

## SELECTED LEGISLATIVE , ADMINISTRATIVE , AND MANAGEMENT APPROACHES FOR PROTECTING THE SETTING OF HERITAGE PLACES IN THE UNITED STATES

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This paper focuses on several techniques that have prove

### **Overview of the Legal Framework for Heritage Conservation**

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The United States' Constitution is based on the premise that power should not be concentrated in one person or group, or in one place. Power at the federal government level is divided among three branches of government: the executive (President), legislative (Congress) and judicial (federal courts). Power is also shared among the different levels of government: federal, state, and local. The federal Constitution specifies which powers are granted to the federal government, such as defense, foreign relations, and currency regulations, for examples. However the Constitution also limits the power of the federal government and the Tenth Amendment further specifies that, "The powers not delegated to the United States (i.e., the federal government), nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Each state has its own constitution, which specifies which powers the state may exercise and which powers are delegated to local governments. The relationship between states and local governments is very complex, and differs from state to state. Local governments have no inherent power of their own – their authority comes from the state. Some states have given broad powers to local governments while others have given more limited powers. 1

Among the powers traditionally reserved to the states is the so-called "police power", a concept derived from Anglo-Saxon law. This is the inherent authority of the state to regulate, protect and promote the public health, safety, morals, and general welfare. Exercising this power,

states have enacted laws regulating the use of land and have delegated some of their authority to local governments. Many local governments, in turn, have enacted local planning, zoning and historic preservation laws. The U.S. Supreme Court has held that the power to protect buildings and areas with special historic, architectural, or cultural significance is a legitimate use of the police power.<sup>2</sup>

The movement to preserve historic places began in earnest at the local level. First came private initiatives focused on individual monuments, like efforts in the nineteenth century to preserve Mount Vernon, the home of the first President, George Washington. In the late 1920s the City of Charleston, South Carolina was the first local government to adopt a law for the protection of a heritage area – its historic district. Many local governments in the following decades followed this approach. The United States government did not enact comprehensive preservation legislation until 1966. Even that effort resulted from a study sponsored by the U.S. Conference of Mayors that looked at European models to help formulate a national approach.<sup>3</sup>

### **Listing and Protection**

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The National Historic Preservation Act of 1966 established a partnership among the federal, state, and local governments. It introduced a new comprehensive program with national standards and economic incentives without pre-empting existing state and local legislation. This law provided for a national inventory of heritage properties – the National Register of Historic Places –, which contains properties of federal, state, and local significance. Federal law protects nationally owned heritage properties (e.g. national parks) and offers a degree of protection to any listed<sup>4</sup> heritage properties at any level that are affected by federally funded or licensed projects (e.g. highway or dam construction). The federal government also is able to

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<sup>1</sup> Berman, David R., "The Powers of Local Government in the United States", United States Information Service (USIS), <http://usinfo.state.gov/journals/itdhr/0499/ijde/berman.htm>, accessed August 1, 2003.

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<sup>2</sup> Penn Central Transportation Co. v. New York City, 438 U.S. 105 (1978).

<sup>3</sup> *With Heritage So Rich*, New York (Random House, 1966).

<sup>4</sup> Or eligible for listing.

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impose its standards as a condition for grants or tax incentives to lower levels of government or private individuals, but has no control over the local scheme of land use regulation.

The National Register of Historic Places is the official list of resources in the United States worthy of preservation.<sup>5</sup> Many states also maintain registers. However, the most important listing mechanism to protect cultural properties is found at the local level. States delegate authority to local governments to enact laws or ordinances for the protection of heritage resources. The specific scope and content of local preservation legislation varies considerably due to the differences among the states in the authority delegated to local governments, community need, and the type of resources protected. Generally, though, preservation ordinances regulate changes that would negatively affect or destroy the character that gave designated historic properties or historic districts their significance. Over 2,000 local governments across the United States have enacted some form of historic preservation ordinance.

A typical preservation ordinance would generally contain the following key components:<sup>6</sup>

1. Statement of "purpose" and the legal authority under which the ordinance is enacted.
2. Definitions.
3. Establishment, powers, and duties of the historic preservation commission or other administrative board.
4. Criteria and procedures for designating historic landmarks and/or districts.
5. Statement of actions reviewable by the commission (*e.g.*, demolition or a material change in the exterior appearance of structure) and the legal effect of such review (*e.g.*, approval or denial, non-binding recommendation.)
6. Criteria and procedure for reviewing such actions.<sup>7</sup>
7. Standards and procedures for the review of "economic hardship" claims.
8. "Affirmative maintenance" requirements and procedures governing situations of "demolition-by neglect".

