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Senate Ethics, Elections and Local Government Committee
Hearing: Tuesday, March 12, 2013, 9:30 A.M. Room 159-S

TESTIMONY OF EDWIN H. BIDEAU III BEFORE SENATE ETHICS, ELECTIONS AND LOCAL GOVERNMENT COMMITTEE IN SUPPORT OF H.B. 2118

Mr. Chairman and Committee Members

My name is Ed Bideau and I am the State Representative for District 9 which includes the cities of La Harpe, Gas, Iola, Humboldt and Chanute. I am also a country lawyer a am appearing before you today as one of the property owners in the downtown area of Chanute that is very concerned about what we view as substantial permanent restrictions imposed on our property, without any notice to us or opportunity to be heard, by the regulations of the Kansas State Historical Society (KSHS) and the provisions of K.S.A. 75-2724. Kansas is the only state in the union to impose these restrictions.

Problems With K.S.A. 75-2724

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 perpetual 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 the historical district issue by the Chanute City Commission we were all very surprised to discover that the old Murray Hill Elementary School, in the middle of a quiet and modest residential area, 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 imposed

very substantial design and appearance restrictions on homeowners within 500 feet from the borders of the property, many of whom were on fixed incomes and could have major adverse impact on owners of homes in the area.

These restrictions were imposed on those property owners without any notice to them and with no opportunity for a fair hearing, to be heard or object. Had the property been rezoned by the City, all of those owners would have been given very extensive and specific legal notice, the right to a hearing and to object, both at the Planning Commission level and to the City Commission, but no such notice or right to hearing is available to them for the historic restrictions. This would seem to violate fundamental constitutional protections of our property, denying even the minimum constitutional requirements of notice and an opportunity to be heard. It is a perpetual taking and restriction of their property and must be remedied.

Tax Credit Issues - Unfair Advantage

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.

Tax credits under Federal law are only available to a property on the National Registry or a "contributing property" within a historical district. In order to qualify for the credit an owner must spend an additional amount equal to their tax basis in the property. This presents a significant hurdle for many owners who have a high tax basis in their property.

Tax credits under Kansas law may fade away since the tax bill passed in 2012 results in a zero state income tax liability for many local businesses.

Perpetual Design and Appearance Restrictions

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.

Problems Outside City Limits

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. No notice to landowners is required inside the city limits. 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 only two states in the union that impose the 500 foot environs restrictions. Kansas is the only state that applies these restrictions to private property owners.

HB 2118 Repeals 500 Foot and 1,000 Foot Environs Restrictions

In my view Kansas should not be the only state in the union to impose these perpetual restrictions and they should simply be repealed. Although the Fiscal Note indicates no impact from a repeal, I would submit that common sense indicates that substantial resources could be saved if these restrictions were simply repealed.

Benefits of Repeal - HB 2118

HB 2118 would end the current practice of imposing restrictions within the 500 foot and 1,000 foot restrictions 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, unless a local unit of government required that on their own, and I suspect would result in considerable budget savings. In addition, I would submit that repeal might prompt more property owners to pursue listing on the National Registry since it would no longer impose perpetual restrictions on their neighbors.

Local Zoning Rights Preserved

Local cities and counties would retain the right to regulate design and appearance under either local zoning ordinances or home rule powers, which retains flexibility, would provide to adjoining property owners the same right to notice, opportunity to be heard and appeal rights which exist under current laws. If a city chose

to require review by KSHS of building permits under those systems, they could certainly do so. This bill simply removes the requirement, but leaves the local home rule option open.

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

Attachments:

Summary of 500 foot restrictions and caselaw.
Map of 500 foot restrictions on proposed Chanute historic district.
Map of 500 foot restrictions in Murray Hill neighborhood.
Photos of Murray Hill neighborhood properties subject to restrictions.

Also see: Power Point Presentation - Impact on Murray Hill Neighborhood

http://www.bideaulaw.com/docs/historical_design_and_appearance_restrictions.ppt

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 show that:

> "based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to the historic property."

Only by proving these facts can the landowner obtain relief from the City government to over rule. The burden of proof is on the landowner. 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 by KSHS that the Department of the Interior uses on historic buildings in national parks. These rules have 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 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. The Bethany Place dispute, just a few blocks East of this building, has been tied up in the courts for three years.

