THE USE OF CULTURAL EASEMENTS FOR THE PROTECTION OF HISTORIC RESOURCES IN GEORGIA

by

CHRISTOPHER TODD FULLERTON

(Under the Direction of Professor James Reap)

ABSTRACT

As the preservation movement devotes greater efforts toward ensuring more comprehensive protection for historic resources, interest in private land-use controls has risen. The General Assembly of the State of Georgia first authorized the creation of façade and conservation easements in 1976, paving the way for their use by local nonprofit organizations, governmental agencies, and other qualifying organizations. A survey of preservation-related individuals in Georgia indicates that conservation easements are already in widespread use, with even greater usage expected in the near future. Several types of federal, state, and local tax incentives, as well as other motivations, have spurred on this growth in easement creation. Recommendations for improvement in easement programs include better acquisition and monitoring strategies and collaboration with organizations sharing similar goals, such as environmental conservation groups.

INDEX WORDS: Façade and Conservation Easements Act of 1976, Georgia Property Law, Historic Preservation, Mixed-Heritage Resources, Private Land-Use Controls, Uniform Conservation Easement Act of 1992

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The form and substance of this thesis have changed countless times since the idea first presented itself in the spring of 2002. What initially began as primarily a survey-based review of cultural easement practices in Georgia expanded to include a general discussion of the history of statutorily-authorized easements and the tax consequences of easement donations in Georgia. This thesis owes a tremendous debt to those who have helped in many ways to see it through to its completion. The generous sharing of information by survey participants, despite a barrage of attendant administrative and legal flak, has allowed the survey to remain a small part of the thesis. Individual recognition, sadly, cannot be given here because of university research restrictions, but I would be remiss if I did not convey my deep gratitude to them as a group.

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the Glenn Building. These documents serve as excellent examples from which the reader may learn a great deal.

Dr. Hans Neuhauser proved an invaluable font of information on the operation of land trusts in Georgia. He kindly shared a wealth of knowledge from his work as Executive Director of the Georgia Land Trust Service Center (GLTSC) in Athens. Dr. Neuhauser helped to enlighten me as to the progress that environmental conservationists in Georgia have made in recent years through the use of easements. Because of his comments, this thesis grew to include suggestions for the use of the GLTSC as a model for a similar statewide historic preservation organization.

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PREFACE

To The Reader:

This thesis is broken into five components. Part I provides an initial foray into the legal landscape. Modern preservation policies can take advantage of often overlooked tools of the law in order to ensure the adequate protection of historic resources through private means when governmental policies stop short. These underused instruments deserve more attention, especially when many assemblages of historic resources have little prospect of receiving public protection in the near future.

Part II delves into the legal theory behind relevant aspects of Anglo-American jurisprudence in the area of real property. The law here is a bizarre and confusing patchwork, for it was assembled bit-by-bit over centuries by the courts. Not until recent times have legislatures engaged in attempts at codifying more modern ideas about property. Even so, the courts rely heavily on the durable principles of the common law. In light of this fact, a brief discussion of common law tradition helps to delineate the boundaries of various legal tools available to preservationists, and, thus, shows the origin of the legal principles that have been woven together to create cultural easements. An analysis thereafter follows regarding the statutorily-authorized easement, based on two different pieces of state enabling legislation.

Georgia has had ample time to experiment with cultural easements, now that twenty-eight years have elapsed since the passage of first easement enabling legislation. Part III addresses the experiences of preservationists in the Peach State, based on a limited survey of governmental and nonprofit organizations. The results of the survey reveals some interesting and innovative

approaches in easement acquisition and monitoring programs. Also noted are underlying problems in the use of cultural easements in preservation.

Easements offer great promise as a preservation tool, but owners of historic properties need to be persuaded to donate them if any easements are to be conveyed at all. Part IV illustrates several of the tax-related motivations for the transfers of easements, as well as some fairly common reasons that arise outside of the realm of tax benefits.

Finally, Part V completes the paper with a discussion of potential future developments in the application of easements to preservation projects, as well as a list of recommendations for the use of easements under the present law. In particular, the information from the survey responses is distilled to provide guidelines for how easement acquisition and monitoring programs can be effectively created and operated in the near future in Georgia.

INTRODUCTION

Lest there be any doubt, the author is a firm believer in the indispensable role of local governments if communities hope to develop truly effective preservation programs over the long-term. Unfortunately, given the nature of politics, the foundation of many a county- and municipally-sponsored protection program has been built on shifting sands. The risk of erosion is most severe in times of economic turmoil – such as the present. We currently live in a world where the phrase "budget deficit" has entered the daily lexicon. Government operations have been hit severely in this era of financial shortfall. Local government officials in particular, who find themselves in very close daily contact with voters and acutely feel the pressure against raises in property taxes, look to trim local services and reduce staff in order to make up for shortfalls in revenue. Almost inevitably, government-sponsored preservation programs often get hit hard by such cuts. Few cities and counties in Georgia with locally designated districts have full-time preservation staff – and even these individuals are usually overpowered by the huge amount of work to be done. Understaffed planning department employees often try to fill the gap, yet they are too often overwhelmed with applications for zoning variances, new construction, public works projects, public hearings, and other planning issues. The monitoring of existing historic districts and the issuing of citations for violations are often neglected. Surveying for new districts is out of the question. Local preservation commissions, out of funding concerns for surveying and monitoring or political reasons, generally do not even come close to surveying most of the jurisdiction's historic built environment, much less designating it. In the end, huge swaths of residential neighborhoods and commercial districts with important historic value end up with no protection from local authorities.

