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A DECADE OF PRESERVATION AND PRESERVATION LAW

ROBERT E. STIPE*

INTRODUCTION

The request of the editors of this symposium issue that I submit a personal essay reflecting on the growth and progress of the historic preservation movement in America and in North Carolina during the last ten years is both flattering and humbling, and I am delighted to comply. As a note of caution, however, I hope that readers will consider that the "reflections" of any individual on any subject are inevitably filtered through that sieve of personal values and experiences that makes each of us unique and different from one another, and that those who are not persuaded by my view of the preservation world will be tolerant or forgiving—and perhaps find in my opinions a basis for strengthening their own.

An essay of this kind may be more understandable if the author's biases and values can be laid on the table at the outset. I have several that are important in the context of this article.

First, in matters of public policy generally, and particularly with respect to matters of public intervention into traditional rights of private property, I am essentially and rather consistently conservative. Perhaps this is the result of advancing years, a life-long love affair with what used to be called "Grass Roots Democracy," and an abiding respect for the Rule of Law. But, like most people, my essential conservatism is often contradicted by inexplicable twinges of outrageously liberal thoughts on specific issues, which I rationalize as subconscious attempts to preserve a youthful and optimistic outlook in a body that is aging rapidly and in a world that is increasingly threatening.

Second, on matters of preservation philosophy, I am an unreconstructed environmentalist. I hasten to explain. Many years ago I wrote a short piece entitled "Why Preserve?" in the monthly newspaper of the National Trust for Historic Preservation. It acknowledged the importance of saving good buildings as works of art on the grounds that architecture is the greatest of all the arts and that no civilized person

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would knowingly destroy a great work of art. It also acknowledged that historic buildings and places serve a useful purpose in reminding us of the roles played by great leaders in the important events that shaped the history of the Republic and the states, and in some way thereby also provided instruction in good citizenship. Somewhat adventurously (for those days) I suggested that the historic preservation movement should play a key role in the emerging environmental movement of the 1960's on the grounds that it was no less important to recycle old buildings than used newspapers.

The central issue, it seemed to me then, was whether the preservation movement would progress beyond its traditional preoccupation with artifacts that have value as art or shrines important to good citizenship, and play a more important catalytic role in bettering the urban environments in which most people live. That still seems to me to be an important question even though the environmental context has now changed. I find it interesting that the United States Supreme Court seems philosophically to favor the broader environmental view,¹ while the state courts, including our own,² continue to place reliance on the more restrictive side of the arts, education, and patriotism as most conducive to the general welfare.

While I accept that the smooth functioning of the legal machinery now in place for historic preservation purposes will probably have to rely on the traditional associative values of architecture and history, I also believe it is essential for the preservation community to consider a third associative value, which perhaps has less to do with the objects of our concern than it does with our reasons for undertaking the task of preservation or conservation in the first place. I have come to believe 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. What we are really trying to preserve, I think, is "memory." It is an attempt to keep a mental grip on familiar and accustomed environments that make us feel comfortable and secure whether or not they are aesthetically pleasing or historically credentialed. The real issue is not whether we will have change, but how great it will be, how quickly it will happen, and how shattering its impact will be. Of course we value our National Landmark buildings, but we may equally value a single tree or even an undistinguished building in a known, comfortable environment. That this objective is already embedded in contemporary preservation philosophy is apparent when one considers the widespread concern to preserve neighborhoods of World War I vintage, the current interest in

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

2. See *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979).

vernacular buildings and landscapes, and even the specialized interest in "commercial archaeology"—what Dr. William Murtaugh, the first Keeper of the National Register of Historic Places refers to as the "hot dog stands of America."³

It is apparent that several decades of rapid social change, expanding technological capabilities, population mobility, and a loss of established values have brought us all to a clear realization that the human tolerance for change is limited, and that the urgent task is to refocus our thinking from the artifact to the process and motivation. Preservationists who are skeptical of this approach should ponder thoughtfully the writings of Martin Heidegger in *Building Dwelling Thinking* and of Alvin Toffler in *Future Shock*.

A third bias I bring to this essay is a strong attachment to local government, not only because it is closest to the people and is potentially the most responsive, but also because it bears the principal responsibility for general environmental maintenance and improvement, which in turn includes the entire spectrum of cultural resources. Government in Raleigh is a long way from most localities in North Carolina, and its resources in both preservation expertise and dollars are already stretched very thin. Washington is even more remote, and except to insure that the environmental quality and historic resources of local places are not violated by its own actions, it can do little, relatively speaking, to develop or maintain local quality. Thus, unless the historic preservation movement can become a more constructive and important part of local politics and government, particularly with respect to the management of change in the physical environment, little that is done in state or national capitals will be of much real benefit. This special bias arises from concern that many local preservation efforts have become heavily dependent on Raleigh and Washington during the last decade, that much of what has been done has been according to rules, policies and judgments made in remote places, and that much of what can be accomplished locally remains undone.

CHANGES IN THE NATIONAL CONTEXT

Progress in historic preservation in North Carolina over the last decade must first be viewed in the context of national events and trends. That context is very different than it was ten years ago.

