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The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation

“The Eagle is preserved, not for its use, but for its beauty.”¹

INTRODUCTION

The 1979 session of the North Carolina General Assembly passed the Historic Preservation and Conservation Agreements Act² as one of four Senate bills proposed to reform the state's historic preservation law.³ The bills were the product of a year's work by the Attorney General's Select Committee on Historic Preservation Legislation. Representatives from the State Department of Administration raised an initial objection to the wording of Senate Bill 652, which did not clearly exempt state projects underway prior to the effective date of the legislation.⁴ In response, the Senate Judiciary III Committee⁵ attached an amendment to the bill on May 10, 1979,⁶ and ten days later the General Assembly ratified the four bills without any further opposition. The Historic Preservation and Conservation Agreements Act, enacted without controversy and of apparently little interest to those considering the

1. *Barret v. State*, 220 N.Y. 423, 428, 116 N.E. 99, 101 (1917).

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

3. *Id.* § 160A-241, -395 to -339.13 (Supp. 1979).

4. Memorandum to Mr. Joseph W. Grimsley from J.K. Sherron (April 3, 1979). The memo reads:

Senate Bill 652 sponsored by Senators Barnes and Raynor was introduced April 5th, and referred to the Senate Judiciary III Committee.

The proposed legislation, if enacted, would require that the State obtain a 'certificate of appropriateness' from a 'historic district commission,' planning commission, or similar organization before either renovation or altering the exterior of any structure designated as having historical significance.

The existing plan for the Blount Street Historic District as well as other plans previously adopted for other historical districts located throughout the State would be negated, and any alterations, renovations, etc. would be subject to approval by various local historic district commissions.

It is my feeling that when undertaking projects of this magnitude, a cooperative effort is more conducive to the communities' interest than is the unilateral approach promoted by Senate Bill 652.

For the above-stated reasons, it is my recommendation that the bill be amended so as to exclude the State from the provisions of this Act.

5. The members of the Senate Judiciary III Committee were: Henson Barnes (Goldsboro), Cecil Hill (Brevard), Jim Edwards (Granite Falls), George Marion (Dobson), T. Cass Ballenger (Hickory), Kathy Sebo (Greensboro), Larry Leake (Asheville), and Willis Whichard (Durham).

6. N.C. GEN. STAT. § 160A-398.1 (Supp. 1979).

The pertinent part reads: "No provision of the Part shall be applicable to the construction, use, alteration, moving or demolition of buildings by the State of North Carolina, its agencies and instrumentalities, or institutions of higher education."

package, was perhaps the most significant legislative action taken by the 1979 session of the legislature.

The Act will introduce a measure of certainty into the uncertainty which has long characterized North Carolina property law with respect to deed restrictions. Such restrictions can provide an effective means of land use control through private agreement.⁷ The Act's terms are essentially those of a draft law presently under consideration by the Commissioners on Uniform State Laws.⁸

The stated purpose of the Act, as submitted to the Senate Judiciary III Committee, is as follows:

[T]o principally benefit the Historic Preservation Fund of North Carolina and local revolving funds to better secure the enforcement of various 'less-than-fee' approaches to historic preservation by way of deed restrictions and covenants. The Act will also be useful to local historic properties commissions which become involved in the purchase and sale of historic properties in the fashion of a private revolving fund (a function already authorized by statute).⁹

Property law in North Carolina, adhering as it does to English common-law precepts historically generated by the needs of a long-abandoned feudal system, is at its worst anomalous and fraught with complexities. Yet, it is a law that has evolved through centuries of experience, and may represent, even today, policies with respect to the ownership and use of land which preclude its being totally abandoned and replaced by a statutory scheme—a scheme that would be based on an amorphous concept of the role which property law must play to effectuate not just present, but future policies of ownership and land use in the state. The issue is whether, and to what extent, the legislature is justified in modifying the existing common law with respect to real property, thereby paying heed to policies that may be inconsistent with those which gave rise to the existing law.

Only two general areas of property law are affected by the Agree-

7. Uniform Conservation and Historic Preservation Easement Act, National Conference of Commissioners on Uniform State Laws (Draft—for Discussion Only, Dec. 21, 1979), § 1, Comment.

The comment reads in part:

Conservation and historic preservation easements under the terms of the Act may be created without the approval of any public agency. There are both philosophical and practical reasons for not imposing such a requirement. The purpose of the Act is to sweep away certain common law defenses which would otherwise be available in the case of easements held in gross. It is not its purpose to impose a public ordering system If it is the intention to facilitate private transactions to serve the ends of land conservation and historic preservation, the requirement of public agency approval adds a layer of complexity which may discourage private action.

8. *Id.*

9. Explanation from the Attorney General's Select Committee on Historic Preservation Legislation (to accompany Proposed Historic Preservation and Conservation Agreements Act, 1979).

ments Act.¹⁰ They are 1) property rights in the land of others (specifically easements), and 2) private restrictions on the use of lands (specifically reverter rights and restrictive covenants). Each will be the subject of study in this paper.

PROPERTY RIGHTS IN THE LANDS OF OTHERS—EASEMENTS

An easement is a non-possessory interest which one individual has in the land of another for a limited purpose.¹¹ Easements can be characterized as affirmative¹² or negative,¹³ appurtenant¹⁴ or in gross.¹⁵ Because the owner of a preservation easement has an interest in preserving some aspect of a piece of land or a structure situated on the land, his interest is typically in the nature of a negative easement. What the easement holder "owns" is a right to prevent the possessor of land from doing acts upon the land which, if it were not for the easement, he would be privileged to do. The holder of a preservation easement most often will own no land to which the benefit of the easement attaches. This interest is one personal to him and therefore his easement is in gross. The law concerning easements in gross in North Carolina is well established; such easements are neither assignable nor inheritable, and they terminate with the death of the grantee.¹⁶

One traditional policy of real property law has been to favor the free alienability of land in order to promote its maximum use.¹⁷ Restriction-

10. N.C. GEN. STAT. § 121-35(3) (Supp. 1979).

The section states in part: "A 'preservation agreement' means a right, whether or not stated in the form of a restriction, reservation, easement, covenant, condition or otherwise, in any deed, will or other instrument executed by or on behalf of the owner of the land"

Thus the Act contemplates those rights traditionally viewed as restrictions in the form of easements, covenants, or reverter rights.