What is a preservation organization to do? Unless the local Coca-Cola bottling magnate left the entire family fortune as an endowment for preservation activities, outright purchases will not be an option. But the acquisition of conservation easements on historic properties certainly can help in this situation. Not only does the preservation organization succeed in protecting an important historic resource, but the tranferor will enjoy a variety of tax incentives because of the conveyance of the easement. Additionally, since the protection offered through an easement is a private land-use control agreement, the preservationists may go to court enforce the easement without being dependent on the acts of the local government's inspection department or legal counsel. Moreover, since statutorily-authorized conservation easements are in perpetuity, they remain enforceable regardless of whether the protected resource periodically falls in and out of the stewardship of the local historic preservation commission. This latter point is of importance in Georgia, since local historic districts can lose their protection in more than one way. Houses once in a designated historic district in Jones County lost their protection when they were annexed by the city of Gray, which has no preservation ordinance. Local designation, in the end, depends on the whims of elected officials. Cultural easements, however, remain unaffected by popular opinion. They may only be extinguished by courts under extraordinary circumstances, thus offering much more certain protection for valued historic resources.

Research into the issues surrounding the use of cultural easements developed into a much more complex adventure than I anticipated. This thesis, thus, while rather broad in scope, still only touches the surface of many aspects of easements in law and in preservation practice. Chapter 12 includes recommendations on the need for further study into several areas, based on information that came to light during the process of preparing this thesis for final presentation.

These suggestions are offered in hopes that they might prove helpful to others interested in exploring this subject further.

There is one further note – offered for the sake of clarity. As the reader will discover, statutorily authorized easements may be used to protect a variety of historic resources in Georgia. Conservation easements are very often used to protect natural areas for the sake of the ecological attributes of a particular site, and not only for purely anthropocentric motivations. The discussion of the enabling legislation in Chapter 4 will offer greater explanation of the differing legal terms used to describe statutorily authorized easements. Because of limits on time and resources, this particular thesis focuses on the use of easements for the protection of cultural sites, or, "cultural easements" for shorthand. This term does not possess any independent legal significance, but will be used throughout this thesis (including the title) to refer to sites protected primarily because of their associations with human activity. Even this phrase, however, still proves quite inclusive. The notion of cultural easements embraces the exterior facades and interiors of historic structures, as well as historic landscapes that have been significantly touched by human hands. Formal antebellum boxwood parterre gardens would be eligible for protection, as would the unassuming functional landscape of a working farmstead. Because of this malleability and wide reach, cultural easements can thus be applied to any historic resource of concern to a preservationist in Georgia. This thesis is intended to demonstrate the myriad applications of these easements and to determine, through a sampling of organizations, to what extent they have already been exercised to assist communities in protecting local cultural sites across this great state.

PART I:

WHY EASEMENTS? -- AN INTRODUCTION

TO A USEFUL LEGAL TOOL

CHAPTER 1: PRESERVATION AND PROPERTY RIGHTS

Historic preservation as a movement has brought its energies to bear on "maintaining a sense of place," to quote one expert in the field.[1] A community's sense of place is deeply rooted in the land on which it is sustained – land that has been carefully divided into subdivisions, parcels, and individual lots, each with specific owners. The buildings, structures, districts, cultural objects, and sites that comprise the community and give it a unique character depend on their owners for their continued existence. This simple, yet fundamental, idea of legal possession serves as the point of departure for all efforts geared toward the protection of historic resources.

The Primacy of Property Rights

For the early English settlers of North America, ownership was a defining characteristic in what they saw as the taming of an unfamiliar and wild landscape. They brought over their notions of private property, complete with their common law tradition, as they set about the creation of new colonies. These principles of ownership had become deeply rooted by the time of the American Revolution; while King George III and Parliament were deemed dispensable[2], the legal system on which they relied was not. The concept of enforceable property rights has remained a touchstone of governmental policy since the founding of the new republic. No less a document than the Constitution affirms the importance of private ownership and provides a framework for protecting the rights which flow out of such possession through guaranties of due

[1] Refer to a work published by Professor John C. Waters for a discussion on the history of the preservation movement generally and in Georgia. Maintaining a Sense of Place. Athens, GA: Institute of Community and Area Development at the University of Georgia, 1983.

[2] Refer to: the Declaration of Independence. Jefferson, Thomas, primary author; Second Continental Congress, Philadelphia, PA, July 1776.

process and an independent judiciary to allow grievances to be aired against other private parties and even the government itself.[3] The doctrine of property rights has been so successful that virtually every acre of land in this country has been explored, surveyed, mapped, and recorded for the establishment of title. Even government-owned lands have been delineated in order to provide an inventory of potential resources to exploit within, as well as to solidify boundaries with private lands without.