Perhaps the unkindest fact of life for historic preservation has been a stubborn and escalating rate of inflation, coupled with a severe recession in 1974, and a relatively sluggish economic recovery. This cuts

3. 1 COMM. ON ARCHITECTURAL PRESERVATION, SOCIETY OF ARCHITECTURAL HISTORIANS BULL. NO. 2, ARCHITECTURAL PRESERVATION FORUM 1 (1979).

both ways for preservation. On the one hand it has provided some relief from the devastating impacts of huge public projects such as highways, dams, and reservoirs; but it has also slowed the number of preservation and conservation projects that would otherwise have been undertaken. Fewer restoration projects are undertaken than would have otherwise been the case, and both the extent and quality of work were compromised. One wonders how many buildings that might have been deserving of full-scale restoration in a more economically prosperous and less inflation-prone era have had to settle for being adaptively re-used.

A by-product of inflation has been the inexorable pressures to reduce public expenditures at every level of government, especially for "nonessential" programs, of which historic preservation is still one. When one considers that the fiscal 1980 appropriation of \$55,000,000 for the national historic preservation program will purchase less than half the goods and services procured for that amount in 1970, the growth in governmental support, relative to need, is hardly encouraging. Considering the impact of Proposition 13,⁴ the number of states that have approved the call for a constitutional convention to require a balanced federal budget, and the new demands for increased levels of defense spending, it seems unrealistic to expect a substantially expanded federal funding role.

One can also speculate that there is a "new mood" of conservatism generally in public attitudes about government controls of all kinds—a mood quite the opposite of conservationist enthusiasm about which William K. Reilly, President of the Conservation Foundation, wrote in 1973.⁵ In the face of the growing energy shortage since 1974, we have already backed away from a variety of high environmental standards, and it seems quite likely that many of the gains of the early 1970's will continue to give way in the urgent push to develop new sources. Proposals for an Energy Mobilization Board with power to over-ride state and local environmental requirements of many kinds will undoubtedly pass in one form or another, and the protective review systems we have created in the last decade will come under fierce political pressure for relaxation. Cultural resources of many kinds will become vulnerable once again.

The preservation community tends to regard the Department of the Interior as the principal federal benefactor of historic preservation efforts. The Department of Housing and Urban Development, however,

4. CAL. CONST. art. 13, § 12.

5. See THE USE OF LAND: A CITIZENS POLICY GUIDE TO URBAN GROWTH (W. Reilly ed. 1973). Part of the heading of chapter one is "Challenging the Ideal of Growth: A New Mood in America."

has been a major stimulus to preservation efforts for many years, having made available funds for local planning and inventory efforts through the Housing Act of 1954,⁶ urban renewal funds for preservation in the Demonstration Cities & Metropolitan Development Act of 1966,⁷ funds for acquisition and development through section 709 grants,⁸ and a variety of below-market loans and subsidies for preservation and preservation-related activities since that time. Of special interest for the last decade is the impact of changes in funding methods brought about in the Housing and Community Development Act of 1974,⁹ through which decision-making about spending priorities was given to local officials. Prior to that time, under the categorical grant program approach, local preservationists needed only to convince a state or regional HUD representative, usually supportive, that a particular local project was a worthy one. With the passage of the 1974 Act, however, decision-making with respect to the expenditure of funds was devolved to the local governing board,¹⁰ which more often than not chose to spend available funds on housing and other programs, notwithstanding that preservation projects continued as eligible items of expenditure. While precise figures are not available, it is clear that HUD funds for direct preservation expenditure diminished substantially thereafter, particularly following 1976 when by administrative requirement the Secretary directed that funds could be spent for historic preservation only when there would be a direct benefit to low- and moderate-income families.¹¹ While one must applaud the results of HUD-subsidized preservation and housing efforts as those in Savannah's Victorian district, it is a disappointment that more North Carolina communities have not undertaken similarly successful initiatives. This is perhaps more a result of the failure of the preservation community itself to mount politically persuasive efforts at the local level than the fault of the Department of Housing and Community Development.

The 1974 Act also authorized the Secretary of HUD to delegate to the highest local official responsibility for enforcement of federal environmental review procedures with respect to historic properties¹²—an

6. Ch. 649, 68 Stat. 590 (1954) (codified in scattered sections of 12, 18, 40, 42 U.S.C.).

7. Pub. L. No. 89-754, 80 Stat. 1255 (codified in scattered sections of 11, 12, 15, 16, 40, 42 U.S.C.).

8. Housing Act of 1961, Pub. L. 89-754, 80 Stat. 1279 (codified at 42 U.S.C. §§ 1500, 1500a, 1500c-2, 1500d, 1500d-1, 1500e (1976)).

9. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. §§ 5301-17 (1976)).

10. *Id.* § 5303(a)(1).

11. *Proposed HUD grant regulations draw fire, ire*, Preservation News, Jan. 1978, at 3, col. 3; *HUD defines role for agency cities*, Preservation News, May 1978, at 16, col. 1; *Hud clarifies preservation stance*, Preservation News, Jan. 1979, at 1, col. 4.

