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Ronald H. Rosenberg  
*College of William and Mary*

Pamela G. Jacobstein

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## Historic Preservation Easements: A Proposal for Ohio

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## HISTORIC PRESERVATION EASEMENTS: A PROPOSAL FOR OHIO

Ronald H. Rosenberg\* & Pamela G. Jacobstein\*\*

### I. INTRODUCTION

Americans have begun to recognize the importance of historically significant structures and places. Historic districts are being restored in many parts of the nation. This recognition has spawned the creation of a social value which places emphasis upon the preservation of historic properties. Historic places provide a physical link to society's cultural history - a unique and irreplaceable connection to the past.<sup>1</sup> More specifically, the protection of cultural resources has social importance since it encourages increased understanding and respect for the past and provides a source of architectural beauty for the future. Governmental promotion of protective policies for historic properties, therefore, satisfies intergenerational responsibilities both to the past and to the future. On a more pragmatic level, the preservation of historic districts has been shown to revitalize urban neighborhoods and bolster local economic conditions.<sup>2</sup>

Although historic resources command increasing respect in society, they are exceptionally vulnerable to "public and private interests, natural forces and a concept of progress oriented toward physical expansion and alteration of the environment."<sup>3</sup> The growing awareness of this fra-

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\* Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia. B.A., 1971, Columbia University; Masters of Regional Planning, 1974 and J.D., 1975, University of North Carolina at Chapel Hill. Professor Rosenberg gratefully acknowledges the support of the Cleveland-Marshall Fund which provided a research grant for the preparation of this article.

\*\* Associate, Squire, Sanders and Dempsey, Cleveland, Ohio. B.A. 1975, Kent State University. J.D. Cleveland State University.

1. See Stipe, *A Decade of Preservation and Preservation Law*, 11 N.C. CENT. L.J. 214, 215 (1980).

2. See generally ADVISORY COUNCIL ON HISTORIC PRESERVATION, *THE CONTRIBUTION OF HISTORIC PRESERVATION TO URBAN REVITALIZATION* (1979). Professor Carol M. Rose has recently identified another rationale for modern historic preservation law as "the fostering of community cohesion, and ultimately, the encouragement of pluralism." Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 533 (1981).

3. Note, *Cultural Resource Preservation in Ohio: The Development of Federal and State*

gility has resulted in the development of a number of legal techniques and governmental programs intended to protect historic properties. One such device is the historic preservation restriction.<sup>4</sup> By legislative act, many states have sought to achieve a preservation policy by encouraging the use of conservation and historic preservation easements. These statutes authorize the creation of a new form of private property right which employs traditional property law concepts to accomplish a new purpose.<sup>5</sup> This new right is a less-than-fee interest in land. By legislative action, the common law limitations associated with real covenants and easements have been eliminated, thereby producing a "novel interest in land that is freely assignable and enforceable against subsequent takers."<sup>6</sup> This interest, often termed a "preservation restriction,"<sup>7</sup> permits a landowner to segment ownership rights and to convey the right to modify the physical appearance and use of lands and structures. By recognizing the existence of an alienable property right to preserve the

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*Law*, 29 CLEV. ST. L. REV. 311 (1981) (hereinafter cited as *Cultural Resource Preservation*).

4. The statutes employ varied terminology to describe a less-than-fee interest in land. The historic preservation and conservation restrictions or easements create essentially the same type of interest in land, however, they differ basically in the purpose which they serve. The purpose of the conservation easement is to protect the natural environment and the purpose of the historic preservation easement is to protect historically significant buildings and landmarks from any destructive activity. See, e.g., CONN. GEN. STAT. ANN. §§ 47-a to 42-c (West 1978) (conservation easement); MASS. ANN. LAWS ch. 184, §§ 31-33 (West 1977 & 1980 Supp.) (conservation, preservation and agricultural restriction).

5. Through statutory enactment, the state legislatures have recognized less-than-fee devices to preserve the natural and cultural environment. Under traditional doctrine a private landowner receives a wide spectrum of rights associated with his ownership of a fee simple land interest, and any of these partial or less-than-fee interests may be transferred separately to another party. The common law interests of easements, covenants, and equitable servitudes which are less-than-fee interests have been used in the past to create rights-of-way, licenses, profits, and negative and affirmative obligations on a landowner's estate. For instance, utility companies must obtain a right-of-way over the owner's property to maintain electrical power lines. As will be discussed, the use of these traditional concepts to address modern problems associated with cultural preservation are inadequate due to the common law limitations which often prevent an assignment of less-than-fee interests. See notes 54 & 68 and accompanying text *infra*.

6. Note, *Preserving Utah's Prehistoric Past: A Proposal for Legislative Reform*, 1976 UTAH L. REV. 143, 153 [hereinafter cited as *Prehistoric Past*]. Because the common law impediments of enforceability and assignability associated with easements and covenants have been neutralized by legislation, the state provides for a voluntary and private regulatory strategy for conservation and historic preservation purposes. For an excellent discussion of easements and covenants under traditional property law, see C. CLARK, *REAL COVENANTS & INTERESTS RUNNING WITH LAND* 65 (2d ed. 1947).

7. The less-than-fee interest at various times has been labelled as "preservation restrictions, preservation easements, development rights, cooperative agreements, controlled use agreements, historic easements, and conservation futures." Netherton, *Restrictive Agreements for Historic Preservation*, 12 URB. LAW. 54, 55 (1980). Whether the preservation restriction is defined as a restriction, easement, or covenant, the interest created by the statute is the same. For the purposes of this article, the terms "historic preservation and conservation easements" will be used to describe the modern less-than-fee devices recognized by state legislatures.

physical appearance of buildings and places, states authorizing preservation restrictions have established a voluntary, nongovernmental technique for the conservation of cultural resources. This presents an attractive alternative or supplement to the traditional methods of public land use control which compel preservation through the exercise of the police power. In 1980 the Ohio Legislature enacted a statute recognizing "conservation easements" limited to the purpose of preserving open space and agricultural lands.<sup>8</sup> It did not provide any protection for historically significant properties. It is argued that Ohio legislation should be expanded to allow the conservation easement technique to accommodate historic preservation objectives.

This article will examine the sufficiency of existing Ohio law to allow the use of the preservation restrictions device for historic preservation purposes. First, public and private land use controls for the preservation of the cultural environment will be critically discussed. Second, there will be a brief exploration of the federal law pertaining to the preservation of historic properties. Third, the legislation of numerous other states<sup>9</sup> which have authorized preservation restrictions will be examined in order to isolate the essential characteristics of an effective preservation restriction system. Fourth, the present Ohio historic preservation law will be described with special attention given to the limited way in which the preservation restriction concept has been incorporated into state law. Finally, recommendations for legislative amendment will be provided to improve the statutory framework thereby making preservation restrictions available for the protection of historic properties in the State of Ohio.

## II. METHODS OF HISTORIC PRESERVATION

### A. Public Control of Historic Properties

With the emergence of historic preservation as an important public issue, state and local governments have focused their powers upon the goal of protecting and enhancing historically significant properties. The governmental strategy has taken three major forms: acquisitional, regulatory, and incentive. As will be seen below these methods of governmental intervention all require a substantial degree of effort, competence, and cost. Furthermore, except for the incentive or tax-based

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8. OHIO REV. CODE ANN. §§ 5301.67 - .70 (Page 1981).

9. See *Appendix of State and Territorial Historic Preservation Statutes and Session Laws*, 11 N.C. CENT. L.J. 308 (1980) [hereinafter cited as *Appendix*]; *Citations of State Laws Authorizing Acquisition, Transfer and Enforcement of Less-than-fee Interests for Historic Preservation and Environmental Conservation*, 12 URB. LAW. 62 (1980) [hereinafter cited as *Citations of*

method, the traditional governmental efforts at historic preservation have been coercive in nature — often pitting the power of local government against the private interest of the landowner.

### I. Zoning Controls for Historic Preservation

Zoning is a public land-use control technique which has been used for historic preservation purposes. The power to zone is derived from the police power inherent in every state and it is commonly delegated to the local government through enabling legislation or transferred in home rule grants.<sup>10</sup> During the twentieth century, local governments have used police power authority to regulate the private use of land for the promotion of the health, safety, and welfare of its citizens.<sup>11</sup> Most often zoning power has been exercised in the form of height, bulk, and use restrictions. In the landmark case of *Euclid v. Ambler Realty Co.*,<sup>12</sup> the United States Supreme Court upheld the Village of Euclid's power to enact a zoning ordinance establishing exclusive land-use categories. The *Euclid* case set the stage for future decisions which would expand the definition of permissible police power objectives and extend zoning control over a broad range of activities. As aesthetic considerations were gradually embraced by the police power,<sup>13</sup> zoning techniques have been used for historic preservation purposes.<sup>14</sup>

The application of zoning methods for historic preservation purposes attempts to maintain the existing external form of buildings and areas by restricting and regulating the "citizens' use of their property in such a manner as not to destroy the historic value of the property."<sup>15</sup> It is common for a local ordinance to identify historic landmarks or districts and to impose various forms of regulations upon the alteration or destruction of the designated property.<sup>16</sup> These requirements are in-

10. See 1 P. ROHAN, ZONING AND LAND USE CONTROLS § 1.02[4] (1981) and RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.02[1] (1981). In Ohio, the State Constitution states that home rule municipalities have the authority to exercise all of the powers of local self-government and to adopt and enforce local police, sanitary, and other similar regulations as are not in conflict with general laws. Ohio Const. Art. 18, § 3. Zoning is encompassed within this broad constitutional grant.

11. See 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 2.01-.02 (1981). These general objectives reflect an articulation of familiar police power objectives.

12. 272 U.S. 365 (1926).

13. See *Berman v. Parker*, 348 U.S. 26 (1954).

14. See 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 15.01-.02 (1981).

15. Comment, *Historic Preservation Cases: A Collection*, 12 WAKE FOREST L. REV. 227, 236 (1976).

16. See generally 2 P. ROHAN, ZONING AND LAND USE CONTROLS §§ 7.01-.04 (1981). A common regulatory device employed in local government historic preservation programs is the pre-modification permit requirement obtainable from a commission established to protect historic properties. Such agencies have varying powers. *Id.* at § 7.03[2][6][i].

tended to preserve and enhance the historic and architectural characteristics of the location. While supported by the same source of authority, historic preservation regulations act as an additional regulatory control imposed upon land ownership beyond that required by traditional zoning. A property owner within the historic district is therefore limited in the use of his historically significant property. Although his property value may be diminished as a result of the regulation, the local government is not obligated to pay for this diminution or costs associated with the maintenance of an historic property.<sup>17</sup> As stated above, historic preservation zoning is a public regulatory strategy where the government compels protection through the exercise of the police power.

The propriety of using the police power for the preservation of individual buildings or landmarks has been recently upheld by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.<sup>18</sup> That case rejected a constitutional challenge to the operation of the New York City Landmarks Preservation Law.<sup>19</sup> Under the New York City system, certain historic properties could be designated as landmarks and thereafter could not be significantly altered without a certificate issued by the city's Landmarks Preservation Commission.<sup>20</sup> The Supreme Court upheld the New York City program as it affected a massive renovation proposal for the Grand Central Station building<sup>21</sup>

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17. A number of cities have enacted ordinances requiring that minimum maintenance be undertaken so that historic properties will not be ordered demolished by health and safety inspectors. See 2 P. ROHAN, ZONING AND LAND USE CONTROL § 7.03[4]. Without such ordinances intentional property neglect would ultimately authorize demolition.