11. RESTATEMENT OF PROPERTY § 450 (1944).

12. RESTATEMENT OF PROPERTY § 451, Comment a (1944). An affirmative easement is one which entitles the owner to do acts which, were it not for the existence of the easement, he would not be privileged to do.

13. RESTATEMENT OF PROPERTY § 452, Comment a (1944). A negative easement is one which entitles the owner to limit or prohibit the possessor of the land from doing acts which, were it not for the existence of the easement, the possessor of the land would be privileged to do.

14. RESTATEMENT OF PROPERTY § 453, Comment b (1944). An easement appurtenant is one which has been created to benefit the owner of the easement in his physical use or enjoyment of some tract of land owned by him (a dominant estate).

15. RESTATEMENT OF PROPERTY § 454, Comment a (1944). An easement in gross is one which has been created solely to benefit the owner of the easement personally, irrespective and independent of his ownership of any tract of land. *See also* Shingleton v. State, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). "An easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another"

16. *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925).

17. *Id.* at 597, 127 S.E. at 702. The case offers the traditional view on the favored policy of free alienability. The opinion states in part:

Land is becoming more and more an object of daily commerce, and its uses are changing with varying needs and wants of society. Inventions and new wants reflect themselves in the uses

tions against the alienability of easements in gross are justified on similar policy grounds. The existence of an easement restricts or in some way limits the landowner's use of the burdened or servient estate. Unlike an easement appurtenant, there is no corresponding benefit to a dominant tract of land. The use granted by an easement in gross does not enhance the economic value of another interest in land, but inures to the personal satisfaction of the easement holder. Absent the symmetry of a burden/benefit analysis, a decrease in the use made by the landowner of a servient estate could exceed the use made by the owner of the easement. Thus, restrictions on the alienability of an easement in gross contribute to maximum use of land by forcing an early termination—within one lifetime.¹⁸

The North Carolina legislature, through the Agreements Act, abandoned the distinction between appurtenant easements and easements in gross, treating a conservation or preservation easement as an interest in land which "may be acquired by any holder in the same manner as it may acquire other interests in land."¹⁹ The wisdom of extending the policy for restricting the alienability of easements in gross to an exterior (facade) easement or other preservation easements can be tested only by a close examination of these unique interests.

A facade easement may be defined as an easement pertaining to the facade of a historic structure; it invests a public or private organization with a property interest in the building's exterior without disturbing private ownership and control of the interior.²⁰ The scope of the Act, however, is not limited to those rights acquired for the preservation and control of exterior features, but extends to include easement rights prohibiting any or all alterations in interior features, and uses that are not historically appropriate.²¹

Preservation easements do not fit neatly into the usual easement categories (appurtenant or in gross). The traditional relationship between grantor and grantee of an easement in gross is personal. The parties intend that the use and enjoyment of the easement right be so personal to the easement holder that he alone may make that use,²² and in this sense the restrictions on alienability accepted at common law are justified.

of land, and it is for the best interest of the public that the free and unrestricted use shall be enjoyed, unless such use is restricted in a reasonable manner consistent with the public welfare.

18. RESTATEMENT OF PROPERTY § 490, Comment a (1944). A commercial easement in gross, because it is deemed to contribute to some overall economic value, is generally excepted from the non-alienability rule.

19. N.C. GEN. STAT. § 121-38(3)(b) (Supp. 1979).

20. H-866 OP. ATT'Y GEN. (Tex. 1976).

21. N.C. GEN. STAT. § 121-35(3) (Supp. 1979).

22. RESTATEMENT OF PROPERTY § 492, Comment to Clause (a)(1944).

It would be wrong, however, to assume that a historical commission, revolving fund, or government agency²³ share those attributes of purely personal needs or motivations conceived at common law as characteristic of the holder of an easement in gross. The easement they might hold is intended as a legal device to protect and preserve historic landmarks. The rights and interests created by this easement are viewed more properly as belonging to the public in general. Perhaps, too, the policy favoring the free alienability of interests in land to encourage development should be extended, as a counterbalancing mechanism, to encourage preservation and conservation through easements in gross. As such, the "burdens" imposed on the land subject to the easement are no longer considered as restrictions on the free use of land, but as societal benefits contributing to an overall plan of both growth and preservation.

The Agreements Act will not validate those easements which were created before the passage of the Act.²⁴ Without benefit of statute, the North Carolina courts, however, might consider recognizing preservation easements as unique creations deserving unique treatment.²⁵ Should a dispute arise as to the enforceability of a preservation easement in gross created prior to the Act, the same policies expressed by the Act could determine the court's ruling.²⁶

In order to assure the continued life of an easement traditionally viewed as in gross (that is, to build a body of case law to support a policy of enforceability), several precautionary measures can be taken at the creation of a preservation easement.²⁷ Where the easement holder is a private corporation or charitable organization, the grantee organization can stipulate that the interest shall pass to an appropriate named state agency should the present grantee cease to exist. While

23. N.C. GEN. STAT. § 121-35(2) (Supp. 1979). The section defines "Holder" as "any public body of this State, including the State, any of its agencies, any city, county, district or other political subdivision or municipal or public corporation, or any instrumentality of any of the foregoing, any nonprofit corporation or trust, or any private corporation or business entity"

24. Uniform Conservation and Historic Preservation Easement Act, *supra* note 7, at Sec. 6, Comment. The drafters state that "[r]etroactive validation of property interests that were invalid when created might raise troublesome issues under the taking and contract clauses of the federal and individual state constitutions."

25. In many states, modern case law has approached the subject of the validity and enforceability of less-than-fee interests more liberally. North Carolina cases, holding consistently to the requirements for assignment or inheritability of easements, represent a somewhat antiquated, and very traditional adherence to English common law. It might be suggested that rather than an unwillingness to change, the courts of the state have yet to perceive a need for change.

26. For advantages of preservation easements see Comment, *Alternatives to Destruction: Two New Developments in Historic Preservation*, 19 SANTA CLARA L. REV. 719, 737 (1979). The easement permits the preservation of a historic property at a fraction of the cost of acquisition of full ownership. The holder of the easement is not encumbered with costs of operation and maintenance of the property. The property, because it is held privately, remains on the tax rolls.