12. Housing Act of 1961, Pub. L. 89-754, 80 Stat. 1279 (codified at 42 U.S.C. §§ 1500, 1500a, 1500c-2, 1500d, 1500d-1, 1500e (1976)).

action roughly equivalent to putting the fox in charge of the chickens. The current controversy over the expenditure of HUD Urban Development Action Grants in such cities as Charleston and Louisville (although not in North Carolina) again raises the question of the wisdom of designating local officials to enforce environmental restrictions that may work to their detriment. Both situations point up the continuing need for the local preservation community to become more effective at the local level of government.

Those of us who believe that real progress in preservation must ultimately depend upon the private sector have been cheered, of course, by the preservation incentives provided by the Tax Reform Act of 1976¹³ and related legislation, which has probably generated in its short lifetime at least ten dollars of "hands on" preservation work for each dollar of direct appropriation through the National Historic Preservation Act of 1966.¹⁴ This approach was slow in coming, having been recommended originally by the same Special Committee on Historic Preservation that recommended the National Historic Preservation Act of 1966, but the results have been profound. Indirect preservation incentives only dreamed about in 1966 are now in place. Keeping them may be another matter because the present act expires in 1981, and has recently come under increasing criticism from outside the preservation community.¹⁵

The 1970-1980 decade has been one of explosive growth (no doubt generated in part by the Bicentennial celebration of 1976) for the preservation movement nationally. There has been a significant increase in federal funding sources, the establishment of preservation programs in a number of federal agencies in addition to HUD and Interior, the granting of indirect subsidies through the tax laws, and a vast increase in the number of national preservation organizations at an average rate of two each year since 1966. The first national scientific-protective inventory of cultural resources has been established, even though less than fifteen percent complete.

With this growth has also come considerable specialization within the preservation movement. There are now specialist organizations concerned with the Victorian period, Art Deco buildings, cast iron buildings, living farms, large estates, historic landscapes, vernacular buildings, industrial and engineering structures, concrete buildings, and commercial archaeology, to name a few. Specialization and special interests are not in and of themselves bad things, of course. What

13. Pub. L. No. 94-455, 90 Stat. 1525 (1976) (codified in scattered section of 10, 15, 26, 42 U.S.C.).

14. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 16 U.S.C. §§ 470-70t (1976)).

15. See Nessen, *Treasure Houses Taking Shelter in Old Buildings*, Harper's, Dec. 1978, at 16.

is of concern, however, is that pluralism and the raising of many voices on behalf of special interests may divert public and legislative attention from the needs of the preservation-conservation community as a whole.

Nowhere has this been more evident than in the reaction of the lead preservation organizations to the introduction of the Administration's National Heritage Policy Act and the so-called Seiberling Bill in Congress in the fall of 1979. The former essentially restructures the national historic preservation program as one component of an administratively merged program to deal with both built and natural environments. The second tends in exactly the opposite direction to create a new national preservation agency, independent of the Department of the Interior, focused entirely on cultural resources. As the national preservation bureaucracies review these bills, one has the uneasy feeling that all of them—the Heritage Conservation and Recreation Service, the National Conference of State Historic Preservation Officers, the several species of archaeological professionals, the National Trust for Historic Preservation, and a variety of special interest groups primarily concerned with the natural environment—could easily be tempted to evaluate their impacts more in terms of the consequences to the groups themselves than to the needs of the preservation community as a whole. It is indeed ironic to hear the old cry “separate, parallel, and equal” in this day and age.

GROWTH AND CHANGE AT THE STATE LEVEL

At the state level, there has been considerable progress in North Carolina since 1970, not the least of which has been the growth of a very strong statewide preservation constituency in both government and the private sector.

Legislatively, there has been relatively little significant change in section 121 of the North Carolina General Statutes¹⁶ containing the principal authorities for the Division of Archives and History. This is not because of any reluctance or backwardness on the part of the preservation community to seek up-to-date preservation legislation, but because that section of the statutes was rewritten in its entirety in 1967 to include what were then regarded as the “cutting edge” of preservation techniques: the authority to acquire neglected or threatened historic properties through the use of the eminent domain power,¹⁷ the establishment of a state-level Advisory Council on Historic Preservation with review and comment authority roughly equivalent to that contained in section 106 of the National Historic Preservation Act of

16. N.C. GEN. STAT. § 121 (1974 & Supp. 1979).

17. *Id.* § 121-9(c).

1966,¹⁸ the authority to acquire less-than-fee interests in historic properties,¹⁹ and other innovative preservation management tools. At that time North Carolina's legislative authorization for its state program was far in advance of acts in other states, and it remains so today.

