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# CONSERVING THE NATION'S HERITAGE USING THE UNIFORM CONSERVATION EASEMENT ACT

ELLEN EDGE KATZ

Our third century as a nation has begun, and an ever-growing interest exists in preserving historic resources.[1] Preservation is accomplished with an aggregation of techniques employed to conserve buildings, neighborhoods or areas which possess historic, cultural or architectural significance.[2] While government activity is widespread,[3] political pressures and economic realities

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1. *See* Stipe, *Why Preserve?,* PRESERVATION NEWS, July, 1972, at 5, col. 2, *reprinted in* 11 N.C. CENT. L. J. 211 (1980). More than a decade ago, Professor Robert E. Stipe set forth several reasons to conserve historically significant resources. *Id.* Stipe wrote that we

> seek to preserve because our historic resources are all that physically link us to our past.
>
> . . . [W]e save our physical heritage partly because we live in an age of frightening communication and other technological abilities, as well as in an era of increasing cultural homogeneity.
>
> . . . [W]e preserve historic sites and structures because of their relation to past events, eras, movements and persons that we feel are important to honor and understand.
>
> . . . [W]e seek to preserve the architecture and landscapes of the past simply because of their intrinsic value as art.
>
> . . . [W]e seek to preserve our past because we believe in the right of our cities and countryside to be beautiful.
>
> . . . [W]e seek to preserve because we have discovered—all too belatedly—that preservation can serve an important human and social purpose in our society.

Id. at 211-12. *See also* NATIONAL TRUST FOR HISTORIC PRESERVATION, PRESERVATION: TOWARD AN ETHIC FOR THE 1980'S (1980); Biddle, *Historic Preservation: The Citizens' Quiet Revolution,* 8 CONN. L. REV. 202 (1976); Gilbert, *An Overview of the Law of Historic Preservation,* 12 URB. LAW. 13 (1980); Hershman, *Critical Legal Issues in Historic Preservation,* 12 URB. LAW. 19 (1980); Stipe, *A Decade of Preservation and Preservation Law,* 11 N.C. CENT. L. J. 214 (1980).

2. *See* READINGS IN HISTORIC PRESERVATION—WHY? WHAT? HOW? (N. Williams, E. Kellogg & F. Gilbert, eds. 1983) (comprehensive discussion of historic preservation).

3. *See* United States v. Gettysburg Electric Railway Co., 160 U.S. 668, 681 (1896). All of the four great powers commonly ascribed to government, i.e., war, eminent domain, police and tax, have been associated with historic preservation. *Id.* The least commonly used, the war power, and the power of eminent domain were the justifications for federal condemnation of private property which was the site of the Civil War battle at Gettysburg, Pennsylvania. *Id.*

State government inherently possesses police power which allows appropriate action to be taken in order to protect the general citizenry. This collective nature of the police power means individual rights necessarily are circumscribed. So, exercise of the police power is not without limitation. To be upheld, exercise of the police power must be reasonable in that it must bear a rational relation to the achievement of a public good. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Otherwise, it is not mere regulation but an impermissible taking of a property interest. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). State constitutions vest law making authority in legislative bodies. Via the police power, a legislature is thus empowered to enact statutes consistent with the protection of the public health, safety, morals or general welfare.

limit its significance. The result is an increased number of private, non-governmental initiatives. These efforts often involve a land owner entering into an agreement to limit and control a property's future development in order to assure continued historic significance.[4] Although such arrangements appear relatively simple, certain obsolete, yet still recognized, common law property doctrines impede the effectiveness of private agreements to control future development.[5] If private preservation agreements are to flourish, these hindrances must be eliminated.

Early preservation projects often relied on government initiative[6] rather than private agreements. Outright acquisitions of historic properties predominated. However, shifting political climates as well as the expense involved

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In addition to state-wide legislation, in recognition of the peculiarly local nature of many zoning issues, municipalities are delegated zoning authority through enabling statutes in every state. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.19 (2d ed. 1976). Litigation concerning historic preservation zoning generally involves questions of the degree of public good or the reasonableness of the ordinances. *See generally* 2 ANDERSON, *supra*, at § 9.70 (2d ed. 1976 & Supp. 1982). At least forty jurisdictions authorize some type of historic district zoning. Beckwith, *Preservation Law 1976-1980: Faction, Property Rights, and Ideology*, 11 N.C. CENT. L. J. 276, 308-40 App. (1980).

The taxing power is also used to promote historic preservation. *See* Gold, *The Welfare Economics of Historic Preservation* 8 CONN. L. REV. 348 (1976) (economic analysis of government involvement in historic preservation). For current discussions of federal income tax policy, *see* NATIONAL TRUST FOR HISTORIC PRESERVATION, TAX INCENTIVES FOR HISTORIC PRESERVATION (rev. ed. 1981); Coughlin, *Increased Tax Penalties for Valuation Overstatements*, 2 PRESERVATION L. REP. 2034 (1983) [hereinafter Coughlin (1983)]; Coughlin, *Preservation Easements: Statutory and Tax Planning Issues*, 1 PRESERVATION L. REP. 2011 (1982) [hereinafter Coughlin (1982)]; Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVTL. AFF. L. REV. 513 (1981). State and local tax issues are reviewed in D. LISTOKIN, LANDMARKS PRESERVATION AND THE PROPERTY TAX (1982); Powers, *Tax Incentives for Historic Preservation*, 12 URB. LAW. 103 (1980); Shull, *The Use of Tax Incentives for Historic Preservation* 8 CONN. L. REV. 334 (1976).

4. Numerous commentators have discussed private preservation agreements. *See generally* R. BRENNEMAN, SHOULD EASEMENTS BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS? (1975); T. COUGHLIN, EASEMENTS AND OTHER TECHNIQUES TO PROTECT HISTORIC HOUSES IN PRIVATE OWNERSHIP (1981); N. ROBINSON, HISTORIC PRESERVATION LAW (1979); Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976); Freeman, *The Use of Easements for Historic Preservation*, in LEGAL TECHNIQUES IN HISTORIC PRESERVATION 28 (1972); Lord, *The Advantages of Facade Easements*, in LEGAL TECHNIQUES IN HISTORIC PRESERVATION 33 (1972); Netherton, *Restrictive Agreements for Historic Preservation*, 12 URB. LAW 54 (1980) [hereinafter Netherton (1980)]; Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540 (1979) [hereinafter Netherton (1979)]; Rosenberg & Jaconstein, *Historic Preservation Easements: A Proposal for Ohio*, 7 U. DAYTON L. REV. 313 (1982); Stipe, *Easements vs. Zoning: Preservation Tools*, 20 HISTORIC PRESERVATION 78 (1968).

5. *See infra* notes 31-65 and accompanying text.

6. *See* Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963). For example, preservation efforts in the mid-nineteenth century included New York's acquisition of Hasbrouck House which served as General Washington's headquarters in Newburgh, New York. *Id.* An early example of non-governmental preservation was the formation of a private organization in order to purchase and protect

render dependence on government unwise.[7] Government inherently is a political body, and reliance solely upon an institution noted for the emphemeral quality of its decisions is naive. As one preservationist has remarked, supplemental private agreements "are essential in implementing an historic district. When politicians change the district zoning, you can fall back on the easements."[8]

An additional barrier to governmental preservation efforts arises because governmental entities operate within discrete borders and have restrictions on the scope of their power. Jurisdictional limits do not necessarily coincide with historic or aesthetic considerations. Geographic boundaries inherently discourage broad-scaled efforts since one governmental unit may choose to preserve a portion of a section while deterioration persists in the adjacent community. Even within a single jurisdiction constraints on the exercise of power exist. For instance, state enabling legislation which delegates zoning authority to local government predominately concentrates on controlling property usage.[9] Earlier, some had questioned whether this delegation of the

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Mount Vernon. *Id. See also* Freeman, *supra* note 4, at 28; READINGS IN HISTORIC PRESERVATION—WHY? WHAT? HOW?, *supra* note 2, at 34-53 (discussing additional early preservation efforts).

7. *See* A. DUNHAM, PRESERVATION OF OPEN SPACE AREAS 91 app. B. (1966). An interesting example of the impact of political influence is revealed in discussion of the struggle of A. Montgomery Ward in Chicago to maintain as open space the Lake Michigan frontage occupied by Grant Park. *Id. See also* Stipe, *supra* note 4, at 81.

8. Statement of Mrs. S. Henry Edmunds, Director, Historic Charleston Foundation, *reprinted in* 1 R. BRENNEMAN, *supra* note 4, at 34. In a recent example of this phenomenon, the historic zoning in Upland, Pennsylvania was repealed. *Pa. Borough Repeals Historic District Law,* PRESERVATION NEWS, Nov. 1982, at 10, col. 3.

9. *See, e.g.,* CAL. GOV'T CODE § 65850 (West Supp. 1986). California's delegation of zoning authority provides:The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

(a) Regulate the use of buildings, structures and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.
(b) Regulate signs and billboards.
(c) Regulate all of the following:
(1) The location, height, bulk, number of stories and size of buildings and structures.
(2) The size and use of lots, yards, courts and other open spaces.
(3) The percentage of a lot which may be occupied by a building or structure.
(4) The intensity of land use.
(d) Establish requirements for off-street parking and loading.
(e) Establish and maintain building setback lines.
(f) Create civic districts around civic centers, public parks, public buildings or public grounds and establish regulations for those civic districts.

*Id. See also* PA. STAT. ANN. tit. 53 § 10105 (Purdon Supp. 1983). Pennsylvania's enabling statute provides:

It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities . . . to provide for the general welfare by guiding and protecting amenity, convenience, future

police power included aesthetics and, thus, could be used to support historic concerns.[10] The Supreme Court's decision in *Penn Central Transportation Company v. New York City,*[11] however, removed any doubts. The police power can be exercised to promote aesthetic considerations.[12] Still, application of this power to particular situations may be contested. The designation of a single building as an historic landmark[13] leads to charges of impermissible

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> governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; to promote the conservation of energy through the use of planning practices and to promote the effective utilization of renewable energy sources; and to permit municipalities . . . to minimize such problems as may presently exist or which may be foreseen.