27. *Id.* at 741, 743.

that stipulation simply purports to authorize a transfer of rights, prohibited at common law, the hybrid nature of a preservation easement²⁸ might, to a court willing to uphold the validity of the easement (now mandated by the Act), suggest a continued life for the easement.

Of equal importance, especially if the courts are to rule on the validity of a preservation easement without the mandate of the Act,²⁹ are both the consideration which has passed in exchange for the grant of the easement and the nature of the easement itself. Thus the donation of a historic preservation easement should be accompanied by at least token compensation, as the likelihood that the easement will be upheld increases when consideration is given. Also, inasmuch as the courts have had fewer problems recognizing novel easements that impose affirmative rather than negative obligations, the prohibitive provisions of the easement should be cast in affirmative, as well as negative, language.³⁰ For example, the right of the easement holder to prevent the landowner from altering the outside brick exterior of the building in a way inconsistent with its present state, can also be worded to impose a duty on the landowner to maintain the exterior features in a way consistent with its present state.

Easements for preservation purposes will generally be confined to those characteristically described as facade easements. However, the Agreements Act has, by its terms, a broader scope, and its purview will extend to easement rights in the alteration of interior features and uses not historically appropriate.³¹

While certain modifications in existing property law may be justified in the use of facade easements, the broader scope of the statute presents another issue. The restrictions on interior alterations and use create greater burdens than those imposed by facade easements. Without a corresponding benefit to land owned by the easement holder, the burden may outweigh a more nebulous benefit to society or to land owners adjacent to the burdened property.³² It would seem that those policy

28. The preservation easement could be viewed as analogous to a commercial easement in gross.

29. The Agreements Act can be amended or repealed.

30. See Netherton, *Environmental Conservation and Historic Preservation through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540, 561 (1979). Although negative easements appear to be less favored than affirmative ones, for purposes of remedies a negative easement is more likely to be enforced by injunction. Enforcement of an affirmative easement by mandatory injunction would impose on a court the duty of supervision, and a responsibility that courts generally strive to avoid.

31. N.C. GEN. STAT. § 121-35(3) (Supp. 1979).

32. Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 L. & CONTEMP. PROB. 416, 419 (1971). The author suggests that a private person or government agency owning neighboring land and who may have special interests in the maintenance of a historic property can negotiate for himself the purchase of an easement right, thus making the easement appurtenant to his property and enforceable. The availability of this alternative makes less tena-

considerations justifying the restrictions on the alienability of an easement in gross which favor early termination, should, in these circumstances, be given greater weight. Thus, those who wish the continued advantage of the Agreements Act might be cautioned to exercise restraint in imposing controls which will unduly burden the use of land, for this may ultimately defeat their purposes. Envision, for example, a situation where a landowner, in exchange for considerable financial gain to himself, conveys an exterior, interior, and use easement to a private organization interested in preserving the structure as is in a neighborhood which subsequently alters in character. To the landowner's heirs the structure is burdened by the imposition requiring them to maintain the interior, exterior, and use of the structure as originally contemplated; it is also essentially valueless in its present condition and use in a neighborhood materially altered by time and circumstances.

An illustration of the possible long-term detrimental effects of an easement in gross which is valid into perpetuity can be developed through a discussion of property tax assessments. Easement rights are reflected in property tax adjustments.³³ Where the easement is one appurtenant, the lower adjustment to the property burdened is balanced by an upward adjustment for the property benefiting from the easement. The effect is one of equalization, and revenues neither increase or decrease.³⁴ Easements in gross, however, tend to detract from the overall tax base as the upward adjustment on benefited property is not available.³⁵ With the exception of commercial easements in gross, which are viewed as economically beneficial to the public in general, the imbalance is short-lived as the easement by definition terminates with attempts to transfer or with the death or extinction of the grantee/holder.

Clearly, the Agreements Act, by authorizing the enforcements of easements in gross, creates a perpetual imbalance and a concomitantly long-term decline in property tax revenues. By foregoing a given amount of tax revenue, the county or municipality is, in effect, making

ble the argument that adjacent landowners have a special interest in preserving not just the exterior, but the interior and use of a structure when the easement is in gross and held by an outside agency or organization.

33. N.C. GEN. STAT. § 121-40 (Supp. 1979). The provision states: "For purposes of taxation, land and improvements subject to a conservation or preservation agreement shall be assessed on the basis of the true value of the land and improvements less any reduction in value, caused by the agreement."

34. For a thorough discussion and criticism of the widely accepted practice of adjusting property tax assessments for easements, see Menikoff, *Taxation of Restricted Use of Property: A Theoretical Framework*, 27 BUFF. L. REV. 419 (1978).

35. Only a private corporation or organization for profit would be subject to property tax on the easement interest.

a tax expenditure. Facade easements rights alone, however, generally result in only slight downward adjustments. In fact, where the property has been designated as historically significant, the designation may tend to increase the overall value of the property. More extensive easement restrictions on an isolated piece of property, whose fair market value may be greatly increased were it not so encumbered by the easement, may significantly reduce its property tax valuation. By authorizing the validity of in gross easements subject only to termination by agreement,³⁶ the Agreements Act not only relegates property to less than its highest and best use, but condones what could be a significant reduction in property tax revenues.

Absent in the Agreements Act are provisions for termination of easements or other preservation restrictions. The drafters of the Act admit their intent to exclude the possibility of termination entirely when not specified in writing.³⁷ The Act provides only for termination upon express agreement between the parties or as stipulated at the time of creation.³⁸

It is interesting to note, however, that the Uniform Act upon which the North Carolina Act is based does include provisions for modification and termination.³⁹ Specifically, the Uniform Act addresses itself to situations where the parties are unable to agree on terms for modification or termination. In these circumstances the question is to be resolved by the court, which is required to adhere to certain guidelines set forth in the statute.⁴⁰ The Uniform Act's provisions would apply a more stringent test to the common law doctrine of changed conditions,⁴¹ yet they would broaden the scope of the doctrine to extend also to easements. In addition, the provisions allow a court to award damages to the holder of the easement in the event of termination. Had a charitable organization paid a considerable sum for the easement

36. N.C. GEN. STAT. § 121-41(b) (Supp. 1979).

37. Interview with Myrick Howard, Exec. Dir. Historic Preservation Fund of North Carolina, Inc., and Keith Morgan, N.C. Div. of Archives & History, in Raleigh, N.C. (Feb. 14, 1980).