18. 438 U.S. 104 (1978).

19. 438 U.S. 120-21. The New York City Landmarks Preservation Law permits the Landmark Preservation Commission to designate historically significant property as a "landmark." 438 U.S. at 112. Once the property is so designated, the ordinance imposes a special procedure upon any modification of a landmark from the designated appearance. The owners of designated landmarks are permitted to transfer unused development rights in high density areas to different nearby sites. In smaller communities or rural areas, these development rights would be of little value.

20. Once designated a landmark by the Commission a landowner may not construct, reconstruct, alter or demolish any improvement on the site without first obtaining a certificate of "no exterior effect" or "appropriateness" from the Commission. See 2 P. ROHAN, ZONING AND LAND USE CONTROLS § 7.04[2] [6].

21. Justice Brennan described the proposed renovation of the Grand Central Station as follows:

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, called for tearing down a portion of the Terminal that included the 42d Street facade, stripping off some of

and, it held that there was no "taking" of the owner's property rights.<sup>22</sup> The Court emphasized the fact that there was a reasonable return from the continued use of the terminal as a railroad station and from rental income of existing office space.<sup>23</sup> In his discussion of the case, Justice Brennan analogized preservation laws to traditional zoning land-use controls and identified historic preservation as a legitimate police power objective. The preservation restrictions imposed were found to be "substantially related to the promotion of the general welfare and . . . [permitted] reasonable beneficial use of the landmark site."<sup>24</sup>

Despite general support and judicial approval of regulatory systems for historic preservation, the coercive elements of such a policy may be resisted. In fact, the public may respond more positively to a preservation approach which emphasizes voluntary participation in private agreements rather than one based upon non-compensated government regulation. Furthermore, public regulation of historic or architectural characteristics requires a degree of governmental expertise, organization, and expense which make it undesirable and unachievable for many communities. As will be discussed below, the preservation of historic structures and places can be accomplished by private parties who voluntarily agree to preserve their historically significant properties.

## 2. *Public Acquisition of Historic Properties*

While police power regulation of property for historic preservation purposes is frequently used by local governments, other powers exist to accomplish similar objectives. State and local government can exercise direct control over historic properties by direct acquisition either through a voluntary transaction or by condemnation. The exercise of condemnation authority or eminent domain is an inherent sovereign power<sup>25</sup> authorizing the state or federal government to acquire private

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the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

438 U.S. at 116-17.

22. *Id.* at 138.

23. *Id.* at 136. *But see Id.* at 138 n.36.

24. *Id.* at 138. Although the Court in *Penn Central* upheld the landmark regulation as a valid exercise of the police power, some observers believe that this result may not obtain in future cases arising under substantially different facts. See Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19, 27 (1980). While this can be said of any judicial precedent it may be specially true in the historic preservation context where there is such a great variety of local regulations.

25. See *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) and <https://ecommons.udayton.edu/udlr/vol7/iss2/2>



property for public use<sup>26</sup> provided the land owner is paid just compensation.<sup>27</sup> Traditionally this power to compel the sale of private property has been employed to provide necessary public facilities. However, the United States Supreme Court has long ruled that the exercise of condemnation authority for historic preservation purposes is permissible.

In 1896 the Court held in *United States v. Gettysburg Electric Railway*<sup>28</sup> that condemnation of lands comprising portions of the historic Gettysburg battlefield was for a "public use" and a proper exercise of eminent domain power by the federal government.<sup>29</sup> This case established the premise that "[a]ny act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them"<sup>30</sup> satisfies the concept of public benefit. In so holding, the Court established a legal basis for federal involvement in the protection of cultural resources. Although the Constitution did not expressly delegate to the Congress the power of condemnation for historic preservation, this purpose was found to be "so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country."<sup>31</sup> Furthermore, in *Roe v. Kansas ex rel Smith*<sup>32</sup> the Supreme Court upheld the use of eminent domain by the state government to condemn and take historic properties "for the use and benefit of the public."<sup>33</sup> There the Court ruled favorably upon a Kansas statute permitting the use of state condemnation authority "for any tract or parcel of land in the State of Kansas, which possesses unusual historical interest."<sup>34</sup> In addition, the inherent state power of eminent domain may be delegated by the state to local governments by statutory authorization. Such a delegation can authorize local condemnation of cultural resources.<sup>35</sup>

The primary weakness associated with the strategy of condemna-

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United States v. Jones, 109 U.S. 513, 518-19 (1883).

26. The concept of public use, although not clearly defined, has become synonymous with the public benefit. In *Berman v. Parker* the Supreme Court upheld the condemnation of a department store as part of a redevelopment plan for slum removal. The Court, in dictum, expansively defined the removal of slums for aesthetic purposes as serving a public benefit. 348 U.S. 26, 33 (1954).

27. See *Chicago, B. & O.R.R. v. Chicago*, 166 U.S. 226, 241-42 (1897).

28. 160 U.S. 668 (1896).

29. *Id.* at 680.

30. *Id.* at 681.

31. *Id.* at 682.

32. 278 U.S. 191 (1926).

33. *Id.* at 193.

34. *Id.* at 192.

35. See, e.g., *Flaccomio v. Mayor of Baltimore*, 194 Md. 275, 71 A.2d 12 (1950).

tion for historic preservation purposes is the cost of paying just compensation. This deficiency also applies with equal force to voluntary acquisitions. To satisfy this compensation requirement "it is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."<sup>36</sup> The United States Supreme Court in *Olson v. United States* described the scope of just compensation as

[including] all elements of value that inhere in the property, but it does not exceed market value fairly determined . . . . The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."<sup>37</sup>

It is the requirement of compensation which makes a large-scale local government condemnation program unlikely.

Although eminent domain usually results in the acquisition of the entire fee simple interest, however, other property interests such as easements may also be acquired by this method. For instance, the Supreme Court in *United States v. Causby*<sup>38</sup> upheld an inverse condemnation claim arising from the low level flights over privately owned lands. The Court determined that the federal government had taken an "easement of flight" over the land by depriving the owners of their use and enjoyment.<sup>39</sup> While in many cases the entire fee may be acquired to accomplish a public purpose, condemnation of a negative easement restricting modification of the facade of a building may be necessary for the purposes of preserving the historic structure. The cost of condemning an historic easement that prohibits alteration of the facade of the building may be substantially less than the cost of condemning the entire fee.<sup>40</sup> In this way a condemnation strategy could be implemented without the major costs associated with full fee simple acquisition.

Despite the fact that the condemnation of an historic easement

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36. *Berman v. Parker*, 348 U.S. 26 (1954).

37. 292 U.S. 246, 255 (1934).

38. 328 U.S. 256 (1946). The Court addressed the issue of whether the United States - through airplane overflights - had "taken an easement" over the owners' property requiring just compensation under the fifth amendment of the U.S. Constitution. *Id.* at 258.

39. *Id.* at 262. Since there was no finding of fact as to whether the easement was temporary or permanent, the case was reversed and remanded. Because the "interest vests in the United States," a determination of the type of easement must be made before the amount of the just compensation can be deemed proper. *Id.* at 268. See also *Griggs v. Allegheny County*, 369 U.S. 84 (1962), where liability was imposed on a county under the fourteenth amendment for "taking" an easement over the owners' land contiguous to a county-owned airport. *Id.* at 90.

40. The measure of compensation for the easement taken is the difference between the market value of the unencumbered fee and the market value of the fee burdened with the easement.

*Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949).

may be less expensive than condemnation of the entire fee, there may be other objections to the adoption of such a public policy. In contrast to historic preservation zoning where the government regulation is a noncompensable exercise of the police power, the use of eminent domain requires compensation. Whether the local government is acquiring the entire fee simple interest or only a facade easement, the cost of such a purchase severely limits the use of eminent domain as a useful preservation tool. This is especially true in times of budgetary austerity when the provisions for basic governmental services are in jeopardy. Also, there may be an underlying public objection to the use of the coercive power of eminent domain for historic preservation purposes. While condemnation may be tolerated as a practical necessity for the construction of roads, schools, and other public buildings, similar public support may be lacking for the exercise of such governmental acquisition powers in the historic preservation context. Finally, the condemned property, being publicly-owned, will be removed from local real estate tax rolls resulting in another loss of revenues to the local government.<sup>41</sup> This reduction in the local tax base is yet a further reason for limited interest in condemnation of historic properties. As has been demonstrated, eminent domain exists as a local government technique available to preserve historic properties. However, this preservation method will probably not receive major emphasis for the reasons stated. Public acquisition of historic properties will likely remain a method used in a narrow range of situations when funding is available, public support and commitment exist, and an unusually important property is involved.

## B. Common Law Property

### 1. Interests and Historic Preservation

In theory, the common law has traditionally provided a voluntary approach to the preservation of historic properties in the form of enforceable land restrictions such as easements and real covenants. The idea of fee simple land title resulted in the theory that the landowner held a collection of severable rights respecting the use of the land. Each of these rights constituted a portion of the "bundle of rights" that was described by fee simple ownership.<sup>42</sup> In addition to the segmentation of

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41. See note 132 *infra*.

42. While the concept of fee simple ownership is considered to be the maximum estate in land due to its potentially infinite duration, it must also be understood in a nontemporal fashion. The fee simple owner may transfer either gratuitously or for consideration fractions of his/her property interest. Examples include the creation of easements, licenses, profits, and leases. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 40-42 (1975).

property rights, the common law also stressed that such interests were generally transferable to others.<sup>43</sup> Consequently, it became possible to convey land burdened with various forms of restrictions on its free use. Usually these restrictions limited the type of land use permitted, the size, shape, or dimensions of the structure to be located on the land.<sup>44</sup> Occasionally, these agreements included affirmative obligations to perform specified services.<sup>45</sup> However, it would be technically possible for the owner of an historic site to transfer the right to modify the special characteristics of the historically significant property. The conveyance of such a less-than-fee interest would permit a private holder "to enforce negative controls or affirmative obligations against the owner of an historic site to preserve its historic significance."<sup>46</sup> Thus, private parties could use traditional less-than-fee interests, whether in the form of easements, covenants or equitable servitudes, to preserve the physical characteristics of the cultural or natural environment.<sup>47</sup> The following discussion will examine the specific legal requisites of these interests.

### *Easements*

An easement is a nonpossessory interest in land which gives the holder of the easement the right to use land of another in a limited manner.<sup>48</sup> A common example is a right-of-way granted to permit the

43. As will be discussed *infra*, the less-than-fee rights could be transferred only with a dominant estate. This position manifested itself in the English legal doctrine against the alienation of easements in gross. See J. CRIBBET, *supra* note 42, at 341-42 and A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* 1161-68 (1969) (citing *Boatman v. Lasley* and *Geffine v. Thompson*).

44. Less-than-fee interests exist for numerous purposes. The modern application of the easement has resulted in a surprisingly wide range of applications. See 3 R. POWELL, *THE LAW OF REAL PROPERTY*, ¶ 414[1]-[9] (1981).