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. In some instances, costs to comply with the restrictions is not covered under an owner's insurance policy.

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.

Kansas Appellate Cases - Historic Property Disputes -Appeals and Delays

Historic Preservation Alliance, Inc. v. City of Wichita,
20 Kan.App.2d 721 (1995) City Owned Building - 1 Year Delay for Appeal - Then District Court Trial on original appeal petition.

In March of 1994 the City of Wichita acquired a hotel building that had been placed on the National Registry. In August of 1994 the City sent notice to KSHS that it intended to demolish the property. The City held a hearing in November of 1994 finding no feasible and prudent alternative to demolition. The HPA, (3rd Party Historical Society) appealed to the District Court and asked for an injunction to stop demolition. The District Court denied and found HPA appeal was out of time. HPA appealed the injunction to the Court of Appeals which reversed District Court, found HPA appeal was timely and sent it back to District Court for trial on HPA appeal.

Reiter v. City of Beloit,
263 Kan. 74 (1997) Over 2 Years of Delay

Developer wanted to build store on property next to historical home. Filed for building permit in 1995. KSHS issued opinion that the project would harm the appearance of the historical area. City conducted two extended hearings with several witnesses and granted building permit anyway. Reiter appealed to District Court. More delays,

extended hearings, District Court finally approves the City action. Reiter then appeals to Court of Appeals. Although Court of Appeals eventually supported the City decision, the opinion sets out the detailed findings that are required by the City in order to go against the KSHS recommendation. Court of Appeals decision was issued in October of 1997, over 2 years of delay. Note that Reiter could have filed for review by Kansas Supreme Court, but did not and if she had, would have been further delay.

Historic Preservation Alliance of Wichita and Sedgwick County vs.
City of Wichita,
2003 WL 25455928 (2003) Over 2 Year Delay Because Of Third Party Appeal Rights

This case involves a certified local government and shows that local control does not prevent extreme delays because the statute gives third parties appeal rights. The Wichita Bar Association filed with local Historic Preservation Board for permission to demolish building to build parking lot. Permit was approved. Preservation Alliance then appealed to the City Council that affirmed the granting of the permit. Preservation Alliance then appealed to District Court. District Court reversed both the finding of the local preservation agency and City Council. The City appealed to the Court of Appeals which reversed the District Court. The Preservation Alliance then petitioned for review to the Kansas Supreme Court which was denied in May of 2005. Over 2 years of delay after the building permit was sought.

Mount St. Scholastica, Inc. v. City of Atchison, Kansas,
482 F.Supp.2d 1281 (2007) Over 2 Year Delay and still not resolved.

Monastery in Atchison had some properties on it's campus that were on the National Registry. It's administration building was not on the Registry. It was aged and in decay so they decided to tear it down. They filed for building permit in October of 2005 and KSHS said no, would damage the appearance of the historic property and environs. Hearing held in front of City and City denied the permit. A third party, Atchison Preservation Alliance, had contested it at the City hearing. KSHS suggested that the Monastery either mothball the building or sell it to someone else. The Monastery did not want to mothball it which they thought would look terrible in the middle of their campus. They did not want to sell a property right in the middle of it to a third party either. It is interesting to note that a Steve Foutch, who may be the same as the promoter of Murray Hill, is mentioned in the case opinion as the party who wanted to get ahold of the building to build senior housing. The Monastery turned it down.

The Monastery took the City to Federal Court and the Federal judge determined on a motion for summary judgment that the City had violated their free exercise of religion rights under the constitution but that ruling did not resolve all issues in the case. The order on the civil rights claims was issued March of 2007 and still the case was not resolved after a year and a half.

Friends of Bethany Place, Inc. v. City of Topeka,

43 Kan.App.2d 182 (2010) Episcopal Church Parking Lot Approved 9-0 by City of Topeka in August 2007. Appealed by 3rd Party and still on appeal almost 4 years later.

Episcopal Church had 6 acres in Topeka next to it's state Cathedral which it had owned since the 1800s. To try to prevent the City of Topeka from condemning the property and taking it away from them, the church voluntarily placed the property on the Registry. In 2007 the church applied for permit to install parking lot of 40 spaces, 10 of them handicap, to give access to the Cathedral. The proposed lot would be 4.5% of Bethany Place and would reduce green space 6.5%.