*Id.*

10. *See* City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964). In *City of Santa Fe,* a property owner unsuccessfully argued that the phrase "general welfare" as used in the state zoning enabling act did not encompass regulation of the size and shape of window panes on buildings within the Old Santa Fe Historic District. *Id.* at 17. *See generally* Metromedia, Inc. v. City of San Diego 453 U.S. 490 (1981) (aesthetic considerations alone provide sufficient basis to regulate billboards, however, because of differing treatment of noncommercial and commercial signs, ordinance violated first amendment); 1 A. RATHKOPF, *The Law of Zoning and Planning,* § 14 (4th ed. 1983); Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulations,* 48 UMKC L. REV. 125 (1980); Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality,* 34 VAND. L. REV. 603 (1981); Comment, *The Reasonableness of Aesthetic Zoning in Florida: A Look Beyond the Police Power,* 10 FLA. ST. L. REV. 441 (1982); *Bibliography to Legal Periodicals Dealing With Historic Preservation and Aesthetic Regulation,* 11 N.C. CENT. L. J. 384 (1980); *Bibliography to Legal Periodicals Dealing With Historic Preservation and Aesthetic Regulation,* 12 WAKE FOREST L. REV. 275 (1976).

11. 438 U.S. 104 (1978).

12. *Id.* at 129. In *Penn Central,* Grand Central Terminal in New York City had been designated a landmark by the Landmark Preservation Commission. *Id.* at 115. The Commission refused to approve plans to construct a fifty story office building above the terminal. *Id.* at 116-17. In upholding the exercise of the police power in this manner, Justice Brennan commented that ". . . States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ." *Id.* at 129. In fact, the plaintiff had not challenged the consideration of aesthetics as a permissible governmental goal. *Id.* Instead, the property owner argued unsuccessfully that it was entitled to compensation due to a "taking" of its property. *Id.*

The "taking" issue remains significant due to the Court's decisions in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981) and *Agins v. City of Tiburon,* 447 U.S. 255 (1980). These cases and the theory of inverse condemnation have generated much commentary. *See, e.g.,* Bonderman, *Comment on "San Diego Gas and Electric Co. v. City of San Diego,"* 33 LAND USE L. & ZONING DIG. May, 1981, at 10, 11; Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L. Q. 517 (1981); Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L. Q. 491 (1981); Note, *Filling in the Pennsylvania Coal Mine: "Agins v. City of Tiburon and Supreme Court Approval of Open Space Zoning,"* 1981 WISC. L. REV. 790.

13. The designation of the Villard Houses in New York City and the creative plan for their development is discussed in Marcus, *Villard Preserv'd: Or, Zoning for Landmarks in the Central Business District,* 44 BROOKLYN L. REV. 1 (1978).

spot zoning[14] because of differential treatment. To the judiciary, the charge may be unpersuasive if the selection is part of a comprehensive land use program.[15] Regardless, the mere allegation may chill local politicians who are fearful of disputes. Governmental undependability and limitations on zoning authority are impediments to implementing historic preservation.

Economic pressures compound the issue. Government acquisition of property is quite costly. Large tax revenues required for purchase and maintenance result in practical spending limitations. Additionally, both government and charitable ownership remove property from the tax rolls,[16] further reducing the political popularity of preservation efforts. The search for less expensive alternatives is prudent especially since public or charitable ownership often leads to conversion to a museum, representing a financial burden that often has limited practicality.[17]

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Many jurisdictions have enacted legislation which authorizes the designation of historic landmarks. *E.g.*, California, Cal. Gov't Code § 25373 (Deering 1974); District of Columbia, D.C. Code Ann. §§ 5-1001 to -1006 (1981); Idaho, Idaho Code § 67-4614 to 4616 (1980); Illinois, Ill. Ann. Stat. Ch. 24, §§ 11-48.2-2, -5 (Smith-Hurd Supp. 1983); Louisiana, La. Rev. Stat. Ann. §§ 25:751 to 767 (West 1975 & Supp. 1983); Minnesota, Minn. Stat. Ann. § 471.193 (West 1977); Mississippi, Miss. Code Ann. §§ 39-13-1 to -5 (Supp. 1982); New York, N.Y. Gen. Mun. Law § 96-a (McKinney 1977); N.Y. Town Law § 64 (17-a) (McKinney 1973), N.Y. Village Law § 7-700 (McKinney 1973); North Carolina, N.C. Gen. Stat. §§ 160A-399.1 to -.399.13 (1982); Ohio, Ohio Rev. Code Ann. § 713.02 (Page 1976); South Dakota, S.D. Codified Laws Ann. §§ 1-19B-20 to -31 (1980); West Virginia, W. Va. Code § 8-26A (1976).

14. Spot zoning has been defined as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area. . . ." 1 R. ANDERSON, *supra* note 3, at § 5.08, *citing*, Burkett v. Texarkana, 500 S.W.2d (Tex. Civ. App. 1973). It is impermissible because it differentially classifies a small parcel in a manner inconsistent with the comprehensive plan and is, therefore, arbitrary and discriminatory.

15. In rejecting the spot zoning argument in *Penn Central,* the Court wrote that

> landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Penn. Central Transportation Company v. City of New York, 438 U.S. 104, 132 (1978).

16. *See* Freeman, *supra* note 4; Lord, *supra* note 4, at 33.

17. *See* READINGS IN HISTORIC PRESERVATION—WHY? WHAT? HOW?, *supra* note 2 at 233; T. COUGHLIN, *supra* note 4, at 2; Wilson & Winkler, *The Response of State Legislation to Historic Preservation,* 36 LAW & CONTEMP. PROB. 329, 339 (1971) (all expressing reservations about viability of general policy which encourages conversion of numerous historic properties to museums).

> Museums and museum towns like Williamsburg, Virginia, are not, except in unusual cases, a desirable way to carry out preservation. Such arrangements are expensive, and create an artificial atmosphere. At best, they can only preserve a small part of the building stock which needs preservation.

READINGS IN HISTORIC PRESERVATION—WHY? WHAT? HOW?, *supra* note 2, at 233.

> For all but the most exceptional properties, continued ownership by concerned individuals or private organizations is essential to their preservation. Only the most

These political and economic constraints on government action motivate preservationists to continue to search for innovative techniques. With increased private interest in investment,[18] some commentators stress that historic preservation can be encouraged through adaptive reuse of older buildings.[19] This technique requires maintenance of significant original qualities while permitting newer, alternative uses of the structure. Using this principle, one type of private sector initiative involves utilizing voluntary private agreements such as easements. Coercive and expensive[20] governmental power is, therefore, unnecessary. Moreover, a private right of redress exists if the agreement is broken. As one writer emphasized, "[t]his binding, contractual, partial ownership justifies and necessarily leads to a more personal and direct enforcement program."[21]

The prospect of harnessing private initiative through individual agreement thus is encouraging. It neither robs the land of its economic benefit nor allows destruction of its aesthetic quality. Yet, barriers to implementation of private preservation efforts exist because of certain constraints on the creation of easements. This article considers supplemental private preservation techniques, focusing on the Uniform Conservation Easement Act[22] (UCEA) as a useful tool for simplifying private initiatives. The article presents the UCEA as an aid to historic preservation allowing voluntary, private

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significant properties, fully and accurately furnished, and amply endowed to defray projected costs for maintenance, capital improvements, collections management and staffing can be considered for museum use.

T. Coughlin, *supra* note 4, at 2.

18. For a discussion of revolving funds, an alternative method for financing historic preservation, *see* A. ZIEGLER, L. ADLER & W. KIDNEY, REVOLVING FUNDS FOR HISTORIC PRESERVATION: A MANUAL OF PRACTICE (1975); Howard, *Revolving Funds: In the Vanguard of the Preservation Movement,* 11 N.C. CENT. L. J. 256 (1980); *Revolving Fund Uses Federal Preservation Dollars,* PRESERVATION NEWS, May 1976, at 7, col. 1.

19. Adaptive reuse is an increasingly popular device and has been discussed extensively. *See generally,* READINGS IN HISTORIC PRESERVATION—WHY? WHAT? HOW?, *supra* note 2, at 233-272; A. ZIEGLER, HISTORIC PRESERVATION IN INNER CITY AREAS (1974); Tondro, *An Historic Preservation Approach to Municipal Rehabilitation of Older Neighborhoods,* 8 CONN. L. REV. 248 (1976); Ziegler, *Large-Scale Adaptive Use: Preservation Revitalizes Old Buildings—And New Ones Too,* 11 N.C. CENT. L.J. 234 (1980).

20. Acquisition of a partial interest generally is less expensive than outright purchase. The value of a facade easement has been estimated as ten percent of full value. Lord, *supra* note 4. Valuation of partial interests is discussed in T. COUGHLIN, *supra* note 4, at 8-11.

It has been suggested, however, that purchase of partial interests is not always less expensive. Government purchases of scenic easements in conjunction with the Blue Ridge Parkway and Natchez Trace Parkway were perhaps as costly as it would have been to make outright purchases. National Park Service, *Scenic Easements and their Tax Consequences,* in NATIONAL TRUST FOR HISTORIC PRESERVATION, *supra* note 3, at 147; Coughlin (1983), *supra* note 3; Coughlin (1982), *supra* note 3.

21. Lord, *supra* note 4.

22. Unif. Conservation Easement Act, 12 U.L.A. 55 (Supp. 1985) [hereinafter cited as UCEA]. Several jurisdictions have adopted the UCEA. *See* ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1983); NEV. REV. STAT. § 111.390 (1983); Ore. Rev. Stat.. §§ 271.715-271.795 (1985); WISC. STAT. ANN. § 700.40 (West Supp. 1982).

transfers while minimizing legal complexities. In order to understand the UCEA, however, it is advantageous first to highlight the myriad uses of private agreements and extant impediments to their employment.

## I. USING PRIVATE PRESERVATION TECHNIQUES

In furtherance of a private preservation program, a land owner typically agrees to retain historic aspects of a property in exchange for compensation, tax benefits or other consideration. When a structure remains usable for modern purposes, the devaluation from the restriction may be minimal.[23] Private agreements for land management are neither new nor unusual; application to historic preservation is merely a variation of programs designed to conserve open space first developed in the nineteenth century.[24] As with conservation, the predominant function for historic preservation is to reduce development potential where it threatens the historic character of a significant property. With a private easement plan, the grantor may obtain an economic remuneration or tax benefit in lieu of traditional development rights.