45. Common examples of affirmative burdens are promises for the maintenance of property or buildings, construction of improvements, the provision of specified services, or the payment of money. See 5 R. POWELL, *supra* note 44, ¶¶ 670, 676-77.

46. Breneman, *Historic Preservation Restrictions: A Sample of State Statutes*, 8 *COMM. L. REV.* 231 (1975).

47. The separation of the fee into various parts or less-than-fee interests has been traditionally recognized under the common law. Easements, covenants and equitable servitudes have been traditionally described as "incorporeal hereditaments" and the grantee receives a nonpossessory interest in the limited use and enjoyment of the land of the grantor. These traditional common law tools have been utilized to recognize rights-of-way, licenses to perform acts, profits consisting in the right to remove soil or products such as timber, minerals, water and the imposition of affirmative or negative obligations upon the grantor's land. 3 R. POWELL, *supra* note 44, ¶ 405. As will be seen, the intrinsic limitations associated with less-than-fee interests will necessitate legislative enactment to assure assignability for conservation and historic preservation easements.

48. *RESTATEMENT OF PROPERTY* § 450 (1944) provides,

[a]n easement is an interest in land in the possession of another which a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; b) entitles him to protection as against third persons from interference in such use and enjoyment; c) is not subject to the will of the possessor of the land; d) is not a normal incident of the possession of any land possessed by the owner of the interest; and e) is capable of

passage over one's land. Easements are classified commonly as being affirmative<sup>49</sup> or negative.<sup>50</sup> While the holder of an affirmative easement may have the right to use the land of another, the holder of a negative easement can restrict the free use of the burdened land. A further classification divides easements as appurtenant or in gross. An appurtenant easement attaches to the land which it benefits, the dominant estate, and burdens the land upon which the obligation rests, the servient estate.<sup>51</sup> On the other hand, an easement in gross benefits the holder personally and not as an owner of a dominant parcel of land.<sup>52</sup> The distinction in classification is not solely semantic since it becomes important in terms of alienability of the interest. Easements appurtenant have always been transferable due to their attachment, in theory, to the dominant estate.<sup>53</sup> Because an easement in gross was deemed to be a personal right, the interest was unassignable and expired at the death of the grantee.<sup>54</sup> The public policy rationale for this position was

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creation by conveyance.

49. RESTATEMENT OF PROPERTY § 451 (1944). Professor Boyer defines affirmative easements as those which,

[entitle] the easement owner to do affirmative acts on the land in the possession of another - e.g., *A* owns a right of way across *B*'s Whiteacre. *A* is entitled to go onto Whiteacre, move across Whiteacre and may repair and improve the way on Whiteacre. *A* has an affirmative easement as to the servient tenement, Whiteacre.

R. BOYER, SURVEY OF THE LAW OF PROPERTY 562 (3d ed. 1981).

50. The negative easement has been described as follows, "[A] negative easement consists solely of a veto power. The easement owner has, under such an easement, the power to prevent the servient owner from doing, on his premises, acts, which, but for the easement, the servient owner would be privileged to do." 3 R. POWELL, *supra* note 44, ¶ 405 at 34-18. See also R. BOYER, *supra* note 49, at 562.

51. The dominant and servient estates are generally adjacent to one another. 3 R. POWELL, *supra* note 44, ¶ 405 at 34-20. To constitute an appurtenant easement there must be two distinct estates. See generally *Gibbons v. Ebding*, 70 Ohio St. 298, 71 N.E. 720 (1904).

52. 3 R. POWELL, *supra* note 44, ¶ 405 at 34-22. In 1873, the Ohio Supreme Court recognized in *Boatman v. Lasley*, 23 Ohio St. 614 (1873), that a right of way which was regarded as personal, was not transferable by grant or descent. "A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person." *Id.* at 618. However, a commercial easement in gross rule upholding the transfer of in gross easement also exists in Ohio. See *Junction R.R. v. Ruggles*, 7 Ohio St. 1 (1857).

53. The general rule is that an appurtenant easement will pass with the transfer of the dominant estate. See J. CRIBBET, *supra* note 42, at 341. As Justice McIlvaine stated in 1873, [w]here the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto.

*Boatman v. Lasley*, 23 Ohio St. 614, 618 (1878).

54. See 3 R. POWELL, *supra* note 44, ¶ 405 at 34-22 n. 37. Some states have overcome this restriction on the assignability of easements in gross by statutorily eliminating it. See, e.g., IND. ANN. STAT. § 32-5-2-1 (Burns 1980) ("Easement in gross . . . may be alienated, inherited, and

that if assignable, the easement would burden the land long after its usefulness had ceased. A combination of the courts' antipathy to restraints on alienation, the difficulties encountered in locating the owner, and the lack of control in monitoring the easement in gross due to inferior land record systems, buttressed this public policy.<sup>55</sup> Through an evolution of the law, Ohio courts have created an exception to the rule against assignability for commercial easements in gross.<sup>56</sup> Furthermore, the *Restatement of Property*<sup>57</sup> has extended this position to a greater degree. It has adopted the position that noncommercial easements in gross are assignable rights "as determined by the manner or the terms of their creation."<sup>58</sup>

Although there seems to be a growing trend which recognizes the assignability of all easements in gross<sup>59</sup> unless clearly for the benefit of only the initial grantee, at the present time this is not the uniform common law view. This fact creates uncertainty as to the longevity of such a common law land interest when held by an organization that may later attempt to transfer it. Since the holder of an historic preservation or conservation easement often does not own a dominant estate, this type of easement would be considered a negative easement in gross.<sup>60</sup> For instance, where an owner of an historic site transfers his right to modify the historic property to a charitable organization, the benefit of the negative easement is in gross or personal to the holder. If the charitable organization ceases to exist, the benefit of the easement in gross may not be enforceable by a subsequent grantee. Because of the traditional common law disfavor toward negative easements and general hostility to the assignability of noncommercial easements in gross, statutory enactment clarifying these issues is vital. The use of historic preservation or conservation easements as legal tools to preserve historic structures or open spaces will only flourish when there exists certainty regarding the creation and assignability of such interests.

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assigned if instruments that create such easements in real property so state.")

55. See Netherton, *Restrictive Agreements for Historic Preservation*, 12 URB. LAW. 54, 55-6 (1980).

56. In *Jolliff v. Hardin Cable Television Co.*, 26 Ohio St. 2d 103, 269 N.E.2d 588, *rev'g*, 22 O. App.2d 49, 258 N.E.2d 244 (1971), an easement in gross of a commercial nature was deemed to be an alienable property interest. See also, *Junction R.R. v. Ruggles*, 7 Ohio St. 1, 7 (1857), where a railroad right-of-way in gross was assignable.

57. RESTATEMENT OF PROPERTY § 491 (1944).

58. *Id.* See also 3 R. POWELL, *supra* note 44, ¶ 419 at 34-224.

59. Professor Simes was an early American proponent of that view. See generally, Simes, *The Assignability of Easements in Gross in American Law*, 22 MICH. L. REV. 521 (1924).

60. However, an historic preservation easement is not the equivalent of a personal easement in gross. Generally, a public or quasi-public agency holds the easement for the benefit of the general population and the personal easement rationale should not apply. See RESTATEMENT OF

PROPERTY § 492 (1944)

### Covenants

A real covenant is a promise which pertains to the use of land by its owner. This private law device restricts the landowner's right to use his land as he desires in contrast to an easement which gives the holder the right to a limited use of the land of another.<sup>61</sup> The distinction has not always been clear. As a voluntary and private approach for conservation or preservation purposes, various requirements attach. The common law divides covenants into two categories: real covenants enforceable at law and equitable servitudes enforceable in equity.<sup>62</sup> A real covenant is a covenant that "runs with the land"<sup>63</sup> at law; that is, the duty to perform or the right to take advantage and enforce performance of the covenant passes to the assignee of the land.<sup>64</sup> The covenant attaches to and passes as an incident of the ownership of that parcel. For a real covenant to run with the land, the common law required strict adherence with technical requirements concerning covenant form, the parties' intent, the "touch and concern" requirement,<sup>65</sup> and privity

61. The common law offers various other approaches for the preservation of historic properties. A power of termination for the breach of a condition subsequent and a possibility of reverter which automatically reverts upon the happening of some specified event are voluntary agreements available for preservation purposes. However, there are technical requirements which apply to the creation of both interests. See Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 127-30 (1976).

62. To avoid the rigid legal requirements of real covenants, the English courts of equity developed a viable alternative. A covenant enforced in equity is called an equitable servitude. An equitable servitude which is the practical equivalent of a restrictive or negative covenant received wide recognition in the leading case of *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Chancery 1948). There the Court of Equity upheld a restrictive covenant against a successor of the original covenantor who acquired title with notice of the covenant. This remote grantee was enjoined from building on his land which would have violated the covenant and caused him to be unjustly enriched. The requirements of notice and intent must be present before the burden of the equitable servitude can be enforced by a successor of the original covenantee upon the successor of the original covenantor. If the requirements of notice and intent are met, the equitable servitude, which is analogous to a negative easement, could be used to restrict the owner of an historic site from any modification or destruction of the historically significant property. However the lack of a dominant estate would still hinder the application of this technique in the common situation of a non-profit organization holding the right. See R. BOYER, *supra* note 49, at 539-43.

63. See 5 R. POWELL, *supra* note 44, ¶ 673[1] at 60-37. It must be observed that the "running with the land" characteristic may be associated with both the ownership of the burdened and the benefitted parcel. See R. BOYER, *supra* note 49, at 516.

64. See *Platt v. Eggleston*, 20 Ohio St. 414, 419 (1870).

65. The "touch and concern" rule conditions the running of a covenant upon its effect on the use and enjoyment of both the dominant and servient estates. This requirement was obviously intended to limit the number of permanent land restrictions to those with a demonstrable relationship to land ownership. In an effort to aid in understanding this policy Judge Clark stated that, [i]f the promisor's legal relations in respect to land in question are lessened—his legal interest as owner rendered less valuable by the promise the burden of the covenant touches or concerns the land, if the promisee's legal relations in respect to the land are increased his legal interest as owner rendered more valuable by the promise the benefit of the covenant touches or concerns that land.

of estate.<sup>66</sup> Because the common law was most reluctant to force parties who had not agreed to a promise to be bound by it, each of the above requirements had to be satisfied before the burden of the covenant would run to the successor of the original covenantor. As a result, these highly technical rules often precluded the assignability of real covenants.

The use of covenants as a device for conservation or historic preservation purposes is severely limited due to the highly technical requirements which restrict assignability of covenants. This is similar to the rule regarding easements. Within this context, the interests created would be "covenants in gross" or personal contracts, because the covenantee will generally be a public agency or charitable organization, and consequently the benefit does not attach to any particular property.<sup>67</sup> Finally, the remedy at law for a breach of a covenant is restricted to money damages. Although this type of remedy would seemingly be inadequate in the area of conservation or historic preservation, equitable remedies are not automatically available.