Preservation and Public Land Use Controls

Preservationists have found the American system of property rights to be both a great help and a terrible stumbling block. In some cases, a preservation-minded person or group possesses full title to a particular parcel of land on which rests a structure of special historic interest – a scenario in which title to the property is described as fee simple absolute.[4] The owner(s) may then go about protecting the structure without fear of it being demolished.

The financial assets of private preservationists and government entities, however, are far too meager to allow for the purchase and maintenance of the many historic sites of national significance, much less the thousands more of state and local significance. House museums, for example, have become an important part of the American landscape in the effort to protect historic structures and educate visitors about the interpretive periods of the buildings, but neither the fundraising efforts of interested organizations, nor the market for historic house visitors, can support the wholesale conversion of wide swaths of the American built landscape into museums.

[3] Refer especially to the Fifth Amendment, which, through application of the Fourteenth Amendment, ensures that both the federal government and state governments are bound to respect "due process of law" and to provide "just compensation" for takings of private property.

[4] Fee simple absolute refers to complete and uncompromised ownership of a property, meaning that the owner is in control of the structures standing on the ground, any mineral rights below the surface, and air rights above the property. Property rights have often been described as similar to a bundle of sticks, where a full bundle represents fee simple absolute ownership. More will be said about different types of ownership in the following pages.

Other avenues must be pursued to ensure more extensive means of protection, as well as more effective incorporation of historic neighborhoods with modern ways of life, in order to attain the sense of place that energizes the movement in the first place.

In Georgia, the formation of locally designated districts is not mandated by the General Assembly. Indeed, because many areas of this state have traditionally been averse to public land use controls, the Georgia Historic Preservation Act specifically allows local governments to pass ordinances creating preservation commissions and historic districts without needing local zoning as an adjunct power.[5] Even with this decoupled approach, there are still many communities in Georgia without any local governmental oversight of preservation activities.[6] Further, municipalities and counties with local designation powers allowing for the creation of historic districts and landmarks often choose not to invoke their authority, leaving many important properties completely unprotected. In such cases, preservationists are faced with the real possibility that the owners of certain historic properties may choose to alter them irrevocably, notwithstanding their cultural significance.

The federal government has traditionally remained aloof in the regulation of private land use, leaving such oversight to state governments.[7] All states have passed legislation providing for the recognition of important historic places, along with the creation of the position of state

[5] Waters, John C. Maintaining a Sense of Place. Athens, GA: Institute of Community and Area Development at the University of Georgia, 1983.

[6] The state of Georgia currently possesses 159 counties and over 485 cities and counties. For counties refer to: http://www.accg.org/detail.asp?id=114, and for municipalities, refer to: www.gmanet.com/about_gma/ For a list of those with local preservation ordinances, refer to Appendix G.

[7] Aside from the Religious Freedom Restoration Act of 1993 (found to be unconstitutional by the U.S. Supreme Court in 1997) and its successor, the Religious Land Use and Institutionalized Persons Act of 2000, the federal government has had very little role in overseeing substantive land use controls. The National Park System (NPS) provides the most visible amount of federal cultural resource protection and management, but only within the boundaries of (publicly-owned) NPS sites. The federal government also provides some procedural protections, through review policies such as those under §106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470(f)) or §4(f) of the Department of Transportation Act of 1966 (49 U.S.C. 303). Yet even these procedural reviews are triggered only when a project involves a threshold level of federal involvement.

historic preservation officer to administer the program.[8] In most states, additional legislation has been passed to allow state agencies or local governments to oversee the creation of historic districts for the protection of assemblages of historic sites.[9]

Nonetheless, an enormous amount of the cultural patrimony remains unprotected by governmental fiat. The National Register of Historic Places, a listing of historic properties that requires the consent of property owners for inscription, requires that potentially eligible sites must have survived approximately fifty years and retained historic integrity.[10] By this standard alone, only a small percentage of historic sites have been shielded from the wrecking ball by the aegis of government. Given the growth of the "property rights movement" in the United States, there is little expectation for substantial advances in governmental protection in the near future.[11]

Preservationists are thus caught in a dilemma. While they can advocate in favor of governmental policies that increase the degree and scope of cultural site protection, activists have realized that they cannot rest all their hopes on favorable policy changes in city, county, and state legislative bodies. They cannot even rest assured that existing protections will not be rescinded at some future date by a new crop of elected officials. In response, preservationists have begun to encourage private owners of important sites to practice good stewardship. Education and outreach are important parts of these programs, and nonprofit preservation organizations have

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[8] The National Historic Preservation Act of 1966, *supra*, mandates state participation in this program.

[9] Virtually every state has passed statewide enabling legislation. Florida, in fact, may be the only exception. The state legislature in Tallahassee repealed the statewide act. Now, only Pensacola appears to have traditional local designation powers. This information is gathered in part from a presentation by Pensacola preservation at which the author was in attendance. May 2003. Refer also to information from the site of the National Conference of State Legislatures: http://www.ncsl.org/programs/arts/gethistrec99.cfm?record=1150 The city of St. Augustine has influence over its colonial urban center, but the city's type of control (e.g., ownership vs. police power) is uncertain.

[10] Sites listed on the National Register of Historic Places (hereafter the National Register) generally must reach the 50-year-mark, but this requirement has been loosened in recent years. The management of the National Register falls under the administration of the Secretary of the Interior. In its present form, it was created by Congress as part of the National Historic Preservation Act of 1966 (16 U.S.C. 470).