Until the early 1970's, the Division of Archives and History was a separate state department whose director reported directly to the Governor and whose policies were determined by the North Carolina Historical Commission. In 1971 it was reorganized as part of a state-wide effort to reduce the number of state agencies, becoming first a division within the State Department of Art, Culture and History, and in 1973 a division of the Department of Cultural Resources. The Historical Commission became essentially an advisory body. It was widely feared that the Division's programs would be "politicized" as a consequence of state government reorganization, but these fears have never materialized. The several Secretaries of Cultural Resources holding office since reorganization have all given strong support to the preservation programs of the Division, and the Division Director has had essentially no more or less difficulty in political matters than was previously the case. In fact, the Division of Archives and History now maintains stronger and more positive lines of communication and cooperation with other state agencies (such as the Departments of Transportation, and Natural Resources and Community Development) than had been the case earlier. On balance, the state government reorganization effort of the early 1970's has been a positive force for historic preservation.

It is probably also fair to say that section 121-12 of the North Carolina General Statutes,²⁰ has met with only indifferent success. This is in part the result of some of the same structural weaknesses of the Federal Advisory Council²¹ and also because, unlike the Federal Advisory Council, it is composed entirely of in-house historical and preservation interests which do not command the same cabinet-level authority or political stature of the Federal Council. The review and comment mechanism has been used relatively infrequently, and whether it will assume a more important role in the 1980's is an open question.

Ten years ago, notwithstanding that it was the intention of the framers of the National Historic Preservation Act of 1966²² that federal

18. Pub. L. 89-665, 80 Stat. 915 (1966) (codified at 16 U.S.C. §§ 470-70t (1976)).

19. N.C. GEN. STAT. § 121-9(c) (1974 & Supp. 1979).

20. N.C. GEN. STAT. § 121-12 (1974 & Supp. 1979). The statute originally provided for the establishment of the North Carolina Advisory Council on Historic Preservation, whose duties have since been given over to the North Carolina Historical Commission.

21. The Federal Advisory Council has only review and comment authority over National Register Properties.

22. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 16 U.S.C. §§ 470-70t (1976)).

funds should be extended to the private owners of historic properties, the bulk of federal funds were still used for the development of state-owned historic sites, a practice common in many states. The intervening years, however, have seen an increased amount of federal funds, often accompanied by grants-in-aid from the state, passed through the state to local private and nonprofit owners of National Register properties. State assistance to local preservation agencies has been marked by a high degree of innovation and imagination since 1970. This year grants have been made available for area-wide preservation projects in Wilmington and for the maintenance of historic properties in Salisbury. Thus, the federal-state partnership created by the National Historic Preservation Act of 1966 has resulted in the development of an energetic and imaginative state-local partnership as well.

A development of special significance in the last ten years has been the creation of the Historic Preservation Fund of North Carolina, Inc. as a nonprofit, tax-exempt revolving fund, the first statewide activity of its kind in the nation, which has already become a model for similar efforts in other parts of the United States. Unlike other revolving funds operating at the local level, the North Carolina Fund has pioneered in the technique of optioning properties and putting them up for re-sale to buyers who preserve and restore them according to preservation plans nailed down in restrictive covenants or easements. A relatively small amount of money, on the order of \$250,000 overall, has already generated more than \$2,000,000 of preservation work.

Ironically, this novel approach envisioned by the Fund (other funds generally acquire properties, restore them, and then re-sell) provided North Carolina with a special opportunity to be of service to the national historic preservation movement. When the Fund was incorporated in 1977, the Internal Revenue Service promptly denied its application for tax-exempt status under section 501(c)(3) of the Internal Revenue Code²³ on the grounds that the required public educational benefit was provided not by the Fund, which proposed to act merely as a broker of historic properties, but by the ultimate purchaser who undertook the actual preservation work. A protracted and expensive period of appeal and negotiation with the IRS eventually produced a favorable result in the form of a letter ruling giving the Fund tax-exempt status.²⁴ What is significant from a national perspective, however, is that a number of other revolving funds outside North Carolina, including the national fund established and administered by the Na-

23. I.R.C. § 501(c)(3).

24. Letter from Jeanne S. Gessay, Internal Revenue Service to Historic Preservation Fund of North Carolina, Inc. (Nov. 7, 1977).

tional Trust for Historic Preservation,²⁵ stood in jeopardy of losing their favored status as well. The successful outcome of the North Carolina application thus greatly strengthened the private preservation movement throughout the country.

The work of the Fund and, indeed, of all other public and private historic preservation and natural heritage conservation organizations in North Carolina was immeasurably enhanced with the passage of the Conservation and Preservation Agreements Act of 1979.²⁶ While private conveyancing techniques such as facade easements and preservation restrictions have long been used by local organizations in North Carolina (notably Old Salem and the Historic Wilmington Foundation), their ultimate effectiveness has always been clouded to some extent by uncertainties about their legal nature, transferability, and enforceability. In this state, the problem stems from an early holding of the North Carolina Supreme Court that easements in gross could not be enforced against third party transferees²⁷ and from continuing uncertainty about the applicability of other common-law rules that might apply in given situations but which were not yet tested in court. All of these disabilities were removed for all practical purposes with the passage by the 1979 General Assembly of sections 124-34 to -42 of the North Carolina General Statutes²⁸ which had been presented to it as one of four major legislative proposals advanced by the Attorney General's Select Committee on Preservation Law Revisions. In this, as in so many other areas of preservation activity, North Carolina has set an important precedent for other states to emulate.

