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Historic District Zoning: A Texas Overview.

Margaret Corning Boldrick

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COMMENTS

Historic District Zoning: A Texas Overview

Margaret Corning Boldrick

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I. INTRODUCTION

America's concern for its cultural heritage has been late in developing.¹ In the immediate past, hundreds of structures important to the history of this country were leveled to make room for progress.² Fortunately, concerned citizens began to realize that wholesale destruction of the existing "built" environment resulted in an irreplaceable loss.³ After tentative be-

1. See J. MORRISON, *HISTORIC PRESERVATION LAW* 1-2 (1965).

2. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 (1978). Of the 12,000 buildings listed in the federal government's Historic American Building Survey in 1933, over half have since been destroyed. See *id.* at 108, n.2.

3. See Gray, *A Guide to Historic Preservation for the California Practitioner [sic]*, 21 *SANTA CLARA L. REV.* 613, 614-15 (1981). Recognition of historic preservation goals has

ginnings, the preservation movement quickly gained momentum so that, today, historic preservation has a well-established place in contemporary society.⁴

Historic preservation involves both historic public property, owned and maintained by a government entity, and private property of historic value, which involves varying degrees of government regulation.⁵ Early private preservation efforts focused on the historic landmark, a building usually related to a significant historic person or event.⁶ Interest next expanded to include areas around historic sites, or areas of general historic and architectural value.⁷ Many of these areas were designated historic districts, with the property included subject to numerous government regulations affecting the appearance of the area in order to protect its architectural and historical integrity.⁸

The purpose of this comment is to arrive at some understanding of historic districts in Texas—how they operate and affect the rights of property owners within their boundaries. With this knowledge, even though it is only a beginning,⁹ the lawyer may be better prepared to aid both the admirable cause of historic preservation and the client who comes in contact with property in a historic district.

II. ZONING LAW

A. Development

An understanding of the legal aspects of historic districts requires a look at the general law of zoning, since the preservation of historic dis-

grown appreciably in both the public and private sectors, with the result that "preservation is coming of age, and perhaps none too soon." *Id.* at 614-15.

4. See Beckwith, *Preservation Law 1976-1980: Faction, Property Rights, and Ideology*, 11 N.C. CENT. L. REV. 276, 276 (1980); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 473 (1981).

5. See J. MORRISON, *HISTORIC PRESERVATION LAW* 3 (1965). See generally Comment, *Public Historic Preservation in Texas*, 49 TEX. L. REV. 267, 267 (1971) (traced phases of public preservation movement in Texas). Governments acquire property for preservation purposes through the exercise of the power of eminent domain, i.e., the right to take private property through just compensation. See J. MORRISON, *HISTORIC PRESERVATION LAW* 20 (1965). Such acquisition becomes prohibitively expensive, so states have resorted to regulation under the police power of historic property still privately owned. See *id.* at 21.

6. See 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 9.69, at 260 (2d ed. 1976).

7. See *id.*

8. See *id.*

9. Because of the recent proliferation of written materials on historic preservation, including treatises, periodical articles, both legal or otherwise, federal, state, and municipal governmental pamphlets, and publications of private organizations, the material cited in this comment is necessarily representative rather than exhaustive.

tricts derives from zoning law.¹⁰ Zoning, or land use regulation, realized importance after industrialization caused large urban areas to develop.¹¹ The first comprehensive zoning measure, adopted by New York City in 1916, stimulated other efforts nationally so that, by 1925, nearly 500 communities had enacted zoning ordinances.¹² Many state courts found zoning laws constitutional,¹³ but a minority, including Texas, held that zoning violated due process.¹⁴ The United States Supreme Court established the validity of zoning legislation in 1926, in *Village of Euclid v. Ambler Realty Co.*¹⁵ The Court determined that the Euclid zoning ordinance, and others similar, bore a "substantial relation to the public health, safety, morals, or general welfare"¹⁶ and thus was a legitimate exercise of the state's police power.¹⁷

B. *The Police Power and Zoning*

An earlier Supreme Court case¹⁸ declared that the police power, previously defined as a concept of governmental power inherent in the idea of sovereignty,¹⁹ extended to "all the great public needs."²⁰ Although the application of the police power must be reasonable and not arbitrary,²¹ if

10. See Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19, 19 (1980).

11. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1434 (1978).

12. See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1434 (1978).

13. See, e.g., *City of Aurora v. Burns*, 149 N.E. 784, 789 (Ill. 1925) (zoning ordinance not "unreasonable exercise of power"); *Ware v. City of Wichita*, 214 P. 99, 102 (Kan. 1923) (ordinance related to "health, safety, morals, and general welfare of the community"); *State ex rel. Civello v. City of New Orleans*, 97 So. 440, 444 (La. 1923) (ordinance not arbitrary in application to property owners).

14. See, e.g., *Goldman v. Crowther*, 128 A. 50, 60 (Md. 1925) (ordinance void for unconstitutional deprivation of property rights); *State ex rel. Better Built Home & Mortgage Co. v. Davis*, 259 S.W. 80, 81 (Mo. 1924) (zoning ordinance was invalid restriction of property use); *Spann v. City of Dallas*, 111 Tex. 350, 359, 235 S.W. 513, 516 (1921) (ordinance's purpose not related to police power); see also *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1435 (1978) (discussed majority and minority attitudes toward zoning).

15. 272 U.S. 365 (1926).

16. *Id.* at 395.

17. See *id.* at 387.

18. See *Noble State Bank v. Haskell*, 219 U.S. 104 (1911).

19. See *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 583 (1847).

20. *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). According to Justice Holmes, the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Id.* at 111.

21. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (standard of reasonableness was only criterion for police power); *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (Court would not set aside ordinance unless arbitrary or irrational); *Village*

the use of the police power meets these requirements, then the power's broad scope is seldom limited.²² Consequently, a zoning ordinance that permits a valid application of the police power is constitutional, even though it prevents the most advantageous use of the property.²³ If a regulation extends too far, however, it can result in a "taking" of property without compensation, violating the fifth and fourteenth amendments²⁴ and requiring remuneration to the deprived property owner.²⁵ Since the line between the use and the abuse of the police power is often hard to determine, many challenges to zoning ordinances involve the "taking" issue.²⁶

C. Changing Attitudes Toward Aesthetic Zoning

For decades, the use of the police power in zoning ordinances related strictly to the standards of "public health, safety, morals, or general welfare"²⁷ delineated in *Euclid*.²⁸ Most courts held that zoning aims which

of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (ordinance was unconstitutional only if "clearly arbitrary and unreasonable").

22. See *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915). In upholding a city ordinance requiring the demolition of a brick kiln, the Supreme Court stated that the police power was "one of the most essential powers of government—one that is the least limitable." *Id.* at 410.

23. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9-10 (1974) (valid zoning ordinance had impact on property value); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (police power's valid exercise did not render zoning ordinance unconstitutional in spite of restrictions on property use); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946) (many regulations diminished property values).

24. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (excessive regulation of property resulted in taking). The fifth amendment reads in part, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The fourteenth amendment provides in part, "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

25. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (question whether taking required compensation determined on case by case basis); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (standard of "reasonableness" used to determine whether regulation resulted in taking requiring compensation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (excessive regulation of property resulted in taking).

26. See, e.g., *Trust of Three v. City of Emeryville*, 430 F. Supp. 833, 835 (N.D. Cal. 1977) (plaintiff asserted that application of land use regulation "resulted in a de facto taking"); *Hotel Coamo Springs, Inc. v. Hernandez Colón*, 426 F. Supp. 664, 667 (D.P.R. 1976) (plaintiff claimed regulation made land useless "without just compensation"); *Pope v. City of Atlanta*, 418 F. Supp. 665, 668 (N.D. Ga. 1976) (plaintiff challenged zoning prohibition of tennis court on property as "a taking of private property for public purposes without just compensation"), *aff'd*, 575 F.2d 298 (5th Cir. 1978).

27. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

28. See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1443 (1978).

expanded the police power beyond these limits were impermissible.²⁹ In particular, courts disallowed zoning based on aesthetic considerations alone.³⁰ Following the Supreme Court's decision in *Berman v. Parker*,³¹ however, this attitude began to change.³² Not strictly related to zoning issues, *Berman* dealt with the government's power of eminent domain in land redevelopment in the District of Columbia;³³ nevertheless, courts and commentators frequently cited Justice Douglas' dictum, that "it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled,"³⁴ to justify aesthetic considerations in zoning.³⁵ A subsequent Supreme Court case, *Village of Belle*

29. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (zoning ordinance did not promote "health, safety, convenience and general welfare"); *LaSalle Nat'l Bank v. Chicago*, 125 N.E.2d 609, 612 (Ill. 1955) (police power not unlimited, must relate reasonably to "public health, safety, morals, or general welfare"); *Montgomery County Council v. Scrimgeour*, 127 A.2d 528, 531 (Md. 1956) (purpose of zoning must be to exercise police power and not to enhance value of property).

30. See, e.g., *City of Jackson v. Bridges*, 139 So. 2d 660, 664 (Miss. 1962) ("aesthetic considerations alone do not justify zoning regulations"); *State v. Henze*, 342 S.W.2d 261, 265 (Mo. Ct. App. 1961) (city had no right to impose aesthetic standards); *City of Defiance v. Killion*, 186 N.E.2d 634, 636 (Ohio Ct. App. 1962) (ordinance based solely on aesthetic grounds unconstitutional). For an informative discussion of aesthetic considerations in zoning, see J. MORRISON, *HISTORIC PRESERVATION LAW* 21-34 (1965). But see 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 15.01, at 15-4 (4th ed. 1982) (historic district zoning not synonymous with zoning based on aesthetic considerations); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 484 n.52 (1981) (disagreed with Morrison and distinguished historic preservation cases from cases involving "mere aesthetics").

31. 348 U.S. 26 (1954).