[11] For an excellent treatment of the issues surrounding the property rights debate, refer to: Grier, Casey Christine. This Land Is My Land: Historic Preservation and Land Use Regulation in the Twenty-First Century. Master's Thesis. Athens, GA: University of Georgia, 2001. Chapter 3 is especially on point.

been successful across Georgia and throughout the nation in implementing voluntary programs that have rejuvenated historic neighborhoods and instilled a preservation *ethos* in communities.[12]

Yet preservationists are not limited to pleas and boosterism. Private land use controls have achieved widespread use as another means of protecting the irreplaceable.[13] Attempts at creating restrictions on property interests are as old as the Anglo-American legal system itself. While the mediaeval lawyers were not terribly concerned with preservation, the legal tools they and their successors at the bar helped to craft eventually earned the begrudging acceptance of courts. Many have withstood the test of time, allowing them to be used in modern-day efforts at cultural resource protection. Common law tools, such as restrictive covenants, can thus be redeployed as revived, albeit limited, weapons in the preservationist's arsenal.

Several states have passed legislation in order to redress the inherent restrictions on the applicability of the common law tools, leading to the creation of a new class of property rights based on the old concept of easements.[14] This last method, since it requires explicit authorization from state legislatures through the form of statutes in derogation of the common law, is one of the newest approaches and offers a great deal of promise. Georgia has permitted such easements since 1976, and this paper seeks to analyze the success of the easement laws over the past twenty-seven years and comment on the present and future of easement usage in Georgia.

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[12] The voice of nonprofits should not be the only one heard in education efforts. Notably, the Georgia Historic Preservation Act of 1980, which provided a law of general application that enabled cities and counties across the state to create preservation commissions and locally designated districts, also exhorts preservation commissions to promote general education about the goals and benefits of preservation in the community. Discussion of easement donations would certainly fall within the scope of this exhortation, whether the donations would be directed toward a local governmental agency or a certified nonprofit organization.

[13] The National Trust for Historic Preservation is a Congressionally-chartered nonprofit organization dedicated to preservation. Its motto is "protecting the irreplaceable." www.nthp.org

[14] For a list of states that have created statutory easements in property for purposes of conservation or preservation, based on the Uniform Conservation Easement Act, see: http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucea.asp

CHAPTER 2: IS LESS MORE? --THE ADVANTAGES OF EASEMENTS GENERALLY

Private sector tools for protecting historic resources can often be enormously expensive. Fee simple absolute acquisition, for instance, involve large sums of money for the purchase and subsequent maintenance of historic structures or landscapes. Even for preservation organizations with sizeable budgets, the cost of outright purchases, as well as restoration and maintenance costs, can quickly prove to be prohibitive. Revolving funds are often used in conjunction by local or state organizations to promote the rehabilitation or restoration of individual properties, but these typically take considerable time and money to create shifts in neighborhood character. Even in a revolving fund, there is a strong impetus for attaching protective restrictions on the property after the organization relinquishes its fee simple ownership. The right legal tools must be made available if this is to be accomplished effectively. In order for private land use controls to be viable as tools for preservationists, there must be feasible alternatives to outright acquisition of historic properties.

Property Ownership as a Bundle of Sticks

Chapter 1 introduced the idea of less than full ownership in a parcel of real property. Every first-year law student must receive the long-used bundle of sticks metaphor in describing the nature of the various interests in a particular piece of real property. A complete bundle with all of its sticks is analogous to fee simple absolute ownership of a property. Yet various individual sticks may be alienable – that is, they may be removed from the bundle as a whole and sold or otherwise conveyed to other owners while the original owner retains the remaining sticks in the bundle. The value of the individual sticks depends on the location of the property. Oil

rights to ten acres of land in southwest Georgia would be of virtually no value, while a similar plot in the prime petroleum country of east Texas might be worth millions.

From a financial point of view, purchasing just one or two sticks from the bundle is generally much cheaper than purchasing the entire bundle. This small handful of sticks can be applied to achieve the primary goal of the purchase – that is, to prevent the alteration of the historic fabric of the resource to a point that the historic integrity is seriously damaged or destroyed. Further, easement agreements are generally written so that the maintenance cost of an historic structure would remain as a burden on the original owner, providing yet another financial savings for the easement holder. The use of easements is therefore a very cost effective approach toward leveraging limited private funds to protect important cultural sites.

The Adaptability of Cultural Easements

Common law tools often have provided limited assistance in the effort to protect historic sites because of significant limitations on their use. Chapter 3 will describe in greater detail how these restrictions have frustrated preservationists and hindered them from employing the law more effectively in their cause. Fortunately, with the advent of statutorily authorized easements, a traditional tool of property owners became unshackled from its earlier constraints and made more flexible to meet the varied needs of historic resource protection.