The last ten years have also seen the passage of special tax incentives for historic preservation in the private sector. The results have been helpful in some respects, but damaging in others.

North Carolina income tax law was amended in 1977²⁹ to provide offsets against state income tax generally paralleling those of the Tax Reform Act of 1976³⁰—a beneficial step. The state historic properties (landmarks) registration and enabling legislation applicable to locally designated landmarks has provided since 1971 that the existence of preservation easements or other restrictions affecting their valuation for local property tax purposes should be taken into account,³¹ also a progressive step to reduce the tax burden on historic properties that might

25. *See IRS okays three funds*, Preservation News, Jan. 1978, at 1, col. 3.

26. N.C. GEN. STAT. §§ 121-34 to -42 (Supp. 1979).

27. *See Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963); *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925).

28. N.C. GEN. STAT. §§ 121-34 to -42 (Supp. 1979).

29. N.C. GEN. STAT. § 105-278 (1979).

30. Pub. L. No. 94-455, 90 Stat. 1525 (1976) (codified in scattered sections of 10, 15, 26, 42 U.S.C.).

31. N.C. GEN. STAT. § 105-278 (1979).

be unreasonably burdened by higher taxes based on speculative rather than actual use value.

The 1975 amendments to Chapter 105 of the North Carolina General Statutes, the Machinery Act,³² provided for the indefinite deferral of fifty percent of local property taxes on all properties officially listed as historic landmarks by a local Historic Properties Commission pursuant to North Carolina General Statute, Chapter 160A, Part 3B.³³ These amendments have proved to be a mixed blessing.

Proposed to the General Assembly for the purpose of providing a measure of tax relief for the owners of restored or preserved historic properties in Forsyth and New Hanover counties who were unduly penalized for their preservation efforts as a consequence of recent octennial tax revaluations in those counties, and passed without much consideration of the ultimate consequences, the Act has been criticized on a number of grounds: (1) that the deferral benefits the owners of historic properties without regard to need; (2) that it sets no particular standards for actual preservation work; (3) that it has the potential for unduly eroding the local property tax base, which is the principal source of city and county revenues; and (4) that it does not require a corresponding public benefit such as periodic public access or visitation in exchange for the benefits thereby conferred.

In practice, while the deferral provisions have undeniably provided substantial benefits and incentives for preservation by the owners of historic properties (particularly when the property tax subsidy can be coupled to federal and state tax benefits), local tax supervisors and elected officials have regarded the law with considerable skepticism. Some would accept that so long as the deferral is limited to private residences no great harm is done to the local property tax base, but that in extending the deferral to more valuable properties such as listed industrial buildings adaptively used for shopping centers, the cost of the deferral in lost revenues is too high.

Unfortunately, under the Uniformity Clause of the North Carolina Constitution,³⁴ there is no practical way to alleviate most of the problems cited above. The practical result has been that because the tax deferral vests automatically in the case of a listed building, some cities and counties have refused even to establish local historic properties commissions, thereby losing other opportunities for local action to protect landmark structures. In a few cases, local historic properties commissions have reportedly been under pressure to list buildings of

32. *Id.*

33. N.C. GEN. STAT. §§ 160A-399.1 -.13 (1974 & Supp. 1979).

34. N.C. CONST. art v, § 2, col. 2.

very marginal historic or architectural quality solely for the purpose of tax advantage to the owner.

Two successive committees have wrestled with the question of how to alleviate these problems, but so far without success—thus demonstrating the validity of the old adage that once a tax break has been put in place it is there to stay. The entire question of tax strategies as a useful inducement for the preservation of historic buildings is one that still requires detailed and serious consideration by the preservation community.

GROWTH AND CHANGE AT THE LOCAL LEVEL

It remains, then, to comment briefly about the growth and change of the preservation movement at the local level, where the primary legal approaches to preservation are through uncompensated regulation rather than public investment. The principal laws are those relating to historic districts and landmarks, which we refer to in North Carolina as "historic properties."

Interestingly, the principal impetus for historic district enabling legislation in this state was an opinion of the Attorney General in the early 1960's to the effect that the first such ordinance in North Carolina, adopted in 1949 to create the Old Salem Historic District, had no basis in legislative authorization. To legitimize the Winston-Salem ordinance, by then in effect for approximately fifteen years, a local enabling act was drafted and presented to the General Assembly in 1965.³⁵ Prior to its passage that year, other towns with an interest in historic preservation were annexed to it.³⁶ More were added in 1967³⁷ and 1969,³⁸ but the act was not made statewide in application until 1971, when Chapter 160 of the North Carolina General Statutes was rewritten and codified as Chapter 160A.³⁹

A decade ago there were few historic districts in cities in North Carolina; now there are twenty-six in sixteen cities and one county, and several more are pending. The basic act remained essentially unchanged until 1979, when it was completely overhauled and amendments recommended by the Attorney General's Committee on Preservation Law Revisions were adopted without substantial change or even challenge.⁴⁰

35. Ch. 504, 1965 N.C. Sess. Laws 561.

36. *Id.* (Edenton, Bath, and Halifax).