38. N.C. GEN. STAT. § 121-41(b) (Supp. 1979). The provision states: "Releases or terminations of such agreements shall be recorded in the same waiver. Releases or terminations, or the recording entry, shall appropriately identify by date, parties, and book and pages of recording, the agreement which is the subject of the release or termination."

39. Uniform Conservation and Historic Preservation Easement Act, *supra* note 7, at § 3.

40. *Id.* § 3(b). The statute states in part:

The court may modify or terminate the easement only if the petitioner establishes that the easement no longer substantially achieves the conservation or historic preservation purpose for which it was established. In the case of modification, the petitioner must also show that the requested change is no greater than necessary to cure the claimed deficiency of the easement. The court shall not modify or terminate an easement that continues to serve the purpose for which it was established even though public land use and planning objectives would be facilitated thereby unless continued enforcement of the easement according to its terms would violate a fundamental public policy of the state.

41. See text accompanying notes 74-75 *infra*.

rights, and the value of the property without the easement was considerably more than as encumbered, a court would be justified in awarding the easement holder damages for the involuntary surrender of his rights.

In the absence of specific provisions regarding the modification or termination of preservation easements, the North Carolina courts may look to existing common law to support a decision to terminate. Assuming that for preservation purposes the easements are in gross, a court may, for example, terminate under the cessation of purpose doctrine.⁴² A broad interpretation of the doctrine suggests that where the purpose of a preservation easement is to preserve the integrity of a particular structure, and the cultural, aesthetic, economic, or social conditions upon which those values have been based no longer exist, the purpose of the easement and the easement itself would cease to exist. Fulfilling the purpose of its creation, the maintenance of a structure of then historical or architectural significance, cannot justify continued maintenance should the structure cease to be significant due to change in the concept of what constitutes "significance." Historical or architectural significance is an essentially subjective judgment dependent on what the society values at a particular time.

Easements may also be terminated by abandonment.⁴³ Should an easement holder, the governmental agency, or a private corporation intend to abandon its rights and accompany the intent with an external act evidencing the intent, the easement will terminate.⁴⁴ When the easement holder reserves a right to enter and inspect the premises and fails to exercise that right, and the failure to act is accompanied by an intent to abandon all interest it holds in the preservation of the property, a court may hold that the rights are thereby terminated.

An exercise of eminent domain can terminate an easement.⁴⁵ If a governmental agency acquires a preservation easement, the Act does not preclude another governmental agency from exercising a power of eminent domain to acquire the land and easement for other purposes.⁴⁶ Should the easement holder be a private organization, government may exercise its power of eminent domain; the taking, however, must be accompanied by just compensation.

42. *Railroad v. Way*, 172 N.C. 774, 90 S.E. 937 (1916); J. WEBSTER, *REAL ESTATE LAW IN NORTH CAROLINA* § 301 (1971).

43. J. WEBSTER, *supra* note 42, at § 303.

44. *Miller v. Teer*, 320 N.C. 605, 18 S.E.2d 173 (1941).

45. J. WEBSTER, *supra* note 42, at § 308.

46. N.C. GEN. STAT. § 121-36(c) (Supp. 1979).

PRIVATE RESTRICTIONS ON THE USE OF LAND CONDITIONS

(A) *Possibility of Reverter and Power of Termination.*

"A possibility of reverter is an untransferred potential residuum of an estate remaining in a grantor and his heirs or in a deviser's heirs when an estate of fee simple determinable is created in real property either by deed or will."⁴⁷ By using appropriate words such as "until" the event occurs or "while," "during," or "so long as" the property is used for a stated purpose, the grantor can indicate that the fee simple will expire automatically upon the happening of the stated event. A possibility of reverter operates automatically to revest the fee simple interest in the grantor or his heirs. It requires neither the institution of a lawsuit, nor the intervention of any court.⁴⁸

A power of termination arises after the creation of a possessory estate known as a fee simple subject to a condition subsequent. The fee remains vested in the grantee "on the condition that," or "provided that," the land be used for a stated purpose, or it will be "rendered null and void" if the stated condition is subsequently breached. The power to terminate and revest the possessory estate in the grantor or his heirs is not automatic. It requires a positive action. The grantor must either effectuate actual entry upon the land or bring an action at law.⁴⁹

The Agreements Act authorizes the use of reverter rights as a means to control the preservation and use of historic properties. The reverter clause is effective insurance that the special conditions included in a deed of sale or transfer will be complied with. It provides for the return of the land to the grantor if the grantee does not honor the conditions.⁵⁰

Reverter rights, however, have not been widely used as a preservation mechanism in North Carolina.⁵¹ They have practical uses under circumstances which are limited. The grantor, in imposing conditions on the use of the land he conveys, becomes a private land-use planner. It is he who determines to what use the land may be put and whether it will be the most productive, profitable, or socially desirable.⁵² Reverter clauses are an effective means of preserving the private control of land. Possibilities of reverter and power of termination are also alienable by both inter vivos conveyance and by will.⁵³ Thus the Agreements Act has no significant effect on the enforceability of reverter rights.

47. Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807, 809 (1963-64).

48. *Id.*

49. *Id.* at 810.

50. *Id.*

51. See generally interviews cited note 37 *supra*.

52. See Webster, *supra* note 47, at 808.

53. J. WEBSTER, *supra* note 42, at § 345 n.11. "Under North Carolina law since the adoption

Reverter rights have also been harshly criticized as being unreasonable impediments to the free alienability and usability of land,⁵⁴ and the courts, consequently, do not favor them.

