ch. 40C (1961).

88. Mass. Gen. Laws Ann. ch. 40C § 6 (1961). It is interesting to note that a similar provision was declared invalid by the Florida court in *City of West Palm Beach v. State ex rel. Duffey*, 158 Fla. 863, 30 So. 2d 491 (1947), but upheld by the Wisconsin court in *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

89. Mr. Rockefeller through gifts and trusts donated some forty-eight million dollars to the restoration project. Colonial Williamsburg, President's Rep. 24 (1951).

acquisition was made either in the name of a private individual or in the name of the Williamsburg Holding Corporation.<sup>90</sup> At the present time, all the land so purchased as part of the historical area is held by a nonprofit corporation, Colonial Williamsburg, Inc.<sup>91</sup> Williamsburg Restoration, Inc., a profit-making corporation, owns and operates or leases certain properties adjacent to the historic area.<sup>92</sup> These properties are used, in most instances, to accommodate the many tourists who visit Williamsburg each year to see the restored area. Both of these corporations pay real estate and business license taxes to the City of Williamsburg, and the business corporation is taxed like any other business enterprise.<sup>93</sup> Many of the buildings were completely rebuilt or restored to their original form through major alteration. Historical accuracy has been achieved so that at the present time "Colonial Williamsburg" represents, as far as possible, an exact replica of the eighteenth century city.

The restored area represents approximately eight and one half per cent of the total area of the City of Williamsburg.<sup>94</sup> As privately owned land, it is subject to the zoning provisions of Williamsburg, and as such it is one of the eight zoning districts within the city.<sup>95</sup> Since 1953, the City of Williamsburg has had a comprehensive city plan which was prepared by independent city planners.<sup>96</sup> A considerable portion of the plan is concerned with the city's appearance and deals with such aesthetic considerations as the planting of street trees,<sup>97</sup> the removal of overhead poles and wires,<sup>98</sup> street appurtenances,<sup>99</sup> the entrances to the city,<sup>100</sup> and the appearance of residential,<sup>101</sup> commercial<sup>102</sup> and recreational areas.<sup>103</sup> As to some of these projects, work has been done,<sup>104</sup> but as to many of the others, the plans are "long range."<sup>105</sup>

#### *Other Cities*

As of 1958 there were only twenty cities and towns in the United States and its possessions that regulated historic areas.<sup>106</sup> However, since that time, at least

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90. *Ibid.*

91. Colonial Williamsburg, President's Rep. (1959).

92. *Ibid.*

93. *Id.* at 47.

94. City of Williamsburg, Va., Zoning Map.

95. *Ibid.*

96. Letter from Chairman of Planning Commission to the Mayor and City Council, Sept. 1, 1953, in City of Williamsburg, Va., Comprehensive Plan (1953).

97. City of Williamsburg, Va., Comprehensive Plan 127-28 (1953) [hereinafter cited as Comprehensive Plan].

98. Comprehensive Plan 128.

99. Comprehensive Plan 129.

100. Comprehensive Plan 133.

101. Comprehensive Plan 130-32.

102. Comprehensive Plan 133-34.

103. Comprehensive Plan 132-33.

104. E.g., as part of the restoration program, the poles and wires were removed from one street and placed underground, at a cost of \$520,000. Comprehensive Plan 128-29.

105. Comprehensive Plan 127-28.

106. Nantucket, Mass., Historic Dists. Comm'n Rep. (1958).

five municipalities in Massachusetts alone have enacted such regulations.<sup>107</sup>

Philadelphia has adopted a code provision "to preserve the historical character of the Independence Hall Structures, Independence Hall, and Independence National Historic Park. . . ."<sup>108</sup> In addition, the Philadelphia Code contains a more general provision creating a "historical commission," the function of which is to assist the Department of Public Property in preparing a list of buildings with historical significance which cannot be demolished or altered without a license from the appropriate department.<sup>109</sup> It should be noted that the Philadelphia ordinance differs from that of Nantucket and New Orleans in that it does not create a historic district but merely endeavors to preserve certain buildings of historical value.

Los Angeles has also sought to preserve its historic centers. In an effort to preserve "the birthplace of Los Angeles" with its Spanish flavor, the Pueblo de Los Angeles State Historical Monument was established.<sup>110</sup> The creation of this district came about largely through the efforts of individual citizens and a nonprofit corporation which promoted the idea. As a result, California appropriated a sum of money, which was matched by the city and county combined, to create a state historical monument.<sup>111</sup> The monument includes numerous historical buildings and an entire street.<sup>112</sup>

The Beacon Hill District in the City of Boston was established in an effort to preserve some of the tradition of one of the oldest cities in the United States.<sup>113</sup> The procedural requirements of the Boston act are similar to those of the Nantucket act.<sup>114</sup> Unlike Nantucket, however, Boston has a zoning code and originally there was some question as to whether the preservation should be done through the code. It appears that the decision to proceed through a special act of the legislature was due, to a large extent, to the uncertainty of the law as to the validity of "aesthetic zoning."<sup>115</sup> As part of its urban renewal program, Boston is also considering the possibility of preserving other areas, such as its "Back Bay," but some questions remain as to whether these areas can be considered historic.<sup>116</sup>

107. Nantucket, Mass., Historic Dists. Comm'n Rep. (1960).

108. Philadelphia, Pa., Zoning and Planning Code § 14-2005 (1959).

109. Philadelphia, Pa., Zoning and Planning Code § 14-2003 (1959).

110. Letter from Los Angeles, Cal., City Planning Architect to the Fordham Law Review, March 15, 1961.

111. Los Angeles, Cal., Accomplishments of City Planning Commission 6 (1954).

112. Before the creation of this historic district, it was held in *Simpson v. City of Los Angeles*, 4 Cal. 2d 60, 47 P.2d 474 (1935), that a city ordinance which closed Olvera Street to vehicular traffic in order to convert it into a tourist attraction was valid. The court, in sustaining the ordinance, refused to look at its purpose, thereby reversing a lower court decision which held the ordinance invalid because its actual purpose was aesthetic.

113. Mass. Acts & Resolves 1955, ch. 616, as amended by Acts & Resolves 1958, chs. 314-15.

114. Mass. Acts & Resolves, 1955, ch. 601.

115. Letter from Director of Planning of Boston Redevelopment Authority to Mayer's Office, Boston, Mass., Feb. 28, 1961.

116. *Ibid.*