37. *See, e.g.*, ch. 174, 1967 N.C. Sess. Laws 215 (Hillsboro); ch. 303, 1967 N.C. Sess. Laws 347 (Murfreesboro); ch. 385, 1967 N.C. Sess. Laws 403 (Beaufort); ch. 1099 N.C. Sess. Laws 1618 (New Bern).

38. *See, e.g.*, ch. 246, 1969 N.C. Sess. Laws 215 (Wilmington).

39. N.C. GEN. STAT. §§ 160A-395 to -399.13 (1976).

40. *Id.*

Similarly, a decade ago, with the exception of Raleigh, we had no individual landmark protection powers available to cities or counties beyond what might have been accomplished by establishing single-property historic districts—a technique of sufficiently uncertain legality that no city cared to experiment with it. Thus, our historic properties enabling legislation was adopted as a statewide authorization in 1971.⁴¹ Unlike the historic districts enabling act, the historic properties law was manufactured out of whole cloth, so to speak.

Because landmark protection was a relatively novel concept in North Carolina at the time, the authority to protect individual landmarks, once designated by ordinance, was deliberately mild; in effect, the only limitation was a requirement that the owner of a landmark give ninety days notice of intention to demolish.⁴² Otherwise the enabling act contained a number of innovative features: a requirement that designated properties should be recorded in the Register of Deeds office for the information of property owners and attorneys;⁴³ a requirement that any recorded preservation restrictions on the property should be considered by the county tax supervisor in valuing the property for tax purposes;⁴⁴ and, most important, an authorization for local historic properties commissions to acquire, manage and dispose of landmarks (including less-than-fee interests therein),⁴⁵ and to operate in much the same manner as a local urban redevelopment commission.⁴⁶ It was intended that historic properties commissions might thereby operate as publicly-supported revolving funds. While no city or county went quite that far, the specific authority to acquire and dispose of various interests in historic properties has been useful. Elaborate procedural safeguards were established governing the certification of properties and the subsequent designation by ordinance of the local governing board.

It had been our expectation that coastal area communities in the eastern portion of the state would be the first to take advantage of this new law. Surprisingly, Charlotte was the first city to establish a historic properties commission, and the nine years since its passage have seen the creation of eighteen more.

It was both inevitable and intended that these enabling acts should be amended as more communities gained experience with them, and the 1979 revisions promised much for the future.⁴⁷ The stay of demoli-

41. *Id.*

42. *Id.* § 160A-399 (1976).

43. *Id.* § 160A-399.5(5).

44. *Id.* § 160A-399.5(b).

45. *Id.* § 160A-403.

46. *Id.* § 160A-405.

47. See Morgan, *Reaffirmation of Local Initiative: North Carolina's 1979 Historic Preservation Legislation*, 11 N.C. CENT. L.J. 243 (1980).

tion requirements for both individual landmarks and those in historic districts has been extended from three to six months,⁴⁸ and alterations to individually listed landmarks as well as those located in historic districts are now subject to the more stringent review processes required for the issuance of certificates of appropriateness.⁴⁹ A significant step forward is the authorization in the amended law allowing consideration of the scale of structures and, in the discretion of the local governing board, of important landscape features.⁵⁰ A variety of improvements dealing specifically with procedural due process issues were also straightforwardly addressed in the 1979 revisions for the further protection of property owners, and under the new law previously troublesome relationships between the local commission and the Division of Archives and History have been significantly alleviated.

Most importantly, no historic building of real significance need be lost through the sheer perverseness of the individual owner, at least where the political will is available to save it, since the 1979 revisions authorize for the first time the acquisition through eminent domain of listed buildings threatened with demolition.⁵¹

At this point I should perhaps emphasize that my enthusiasm about a decade of accomplishment and the future potential for preservation through regulation is tempered by personal experience. Albert Coates, founder of the University of North Carolina's Institute of Government and one of the truly great figures in North Carolina history with whom it was my privilege to be associated prior to his retirement, was fond of stressing the difference between what he called "the law in books" and "the law in action." My personal experience, for several years as Chairman and now as a member of the Chapel Hill Historic District Commission, confirms that the gap is often uncomfortably wide.

It will be recalled that a principal task of a historic district commission is to review proposed designs of new buildings and the alteration of existing buildings in designated districts. Notwithstanding judicial sanction of this process in such decisions as *Penn Central*⁵² and *A-S-P*,⁵³ it is abundantly clear that such elevational control procedures will not in and of themselves ever produce a good result or even a good design. That can only be accomplished by good designers working constructively with commissions that understand not only the design process itself but more importantly the effective limits on the use of the powers given to them. Subjectivity in such procedures cannot be elimi-

48. N.C. GEN. STAT. § 160A-399.6 (Supp. 1979).

49. *Id.*

50. *Id.* § 160A-398.

51. *Id.* § 160A-399.8 (Supp. 1979).