Since restrictions created by such conditions operate so harshly and may terminate vested fee simple estates, the courts do not lightly construe a clause in a deed as a condition subsequent which qualifies or limits the duration of the estate conveyed thereby, unless the clause clearly expresses in 'apt and appropriate language' the intention of the parties to that effect. A mere statement of the purpose for which the land is to be used, without more is not sufficient to create a condition.⁵⁵

The limited use of reverter rights to preserve historic properties may thus be explained at three levels. First, the conditions originate upon the grant of a fee and are accomplished therefore only by a conveyance of land. Apart from individual landowners who wish to take the preservation initiative, only an organization such as the Historic Preservation Fund of North Carolina, Inc. would be in a position to effectively use a reverter right clause. As most frequently is the case with endangered properties of historic or architectural significance, a revolving fund provides the only means to accomplish what the landowner will not do—further diminish the value of his property by imposing a harsh reverter clause.

Second, with a view toward the ultimate goals of the preservation movement, a reverter clause may in fact be more negative than positive in effect. Its validity will not be upheld if the conditions are vague and unspecified. For example, "for use as an historic property" would not suffice to meet the test of specificity. Yet to anticipate the particular conditions which could justify an exercise of a reverter right is virtually impossible when dealing with historic properties.⁵⁶

The third factor contributing to the limited use of reverter clauses is the general inappropriateness of the remedy. Whether automatically or by court action, the property re-vests in the grantor. The result may serve to prevent the unauthorized use, alteration or demolition of the structure; however, a revolving fund, for example, would then be burdened with the added aggravation and expense of dealing with the same property each time the conditions were broken.

Reverter clauses can be effective penalty devices for breach of covenants. The Historic Preservation Fund of North Carolina, Inc., for example, provides for possibility of reverter for three years following

of N.C. GEN. STAT. § 39-6.3 in 1961, rights of entry for condition broken and possibilities of reverter are assignable both before and after breach of the condition."

54. J. WEBSTER, *supra* note 42, at § 345.

55. *Id.*

56. A deed would have to specify with some particularity the acts which would result in a breach of condition. For example, part of the clause might read, "as long as the grantee maintains the exterior or affects repairs in yellow pine of five inch diameter, painted white with black trim."

conveyance, should the grantee not comply with extensive covenants in the deed.⁵⁷ Viewed as a precautionary measure to assure the good faith intentions of the grantee to comply, a reverter clause is neither harsh nor unreasonably restrictive on the long-term future use of land. However, the reverter right now ceases to be independent, depending for its validity on the enforceability of the covenants. In this respect the Agreements Act becomes vitally important in insuring that all covenants will be upheld as against the present purchaser or his successors in interest.

(B) *Covenants*

A covenant is a promissory obligation arising out of and respecting the use of land.⁵⁸ Covenants, in order to be valid and enforceable, must be in writing since they constitute interests in land analogous to negative easements.⁵⁹ The grantor of land may set forth the covenant restrictions in a deed of conveyance, and covenants can be enforceable at law or in equity. In order to be enforceable at law, a covenant must "run with the land"; that is, the covenant must conform to rigid common-law requirements of form, intent, privity, and substance.⁶⁰ Covenants which do not meet the test of running with the land are termed covenants in gross and are treated in much the same fashion as easements in gross.⁶¹

English courts refused to permit the burden of a covenant in gross to run with the land. In addition, a majority of American courts deny the enforcement of covenants in a court of law where the benefit is in gross,⁶² and the benefit is not assignable and will end with the original covenantee.⁶³ The rules are consistent with those respecting the non-recognition of easements in gross, and the policy issues are similar. The Restatement of Property takes the following position, endorsing that policy:

The imposition, by virtue of his succession, of an obligation as a promisor upon the successor of one who has made a promise respecting the use of his land creates a burden upon the ownership of the land of the promisor which may have a disadvantageous effect upon its use and development. There is a social interest in the utilization of land. That social interest is adversely affected by burdens placed on the ownership of land Unless a burden has some compensating advantage which prevents it from being on the whole a deterrent to land use and

57. See generally interviews cited note 37 *supra*.

58. J. WEBSTER, *supra* note 42, at § 346(a).

59. Hege v. Sellers, 241 N.C. 240, 241, 84 S.E.2d 892, 898 (1954).

60. 5 R. POWELL, REAL PROPERTY § 672-75 (Supp. 1979-80).

61. London County Council v. Allen, 3 K.B. 642 (1914).

62. 2 AMERICAN LAW OF PROPERTY § 9.13 (A. Casner ed. 1952).

63. RESTATEMENT OF PROPERTY §§ 534, 537 (1944).

development, the running of the promise by which it was created is not permitted. The requirement of such a compensating advantage is commonly expressed by saying that the promise must 'touch and concern' the land with which it runs.⁶⁴

Thus, uses inhibited by the covenant (burden imposed) must be offset by a benefit to the promisee or a beneficiary of the promise respecting the physical use and enjoyment of land possessed by him.

The nature of covenants imposed for the preservation of structures precludes enforcement at law where the beneficiary of the promise is a state agency or other organization possessed of no land to which the benefit of the promise may run. An additional consideration respecting the utility of creating a covenant at law is that the remedy for breach of a covenant is in the form of damages, unless it is shown that the remedy would be inadequate.⁶⁵ Where money damages do not constitute an adequate substitute for the loss of the promised benefit, an injunction requiring performance may be granted.⁶⁶ Inadequacy of a remedy at law, however, is not determinative of the question of whether an injunction will be granted. A court, in its discretion, may deny injunctive relief if it deems the action to be prohibited, unnecessarily burdensome, or disproportionate to the benefit resulting from the enforcement of the promise.⁶⁷ In short, even if it were possible to characterize a preservation covenant as one running with the land, and therefore enforceable at law, the remedies are uncertain and possibly ineffective to achieve the desired preservation goal. For assuming that money damages were the remedy, property rights would tend to evolve to more highly valued uses should the gain from breach exceed the damages to be paid. An injunction would make such a change less likely.

In order to ameliorate the harshness of the rigid requirements respecting covenants enforceable at law, a more modern trend has been to grant equitable relief if the promisor has notice of the restrictions.⁶⁸ Termed equitable servitudes, covenants enforced in equity are most frequently of value in enabling landowners who are strangers to each other's titles to enforce the restrictions. Generally the benefit of the servitude "touches and concerns" the land of the individual asking for enforcement. Privity of estate between promisor and promisee is not required. There is some doubt, however, that the burden of an equitable servitude will run when the benefit is in gross.⁶⁹ Moreover, of the few cases dealing with the assignability of servitudes in gross, most

64. *Id.* § 537, Comment a.