32. See, e.g., *Eskind v. City of Vero Beach*, 159 So. 2d 209, 211 (Fla. 1963) (aesthetic considerations important in planning); *Wright v. Michaud*, 200 A.2d 543, 548 (Me. 1964) (aesthetic considerations entered into zoning plans, citing *Berman*); *Lenci v. City of Seattle*, 388 P.2d 926, 934 (Wash. 1964) (aesthetic considerations may play part along with other factors of police power).

33. See *Berman v. Parker*, 348 U.S. 26, 28 (1954).

34. *Id.* at 33.

35. See, e.g., *Maher v. City of New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975) (quoting *Berman v. Parker*, cert. denied, 426 U.S. 905 (1976); *Wright v. Michaud*, 200 A.2d 543, 548 (Me. 1964) (court quoted *Berman*'s language to show expanded police power's application to zoning); *People v. Stover*, 191 N.E.2d 272, 275, 240 N.Y.S.2d 734, 738 (1963) (opinion quoted Douglas' words in *Berman*), cert. dismissed, 375 U.S. 42 (1963); see also Brace, *Comment: Urban Aesthetics and the Courts—A Review of Current Judicial Opinions on Community Appearance*, 12 URB. LAW. 151, 151-53 (1980) (quoted *Berman*, discussed *Penn Central* case); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 486 (1981) (quoted *Berman*, noting its great influence); Comment, *Historic Preservation and the Zoning Power: A Mississippi Perspective*, 50 MISS. L.J. 533, 545 n.66 (1979) (quoted Douglas' "spiritual" words in *Berman*).

Terre v. Boraas,³⁶ dealt directly with the zoning issue and left no doubt as to the viability of the aesthetic zoning concept.³⁷ Justice Douglas, again writing for the majority, offered an expanded role for the police power; "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."³⁸

D. Texas Zoning Law and Cases

Texas was slow to accept zoning, perhaps as a result of traditional respects for private property and the rights of individuals.³⁹ Prior to *Euclid*, the Texas Supreme Court had declared a Dallas zoning ordinance unconstitutional.⁴⁰ According to the supreme court, the police power of the state was subordinate to the private property rights of the citizen;⁴¹ therefore, unless the police power served an obvious public necessity, an ordinance preventing the lawful use of private property, such as the location of businesses in a residential district, could not stand.⁴² After *Euclid*, the Texas Legislature enacted a zoning statute delegating the power to zone for purposes of "health, safety, morals, or the general welfare" to the various municipalities.⁴³ Texas courts, however, continued to overturn zoning ordinances.⁴⁴ Finally, in 1934 the Texas Supreme Court, in *Lombardo v.*

36. 416 U.S. 1 (1974).

37. *See id.* at 9.

38. *Id.* at 9. Douglas continued: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9.

39. *Cf. Spann v. City of Dallas*, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921) (right to acquire and own property was "natural right" not originating in constitutions). Texas, of all the states, had "the sharpest struggle over the acceptance of zoning." 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 84.04, at 35 (1975). To date, Houston, without zoning of any kind, is "by far the largest city which is still unzoned." *Id.* § 82.03, at 2.

40. *See Spann v. City of Dallas*, 111 Tex. 350, 361, 235 S.W. 513, 518 (1921).

41. *See id.* at 515.

42. *See id.* at 515.

43. *See TEX. REV. CIV. STAT. ANN. arts. 1011a-1011j* (Vernon 1963 & Supp. 1982-1983). Article 1011a reads:

For the purpose of promoting health, safety, morals, . . . or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose;

. . . .

Id.

44. *See, e.g., City of Dallas v. McElroy*, 254 S.W. 599, 601 (Tex. Civ. App.—Dallas 1923,

City of Dallas,⁴⁵ held constitutional both the Texas zoning statute and the Dallas ordinance promulgated under this statute.⁴⁶ In a reversal of its previous position, the court asserted that valid use of the police power took precedence over private property rights;⁴⁷ moreover, valid regulations which resulted in property loss to individuals did not require compensation for a taking.⁴⁸

Since *Lombardo*, the supreme court has required that any zoning ordinance be reasonable and not arbitrary, thus applying the standard first enunciated in *Euclid*.⁴⁹ The courts presume, however, that a particular ordinance is valid unless the challenger proves a clearly unreasonable and arbitrary abuse of the police power.⁵⁰ Without such a showing of abuse, courts apply the rule of *Hunt v. City of San Antonio*.⁵¹ "If reasonable minds may differ as to whether or not a particular zoning ordinance has a

writ *dism'd*) (city officials, through denial of building permit, invaded "appellee's right"); *Marshall v. City of Dallas*, 253 S.W. 887, 889 (Tex. Civ. App.—Dallas 1923, writ *dism'd*) (only if property use created nuisance could lawful use of property be restricted); *City of Dallas v. Mitchell*, 245 S.W. 944, 945 (Tex. Civ. App.—Dallas 1922, writ *ref'd*) (person had inherent right to use property "as he sees fit").

45. 124 Tex. 1, 73 S.W.2d 475 (1934).

46. *See id.* at 12-13, 73 S.W.2d at 478.

47. *Compare Lombardo v. City of Dallas*, 124 Tex. 1, 13-14, 73 S.W.2d 475, 479-80 (1934) (exclusion of business from residential district was valid exercise of police power) with *Spann v. City of Dallas*, 111 Tex. 1, 350, 358, 235 S.W. 513, 516 (1921) (exclusion of business from residential district deprived property owner of rights). Although rejecting its reasoning in *Spann*, the court merely distinguished *Spann* rather than overruling it. *See Lombardo v. City of Dallas*, 124 Tex. 1, 9, 73 S.W.2d 475, 478 (1934). According to one commentator, the supreme court has never overruled *Spann*; consequently, it is still occasionally cited as good law, even though its reasoning is superceded. *See* 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 6.15, at 143, n.103 (1974). A commentary written in the interim between the *Spann* and *Lombardo* cases provides an interesting perspective of the state of Texas zoning law at the time. *See Comment, Zoning Texas Cities—Constitutionality of Comprehensive City Plan Ordinances*, 5 TEX. L. REV. 307, 307 (1927).

48. *See Lombardo v. City of Dallas*, 124 Tex. 1, 10, 73 S.W.2d 475, 478-79 (1934). The court also noted in *Lombardo* that regulations affecting property rights, based solely on aesthetic considerations, would not stand. *See id.* at 10, 73 S.W.2d at 479.

49. *See, e.g., City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981) (ordinance must not be "arbitrary or unreasonable"); *City of University Park v. Benners*, 485 S.W.2d 773, 779 (Tex. 1972) (zoning ordinance could not be "arbitrary either generally or as to particular property"), *cert. dismiss'd*, 411 U.S. 901 (1973); *City of Waxahachie v. Watkins*, 154 Tex. 206, 212, 275 S.W.2d 477, 481 (1955) (ordinance must not be "unreasonable and arbitrary").

50. *See, e.g., City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981) (challenger had burden to prove ordinance arbitrary and unreasonable); *Thompson v. City of Palestine*, 510 S.W.2d 579, 581 (Tex. 1974) (ordinance presumed valid; party attacking had burden to prove otherwise); *City of Bellaire v. Lamkin*, 159 Tex. 141, 143, 317 S.W.2d 43, 45 (1958) (party attacking ordinance had to show "clear abuse of municipal discretion").

51. 462 S.W.2d 536, 539 (Tex. 1971).

substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power."⁵² The Texas Supreme Court has not considered aesthetic zoning since its dictum in *Lombardo* that zoning ordinances based strictly on aesthetic considerations were prohibited.⁵³

III. HISTORIC DISTRICT ZONING

A. *Historic Zoning Law in Various Jurisdictions*

The first historic district was established in Charlestown, South Carolina, in 1931,⁵⁴ followed by one in New Orleans in 1936.⁵⁵ In 1980, esti-

52. *Id.* at 539. Subsequent cases which applied *Hunt's* rule include *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981) and *Thompson v. City of Palestine*, 510 S.W.2d 579, 581 (Tex. 1974).

53. See *Lombardo v. City of Dallas*, 124 Tex. 1, 10, 73 S.W.2d 475, 479 (1934). Several Texas appeals courts' decisions have mentioned aesthetic zoning. In *Niday v. City of Belaire*, 251 S.W.2d 747 (Tex. Civ. App.—Galveston 1952, no writ), the court referred to *Lombardo's* prohibition of aesthetic zoning. *Id.* at 750. Other courts, though, have approved of aesthetic considerations if followed in conjunction with the goal of promoting the general welfare. See *Thompson v. City of Carrollton*, 211 S.W.2d 970, 971 (Tex. Civ. App.—Texarkana 1948, no writ); *Connor v. City of University Park*, 142 S.W.2d 706, 712 (Tex. Civ. App.—Dallas 1940, writ ref'd).