Determining how to protect an important site often involves a careful determination of its valued attributes. Preservationists and architectural historians often describe an historic resource by breaking it down into its major components. An historic house, for example, is comprised of several different parts: its exterior, its interior, and its landscape features.[15] The relative

[15] Too often, there is not enough appreciation of the entire context of a resource. Yet entire theses have been written on each of these categories. For just such an example, refer to: Morgan, Julie Camille. An Analysis of the

importance of each of these categories will depend on the particular property. An effective preservation strategy would individually note each of these respective characteristics and seek to protect them in perpetuity in a relatively uncomplicated, but very effective, manner. In Georgia, since the passage of the Uniform Conservation Easement Act of 1992 (UCEA), such varying attributes may all be collectively protected under the legal term *conservation easements*.[16] Within the terms of a single easement agreement, protection may be extended broadly to an entire resource as well as to important elements. Well-drafted easement agreements provide accurate and carefully worded descriptions when discussing the area(s) to be protected so that any dispute in the future over the scope of protection can be minimized.

Tax Benefits from Easement Donations

There are several potential tax benefits to the owner of a property who grants a conservation easement in perpetuity to a qualified organization. First and foremost, however, the donor must ensure that the recipient organization is a Qualified Organization under applicable federal and state laws. Organizations that fall within the acceptable definition include a governmental agency, charitable corporation, charitable association or charitable trust.[17] This requirement ensures that the organizations are properly motivated to monitor and enforce, if need, be, the easement that they are agreeing to take.

Tax benefits from easement donation stem from the economic impact that occurs when an owner experiences a partial loss of control over the property affected. The conveyance of an easement necessarily encumbers the property by preventing other more intensive uses. The

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Use of Preservation Easements for Historic Interiors. Master's thesis. Athens, GA: University of Georgia, 1999, pp. 1, 6.

[16] Refer to O.C.G.A. § 44-10-2.

[17] Refer to IRC § 170(h).

owner's development rights on the property have been permanently curtailed. As a result, the market value of the property often decreases.

In recognition of this economic fact, federal, state, and local revenue collection agencies have adjusted their programs to provide corresponding treatment to the property. In the realm of income tax, the land owner has taken a loss of future income derived from the potential use of the property at a more intensive level. Tax credits taken against the grantor's federal income tax are permitted to offset this loss of economic value.

The reduction in value also impacts other areas of tax law, from estate planning to property tax payment. In the latter case, for example, after a grantor has gifted a cultural easement on a property, the land owner is entitled to a property tax reassessment. The county tax assessor must take the irrevocable grant of development rights into account when recalculating the fair market value (FMV) of the parcel. Should the re-evaluation lower the FMV, the owner can expect lower property taxes.[18]

Summation

The general concepts which have been briefly mentioned in this chapter are examples of how easements can offer special ways of advancing preservation goals in addition to, or in absence of, governmental action. The following chapters are dedicated to more detailed explanations of the legal and other issues surrounding the use of easements. The structure of an easement transfer will be reviewed, as well as actual experiences around the state in evaluating the effectiveness of easement usage.

[18] While state law mandates a reassessment of the property's FMV, there is no parallel requirement that the tax assessor must determine that the property has lost substantial economic value. The assessor thus retains a large amount of discretion. This issue will be discussed in much greater depth, especially in chapters 4 and 11.

PART II:

THE LAW OF PROPERTY

AND PRIVATE LAND-USE CONTROLS

CHAPTER 3: CREATURES OF THE COMMON LAW

The field of Anglo-American law owes much to the ebb and flow of historical events, and much less to specific pronouncements of exhaustive, discrete legal documents. Those subjects of the British crown residing in the Home Isles, for instance, still carry out their daily life and work despite the lack of a single text that could be authoritatively called a constitution.[19] Residents of the United States even today handle their transactions and enforce their contracts in a court system which depends on common law principles that substantially predate 1789. These laws crafted by centuries of judges represent layer upon layer of judicial decisions that have created accretions of law which provide the basic foundations of the modern legal system. As Oliver Wendell Holmes famously pointed out: "The life of the law has not been logic: it has been experience."[20] Nowhere is this more accurate than in the law of property.

A Brief History of Anglo-American Land Ownership Patterns

Statutory easements are relative newcomers to the field of property law. The common law of the courts received little interference from legislative enactments until recent history. The establishment and regulation of property rights had been a matter of state concern, and the form of these rights had been little altered by state legislatures. Indeed, Georgians have been highly suspicious of legislative involvement in the realm of property rights for quite some time. A

[19] Refer to Constitutional Law.

[20] Excerpted from the first of a series of lectures of Oliver Wendell Holmes, Jr., which he delivered to the Lowell Institute in Boston. His lectures were later published as The Common Law. New York: Dover, 1991 (originally published in 1881).

Georgia judge seemed to capture the sentiment in 1851 when he wrote: "The sacredness of private property ought not to be confided to the uncertain virtue of those who govern."[21]

State legislators were careful to tread lightly and slowly as they balanced the traditions of the common law with the new concerns of a rapidly industrializing economy. The mere process of codification of state laws did not even begin until Georgia led the way in 1859.[22] If old rights were to be extinguished or new ones created, the state legislature would be responsible for bringing about such a result.[23] Only in the twentieth century did such efforts gain much currency, and often as a result of nationwide efforts to promote modified interests in property or uniformity amongst state laws in land ownership and other areas. Georgia is a clear example: The first statutory act creating façade and conservation easements as distinct interests in real property was not passed until 1976.[24]

In contrast, common law easements and their cousins enjoy a lengthy, if convoluted, history. These legal tools all have the effect of placing restrictions on the use or sale of real property. Such purposes have been regarded with suspicion by the courts, which have struggled with such issues throughout English and American legal history.