For instance, a local historic organization may pay the owner to control a property's future in order to conserve its historic significance. Rather than transferring full title, an easement is granted, and the easement is limited to the grantor's duty to maintain the historic aspects of the property. In short, the owner retains a power to use the property in any manner consistent with preservation. Thus, instead of expending large sums in outright acquisitions, less money is required to purchase historic preservation easements. By agreement, the landowner retains the right to utilize the property for modern purposes while receiving financial compensation for limiting development to those uses consistent with the historic easement.

The variety of extant preservation efforts attests to the flexibility of the concept. Protection of the exterior of a structure in order to maintain architectural features is most common,[25] but in some instances, the interior

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23. *See supra* note 19 and accompanying text (discussing adaptive reuse).

24. W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 11 (1959). In his seminal work on conserving open-space, William Whyte traces early use of conservation easements to the 1890's in Boston, Massachusetts. *Id.*

25. A typical facade easement is held by the National Trust for Historic Preservation relating to Reynolds Tavern in Annapolis, Maryland. It provides, in part,

> [w]ithout the express written permission of the Grantee signed by its duly authorized representative, no construction, alteration or remodeling or any other thing shall be undertaken or permitted to be undertaken on the subject premises which would affect . . . the exterior (including, without limitation, the roofs and chimneys) or any building or other improvement located thereon, . . . provided, however, that the reconstruction, repair, repainting or refinishing of presently existing parts or elements of the lot and improvements, damage to which has resulted from casualty loss, deterioration, or wear and tear, shall be permitted, provided . . . [it] would not alter the appearance of the lot or improvements as they are as of this date. . . . In all events, the Grantor, in painting the exterior of any building or improvements on the premises, agrees to obtain the prior written consent of Grantee. . . .

Deed of Easement, *reprinted in* 3 R. BRENNEMAN, *supra* note 4, at D-51.

is the preservation subject.[26] Land adjacent to historic structures might also be involved. Piscataway Park, Maryland, includes easements on 1,215 acres and is designed to enhance and protect the view from Mt. Vernon on the adjacent Virginia shore.[27] Another example is in Louisa County, Virginia, where the rural atmosphere is protected by easements covering 7,000 acres.[28] An interesting adaptation of this approach found in New York City and other locations allows sale of development rights represented in the vacant air space above low-rise buildings.[29] This innovation has come about through cooperation between government and the private sector. In order to preserve the character of an area which could be lost with new high rise structures, local government allows the transfer of development rights. It designates receiving areas where increased density and height are allowed and permits those property owners to purchase a construction power from owners in the low-rise district. Accordingly, new construction is limited in a low-rise area while property owners realize the economic value that would have attended high-rise development.

Clearly, the hallmark of any successful preservation program is innovation through artistic and managerial creativity. To require in all settings only the choices of museum status or foregoing preservation is unnecessary and unwise. Nevertheless, under many existing statutes these are the only available options because of the confluence of limited preservation funds and archaic legal doctrine. An active private easement program presents a viable solution because less money is required and more properties may be preserved. Because funding requirements are lower, more and smaller groups of preservationists may become active. Yet, many jurisdictions inhibit the use of easements.[30] Unless traditional legal concepts are carefully adapted to meet current problems, historic resources are imperiled. These doctrinal impediments and modern modifications including the UCEA will be reviewed.

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26. *See id.* at D-50. The alteration limitation on a three hundred year old building in Ipswitch, Massachusetts, stipulates that permission must be obtained to alter:

> [t]he central frame including primary and secondary members; the feather edged paneling in the first floor right front room of the original 1690 building; the wooden architectural elements including if any, paneling, mantlepieces, doors and other molded detail on the inner walls of the two second story bedrooms of the original 1690 dwelling.

*Id.* at D-50.

27. 1 R. BRENNEMAN, *supra* note 4, at 37; 3 R. BRENNEMAN, *supra* note 4, at D-31 (setting forth specific restrictions encumbering Piscataway Park).

28. *See* Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (1980) (discussing Louisa County, Va., easement program).

29. *See* Penn Central Transportation v. New York City, 438 U.S. 104, 113-14 (1978) (discussing transferable development rights). *See also* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks,* 85 HARV. L. REV. 574 (1972); Marcus, *Air Rights Transfers in New York City,* 36 LAW & CONTEMP. PROB. 372.

30. *See infra* notes 36-65 and accompanying text (discussing traditional doctrinal limitations on real covenants, equitable servitudes, and easements).

## II. Common Law Requirements and Limitations

In order to defray the enormous acquisition and maintenance costs required for museums, innovative preservationists seek less expensive methods. Adaptive reuse with control over significant design features is ideal if an enforceable, long-term program is possible. A similar problem with acquiring open space can be solved where compatible uses such as farming are maintained. Private agreements to meet these goals potentially could be implemented through common law property concepts such as real covenants and easements. Traditional burdens limit the usefulness of these doctrines, however.

In pre-industrial England, land was the major incident of wealth and its transferability was an important aspect of early commerce.[31] Practices which hampered the marketability of land were discouraged. Since easements and real covenants are held by third parties, and at that time, there was no land title registry,[32] their existence was difficult to ascertain. Characterized by one judge as "novel incidents,"[33] creation of covenants and easements was severely limited by impediments designed to curtail any long term effect.[34] Although every state has some form of land registration system,[35] development of these common law limitations concerning covenants and easements is significant since many tenets have survived. Adaptation of the concepts of covenants and easements is important to preservationists because under these arrangements, private ownership of the fee interest continues, and, at the same time, historic aspects are protected. Unless agreements such as covenants and easements can bind subsequent owners, the only remaining alternative is expensive outright purchase of historic property.

### *A. Real Covenants and Equitable Servitudes*

A covenant is a promise which may give rise to a contractual obligation.[36] If the agreement pertains to the use of land and certain requirements are

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31. *See generally* J. Baker, An Introduction to English Legal History 120 (1971).

32. *See* D. Hayton, Registered Land (2d ed. 1977); C. Kolbert & N. MacKay, History of Scots and English Land Law 279-95 (1977) (discussing history of English land registration).

33. *See* Keppell v. Bailey, 2 Myl. & K. 517, 39 Eng. Rep. 1042 (Ch. 1834). Speaking against non-possessory interests, one English judge said, "it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner." *Id.*

34. *See generally* 2 American Law of Property § 9.14 (A. Casner ed. 1952); Browder, *Running Covenants and Public Policy,* 77 Mich. L. Rev. 12, 14-19 (1978); Netherton (1979), *supra* note 4, at 543-45. Modern concern about marketability is reflected in the Restatement of Property. Restatement of Property §§ 537 comment (a), 543 comment (a) (1944) [hereinafter cited as Restatement].

35. R. Kratovil & R. Werner, Real Estate Law 83 (8th ed. 1983); G. Pindar, American Real Estate Law § 19-114 (1976).

36. *See generally* 2 American Law of Property, *supra* note 34, at § 9.8; 7 G. Thompson, Commentaries on the Modern Law of Real Property § 3150 (1962).

fulfilled, it also may affect successive property owners. This is a crucial factor for historic preservation because the primary purpose is long range protection. In order for a real covenant to run with the land[37] and bind subsequent owners, several elements are indispensable: a written agreement[38] evidencing an intention that the real covenant shall run to subsequent owners must exist,[39] the covenant must touch and concern the land,[40] and privity of estate is required.[41] Unless each element is present, traditionally enforcement is refused.[42]

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37. Covenants which run with the land and, therefore, bind successive owners are to be differentiated from personal covenants which bind only the original parties to the agreement. 7 G. THOMPSON, *supra* note 36, at § 3151. One example of a personal covenant is a clause requiring a mortgagor to insure premises for the benefit of the mortgagee. Tremont Savings & Loan Assn. v. Aetna Casualty & Surety Co., 41 A.D.2d 633, 340 NYS2d 732 (1973). *See generally* C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND (2d ed. 1947).

38. A real covenant does not create an interest in land in the way an easement does. 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.8. However, for purposes of the Statute of Frauds, the RESTATEMENT OF PROPERTY and many jurisdictions treat a real covenant as an interest which must be in writing. *See generally* 5 R. Powell & P. Rohan, POWELL ON REAL PROPERTY 671 NN.9, 10 (1981); Restatement, *supra* note 34, at § 522. For example, an oral promise was held unenforceable as a real covenant in *City of Tucson v. Superior Court of Pima County,* 116 Ariz. App. 322, 569 P.2d 264, 266 (1977).

39. *See, e.g,* Brendonwood Common v. Franklin, 403 N.E.2d 1136, 1141 (Ind. App. 1980) (explicit deed language showed that parties intended to bind subsequent owners); Huff v. Duncan, 263 Ore. 408, 502 P.2d 584, 586 (1972) (same); Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W.2d 67, 73 (1974) (subject of covenant demonstrated intent of parties to bind subsequent owners). *See generally* 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.10; 5 R. POWELL & P. ROHAN, *supra* note 38, at 673[2][B].

40. A covenant involves both a benefit and a burden. The touch and concern requirement is satisfied where the value of the benefited land is enhanced and the value of the burdened land is diminished. C. CLARK, *supra* note 37, at 97. *See, e.g.,* Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W.2d 67, 74 (1974) (covenant for road maintenance); Huff v. Duncan, 263 Ore. 408, 502 P.2d 584, 585 (1972) (building restrictions). *See generally* 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.13; 5 R. POWELL & P. ROHAN, *supra* note 38, at 673[2][A].