54. See 3 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 71.04 (1974). It is important to realize that there are two different types of historic districts. See Weidl, *Historic District Ordinances*, 8 CONN. L. REV. 209, 213 (1976). One type is listed on the National Register of Historic Places, "the nation's official list of districts, sites, buildings, structures, and objects" important in America's cultural history, which is maintained by the National Park Service in the Department of Interior. See *id.* at 213. National Register district designation affects property within the district only when any federal funds are involved. See *id.* at 213. It also affords important federal income tax advantages. See, e.g., Anthony, *1982 Legislative Changes in the Federal Tax Incentives for Historic Preservation*, 1 PRESERVATION L. REP. 2087, 2087 (1982) (updated tax benefits for historic preservation); Anthony, *Summary of Preservation Tax Incentives in the Economic Recovery Tax Act of 1981*, 1 PRESERVATION L. REP. 2001, 2001 (1981) (detailed increased tax incentives for historic rehabilitation); Note, *Federal Tax Incentives for Historic Preservation: A Strategy for Conservation and Investment*, 10 HOFSTRA L. REV. 887, 887 (1982) (history of tax incentives through 1981). For a comprehensive analysis of federal tax programs affecting historic preservation, see *Federal Tax Incentives for Historic Preservation*, PRESERVATION L. REP. 11,003-705 (Ref.) (1982). The other type of district, the subject of this comment, is created by local ordinance, or sometimes by state statute. See Weidl, *Historic District Ordinances*, 8 CONN. L. REV. 209, 213 (1976). Property within a local historic district is subject to extensive regulations affecting exterior appearance. Frequently, an area may be both a National Register district and a local district; sometimes the boundaries are not identical. See *id.* at 213. In Texas, there are approximately 60 National Register historic districts, of which approximately one-fourth are local districts. Telephone Interview with Peter Maxson, Chief Architectural Historian/

mates of the number of historic districts in the United States ranged from 500 to 1900.⁵⁶ Historic district zoning overlays traditional zoning.⁵⁷ Whereas traditional zoning regulates the use of land and buildings, historic zoning affects only the exterior of buildings.⁵⁸ In establishing a historic district, boundaries are defined to enclose an area with some common historical or architectural theme; in addition, a historic district commission is created and endowed with powers to pass on all proposed construction, alteration, or demolition within the district.⁵⁹

The first cases to deal with the validity of historic districts involved the Vieux Carré district in New Orleans.⁶⁰ In 1941, in *City of New Orleans v. Pergament*,⁶¹ the Louisiana Supreme Court upheld the historic district ordinance which prohibited a huge sign on a modern filling station in the district.⁶² Plaintiff had contended that the regulation should not apply to new property within the district.⁶³ In rejecting plaintiff's due process and equal protection claims, the court ruled that the ordinance's application to all buildings, both old and new, was neither arbitrary nor discriminatory.⁶⁴ The court also approved the incorporation of aesthetic considera-

Nominations, Texas Historical Commission, Austin, Tex. (Jan. 20, 1983). In small towns, often the area around the old courthouse becomes a National Register district; however, since those towns have no zoning regulations, they naturally have no local historic districts. There is no central source of information on local historic districts in Texas. *Id.*

55. See 3 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 71.07, at 260-61 (1974). One commentator credits San Antonio with the third historic district in the United States, in 1939. See J. MORRISON, *HISTORIC PRESERVATION LAW* 16 (1965). Although La Villita became a restored area at that time, it was more in the nature of a public authority rather than a historic district set up under the general zoning powers. Interview with Patricia E. Osborne, Historic Preservation Officer, San Antonio, Tex., in San Antonio (Jan. 26, 1983). See San Antonio, Tex., Ordinance 01-355 (Oct. 12, 1939); see also Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473, 505 (1981) (cited to Morrison in crediting San Antonio with third historic district).

56. See Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473, 505, 505 n.138 (1981).

57. See 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 15.01, at 15-2 (4th ed. 1982).

58. See *Mayor of Annapolis v. Anne Arundel County*, 316 A.2d 807, 821 (Md. 1974); Comment, *Historic Preservation Cases: A Collection*, 12 *WAKE FOREST L. REV.* 227, 236 (1976). A historic district may contain, within its boundaries, various categories of traditional zoning. See 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 15.01, at 15-2 (4th ed. 1982).

59. See Comment, *Historic Preservation Cases: A Collection*, 12 *WAKE FOREST L. REV.* 227, 236 (1976).

60. See *City of New Orleans v. Pergament*, 5 So. 2d 129 (La. 1941); *City of New Orleans v. Impastato*, 3 So. 2d 559 (La. 1941).

61. 5 So. 2d 129 (La. 1941).

62. See *id.* at 129-30.

63. See *id.* at 130.

64. See *id.* at 131.

tions into the police power:

The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance.⁶⁶

Another Louisiana case, *City of New Orleans v. Levy*,⁶⁶ decided in 1953, addressed the issue of aesthetic zoning.⁶⁷ The court admitted that aesthetic zoning alone might not support the historic zoning restrictions;⁶⁸ however, since the preservation of the Vieux Carré was important for commercial as well as sentimental value, the regulations were a legitimate use of the police power.⁶⁹ The *Levy* court also rejected a challenge to the ordinance's language as "vague" and "without adequate standards."⁷⁰

In 1955, the Massachusetts Supreme Judicial Court handed down two advisory opinions concerning the Beacon Hill Old and Historic District in Boston, and the Nantucket and Siasconset Old and Historic Districts on Nantucket.⁷¹ In declaring the historic districts valid, the justices found the restriction imposed on private property legitimate under the police power rather than unconstitutional as a taking.⁷² This use of the police power served the general welfare, in which both aesthetics and tourism figured prominently.⁷³ The court also found the act contained sufficient standards.⁷⁴ Finally, the justices cautioned against unconstitutional application of the act which in particular instances could result in severe hard-

65. *Id.* at 131. The court's use of the phrase "tout ensemble" to justify regulation of all buildings within a historic district set a theme that recurred not only in the later Louisiana cases but also in cases of other jurisdictions. *See, e.g., City of New Orleans v. Levy*, 64 So. 2d 798, 800 (La. 1953) (quoted *Pergament* in withholding sign permit in historic district); *Faulkner v. Town of Chestertown*, 428 A.2d 879, 884 (Md. 1981) (quoted from *Pergament* in upholding application of historic zoning regulation to new structure within district); *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 451 (N.C. 1979) (referred to "tout ensemble doctrine" as "an integral and reasonable part of effective historic district preservation").

66. 64 So. 2d 798 (La. 1953).

67. *See id.* at 802.

68. *See id.* at 802.

69. *See id.* at 803.

70. *See id.* at 801. The words "architectural and historical" and "quaint and distinctive" provided definite standards within the context of the ordinances. *See id.* at 801.

71. *See* Opinion of the Justices to the Senate, 128 N.E.2d 563 (Mass. 1955); Opinion of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955).

72. *See* Opinion of the Justices to the Senate, 128 N.E.2d 557, 560 (Mass. 1955).

73. *See id.* at 561-62.

74. *See id.* at 562.

ship and remoteness from the purposes of the act.⁷⁵

In 1964, a significant New Mexico case, *City of Santa Fe v. Gamble-Skogmo, Inc.*,⁷⁶ dealt with standards in the Santa Fe historic zoning ordinance which required window panes to be limited in size to thirty inches square.⁷⁷ Defendant had attacked the requirement as aesthetic detail not related to the general welfare.⁷⁸ The court cited the Massachusetts and Louisiana cases in concluding that window size, as a part of a historical architectural style, was a proper subject for regulation under the police power.⁷⁹ The court justified its holding by pointing to the economic benefits derived from tourism⁸⁰ and refused to rule on aesthetic considerations as a sole basis for exercise of the police power.⁸¹

By the late 1960's, the legal foundation of historic district zoning seemed well-established.⁸² Subsequent cases in various jurisdictions often cited to the same earlier cases.⁸³ Many courts dealt with the exercise of the police power, relating historic preservation to the general welfare, usually because of some economic benefit, rather than aesthetic considerations alone.⁸⁴ Those courts often found that historic zoning regulation

75. *See id.* at 562; Opinion of the Justices to the Senate, 128 N.E.2d 563, 567 (Mass. 1955).

76. 389 P.2d 13 (N.M. 1964).

77. *See id.* at 14.

78. *See id.* at 17.

79. *See id.* at 17-19.

80. *See id.* at 18.

81. *See id.* at 17.

82. *See Rebman v. City of Springfield*, 250 N.E.2d 282, 287-88 (Ill. App. Ct. 1969). The court declared that Springfield, in enacting historic district zoning, "has done that which has been done in some fifty-six other communities in America located in nineteen different states . . ." *Id.* at 287. In citing to previous cases, the court stated that all the cases, in addition to the instant case, were united in accepting the application of the police power to the "preservation of historical areas." *Id.* at 288.

83. *See, e.g., Rebman v. City of Springfield*, 250 N.E.2d 282, 288 (Ill. App. Ct. 1969) (cited cases from New Orleans, Massachusetts, and Santa Fe in support of extension of zoning power to historic zoning); *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856, 861 n.2 (Mo. Ct. App. 1977) (listed New Orleans, Massachusetts, and Santa Fe cases as general support for case of first impression in Missouri); *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 449 (N.C. 1979) (included cases from New Orleans, Massachusetts, and Santa Fe in support of exercise of police power for historic preservation).

84. *See, e.g., Bohannon v. City of San Diego*, 106 Cal. Rptr. 333, 336-37 (Ct. App. 1973) (ordinance was legitimate exercise of police power; economic and educational benefits related to general welfare); *Figarsky v. Historic Dist. Comm'n*, 368 A.2d 163, 170 (Conn. 1976) (preservation of historic area served general welfare due to economic benefits); *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856, 861 (Mo. Ct. App. 1977) (zoning ordinance valid if related to "public health, safety, morals, or general welfare"; historic district zoning ordinances based on economic and cultural considerations); *see also M & N Enters., Inc. v. City of Springfield*, 250 N.E.2d 289, 293 (Ill. App. Ct. 1969) (historic district zoning created "new concept of public welfare" within police powers); *A-S-P Assocs. v. City of Raleigh*, 258

was not so restrictive as to constitute a taking without compensation, even though the most beneficial property use was precluded, as long as the regulation was not applied arbitrarily or unreasonably.⁸⁵ A number of decisions considered the adequacy of historic district standards, concluding that general standards were permissible if they afforded a reasonable application within the context of the district or the ordinance.⁸⁶ Those cases which allowed a challenge to a regulation or ordinance usually did so based on procedural due process as applied to the particular situation.⁸⁷

B. Federal Case Law

Two recent federal cases involved historic preservation.⁸⁸ In *Maher v.*

S.E.2d 444, 448-50 (N.C. 1979) (case traced development of police power, distinguished pure aesthetic zoning from historic district zoning). *But see* Zartman v. Reisem, 399 N.Y.S.2d 506, 509 (App. Div. 1977) (purpose of preservation board was not zoning, purpose "to protect the public health, safety and welfare generally").

