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

To: Senate Ethics, Elections and Local Government Committee

Date: February 5, 2013

Subject: **HB 2118** – Supporting the Protection of Private Property Rights and Enhancement of Local Control by Repealing the Kansas Historic Environs Review Requirements

Chairman Pyle and members of the Senate Ethics, Elections and Local Government Committee, thank you for the opportunity to provide testimony on behalf of the Kansas Association of REALTORS® in strong support of **HB 2118**, which protects private property rights and enhances local control by repealing the Kansas historic environs review requirements found in **K.S.A. 75-2724**. 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 and providing affordable housing opportunities while protecting the rights of private property owners.

HB 2118 would amend the provisions of **K.S.A. 75-2724** to repeal the historic environs review requirement by eliminating the ability of the state historic preservation officer (or any certified local government that has been delegated that authority by the state) to review and comments on any projects that do not directly damage or destroy a historic property actually listed on the state or national historic registers. In our opinion, **HB 2118** would provide greater protection to private property rights and enhance local control by providing increased flexibility to local governments in complying with the overly-burdensome and arbitrary 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 extremely broad authority to review and comment on any development project that would result in the construction of a new improvement to real property or the modification of any existing improvement 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.

As a result, the current language in **K.S.A. 75-2724(a)** draws an arbitrary circle with a circumference over a half or full mile (3,142 or 6,284 feet depending upon whether the property is located in the city or county) around every historic property listed on the state or national historic register. Within the very broad reach of this burdensome circle, a property owner cannot construct a new improvement or modify an existing structure without going through the arbitrary and burdensome process required by this statute.

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, the building 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, developers and local government officials who are dealing with the very complex financing and regulatory environment that is involved with the construction of new buildings or modification of existing buildings. In fact, a very cursory and quick review of the case law and newspapers reveals a large number of projects that have been significantly delayed or cancelled due to problems with the existing historic environs review process.

Under the current language found in **HB 2118**, the 500 feet and 1,000 feet restricted area surrounding any property listed on the state or national historic registers would be eliminated from the statute. As a result, we believe that **HB 2118** could provide meaningful regulatory relief to property owners from the arbitrary and burdensome requirements found in the current statute.

As drafted, **HB 2118** would be a huge improvement to this process by providing greater protection to the private property rights of property owners and enhancing local control by providing flexibility to local governments in complying with the arbitrary and burdensome historic environs review requirements. 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 without interference from unelected bureaucrats and third party groups that have no economic or ownership interest in the property.

Overview and History of the "Historic Environs Review" Concept

According to my comprehensive research on this issue, Kansas currently has one of the most (if not the most restrictive) historic preservation statutes in the entire nation. Only one other state has adopted the 500 or 1,000 feet historic "environs" review requirement and this state (South Dakota) specifically restricts the application of this requirement to only projects actually conducted by a governmental entity.

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.

As a result, property owners are forced to comply with this extra layer of requirements even though they are already forced to comply with all the applicable local zoning, public safety and building code requirements. The historic environs review requirements amount to an extra step in the process that, in some cases, can lead to years of delays and thousands of dollars in additional costs for property owners in developing the property.

Unfortunately, this fundamentally-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 current language found in **K.S.A. 75-2724(a)** since the neighboring property is 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 a significant amount of criticism from property owners and local governments. According to its critics, the unilateral and arbitrary restrictions imposed by the historic preservation requirements 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, which is similar to the concept in **HB 2089**.

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. The passage of **HB 2118** would have absolutely no effect on the NHPA requirements.

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 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 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 defeats the interests of historic preservation.

<u>Overview and History of the Kansas Historic Environs Review Requirements</u>

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 minimum 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.

Under the act, 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 often leads to 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, but only referred to projects actually carried out by governmental entities

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 even the most restrictive 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 and how bar the restricted area extended from a historic property.

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 broad 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 and other advocacy groups 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, which is a very large area.

<u>Criticisms of the Historic Environs Review Process</u>

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 bureaucrat 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 may still be forced to incur large legal and architectural fees to successfully navigate the environs review process and may be forced to make changes to the project to clear the review.

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 by adopting requirements that exist in no other states. 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 order to make even further expansions to the scope of the law, 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 time frame and could become eligible for the register over 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 the rural and urban areas 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.