Although the common law provides a preservation method which

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C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* 97 (2d ed. 1947). At least one Ohio case has adopted this theory. In *Peto v. Korach*, 17 Ohio App. 2d 20, 244 N.E.2d 502 (1960), the Ohio Court of Appeals addressed the issue of whether a covenant to pay money for the maintenance of an easement permitting sewer pipes across the covenantee's land was a real covenant running with the land. The Court determined that "the covenant directly touches and concerns the land, particularly since its obvious purpose was to share in the maintenance of an easement which yielded benefits only to whoever should own or possess the dominant estate." *Id.* at 24, 244 N.E.2d at 506. As a result, the covenant was deemed a real covenant which runs with the land and not a personal covenant "establishing continuing liability in the original covenantor." *Id.* at 22, 244 N.E.2d at 505.

66. The privity of estate requirement has been a major source of confusion for courts and commentators alike. English common law found the requisite privity in the landlord/tenant relationship due to the continuing tenurial connection between parties. The difficulty occurs in attempting to satisfy the privity of estate requirement in cases dealing with the running of covenants binding fee simple estates. Clark in his treatise on covenant law indicated that privity should be found in the "succession to the estate of one of the parties to the covenant." C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* 111 (2d ed. 1947). Such a position appears to be the majority rule in the United States. See W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* 98 (3d ed. 1965). This element of property succession would make it difficult, if not impossible, to create and transfer a real covenant to a party who never had a real property interest in the burdened parcel. This would disqualify grants of covenants to organizations holding no land and would also eliminate such conveyances between neighboring landowners. Some have vigorously disagreed with this rule. See E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 552 (1974).

67. English courts would not permit the burden of a covenant in gross to run. The weight of authority followed by American courts is to prevent covenants from running with the land where the benefit is in gross, *i.e.*, the benefit of the covenant is personal to the covenantee and does not attach to the dominant estate. See 2 *AMERICAN LAW OF PROPERTY* § 9.13 (A. J. Casner ed. 1952). See also, Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 962 (1942).



can effectively bind the original parties to an agreement, it also offers an uncertain approach to future land-use control. Based upon highly technical property law rules relating to assignability and enforcement of less-than-fee interests held in gross, the use of traditional concepts to address the modern problems associated with conservation and historic preservation is often inadequate.<sup>68</sup> The traditional policy of American courts based upon English legal doctrine has been to disfavor restrictions that adversely affect the full development and free alienation of land. As a result, these subfee interests, whether described as an easement, restriction, or covenant, require statutory recognition to define their scope and preclude the application of rigid common law principles.<sup>69</sup>

Despite statutory recognition, the approach to conservation and historic preservation remains a voluntary rather than a coercive property right system. This preservation method precludes governmental intrusion upon private property rights and in "[f]reeing interests in gross to be assignable and [to] run with the land adds a third—and a middle way for public agencies to carry out their programs; and, it is a way that permits public-private sector cooperative activity on a scale not possible with other options."<sup>70</sup> However, even if the statutory approach did nothing more than modernize earlier property law doctrine, it would be worthwhile.

### III. FEDERAL PROGRAM TO PROTECT HISTORIC PROPERTIES

A multifaceted federal program has gradually evolved to protect historically significant properties and other cultural resources. The development of federal law in this area has taken nearly a century and involves numerous federal agencies acting under a wide range of statutory authority.<sup>71</sup> The original thrust of the federal involvement in historic preservation was through public ownership of nationally significant properties. During the nineteenth century, the federal government offered limited protection to particular landmarks and sites, military battlefields, and prehistoric properties.<sup>72</sup> As the purpose of historic preservation was largely considered to be the promotion of patriotism,

68. See J. BEUSCHER, R. WRIGHT, & M. GITELMAN, *CASES AND MATERIALS ON LAND USE* 143-45 (2d ed. 1976).

69. E.g., ARK. STAT. ANN. §§ 50-1201-1206 (Supp. 1981) (historic easements).

70. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 556 (1979).

71. For a discussion of the historical development of the federal preservation program, see J. Fowler, *Protection of the Cultural Environment in Federal Law*, in FEDERAL ENVIRONMENTAL LAW 1466 (1974) [hereinafter cited as FED. ENVT'L LAW]. See also Rosenberg, *Federal Protection for Archeological Resources*, 22 ARIZ. L. REV. 701, 705-14 (1981).

72. FED. ENVT'L LAW, *supra* note 71, at 1472.

federal involvement was limited "to cultural properties having value to the entire nation."<sup>73</sup> This self-limiting conception would characterize the federal program until 1966. In 1906, Congress passed the first significant preservation legislation, the Antiquities Act of 1906.<sup>74</sup> This act extended federal protection to "antiquities" located on federal land by making it a criminal offense to disturb such a site.<sup>75</sup> Further, the President was authorized to withdraw lands from the federal domain and designate "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . [as] national monuments."<sup>76</sup> This unrestricted executive power would later result in serious federal/state discord over the disposition of western federal lands.<sup>77</sup>

Although the 1906 Act created legal protection for archeological resources located on federal lands, it was founded upon a theory of cultural resource protection through federal ownership.<sup>78</sup> At this early stage, federal land control was to be exercised in a possessory fashion as that of a landowner. Limited federal regulatory power would be developed sixty years later. Further, there was adherence to the previous policy of only extending federal protection to cultural resources of national significance located on federal lands. The statute gave no protection to cultural resources which were of state or local significance or which were situated on state or privately owned land. Furthermore, it did not protect even the national monuments from harmful actions of federal government agencies. This statute could be best characterized as a limited first step in federal activity.

The next major federal preservation law to be enacted was the Historic Sites Act of 1935.<sup>79</sup> This statute, for the first time, established cultural resource preservation as a national policy.<sup>80</sup> Although the declaration of such a policy was an innovation, this Act continued to follow the previous legislative pattern where "[t]he purpose . . . was to

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73. *Id.*

74. Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (current version codified at 16 U.S.C. §§ 431-33 (1976 & Supp. III 1979)).

75. 16 U.S.C. § 433 (1976 & Supp. III 1979).

76. 16 U.S.C. § 431 (1976 & Supp. III 1979).

77. See Rosenberg, *supra* note 71, at 706 n.21.

78. FED. ENV'T'L LAW, *supra* note 71, at 1474. The Secretary of the Interior was permitted to accept privately-owned property eligible for national monument designation which was voluntarily relinquished, however, any other method of acquisition, such as condemnation or purchase, was not specifically permitted by the Antiquities Act. See 16 U.S.C. § 431 (1976 & Supp. III 1979).

79. Historic Sites, Buildings, and Antiquities Act. Act of August 21, 1935, ch. 593, § 1, 49 Stat. 666 (current version codified at 16 U.S.C. §§ 461-67 (1976 & Supp. III 1979)).

80. The statute states that "[i]t is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States" 16 U.S.C. § 461 (1976).

protect properties of national significance through public ownership in order to promote a sense of national pride and patriotism."<sup>81</sup> The Historic Sites Act also authorized the Secretary of the Interior to investigate, identify, and evaluate prehistoric and historic properties, and to conduct the National Survey of Historic Sites and Buildings.<sup>82</sup> This latter responsibility was especially important since it represented the first coordinated federal effort to catalogue existing historic properties. In addition, the 1935 Act expanded the acquisition powers of the Secretary who was thereafter authorized to acquire "by gift, purchase, or otherwise any property, personal or . . . real, . . . or any interest or estate therein"<sup>83</sup> to accomplish the purposes of the Act.

To supplement the previous federal legislation and to prevent further destruction of valuable cultural resources, Congress enacted the National Historic Preservation Act of 1966 (NHPA).<sup>84</sup> This Act serves as the major federal statute concerned with historic preservation. The 1966 statute made a significant change in the underlying theory of federal preservation law. The policy it advanced was "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."<sup>85</sup> This reorientation of federal policy for the first time emphasized a functional role for historic properties. As federal intervention was no longer limited to properties of national significance, federal protection extended to properties of state and local cultural, historical, and archeological importance.<sup>86</sup> Furthermore, the method of federal protection was not restricted exclusively to preservation through public ownership.<sup>87</sup>

The substantive innovations advanced by NHPA were two-fold:

81. *Cultural Resource Preservation*, *supra* note 3, at 315.

82. See 16 U.S.C. § 462(a)-(c) (1976 & Supp. III 1979). See Rosenberg, *supra* note 71, at 710.

83. 16 U.S.C. § 462(d) (1976 & Supp. III 1979). In *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939), the Eighth Circuit determined that condemnation power was included within acquisitional methods authorized by the 1935 Act. Congress would later enact legislation creating the National Trust for Historic Preservation to encourage private historic preservation activity. See Act of Oct. 26, 1949, ch. 755, § 1, 63 Stat. 927 (current version at 16 U.S.C. § 468 (1976)). The Trust, established as "a charitable, educational, and nonprofit corporation," was expected to acquire through a variety of means "sites, buildings and objects significant in American history or culture" and to undertake a preservation program. *Id.* § 468(a).

84. Pub. L. No. 89-665, 80 Stat. 915 (current version codified at 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979)). The Act has been amended several times. Act of Aug. 18, 1970, Pub. L. No. 91-383, 84 Stat. 825; Act of Sept. 28, 1976, Pub. L. No. 94-422, 90 Stat. 1313; Act of Oct. 7, 1976, Pub. L. No. 94-458, 90 Stat. 1939; Act of Dec. 12, 1980, Pub. L. No. 96-515, 94 Stat. 2987.

85. 16 U.S.C. § 470 (1976 & Supp. III 1979).

86. *Id.* § 470a(a)(1).

87. FED. ENV'T'L LAW, *supra* note 71, at 1484-88.

the provision of a comprehensive financial aid program for state and local government,<sup>88</sup> and a regulatory system intended to promote participation of federal agencies in preservation efforts.<sup>89</sup> In addition, the Act instituted an expanding inventory of the nation's cultural resources known as the National Register of Historic Places.<sup>90</sup> The National Register served as an important planning tool for federal projects by enabling project agencies to avoid harming listed historic properties. NHPA also provided for the creation of the Advisory Council on Historic Preservation.<sup>91</sup> The Council was established to create a cabinet level<sup>92</sup> body to review federal agency activities which affect cultural resources and also to administer the regulatory provisions of NHPA. The main regulatory provisions are found in section 106 of NHPA,<sup>93</sup> and they require all federal agencies to assess the impact of their activities upon cultural resources that are either listed on the National Register or eligible for inclusion.<sup>94</sup> Although section 106 review extends to federal, federally-assisted, and federally-licensed undertakings,<sup>95</sup> only federal agencies must comply with its procedures.<sup>96</sup> Furthermore,

88. 16 U.S.C. § 470a-e (1976 & Supp. III 1979).

89. *Id.* § 470f.

90. *Id.* § 470(a)(1).

91. *Id.* § 470i.

92. The Council is comprised of 29 members: the Secretaries of Agriculture — Commerce—Defense—Health, Education and Welfare—Housing and Urban Development —Treasury—Interior—and Transportation; the Attorney General; the Administrator of the General Services Administration; the Secretary of the Smithsonian Institute; the Chairmen of the Nat'l Trust for Historic Preservation—the Council on Environmental Quality—the Federal Council on the Arts and Humanities; the Architect of the Capitol; the President of the National Conference of State Historic Preservation Officers; the Director of the International Communication Agency; and 12 representatives of state and local government and citizens who are selected by the President for their interest and expertise in the area of historic preservation. 16 U.S.C. § 470i (1976 & Supp. III 1979). The highest levels of government are providing a review of federal activities which affect cultural resources. FED. ENV'T'L LAW, *supra* note 71, at 1489.