85. *See, e.g.*, Figarsky v. Historic Dist. Comm'n, 368 A.2d 163, 171-72 (Conn. 1976) (historic district ordinance not confiscatory even though maximum property use prevented); M & N Enters. v. City of Springfield, 250 N.E.2d 289, 292 (Ill. App. Ct. 1969) (historic zoning ordinance prevented more intense use but not confiscatory); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856, 861-62 (Mo. Ct. App. 1977) (diminished property value not evidence of unreasonableness or confiscation); *see also* A-S-P Assoc. v. City of Raleigh, 258 S.E.2d 444, 451 (N.C. 1979) (depreciation of property values under ordinance did not invalidate ordinance). According to the court in *A-S-P Associates*, "[t]he test of reasonableness necessarily involves a balancing of the diminution in value of an individual's property and the corresponding gain to the public." *Id.* at 451.

86. *See, e.g.*, Bohannan v. City of San Diego, 106 Cal. Rptr. 333, 338 (Ct. App. 1973) (architectural criteria, incorporated in historic district ordinance, not "vague and ambiguous"); South of Second Assocs. v. Georgetown, 580 P.2d 807, 810 (Colo. 1978) (ordinance contained abstract definition and also specific criteria, so ordinance definite in actual application); Zartman v. Reisem, 399 N.Y.S.2d 506, 510 (App. Div. 1977) (general standard specifically related to particular district); *see also* Faulkner v. Town of Chestertown, 428 A.2d 879, 885 (Md. 1981) (ordinance's standards "clear and capable of understanding by people of ordinary intelligence"); Town of Deering *ex rel.* Bittenbender v. Tibbets, 202 A.2d 232, 235 (N.H. 1964) ("atmosphere" as standard "takes clear meaning from the observable character of the district to which it applies").

87. *See, e.g.*, South of Second Assocs. v. Georgetown, 580 P.2d 807, 811 (Colo. 1978) (ordinance which failed to delineate different areas within district "vested unreviewable discretion in the Commission"); Gumley v. Board of Selectman, 358 N.E.2d 1011, 1015 (Mass. 1977) (decision of historic district commission exceeded authority); Wolk v. Reisem, 413 N.Y.S.2d 60, 61 (App. Div. 1979) (preservation board's decision was "arbitrary, capricious and an abuse of discretion"); *see also* Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856, 863 (Mo. Ct. App. 1977) (board applied wrong standard in refusing demolition permit in historic district); Hayes v. Smith, 167 A.2d 546, 548 (R.I. 1961) (court upheld zoning board's reversal of historic zone commission's decision based on "'strict, unbending interpretations of the ordinance'").

88. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); *Maher v. City*

City of New Orleans,⁸⁹ plaintiff, who had repeatedly been denied a demolition permit for his building within the Vieux Carré, challenged the constitutionality both of the ordinance in general and of its particular application.⁹⁰ Recognizing the national importance of the issues in the case,⁹¹ the Fifth Circuit upheld the ordinance generally and specifically in a lengthy discussion of the police power as related to historic district zoning.⁹² The court quoted from *Euclid* in noting that the role of the police power can expand to meet changing economic and cultural demands.⁹³ Because of the growing national consensus as to the value of historic preservation,⁹⁴ in addition to the Supreme Court's validation of aesthetic zoning,⁹⁵ the purpose of the New Orleans ordinance represented a permissible broadened use of the police power.⁹⁶

In 1978, the United States Supreme Court decided its only case involving historic preservation.⁹⁷ Considered a victory for all preservation issues,⁹⁸ *Penn Central Transportation Co. v. City of New York*⁹⁹ actually

of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

89. 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

90. *See id.* at 1053. In addition to other provisions, the ordinance required the property owner to obtain a permit for all alteration, construction, and demolition within the Vieux Carré from the Vieux Carré Commission. *See id.* at 1054.

91. *See id.* at 1053.

92. *See id.* at 1058-61.

93. *See id.* at 1059. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926), the Supreme Court had stated:

[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

Id. at 386-87.

94. *See Maher v. City of New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

95. *See id.* at 1060. The *Maher* court referred to its previous holding in *Stone v. City of Maitland*, 446 F.2d 83 (5th Cir. 1971), in which it sustained zoning ordinances utilizing the police power for aesthetic purposes. *See Maher v. City of New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). The court's comment in *Stone* also pointed to an expanded police power encompassing aesthetic goals. "[I]n an age in which the preservation of the quality of our environment has become such a national goal, a concern for aesthetics seems even more urgent." *Stone v. City of Maitland*, 446 F.2d 83, 89 (5th Cir. 1971).

96. *See Maher v. City of New Orleans*, 516 F.2d 1051, 1060 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

97. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

98. *See Beckwith, Preservation Law 1976-1980: Faction, Property Rights, and Ideology*, 11 N.C. CENT. L.J. 276, 286 (1980) (pointed to future growth of preservation bureaucracy as direct result of Supreme Court's sanction in *Penn Central*); Waters & Scott, *The*

involved landmark law.¹⁰⁰ The case concerned the validity of restrictions on the use of Grand Central Terminal, an individual historic landmark.¹⁰¹ Penn Central, which had planned to build a fifty-three story office building on top of Grand Central, claimed that denial of these plans, under New York's Landmarks Preservation Law, amounted to a taking.¹⁰² The Court held that the restriction promoted the general welfare and did not result in a taking.¹⁰³ The Court also commented, in dictum, that Penn Central could not have raised the taking question if the restriction had diminished property values within a historic district instead of the value of an individual building.¹⁰⁴

In these two cases, the federal courts have clearly upheld the validity of historic district zoning.¹⁰⁵ It must be remembered, however, that what is acceptable under federal standards must still be permissible according to a state's constitution, statutes, and case law.¹⁰⁶

Need for Expanded Initiatives: An Overview of the ABA Special Symposium on "Preserving, Conserving, and Re-Using Historic Properties," 12 URB. LAW. 413, 425 (1980) (*Penn Central* "erases, from a federal constitutional standpoint, any doubt whether historic preservation is independently an appropriate purpose for exercise of the police power").

99. 438 U.S. 104 (1978).

100. *See id.* at 107.

101. *See id.* at 122.

102. *See id.* at 131.

103. *See id.* at 137.

104. *See id.* at 131. The Court cited to *Maher* in noting that "appellants . . . do not dispute that a showing of diminution in property value would not establish a 'taking' if the restriction had been imposed as a result of historic-district legislation." *Id.* at 131.

105. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978); *Maher v. City of New Orleans*, 516 F.2d 1051, 1061 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). Federal legislation also supports historic preservation efforts. The first federal preservation measure, the Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1976), enabled the President to designate historic landmarks on federally controlled lands. The Historic Sites Act of 1935, 16 U.S.C. §§ 461 to 467a-1 (1976), expanded the federal government's role in protecting historic sites and buildings of national interest. In 1949, Congress chartered the National Trust for Historic Preservation, a quasi-public organization which has become the leading preservation agency in the United States. *See* 16 U.S.C. § 468 (1976). In 1966, Congress strengthened federal commitment to historic preservation by enacting the National Historic Preservation Act, 16 U.S.C. §§ 470-470n (1976). Among its significant provisions, the Act created the National Register of Historic Places, comprised of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture." *Id.* § 470a(a)(1). The Act was amended in 1980, in 16 U.S.C.A. §§ 470 to 470w-6 (West Supp. 1982). One important addition gave property owners the right to prevent their property's inclusion in the National Register. *See id.* § 470a(a)(5). For a discussion of the National Historic Preservation Act and other pertinent federal legislation, see Gray, *A Guide to Historic Preservation for the California Practitioner [sic]*, 21 SANTA CLARA L. REV. 613, 619-41 (1981).

106. *Cf.* Comment, *Preserving Historic Landmarks in Texas: A Role for the Cities?*, 31 BAYLOR L. REV. 537, 549 (1979) (argued that "Texas law presently reflects the attitude of

IV. TEXAS HISTORIC DISTRICT ZONING

A. *State Law*

The Texas Legislature, in 1959, amended the general zoning statute to add provisions related to historic preservation.¹⁰⁷ Municipalities now receive delegated power to zone “[f]or the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical and cultural importance and significance, or the general welfare of the community.”¹⁰⁸ In addition to the usual zoning powers listed, a city has the right, “in the case of designated places and areas of historic and cultural importance, to regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures.”¹⁰⁹ The legislature thus seemingly expanded the police power to include historic preservation as a separate category, in addition to the usual categories of health, safety, morals, and general welfare.¹¹⁰

Other Texas statutes dealing with historic preservation affect historic districts incidentally. In 1957, the legislature established the Texas State Historical Survey Committee,¹¹¹ later changed to the Texas Historical Commission.¹¹² The commission’s responsibilities include the administration of the National Historic Preservation Act and the development of a Statewide Comprehensive Historic Preservation Plan.¹¹³ In addition, the

the dissent in *Penn Central*” in regard to taking question).

107. See TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon 1963). In dealing with a taking, the Texas Constitution contains stronger language than does the fifth amendment of the United States Constitution. Article 1, section 17 of the Texas Constitution provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person” TEX. CONST. art. 1, § 17. Many state constitutions prohibit taking or *damaging* property without compensation. See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1463 n.3 (1978). Theoretically, state damages clauses may afford greater protection of private property than the traditional clause; however, in actual practice, the scope of protection is similar. See *id.* at 1463 n.3. But see *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978) (court pointed to expanded scope of Texas’ taking clause which provided compensation to damaged property owner). In *Teague*, the city of Austin had imposed a scenic easement on the landowner’s property after he had purchased it for development under the current zoning ordinances. See *id.* at 390-91. Justice Pope, writing for the Texas Supreme Court, held that the scenic easement amounted to a servitude, thus requiring compensation to the property owner for damaging the property. See *id.* at 394.

108. TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon 1963).

109. *Id.*

110. See *id.*

111. See *id.* art. 6145 (Vernon 1970).

112. See *id.* art. 6145, § 1a (Vernon Supp. 1982-1983).

113. See *id.* § 9.

commission acts as a consultant in preservation activities¹¹⁴ and may certify the worthiness for preservation of significant historic districts and structures.¹¹⁵ The executive director of the commission serves as a liaison officer to all federal historic preservation programs.¹¹⁶

In 1969, the legislature enacted the Antiquities Code,¹¹⁷ later made a part of the Natural Resources Code.¹¹⁸ The stated purpose of the Antiquities Code was to "locate, protect, and preserve all sites, objects, buildings, pretwentieth century shipwrecks, and locations of historical, archeological, educational, or scientific interest."¹¹⁹ To carry out this purpose, the Code created an Antiquities Committee, one of whose members is the Director of the State Historical Commission.¹²⁰

B. Texas Cases

Texas courts have not ruled directly on the validity of historic district zoning. In *City of Pharr v. Tippitt*,¹²¹ the Texas Supreme Court included historic preservation with other recognized zoning criteria.¹²² The zoning ordinance in question had to "bear a substantial relationship to the public health, safety, morals or general welfare or protect and preserve historical and cultural places and areas."¹²³

Several Texas cases have dealt with some aspect of historic preservation.¹²⁴ A Texas Supreme Court case, *Texas Antiquities Committee v. Dallas County Community College District*,¹²⁵ involved threatened demo-

114. *See id.* § 8.

115. *See id.* § 15.

116. *See id.* § 10.

117. *See id.* art. 6145—9 (Vernon 1970).

118. *See* TEX. NAT. RES. CODE ANN. tit. 9, chap. 191 (Vernon 1978).

119. *Id.* § 191.002.

120. *See id.* § 191.011. For a general discussion of the Texas Antiquities Code, see Comment, *Texas Historic Landmarks—Criteria for Designation*, 11 ST. MARY'S L.J. 176 (1979). The Antiquities Code also specifies that state archeological landmarks include those "wrecks of the sea . . . and all treasure imbedded in the earth, located in, on, or under the surface of land belonging to the State of Texas." TEX. NAT. RES. CODE ANN. § 191.091 (Vernon 1978). Section 191.094 extends the designation to sites on private land, and section 191.095 prohibits any alteration or destruction without a permit from the committee.

121. 616 S.W.2d 173 (Tex. 1981).

122. *See id.* at 177.

123. *Id.* at 177.

124. *See, e.g.*, *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 927 (Tex. 1977) (Antiquities Code provision unconstitutional); *Southern Nat'l Bank of Houston v. City of Austin*, 582 S.W.2d 229, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (historic zoning ordinance unconstitutional); *City of Dallas v. Crownrich*, 506 S.W.2d 654, 658 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (denial of building permit in pending historic district valid).

125. 554 S.W.2d 924 (Tex. 1977).

lition of three buildings listed on the National Register.¹²⁶ Although the buildings were not designated State Archeological Landmarks, the Antiquities Committee denied permission to demolish the buildings.¹²⁷ The supreme court found unconstitutionally vague that section of the Antiquities Code giving the Antiquities Committee power over "all other sites, objects, buildings, artifacts, implements, and locations of historical, archeological, scientific, or educational interest."¹²⁸ Since the Antiquities Committee had formulated no rules or standards, the words "buildings . . . of historical . . . interest" provided no criteria or safeguards.¹²⁹

In *City of Dallas v. Crownrich*,¹³⁰ decided in 1974, the city had denied Crownrich's application to build a high rise apartment building within a proposed historic district.¹³¹ The trial court ordered the permit issued, since the historic district ordinance had not been adopted.¹³² The Tyler Court of Civil Appeals reversed this decision, declaring that the city's broad police power enabled it to protect property affected by impending zoning regulations.¹³³

126. *See id.* at 926.

127. *See id.* at 926.

128. *Id.* at 926-27.

129. *See id.* at 927. Justice Pope declared:

There has been called to our attention no case in Texas or elsewhere in which the powers of a state board are more vaguely expressed or less predictable than those permitted by the phrase in question. The word "buildings" comprehends all structures; "historical" includes all of the past; "interest" ranges broadly from public to private concerns and embraces fads and ephemeral fascinations. All unrestorable structures ordinarily hold some nostalgic tug upon someone and may all qualify as "buildings . . . of historical . . . interest."

Id. at 927. The opinion suggested that, had the Antiquities Committee implemented standards, it might have averted the dangers of vagueness. *See id.* at 927. *See generally* Note, *New Problems for Preservationists*, 15 Hous. L. Rev. 747, 755 (1978) (discussed case in terms of due process void-for-vagueness doctrine). *Texas Antiquities Comm. v. Dallas County Community College Dist.* was a plurality opinion. Nevertheless, the decision prompted several law journal comments which suggested proposed changes for the Antiquities Code. *See* Note, *New Problems for Preservationists*, 15 Hous. L. Rev. 747, 756-57 (1978); Comment, *Texas Historic Landmarks—Criteria for Designation* 11 ST. MARY'S L.J. 176, 179-86 (1979). Article 6145-9, section 6 of the Antiquities Code became section 191.092 of the Natural Resources Code, with virtually the same wording as the previous section 6. A 1981 amendment added subsection (b) to section 191.092, specifying standards for a structure or building of historical interest. *See* TEX. NAT. RES. CODE ANN. § 191.092(b) (Vernon Supp. 1982-1983).

130. 506 S.W.2d 654 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

131. *See id.* at 655.

132. *See id.* at 656.

133. *See id.* at 659. The court, discussing at length the flexible and expansive nature of the police power, stated that "as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions." *Id.* at 659.

Five years later, the Tyler Court of Civil Appeals, in *Southern National Bank of Houston v. City of Austin*,¹³⁴ considered the validity of Austin's historic preservation ordinance.¹³⁵ Appellant's property, the Driskill Hotel, had been listed on the agenda of the Landmark Commission, under section 45-51.1 of Austin's historic preservation ordinance, causing the restrictions of the ordinance to attach immediately and indefinitely.¹³⁶ The court held that such action amounted to a "damaging" of property without adequate compensation;¹³⁷ moreover, section 45-51.1 deprived property owners of due process as well as equal protection of the laws, due to lack of reasonable time limits within which to consider property placed on the Landmark Commission's agenda.¹³⁸ The court distinguished its opinion in *Crownrich*, in which the time period was limited to a specific duration.¹³⁹ The court also found section 45-51.1 void for vagueness, citing *Texas Antiquities Committee v. Dallas County Community College District* for its requirement of proper standards to protect landowners' property rights.¹⁴⁰

C. Historic Zoning Law of Selected Texas Municipalities

Because of the general nature of the Texas statute delegating historic zoning power to the municipalities, it is incumbent upon the local governing bodies to provide adequate historic zoning ordinances.¹⁴¹ An examination of selected Texas city codes reveals great diversity in historic zoning ordinances.¹⁴²

San Antonio's city code contains a long article dealing with historic

134. 582 S.W.2d 229 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

135. See *id.* at 231.

136. See *id.* at 236.

137. See *id.* at 238.

138. See *id.* at 239.

139. See *id.* at 238-39.

140. See *id.* at 239.

141. Cf. NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS ch. III (1980) (available from the National Trust for Historic Preservation, 1785 Massachusetts Ave. N.W., Washington, D.C. 20036).

142. See AUSTIN, TEX., CODE ch. 13-2, art. V (1967); DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. III, § 51-3.103; art. IV, § 51-4.501 (1981); FORT WORTH, TEX., CODE part III, app. A, § 2G (1981); SAN ANTONIO, TEX., CODE ch. 42, art. VII (1974). A number of other Texas cities have local historic district zoning, except for Houston, which has no zoning at all. Interview with Patricia E. Osborne, Historic Preservation Officer, San Antonio, Tex., in San Antonio (Jan. 26, 1983). Galveston's historic district zoning has received national attention. See Brink, *Experience of the Galveston Historical Foundation in Using Legal Tools to Support Historic Preservation*, 12 URB. LAW. 74, 74 (1980); see also A. ZIEGLER & W. KIDNEY, HISTORIC PRESERVATION IN SMALL TOWNS 91-101 (1980) (case history of Galveston's experience); NATIONAL TRUST FOR HISTORIC PRESERVA-

preservation.¹⁴³ The article begins with a detailed statement of purpose,¹⁴⁴ which acknowledges San Antonio's attraction to visitors, based on the city's "aesthetic, educational, and historical features,"¹⁴⁵ and the dangerous threat to historic places posed by construction and repairs of poor quality.¹⁴⁶ The purpose of the article, therefore, is "to preserve these irreplaceable areas and places of historical significance . . . and thus to promote and protect the health, safety, comfort, and general welfare of the community."¹⁴⁷ The article provides procedures by which the city council may designate a historic district¹⁴⁸ and creates a board of review for historic districts and landmarks.¹⁴⁹ Composed of nine members, including four design professionals, this board acts in an advisory capacity to the director of building and planning administration in matters pertaining to all permits for "construction, reconstruction, alteration, restoration, relocation, demolition, or razing of all or part of any building within the historic district."¹⁵⁰ The article also sets out, in very general terms, the criteria which the board uses to determine its recommendations.¹⁵¹ If the

TION, A GUIDE TO DELINEATING EDGES OF HISTORIC DISTRICTS 67-69 (1976) (case history of Galveston's historic district zoning).