<u>Case Study on How the Historic Environs Review Process Can Severely Burden Private Property Owners</u>

In order to illustrate the burden that the historic environs review requirements can place on a private property owner, it is a useful exercise to examine how the requirements have effectively derailed the efforts of a local church to utilize a portion of their property to simply construct a parking lot. Over the last six years, the historic environs review requirements found in the statute have been used to effectively deny the cathedral the opportunity to use their property for its highest and best use according to their own demands and needs.

In early 2007, the Grace Episcopal Cathedral in Topeka (hereinafter the "cathedral") applied for a building permit from the City of Topeka to construct a parking lot on a portion of Bethany Place, which is a tract of ground on which the cathedral and two other buildings are located. These two other buildings and the surrounding grounds (but not the actual cathedral itself) are listed on the Register of Kansas Historic Places.

Unfortunately, the state historic preservation officer (SHPO) used the authority granted in **K.S.A. 75-2724(a)** to review the project and determine that the construction of the parking lot would "encroach upon, damage or destroy the historic environs of Bethany Place because the project would require the removal of mature trees and because the project would drastically change the relationship between the two historic buildings on the site." Just to reiterate, although no modifications were proposed the actual historic buildings themselves, the project was denied by SHPO since it would among other things "require the removal of mature trees."

In August 2007, the building permit came before the Topeka City Council and, following a public hearing that featured extensive testimony from both proponents and opponents of the project, the building permit was approved by the Topeka City Council on a unanimous vote. Just prior to the hearing, a group of Topeka residents that had no ownership interest in the property formed a group called the Friends of Bethany Place specifically for the purpose of stopping the construction of the parking lot on the cathedral's property.

Friends of Bethany Place filed a lawsuit in Shawnee County District Court challenging the city's findings that there were no "feasible and prudent alternatives to the proposed parking lot and that all possible planning to minimize the harm to Bethany Place had been undertaken." In mid-2008, the Shawnee County District Court issued an opinion siding with the opponents of the project that concluded that the city had not fully considered all "feasible and prudent alternatives" and had not conducted all possible planning to minimize the harm to the adjacent historic properties.

Following the issuance of the district court opinion in mid-2008, the cathedral and the City of Topeka appealed the opinion to the Kansas Court of Appeals. In January 2010, the Kansas Court of Appeals finally issued an opinion siding with the City of Topeka and the cathedral in this matter. Unfortunately, this opinion was appealed to the Kansas Supreme Court by the Friends of Bethany Place where it finally received a hearing before the court in April 2012.

At this time, no opinion on this matter has been released by the Kansas Supreme Court, which means the cathedral's project is still in limbo roughly six years after the initial application for a building permit was submitted by the cathedral to the City of Topeka. In that time, the cathedral has not been able to make productive use of the subject property and has been forced to consider alternative arrangements to fulfill the needs of the property owner that prompted the original application for a building permit over six years ago.

In summary, the historic environs review requirements found in **K.S.A. 75-2724(a)** have effectively prevented the cathedral (a private property owner) from utilizing their own property in a manner that will increase the economic and social utility of the property for a period of over six years and prevented the governing body of a city from exercising effective and timely local control over a building project that was approved by the governing body on a unanimous 9 to 0 vote. Is this an example of good public policy?

Unfortunately, this same scenario has played out in similar situations over the last 25 years since the dramatic expansion of the historic environs review requirement by the Kansas Legislature in 1988. If the Kansas Legislature does nothing to modify the overly burdensome and arbitrary requirements contained in the act, then many other Kansas property owners in the future will be prevented from utilizing their private property in an efficient and timely manner by the same burdensome and arbitrary requirements.

<u>Conclusion</u>

In order to protect the private property rights of property owners and eliminate the regulatory red tape for property owners and local governments imposed by the historic environs review requirements, Kansas REALTORS® strongly believe that now is the time for the Kansas Legislature to undertake a long-overdue reform of the historic environs review requirements. In our opinion, the passage of **HB 2118** would be a significant and much-needed step towards the reform of the state's historic environs review requirements.

In our opinion, the language found in **HB 2118** will provide meaningful relief to private property owners from the regulatory overreach found in the current 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 without undue and unreasonable interference from unelected bureaucrats and third parties. For all the foregoing reasons, the Kansas Association of REALTORS® would urge the members of the Senate Ethics, Elections and Local Government Committee to strongly support the provisions of **HB 2118**.