65. *Id.* § 528.

66. *Id.* Comment e.

67. *Id.* Comment f.

68. *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848).

69. *Stegall v. Housing Auth.*, 278 N.C. 95, 178 S.E.2d 824 (1971); *Craven County v. First-Citizens Bank & Trust Co.*, 237 N.C. 502, 503, 75 S.E.2d 620, 621, (1953).

agree that the benefit of an equitable servitude cannot be assigned.⁷⁰

All covenants, whether characterized as covenants at law or equitable servitudes, whether they touch and concern the land or are in gross, are valid and enforceable under the Agreements Act.⁷¹ Of particular significance is the certainty that servitudes in gross, those which enable a revolving fund or preservation society or government agency to control the use and exterior appearance of an historic structure, can be assured of the future effectiveness of that control. It can also be assumed that the benefit of the servitude can be assigned, which would enable a private corporation to assign its rights to a government agency, should the corporation cease to exist at a future time.

The Agreements Act also provides for remedies in the form of equitable relief, or where appropriate, damages,⁷² a curious reversal where the agreement is characterized as a covenant at law and equitable relief is available only if damages are inappropriate. In effect, the Act has tailored its provision for remedies to meet the needs of those for whom the Act was designed.

As with easements, the Act is silent as to terminability of covenants unless by express agreement between the parties either at the time of their making or at a subsequent time. In North Carolina, if the creators of restrictive covenants do not place a limitation on the duration of the covenants, they have a potentially infinite duration.⁷³ Equity may refuse to enforce a covenant of infinite duration "when there has been a change of circumstances in the restricted area or a change in the character of the neighborhood to such an extent that the objectives of the covenant have in fact been frustrated or made impossible or impracticable of accomplishment."⁷⁴ Changes in the character of land adjacent to, but outside, an area of a subdivision restricted to residential purposes do not affect the validity of the restriction.⁷⁵

It appears that should it be the intention of the parties that the restrictions be enforced for the purpose of preserving the character of the neighborhood, and the character of the neighborhood significantly changes, those purposes would be deemed frustrated and the agreement unenforceable. Where restrictive covenants are imposed to preserve the historical or architectural integrity of the individual property, an argument similar to that made for the termination of easements

70. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 56, 58-59 n.37 (1967).

71. N.C. GEN. STAT. § 121-38 (Supp. 1979).

72. *Id.* § 121-39.

73. J. WEBSTER, *supra* note 42, at § 346(e).

74. *Id.*

75. *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961). *But see Elrod v. Phillips*, 214 N.C. 472, 199 S.E. 722 (1938).

emerges. For example, by construing a restricted area to mean an area upon which the property is situated, a change in circumstances would include an excessive economic burden upon the landowner to comply with the agreement in light of a change in values with respect to maintaining the property as a historical landmark.

New to property tax assessors is the requirement of the Act that any reduction in the value of the land caused by an agreement in the form of covenant or condition be considered in valuation.⁷⁶ Whereas easements have traditionally been considered in adjusting value for property tax purposes, covenants and conditions have not.⁷⁷ A similar problem is thus presented as was discussed with respect to easements in gross when the agreement involves an equitable servitude in gross or reverter rights.⁷⁸ Conceivably there will be a downward adjustment with no compensatory upward adjustment for personal benefits received. It is impossible to predict at this point how the existence of a preservation agreement in the form of a promise made to an organization or agency exempt from property taxation will affect the value of the property so encumbered. A significant drop in value could be viewed as symptomatic of the changed circumstances that would preclude a court of equity from upholding the validity of the agreement.

PRIVATE VS. PUBLIC LAND USE PLANNING

The use of preservation restrictions in the form of easements, covenants, or reverter rights, as an alternative to zoning or the exercise of eminent domain, has received widespread endorsement. Most attractive are the arguments that government bureaucracy plays no role in a private contract between two individuals,⁷⁹ that the private sector is given an opportunity to voluntarily regulate land use,⁸⁰ and that control can be individualized to a particular parcel of land.⁸¹

Two issues emerge, both of which suggest that the Agreements Act does not statutorily endorse a completely private agreement approach to preservation restrictions. The first is that the Act authorizes state and municipal agencies to acquire easement rights, and to impose covenant or reverter right restrictions.⁸² An easement right, if purchased, is paid for with taxpayer dollars. Assuming that a state, or particularly a municipal government, is responsive to the needs and wishes of the

76. N.C. GEN. STAT. § 121-40 (Supp. 1979).

77. See Menikoff, *supra* note 34.

78. See text accompanying notes 33-36 *supra*.

79. See Brenneman, *supra* note 32, at 417.

80. Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 142 (1976).

81. See Brenneman, *supra* note 32, at 417.

82. See N.C. GEN. STAT. § 121-35(2) (Supp. 1979) & note 23 *supra*.

voter/taxpayer, this delegation of authority to acquire easements, while a function of the political machinery, is not objectionable. When private preservation organizations, in varying degrees, are governmentally subsidized, they acquire easement rights either wholly or in part with public funds. A private organization may also use public funds to revolve properties encumbered with covenants. Here there is a shift of decisionmaking unaccompanied by political safeguards.⁸³ There is control only to the extent that government may withhold funds or impose conditions of limited regulation and supervision.⁸⁴ A private preservation organization, supported primarily by donations from a select group of preservation enthusiasts, may be least responsive to the taxpayer whose dollars provide additional funding.

A second and more realistic approach to the use of private controls for preservation purposes is an acknowledgment that it is, in fact, an alternative method for public agencies to carry out their programs. Where public agencies have been delegated the responsibility for preservation programs, they have traditionally exercised that responsibility through police power (zoning) controls⁸⁵ or through purchase or condemnation (eminent domain).⁸⁶ Arguably, by removing common law limitations on interests in gross, it is now possible to encourage planning on a co-operative level between the private sector and the public agency. The ultimate issue is whether the private landowner's voluntary acquiescence to the agreement can justify the absence of procedural safeguards necessary to a states' legitimate exercise of a planning and regulatory function.