93. 16 U.S.C. § 470f (1976 & Supp. III 1979) provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking *shall*, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, *take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register*. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470i to 470t of this title a reasonable opportunity to comment with regard to such undertaking. (emphasis supplied.)

94. Initially, the scope of a section 106 review extended only to properties formally listed on the National Register. This left many historic properties with the protection of § 106. The application of § 106 has been expanded and there is now protection for properties eligible for inclusion in the National Register. Exec. Order No. 11,593, 36 Fed. Reg. 8921 (May 15, 1971) *reprinted in* 16 U.S.C. § 470 (1976), has been incorporated in to NHPA.

95. 16 U.S.C. § 470f (1976).

96. 16 U.S.C. § 470f (1976). NHPA does not prevent destruction of historic properties

purely private activities are not controlled by the NHPA in any fashion. The role of the Council is advisory; and, while its recommendations are often persuasive, they are not binding upon the project agency.<sup>97</sup> As a matter of federal law, the NHPA represents the furthest that the Congress has come toward enacting truly regulatory legislation for historic preservation.

A complement to the preservation efforts set forth in NHPA is the National Environment Policy Act passed in 1969.<sup>98</sup> This Act, while most often associated with the preservation of the natural environment, also protects cultural resources. NEPA advanced a comprehensive environmental protection policy designed in part to "preserve important historic, cultural, and natural aspects of our national heritage."<sup>99</sup> To achieve this goal, federal agencies are required to assess the total environmental impact of their proposed activities and to prepare an Environmental Impact Statement (EIS)<sup>100</sup> for those major actions having a significant environmental impact. Consequently, the environmental review requirements of NEPA embrace cultural resource values as well as elements of natural environmental quality. As with the section 106 of the NHPA, the NEPA impact statement requirement only applies to federal actions. These two statutes provide a measure of control upon agencies and force them to consider the effects of their activities on historically significant properties.

While the regulatory authorities discussed above are primarily intended to influence the planning and development activities of federal agencies, other federal legislation is aimed at encouraging the preservation of historic structures and places by private action. The unlikely vehicle for this protective policy is the Internal Revenue Code. Con-

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listed in the National Register by state or private action when there is no federal nexus. *See, e.g., Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974), where the state of Virginia was required to comply with NHPA and the National Environmental Policy Act of 1969 (NEPA) when using federal funds to finance a prison project located near houses on the National Register. Although the state attempted to bypass the compliance requirements of both NHPA and NEPA by redirecting the federal funds to other projects and by building the prison with state funds, the court held that the federal involvement remained. *Id.* at 257. *See also Bennett v. Taylor*, 505 F. Supp. 800, 812 (M.D. La. 1980); *Wisconsin Heritages v. Harris*, 490 F. Supp. 1334 (E.D. Wis. 1980).

97. Since it possesses, in theory, only advisory powers the Council might be thought to have little substantive effect upon agency decisions. However compliance with the consultation procedures of the Council has become a frequently litigated issue. *See, e.g., Romero-Barcelo v. Brown*, 643 F.2d 835, 858-60 (1st Cir. 1981); *Bennett v. Taylor*, 505 F. Supp. 800 (M.D. La. 1980), *National Indian Youth Council v. Andrus*, 501 F. Supp. 649 (D.N.M. 1980); *Wisconsin Heritages v. Harris*, 490 F. Supp. 1334, 1341 (E.D. Wis. 1980); and *Aertsen v. Landriou*, 488 F. Supp. 314, 320 (D. Mass. 1980).

98. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (codified at 42 U.S.C. § 4321-47 (1976)).

99. *Id.* at § 4331(b)(4).

100. *Id.* at § 4332(2)(C).

gress in recent years has created a system of financial incentives and disincentives to persuade private developers to renovate certified historic properties. Tax rules originating in the 1976 Tax Reform Act permit accelerated depreciation of renovated structures and rapid amortization of restoration expenses.<sup>101</sup> On the other hand, demolition expense and accelerated depreciation deductions are denied when a developer clears a site previously occupied by an historic structure.<sup>102</sup> These tax provisions were designed to aid in the rehabilitation of declining buildings having a culturally important value. As a federal policy, this tax legislation has fostered a view of historic preservation as a community building force providing aesthetically attractive, functioning neighborhoods.

Another aspect of federal tax policy has even greater importance for the area of historic preservation rights. The Code allows the deduction of contributions to charitable organizations.<sup>103</sup> Such donations can take a variety of forms, including less-than-fee interests in real property. Furthermore, Congress specifically authorized charitable contributions of historic preservation rights as long as they are limited to conservation purposes.<sup>104</sup> By permitting the grantor to take a federal

101. Public Law 96-541 extends the provisions of the Internal Revenue Code relating to Historic Preservation for three years until 1984. Act of Dec. 17, 1980 Pub. L. No. 96-541, § 2, 94 Stat. 3204. This extension applies to I.R.C. § 191, § 167(o), § 280(B) and § 167(n). I.R.C. § 191 permits rehabilitation expenditures of a "certified historic structure" to be amortized over a 60-month period. Alternatively, I.R.C. § 167(o) which also deals with the renovation of historic properties, permits the taxpayer to use accelerated depreciation methods to depreciate substantially rehabilitated historic structures.

102. I.R.C. § 280(B) denies any deductions for the demolition of certified historic properties as a further disincentive to the destruction of historic structures. Finally, I.R.C. § 167(n) precludes the use of accelerated depreciation for real property constructed on a site that was occupied by a certified historic structure which has been demolished or substantially altered.

103. I.R.C. § 170(f) (3) (B) (iii). This section has been recently amended and the expiration date of June 14, 1981 has been deleted. Act of Dec. 17, 1980, Pub. L. No. 96-541, § 6, 94 Stat. 3206. As amended, this provision is permanent and is currently numbered as I.R.C. § 170 (h) (4) (A) (iii).

104. Conservation purposes qualifying for the deduction are defined in section 170(h) (4) (A) of the Code as:

- (1) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (2) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (3) the preservation of open space (including farmland and forest land) where such preservation is-
  - (a) for the science enjoyment of the general public, or
  - (b) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (4) the preservation of an historically important land area or a certified historic structure.

income tax deduction for the value of the interest conveyed,<sup>105</sup> Congress has established an economic incentive for such donations.<sup>106</sup> This provision of the federal tax law, when considered in combination with the reductions in local real estate taxation, can make the gift of preservation right an attractive financial proposition for the grantor.

Federal preservation, which initially was quite limited in scope, has evolved into a diverse program. Federal interest has increased due to the recent public awareness and concern for the loss of cultural resources. But, clear limitations exist in the scope of federal coverage.<sup>107</sup> Undoubtedly the *Penn Central* case has focused the attention of the legal profession on historic preservation problems and has given the Supreme Court's approval to local police power control. However, other alternative sub-federal actions are available. The states are in a key position to recognize novel interests in land for preservation purposes and create an adjunct to the federal law. As will be seen, statutory recognition of conservation and historic preservation easements will offer an alternative preservation approach not relying upon governmental regulation.

#### IV. STATE LAW CREATING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS

As demonstrated above, the common law rules regarding easements and real covenants provide an uncertain method for preserving historic properties. Since local property law exists under the jurisdiction of each state, the power to cure the imperfections of the common

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105. See Rev. Rul. 73-339, 1973-2 C.B. 68.

106. However Congress placed several restrictions upon the unrestricted donation of less-than-fee interests. Limitations are imposed upon the nature of the interest transferred and the recipients. "A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." I.R.C. § 170(h)(5)(A)(iii). A qualified organization is defined as a government unit, a publicly supported charitable organization, or an entity controlled by one of these two kinds of organizations. I.R.C. § 170(b)(1)(A). An easement with the requisite conservation purpose is eligible for a deduction when contributed to one of the above described organizations. The requirement that the easement be granted in perpetuity may best serve the goal of natural conservation and not the goal of historic preservation. Historically significant structures should be preserved but not necessarily in perpetuity. These structures may change and deteriorate over time, requiring unreasonable costs to maintain. An easement for a term of years is better and would allow for a future reevaluation of the effectiveness of the historic preservation easement. Furthermore, owners of historically significant property may be reluctant to impose permanent restrictions on their future land use. R. Brenneman & G. Andrews, *Preservation Easements and their Tax Consequences* in TAX INCENTIVES FOR HISTORIC PRESERVATION 151-52.

107. The House Report on the most recent amendments to the NHPA describes a limited federal role in the historic preservation field. It stated that, "[h]istoric preservation in the United States began through the efforts of private organizations and individuals. Federal support was slow to follow. Even today, its role is mainly to provide stimulus and leadership for what is primarily a State, local and private sector activity." H.R. REP. NO. 96-1457, 1st Sess. 17 (1980), re-

law resides in the state legislatures. The states, through their statutory recognition of conservation and historic preservation easements, have created a new interest in land available for preservation purposes. Despite the movement toward the recognition and assignability of interests in gross held by a public or quasi-public agency for the benefit of the general population, enactment of preservation restriction statutes is vital. Legal distinctions between easements, covenants, restrictions, or servitudes and their incident technicalities as to enforcement and assignability are eliminated by such action.<sup>108</sup> Currently, over forty jurisdictions have specifically recognized this less-than-fee device for conservation or preservation purposes through statutory enactment.<sup>109</sup> Although each statute contains variations, some common components have emerged. It is necessary to isolate and examine these essential features so that a basis for comparison exists for the recently enacted Ohio statute which will be discussed below.

#### A. *Definition of Purpose*

The majority of states have legislatively recognized the less-than-fee property interest as a device to preserve both the natural and the cultural environment. Although they employ a wide variety of terminology to describe this new interest in land, these statutes share the common purpose of enabling landowners to create, alienate, and enforce the restrictions for environmental conservation and historic preservation purposes. It is important to conform a preservation restriction to the statutory purposes clause. Since the state law recognizing the new sub-fee right acts in derogation of the common law, it may be narrowly construed by a reviewing court. Deviation from the strict purposes established by the governing statute could result in the application of pre-existing technical common law covenant and easement rules. Some statutes only apply to preservation agreements "falling within its terms and conditions"<sup>110</sup> and specify that all other restrictions will be gov-

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108. The terminology employed by the various statutes to achieve preservation goals may differ, however "their purpose is the same: to facilitate the private encumbrance of historic property, primarily by making in-gross property rights enforceable without regard to privity or appurtenancy." Beckwith, *Preservation Law 1976-1980: Faction, Property Rights and Ideology*, 11 N.C. CENT. L.J. 276, 295 (1980).

109. See *Citations of State Laws*, supra note 9. The Ohio statute is not included on this list because of its recent adoption by the Ohio Legislature. This bill went into effect March 14, 1980. It is also worth noting that preliminary consideration of a Uniform Conservation and Historic Preservation Agreements Act by the National Conference of Commissioners on Uniform State Laws has begun. Note, *The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation*, 11 N.C. CENT. L.J. 362, 363 (1980) [hereinafter cited as *Agreements Act*].



erned by the common law.<sup>111</sup> Consequently, close adherence to the declaration of statutory purposes is advisable. While compliance with statutory purposes is important,<sup>112</sup> the form of the restriction is not. A number of state laws provide that the interest created will be enforced "whether or not stated in the form of a restriction, easement, covenant or condition in any deed, will or other instrument."<sup>113</sup> Although this degree of flexibility may be desirable, it would be advisable for draftsmen to employ the specific terminology used in the authorizing state statute.