143. See SAN ANTONIO, TEX., CODE ch. 42, art. VII (1974).

144. See *id.* § 42-112.

145. *Id.*

146. See *id.*

147. *Id.* Section 42-113 defines a historic district as "an area which has outstanding historical and cultural significance in the nation, state, region, or community within which the buildings, structures, accessory buildings, fences, or other appurtenances are of basic and vital importance for the development of culture." *Id.*

148. See *id.* § 42-114. San Antonio has designated seven municipal historic districts, of which all but one are also National Register historic districts. Interview with Patricia E. Osborne, Historic Preservation Officer, San Antonio, Tex., in San Antonio (Jan. 26, 1983). The boundaries of the co-existing districts are not necessarily the same, and in one area, the local district and the National Register district even have different names. Thus the local St. Paul Square Historic District is listed on the National Register as the Southern Pacific Depot Historic District. Telephone interview with Peter Maxson, Chief Architectural Historian/Nominations, Texas Historical Commission, Austin, Tex. (Feb. 10, 1983).

149. See SAN ANTONIO, TEX., CODE § 42-117 (1974).

150. *Id.* § 42-123. An additional ordinance increased the size of the board to 11 members, with five professionals; this amendment does not yet appear in the Code. See San Antonio, Tex., Ordinance 50,682 (Apr. 26, 1979).

151. See SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42-123 (1974). The "[c]riteria to be used by the board in determining its recommendation" include a consideration of the following:

- (1) The effect of the proposed change upon the general historic, cultural and architectural nature of the district.
- (2) The appropriateness of exterior architectural features which can be seen from a public street, alley, trail or walkway.
- (3) The general design, arrangement, texture, material and color of the building or structure and the relation of such factors to similar features of buildings or structures

director of building and planning administration disallows the permit request, the applicant may then appeal to the city council.¹⁵² Demolition permits of structures within historic districts may be delayed for 120 days.¹⁵³ The article also describes in detail procedures for obtaining ad valorem tax exemption for residential and commercial sites of historic interest.¹⁵⁴

The Dallas city code includes two sections relating to historic preservation.¹⁵⁵ Section 51-3.103 establishes a landmark committee, appointed by the city plan and zoning commission; the fifteen committee members must have knowledge and experience in the fields of history, art, or architecture and must include five professionals.¹⁵⁶ Duties of the committee include familiarization with all structures, land, areas, and districts possibly eligible for designation as historic landmarks, and creation of guidelines and standards for designating landmarks and issuing certificates of appropriateness.¹⁵⁷ The committee also recommends approval or denial of certificates to the plan and zoning commission.¹⁵⁸ The second section, 51-4.501, provides for historic overlay districts.¹⁵⁹ This section specifies the

in the district. The criterion shall not be the aesthetic appeal to the board of the structure or the proposed remodeling but rather its conformity to the general character of the particular historic area involved.

(4) Signs which are out of keeping with the character of the historic district in question shall not be permitted.

(5) The value of the historic district as an area of unique interest and character shall not be impaired.

Id. On Sept. 26, 1977, the board of review for historic districts and landmarks adopted the standards of the Secretary of Interior "for rehabilitation of historic and architecturally significant structures." See Handout from Patricia E. Osborne, Historic Preservation Officer, San Antonio, Tex. (available from Historic Preservation Office, City of San Antonio). These standards appear in Standards for Rehabilitation, 36 C.F.R. § 67.7(a) (1982). Since these standards are described in general terms, the next section provides an address where an interested party may write for "guidelines and other technical information." *Id.* § 67(b).

152. See SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42-125.1 (1974). Actually, the appropriate person to whom the board reports is the Director of the Department of Building Inspections. Interview with Patricia E. Osborne, Historic Preservation Officer, San Antonio, Tex., in San Antonio (Jan. 26, 1983). The Historic Preservation Officer, whose position was established in 1972, coordinates all preservation activities and serves as a liaison between preservationists, developers, property owners, and the city. San Antonio is one of three cities in the United States to have a Historic Preservation Officer; the other two are Seattle and St. Louis. *Id.*

153. See SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42-121(b) (1974).

154. See *id.* §§ 42-131-35, 42-136-40.

155. See DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. III, § 51-3.103; art. IV, § 51-4.501 (1981).

156. See *id.* art. III, § 51-3.103(a)(1), (2).

157. See *id.* (c)(1), (2).

158. See *id.* (c)(6).

159. See *id.* art. IV, § 51-4.501. A historic overlay district is the term for a historic

following two types of appropriateness review for buildings within the historic district: (1) a simplified routine maintenance and replacement procedure, under the director's supervision but appealable to the landmark committee and the commission; or (2) the full certificate of appropriateness review by the committee and commission.¹⁶⁰ The section additionally provides for an appeal to the city council from the plan and zoning commission.¹⁶¹ The city council may postpone demolition of a building within a historic district for 240 days; if the council then takes no further action, a demolition permit will be issued.¹⁶²

Austin's city code contains, in its zoning chapter, an article entitled Historic Landmark Preservation.¹⁶³ A later section on historic districts, however, extends many of the landmark provisions to historic districts.¹⁶⁴ This section defines historic districts, sets forth criteria and procedures for their establishment, and lists the required elements of a district preservation plan.¹⁶⁵ The article also establishes the Historic Landmark Commission, consisting of eleven members, with a representative from each of five different historical and professional organizations.¹⁶⁶ This commission prepares and maintains a historic preservation plan and advises the city planning commission and the city council on matters pertaining to the plan.¹⁶⁷ The commission also hears requests for changes, construction, or demolition, either forwarding a certificate of appropriateness to the build-

district superimposed on an existing district. *See id.* (a)(3).

160. *See id.* (b).

161. *See id.* (b)(7).

162. *See id.* (c). Dallas has created six historic districts under this general enabling ordinance. Telephone interview with Leif Sandberg, Department of Planning and Development, Dallas, Tex. (Jan. 28, 1983). Four of the districts are residential and are administered through the Department of Housing and Neighborhood Services, whereas the other two, commercial and mixed use districts, are handled in the Department of Planning and Development. The ordinance setting up each individual district contains detailed standards depending on its own particular neighborhood characteristics. *Id.* The earliest of these ordinances, the Swiss Avenue Historic District, passed in 1974, has been highly regarded and used as a model because of its detailed standards. *See Weidl, Historic District Ordinances*, 8 CONN. L. REV. 209, 218 (1976). *See generally* TEXAS HISTORICAL FOUNDATION, ZONING FOR COMMUNITY PRESERVATION: A MANUAL FOR TEXANS (1976) (available in the library of the San Antonio Conservation Society) (referred to Swiss Avenue Historic District ordinance throughout book). Dallas has recently enacted an ordinance providing tax relief for owners of historic property. *See* Dallas, Tex., Ordinance 17,653 (Dec. 15, 1982).

163. *See* AUSTIN, TEX., CODE ch. 13-2, art. V (1967).

164. *See id.* § 13-2-157.

165. *See id.* So far, Austin has set up no local historic districts. Telephone interview with Peter Maxson, Chief Architectural Historian/Nominations, Texas Historical Commission, Austin, Tex. (Jan. 20, 1983). The city does apply regulations and restrictions to its national historic districts, according to section 13-2-154(d).

166. *See* AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-176(a) (1967).

167. *See id.* § 13-2-177.

ing official or to the applicant directly or notifying the applicant that certification is denied.¹⁶⁸ If denied, the applicant has thirty days to appeal to the city council.¹⁶⁹ The landmark commission approves or denies demolition permits indefinitely, and the applicant cannot resubmit a request for twelve months.¹⁷⁰ A person whose application is refused can appeal to the city council within sixty days.¹⁷¹ Austin's code also requires a property owner to maintain the exterior of a designated historic building; the city notifies the property owner if he fails to maintain the building, thus reducing the possibility of demolition by neglect.¹⁷² Section 45-51.1, found unconstitutional in *Southern National Bank of Houston v. City of Austin*,¹⁷³ reappears in almost identical form in section 13-2-154 of the present code.¹⁷⁴ In addition, a new subsection provides for work done in a National Register historic district, with different procedures than those for local historic districts.¹⁷⁵

Fort Worth's city code contains enabling legislation for a historic and cultural subdistrict as an overlay of a regular zoning district.¹⁷⁶ The historic and cultural advisory board, comprised of five members, including three professionals, prepares and maintains a preservation plan, recommends historic and cultural subdistrict establishment or modification, and reviews guidelines specifically drawn up for each subdistrict.¹⁷⁷ These guidelines, on file in the office of the building official, classify all structures within the district and "establish acceptable physical characteristics of structure and sites and modifications thereto including layout and location on site, size, shape, materials and textures, fenestration and interiors where applicable."¹⁷⁸ The historic and cultural advisory board also designates a permit committee, consisting of "two appointed board members, the building official and the planning director."¹⁷⁹ This committee reviews all applications for permits affecting a historic and cultural subdistrict and grants or denies the permit depending on conformity to

168. See *id.* § 13-2-152.

169. See *id.* § 13-2-152(e).

170. See *id.* § 13-2-153(c).

171. See *id.* § 13-2-153(d).

172. See *id.* § 13-2-155.

173. 582 S.W.2d 229 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). The court found that the section deprived property owners of due process and equal protection because it lacked reasonable time limits within which to consider property placed on the landmark commission's agenda. See *id.* at 239.

174. See AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-154 (1967).

175. See *id.* § 13-2-154(d).

176. See FORT WORTH, TEX., CODE part III, app. A, § 2G (1981).

177. See *id.* § 2G(A).

178. *Id.* (B)(3).