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[21] Refer to: Parham v. Justices of Inferior Court, 9 Ga. 341 (1851). Perhaps this offers an antecedent to the adage that neither life nor property is safe when the General Assembly is in session.

[22] GA codification. Codification often was merely an official legislative sanction attached to common law precepts. Thus, the age-old judicial aversion to restraints on alienability often found its way into various parts of state codes, and these sections have continued onward to the present. The passage of the model conservation easement legislation – the Uniform Conservation Easement Act (discussed in detail in Chapter 4) – has been essential in many states in order to allow the creation of easements in perpetuity. Refer to: Kass, Stephen L.; LaBelle, Judith M.; and Hansell, David A. "Qualified Real Property Interest," § 1.5.1. Rehabilitating Older and Historic Buildings: Law Taxation Strategies. 2nd Ed. New York: John Wiley & Sons, 1993, pp. 25-27.

[23] State legislatures have had the sole responsibility in determining whether to end such private land use practices as primogeniture and fee tail. Virginia was a leader in this effort when it accomplished these goals in 1785. Most of the early states and colonies followed. Georgia had abolished the two devices by the time it ratified the Constitution. Mentioned in Lowe v. Brooks, 23 Ga. 325 (1857). To date, however, a few states still permit the limited creation of fee tails. Because of the advent of other legal tools for protecting a family's land holdings, however, this approach is rarely used today even in these states.

[24] Georgia Façade and Conservation Easement Act, O.C.G.A. § 44-10-1 thru 5 (1976).

Before the coming of the Industrial Revolution, ownership of land in the Anglo-American tradition served as the near universal basis for status and wealth. Urban areas, by and large, had not yet become teeming metropolises, and the class of city-dwelling artisans and bourgeois merchants was still rather small. Feudalism had created a hierarchy of fealty, based on the granting of titles derived from grants of land. In a static society where social mobility was almost unknown, ensuring a family's continued enjoyment of social standing proved vital. Preserving a family's status from generation to generation required the retention of property. Thus, lawyers for the landed gentry and nobility found themselves spending enormous effort on devising ways of protecting an estate from division because of the mismanagement or financial excesses of an heir.[25]

Such legal security for a client depended on the ebb and flow of parliamentary action and judicial skepticism at indefinitely restricted ownership. The judges hardly conceived of themselves as great equalizers out to prevent perpetuation of privilege among the elite, but they nonetheless looked to prevent unnecessary encumbrances on land ownership. The centuries after the Norman conquest thus provided a backdrop for the struggle over the alienability of property interests. The needs of English feudalism demanded the conveyance of a father's lands to his first-born son in order to preserve the holdings in their entirety, and with them, the fealties that had been sworn based on possession of the land. Primogeniture[26], as this practice came to be known, was joined by another legal tool known as fee tail.[27] Through use of this latter method, land could be entailed with absolute restrictions against transfer to someone outside of the

[25]Land hunger was widespread in mediaeval England. Stampley, Ginger. Law and Abstraction in Twelfth, Thirteenth, and Fourteenth Century England: The Case of the Maritagium and the Gift in Tail. Rice University. Available online at: http://www.whiterose.org/ginger/writing/swssa.html

[26] Not until the Statute of Wills, passed by Parliament in 1540, was it even possible to cut off a first-born son from his inheritance.

[27] Although the fee tail evolved independent of Parliamentary action, it was given a statutory definition by De Donis Conditionalibus in 1285. Biancalana, Joseph. The Fee Tail and the Common Recovery in Medieval England, 1176-1502. Cambridge: Cambridge U.P., 2001.

lineage of the initial recipient of the grant of property. A landowner could thus perpetuate the ownership of property among his bloodline, even though massive debts were accumulated by spendthrift heirs. At best, creditors could take control over entailed property only for the lifetime of the individual currently in possession of the land. Upon his death, the title and the right of possession would automatically transfer to the appropriate heir.[28] There was deeply-rooted judicial distrust of such restraints on the alienability of title in land, but the endorsement of the fee tail by Parliament in 1285 forced the hand of the courts.[29]

The land-based concepts of wealth and status from England would eventually accompany colonists across the Atlantic and took root in the fertile soil of the American colonies. The high birth rates across classes of the time, as well as the rather overstated numbers of second- and third-born sons who could expect no land inheritance, resulted in the emergence of a restless young population cohort entertained by wild rumors of wealth in the colonies that convinced many to set sail from home.[30]

The southern colonies came to share the greatest similarities with the mother country in this respect. The initial waves of colonists to Virginia, for example, hoped to realize a quick fortune in tobacco and return to the Home Isles in ascendant triumph, so they were less concerned about establishing a system of social classes, and more about protecting their self-interest.[31] Eventually, the establishment of permanent settlements gave rise to a recreation of the