### B. Enforcement of the Restriction

A significant feature of many of the statutes is the attempt to eliminate clearly and completely the common law obstacles to the enforcement of land restrictions. For instance, the Connecticut statute provides that if the preservation restriction is created from an appropriate purpose, it "shall [not] be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned"<sup>114</sup> Such a provision effectively precludes application of the highly technical common law rules relating to assignability and enforcement when an interest is held in gross.<sup>115</sup> The burden of the restriction will be enforceable against the present and future land owners without regard to the common law privity and appurtenance rules.<sup>116</sup> Furthermore, the benefit of the preservation restriction held in gross will be assignable to future grantees. It is critical that the intended effects of the authorizing statutes be explicitly stated so that landowners can confidently create and transfer binding property restrictions.

111. The North Carolina statute adds that, "[t]his Article shall not be construed to make unenforceable any restriction, easement, covenant or condition which does not comply with the requirements of the Article." *Id.* § 121-36(b) (Supp. 1979). As the restrictions are not unenforceable when they fall outside the Article, the direct implication is that the common law still governs assignment and enforceability.

112. See Brennehan, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231, 235 (1975-76). For example, the Connecticut statute states that the purpose of its "conservation restriction" is "to retain land or water areas predominantly in their natural, scenic, or open condition or in agricultural, farming, forest or open space use." CONN. GEN. STAT. ANN. § 47-42a(a) (West 1978). The purpose of its "preservation restriction" is "to preserve historically significant structures or sites." *Id.* § 47-42a(b). If the purpose of the interest fits into the appropriate category then the statute will offer protection. For a more detailed definition of conservation and preservation purposes, see N.C. GEN. STAT. § 121-35(1), (3) (Supp. 1979).

113. See CONN. GEN. STAT. ANN. § 47-42a (West 1978); N.C. GEN. STAT. § 121-35(1), (3) (Supp. 1979).

114. CONN. GEN. STAT. ANN. § 47-42b (West 1978).

115. See notes 48-70 and text accompanying *supra*.

116. See notes 71 & 106 and text accompanying *supra*.

### C. *Affirmative-Negative Distinction*<sup>117</sup>

In the statutes authorizing them, preservation restrictions often are described as limitations or prohibitions on the servient estate.<sup>118</sup> They are functionally similar to the traditional negative easement or restrictive covenant because they impose limits upon the free use of the burdened land. The primary objective of the preservation restriction is to vest the holder with an enforceable right to maintain the pre-existing structural form or design. Most states attain this goal by restricting the servient landowner's freedom to modify the external structural appearance without the prior consent of the holder of the preservation restriction. It is important to note that these statutes create an obligation on the part of the servient landowner not to act in a manner which would damage the architectural or historical characteristics of the land. However, at least one state — New Hampshire — authorizes the creation of affirmative land covenants obligating the servient landowner to maintain and restore the historically significant property.<sup>119</sup> Historically, this form of affirmative duty has been viewed with little favor by the courts when mandatory injunctions have been sought against successors to the initial promisee. The common law resisted the assignability and enforcement of the burden of affirmative duties imposed by covenants upon successors in title to the servient land.<sup>120</sup> Statutes requiring these responsibilities of continuing care are desirable because they ensure that an historic property will be preserved against gradual deterioration through under-maintenance. However, due to the general hostility of the common law rules, statutes must be drafted with precision and care in order to replace them completely.

### D. *Authorized Holders of Preservation Restrictions*

Most statutes creating preservation restrictions specifically designate those legal entities eligible to hold these newly-defined interests.

117. See Netherton, *Environmental Conservation and Historic Preservation through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 560 (1979).

118. E.g., CONN. GEN. STAT. ANN. § 47-42a (West 1978).

119. See N.H. REV. STAT. ANN. § 477:45 (Supp. 1979).

120. See Netherton, *supra* note 117, at 558. The enforcement of affirmative obligations on the servient estate owner is an important feature to the success of conservation or historic preservation easements. The courts have been very conservative, especially when the remedy calls for a mandatory injunction to enforce the affirmative obligation. "Legislators apparently have felt less constrained, and numerous instances can be found where affirmative obligations are imposed on landowners, or where holders of conservation or preservation interests are authorized to enter upon the land and take necessary actions." *Id.* See, e.g., N.H. REV. STAT. ANN. § 477:45 (Supp. 1979). The North Carolina statute permits ". . . representatives of the holder to enter the involved land or improvement in a reasonable manner and at reasonable times to assure compliance." N.C.

The holder of an historic preservation right is often defined to include government agencies, charitable organizations, or trusts.<sup>121</sup> Curiously, individuals are usually excluded from this definition. Although an organization may fit the statutory definition of a holder of a preservation right, it must also meet a secondary test before properly possessing the property interest. The organization must also hold the right for the purpose of preserving the historic building or site.<sup>122</sup> Consequently, eligibility for holding preservation restrictions depends upon both organizational forms and purpose. Compliance with these requisites should be established by specific declaration within the instrument creating the new property interest.

### E. Recordation Requirements

Historic preservation restrictions constitute real property interests. As the Connecticut statute notes, preservation easements "are interests in land and may be acquired by any holder in the same manner as it may acquire other interests in land."<sup>123</sup> Since these restrictions are real property interests, they fall subject to the same rules regarding recordation as do more familiar land interests. The requirement of public recordation has been intended to provide constructive notice of outstanding property rights to those who may later purchase the land.<sup>124</sup> In most jurisdictions, subsequent purchasers take their titles subject to prior interests which have been properly recorded or of which there is actual notice. Statutes recognizing preservation rights usually direct the public recording of the restrictions in the county office, where other property interests must be filed. At least one state — Colorado — makes the preservation restriction unenforceable unless it is properly recorded.<sup>125</sup> Due to the substantial nature of the preservation right, it is

121. The North Carolina *Conservation and Historic Preservation Agreements Act* extends the description of a holder to include "any private corporation or business entity whose purposes" fall within the statute. N.C. GEN. STAT. § 121-35(2) (Supp. 1979); See also N.H. REV. STAT. ANN. § 477:46 (Supp. 1979). This expansive definition of a "holder" allows private entities to enforce conservation and historic preservation agreements. The "preservation firm" can help to reduce transaction costs in private preservation agreements. Beckwith, *supra* note 108, at 295.

122. See MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1977 & 1980 Supp.); N.C. GEN. STAT. § 121-35(2)(Supp. 1979). For a listing of the various "Purposes, Interests and Parties Involved in Conservation and Preservation Agreements," see Netherton, *supra* note 117, at 567-77.

123. CONN. GEN. STAT. ANN. § 47-42c (West 1978); See also N.C. GEN. STAT. § 121-38(b) (West 1978). The statutes recognize the easement as an interest in real estate which may be conveyed in "any deed, will or other instrument executed by or on behalf of the owner of land or in any order of taking of such land . . ." CONN. GEN. STAT. ANN. § 47-42b (West 1978).

124. See R. BURBY, REAL PROPERTY 323-24 (3d ed. 1965).

125. COLO. REV. STAT. § 38-30-5-106 (Supp. 1978). If the instrument creating the easement is not recorded, the mandatory language of the statute precludes enforcement. See also

desirable and equitable to impose the general public recordation rules upon the holders of those property interests.

#### F. Enforcement Remedies

The creation of a preservation restriction gives rise to a series of rights and duties defining a new legal relationship in the ownership of the land. However, for the preservation restriction to have any meaning, it must grant enforceable power. It is common, therefore, for statutes recognizing the new property interest to make specific provisions for legal remedies available to the holder. For example, the New Hampshire legislation states that a preservation restriction "may be enforced by an action at law or by injunction or other proceeding in equity."<sup>126</sup> By granting both legal and equitable relief, the statute anticipates a wide range of enforcement settings and a flexible choice of remedies. Such a statute also has the effect of circumventing common law rules which might limit the availability of certain remedies for easements or real covenants. Furthermore, in order for the holder of a preservation right to be able to act when necessary to protect the historic property, there must be access to information concerning the condition of the site. It is therefore important to provide the holder with a right of inspection to assure compliance with the restriction.<sup>127</sup> This right should either be explicitly provided for in the agreement between parties or in the statute authorizing the creation of the preservation restriction.

Another attractive feature of state laws which govern preservation restrictions is one which extends the enforcement powers of the interest beyond the holder to a public agency. Where a restriction holder is unwilling or incapable of enforcing the interest, the Maryland law allows these powers to pass to a state agency.<sup>128</sup> Such a provision may prevent a court from declaring the right to be extinguished or released through abandonment by the holder.<sup>129</sup> This aspect might become important in the future when the interest in cultural resource protection could wane or when private preservation organizations disbanded or be-

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126. N.H. REV. STAT. ANN. § 477:47 (Supp. 1979).

127. See note 119 *supra*.

128. MD. [REAL PROP.] CODE ANN. § 2-118(e) (1974 & 1979 Supp.) Depending upon the particular purpose involved, the interest is transferred either to the Maryland Historical Trust or the Maryland Environmental Trust.

129. Such a legislative provision could counteract a possible finding of abandonment. "Abandonment is a question of intention. A person entitled to a right of way or other easement in land may abandon and extinguish such right by acts *in pais*; and a cessation of use coupled with acts or circumstances clearly showing an intention to abandon the right will be as effective as an express release of the right." *Blind v. Wood*, 193 Va. 522, 525, 69 S.E.2d 342, 344 (1952).

came inactive.<sup>130</sup>

### G. Real Property Taxation

When the fee simple owner of land conveys a preservation right to another, a segmentation of the estate in land has occurred. As discussed above, this is significant because it vests the holder of the restriction with specific rights which may be enforced by a range of actions. In addition, by dividing the land interest into identifiable parts, the transfer has expanded the number of property rights subject to local real estate taxation. The practical effect of conveying a preservation right is to reduce the assessed valuation of the underlying fee simple title based upon the theory that a land use restriction erodes the market value of the property. This, in turn, lessens the amount of real estate taxes imposed upon the fee simple owner. State statutes recognizing historic preservation rights ordinarily will permit the impact of the restrictions to be considered in the local property tax assessments.<sup>131</sup> The tax assessor is directed to take into account the diminution in value of the underlying fee caused by transferred encumbrance.<sup>132</sup> This tax reduction serves as a financial incentive for granting a preservation right. Theoretically, the recipient of the right holds a taxable property interest so that the locality does not lose any tax revenue. However, the grantee of a preservation right is usually a tax-exempt organization,<sup>133</sup> with the result that the property interest escapes taxation altogether. Because of this fact, local tax officials should be directed by state statute to adjust assessments when a preservation

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130. At least one other doctrine is relevant to the issue of the termination of easements. The equitable doctrine of changed conditions is designed to terminate the easement by operation of law when the necessity or particular purpose ends. The statutes are silent as to the application of this doctrine. If the conservation or historic preservation purpose is no longer being served by this easement, it should be extinguished.