179. *Id.* (A)(6).

guidelines.¹⁸⁰ An aggrieved applicant may appeal the decision of the permit committee to the historic and cultural advisory board and then to the city council.¹⁸¹ Demolition requests may be delayed for 270 days.¹⁸²

Common features of the four cities' codes thus include a historic review committee, ranging in size from five to fifteen members, and an appeals process.¹⁸³ The four code sections vary significantly, however, in dealing with other aspects of historic districts.¹⁸⁴ Austin, Fort Worth, and San Antonio codes all contain a statement of purpose, which the Dallas code lacks.¹⁸⁵ The cities also differ in their treatment of time limits. In Dallas, the landmark committee must consider an application for a certificate of appropriateness within thirty-five days of its receipt.¹⁸⁶ Austin's landmark commission must hold a hearing on issuance of permits and report to the building official within thirty days of the hearing; however, the code omits any time limit during which the hearing must be set after receipt of the application.¹⁸⁷ Neither Fort Worth nor San Antonio provide any specified time period; conceivably the application process could drag out indefinitely.¹⁸⁸ Another major difference involves guidelines or standards. In Dallas, the local historic board establishes, for each historic district, guidelines which are contained within the ordinance establishing the district but are not included in the code.¹⁸⁹ Austin's board may recommend

180. *See id.*

181. *See id.* (B)(7).

182. *See id.* (B)(4)(c). Fort Worth has not yet designated local districts under these code sections but expects to do so soon. Telephone interview with Lester Page, Secretary and Executive Director of the Historic and Cultural Advisory Board, Department of Development, Fort Worth, Tex. (Jan. 31, 1983).

183. *See* AUSTIN, TEX., CODE ch. 13-2, art. V, §§ 13-2-153(d), 13-2-176 to -177 (1967); DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. III, § 51-3.103; art. IV § 51-4.501(b)(7) (1981); FORT WORTH, TEX., CODE part III, app. A, § 2G(A), (B)(7) (1981); SAN ANTONIO, TEX., CODE ch. 42, art. VII, §§ 42-117, 42-125.1 (1974).

184. *See* AUSTIN, TEX., CODE ch. 13-2, art. V (1967); DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. III § 51-3.103; art. IV § 51-4.501 (1981); FORT WORTH, TEX., CODE part III, app. A, § 2G (1981); SAN ANTONIO, TEX., CODE ch. 42, art. VII (1974).

185. *See* AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-147 (1967); FORT WORTH, TEX., CODE part III, app. A, § 2G (1981); SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42-112 (1974).

186. *See* DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. IV, § 51-4.501(b)(4) (1981).

187. *See* AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-152(b)(2) (1967).

188. *See* FORT WORTH, TEX., CODE part III, app. A, § 2G (1981); SAN ANTONIO, TEX., CODE ch. 42, art. VII (1974). *See generally* Comment, *Historic Preservation and the Zoning Power: A Mississippi Perspective*, 50 MISS. L.J. 533, 567 (1979) ("some limit beyond which boards or commissions cannot delay private property dispositions is a desirable counterbalance against the possible abuse of landowner's rights").

189. *See* DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art.

architectural regulations for historic districts but is not required to do so.¹⁹⁰ San Antonio's code offers general guidelines,¹⁹¹ which the board has augmented with the Department of Interior Standards,¹⁹² but it contains no specific guidelines for each individual district. Fort Worth's code provides for creation of guidelines,¹⁹³ and the historic board has also adopted the Department of Interior's standards.¹⁹⁴ The cities also vary in their treatment of demolition requests within a historic district. Only Austin allows an indefinite denial of a demolition request for a historic structure,¹⁹⁵ whereas Dallas, Fort Worth, and San Antonio merely provide a time delay during which an alternative plan may be reached.¹⁹⁶ Austin's code contains a strong prohibition against demolition by neglect.¹⁹⁷ Both Dallas and Fort Worth suggest that a prohibition might exist, by specifying, in certain circumstances, relief from required preservation of historic structures.¹⁹⁸ San Antonio's code has no required maintenance of historic property.¹⁹⁹ Finally, only Dallas and San Antonio provide some measure of tax relief for property owners whose property is subject to historic district zoning regulations.²⁰⁰

These cities, and all others involved in historic district zoning, would benefit by consulting model provisions for a preservation ordinance, tailoring their ordinance to meet the needs of the particular community involved.²⁰¹ Such an ordinance should contain a statement of public pur-

III, § 51-3.103(c)(2)(C) (1981). Telephone interview with Leif Sandberg, Department of Planning and Development of Dallas, Tex. (Jan. 28, 1983).

190. See AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-157(f)(5) (1967).

191. See SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42-123 (1974).

192. See Handout from Patricia E. Osborne, Historic Preservation Officer, San Antonio, Tex. (available from Historic Preservation Office, City of San Antonio).

193. See FORT WORTH, TEX., CODE part III, app. A, § 2G(B)(3) (1981).

194. Telephone interview with Lester Page, Secretary and Executive Director of the Historic and Cultural Advisory Board, Department of Development, Fort Worth, Tex. (Jan. 31, 1983).

195. See AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-153 (1967).

196. See DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. IV, § 51-4.501(c)(5); FORT WORTH, TEX., CODE part III, app. A, § 2G(B)(4)(c); SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42.121(b).

197. See AUSTIN, TEX., CODE ch. 13-2, art. V, § 13-2-155 (1967).

198. See DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. III, § 51-3.103(c)(5); FORT WORTH, TEX., CODE part III, app. A, § 2G(B)(8).

199. See SAN ANTONIO, TEX., CODE ch. 42, art. VII (1974).

200. See Dallas, Tex., Ordinance 17,653 (Dec. 15, 1982); SAN ANTONIO, TEX., CODE ch. 42, art. VII (1980).

201. See NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS (1980). The National Trust selected provisions from various municipalities in the United States to use as examples, since the variations in state acts prevented the use of a single uniform model ordinance. See *id.* at 1.

pose,²⁰² provide for the creation of a historic district commission with specified professional membership and duties,²⁰³ establish boundaries,²⁰⁴ clearly set out the extent of controls,²⁰⁵ detail application procedures for changes to structures within the district, including time limits,²⁰⁶ delineate the appeals process,²⁰⁷ and specify design criteria for alterations and construction within the district.²⁰⁸

D. *What Future for Texas Historic District Zoning?*

It is clear that historic district zoning as a land use planning device is

202. *See id.* at 4-5. According to the National Trust, "every preservation ordinance should contain a purpose clause stating clearly a municipality's reasons for enacting the ordinance. An attempt to invalidate a preservation ordinance as an impermissible use of the police power may succeed if the ordinance's purpose clause recites improper or inadequate purposes." *Id.* at 4-5. The National Trust also recommends particular care in those states whose courts have disapproved of aesthetic zoning. In that situation, the drafter should "avoid the possible accusation of his purpose clause as 'aesthetically' motivated only. The benefits accruing to the 'general welfare' should . . . be highlighted." *Id.* at 6. Since the Texas Supreme Court has never validated aesthetic zoning, this recommendation should be carefully noted. *See Lombardo v. City of Dallas*, 124 Tex. 1, 10, 73 S.W.2d 475, 479 (1934).

203. *See* NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS 11-32 (1980).

204. *See id.* at 40-42.

205. *See id.* at 97-109, 119-21.

206. *See id.* at 65-70, 93-94. The time period during which the commission acts on applications should not be less than 30 days or more than three months. *See id.* at 94.

207. *See id.* at 133-35.

208. *See id.* at 59, 72-75. The National Trust suggests that design criteria are more functional if promulgated by the preservation commission rather than included in the ordinance establishing the historic district. *See id.* at 59. Another commentator feels that a historic district ordinance may rest on firmer legal ground if it includes sufficient standards to avoid a challenge for vagueness. *See Gray, A Guide to Historic Preservation for the California Practitioner [sic]*, 21 SANTA CLARA L. REV. 613, 649 (1981). The explicitness of design criteria depends on the particular state's requirements, with special consideration paid to the state's court decisions on criteria. *See* NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS 74 (1980). On the other hand, criteria that are too specific may "eventually restrict the building styles within a historic district to plans that copy or adapt traditional form." *Id.* at 74. If criteria are extremely rigid, the resulting uniformity can lead to "visual tedium and creative atrophy." Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 510 (1981). A commission should draw up guidelines based on the needs of the individual historic district, rather than merely using the guidelines of another community. *See* NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS 74 (1980); *see also* Stipe, *A Decade of Preservation and Preservation Law*, 11 N.C. CENT. L.J. 214, 228 (1980). "There is still much 'copying' of ordinance standards, both graphic and verbal, from one city to another, a practice which leads inevitably to results that are at best irrelevant and at worse perverse". *Id.* at 228. A useful discussion of design guidelines is located in BOWSHER, *DESIGN REVIEW IN HISTORIC DISTRICTS* 25-50 (1978).

well established in Texas.²⁰⁹ Even though Texas courts have not ruled directly on the validity of historic district zoning, tacit endorsement of the concept is implied in their decisions on historic preservation.²¹⁰ Given the stamp of approval placed on historic district zoning by other jurisdictions,²¹¹ together with the massive thrust of popular support for preservation causes,²¹² a Texas court would not be likely to overturn a historic district ordinance on general constitutional grounds unless it clearly violated established zoning law.²¹³ Since the Texas Supreme Court, however, has never approved zoning for aesthetic purposes,²¹⁴ cities would be on more firm ground if the purpose of their historic district ordinances clearly related to some other aspect of the police power.²¹⁵ Texas courts have shown concern for the wording of preservation legislation.²¹⁶ Con-

209. See AUSTIN, TEX., CODE ch. 13-2, art. V (1967); DALLAS, TEX., REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES ch. 51, art. III, § 51-3.103, art. IV, § 51-4.501 (1981); FORT WORTH, TEX., CODE part III, app. A, § 2G (1981); SAN ANTONIO, TEX., CODE ch. 42, art. VII (1974).

210. See *Southern Nat'l Bank of Houston v. City of Austin*, 582 S.W.2d 229, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (historic zoning ordinance unconstitutional); *City of Dallas v. Crownrich*, 506 S.W.2d 654, 659 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (denial of building permit valid in pending historic district); cf. *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 927 (Tex. 1977) (Antiquities Code provision void for vagueness).