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<sup>5</sup> Established under the Historic Sites Act of 1935, 16 U.S.C. §§ 461 *et. seq.*, and expanded by the National Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 470a *et. seq.*

<sup>6</sup> Miller, *supra* note 4, at 10.

<sup>7</sup> Commissions generally adopt rules and procedures for conducting business as well as design standards or guidelines by which to judge the appropriateness of a proposal for demolition, alteration or new construction.

9. Procedures for appealing the final preservation commission decision to a higher authority.<sup>8</sup>
10. Fines and penalties for violation of ordinance provisions.

## Planning

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Historic preservation efforts can often be significantly enhanced when the preservation ordinance is closely coordinated with other land use laws and regulations such as those governing comprehensive planning, zoning, and subdivision regulations as well as other government programs such as transportation and housing. Many communities throughout the United States have developed formal written preservation plans, reconciling in one document all of the policies and procedures regarding the community's historic resources.<sup>9</sup> The Georgia State plan, for example, outlines a model process for developing a local preservation plan<sup>10</sup>, incorporating the Secretary of the Interior's Standards for Preservation Planning. While it is important to have a stand-alone local preservation plan to articulate the preservation goals and objectives of the community, it is even more important that those goals and objectives are incorporated in broader community planning. This helps ensure consideration by other programs such as land use, transportation, and development. The US/ICOMOS Preservation Charter supports this approach, declaring that the preservation of historic towns and historic districts or areas must be an integral part of every community's comprehensive planning process.<sup>11</sup>

Georgia was one of the first states to adopt growth management legislation with the passage of the Georgia

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<sup>8</sup> Appeals generally go to another administrative board such as a board of zoning appeals, the local governing authority itself (mayor and city council or county commission), or directly to the courts.

<sup>9</sup> Bradford J. White and Richard J. Roddewig, *Preparing a Historic Preservation Plan*, 4 (American Planning Association, 1994).

<sup>10</sup>The Georgia Constitution, Art. 9, § 2, Par. 4, explicitly grants authority to plan and zone to local governments, but also permits the General Assembly to limit this power by generally-applicable statutes.

<sup>11</sup> *US/ USICOMOS A Preservation Charter for the Historic Towns and Areas of the* (1992). One of the four basic objectives for the preservation of historic towns and areas reads, in part: "Property owners and residents are central to the process of protection and must have every opportunity to become democratically and actively involved in decisions affecting each historic town and district."

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Planning Act of 1989.<sup>12</sup> This law requires each local government in the state to prepare a long-range comprehensive plan. The plan is intended to identify community goals and objectives as well as determine how the local government proposes to achieve them. Ideally it is to be used in government decision-making on a daily basis. Failure to have an approved plan can result in the loss of state funding for a range of activities. While the scope of growth management is much broader than historic preservation, almost all such legislation includes historic preservation as a goal and/or a required planning element.<sup>13</sup> By including preservation with other key elements, comprehensive planning fosters better coordination between preservation and other land use controls such as zoning.<sup>14</sup> The Georgia law requires that historic resources be considered along with land use, economic development, community facilities, population, housing, and natural resources.<sup>15</sup>

In addition to this public planning and regulatory process, states have passed legislation that employs elements of private property law to accomplish heritage conservation goals. Two of these techniques are conservation easements and transferable development rights.

### **Conservation Easements**

A conservation easement is a legal agreement between a landowner and governmental agency or non-governmental organization that permanently restricts future development on a piece of land to protect its key values. These legal devices are in use in every state and currently protect millions of acres of land. Among the non-governmental agencies that commonly use this protective tool are non-profit historic preservation organizations land trusts,

which hold over 17,000 conservation easements<sup>16</sup>. Local governments, too, have increasingly established easement programs.

Conservation easements are created through a legal document signed by a property owner (called a grantor) and an eligible organization (called a holder) and recorded in the official land records of the political jurisdiction where the property is located. These agreements apply to all future landowners.

Easements are appealing because their creation is a private transaction entered into voluntarily by the landowner and the easement-holding organization. The owner either donates an easement (and receives tax incentives for the donation) or sells the easement to the holding organization at a price that is less than the cost of purchasing the property outright. Since the owner retains restricted use of the land, it remains productive and on the tax rolls while preserving specific conservation values. Conservation easements can protect all kinds of conservation values including, for example, farmland, scenic vistas, historic facades, and sensitive ecological areas.