Where a state statute does not provide a mechanism to effectuate this policy, and the original parties to the agreement grant the easement in perpetuity, the courts should be able to use the doctrine of changed conditions to extinguish "stale" restrictions. See Hershman, *supra* note 24, at 30. The Maryland statute precludes application of the changed conditions doctrine in a prescribed situation. That is, where the grantee is incapable or unwilling to hold or maintain the conservation or preservation interest. The interest may legitimately pass to an appropriate state agency whose purposes include preservation of the natural and cultural environment so as to carry out the grantor's intention. MD. [REAL PROP.] CODE ANN. § 2-118(e) (1974 & 1979 Supp.).

131. The Georgia statute is illustrative. It states that, "The instrument of conveyance of such a facade or conservation easement . . . shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of such encumbrance." GA. CODE ANN. § 85-1409 (1978 & 1979 Supp.).

132. See R. Brenneman and G. Andrews, *supra* note 106, at 153.

133. In fact some statutes require that the holder of the preservation right be a nontaxable entity. Under the existing Ohio statute only specified local government bodies and tax-exempt organizations are permitted to hold conservation easements. See OHIO REV. CODE ANN. §

right has been conveyed.

## V. OHIO LAW CREATING CONSERVATION EASEMENTS

In 1980 the Ohio legislature acted to pass legislation recognizing new less-than-fee interests for preservation purposes;<sup>134</sup> however, the statute only authorized the creation of conservation easements.<sup>135</sup> There was no attempt to include historic preservation purposes within the coverage of the law, and consequently the new legislation is not available for the protection of cultural resources. Although the statutory easement was intended for the preservation of the natural environment, its structure is similar to that of preservation restrictions found in other states. The Ohio statute will now be examined to determine its essential components and its potential adaptability for historic preservation purposes.

### A. *Form and Definition of Purpose*

The historic preservation right statutes surveyed above generally deemphasized the need to employ uniform language to describe the interest being created. The Ohio statute is similar and permits a designated holder to receive the conservation easement "in the form of articles of dedication, easement, covenant, restriction, or condition."<sup>136</sup> This is a proper position to minimize formal requirements and to stress substance. The validity of a conservation easement under Ohio law is more closely associated with the conformity with statutory purposes than with form. The Ohio law describes the conservation easement as an "interest in land that is held for the public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition in agricultural, horticultural, silvicultural, or other farming or forest use, or as suitable habitat for fish, plants, or

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134. The Ohio Amended Substitute House Bill No. 504 [hereinafter cited as H.B. 504] amends the Ohio Revised Code §§ 317.08, 5713.01, and 5713.04 and enacts §§ 5301.67 to 5301.70 of the Ohio Revised Code with regard to conservation easements. Section 317.08 requires that the conservation be recorded. Section 5301.67 defines the purpose of the conservation easement. Section 5301.68 describes the conservation easement as an interest in land which may be conveyed to an appropriate holder. Section 5301.69 deals with the acquisition of a conservation easement by a government agency or charitable organization and defines the purpose for which it may hold. Section 5301.70 is the enforceability provision and specifies the appropriate remedy for noncompliance. Finally, §§ 5713.01 and 5713.04 deal with the tax assessment for real estate purposes and the method used for valuation of the property encumbered with the conservation easement. H.B. 504 went into effect March 14, 1980.

135. See OHIO REV. CODE ANN. § 5301.67 (Page 1981).

The interest recognized is specifically for a scenic or open space easement. The concept of historic preservation is not incorporated into this statute. The purpose as intended is quite narrow.

136. OHIO REV. CODE ANN. § 5301.68 (Page 1981).

wildlife.”<sup>137</sup> It is apparent that the statutory definition does not explicitly provide for the preservation of historically significant buildings or sites. Also, such a purpose cannot be implied from the statutory language.

Ohio law imposes an important sanction for failure to comply with the enumerated statutory purposes. Section 5301.70 of the Ohio Revised Code states that the conservation easement legislation does not apply to other agreements falling outside the statute’s limitations and consequently does not affect “[t]he enforceability of any article of dedication, restriction, easement, covenant, or condition that does not meet the requirements [of the statute].”<sup>138</sup> This rather innocuous language should not obscure the true meaning of the law. The common law would govern the assignability and enforcement of land restrictions which did not meet the purpose limitations of the statute. As a result, the explicit legislative waiver of the common law privity and in gross defenses to the enforcement of conservation easements would not apply to historic preservation restrictions.<sup>139</sup> Consequently, when the purpose of the easement is for the preservation of historic buildings and sites, the statute does not apply and the highly technical common law rules will continue to control. Since the historic preservation right would be considered a noncommercial easement in gross, its continued effectiveness would be questionable. In order to achieve the social goal of cultural resource preservation through the use of traditional property law concepts, there must be certainty regarding the assignability and enforcement of easements in gross. These features do not extend to historic preservation activities under existing Ohio law.

### *B. Specified Holders of Less-Than-Fee Interests*

The holder of a conservation easement in Ohio may be a specified governmental body or a charitable organization.<sup>140</sup> Private organizations and individuals are not included as permissible holders under the statute.<sup>141</sup> In a rather confusing way, the Ohio law states that a charitable organization can acquire a conservation easement if it is a tax exempt entity under federal law and if it is organized for any one of the following purposes: “the preservation of land areas for public outdoor recreation or education, or scenic enjoyment; the preservation of historically important land areas or structures; or the protection of nat-

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137. *Id.* § 5301.67.

138. *Id.* § 5301.70.

139. *Id.*

140. *Id.* § 5301.68 & .69.

141. *But see* N.C. GEN. STAT. § 121-35(2) (Supp. 1979) and N.H. REV. STAT. ANN. §

ural environmental systems."<sup>142</sup> Although an easement holder may be organized for the purpose of cultural resource protection, the conservation easement under Ohio law cannot be used to preserve historic properties. This inconsistency either reflects an unnecessarily limited policy choice or an error in legislative drafting.

The Ohio legislature has created a two-pronged test of eligibility under two separate sections of the statute. First, the act limits the use of the conservation easement to the conservation of land or water in its natural, scenic or open condition.<sup>143</sup> And second, it specifies that the holder of the easement must be a governmental agency or charitable organization organized for a restricted group of purposes.<sup>144</sup> The narrow definition of acceptable easement holders under the Ohio statute appears to be unnecessarily restrictive. It also disqualifies a great number of public interest organizations which are organized for different or more expansive purposes than those listed in the legislation. A charitable organization would have to be formed with the exact statutory purposes in order for there to be any assurance that the less-than-fee interest acquired would be accorded all of the statutorily-mandated attributes of a conservation easement.<sup>145</sup> This would certainly discourage the general use of the device. By adopting such limiting language the Ohio legislature has seriously impaired the usefulness of the conservation easement technique.

### C. *Recordation Requirements*

Under Ohio law, the conservation easement is considered an interest in land. Consequently, it must be "executed and recorded in the same manner as other instruments conveying interests in land."<sup>146</sup> The statute specifically provides that conservation easements are to be recorded by the county recorder just as any deed for the conveyance of an interest in land.<sup>147</sup> Once the instrument conveying the conservation easement is properly recorded, the public record provides subsequent purchasers and others with constructive notice of the interest. In this respect the Ohio statute is similar to those of other states.

### D. *Governmental Approval of Acquisition or Release*

The Ohio statute does not require governmental approval for the acquisition or termination of conservation easements. A landowner in

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142. OHIO REV. CODE ANN. § 5301.69 (Page 1981).

143. *Id.* § 5301.67.

144. *Id.* § 5301.69.

145. *Id.* § 5301.70.

146. *Id.* § 5301.68.

147. OHIO REV. CODE ANN. § 317.98(A) (Page 1980 Supp.).



Ohio may grant a conservation easement to a qualifying government agency or charitable organization without governmental approval.<sup>148</sup> The easement will then receive the protection of the statute and exist in perpetuity unless the grantor has clearly indicated an intention to make the interest terminable on the occurrence of a specified condition or after an established period of time.<sup>149</sup> The Ohio legislature properly rejected the statutory model set by Massachusetts where governmental approval is required to validate the acquisition or termination of a protective restriction. Such an approach involves unnecessary governmental intrusion into an area better left to the discretion of individuals.

### E. *Affirmative-Negative Distinction*

The conservation easement exists as a limitation upon the servient estate and requires the fee simple owner to retain "land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition."<sup>150</sup> The interest is considered a use limitation or a negative easement in gross. The statute does not impose affirmative obligations upon the servient estate owner since the goal of the statute is to maintain existing environmental conditions. It is unclear whether an easement serving the statutory conservation purposes, yet also containing affirmative duties, would be assignable and enforceable. If the Ohio legislation were to be expanded to encompass historic preservation purposes, there would be clear need to provide for the transferability of affirmative covenants. Under present law, the only affirmative obligation imposed upon the servient estate owner is the duty to permit the easement "holder to enter the property . . . at reasonable times to ensure compliance [with the easement]."<sup>151</sup> An historic preservation restriction might require the landowner to repair and maintain the property in a designated fashion. Such a provision would have to be made enforceable against successors in title to the original grantor of the less-than-fee interest. The existing law does not grant such a result.

### F. *Enforcement Remedies*

By statute, the holder of a conservation easement may enforce its

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148. The Massachusetts statute specifically requires governmental approval before the easement will be acquired or terminated. See MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1977 & 1980 Supp.).

149. The Ohio statute does not specifically state that the conservation easement is created in perpetuity, however, this language is mandatory for the application of the tax incentives provided in I.R.C. § 170(f)(3)(B)(iii). If the conservation easement is not created in perpetuity, the grantor cannot take advantage of the charitable contribution deduction. See notes 103-6 and accompanying text *supra*.

150. OHIO REV. CODE ANN. § 5301.67 (Page 1981).

151. *Id.*

terms "by injunction or in any other civil action."<sup>152</sup> This language apparently authorizes a full range of equitable and legal remedies. The Ohio law grants jurisdiction to its courts for the enforcement of the interests created by the statute. Furthermore, drafters of conservation easements are not limited in their choice of enforcement provisions by the legislation. In its brevity, however, the legislation leaves numerous enforcement issues unanswered.

### G. Local Property Tax Assessments

Real estate taxes are levied upon the ownership of taxable property within a local government's taxing jurisdiction. A predetermined tax rate is applied to an assessment of the value of the property right owned by the taxpayer. By conveying a conservation easement, the owner of the fee simple has transferred "valuable development rights . . . from the bundle of rights included within common law 'title' [and this act] should reduce the value of the remaining rights in the bundle."<sup>153</sup> Consequently, Ohio law directs the county auditor to "revalue and assess at any time all or any part of the real estate . . . when a conservation easement is created."<sup>154</sup> The statutory assumption is that the conveyance of the easement will result in a diminution in value of the underlying fee simple estate. The Ohio property tax law is comparable to the provisions found in the other statutes surveyed.<sup>155</sup> However, specific recognition is only given to conservation easements as defined by Ohio statute. As a result, a less-than-fee simple interest created for historic preservation purposes may not receive the same statutorily mandated tax treatment available for conservation easements. An expansion of the conservation easement to include cultural resource values would eliminate this problem and would encourage fee simple landowners to convey the less-than-fee interest.