POLICY JUSTIFICATIONS

The significance of the Act in providing a new legal tool whereby public agencies may contract with a private individual to achieve preservation goals surfaces most readily in dealing with conflicting policy judgments. Any landowner may, at any time, agree privately to the imposition of restrictions upon his land. The nature and duration of

83. The rules which govern permissible lawmaking insist on the assurance of a policy's promulgation by a *sufficiently accountable body*. Thus a group of private citizens exercising delegated authority in an open-ended way within the community is not permissible. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-17 (1978).

84. *See generally* interviews cited note 37 *supra*. The Revolving Fund of North Carolina, Inc. received two challenge grants of \$50,000 each in its first two years of operation. It was required to purchase and re-sell \$100,000 worth of property in each year and the properties were to be appraised according to Federal Uniform appraisal standards at a cost of \$750 to \$1,500 for each appraisal. Although not unduly burdensome, the requirements illustrate the role of government in "private" agreements.

85. N.C. GEN. STAT. § 160A-381 (1976).

86. N.C. GEN. STAT. § 160A-241 (Supp. 1979).

these restrictions have, in the past, been subject to limitation for two reasons.

The decision to create an interest in gross need not be reasonable; that is, it need not be economically practical or socially beneficial. In these terms, reasonableness requires that there be a corresponding benefit in return for the burden or restriction. Common law has consistently held that one cannot restrict, indefinitely, the development of land when the possibility (probability) of an unreasonable agreement exists.

Yet if reasonableness is measured in terms of land management rather than land development, in gross interests provide public agencies and private landowners with a means to conserve environmental values and preserve historical and cultural landmarks. Indeed, the past decade has been one of awareness and shifting values: an awareness that our resources are limited, new values recommending permanency over change. Growth policies have taken on new directions as a slowing economy emphasizes the need for introspection, deacceleration, and more careful planning. The conservation and preservation movement is largely representative of an effort to inject a measure of conservatism into a society which conditions progress on urban and industrial development. If the Agreements Act is viewed as a viable tool to achieve the stabilization of land use by enforcing restrictions against change, the in gross interests held as a result of the Act become inherently reasonable.

It should be cautioned that the decision to raise the status of in gross interests is based on a value judgment; it is based on the assumption that it is socially and economically desirable to preserve, adapt, and reuse. Moreover, as the Act extends its scope only to agreements between an individual promisor and an agency or organization as promisee, the values espoused are not necessarily those of the private sector. The individual landowner who covenants with a governmental agency to do or refrain from doing certain acts on his property may ultimately be bowing to what is yet another bureaucratic decision.

A second rationale for common-law limitations on the duration of in gross interests was an absence of recording acts. Whereas it was possible to identify the holder of an easement appurtenant or a covenant which benefited an adjacent or nearby parcel of land, it was undoubtedly more difficult, before the modern recording acts, to determine who, if anyone, held an in gross interest. If alienable, the danger of an interest in gross becoming an unreasonable encumbrance on the title would increase with the difficulty of locating the holder of the interest.

The Agreements Act expressly provides for the preservation agree-

ment to be recorded in the same manner as deeds.⁸⁷ Recording protects a grantee from claims of other purchasers for value or encumbrances; hence, there is little doubt that a deed containing preservation restrictive covenants, or a deed granting an easement, will be recorded by the grantee. As to the original parties to the agreement, recordation insures that subsequent purchasers of the land subject to the restriction will be notified by title search of the nature and holder of the restriction. As the Agreements Act has limited its definition of a holder to government agency, private corporation, or business entity,⁸⁸ the difficulty of locating holders of an in gross interest is minimized to the extent that the agency or organization is likely to remain in existence and in a known location for as long as the interest is in existence. Recording acts favor the possibility of viewing interests in gross as alienable, at least where it serves a public policy to do so.

EFFECT OF RECORDING ACTS

In North Carolina, the Marketable Title Act⁸⁹ became fully operative on October 1, 1976.⁹⁰ As easements and covenants created by authority of the Agreements Act are not of the type excluded by the Marketable Title Act, it may be possible to circumvent the purposes of the latter Act by taking advantage of the former. A covenantor, grantor of an easement, or his or her assigns, for example, could convey the burdened property without including in the deed any restriction. Assuming the deed is recorded and no action is taken upon it for thirty years, any conflicting claims based on a prior transaction with respect to that title are extinguished.

It might also be argued that, having recorded the deed without restriction, the owner-grantee possesses under color of title and may claim adversely to the entire interest granted, as against an individual in seven years, and as against the state in twenty-one years.⁹¹ Under color of title, the adverse possessor, if he has actual possession of some part of the land, will be the constructive possessor of the remaining land or interest described in the deed, if the land involved is adequately described.⁹²

A court of equity, in determining whether to enjoin a subsequent purchaser from action in derogation of the covenants or restriction not found in his deed, would be required to comply with the provisions of

87. N.C. GEN. STAT. § 121-41 (Supp. 1979). In North Carolina the recordation statutes are known as The Connor Act, enacted in 1885. See N.C. GEN. STAT. § 47-18, -20 (1976).

88. N.C. GEN. STAT. § 121-35(2) (Supp. 1979).

89. N.C. GEN. STAT. §§ 47B-1 to -9 (1976 & Supp. 1979).

90. N.C. GEN. STAT. § 47B-3 (1976).

91. N.C. GEN. STAT. §§ 1-35, -38 to -40 (1976 & Supp. 1979).

92. J. WEBSTER, *supra* note 42, at § 264.

the Marketable Title Act. Whether a court would refuse injunction under an adverse possession theory is speculative. In order to avoid either possibility, it would be advisable for any agency to maintain a system of periodic checks on property in which it has an interest, or to preserve its interest by registering or re-registering such rights with the Register of Deeds office so that they will be discoverable in the record chain of title in the thirty year title search.

VALIDITY OF THE ACT

In *A-S-P Associates v. City of Raleigh*,⁹³ the Supreme Court of North Carolina established an important constitutional precedent concerning the constitutionality of preservation efforts accomplished through zoning ordinances. Thus the *A-S-P* case precludes a constitutional attack on the Act as authorizing a "taking"⁹⁴ under the due process clause of the fourteenth amendment. The court held that an ordinance based on aesthetic considerations was a permissible exercise of police power. Moreover, the Agreements Act, as a tool for achieving preservation goals, lacks the coerciveness of the traditional exercise of police power. It does not interfere with the right of two consenting parties to enter into a private contract with respect to the use of land. It merely extends those property interests which are the subject matter of the contract.