41. Privity of estate is a troublesome concept from the historical perspective. The seminal statement of the requirements for a covenant to run, found in *Spencer's Case,* 5 Coke 16a, 77 Eng. Rep. 72 (Q.B. 1583), failed to specify the nature of the required privity. Two hundred years later the dispute was settled by dicta in *Webb v. Russel,* 100 Eng. Rep. 639 (KB 1789), which stated there must be privity of estate between the covenantor and covenantee. In transfers between fee owners, this requirement is satisfied by horizontal or mutual privity. *See, e.g.,* Carlson v. Libby, 137 Conn. 362, 77 A.2d 332, 335 (1950); Leighton v. Leonard, 22 Wash. App. 136, 589 P.2d 279, 281 (1979). For discussion of the conflicting views of privity of estate, *see* 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at §§ 9.11, 9.15; C. Clark, *supra* note 37, at 116-37; 5 R. POWELL & P. ROHAN, *supra* note 38, at 673[2][c]; 7 G. Thompson, *supra* note 36, at § 3155.

42. *Spencer's Case,* 5 Coke 16a, 77 Eng. Rep. 72 (Q.B. 1583), is the landmark English case which set forth some of the requirements for enforcement of a real covenant. *See* 7 G. THOMPSON, *supra* note 36, at §§ 3151, 3155. The requirements have been refined into those presently mandated. 5 R. POWELL & P. ROHAN, *supra* note 38, at 673[1]. *See infra* notes 31-34 and accompanying text for a discussion of the historical setting for the development of these limitations.

A particular complication arises when the covenant is held in gross and does not pertain to a dominant tenement retained by the owner of the personal covenant.[43] An example occurs when a preservation group conveys a property to a third party with a deed containing an agreement to maintain an historic facade. Since the preservation group retains no real property benefitted by the facade agreement, it is a covenant in gross, i.e., no dominant tenement exists. Many courts refuse to enforce such a covenant against subsequent owners of the burdened land since the benefit in gross actually does not touch and concern property. This same factor prevents the assignment of an otherwise valid covenant to a third party such as a preservation group.[44] So, these very typical arrangements fail to meet traditional requirements necessary to ensure long term enforcement.

Even though real covenants might be useful for historic preservation where fee ownership is transferred with real covenants either preserving significant aspects of the property, requiring maintenance, or excluding incompatible uses,[45] their utility is questionable. Preservationists often lack sufficient funds to acquire the fee title initially[46] and, therefore, are unable to create the real covenants themselves. In addition, enforcement of a real covenant is an action at law for which the usual remedy is damages.[47] However, if a covenant protecting an historic facade is breached, the desired remedy would be an injunction in equity rather than a money judgment. Due to these limitations, real covenants do not provide a dependable preservation mechanism.

The unenforceability against successive owners of land bearing a real covenant that failed to meet technical requirements seemed a harsh result if

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43. *See* C. CLARK, *supra* note 37, at 4.

> The individual who has the right, privilege, or power . . . has the benefit; the one who has the duty, no-right, or liability has the burden. When the benefit is to be exercised for a particular parcel of land, it is appurtenant to and passes with such land; when it is personal to a named person, it is said to be in gross.

*Id.*

44. 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.13 & n.10. *See also* Netherton (1979), *supra* note 4, at 550; RESTATEMENT, *supra* note 34, at §§ 534, 537.

45. In cases not directly related to historic preservation, the following real covenants have been allowed: Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974) (covenant restricting age of residents in trailer park); Inhabitants of Middlefield v. Church Mills Knitting Co., 160 Mass. 267, 35 N.E. 780 (1894) (bridge maintenance); Malcolm v. Shamie, 95 Mich. App. 132, 290 N.W.2d 101 (1980) (single-family covenant aimed at exclusion of group residence for mentally retarded adults); Chesapeake & Ohio Ry. Co. v. Willis, 200 Va. 299, 105 S.E.2d 833 (1958) (fence construction and maintenance).

46. *See infra* notes 16-18 and accompanying text.

47. *See generally* 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.8. In some instances, a court might view the agreement as creating a "property interest in the nature of an equitable servitude: and grant an injunction. *Id.* at §§ 9.8, 9.24. *See also* RESTATEMENT, *supra* note 34, at § 528. Or, the agreement may be construed as a contract for which money damages are an inadequate remedy. 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.24. Many American courts adopt the former view when granting such an injunction. *Id.;* C. CLARK, *supra* note 37, at 180.

the successive owners had advance knowledge of its existence. Courts came to recognize this unfairness and developed the doctrine of equitable servitudes in the nineteenth century.[48] Privity was not demanded. Equity courts enforced these agreements against later owners who actually knew of the limitation since injustice otherwise would result.[49] Because the claim was raised in equity, an injunction was an appropriate remedy.[50] This factor remains significant for preservation programs.

Still, an important limitation exists since many courts apply the requirement that in order to run to subsequent owners of the burdened land, the benefit must touch and concern land owned by the holder of the benefit.[51] A preservation group possessing a benefit in gross fails to meet this test if it owns no other land so enforcement is unlikely. Equitable servitudes in gross also are not assignable to third parties.[52] Simply stated, neither real covenants nor equitable servitudes are consistently useful preservation tools.

### *B. Easements*

An older and more broadly employed concept is the easement which is a limited property ownership interest in another's land.[53] It guarantees to the

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48. *Hills v. Miller,* 3 Paige 254 (N.Y. Ch. 1832), reportedly is the first American decision adopting the doctrine of equitable servitudes. In *Traficante v. Pope,* 115 N.H. 356, 341 A.2d 782 (1975), the Court stated the modern American view of equitable servitudes.

> Even though a promise is unenforceable as a covenant at law because of failure to meet one of the requirements, the promise may be enforced as an equitable servitude against the promisor or a subsequent taker who acquired the land with notice of the restrictions on it. The rationale for enforcing promises restricting the use of land as equitable servitudes is that 'he who takes land with notice of a restriction upon it will not in equity and good conscience be permitted to act in violation of the terms of these restrictions.'

*Id.* at 784 (citations omitted). In England, the doctrine arose in *Tulk v. Moxhay,* 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848), which is discussed in 5 R. POWELL & P. ROHAN, *supra* note 38, at 670[2], 673[2][d].

49. Traficante v. Pope, 115 N.H. 356, 341 A.2d 782, 784 (1975); R. BOYER, SURVEY OF THE LAW OF PROPERTY 540 (3d ed. 1981).

50. The majority of American courts view an equitable servitude as a property interest which gives the owner rights *in rem* making available injunctive relief. There is some authority that the interest is a contract right for which specific performance is available. This is the less popular view, 2 AMERICAN LAW OF PROPERTY, *supra* note 34, at § 9.24.

51. *Id.* at § 9.32.

52. *Id.*

53. The RESTATEMENT OF PROPERTY sets forth the following definition.

> An easement is an interest in land in the possession of another which
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> (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
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> (b) entitles him to protection as against third persons from interference in such use or 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 creation by conveyance.

holder specified rights in the servient property.[54] Easements are subcategorized on various dimensions. One classification depends upon the effect on the burdened land. An affirmative easement allows entrance or utilization.[55] For example, rights-of-way permit the holder to cross the servient land.[56] A negative easement, by contrast, assures to the holder the right to prevent the burdened property from being used in specified ways.[57] Building restrictions are a common example.[58]

Another division depends on whether the guaranteed right pertains to a dominant parcel rather than to the holder personally. If the easement confers a benefit associated with property owned by the holder, it is an easement appurtenant.[59] For example, provisions for ingress and egress over the servient land enabling the holder to reach the dominant parcel constitute an easement appurtenant.[60] Some easements grant rights in the burdened property but not in relation to other land owned by the holder. They merely are personal and are called easements in gross.[61] Representative of this concept are use rights such as hunting or boating not associated with the holder's property but only with personal desires.[62] A further delineation of easements in gross occurs if removal of soil, timber or similar items is permitted. Such an easement is characterized as in gross with a profit.[63] Since easements in gross

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RESTATEMENT, *supra* note 34, at § 450. For a slightly different definition, *see* 7 G. THOMPSON, *supra* note 36, at § 3183.

Easements may be created in a written instrument, or by implication, necessity or prescription. 3 R. POWELL & P. ROHAN, *supra* note 38, at §§ 415, 416. This article deals only with express easements.

54. *See, e.g.*, Etz v. Mamerow, 72 Ariz. 228, 233 P.2d 442 (1951); Clements v. Sannuti, 356 Pa. 63, 51 A.2d 697 (1947).

55. RESTATEMENT, *supra* note 34, at § 451.

56. *E.g.*, White v. New York & N.E.R. Co., 156 Mass. 181, 30 N.E. 612 (1892) (right-of-way over railroad bed). *See also* Shrull v. Rapasardi, 33 Colo. App. 148, 517 P.2d 860 (1973) (drainage ditch); Putnam v. Dickinson, 142 N.W.2d 111 (N.D. 1966) (right to use land as a private park).

57. RESTATEMENT, *supra* note 34, at § 452.

58. *E.g.*, Ham v. Massasoit Real Estate Co., 41 R.I. 293, 107 A. 205 (1919) (cost and location of structures); Hennen v. Deveney, 71 W. Va. 629, 77 S.E. 142 (1913) (ten foot wide strip where all building prohibited). *See also* Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (prohibition of liquor sales).

59. RESTATEMENT, *supra* note 34, at § 453.

60. *E.g.*, White v. New York & N.E.R. Co., 156 Mass. 181, 30 N.E. 612 (1892) (right of way over railroad bed to connect two parcels owned by the holder). *See also* Shrull v. Rapasardi, 33 Colo. App. 148, 517 P.2d 860 (1973) (drainage ditch to benefit holder's property); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (prohibition of liquor sales for benefit of other lands owned by holder).

61. RESTATEMENT, *supra* note 34, at § 454.

62. *E.g.*, Williams v. Diederich, 359 Mo. 683, 223 S.W.2d 402 (1949). *See also* Willoughby v. Lawrence, 116 Ill. 11, 4 N.E. 356 (1886) (right-of-way in holder not benefiting other land).

Courts do not favor construction of interests in gross; rather, courts construe easements as appurtenant if possible. Todd v. Nobach, 368 Mich. 544, 118 N.W.2d 402, 405 (1962) ("to personally have the privilege of ingress and egress" construed to create easement appurtenant).