Until recently, an easement affecting an historic building typically protected the façade or other significant architectural details of the property (“façade easement”). Increasingly, however, this tool is being used in an expanded way to ensure the setting of an historic structure or area remains undeveloped or is developed in a way that is compatible with the heritage resource. During the 1930s and 1940s the National Park Service acquired scenic easements to protect views along the Blue Ridge and Natchez Trace Parkways. A number of states have also used this method of protecting scenic areas. A good example of a public/private effort involves the Olana State Historic Site in New York. The historic villa and its surroundings were made famous by the paintings Frederick Church, a nineteenth century landscape artist. To protect the setting, Scenic Hudson, Incorporated, a NGO, bought scenic easements to protect 1,060 acres of the Olana viewshed.<sup>17</sup> Where planned gardens are key components of the setting of a heritage place, their conservation can also be addressed in a conservation easement. Since gardens involve active management, such an easement might require the landowner and holder to develop and implement a management plan. The Garden Conservancy has uses this

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<sup>12</sup> O.C.G.A. 50-8-1 et seq.

<sup>13</sup> David Listokin, “Growth Management and Historic Preservation: Best Practices for Synthesis”, 29 *The Urban Lawyer* 202 (1997). Other states with comprehensive planning acts are Delaware, Florida, Hawaii, Maine, Maryland, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont and Washington.

<sup>14</sup> Such coordination, while dictated by logic, is frequently absent. There are other advantages. By being part of a comprehensive community plan, preservation can blunt criticism that it is part of the NIMBY [“Not in My Back Yard”] process to stop growth. See *id.*, at 206 and 210.

<sup>15</sup> O.C.G.A. , § 50-8-1, et seq.

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<sup>16</sup> Elizabeth Byers, *The Conservation Handbook*, The Trust for Public Land, 2005, at 8. There are more than 1,500 land trusts in the United States.

<sup>17</sup> *Id.* at 213.

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technique to protect important works by noted landscape architects such as Thomas Church.<sup>18</sup> Other aspects of historic character such as barns, fences, orchards, pastures and woodlands may be the subject of an easement. Paul Edmondson, general counsel of the National Trust for historic Preservation has said, “Preservation easements increasingly protect all the character-defining elements that collectively define a historic ‘place.’ Whether the elements are old stone walls, historic outbuildings, or landscape features, preservation easements have the capacity to protect an entire site.”<sup>19</sup>

Conservation easements are relatively recent devices created by state legislatures, but are grounded in the common law of easements in England and the United States. Historically easements were used to convey privileges or restrict uses between adjacent parcels of land. Courts were reluctant to extend this restriction on the unencumbered use of land in perpetuity to organizations and individuals that did not own appurtenant property. During the 1970s through the 1990s most states passed laws authorizing conservation easements generally following the principles established by the Uniform Conservation Easement Act, a model law developed by the National Conference of Commissioners on Uniform State Laws.<sup>20</sup>

While the creation of easements is dependent on state legislation, conservation easements that fall within governmental guidelines are eligible for both federal and state tax incentives. The value of the easement is based on the difference between the appraised fair market value of the property prior to conveying an easement and its value with the easement restrictions in place. The more the easement restricts the property's development potential, the more valuable it is. The Internal Revenue Service guidelines suggest that an easement can be appraised at 10-15 percent of the value of the property. In most cases, the easement donor can take a one-time deduction of the value of the easement from his adjusted gross income for federal taxes.<sup>21</sup> Many states also have provisions that will allow individuals to similarly reduce their state income taxes. <sup>22</sup>

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<sup>18</sup> *Id* at 217.

<sup>19</sup> *Id* at 219.

<sup>20</sup> *Id* at 13.

<sup>21</sup> Federal estate taxes may also be reduced when a property subject to an easement passes by inheritance because the fair market value of the property has been reduced by the easement restrictions.

<sup>22</sup> National Park Service, *Historic Preservation Easements: A Historic Preservation Tool with Federal Tax Benefits* <http://www2.cr.nps.gov/TPS/tax/easement.htm>, accessed 8/15/05; see also Mark Primoli, Internal Revenue Service, *Façade*

In addition, since the granting of an easement reduces the value of the remaining property, the owner's annual property taxes are also reduced. Although these incentives can be powerful tools, surveys have shown that owners are often motivated by the desire to ensure that the character of resources they value are protected in the future.

### **Transferable Development Rights**

In urban centers, the preservation of older, smaller buildings or less-intensively developed sites is made difficult when economic factors make it more profitable for the owner to demolish the building(s) and take advantage of unutilized development potential on the site. Where such buildings are designated as historic under local ordinances, the transfer of development rights (TDR) concept may prove useful in providing the owner an opportunity to realize some return on the unused development potential while preserving the historical, architectural or landscape character of the property or district.<sup>23</sup> This approach can help retain, for example, a low-rise neighborhood in an area where economic pressures would result in high-rise development, thus destroying the setting of the historic structures.

