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TESTIMONY OF EDWIN H. BIDEAU III BEFORE SENATE LOCAL GOVERNMENT COMMITTEE IN SUPPORT OF S.B. 329

Mr. Chairman and Committee Members

My name is Ed Bideau III and I am a country lawyer from Chanute, Kansas, but I am appearing before you today as a property owner in the downtown area of Chanute and as a former member of the Kansas House during the 1980s. I am supporting S.B. 329 and I am recommending a possible amendment.

Chanute encountered very substantial problems with K.S.A. 75-2724 when the creation of a Historical District was proposed for the downtown area in order to allow owners of property to pursue historic tax credits. The proponents of the District were misinformed and were not aware that placement of a property on the National Historic Registry would impose very substantial appearance and design restrictions on not only the property on the registry, but would also impose those same exterior restrictions on all adjoining property owners within a 500 foot radius. A map showing the extent of the restricted area is attached. These restrictions would be imposed on the owners within that radius without legal notice to them and without any opportunity to be heard or object. These restrictions would have very profound adverse consequences to the property owners within that area. A summary of the restrictions is included as an exhibit to my testimony

During the consideration of this issue by the Chanute City Commission we then became aware that the old Murray Hill Elementary School had been listed on the National Registry and that insufficient notice of that pending action may have been given to city and county authorities. The listing of the school on the registry would impose very substantial design and appearance restrictions on homeowners within 500 feet from the borders of the property and could have major adverse impact on owners of homes in the area. These restrictions were imposed on those property owners without any notice and with no opportunity for a fair hearing, to be heard or object.

I believe that the major reason a building or district is nominated for the National Registry by a private developer or private owner is to try to get tax credits and grants. It

is more about money than it is creating a historical monument and if the money was not there, it would probably not happen. With the 500 or 1,000 foot restriction on other neighborhood properties, the rest of the Murray Hill neighborhood owners are being taken advantage of for the financial benefit of an out of town private developer. The private developer will get those tax credits because of the restrictions imposed on the neighbors, yet the neighbors in the environs get absolutely nothing in the way of compensation. It harms innocent parties in the 500 foot area just to help an out of town developer make money. It is doing something wrong unto others just to help yourself and would seem to violate the basics of The Golden Rule.

A major problem with the existing provisions of K.S.A. 75-2724 is that it allows the Kansas State Historical Society to impose design and appearance restrictions on property owners within 500 feet of a historical property in a city and 1,000 feet outside of a city, without any notice or opportunity to be heard, no fair hearing rights and with no apparent remedy other than a suit for inverse condemnation and violation of civil rights. I think we would all agree that notice and opportunity to be heard are very fundamental constitutional rights, but under the statutory procedures now in place, those are denied to innocent property owners. I believe that the restrictions imposed can also substantially impede economic development and investment in the restricted area.

I would also point out that the restrictions in K.S.A. 75-2724 have a much larger radius outside of a city, reaching out to 1,000 feet. The provisions of K.S.A. 75-2720, which was amended in 2004, requires KSHS to give notice to landowners within 500 feet, but only in unincorporated areas. This appears to create a situation where landowners out in the county within 500 feet are entitled to notice, but owners located between 501 feet and 1,000 feet away and owners inside an incorporated area receive no notice at all. This would appear to create very substantial constitutional and equal protection issues.

RECOMMENDED ACTION

Based on the literature available and the testimony presented in legislative consideration of this issue several years ago, I understand that Kansas is one of the few states in the country that has a specific historical preservation statute and one of only two in the nation that has a statutory 500 foot and 1,000 foot restricted area.

Amend S.B. 329 To Include Counties

S.B. 329 as proposed is certainly a step in the right direction to allow a city to exempt itself from these restrictions. However, the bill as drawn may not give counties the same benefits and I would suggest an amendment to bring counties under it and give them the same option to opt out.

Amend S.B. 329 To Require Notice and Opportunity To Be Heard

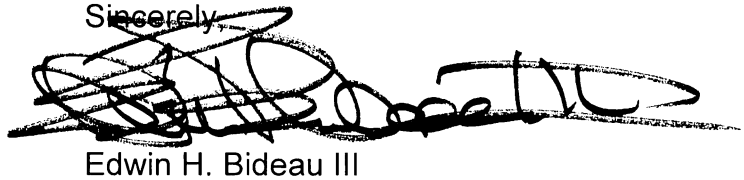
Include in the provisions of S.B. 329 an amendment to K.S.A. 75-2720 to require notice and opportunity to be heard for ALL landowners, not just those within 500 feet outside of an incorporated city, and require specific fact findings before a property is included on the registry, including no adverse economic impact to surrounding properties subject to restrictions.