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

53. *A.S.P. Assoc. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979).

nated; it can only be reduced and regularized in a procedural sense. The process itself is fraught with difficulty, not only because reasonable people may always reasonably disagree about matters of taste, but also because design judgments, even those of the expert members of the design review boards, are always influenced to some degree by strongly held opinions about how far government should intrude into affairs long regarded as a private matter.

It is essential that several requirements be fulfilled if the historic district procedures we now use are not to become a complete abuse of public privilege. One is that the best attempt possible must be made to articulate in local ordinances those design guidelines and standards that are appropriate for the districts and communities in which they are enforced. 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 worst perverse. Another is that commission members must somehow become more literate in both the language and the process of design. Presently there are many members of historic district commissions who cannot or will not learn even to read plans and elevations, or take the trouble to visit the site of a project prior to the public hearing on the project application for a certificate of appropriateness.

Even more frightening is the tendency of local commissions to ride rough-shod over the most rudimentary requirements of procedural due process. Many decisions are taken on the basis of sloppy or inadequate public notice. Written findings of fact, which are always required of any quasi-judicial body under North Carolina law, are either not made at all, or when made, are worded carelessly. Technical requirements such as the swearing-in of applicants and witnesses are usually overlooked, and the preparation of minutes is approached casually without regard for their being an essential part of the record on appeal. Some ordinances do not follow procedures laid down by the enabling legislation in that appeals may be taken elsewhere than to the local zoning board of adjustment.

It would not be amiss to suppose that perhaps ninety percent of all the decisions of all historic district commissions in North Carolina (and elsewhere) would instantly be overturned by a court on appeal for procedural defects alone. These things remind us that even the best enabling legislation is not self-enforcing, and that the line between flexibility and arbitrariness is often thinly drawn.

These criticisms are not to suggest that historic district and properties commissions should be abolished, only that there is much room for improved performance. It strikes me that those commissions that succeed in doing the best job in their respective jurisdictions will be those

that are first able to handle their regulatory tasks in a procedurally and substantively acceptable way, and then go on from there to become active and positive forces for good planning and good design.

It is perhaps unfortunate that the legislation itself has always focused on architectural detail in the search for "congruity" on a building-to-building basis, since this emphasis tends to obscure the importance of dealing in a more creative way with larger environmental design issues that go beyond mere regulation and the individual structure and its "fit." Equally important are the problems of landscape and townscape elements involving the spaces between buildings or public rights-of-way. In this respect, the environmental design guidelines prepared by the Chapel Hill Historic District Commission for use by property owners, builders, architects, and the town itself are an example of the more positive role that any historic district commission can play with imagination and the right kind of help.

A special advantage of the Chapel Hill Commission in this larger role is its additional designation by the town council as the Appearance Commission for the historic district. In that capacity it is regularly called upon by the planning and governing boards for advice on such matters as street landscaping and maintenance, the selection of public facilities (telephone booths, lighting fixtures, etc.), as well as for advice on planning decisions related to land use, traffic, parking, and so on. Happily, the 1979 revisions of the historic district enabling legislation, when read in conjunction with general planning legislation, now make it possible for such commissions to approach their tasks in a more creative spirit.

Finally, one could wish for more regularized, mutually supportive arrangements between the public commissions on the one hand and local private organizations and revolving funds on the other. Again, this is essentially a matter of imagination and creativity in approach; the legislation is no bar to the achievement of a wider range of objectives.

THE NEXT TEN YEARS

It is impossible to look back on ten years of preservation and preservation law in North Carolina and not be tempted to look ahead as well. Putting to one side many aspects of the larger picture over which we have no control—inflation, the changing fortunes of federal programs, and so on—it seems to me that whether the next decade of historic preservation in North Carolina is also one of solid progress will depend on a number of factors.

First, there is the question of whether needed inventories and surveys of cultural resources throughout the state can be speeded up and com-

pleted. This is a slow and difficult task because it is not very visible politically, funds for the work are hard to come by, and the supply of adequately trained individuals to conduct such surveys is limited. Yet the entire structure of preservation law, including every aspect from public expenditure and environmental review procedures to the use of the police power, rests upon the credibility, accuracy, and thoroughness with which the process of identification, evaluation, and documentation is carried out. In most counties in North Carolina the work is still incomplete, and in many it has barely begun.

Another important question is whether the various actors in the preservation planning and regulatory processes can begin to sort out appropriate roles for themselves. For example, the present system requires that individuals trained and expert in the area of identifying and evaluating historical resources—primarily historians and architectural historians—are also assigned the task of making professional judgments that go far beyond their fields of expertise. It is one thing for an architectural historian to document and certify the importance of a given historic building and even to say what measures might be appropriate for its preservation or restoration. But it is quite another to permit that same individual to pass judgment on the design guidelines to be established for a given historic district or to comment on the appropriateness or “adverse effect” of a contemporary building project in a historic area. I believe firmly that only individuals with specific training and experience in the design arts, particularly landscape designers and architects, are specially qualified to pass judgment on the design of new environments or change in existing ones. Urban planners, historians, and others who enter judgments for which they are not professionally qualified not only carry an unfair burden but jeopardize the entire system.