A more serious question arises with respect to the requirement that the power delegated by the legislature include standards to guide the delegated party in its exercise of that power. The requirement preserves constitutional checks, both political and judicial, on the exercise of governmental authority.⁹⁵ The issue is whether a court could determine if the action authorized by the Act is within the scope of the delegated power. Clearly, the legislature intended the Act to extend only to the conservation or preservation of land, sites, or structures. The historic sites or structures included by the Act are not clearly defined, and the Act has not specified that they will be recorded on the National Register of Historic Places.⁹⁶ The 1979 amendment relating to historic properties authorizes the acquisition of any property that "embodies important elements of its cultural, social, economic, political or architectural history"⁹⁷ Properties subject to the Act, under this definition, are unlimited. Who is to determine significance, how it is to be determined, and what limits can be imposed are questions left unan-

93. 298 N.C. 207, 258 S.E.2d 444 (1979).

94. In defining a preservation agreement, the Act authorizes "a right . . . or in any other [order] of taking" N.C. GEN. STAT. § 121-35(3) (Supp. 1979).

95. L. TRIBE, *supra* note 83.

96. N.C. GEN. STAT. § 121-35 (Supp. 1979). The Act applies to any property that is "historically significant for its architecture, archaeology or historical associations."

97. N.C. GEN. STAT. § 160A-399.1(a)(1) (Supp. 1979).

swered by the Act. In fact, any contract subject to the Act's terms could, in itself, be voided under the doctrine of mistake should it be determined by a court that the subject matter of the contract, a purportedly significant property, is one not significant within the meaning of the Act.⁹⁸ An amendment to the Act or a body of case law interpreting "significance" might inject some certainty into what is now a serious weakness. It is certain that any deed conveying a property with preservation restrictions should include sufficient recitals as to what, in fact, constitutes its significance. A mere label such as Historic Property Preservation Agreement should not automatically bring the agreement within the purview of the Act. Recitals would be of particular importance where a court may, at a later date, be asked to interpret the meaning of "significance" and to measure against its interpretation the attributes of the property in question.

TAX CONSEQUENCES

The Tax Reform Act of 1976⁹⁹ reflected the policy of government to encourage the preservation, restoration, and maintenance of historic structures. Adopting the mechanism used in section 167(k) of the Code,¹⁰⁰ Congress identified a new class of real estate, "certified historic structures," in connection with which rehabilitation expenditures are eligible for five-year amortization.

Section 167(o),¹⁰¹ another provision dealing with the renovation of historic properties, offers the taxpayer the alternative of being treated as an original user of a substantially rehabilitated historic property. Should the taxpayer elect this treatment, he may use either the 150% declining balance method of depreciation for nonresidential property, or the 200% declining balance method or sum-of-the-years' digits method in cases of residential property.

Section 280(B)¹⁰² provides that no deduction is allowed for any amount expended on the demolition of a certified historic property, or for any loss sustained as a result of the demolition. Not only is the taxpayer discouraged from the demolition of historic structures, but as a concomitant to section 280(B), section 167(n)¹⁰³ provides that for real property constructed on a site that was occupied by a certified historic

98. 3 A. CORBIN, *CONTRACTS* § 605 (1960 & Supp. 1971); *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

99. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1042, 90 Stat. 1520 (codified in scattered sections of 26 U.S.C.).

100. I.R.C. § 167(k).

101. *Id.* § 167(o).

102. *Id.* § 280(B).

103. *Id.* § 167(n).

structure on or after June 30, 1976, the depreciation allowance be limited to straight line.

Balanced against these disincentives for demolition or substantial alteration, the Code provides, in section 170(f)(3),¹⁰⁴ an incentive in the form of a deduction for contributions of partial interests. Section 170(f)(3), effective for contributions made after June 13, 1977, and before June 14, 1981, includes an "easement with respect to real property granted in perpetuity to an organization described in subsection (b)(1)(A) exclusively for conservation purposes." Section 170(f)(3)(C)(ii) defines conservation purpose as the "preservation of historically important land areas or structures." The Code provides a deduction allowance only for easements granted in perpetuity.

The Agreements Act assists the North Carolina taxpayer in taking advantage of the tax incentives for preservation. By insuring that an easement in gross donated for preservation purposes is enforceable into perpetuity, the Act has insured that those easements fall within the scope of section 170(f). In fact, in the absence of the Act, it seems unlikely that any such easement in gross could qualify for a charitable deduction since by its definition the easement, in North Carolina, would be extinguished upon an attempt to transfer or with the death of the easement holder.

For federal income tax purposes, the owner of a historic property is presently encouraged to consider preservation as an alternative to demolition. The donation of an easement does not preclude the adaptive re-use of the building as long as the use and proposed renovations are not inconsistent with the building's historical or architectural integrity.

CONCLUSION

North Carolina is presently one of eight states that has passed legislation to facilitate historic preservation through private agreement.¹⁰⁵ Both the drafting of the Act and its inclusion in the 1979 historic preservation legislative package speak highly of a few dedicated and capable preservationists. An act of this nature merits serious consideration by a legislature contemplating its passage, by preservation groups who will work with it, by landowners affected by it, by citizens who support its policies with their tax dollars, and by courts that will be asked to settle controversies arising from it. A landowner who agrees to convey

104. *Id.* § 170(f)(3).

105. ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1979); CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1978); GA CODE ANN. §§ 85-1406 to -1410 (1978 & Supp. 1979); LA. REV. STAT. ANN. § 9:1252 (West Supp. 1980); MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West 1977 & Supp. 1979); N.H. REV. STAT. ANN. §§ 477:45-47 (Supp. 1979); R.I. GEN. LAWS §§ 34-39-1 to -5 (Supp. 1978).

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or donate an easement, or a purchaser willing to buy property burdened with preservation restrictions is free to do so. It is the balancing of economics and aesthetics which will ultimately determine whether that decision will insure the life of the structure long after the death of its owner.

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