The Church applied for permit to City and KSHS issued opinion that the proposed lot would encroach upon, damage, or destroy the historic environs. 1 day before the City hearing, new non-profit group was formed "Friends of Bethany Place", which opposed the parking lot project at the City hearing. Friends of Bethany Place was not a historical society that has automatic appeal rights under the statute.

A detailed hearing was held by the City. 21 witnesses presented and others submitted documents which included detailed reports and assessments along with detailed staff assessments. A motion to grant the Church's parking lot permit based upon "consideration of all relevant factors, that there are no feasible and prudent alternatives to the proposal, and that all possible planning has been undertaken to minimize harm to the historic property" was passed unanimously 9-0.

FOBP then appealed to District Court. The City argued that FOBP was a 3rd party, had no standing and should not be allowed to appeal. The District Court rejected that argument, held that FOBP had standing and allowed the appeal to go forward. As a result of that appeal, the District Court reversed the City's unanimous decision was reversed by the Court finding that it was arbitrary, capricious and unreasonable. Both the City and the Church then appealed to the Court of Appeals.

At the Court of Appeals level, several other parties joined in and filed "friend of the Court" or Amicus briefs. KSHS came into the case and urged the Court to deny the appeal and affirm the District Court denial of the City's unanimous action.

In the Amicus brief filed by KSHS, the agency strongly argued all of the detailed "relevant factors" and "alternative solutions" that it claimed the City should have considered and required. Their position is that the burden to overcome the KSHS objections is a very heavy one and some quotes from their brief on the standards they claim the City had to follow, but did not, is attached.

The Court of Appeals reversed the District Court and found that there was substantial competent evidence to support the unanimous decision to grant the permit by the City Council. However, the Court of Appeals held that FOBL did have standing even though it was only formed the day before the City hearing and was not an owner of the

property. This opened further the door to third party appeals of City decisions on historic properties or environs.

A strong dissent was written by one judge and FOBP subsequently filed a request for review by the Kansas Supreme Court. The request for review was granted in February but the case has not yet been heard.

As of today the permit for the parking lot requested by the Episcopal Church in August of 2007 and unanimously approved by the Topeka City Council, is still in limbo almost 4 years later due to a 3rd party appeal filed by a newly formed group. The door to 3rd party appeals appears to be thrown wide open unless the Kansas Supreme Court rules differently.

<u>Sections from Amicus Brief filed by Kansas State Historical Society in Court of Appeals in Friends of Bethany Place vs. City of Topeka.</u>

Regulations define "relevant factors" to mean "pertinent information submitted by project proponents or project opponents in written form, including evidence supporting their positions." K.A.R. 118-3-1(j). In Reiter v. City of Beloit, 263 Kan. 74, 90-91, 947 P.2d 425 (1997), the Kansas Supreme Court said the "report and reasoning" of the Historical Society is a relevant factor.

"Feasible and prudent alternative" means:

An alternative solution that can be reasonably accomplished and that is sensible or realistic.

Factors that shall be considered when determining whether or not a feasible and prudent alternative exists include the following:

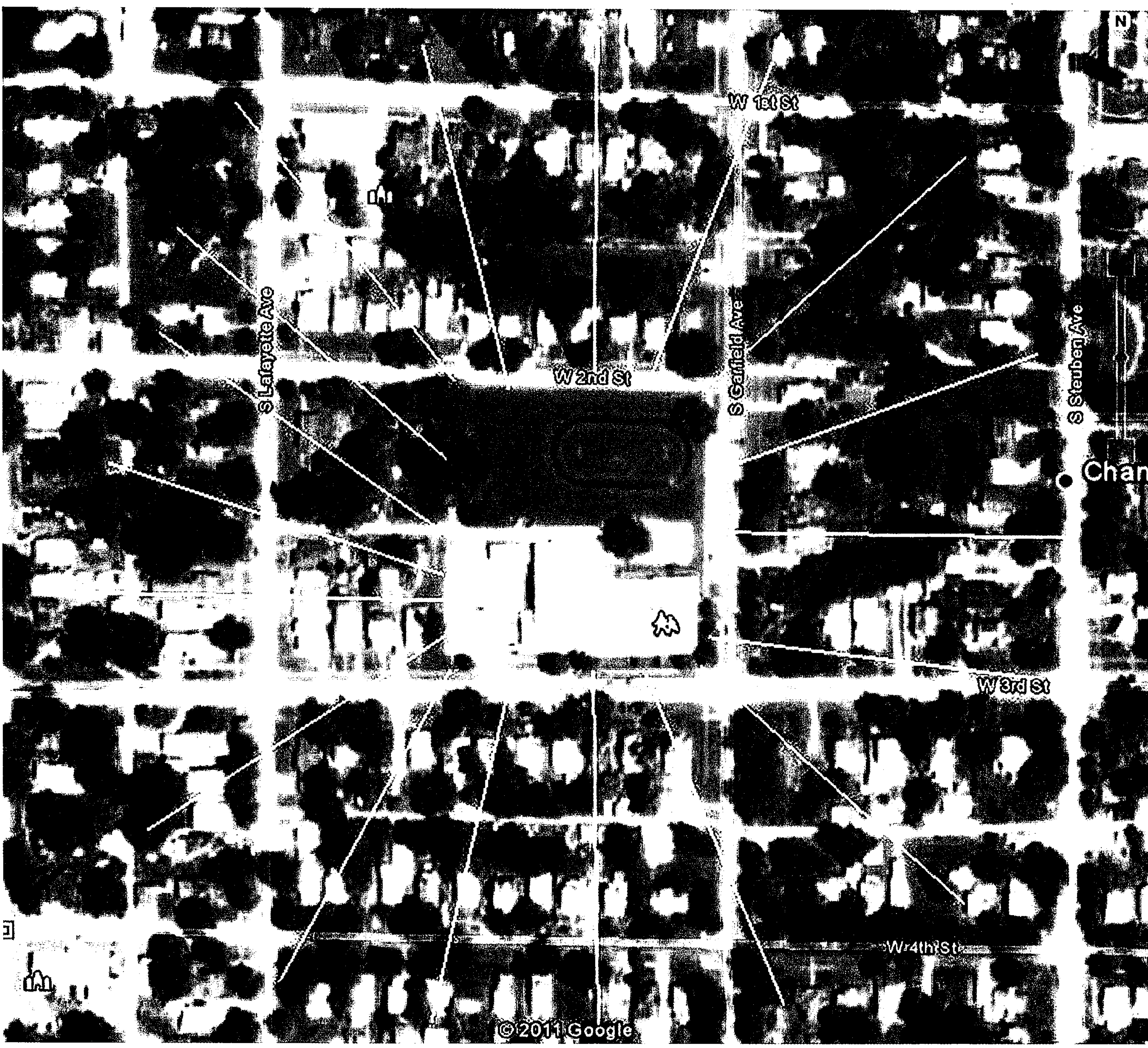
(1) Technical issues;
(2) design issues;
(3) the project's relationship to the community-wide plan, if any; and
(4) economic issues.

K.A.R. 118-3-1(e). The Secretary of the Interior's Standards for the Treatment of Historic Properties 1995 ed. are adopted by reference in K.A.R. 118-3-8(a). Those standards require consideration of the relationship between buildings and landscape features on a historical site as "integral" to planning for every project. Standards, at p. 13. These standards also recommend:

Identifying, retaining, and preserving buildings and their features as well as features of the site that are important in defining its overall historic character. Site features may include circulation systems such as walks, paths, roads, or parking; vegetation such as trees, shrubs, fields, or herbaceous plant material; landforms such as terracing, berms or grading; furnishings such as lights, fences, or benches; decorative elements such as

sculpture, statuary or monuments; water features including fountains, streams, pools, or lakes; and subsurface archaeological features which are important in defining the history of the site, and retaining the historic relationship between buildings and the landscape.

The Standards, furthermore, do not recommend "removing or radically changing site features which are important in defining the overall historic character of the property so that, as a result, the character is diminished."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DOWNTOWN HISTORIC BOUNDARY
453 PARCELS WITHIN 500' RADIUS
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