This issue will become even more important during the next decade as we move beyond registering and regulating the Williamsburgs and Old Salems and concern ourselves increasingly with areas and districts of mixed styles and more recent vintage wherein “character” is of equal or greater importance than architectural purity. It is an issue of special importance also because we have entered upon a time when government at all levels assumes more and more authority over traditional rights of property, privacy, and individual freedom. With the best of intentions and the zeal so characteristic of the environmental movement generally, we preservationists have occasionally created legal mechanisms and procedures that go so far beyond our original intentions that they can easily threaten the very institutions and values that created the artifacts and environments we seek to protect. In short, it is profoundly and urgently necessary to do some sorting out of “who does

what" in preservation if the protective system we have built up is not to come crashing down around us in court.

This should not be construed as an argument for separatism, however. It is quite right for historians to emphasize the importance of history to the preservation movement and for the architectural historians to speak up for old buildings. But it is quite wrong to draw the preservation movement into a narrow corner and argue that preservation stops with ancient buildings having proper historical credentials. The historical and architectural traditions of Nantucket Island cannot be separated from the fragile natural landscape setting of that place, nor the unique quality of light or atmosphere that are integral parts of its setting. Similarly, it is no less important to preserve the quiet cultural landscape of Sandy Mush in Buncombe County—historically or architecturally undistinguished though it may be. As we have seen, the traditional associative values of architecture and history are not enough if human purposes are to be served, and it seems more important than ever that those concerned with these traditional values should now make common cause with other facets of the environmental movement.

The hard reality is that the conservation of buildings, neighborhoods, and landscapes is still the "frosting on the cake" by comparison with the other requirements of both urban and rural societies. It is abundantly clear that the energy shortage is real, and that for this and other reasons the preservation-conservation movement will come under even more pressure in the 1980's than at present. The creation of a broader, deeper environmental constituency to withstand these pressures is an absolute necessity, and, contrary to prevailing wisdom in the historic preservation community, I firmly believe that the Carter administration proposals to merge built and natural area concerns in one administrative structure are a step in the right direction.

If we are to continue to use the powers of government to achieve this kind of environmental betterment, it is imperative that the performance of local regulatory agencies be improved, not only with respect to their ability to deal more sensitively and creatively with design issues, but especially with respect to their capability to observe both substantive and procedural due process requirements. The threshold level of performance is the strict observance of procedures laid down by the enabling legislation, the local ordinance itself, and the more subtle requirements imposed by the courts. Beyond that, it is a matter of showing respect for the rights of one's neighbors.

This is easier said than done, particularly in a state where small towns predominate, governmental authority is exercised in intimate and familiar local settings, and "getting along" may seem more important than the strict observance of legal and procedural niceties. Addi-

tional opportunities for the training of lay board members are badly needed. The Division of Archives and History and the Attorney General's Office have made a start in recent years to provide such training. Keep North Carolina Beautiful, Inc. has contributed in a very significant way through its efforts to provide manuals and training materials for historic districts, historic properties, and community appearance commissions. The Archives and History-School of Design course in historic preservation planning, given seven times in the last twelve years, has yielded significant benefits for those communities that have participated. Yet, the opportunities offered and the extent of participation when measured against need are still inadequate, and all of these educational offerings will have to be expanded and intensified.

The legal profession, it seems to me, has a special responsibility to stay informed and to become more actively involved as advocates for historic preservation. It seems especially appropriate for a profession in which precedent and tradition are such important components of professional practice. Whether as counsel for local commissions or private clients, the profession needs to be aware of the array of special resources that have become available to it during the last ten years: specialists in preservation law in the Office of the Attorney General, the Institute of Government, and the League of Municipalities; the National Center for Preservation Law with offices in New York, Washington, and San Francisco; Preservation Action in Washington, and the Preservation Law and Landmarks program of the National Trust for Historic Preservation. All of these agencies provide invaluable sources of assistance for the practicing attorney.

To end this essay on a personal note, it needs to be said that each of us, whatever our background or specialty, has something to contribute to this important facet of American life—the maintenance of a cultural tradition, the management of change in our physical environment, and the protection of those artifacts and environments that give meaning and continuity to our lives. None of us functions in a vacuum, and I would be remiss in not giving credit where credit is really due: to my friends, mentors, and supporters. A few who come immediately to mind are John Sanders, Director of the Institute of Government, who first encouraged and sustained my interest in this field; Philip P. Green, Jr., my friend and colleague at the Institute for seventeen years who not only possesses one of the finest legal minds I have ever encountered, but who relentlessly challenged and ultimately improved everything I ever drafted, wrote, or thought during that period; and my former Research Assistants there: Myrick Howard, now Executive Director of the Historic Preservation Fund of North Carolina, Douglas Johnston of the Attorney General's Office, and Stephen Dennis, Associate Counsel,

DECADE OF PRESERVATION

233

Landmarks and Preservation Law, at the National Trust for Historic Preservation. These attorneys in particular, along with Larry Tise, our State Historic Preservation Officer, and Dean Claude McKinney of the School of Design at North Carolina State University, and countless other friends and associates through the years are really the people to whom the preservation movement in this State owes so much.