Amend S.B. 329 To Strip All Environs Restriction Provisions from K.S.A. 75-2724

Another alternative would be to amend the bill so that the current practice of imposing restrictions within the 500 foot and 1,000 foot restrictions is eliminated state wide. To the extent that these restrictions create impediments to investment and development of real estate within the restricted areas, removal of these restrictions would create additional economic development. Removing the restrictions would get the KSHS out of the business of imposing design and appearance zoning restrictions and I suspect would result in considerable budget savings.

I would be happy to answer any questions on my testimony or recommendations or submit any additional information or materials which the committee may wish to review or consider.

Sincerely,



EHB:eb

Edwin H. Bideau III

SUMMARY OF RESTRICTIONS IMPOSED
IN 500 FOOT OR 1,000 FOOT "ENVIRONS"
AS PRESENTED TO CHANUTE CITY COMMISSION

A. No building permit can be issued to any property owner in the restricted "environs" until the building permit has been reviewed by the KSHS and approved. The owner has the right of appeal to the City Commission but has the burden of proof to over rule the denial. This will place very substantial design and appearance restrictions on any change to a property within the restricted area. This would include even includes landscape changes, fencing and changes only visible from the alley.

B. The same type of restrictions on changes in appearance would be required that the Department of the Interior uses on historic buildings in national parks. These rules would be adopted by reference and have indeed been adopted by the KSHS by Administrative Regulation. Those rules are major and extensive, not simply "advisory". They may be reviewed at the KSHS web site.

C. The owner of a building in the restricted area could not change the appearance of the building, remodel it or tear it down unless approval of the KSHS was granted or the City Commission overruled the KSHS after a hearing. If demolition was sought the burden would be on the owner to show there was no reasonable alternative to demolition. Under the KSHS and NPS guidelines "demolition" that is prohibited includes demolition of only part of a structure as well as total demolition.

D. If the approval of KSHS is not obtained, the building permit can only be issued after a hearing before the City Commission where the burden of proof is placed on the landowner. Third parties have the right to appeal the issue up to District Court. This would result in substantial delay, cost and expense, perhaps requiring the landowner to hire an attorney, engineer or architect.

E. As stated by the Kansas State Historical Society representative to the Chanute City Commission, once a historical district or property is approved by the state and federal authorities, it is permanent and a property can never be removed from it.

F. Many insurance policies require the insured to carry replacement cost coverage. To the extent that properties within the district have increased replacement cost to comply with the ordinance the amount of insurance required may substantially increase.

G. Some insurance policies provide what is called "ordinance and law" coverage to comply with increased code restrictions for reconstruction. If a policy owner does not have this coverage, then extra costs to comply with the historical requirements, may not be covered. The extra costs and requirements may also

make insurance companies reluctant to write coverage within the district. If this coverage is not obtained then a building might be impossible to repair after a serious fire or storm damage.

H. Mortgage lenders might be reluctant to loan on buildings that would require expensive historical compliance for repairs in the event of damage or where substantial restrictions on modifications or alterations exist. This is not speculative and is a serious issue on large commercial loans.

I. Although the Kansas State Historical society representative indicated that they could not require an owner to do anything with their property, if the property is changed in appearance or even if the owner wants to demolish it, then the substantial restrictions apply. Any appearance change other than paint and any work that requires a building permit would require a Certificate of Appropriateness.

J. Kansas is one of the few states in the country that has a specific historical preservation statute. That statute and the appellate cases under it, give any citizen and any historical society the right to appeal a decision granting or denying a "Certificate of Appropriateness" or any decision by the City Commission granting a building permit within a historic district, property or its 500 or 1,000 foot environs. Based on Kansas case law, this gives third parties a right to appeal what an owner does to a building, even if the City Commission granted a permit. To subject properties to this litigation exposure would be a severe problem.

K. Since no building permit could be issued without approval by the KSHS, and filing a lengthy application for a permit and certificate, the time and expense required for repairs would increase. Owners may not be able to do this themselves and would incur additional legal, architectural and engineering expense.

IMPACT OF HISTORICAL PRESERVATION ACT AND KANSAS CASE LAW

There are some specific statutory provisions in K.S.A. 75-2724 and K.S.A. 75-2725 that have additional substantial and possibly severe impact on property owners in the 500 or 1,000 foot radius of a site on the national registry.

The case law indicates that the statute creates a private cause of action available to any "person aggrieved" by a determination. Even though they have no ownership in the property, they can appeal the determination up to the District Court, to the Court of Appeals and even onto the Kansas Supreme Court. The attached summary shows appellate level cases that have delayed projects for years as a result.

The statute also provides for severe penalties for violations up to $25,000. If this creates a private cause of action allowing any citizen the right to challenge a landowner, that would be a severe obligation to impose on a landowner seeking improvements or changes to their property.

The statute further gives the state historical society or any city or county historical society the authority to file suit in the District Court if they feel a violation has occured or is threatened. It would appear that under current law a city or county would have no control over this and a property owner would be subjected to the judgment of a third party and risk litigation exposure.