Luke Bell
Vice President of Governmental Affairs
3644 SW Burlingame Rd.
Topeka, KS 66611
785-267-3610 Ext. 2133 (Office)
785-633-6649 (Cell)
Email: lbell@kansasrealtor.com

To: Senate Local Government Committee

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Subject: **SB 329** – Supporting the Protection of Private Property Rights and Enhancement of Local Control by Allowing Local Governments to Establish and Enforce Local Requirements on Historic Environs Review Projects

Chairman Reitz and members of the Senate Local Government Committee, thank you for the opportunity to appear today on behalf of the Kansas Association of REALTORS® (KAR) to offer testimony in support of **SB 329**. Through the comments expressed herein, it is our hope to provide additional legal and public policy context to the discussion on this issue.

KAR is the state's largest professional trade association, representing nearly 8,000 members involved in both residential and commercial real estate and advocating on behalf of the state's 700,000 homeowners for over 90 years. REALTORS® serve an important role in the state's economy and are dedicated to working with our elected officials to create better communities by supporting economic development, a high quality of life, sustainable communities and providing affordable housing opportunities, while protecting the rights of private property owners.

As currently drafted, **SB 329** would amend the provisions of **K.S.A. 75-2724** to allow local governments to exempt development projects located within the city from the historic environs review requirements found in **K.S.A. 75-2724** and to adopt local regulations and requirements governing development projects affecting historic properties. In our opinion, **SB 329** would provide greater protection to the private property rights of property owners and enhance local control by providing increased flexibility to local governments in complying with the historic environs review requirements.

Under **K.S.A. 75-2724(a)**, the state historic preservation officer (or any certified local government that has been delegated that authority by the state) is granted very broad authority to review and comment on any development projects that would result in the construction of new improvements to real property or the modification of any existing improvements to real property when the proposed project would infringe upon the "environs" of a historic property. Specifically, the statute mandates that this historic environs review will take place when the proposed project, or any portion of the project, is located within 500 feet of the boundaries of a historic property located within the limits of a city or 1,000 feet of the boundaries of a historic property located in the unincorporated portion of a county.

Once the state historic preservation officer (or any certified local government body that has been delegated that authority by the state) determines that the proposed project will encroach upon, damage or destroy any historic property, such project cannot proceed until the state or local government overrules that determination. In doing so, the state or local government must make a legal determination that, based on a consideration of all relevant factors, there is no feasible and prudent alternative to the proposal and that the project includes all possible planning to minimize harm to such historic property.

In practice, this can be a very time-consuming and burdensome process for property owners or developers who are attempting to either construct new improvements to real property or make major modifications to existing improvements to real property. In fact, a very cursory and quick review of newspapers in the state would reveal a large number of projects in the state that have been significantly delayed or cancelled due to problems identified within the historic environs review process.

According to our research on this issue, Kansas currently has one of the most strict historic preservation statutes in the entire nation. As currently drafted, **SB 329** would be a huge improvement to this process by providing greater protection to the private property rights of property owners and enhancing the local control by providing increased flexibility to local governments in complying with the historic environs review requirements.

Once a local government has determined that the historic environs review requirements found in **K.S.A. 75-2724** will have a detrimental effect on the economic development of the city and adopted its own local standards that would ensure the integrity of historic properties, the language found in **SB 329** will provide meaningful relief to property owners from the currently regulatory overreach found in the statute. As long as property owners comply with all the applicable local zoning, public safety and building code requirements, they should be free to fully utilize their private property as they see fit.

Overview and History of the "Historic Environs Review" Concept

As a fundamental concept, the historic environs review process is generally concerned with controlling the use of the surroundings of a historic property by placing extremely strict controls and guidelines on any neighboring properties. According to the argument behind this concept, the new construction, demolition or any additions of neighboring properties adversely affect historic properties by destroying by their integrity and harmony with neighboring properties.

This flawed concept originated in France in the early 1940s. In order to restrict new construction and development near historic properties in urban areas, the French Parliament passed an act in 1943 to require a historic environs review process for all new construction, deforestation, alteration or demolition of buildings located within the environs of a historic landmark.