63. *E.g.*, Stockdale v. Yerden, 220 Mich. 444, 190 N.W. 225 (1922) (removal of timber). *See generally* 3 R. POWELL & P. ROHAN, *supra* note 38, at 405.

are rights personal to the holder, some older doctrine disallows assignment and alienation, especially where the easement is not coupled with a profit.[64]

Easement classification is relevant to historic preservation because traditional precepts permeate modern practices. Since preservation easement holders frequently do not own benefitted land, and the purpose of the easement is to curtail future alteration and development of the burdened property, most preservation easements are negative, in gross and without a profit. Due to the negative aspect of preservation easements, the burden upon the servient estate is more characteristic of an individual duty not to disturb the land's historic significance. Because the easement is in gross, the benefit and the right to enforce the easement run only to an individual organization. Thus, a negative easement in gross without a profit is an interest held by a third party which can curtail future land development. Unfortunately, such interests traditionally are not assignable or alienable[65] since the older common law viewpoint contends that individual rights remain personal and cannot be part of the title. Easements must be tied to another parcel in order to run to subsequent owners, once again requiring ownership of another piece of land for enforcement.

If historic preservation is to be effective, conservation interests must be obtainable at the lowest possible cost. Requiring ownership of appurtenant real property is an expense that unduly strains scarce resources. Since neither easements, real covenants nor equitable servitudes promote widespread preservation, some modern statutes attempt to rectify these traditional limitations and facilitate creation of long term preservation interests. After discussing these efforts, the article reviews the standardized approach offered by the UCEA.

## III. Modern Modifications of the Common Law

Shifting land use requirements highlighted common law limitations on the use of real covenants, equitable servitudes and easements. As society became more complex and demands upon land resources increased, arguments arose in favor of various modifications of the common law rules.[66]

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64. *See* 3 R. Powell & P. Rohan, *supra* note 38, at 405, 419. Commentators have noted a modern though not universal trend allowing assignability. *Id.*

65. *Id.*

66. *See* R. Powell & P. Rohan, *supra* note 38, at 404[2] (citation omitted).

> Over the past several decades, much of the opinion writing in the area of easements has concerned the topics of interpretation of written instruments; the number of persons entitled to the benefit of an existing easement (particularly where the dominant property is later subdivided and intensely developed); prescriptive rights; obstruction and termination of easements. To this extent, the case law has been marking time, in that the same topics have been litigated for generations. In the coming decades, however, substantial legal questions remain to be answered and new techniques fashioned. The arrival of condominium, and the expanded use of 'air rights' to salvage valuable space over railroads and other unusable urban sites, will necessitate further refinements. The coming of age of cluster housing developments,

Both legislatures and the courts have been involved in implementing these changes. Of great significance to preservationists is the increasing acceptance of non-possessory interests in real property.

*United States v. Albrecht*[67] upheld a recorded easement in gross in favor of the United States for the preservation of waterfowl production areas. Even though under state law easements in gross were not binding on successors, the easement was sustained as necessary to effectuate national public policy. More commonly, statutory modifications have been employed. For example, a number of state legislatures have eliminated common law restrictions on interests in gross.[68] The first state to do so was Massachusetts, which adopted the Massachusetts Conservation and Preservation Statute[69] in 1969. For qualified interests,[70] the statute eliminated both the requirements

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with their maximization of open lands, as well as the condemnation of scenic easements by public authorities, will also prove a fertile source of new approaches. Esthetic considerations will certainly move to the forefront. Finally, questions concerning easements by implication and necessity will continue to challenge the ingenuity of the judiciary, as an attempt is made to achieve sensible land use within the confines of not overly flexible rules of traditional property law. In summary, it may be anticipated that the next decade will witness long overdue progress in the field of easements, perhaps by way of federal, state, and local legislation.

*Id.* The RESTATEMENT OF PROPERTY takes a different view.

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

RESTATEMENT, *supra* note 34, at § 537 comment a (1944).

67. 364 F. Supp. 1349 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).

68. *E.g.*, California, CAL. GOV'T CODE § 50281(5) (Deering 1974); Colorado, COLO. REV. STAT. §§ 38-30.5.101 to -110 (1982); Connecticut, CONN. GEN. STAT. ANN. § 47-42b (West 1978); Delaware, DEL. CODE ANN. tit. 7 § 6811 (Supp. 1980); Florida, FLA. STAT. ANN. § 704.06 (West Supp. 1982); Georgia, GA. CODE ANN. §§ 44-10-1 to -5 (1982); Illinois, ILL. ANN. STAT. ch. 24 § 11-48.2-1A(2) (Smith-Hurd Supp. 1982); Indiana, IND. CODE § 14-4-5.5-1 (Supp. 1981); Maine, ME. REV. STAT. ANN. tit. 33 § 668 (1978); Maryland, MD. REAL PROP. CODE ANN. § 2-118 (1981); Massachusetts, MASS. ANN. LAWS ch. 184 § 30 (Michie/Law. Co-op. 1977); Minnesota, MINN. STAT. § 84.65 (1977); Montana, MONT. CODE ANN. §§ 76-2-205, 209 & 210(2) (1981); New Hampshire, N.H. REV. STAT. ANN. § 477.46 (Supp. 1979); New York, N.Y. GEN. MUN. LAW § 247(4) (McKinney Supp. 1981); Rhode Island, R.I. GEN. LAWS § 34-39-3 (Supp. 1982); South Carolina, S.C. CODE ANN. § 27-9-10, -20 (1977).

69. MASS. ANN. LAWS ch. 184, §§ 31-33 (Michie/Law. Co-op. 1977 & Supp. 1982).

70. *See id.* at § 31. Massachusetts provides, in part,

> [a] preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to preservation of a structure or site historically significant for its architecture, archaeology or associations, to forbid or limit any or all (a) alterations in exterior or interior features of the structure, (b) changes in appearance or condition of the site, (c) uses not historically appropriate, (d) field investigation, as defined in section twenty-six A of chapter nine, without a permit as provided by section twenty-

of privity of estate and appurtenant land[71] and further allowed assignment where the assignee meets certain statutory criteria.[72]

In some instances, conveyancing and recording procedures also have been modified. Massachusetts[73] and Montana[74] provide separate sets of records for conservation and preservation interests which effectively supply notice to future purchasers. Several states require pertinent documents to be filed in multiple offices. For instance, Georgia mandates dedication as a heritage preserve to be filed with the Secretary of State and in the local clerk's office of the superior court if the property is accepted by the Heritage Trust program after recommendation of the board and approval of the Governor.[75] These recording procedures indicate interest in resolving the notice problems created by easements. While these changes are significant, multiformity of approach may lead to immense confusion as each state selects its own unique approach to modify the common law.

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seven C of said chapter, or (e) other acts or uses detrimental to appropriate preservation of the structure or site.

*Id.* Conservation restrictions and agricultural preservation restrictions are separately defined. *Id.*

71. *Id.* at § 32.

72. *Id.*

73. *Id.* at § 33. Massachusetts further provides

[a]ny city or town may file with the register of deeds for the county or district in which it is situated a map or set of maps of the city or town, to be known as the public restriction tract index, on which may be indexed conservation, preservation and agricultural preservation restrictions and restrictions held by any governmental body. Such indexing shall indicate sufficiently for identification (a) the land subject to the restriction, (b) the name of the holder of the restriction, and (c) the place of record in the public records of the instrument imposing the restriction.

. . . .

Whenever any instrument of acquisition of a restriction or order or other appropriate evidence entitled to be indexed in a public restriction tract index is submitted for such indexing, the register shall make, or require the holder of the right to enforce the restriction or order or interest to make, appropriate additions to the tract index, and such addition shall, as to any restriction or order or other appropriate evidence previously recorded entitled to be indexed, be likewise made on request of the holder of the right to enforce it.

*Id.*

74. *See* MONT. CODE ANN. § 76-6-207 (1981). Montana provides

(1) [a]ll conservation easements shall be duly recorded in the county where the land lies so as to effect their titles in the manner of other conveyances of interest in land and shall describe the land subject to said conservation easement by adequate legal description or by reference to a recorded plat showing its boundaries.

(2) The county clerk and recorder shall upon recording cause a copy of the conservation easement to be placed in a separate file within the office of the county clerk and recorder and shall cause a copy of the conservation easement to be mailed to the department of revenue.

*Id.*

75. *See* GA. CODE ANN. § 12-3-75 (1982). Georgia provides:

[a] heritage area which has been acquired by the Department of Natural Resources for the Heritage Trust Program may be dedicated as a heritage preserve after written

## IV. THE UNIFORM CONSERVATION EASEMENT ACT

In reaction to the traditional limitations and diverse state responses,[76] in 1981, the National Conference of Commissioners on Uniform State Laws drafted the UCEA.[77] Four states, Arkansas,[78] Nevada,[79] Oregon,[80] and Wisconsin[81] have adopted the proposal. It was designed to maximize "the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and [to allow] similar latitude to impose affirmative duties for the same purposes."[82] The Act's requirements are viewed in light of current interest in alternative preservation techniques.

The UCEA was aimed at fostering the creation and viability of non-possessory property interests for preservation purposes. As indicated previously, courts historically looked with disfavor on such property interests. The passage of time and the industrialization of society brought diversity in the sources of wealth. No longer was commerce solely dependent on land, nor did non-possessory interests necessarily hinder marketability. Moreover, the prevalence of land recording systems alleviated concern about the ability of prospective purchasers to verify the existence of non-possessory interests.[83] Upon reflection, historic disfavor no longer was justifiable, however, hundreds of years of property theory required modification.

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recommendation of the board and approval by the Governor. Any other real property owned by the State of Georgia and under the custody of the department may be similarly dedicated. The written recommendation shall contain a provision which designates the best and most important use or uses to which the land is to be put. The dedication as a heritage preserve shall become effective when the written recommendation and the approval of the Governor are filed with the office of the Secretary of State. The written recommendation and the approval of the governor shall be filed in the office of the clerk of the superior court of the county or counties in which the heritage preserve is located.

*Id.* Recordable facade and conservation easements are filed in the office of the clerk of the superior court of the appropriate county. *Id.* at § 44-10-5.

In Montana, copies of easements are filed with the county clerk and the Department of Revenue. MONT. CODE ANN. § 76-6-207 (1981).