While the intent to conserve natural environmental quality is a commendable objective of the Ohio statute, the preservation of the cultural environment also deserves attention. The scope of protection offered by existing law is too narrow and should not be confined to the limited purposes of the conservation easement act. The less-than-fee device used for the protection of the cultural resources has been demonstrated to be an effective tool in many other states. At present,

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152. *Id.* § 5301.70.

153. See Brennehan and Andrews *supra* note 106 at 153.

154. OHIO REV. CODE ANN. § 5713.04 (Page 1980).

155. See, e.g., GA. CODE ANN. § 85-1409 (1978 & 1979 Supp.); IDAHO CODE § 67-4613-15 (Supp. 1979); ILL. ANN. STAT. ch. 24, § 11-48.2-6 (Smith-Hurd Supp. 1980); MASS. GEN. LAWS ANN. ch. 132 A, § 11D (West 1981); MO. REV. STAT. § 67.870-955 (Vernon Supp. 1981); N.C. GEN. STAT. § 121-40 (Supp. 1979); and UTAH CODE ANN. § 63-18a-6 (1978).

the historic preservation law in Ohio is insufficient to protect adequately significant buildings and sites within the state.<sup>156</sup> Without statutory recognition of the historic preservation easement, this valuable technique will be unavailable to landowners, and important historical properties will be unnecessarily lost.

## VI. LEGISLATIVE PROPOSAL FOR OHIO

The Ohio law concerning conservation easements represents a first step in the use of less-than-fee property interests to achieve important social purposes. It also serves as a non-regulatory strategy requiring minimal governmental intervention. This private property approach has been used by most of the states.<sup>157</sup> However, the Ohio statute must be adapted to make it useful in the historic preservation context, so that private landowners can act voluntarily to protect the historic characteristics of their properties. The following discussion outlines a series of specific steps which should be taken to amend the existing statute.

### 1. Definition of Purpose

Ohio Revised Code section 5301.67 conclusively defines the purposes of a conservation easement.<sup>158</sup> This section should be expanded to include the preservation of historically significant structures and

156. See *Cultural Resources Preservation*, *supra* note 3, at 343. There the author concludes,

At present, however, Ohio preservation law consists largely of a few weak provisions establishing an excavation permit requirement and a system of landmark registries and public preserves which depend on voluntary and uncompensated participation. Although this represents a beginning, it is hardly adequate. Our cultural resources are a precious legacy and they are exceedingly vulnerable. It will take more than token efforts to safeguard them. Ohio needs to commit itself to the protection of its cultural heritage through a more aggressive program based on cogent legislation.

In addition, a survey conducted by the Ohio Historical Society and the Legislative Service Commission in January of 1966 determined that many significant historic sites had already been demolished during the prior ten years and that many other historic sites would be in jeopardy of destruction within the next twenty years. See Ohio Legis. Serv. Comm'n, *Preservation of Historic Sites*, Staff Research Rep. No. 77, 8 (1966).

157. See *Citations of State Laws*, *supra* note 9. Although this middle preservation approach involves statutory recognition of the less-than-fee interest, the agreement to preserve emphasizes private property relationships rather than the coercive force of government.

158. Section 5301.67 states,

'conservation easement' means an incorporeal right or interest in land that is held for the public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition, in agricultural, horticultural, silvicultural, or other farming or forest use, or as suitable habitat for fish, plants, or wildlife; that imposes any limitations on the use or development of the areas that are appropriate at the time of creation of the conservation easement to achieve one or more of such purposes; and that includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.

sites.<sup>159</sup> The addition of this purpose will properly expand the scope of the statute and also remedy the inconsistency created in section 5301.69 (B). This section permits a charitable organization to hold a conservation easement, if the organization's purposes include "the preservation of historically important land areas or structures."<sup>160</sup> However, under the statute a conservation easement may not be created to achieve such purposes. Such ambiguous drafting leads to confusion requiring clarification of the uncertainties in the present law. A voluntary regulatory strategy for historic preservation will only succeed where there is a clear and definite statute specifically stating the scope of protection. Although the validity of a conservation easement as recognized by the existing law has not yet been challenged, the lack of clarity in the statute might permit a court to invalidate the conservation agreement at some future date. If the statute were amended to recognize an historic preservation easement where the purpose is to protect the cultural environment, then section 5301.69 (B) would be a consistent provision. The protective easement device could then be freely used to preserve historic properties.

## 2. Form

Ohio Revised Code section 5301.68 implies that the form of the conservation easement is not important and that an eligible holder may acquire the interest whether it is "in the form of articles of dedication, easement, covenant, restriction, or condition."<sup>161</sup> Such a position is desirable since it eliminates a technical ground for invalidating an otherwise valid preservation right. To avoid any dispute over form, it is preferable to state specifically that the interest created will be enforced under the statute "whether or not stated in the form of a restriction, easement, covenant or condition."<sup>162</sup> as long as there is compliance with the purposes established by the statute. This provision should be inserted in the definitional section of the statute along with the discussion added for historic preservation purpose. In addition, it would be advisable to provide statutory guidance as to the necessary components of a preservation right. Although not framed in mandatory language, such direction would yield a beneficial uniformity in the drafting of instru-

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159. See, e.g., CONN. GEN. STAT. ANN. 47-42a (b) (West 1978). The preservation restriction is defined as a "limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument . . . whose purpose is to preserve historically significant structures or sites." *Id.*

160. OHIO REV. CODE ANN. § 5301.69 (B) (Page 1981).

161. *Id.* § 5301.68.

162. See, e.g., CONN. GEN. STAT. ANN. 47-42a(b) (West 1978). Also see MASS. GEN. LAWS

ANN. ch. 184, § 32 (West 1977 & 1980 Supp.).

ments creating the protective restrictions.

### 3. *Specified Holders*

Section 5301.69 of the Revised Code describes the entities eligible to hold a conservation easement. In addition to a government agency and charitable organization, the statute should include "any corporation or business entity whose purposes" include a preservation of the natural or cultural environment.<sup>163</sup> Also, thought should be given to the inclusion of individuals to the list of potential holders. By expanding the statutory definition of "holder," other segments of the community can participate in historic preservation activities. There is no reasonable justification for strictly limiting this term as does the present statute. Through increased involvement, "the recognized status of the [historic] property would promote public consciousness of its cultural value and this would afford it an added measure of protection."<sup>164</sup> Further, as the agreement to preserve is voluntary and private, it is unnecessary to require special government approval for acquisition or termination of an easement as required by the Massachusetts statute.<sup>165</sup> In this regard, the present structure of Ohio law should be retained. Once authorized by statute, the system of preservation is operated without major public involvement.

### 4. *Affirmative-Negative Distinction*

If the proposed preservation easement were adopted by amending the existing Ohio statute as mentioned above, it would then take the form of a limitation or prohibition on the servient estate. A negative easement which restricts the owner in his use of the historically-significant property would preclude any alteration or destruction of the property without the easement holder's permission. The present legislation could also be expanded to include a provision which permits the creation of an affirmative duty of the servient estate owner to maintain the burdened property. The landowner would have the obligation to preserve the historical significance of his property. If this duty were assumed by the landowner, the holder of the easement would be relieved of the cost of maintaining and restoring the property, yet he would have the right to force the fee owner to perform those functions. In the

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163. See, e.g., § 121-35(2) (Supp. 1979).

164. *Cultural Resources Preservation*, *supra* note 3, at 341.

165. *But see* MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1977 & 1980 Supp.). For a general discussion of the relative merits of governmental approval, see notes 48-49 and accompanying text *supra*. Consideration of a "Massachusetts-like public restriction tract index" might also be given in Ohio so that a title search for the easement will not extend beyond the customary period. See Brennan, *supra* note 46, at 147.

context of historic preservation policy, the enforcement of such an affirmative obligation of the servient estate owner to maintain and restore the property could be a valuable feature. The allocation of the maintenance expenses between the fee owner and the restriction holder would best be established by mutual agreement of the parties in the preservation restriction instrument.

### 5. Remedies

Section 5301.70 of the Revised Code permits an eligible holder to enforce the terms of the conservation easement "by injunction or in any other civil action."<sup>166</sup> As has been noted, such a remedial provision is quite brief and could cause difficulty in its application.<sup>167</sup> Although a majority of the preservation statutes contain similar enforcement provisions, it would be better to clarify the particular harm or proof of damages needed to invoke an appropriate legal or equitable remedy. Also, it would be helpful for the legislature to define the term "other civil action" to grant the broadest range of the judicial enforcement powers.

### 6. Local Property Tax Assessments

The existing conservation easement technique acts to maintain land in its undeveloped condition by severing the land's development rights and transferring them to a governmental unit or charitable organization due to the shrinkage of the taxable property interest. When the recipient of the conservation easement is a tax-exempt organization, real estate tax revenues are reduced. In addition, the restricted fee simple interest remaining in the hands of the landowner will probably not appreciate in value due to its use limitation. In this instance, the state has accomplished a statewide goal of preserving open space, but has imposed a revenue loss upon the local government through the erosion of its tax base. Under its present configuration, the Ohio conservation easement statute could produce this result. However, the expansion of the conservation easement device to the preservation of historic properties may not have the same unpopular result. This is due to the fact that land or buildings subject to historic preservation restrictions may not suffer a reduction in their fair market value. Rather than depreciate property values, historic preservation restrictions have enhanced the value of taxable real property and have resulted in the rehabilitation of declining portions of cities and towns. This, in turn, has provided local governments with new sources of tax revenues. From a fiscal perspec-

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166. OHIO REV. CODE ANN. § 5301.70 (Page 1981).

167. Similar concerns have been raised about the remedial provisions of other state laws.

tive, the use of preservation restrictions as part of a community redevelopment and historic preservation program can be enormously beneficial.

## VII. CONCLUSION

The protection of the natural environment is now provided by the recently enacted Ohio statute authorizing conservation easements. An examination of other states' legislation reveals a national trend favoring the use of less-than-fee devices for the preservation of both natural and cultural resources. It is clear that Ohio's initial recognition of protective easements should be expanded to include historic properties within the purposes of the existing law. The enactment of such a system would be desirable for several reasons. First, it would accomplish important public objectives through the enforcement of private property rights. Due to the attendant tax advantages, a larger number of historic properties might be saved from destruction by using this method than through a system of public regulation or acquisition. Second, the use of condemnation authority to acquire historically significant sites is less available due to the increasing cost of sites and the conditions of fiscal austerity by many governmental units. The development of a significant private market or property right system of preservation will allow the limited public funding to be concentrated on the most important sites of buildings. Third, the establishment of a preservation right system would lessen the need to rely upon police power regulatory methods to achieve historic preservation objectives. Many cities and towns do not possess a sufficient governmental structure necessary to administer a sophisticated public regulatory program. Furthermore, the use of coercive public authority for historic preservation goals may not be uniformly supported by the populace.

Although existing common law methods of land use control offer a voluntary approach to cultural resource protection, they are of uncertain effect and usefulness. Ohio can join the ranks of the majority of states which have enacted legislation authorizing less-than-fee property interests for the purpose of protecting historic sites. A statutory framework already exists for such action. Our remaining cultural resources are irreplaceable components of our present world. They remind us of our prior history, architectural style, and modes of living. The adoption of historic preservation restrictions as a protective technique offers a sound legal device to protect our unique cultural assets. We must take this opportunity to adapt our system of property interests to protect historic places before it is too late.