Under the original French law, all properties located within 500 meters of a historic landmark (or the "environs" of the landmark) and within its field of visibility are regulated under the French environs review law. However, even the extremely restrictive French law is more lenient than the Kansas statute since the neighboring property will only be subject to the historic environs review requirements if the property is visible or has a line of sight from the historic landmark.

Since the passage of this law in the early 1940s, the French historic environs review law has been subject to significant criticism from property owners and local governments. According to its critics, the unilateral and arbitrary restrictions on neighboring properties are unduly burdensome for the neighboring property owners' ability to fully enjoy the use of their respective properties.

According to some prominent critics of the law, the systematic creation of a protected perimeter around modest and isolated historic properties is disproportionate and unduly burdensome for neighboring property owners. In some small communities, the designation of a single historic property can often lead to blanket restrictions on new development and remodeling projects in an entire community.

As a result of these criticisms, even the French have passed several considerable reforms to the French historic environs review law, which was the guiding inspiration for the Kansas statutes. These legislative reforms have allowed local units of government to exempt themselves from the historic environs review requirements through the creation of local zoning plans.

Fortunately for private property owners, nearly all local and state governments in the United States (with the notable exception of Kansas) have learned from the mistakes of the French law and have specifically chosen not to follow the French approach in drafting their historic preservation statutes. Again with the notable exception of Kansas, I have not been able to identify any other state statutes in the entire nation that place a hard and fast historic environs review requirements on neighboring property owners.

At the federal level, the protection of historic properties is provided by the National Historic Preservation Act of 1966 (hereinafter "NHPA"). NHPA basically requires every agency to take into account the effect of any project on any historic building, site, structure or object that is listed on or eligible for the National Register of Historic Places.

Designed to be a planning tool for federal agencies, NHPA applies to all government projects and all private projects involving federal financing or permits. Any state or federal agency undertaking a project in Kansas must evaluate the potential adverse effects of that project on the historic properties in the area. If the project is likely to have an adverse effect on historic properties, the agency must consult with the State Historic Preservation Officer (hereinafter "SHPO") to develop and evaluate alternatives that could avoid or mitigate the adverse effects.

Nevertheless, no agencies are required to engage in any specific preservation activities under NHPA. According to the courts that have looked at this issue, economic interests and the necessities of modern life often prevail over historic and environmental preservation interests. When historic preservation collides with economic realities, the economic necessity of property use normally defeats the interest of historic preservation.

Overview and History of the Kansas Historic Environs Review Requirements

In order to meet the requirement imposed by the National Historic Preservation Act of 1966 that each state implement a preservation program, the Kansas Historic Preservation Act was enacted by the Kansas Legislature in 1977. The stated purpose of the act, which goes far beyond the federal requirements, was to prevent any actions that may adversely affect the "environs" of historic properties in Kansas.

As it was originally passed, the act prohibited any governmental entity from undertaking any project that would encroach upon, damage or destroy any historic property listed in the National Register of Historic Places or the Register of Historic Kansas Places or its "environs" until the State Historic Preservation Officer (hereinafter "SHPO") had been given notice. Once the SHPO receives notice of the project, the SHPO has 30 days to initiate an investigation into the project.

If the SHPO fails to initiate an investigation within 30 days of receipt of the notice, the project is automatically approved. The SHPO has the ability to delegate its authority to review projects under the act to local historic preservation committees of cities, counties and Regents institutions.

If the SHPO determines that the project will have an adverse effect on the historic property or its environs, the project may not proceed until the governor, in the case of a state project, or the local governing body finds after consideration of all the relevant factors that there is "no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm." Although the local governing body retains the ability to overrule the SHPO, it is extremely difficult and has caused a great deal of litigation.

In the late 1970s, there was some controversy over the definition of the term "project" in the original act. According to an opinion issued by Kansas Attorney General in 1979, the act originally applied only to units of government and did not constrain actions taken by private businesses or individuals. As a result, the term "project" was determined to not encompass construction projects or redevelopment efforts by private businesses or individuals.

In 1981, the Kansas Legislature reacted to this opinion, at the request and urging of historic preservation advocacy groups, by specifically bringing development projects conducted by private businesses and individuals under the act. The impact of this modification to the act is tremendous and should not be underestimated as it expanded the very broad reach of the statute to development projects conducted by private property owners as well as state and local governments.