76. *See* Netherton, *supra* note 4, at 62-65. Numerous states have adopted statutes which alter common law doctrines and aid in creating non-possessory interests for conservation and preservation purposes. *Id.* A comparison of statues of Massachusetts, Connecticut, New Hampshire and Maryland is found in Brenneman, *supra* note 4.

77. UCEA, *supra* note 22.

78. ARK. STAT. ANN. §§ 50-1201 to 1206 (Supp. 1983) (provisions substantially similar to the UCEA).

79. NEV. REV. STAT. § 111.390-440 (1983) (provisions substantially similar to the UCEA).

80. 1983 Or. Laws vol. 2 ch. 642 (provisions substantially similar to the UCEA).

81. WISC. STAT. ANN. § 700.40 (West Supp. 1982) (provisions substantially similar to the UCEA).

82. UCEA, *supra* note 22 (Commissioners' prefatory note).

83. *See* Netherton, *supra* note 4, at 59-60. In the United States, land title recording systems were instituted in the mid-nineteenth century. Sophisticated techniques currently exist for careful searching of these records. *Id.*

Because courts have disfavored non-possessory rights, little law exists to govern the valid use of these interests. The Commissioners first dealt with five aspects of the creation of valid conservation easements: definition, qualified holders, acceptance, duration and modification. Since interests properly created under the UCEA would be valid, enforcement also is covered by the UCEA. Finally, the UCEA removes common law impediments to the use of non-possessory property interests.

### *A. Creation*

The easement[84] concept was selected by the Commissioners as the appropriate tool to simplify effectuation of private agreements. In so doing, the Commissioners rejected adaptation of common law requirements associated with real covenants and equitable servitudes.[85] Additionally, the Commissioners eliminated the development of a new and distinct property concept.[86] Several reasons support the choice of the easement concept. A new interest simply adds additional methodology to property law which already is overly complex. As the oldest non-possessory interest still in common usage, easements are well understood, whereas real covenants and equitable servitudes originally developed in response to limitations on easements occasioned by the lack of a recording system for land ownership.[87]

Interest in conservation and preservation must be weighed against the demands of an administratively feasible program. The Commissioners struck this balance by imposing requirements for the creation and enforcement of valid conservation and preservation easements. As defined in the UCEA, the new easement concept is:

> a non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[88]

Several states[89] also use this approach characterizing the property interest in relation to statutorily stated purposes. In this manner, the common law

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84. *See supra* notes 53-65 and accompanying text.

85. *See supra* notes 36-52 and accompanying text.

86. *See* Brenneman, *supra* note 4, at 247.

87. UCEA, *supra* note 22 (Commissioners' prefatory note).

88. *Id.* at § 1(1).

89. *See* R.I. GEN. LAWS § 34-39-2 (Supp. 1982). The Rhode Island statute uses this language:

> [a] "preservation restriction" shall mean a right to prohibit or require, a limitation upon, or an obligation to perform acts on or with respect to or uses of a structure of site historically significant for its architecture, archaeology or associations, whether stated in the form of a restriction, easement, covenant condition, in any deed, will

modifications discussed below are limited to specified situations, and the validity of other property interests is unaffected.

One important consideration is the determination of qualified grantees. The traditional reluctance to encourage these agreements produces legislative restraint in authorizing their modern creation. Holders under the UCEA are restricted either to a governmental body so empowered or a charitable institution meeting statutory criteria.[90] This is a common approach used in

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or other instrument executed by or on behalf of the owner of the structure or site or in any order of taking, which right, limitation or obligation is appropriate to the preservation or restoration of such structure or site.

*Id.* The statutory definition of conservation easement uses similar language. *Id.* Other examples include Colorado,

'[c]onservation easement in gross,' for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area or airspace above the land or water owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, recreational, forest, or other use or condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.

COLO. REV. STAT. § 38-30.5-102 (1982); Connecticut,

'[p]reservation restriction' means a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, 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 whose purpose is to preserve historically significant structures or sites.

CONN. GEN. STAT. ANN. § 47-42a(b) (West 1978); Georgia,

'[f]acade easement' means any restriction or limitation on the use of real property which is expressly recited in any deed or other instrument of grant of conveyance executed by or on behalf of the owner of real property and whose purpose is to preserve historically or architecturally significant structures or sites located within an officially designated historic district pursuant to any local political subdivision's authority to provide for such districts and to provide for special zoning restrictions therein.

GA. CODE ANN. § 44-10-2(3) (1982); Idaho, "historic easement means any easement restriction, covenant or condition running with the land, designated to preserve, maintain or enhance all or part of the existing state of places of historical, architectural, archeological or cultural significance," IDAHO CODE § 67-4613 (1980); Illinois,

A preservation restriction is a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to the preservation of areas, places, buildings or structures to forbid or limit acts of demolition, alteration, use or other acts detrimental to the preservation of the areas, places, buildings or structures in accordance with the purposes of the Division.

ILL. ANN. STAT. ch. 24, § 11-48.2-1A(2) (Smith-Hurd Supp. 1982).

90. UCEA, *supra* note 22, at § 1(2). The UCEA provides:'[h]older' means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources,

several states.[91] Some other jurisdictions limit holders to governmental bodies or public corporations.[92]

Expansion of qualified holders under the UCEA to include public and certain private entities is an accommodation between wholesale allowance of private agreements and concern about abuse in their creation.[93] For example, sham transactions are curbed because of definitional limitations on qualified donees which must be met in order for a donor to take advantage of tax reductions or other government benefits.[94] Restrictions on qualified charitable donees increase the likelihood holders have the expertise necessary to select

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maintaining or enhancing air or waterquality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

*Id.*

91. *See* COLO. REV. STAT. § 338-30.5-104(2) (1982). For example, Colorado provides "[a] conservation easement in gross may only be created through a grant to a governmental entity or to a charitable organization exempt under section 501(c)(3) of the 'Internal Revenue Code of 1954,' as amended, which organization was created at least two years prior to receipt of the conservation easement." *Id.* Connecticut provides "[s]uch conservation and preservation restrictions are interests in land and may be acquired by any governmental body or any charitable corporation or trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land." CONN. GEN. STAT. ANN. § 47-42(c) (West 1978). The Delaware statute says that "[s]uch conservation and preservation easements are valuable interests in a real property and may be acquired by any governmental body or any charitable corporation or trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land." DEL. CODE ANN. tit. 7, § 6813 (Supp. 1980). In Florida, "[c]onservation easements may be acquired by any governmental body or agency or by a charitable corporation or trust whose purposes include the conservation of land or water areas or the preservation of buildings or sites of historical or cultural significance." FLA. STAT. ANN. § 704.06(3) (West Supp. 1980). Georgia's statute states "[f]acade and conservation easements are interests in land and may be acquired through express grant to any governmental body or charitable or educational corporation, trust, or organization which has the power to acquire interests in land." GA. CODE ANN. § 44-10-4 (1982). Massachusetts provides "[s]uch conservation, preservation, and agricultural preservation restrictions are interests in land and may be acquired by any governmental body or such charitable corporations or trust which have power to acquire interest in the land, in the same manner as it may acquire other interests in land." MASS. ANN. LAWS ch. 184, § 32 (Michie/Law Co-op. 1977). South Carolina says"[s]uch conservation restrictions are interests in land and may be acquired by any governmental body or the Nature Conservancy which has power to acquire interests in land, in the same manner as it may acquire other interests in land." S.C. CODE ANN. § 27-9-20 (Law Co-op 1977).

92. *E.g.*, Alabama, ALA. CODE § 41-10-137 (Supp. 1982) (public corporations known as historical preservation authorities); Idaho, IDAHO CODE § 67-4613 (1980) (any city or county); Illinois, ILL. ANN. STAT. ch. 24, § 11-48.2-3 (Smith-Hurd Supp. 1982) (all municipalities or administrative agencies thereof); IOWA CODE ANN. § 111 D.1 (West Supp. 1982) (the state conservation commission, the Iowa natural resources council, any county conservation board, and any city or agency thereof); Kentucky, KY. REV. STAT. ANN. § 65.420 (Baldwin 1979) (local legislative bodies); Pennsylvania, PA. STAT. ANN. tit. 16 § 11943 (Purdon Supp. 1982) (counties); South Dakota; S.D. CODIFIED LAWS ANN. § 1-19B-13 (1980) (any county or municipal historic preservation commission); Tennessee, TENN. CODE ANN. § 11-15-101, -102(1) (1980) (public bodies); Texas, TEX. NAT. RES. CODE ANN. § 181.054 (Vernon Supp. 1982) (Texas Conservation Foundation); West Virginia, W. VA. CODE § 20-1-7(11) (1981) (director of department of natural resources).

93. UCEA, *supra* note 22 (Commissioners' prefatory note).

94. *Id.*

appropriate projects, provide needed guidance and oversee enforcement.[95] If no requirements existed concerning the identity of the donee, donors would be free to make unwise selections. The UCEA offers a prudent balance of competing concerns.

The UCEA's creation requirements are similar to those for other easements.[96] This feature of the UCEA reflects the attempt to bring these interests under traditional easement doctrine.[97] Acceptance, duration and modification are important considerations in this regard. One unusual provision, also mandated in Delaware,[98] is the requirement of recording the acceptance of the holder.[99] Such a requirement ensures that holders have knowledge of and agree to conveyance of the easement.[100] This strict procedure is imposed due to the UCEA's deviation from common law in allowing non-traditional property interests, and it underscores the mutual agreement aspect of the easement.

In addition to acceptance, the UCEA addresses duration. The UCEA provides for unlimited length unless the parties indicate otherwise.[101] This is an area of divergence among the states. Some have used the same method as the UCEA and presume perpetuity unless stated to the contrary.[102] Others fail to mention duration and, presumably, are governed by applicable state law.[103] A third format is found in Kentucky[104] and North Carolina[105] which

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95. T. COUGHLIN, *supra* note 4, at 6.

96. *See* UCEA, *supra* note 22, at § 2(a). The UCEA provides "[e]xcept as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, otherwise altered or affected in the same manner as other easements." *Id.*

97. *Id.* (Commissioners' prefatory note).