[28] The Restatement, 1st, of Property, § 78, provides a discussion of the operation of a fee tail.
[29] Parliament codified the fee tail when it passed De Donis Conditionalibus in 1285.
[30] Refer in part to: Kolp, John Gilman. Gentlemen and Freeholders: Electoral Politics in Colonial Virginia. Baltimore, MD: Johns Hopkins UP, 1998, p. 40-43.
[31] At first, all white men were extended suffrage. Later, as social class became more important, real property became a means of verifying acceptability and voting rights were restricted to land owners. Kolp, John Gilman. Gentlemen and Freeholders: Electoral Politics in Colonial Virginia. Baltimore, MD: Johns Hopkins UP, 1998, pp. 42-57.

landed gentry of England.[32] The First Families of Virginia became known not merely for their wealth or political influence, but for their vast land holdings.[33]

This mentality continued well into republican times. Thomas Jefferson ardently hoped that the new nation would look to land-owning yeoman farmers to establish a rural agrarianism as the basis for democratic rule.[34] Jefferson chose to retain most of his extensive, largely inherited holdings in real property until his death in 1826, despite the accumulation of tremendous debts.[35] His land-rich, cash-poor situation reflected the condition of many planters.[36] His ownership of these lands arose, not out of the financial motive to place his assets in high-yield investment strategies, but from inheritance and the need to retain his status as a gentleman farmer. This produced quite a twist of fate. Jefferson himself was responsible for convincing the Virginia House of Burgesses to abolish the feudal notions of primogeniture and fee tail[37], thus allowing property to be conveyed more freely. Because of his progressive stance, Jefferson's properties were put up for auction after his death and promptly sold off to help creditors in

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[32]The genteel elite grew up in particular in the Chesapeake and Tidewater areas. Rouse, Parke, Jr. Planters and Pioneers: Life in Colonial Virginia. New York: Hastings House, 1968, pp. 2-6. The western and southern areas, with a somewhat more frontier spirit, showed similarities, but exhibited a little more social fluidity than the static coastal areas. Farmer, Charles J. The Absence of Towns: Settlement and Country Trade in Southside Virginia, 1730-1800. Lanham, MD: Rowan and Littlefield Publishers, 1993, pp. 1-3, 13-15.

[33] The First Families no doubt have been the recipients of overblown hype over the centuries. Many could not exactly claim noble ancestors in England, but they were adept at improvising. In the mid-1900s, the College of Heralds was issuing thousands of coats-of-arms for new gentlemen planters who had become eligible through land acquisitions in the colonies. Dowdy, Clifford. The Virginia Dynasties: The Emergence of "King" Carter and the Golden Age. Boston: Little, Brown and Co., 1969, p. 10. In time, members of the elite would even author histories to polish the patriotism of the wealthy. Randolph, Edmund. History of Virginia. Reissued for the Virginia Historical Society. Charlottesville, VA: University of Virginia Press, 1970, pp. 176-178.

[34] Jefferson has become so entwined in the philosophy of agrarianism that he is a necessary party to class readings on the subject today. For an example, refer to the class discussion assignment for Thursday, September 25, in the course Introduction to Rural and Regional Studies, at:
http://www.southwest.msus.edu/geoffreycunfer/Teaching/IRRS4.htm

[35] Jefferson's public service led to the neglect of his personal finances. By 1823, he had accumulated liabilities of over $40,000. Malone, Dumas. Jefferson and his Time: The Sage of Monticello. Vol. 6. Boston: Little, Brown and Co., 1981, pp. 448, 479-482.

[36] James Monroe, among others, found himself in similar stead. Debts could pile high rapidly on large plantations when harvests proved meager. Indebtedness was very common, although Jefferson represented an extreme case. Leepson, Marc. Saving Monticello. New York: Free Press, 2001, pp. 1-3, 12-16.

[37] The Virginia Act of 1785, and its annulment of these mediaeval principles, is cited in the Georgia case of Thompson v. Sandford, 13 Ga. 238 (1853).

satisfying a portion of his monumental personal debts. Not even Monticello was spared, and Jefferson's daughter and sole surviving child had no choice but to move out with her children in order to allow the house to be sold to resolve the financial arrears of the estate.[38] In Jefferson's case, the ownership of land was even more important than personal solvency.

As Jefferson sat alone in the sanctum sanctorum of his library in his later years contemplating the end of his family's control of their land holdings, develop ers in Boston were laying the groundwork for a new chapter in land use law.[39] As the population of Boston grew, new neighborhoods to the west would be subdivided and sold to those eager to build their own townhouses. In order to ensure some uniformity in design and initial use, the developers began to incorporate covenants in the deeds. These restrictions would ensure that all the houses on the lots would be the same height and number of stories, for instance. Such covenants seemed to apply for relatively short periods during the construction phase. The popularity of these devices grew so much that the city of Boston chose to attach them to newly created lands in the South End beginning in the 1840s, and later, the Back Bay beginning in 1857, as tidal marshes were converted into firm land and sold off to private owners.[40] The number of covenants had ballooned exponentially as the city expanded, but the vague language of the deeds and the untested nature of restrictions left some question as to how much the deeds restricted for how long.

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[38] Jefferson's letters provide a window into the dire financial straits of the family. In the end, Jefferson attempted a legislatively-authorized land lottery, but it unfortunately proved a dismal failure. After his death, the different plantations, the slaves, the furnishings, and even Monticello were auctioned off. Jefferson, Thomas. "The Family Letters of Thomas Jefferson." Betts, Edwin Morris, and Bear, James Adam, Jr. Curators of the University of Missouri. Columbia, MO: University of Missouri Press, 1966, pp. 32-42, 467.