Traditionally, development rights have been considered a permanent part of a parcel of land. TRDs change this concept by permitting these development rights to be severed from their original site (“transferor site”), transferred by the property owner to the owner of another site (“transferee site”), and attached to the transferee site. In some cases, there is an intermediate stage after the rights are severed and before they are transferred and “banked” for future transfer. <sup>24</sup> The end result is that the owner of the transferee site can add the transferred development rights to those all ready attached to his site.

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#### *Easement*

<http://www2.cr.nps.gov/tps/tax/IRSFacade.htm>, accessed 8/15/05.

<sup>23</sup> Useful references on TDRs include: Rick Pruetz, *Saved by Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights*; “Transferable Development Rights and Alternatives after Suitum”, 30 *Urban Lawyer* No. 2 (Spring 1998); “A Review of Transferable Development Rights Programs in the United States,” 16 *Preservation Law Reporter* 1066-1074 (Apr.-Jun. 1977).

<sup>24</sup> J.J. Costonis, “The Redefinition of Property Rights as a Tool for Historic Preservation”, in Mark J. Schuster, *Preserving the Build Heritage: Tools for Implementation* 81, at 85 (University Press of New England, 1997)

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A feature shared by nearly all TDR programs is the designation of sending and receiving areas. Sending areas are designated where community plans call for preservation of development limitations and landowners are restricted from making the maximum economic use of their land by preservation and zoning ordinances or other regulations. Owners within these areas are permitted to sever and transfer their development rights.

Receiving areas, on the other hand, are designated where more intensive development is deemed appropriate. Owners within these areas can purchase transferred development rights and develop at a higher or greater density than would otherwise be allowed by underlying regulations.<sup>25</sup> In crafting successful TRD programs it is a challenge to find appropriate receiving areas in the community for higher-density development and ensuring that the development rights have a sufficient value in the receiving areas to create a market.

TDRs are considered among the most difficult preservation techniques to design and implement. Programs are complex and require a significant investment in staff to implement and maintain. They will not work in isolation, but need to be used in conjunction with other land use and preservation techniques. Other significant factors in their successful use include:

- State enabling legislation which provides clear authority and guidance while allowing localities to tailor the program to their specific circumstances;
- A participating financial institution can help to promote the program, facilitate transactions and provide information about the value of the TDRs;<sup>26</sup>
- A public education component; and
- Support from the real estate and development community.

Most important of all, these programs require leadership and commitment from local elected officials, appointed boards and professional staff.<sup>27</sup>

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<sup>25</sup> "Transfer of Development rights: What is TDR?" <<http://www.co.dane.wi.us/plandev/planning/tdr/section2.htm>> (Accessed 8/15/05).

<sup>26</sup> Robert Lane, "Transfer of Development Rights for Balanced Development", LAND LINES (Lincoln Institute of Land Policy March, 1998).

<sup>27</sup> "Managing Growth and Addressing Urban Sprawl: The Transfer of Development Rights", Research Report Number 563, 3, 9 (Michigan Agricultural Experiment Station, Michigan State University, August, 1999).

While each of the approaches discussed above can be useful in preserving heritage places and their settings, all of them – federal, state and local, public and private – can be brought together in a more comprehensive way through the creation of a heritage area. Although several states and localities have created heritage areas, the focus of this discussion will be on National Heritage Areas, created by the United States Congress.

## Heritage Areas

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Congress has designated twenty-seven heritage areas around the country.<sup>28</sup> These are areas where natural, cultural, historic, and recreational resources combine to create a distinctive and cohesive entity that represents important aspects of the nation's heritage. Although Congress creates National Heritage Areas, they depend for their success on a partnership forged in a particular geographical region by multiple political jurisdictions and many non-governmental organizations. Not only are the natural and manmade physical features important, but also the traditions of the people that created the cultural landscape. Here its setting is not only important as a visual enhancement of landmarks and monuments but has a greater significance in its own right. The National Park Service has identified the following criteria for the designation of National Heritage Areas:

1. An area has an assemblage of natural, historic, or cultural resources that together represent distinctive aspects of American heritage worthy of recognition, conservation, interpretation, and continuing use, and are best managed as such an assemblage through partnerships among public and private entities, and by combining diverse and sometimes noncontiguous resources and active communities;
2. Reflects traditions, customs, beliefs, and folklife that are a valuable part of the national story;
3. Provides outstanding opportunities to conserve natural, cultural, historic, and /or scenic features;
4. Provides outstanding recreational and educational opportunities;
5. The resources important to the identified theme or themes of the area retain a degree of integrity capable of supporting interpretation;
6. Residents, business interests, non-profit organizations, and governments within the proposed area are involved in the planning, have developed a conceptual financial plan that outlines the roles for all participants including the federal government,

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<sup>28</sup> <http://www.cr.nps.gov/heritageareas/VST/INDEX.HTM>, accessed 8/15/05.