98. DEL. CODE ANN. tit. 7 § 6814 (Supp. 1980).

99. *See* UCEA, *supra* note 22, at § 2(b). The UCEA says "[n]o right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance." *Id.*

100. *Id.* (Commissioners' comment). Explaining the reasoning underlying this provision, the Commissioners stated the following rationale.

> Conservation and preservation organizations using easement programs indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations.

*Id.*

101. *Id.* at § 2(c). The UCEA provides "[e]xcept as provided in Section 3(b), [court modification] a conservation easement is unlimited in duration unless the instrument creating it otherwise provides." *Id.*

102. *E.g.*, Colorado, COLO. REV. STAT. § 38-30.5-103(3) (1982); Florida, FLA. STAT. ANN. § 704.06(2) (Supp. 1982); Georgia, GA. CODE ANN. § 44-10-4 (1982); Iowa, IOWA CODE ANN. § 11D.2 (Supp. 1982).

103. *E.g.*, Connecticut, CONN. GEN. STAT. ANN. §§ 47-42(a)-(c) (1978); Idaho, IDAHO CODE § 67-4613 (1980); South Dakota, S.D. CODIFIED LAWS ANN. § 1-19B-13 (1980).

104. KY. REV. STAT. ANN. § 65.410 (Baldwin 1979); *id.* § 65.462 (term of not less than 30 years); *id.* § 65.474 (term may be extended subsequent to creation of easement).

105. N.C. GEN. STAT. § 121-38(c) (1981) (perpetually or for stipulated shorter periods of time).

do not presume perpetuity, so the document must state either perpetuity or a specified shorter length. In contrast, Montana[106] provides that duration must be perpetual or for a renewable term of not less than fifteen years. Tennessee[107] allows conveyance of an easement in fee simple[108] or as measured by the donor's life, the life of another or for a term of years. The UCEA offers a straightforward and realistic approach by simply presuming perpetuity yet allowing the parties to designate otherwise.

For many years non-possessory property interests have been disfavored as unduly restrictive of growth and development. To temper this restrictive potential, flexibility is necessary. While the UCEA makes no separate provision for alteration of an easement, it does allow this to be accomplished by the same method applicable to other easements.[109] The usual ways to extinguish an easement include reunification of title of the dominant and servient tenements or, in the case of an interest in gross, acquisition of the servient tenement by the holder of the benefit.[110] Release,[111] abandonment,[112] and estoppel[113] are other legal doctrines which allow termination. An equity court could consider changed circumstances as a basis to end a conservation easement.[114]

Several jurisdictions[115] employ a format similar to the alteration provision of the UCEA. In statutes not mentioning alteration, arguably, the same

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106. MONT. CODE ANN. § 76-6-202 (1981).

107. TENN. CODE ANN. §§ 11-15-102(2)(C)(i)-(iii) (1980). Tennessee also allows cancellation under limited circumstances. *Id.* at § 11-15-108.

108. *See id.* at § 11-15-102(C)(i). Use of the term "fee simple" in Tennessee's statute concerning the duration of easements is misplaced since an easement is a non-possessory interest and is but one in the "bundle of sticks" of ownership known as fee simple, a possessory interest in land. The Tennessee legislature perhaps intended the concept of perpetuity rather than fee simple.

109. UCEA, *supra* note 22, at § 2(a). "Except as other wise provided in this Act, a conservation easement may be . . . released, modified, terminated or otherwise altered or affected in the same manner as other easements." *Id.* "This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity." *Id.* at § 3(b).

110. AMERICAN LAW OF PROPERTY, *supra* note 34, at §§ 8.87-8.94; RESTATEMENT, *supra* note 34, at §§ 497, 499.

111. AMERICAN LAW OF PROPERTY, *supra* note 34, at § 8.95; RESTATEMENT, *supra* note 34, at §§ 500-503.

112. AMERICAN LAW OF PROPERTY, *supra* § 8.96-8.98.

113. *Id.* at §§ 8.99-8.101.

114. *Id.* at § 9.39.

115. *See* COLO. REV. STAT. § 38-30.5-107 (1982). Colorado provides "[c]onservation easements in gross may, in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned." *Id.* Delaware notes conservation and preservation

> easements may be released, whole or in part by the holder for such consideration, if any, as the holder may determine, in the same manner as the holder may dispose of real property or other interests in real property, subject to such conditions as may have been imposed at the time of creation of the easement consistent with the

would be true.[116] Iowa courts specifically recognize the occurrence of changed circumstances which justify modifications of easements.[117] Allowing general state doctrine to control alteration of these specialized easements, as the UCEA does, is important to guard against undue restrictions and also to provide needed stability.

### *B. Enforcement*

Enforcement is problematic because holders may not compel compliance as vigorously as the spirit of the easement requires. The UCEA stipulates four entities which may institute actions to enforce, modify or terminate easements: the owner of burdened property, an easement holder, a holder of a third-party right of enforcement specified in the easement, and a person authorized by other law.[118] The complexity of a successful program is evident simply in the selection of four enforcement bodies. Designation of several possible enforcers is an attempt to anticipate diverse situations which may occur, especially considering the potentially infinite duration of preservation easements.

The enforcement portion of the UCEA raises several other issues. The third-party provision allows establishment of a third-party right of enforcement.[119] This is an innovative concept and deserves consideration because most state statutes simply do not address the enforcement issue. Three

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requirements of specific future public uses, including, but not limited to, roads and utilities, unforeseen when the easement was created.

DEL. CODE ANN. tit. 7, § 6813 (Supp. 1980). Florida's statue says "a conservation easement may be released by the holder of the easement to the holder of the fee even though the holder of the fee may not be a governmental body or a charitable corporation or trust." FLA. STAT. ANN. § 704.06(4) (West Supp. 1982). The Georgia statute states

> [i]t shall be presumed that facade or conservation easements are created in perpetuity unless the instrument of conveyance creating the facade or conservation easement shall state otherwise, in which case the easement may be extinguished or released in whole or in part by the dominant owner in the same manner or by the same means as other easements are extinguished or released.

GA. CODE ANN. § 44-10-4 (1982). Maryland provides "[a] restriction . . . may be extinguished or released . . . in the same manner as other easements." MD. REAL PROP. CODE ANN. § 2-118(d) (1981).

116. *E.g.*, CONN. GEN. STAT. ANN. §§ 47-42(a)-(c) (West 1978); IDAHO CODE § 67-4613 (1980).

117. *See* IOWA CODE ANN. § 11D.2 (West 1982). Iowa provides

> [a] conservation easement shall be perpetual unless expressly limited to a lesser term, or unless released by the holder thereof, or unless change of circumstances shall render such easement no longer beneficial to the public. No comparative economic test shall be used to determine whether a conservation easement is beneficial to the public.

*Id.*

118. UCEA, *supra* note 22, at §§ 3a(1)-(4).

119. *Id.* at § 1(3).The UCEA provides " '[t]hird party right of enforcement' means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder." *Id.*

noteworthy exceptions exist. Kentucky allows enforcement by the local legislative body, and if it fails to act, then by any citizen of a jurisdiction which has acquired a scenic easement.[120] Colorado limits enforcement to the grantor or easement holder.[121] In North Carolina enforcement is solely the province of the holder although, by agreement, relief also may be available to the creator.[122] The UCEA provision reflects a balancing philosophy and recognizes the intricacies of successful long-term planning.

### C. *Common Law Impediments*

The central concern of the UCEA is common law impediments to preservation easements. The Commissioners succinctly removed common law impediments from qualifying non-possessory interests and enumerated those

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120. KY. REV. STAT. ANN. § 65.470 (Baldwin 1979). Kentucky provides

> (1) [f]rom and after the time when a scenic easement has been acquired by the local legislative body and its acceptance endorsed thereon, no building permit shall be issued for any structure which would violate the easement and the local legislative body shall seek by appropriate proceedings an injunction against any threatened construction or other development or activity on the land which would violate the easement and shall seek a mandatory injunction requiring the removal of any structure erected in violation of the easement and the restoration of the land to its original character insofar as possible.
>
> (2) In the event the local legislative body fails to seek an injunction against any threatened construction or other development or activity on the land which would violate the easement or to seek a mandatory injunction requiring the removal of any structure erected in violation of the easement or the restoration of the land to its original character insofar as possible, or if the local legislative body should construct any structure or development or conduct or permit any activity in violation of the easement, any resident of the jurisdiction which has acquired the easement may, by appropriate proceedings, seek such an injunction.

*Id.*

121. *See* COLO. REV. STAT. §§ 38-30.5-108(2), (3) (1982). Colorado provides

> (2) [a]ctual or threatened injury to or impairment of a conservation easement in gross or the interest intended for protection by such easement may be prohibited or restrained by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by grantor or by an owner of the easement.
>
> (3) In addition to the remedy of injunctive relief, the holder of a conservation easement in gross shall be entitled to recover money damages for injury thereto or to the interest to be protected thereby. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values.

122. N.C. GEN. STAT. § 121.39(a) (1981). North Carolina provides

> [c]onservation or preservation agreements may be enforced by the holder by injunction and other appropriate equitable relief administered or afforded by the courts of this State. Where appropriate under the agreement, damages, or other mandatory relief may also be awarded either to the holder or creator of the agreement or either of their successors for breach of any obligations undertaken by either.

*Id.*

characteristics which do not affect the validity of an easement drafted to meet the requirements of the UCEA.[123]

The traditional requirement that the holder own real property benefited by the agreement was specifically eliminated.[124] The UCEA provides that an easement may be affirmative or negative.[125] Regardless, assignment is allowed.[126] The novelty of the purpose is irrelevant.[127] Where the other requirements of the UCEA are met, existence of these aspects does not bar enforcement.

These are significant factors because a preservation group need not incur the expense of owning benefited real property in order to hold an agreement in gross. The interest may be assigned to another qualified organization if desired. The easement may impose a negative obligation such as restricting the use made of the property, or affirmative duties including maintenance and repair might be required.[128]

The UCEA provides needed uniformity. Its widespread adoption would facilitate creation of valid non-possessory property rights designed to promote community interests in conservation and preservation. There are, however, various additional concerns.