According to my research on this issue, this change in the definition of the term "project" took the Kansas statutes completely out-of-step with the existing historic preservation laws in other states. To my knowledge, no other state requires the historic environs review on the impact of private projects within the "environs" of a historic structure unless financial incentives from the state are involved in the project.

In the late 1980s, there was again controversy over the historic environs review law in general and in particular the meaning of the term "environs." No definition of the term "environs" was included in the act at that time and there was considerable uncertainty among local governments and property owners as to what exactly was meant by that term.

In 1987, the Kansas Attorney General issued another Attorney General's Opinion on the historic environs review law and concluded that the applicability of the environs review law was not limited only to properties adjoining the actual historic structure. Instead, the opinion concluded that the SHPO could use the statute to review a broad swath of properties in the vicinity of the historic structure.

Worried by the Attorney General's broad definition of the term "environs" under the act, the League of Kansas Municipalities requested an amendment to the act to clarify that the term "environs" applied only to properties immediately adjoining the historic property. Unfortunately, the Kansas State Historical Society opposed this definition and instead urged the Kansas Legislature to expand the meaning of the term "environs" to the current definition.

As a result, the act was amended in 1988 to provide that notice must be given to the SHPO when the proposed project is located within 500 feet of a historic property located in a city or within 1,000 feet in rural areas. This change in the definition of the term "environs" again took Kansas statutes completely out-of-step with other state historic preservation laws. To my knowledge, no other state defines the term "environs" to include properties within 500 or 1,000 feet of a historic structure.

Criticisms of the Historic Environs Review Process

Fortunately, the Kansas Historic Preservation Act has generated much controversy since its drastic expansion in the 1980s. Many property owners and property rights advocates, like the Kansas Association of REALTORS®, have expressed outrage over the ability of an unelected state official or local historic preservation committee to prevent property owners from enjoying the full and free use of their property.

Unfortunately, when a property owner is forced to go through the historic environs review process, it can be time-consuming, burdensome and overly restrictive on his or her private property rights. Even if the SHPO does not determine that the proposed project will "encroach upon" the listed historic property, the property owner of major developments is still forced to incur large legal and architectural fees to successfully navigate the environs review process.

Given the current state of the real estate market and the enormous difficulties facing private property owners who want to use their property for residential, commercial, industrial or agricultural use, it is entirely unreasonable for the state to impose an additional hurdle to this process. The historic environs review process deprives a private property owner of important rights and is another burdensome hurdle to infill development and the productive use of private property.

In recent years, the Kansas State Historical Society and the Kansas Preservation Alliance have started to solicit public interest in listing 1950s-era ranch homes in suburban subdivisions on the state historic register. A large amount of housing stock in Kansas was constructed around that timeframe and could conceivably become eligible for the state historic register in the next few years.

If this trend continues to accelerate, an increasing number of property owners in suburban subdivisions will become subject to the burdens and restrictions of the historic environs review process. In future years, the dramatic expansion of the state historic register coupled with the broad reach of the historic environs review law has the potential to declare vast swaths of our state off-limits for future residential, commercial, industrial and agricultural use.

Under the current historic environs review law, if an unelected state official (the SHPO) or a local historic preservation committee determines that a property owner's planned use of their property does not fully conform with their view of the "environs" of a historic structure, these unelected bureaucrats have the authority to severely restrict the property owner's use of his or her private property. Unfortunately, this authority places severe limits on the future use and market value of the property.

Conclusion

Once a local government has determined that the historic environs review requirements found in **K.S.A. 75-2724** will have a detrimental effect on the economic development of the city and adopted its own local standards that would ensure the integrity of historic properties, the language found in **SB 329** will provide meaningful relief to property owners from the currently regulatory overreach found in the statute. As long as property owners comply with all the applicable local zoning, public safety and building code requirements, they should be free to fully utilize their private property as they see fit.

For all the foregoing reasons, the Kansas Association of REALTORS® would urge the members of the Senate Local Government Committee to strongly support the provisions of **SB 329**. Once again, thank you for the opportunity to provide comments on **SB 329** and I would be happy to respond to any questions from committee members at the appropriate time.