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and have demonstrated support for designation of the area;

7. The proposed management entity and units of government supporting the designation are willing to commit to working in partnership to develop the heritage area;
8. The proposal is consistent with continued economic activity in the area;
9. A conceptual boundary map is supported by the public; and
10. The management entity proposed to plan and implement the project is described.<sup>29</sup>

The concept has proven widely popular with the American public. Within the first seven months of 2005, member of the United States Congress introduced 9 study bills on 7 heritage areas, 22 designations on 14 areas, and 5 bills to amend existing area legislation. The U.S. Senate passed the National Heritage Partnership Act (S. 243 H.R. 760) that would establish an overall framework for the creation of National Heritage Areas rather than ad hoc legislative process currently employed.<sup>30</sup> The general legislation is based in part on a report by a committee of the National Park System Advisory Board that was motivated by increased interest in heritage areas by the public and legislators. This report recommended that criteria and standards be established for the designation and management of heritage areas to ensure integrity in the program and that the Park Service be a partner, where appropriate, but not manage an heritage area as a National Park.<sup>31</sup>

After Congress designates a heritage area, National Park Service staff work with local governments and residents to develop a cooperative agreement and management plan that identifies shared goals for heritage preservation and provides a legal basis for funding. The authority to implement the plan is rests with local government that may undertake a range of regulatory and protective activities described earlier in the paper. The federal government does not regulate land use in the area, but would maintain control of any parks or federal reserves included in the heritage area. The federal government does provide funding for the heritage area, along with expertise. This is clearly in line with the overall approach of the federal government to heritage

conservation: promulgating standards and best practices and providing incentives for their implementation. Activities in the heritage area often include, in addition to protection, the development of an interpretation plan, rehabilitation of historic sites, opening and operating visitors' centers, creating a network of trails, etc.<sup>32</sup>

The overall goal of the heritage area is to promote the development of short and long-term solutions to conservation of the heritage resource by the local partners. In this way, not only will historic buildings be saved, but their context as well. The cultural landscape and the intangible aspects of heritage can preserve for future generations.

These are some of the public and private legal tools that have been employed in the United States to control and protect the setting of heritage places. However, in a country where private property rights are highly valued, it takes more than the existence of these tools to ensure that heritage places survive into the future. It takes the active participation of citizens and non-governmental organizations like ICOMOS, working with government, to employ the tools effectively and produce lasting results.

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<sup>29</sup> <http://www.cr.nps.gov/heritageareas/REP/criteria.pdf> , accessed 8/18/2005.

<sup>30</sup> <http://www.cr.nps.gov/heritageareas/LEG/introbills109.pdf>, accessed 8/18/2005.

<sup>31</sup> <http://www.cr.nps.gov/heritageareas/REP/AB%20report.pdf>, accessed 8/21/2005.

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<sup>32</sup> <http://www.cr.nps.gov/heritageareas/FAQ/INDEX.HTM>, accessed 8/20/2005.

## **Abstract**

My paper will focus on three techniques that have proven useful in the United States of America for protecting and controlling the settings of heritage places and may be useful examples for other countries to adapt to their legal systems and traditions:

(1) Heritage Areas - Heritage Areas are a strategy that encourages residents, government agencies, non-profit groups and private partners to collaboratively plan and implement programs and projects that recognize, preserve and celebrate many of America's defining landscapes. Heritage areas seek short and long-term solutions to their conservation and development challenges by fostering relationships among regional stakeholders and encouraging them to work collaboratively to achieve shared goals.

(2) Conservation Easements - A conservation easement (or conservation restriction) is a legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values. It allows a property owner to continue to own and use his or her land and to sell it or pass it on to heirs. When a person donates or sells a conservation easement, he or she give up some of the rights associated with the land. For example, the owner might give up the right to build additional structures, while retaining the right to grow crops. Future owners also will be bound by the easement's terms. Placing an easement on property may also result in property tax savings for the owner and his or her heirs.

(3) Transferable Developments Rights (TDRs) - Transferable development rights offer communities a low cost, politically acceptable way of saving environmentally sensitive areas, farmlands, historic landmarks and other important resources. TDRs capitalize on the ability to separate development rights from other property rights. These development rights can then be moved from properties where development would be detrimental to properties where development would be beneficial.