## V. Topics Unanswered by the UCEA

In adopting the format of the UCEA, the Commissioners elected to include certain provisions and eliminate others. As with all such selections, separate policy considerations supported the competing alternatives. A number of topics are not addressed by the UCEA. These matters may be categorized as concerning creation, enforcement or modification of the interest. Any jurisdiction considering adoption of the UCEA should consider the ramifications of the omissions in light of the state's existing law.

### *A. Creation*

Four issues relating to creation of the interest are not covered. The Commissioners do not include any form of third party approval before the

123. *See* UCEA, *supra* note 22, at § 4. A conservation easement is valid even though:
(1) it is not appurtenant to an interest in real property;
(2) it can be or has been assigned to another holder;
(3) it is not of a character that has been recognized traditionally at common law;
(4) it imposes a negative burden;
(5) it imposes affirmative obligations upon the owner of an interest in burdened property or upon the holder;
(6) the benefit does not touch or concern real property; or
(7) there is no privity of estate or of contract.

*Id.*

124. *Id.* at § 4(1).

125. *Id.* at § 4(4), (5).

126. *Id.* at § 4(2).

127. *Id.* at § 4(3).

128. *See* G. Gammage, P. Jones & S. Jones, Historic Preservation in California 33-34 (1975). It has been suggested that positive easements always should be coupled with negative easements in order to ensure continued compliance. *Id.*

creation of these agreements.[129] Presumably, the creator and the holder are free to make their own arrangements, consistent with the UCEA. This is not the case in several states. Kentucky provides for a report to be prepared by the local planning commission stating whether the proposed scenic easement is consistent with the comprehensive plan. Preparation of the report is mandatory, but its comments are merely advisory to the local legislative body considering acquiring the easement.[130] A similar procedure is required in Montana.[131] Requiring any form of third party approval was specifically rejected by the Commissioners as contrary to facilitation of the private creation of non-possessory interests.[132] The advisory nature of the Kentucky and Montana procedures seems to cut against the undue restriction rationale put forth by the Commissioners. Consideration of compatibility with the comprehensive plan is valuable, as is the community input available in a public hearing. Both of these additions to the UCEA should be reviewed by a jurisdiction considering adoption.

Other than the requirement of a recorded acceptance by the donee,[133] no additional provisions in the UCEA exist regarding recording of an easement. Massachusetts[134] provides for a separate index. Several states[135] require that these interests be treated as other recordable interests. The Commissioners left recording requirements to the adopting jurisdiction.[136] Thus, a state choosing the UCEA must consider whether any modifications to its exiting recordation system are required or desired. There is a caveat, however. While separate indexing should make existence of these interests readily ascertainable, rampant proliferation of a variety of indices actually may increase the risk of erroneous title searching because more volumes must be reviewed and some individual must study each document to determine in which indices it must be entered.[137]

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129. UCEA, *supra* note 22 (Commissioners' prefatory note).

130. KY. REV. STAT. ANN. § 65.468 (Baldwin 1979).

131. MONT. CODE ANN. § 76-6-206 (1981).

132. UCEA, *supra* note 22 (Commissioners' prefatory note).

133. *Id.* at § 2(b).

134. MASS. ANN. LAWS ch. 184, § 33 (Michie/Law. Co-op. 1977) provides

> [a]ny city or town may file with the register of deeds for the county or district in which it is situated a map or set of maps of the city or town, to be known as the public restriction tract index, on which may be indexed conservation and preservation restrictions and restrictions held by any governmental body. Such indexing shall indicate sufficiently for identification (a) the land subject to the restriction, (b) the name of the holder of the restriction, and (c) the place of record in the public records of the instrument imposing the restriction.

135. *E.g.*, Colorado, COLO. REV. STAT. § 38-30.5-106 (1982); Florida, FLA. STAT. ANN. § 704.06(5) (West Supp. 1982); Iowa, IOWA CODE ANN. § 111D.3 (West Supp. 1982); Minnesota, MINN. STAT. ANN. § 84.65 (West Supp. 1982); Montana, MONT. CODE ANN. § 76-6-207 (1981).

136. UCEA, *supra* note 22 (Commissioners' prefatory note).

137. *See* J. CRIBBET & C. JOHNSON, PROPERTY 1281 (4th ed. 1978). Professors Cribbet and Johnson note an overall trend toward reduction in the number of indices. Yet, Idaho, for example, provides for twenty-seven separate indices. IDAHO CODE § 31-2404 (Supp. 1982).

Adopting states should also consider the impact of the UCEA in light of the state's marketable title act.[138] This is a curative provision by which title certification need only extend back a designated number of years. Under a marketable title act, a conclusive presumption exists that property is unencumbered by interests created prior to that time.[139] The Commissioners pointed out a possible conflict between these acts and perpetual duration of non-possessory interests. Nevertheless, they suggested no resolution.[140] This is an instance when a separate index for preservation and conservation easements would be beneficial because its contents could be exempted from a marketable title act. A jurisdiction considering passage of the UCEA must be cognizant of its interplay with extant legislation and must resolve any inconsistencies.

Consideration of local, state or federal tax policy also was omitted, as extraneous to the primary concern of the UCEA.[141] Economic aspects are significant and often are motivating forces in the creation of easements. While a prospective donor should become familiar with applicable tax provisions before conveyance, the Commissioners astutely separated these matters from the UCEA. The Act is intended to be an enduring solution to historical restrictions on non-possessory property interests. On the other hand, tax policy is quite fluid and continually subjected to modification. While existing tax policy should be reviewed prior to passage of the UCEA, tax policy should not be incorporated into the body of the Act.

### *B. Enforcement*

A central problem inherent in non-possessory property interests is enforcement. The UCEA specifies four entities which may institute enforcement actions.[142] Other enforcement issues are left to existing state law.[143] Several jurisdictions[144] provide a right of entry for inspection, which the UCEA lacks. Inspection is a reasonable method for monitoring compliance. With interior easements or exterior easements over vast acreage, inspection may be the only practical means for determining compliance.

### *C. Modification*

Unanticipated changes are of constant concern. The UCEA leaves mod-

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138. *E.g.*, Florida, FLA. STAT. ANN. §§ 712.01-.10 (1969 & Supp. 1982); Iowa, IOWA CODE ANN. §§ 614.29-.38 (Supp. 1982); Ohio, OHIO REV. CODE ANN. §§ 5301.47-.56 (Page 1981).

139. W. ATTEBERRY, K. PEARSON & M. LITTA, REAL ESTATE LAW 157 (2d ed. 1978).

140. UCEA, *supra* note 22 (Commissioners' prefatory note).

141. *Id.*

142. UCEA, *supra* note 22, at § 3(a).

143. *Id.* (Commissioners' comment).

144. *E.g.*, Delaware, DEL. CODE ANN. tit. 7, § 6812 (Supp. 1980); Florida, FLA. STAT. ANN. § 704.06(4) (West Supp. 1980); and Minnesota, MINN. STAT. ANN. § 84.65 subd. 2 (West Supp. 1982).

ification and termination to other state law.[145] Maryland[146] and Minnesota[147] provide for alternative holders in the event private donees become disqualified or otherwise unable to administer easements. Just as a court may apply the doctrine of cy pres[148] to preserve the intended good of a charitable trust, an adopting legislature should consider a contingency provision to preserve easements held by an organization which no longer is able to carry out the intentions of the private agreement. Such an amendment to the UCEA is a positive step.

Another possible occurrence involves condemnation of existing easements. The UCEA does not address this issue.[149] Colorado[150] and Delaware[151] provide that preservation easements are not immune from the power of eminent domain. Specification of the status of preservation easements in a particular jurisdiction is prudent because it resolves any possible uncertainty.

Although the UCEA quite successfully addressed numerous relevant matters, other issues would remain unresolved after the UCEA's adoption by a particular jurisdiction. Careful attention to these additional issues of creation, enforcement and modification is imperative.

## VI. CONCLUSION

The startling growth of the preservation movement should not be mistaken for a whimsical fad. It reflects, instead, our collective desire to cling to important aspects of our past while we rapidly advance toward an uncertain future. There are important lessons to be learned from antecedent events. We might reflect on the tragedy of war while visiting a battlefield, or consider the ramifications of our nation's immigrant character while passing through a preserved ethnic neighborhood. From encounters such as these, society gains strength and stability.

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145. UCEA, *supra* note 22, at § 3(a) (Commissioners' comment).

146. MD. REAL PROP. CODE ANN. § 2-118(3) (1981) (Maryland Agricultural Land Preservation Foundation, Maryland Historical Trust, or Maryland Environmental Trust).

147. MINN. STAT. ANN. § 84.65 subd. 3 (West Supp. 1982) (conservation restriction vest in State of Minnesota, to be administered by the commissioner of natural resources).

148. *Cy pres* is a doctrine of judicial power. The original meaning is "as near as possible." It allows reformation of administrative or substantive provisions of a charitable trust where necessary due to altered conditions based on the imputed or inferred intent of the settlor of the trust. G. BOGERT & G. BOGERT, LAW OF TRUSTS § 147 (5th ed. 1973). By analogy, the legislature could create a separate power, similar to *cy pres,* which would be applicable to reformation of conservation and preservation easements where changed circumstances indicate such a necessity.

149. UCEA, *supra* note 22 (Commissioners' prefatory note).

150. COLO. REV. STAT. § 38-30.5-110 (1982) provides "[n]othing in this article shall be construed so as to impair the rights of a public utility . . . with respect to rights-of-way, easements, or other property rights upon which facilities, plants, or systems of a public utility are located or are to be located."

151. DEL. CODE ANN. tit. 7, § 6815 (Supp. 1980) provides "[n]othing contained in this subchapter is intended to restrict, restrain or hold in abeyance any agency with powers of eminent domain in their exercising that power."

The UCEA is a significant step toward enhancing the preservation arsenal. It recognizes that preservation of social and cultural resources should not be compressed into legal concepts indifferent to the rich characteristics of the preserved past. Given society's limited financial reserves with which to develop an historic portrait, doctrinal impediments should yield to innovative efficiency.