211. See, e.g., *City of New Orleans v. Pergament*, 5 So. 2d 129, 131 (La. 1941) (historic zoning ordinance constitutional); *Opinion of the Justices to the Senate*, 128 N.E.2d 557, 562 (Mass. 1955) (proposed act setting up historic district would be constitutional); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 18 (N.M. 1964) (historic zoning ordinance was within general welfare).

212. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 (1978); *Rose, Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 478-79 (1981).

213. Compare *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61, 66 (Mo. Ct. App. 1980) (historic district ordinance subject to same historic tests as regular zoning ordinance) with *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981) (zoning ordinance must not be arbitrary or unreasonable) and *Thompson v. City of Palestine*, 510 S.W.2d 579, 581 (Tex. 1974) (since zoning ordinance presumed valid, attacking party had burden to prove otherwise) and *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971) (zoning ordinance did not abuse police power if reasonable minds differed as to its relation to public health, safety, morals, or general welfare).

214. See *Lombardo v. City of Dallas*, 124 Tex. 1, 10, 73 S.W.2d 475, 479 (1934).

215. See AUSTIN, TEX., CODE ch. 13-2, § 13-2-147 (1967). Austin's declared public policy is "the protection, enhancement, preservation and use of historic landmarks . . . in the interest of the culture, prosperity, education and general welfare of the people." *Id.* Among the purposes of Fort Worth's historic district zoning is "the promotion of the use of such a place or area for the education, pleasure and welfare of the public." FORT WORTH, TEX., CODE part III, app. A, § 2G(4) (1981). The purpose of San Antonio's article on historic preservation is to promote and protect the health, safety, comfort, and general welfare of the community. SAN ANTONIO, TEX., CODE ch. 42, art. VII, § 42-112 (1974).

216. See *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554

ceivably, a court might invalidate a historic district ordinance because of lack of sufficient standards or specific time requirements.²¹⁷

In order to achieve the dual purpose of securing historic preservation efforts and protecting the rights of individual property owners, Texas cities should strive to clarify the meaning of their historic zoning ordinances.²¹⁸ City codes should contain the pertinent provisions of these ordinances or, if the particular ordinance is too long, give sufficient notice as to where applicable sections may be found.²¹⁹ Cities should also make every attempt to follow the procedure established in their codes and ordinances.²²⁰ If the purpose of a historic or landmark board is to advise, then that board should do so carefully and not make decisions that could be construed as arbitrary or capricious.²²¹ Otherwise, a city might be faced with a challenge based on due process grounds as applied to an individual situation.²²² Cities can also strengthen their position by providing tax incentives for qualified structures; if the property owners receive some sort of relief, then the burden of property restrictions in historic districts will not appear as onerous.²²³ At the same time, owners will be encouraged to restore their property, thus serving the historic preservation goal.²²⁴ Addi-

S.W.2d 924, 927 (Tex. 1977) (language of statute vague because of insufficient standards); *Southern Nat'l Bank of Houston v. City of Austin*, 582 S.W.2d 229, 236, 239 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (ordinance lacked time limits and standards).

217. See *Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 927 (Tex. 1977); *Southern Nat'l Bank of Houston v. City of Austin*, 582 S.W.2d 229, 236, 239 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

218. See Gray, *A Guide to Historic Preservation for the California Practitioner [sic]*, 21 SANTA CLARA L. REV. 613, 649 (1981); Stipe, *A Decade of Preservation and Preservation Law*, 11 N.C. CENT. L.J. 214, 228 (1980).

219. See Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 256 (1982). The "possibility that laws may be enacted without notice to the public and that individuals may be held accountable for noncompliance with unknown and unknowable rules conflicts with the requirements of due process." *Id.* at 256.

220. See *Hayes v. Smith*, 167 A.2d 546, 550 (R.I. 1961).

221. See *Gumley v. Board of Selectmen*, 358 N.E.2d 1011, 1015 (Mass. 1977).

222. See *Maher v. City of New Orleans*, 516 F.2d 1051, 1067 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Opinion of the Justices to the Senate*, 128 N.E.2d 557, 562 (Mass. 1955).

223. See Comment, *Historic Preservation and the Zoning Power: A Mississippi Perspective*, 50 MISS. L.J. 533, 569 (1979). *But cf.* Stipe, *A Decade of Preservation and Preservation Law*, 11 N.C. CENT. L.J. 214, 223 (1980) (tax incentives in North Carolina helpful in some ways, damaging in others).

224. See Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 121 (1976); T. NUTT-POWELL & D. DiPASQUALE, AN HISTORIC PRESERVATION TAX INCENTIVE PROGRAM FOR DALLAS 13 (1981) (available in the library of the San Antonio Conservation Society). For an example of tax provisions included in local historic preservation ordinances, see SAN ANTONIO, TEX., CODE ch. 42, art. VII, Div. 2, AD VALOREM TAX EXEMPTION FOR RESIDENTIAL SITES; Div. 3, AD VALOREM TAX EXEMP-

tionally, Texas cities should fortify their demolition ordinances, providing, in certain instances, for indefinite denial of demolition permits for historic structures, in line with accepted practice in other jurisdictions.²²⁵ Cities should also implement provisions requiring minimum maintenance to historic structures in order to prevent the slow deterioration which can culminate in demolition.²²⁶ If Texas cities do not provide stronger demolition prohibitions, then Texas stands to lose more of its irreplaceable heritage.

V. CONCLUSION

Today, historic preservation and historic district zoning have achieved a high degree of acceptance in many Texas municipalities. The questions remain, however, as to the most beneficial goals of preservation and the preferred methods of attaining them. As emphasis continues to shift from the individual historic landmark to the area around the landmark or to other significant areas, historic district zoning is assuming even greater importance. Whether these districts will become static area museums²²⁷

TION FOR COMMERCIAL SITES. In addition, the San Antonio Historic Preservation Office supplies explanatory material on local tax relief. See San Antonio Ad Valorem Tax Incentives (available from the Historic Preservation Office, City of San Antonio).

225. See, e.g., *Maier v. City of New Orleans*, 516 F.2d 1051, 1066-67 (5th Cir. 1975) (ordinance forbidding demolition in historic district not unconstitutional nor arbitrarily applied), *cert. denied*, 426 U.S. 905 (1976); *Figarsky v. Historic Dist. Comm'n*, 368 A.2d 163, 171-72 (Conn. 1976) (denial of demolition permit within historic district not unconstitutional); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61, 67 (Mo. Ct. App. 1980) (application of demolition ordinance not shown to be arbitrary). If the denial of a demolition permit prevents the property owner from a "reasonable rate of return" from his property, then he may claim a taking. See *Maier v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). The property owner has the burden of establishing such a taking. See *id.* at 1067. In some situations, demolition must be allowed. See Hamm, *When the Bulldozer Should Win: A Survey of Laws and Cases Authorizing Demolition of Protected Historic Resources*, 1 PRESERVATION L. REP. 2076, 2076 (1982). Texas courts might find a taking resulting from a municipal ordinance prohibiting demolition of historic buildings. Cf. Comment, *Preserving Historic Landmarks in Texas: A Role for the Cities?*, 33 BAYLOR L. REV. 537, 546-49 (1979) (argued that, under current Texas law, landmark designation would result in taking). For a thorough discussion of demolition ordinances, see NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS 97-109 (1980).

226. See *Maier v. City of New Orleans*, 516 F.2d 1051, 1066-67 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). In situations involving "demolition by neglect," a property owner often allows a structure to deteriorate to the point that local authorities will issue a demolition permit due to the building's unsafe or unsanitary condition. See NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS 120-21 (1980).

227. See *Zartman v. Reism*, 399 N.Y.S.2d 506, 510 (App. Div. 1977). In upholding the grant of a certificate of appropriateness to build a tennis court in the backyard of a resi-

or whether they will allow for adaptive use of old buildings and imaginative construction of compatible new structures will largely depend on the communities involved. If cities move away from an emphasis on aesthetics and historicity and toward a concept of neighborhood conservation, then historic districts will retain the best of the past together with the most vital ingredients for future growth. With an increased focus on conservation of neighborhoods, rather than on mere collections of old buildings, Texas communities can preserve a sense of place, that stabilizing factor which fosters a sense of belonging and lessens the effects of dislocation resulting from a highly technological society.²²⁸ Such a positive endeavor requires an intense spirit of cooperation between the public and private sectors, with a special degree of participation from the neighborhood residents.²²⁹ Should all of these elements work together harmoniously, then historic district zoning in Texas will truly have the capacity to enhance the quality of life for Texans.

dence in a historic district, the court emphasized that "it must be remembered that the area is one of residences and improvement must not be overly restricted, unless the municipality is prepared to acquire and maintain the buildings as museums." *Id.* at 510. See generally Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 509 (1981). Historic districts should not "freeze a community's architectural character to reflect some quasi-mythic time in the past, at the cost of creative contributions by current residents." *Id.* at 509.

228. See NATIONAL TRUST FOR HISTORIC PRESERVATION, *AMERICA'S FORGOTTEN ARCHITECTURE* 18-19 (1976). Robert Stipe believes that "the 'urge to preserve' is less rooted in high-style cultural soil than in a more fundamental, even biological, need all of us have to try to reduce or moderate the pace and scale of change itself." Stipe, *A Decade of Preservation and Preservation Law*, 11 N.C. CENT. L.J. 214, 215 (1980).

229. Community involvement in historic preservation efforts received extensive consideration in Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981). A recent incident in Upland, Pennsylvania possibly foreshadowed the results of the lack of community cooperation. The local government rescinded the historic district ordinance, the first such action in the state and perhaps in the United States, and cited "bureaucratic delays" and "actions of members of Historic Upland, Inc." as causes. The occurrence "illustrates the misunderstandings and tensions that can grow out of historic district administration, especially when design guidelines or a more general community plan are not present for reference." *Pennsylvania Borough Rescinds Municipal Historic District Ordinance*, 1 PRESERVATION L. REP. 1053, 1053 (Sept. 1, 1982).