[39] For in-depth treatment of the Boston experience, refer specifically of Chapter 3 of Michael Holleran's work: "Boston's Changeful Times," from Origins of Preservation & Planning in America. Baltimore, MD: The Johns Hopkins U.P.

[40] *ibid*., 70-72.

Another major question remained. Crucially, the seemingly limited ability to enforce the covenants proved to be the greatest obstacle to their durability. Under the common law, the concept of privity of estate served to control which parties would have the right to go to court over disagreements in matters of real property. Only those people who personally owned a valid interest in a parcel of land, or who had owned an interest in the land, would generally have the ability to contest the use or ownership of the property in court. Thus, a former owner who placed a restrictive covenant on Blackacre – or his heirs – could sue a current owner who allegedly violated the terms of the covenant. A neighboring landowner on Greenacre, however, who lived next door but held no ownership interest in Blackacre, was without recourse if the owner of Blackacre put the property to a use that violated the covenant, so long as the use did not physically or economically harm Greenacre. This neighbor was said to lack vertical privity of estate, since the restrictions on his property flowed from an earlier owner, but not from the owner of Blackacre. Enforcing covenants proved especially daunting in rapidly growing areas where the original owner (and heirs) who subdivided the land and created the restrictions had died, moved away, or lacked any economic interest in enforcing the covenants.

Finally, a test case appeared on the scene[41], and the Massachusetts Supreme Judicial Court decided to weigh in on the matter. A group of landowners whose properties had been subdivided by a single common owner and limited by uniform restrictive covenants to residential use sued a neighbor whose property was also party to the original ownership and attendant restrictions because of a violation of the residential-only rule. The land in question had initially been subdivided and covenanted in 1823 – three years before Jefferson's death and the selling off of Monticello. In a decision with wide repercussions, the Massachusetts high court made two determinations in 1863. First, while the benefit of the burdens had technical effect of flowing to

[41] Refer to the case of Parker v. Nightingale. 88 Mass. 341 (1863).

the original subdivider (and heirs), the court opined that the later wholesale departure physically and economically of the original owner had the result in allowing this benefit to flow to the later owners. These subsequent owners, who otherwise lacked any connection to each other's agreements with respective prior owners, were deemed to be partaking in the enjoyment of this collective benefit. Individually, each could act to protect that party's share of the benefit through legal action. Second, land use restrictions could indeed be permanent.[42] The earlier agrarian assumption of land ownership as a source of status had become transformed in urban Boston to encompass a more diverse view well-rooted in economic investment value.

In the subsequent decades, the decision of the Massachusetts Supreme Judicial Court gained widespread currency among the states. The ruling helped to establish both the potential permanence of private land use restrictions and the ability of individuals who were otherwise not in privity of estate with their neighbors to have a potential avenue of access to the courts to enforce such restrictions.

Other legal tools were also examined for their usefulness in such ways. As landowners sought to use these common law mechanisms against each other to test their relative effectiveness, the results often depended the fact patterns of the individual cases and on the type of property interest (if any) involved. As with the example of the bundle of sticks, someone's ability to pursue a particular course of legal action successfully would depend on which stick she owned. Alternately, someone who actually owned none of the sticks, but held instead a promise from the real owner of the bundle, might have an altogether different set of rights and remedies. The applicability and durability of these rights would depend on the interpretation given them by

[42] *ibid*., pp. 73-75.

the courts. The remainder of the chapter discusses examples of such property issues and how they relate to preservation.[43]

Real Covenants

There are promises and then there are promises. The different manner in which promises may be enforced can determine the way in which restrictions can be imposed and maintained on land. Two types of covenants are recognized in the courts: those enforceable at law and those enforceable in equity. Those in the former category are called real covenants. Those of the latter are referred to as equitable servitudes, about which more will be noted below.

Real covenants represent legally enforceable promise regarding certain conduct toward a property. In order for a court to enforce a covenant, however, a series of rigorous legal criteria must be met.[44] There is disagreement among the authorities as to whether a real covenant is to be considered an interest in land. If the covenant is not an interest, then it would not need to be reduced to writing, as in the case of easements, in order to satisfy the requirements of the Statute of Frauds.[45]

Covenants have a draw-back in that the remedy for a breach may be monetary damages instead of continued enjoyment of the impositions of the original agreement.[46] For preservationists, this outcome is less than satisfactory. Compelled payment from someone who

[43] The reader should know that this area of law is currently in the midst of a debate over the consolidation of various property law devices. The Restatement (3d) of Property—Servitudes provides an excellent example of the position being advocated by many scholars that these various devices should be unified under the term *servitude*. Thus, terms like "real covenant" and "equitable servitude" would be relegated to histories of the evolution of property law in efforts aimed at simplifying a complex and confusing area of property law. Refer to Rest. (3d) of Property—Servitudes, § 1.4.

[44] "In order for a covenant to run with the land, the grantor and grantee must intend that the covenant run with the land, that the covenant touch and concern the land, and that there be privity of estate between the original parties to the covenant, the original parties and the present disputants, or between the party claiming the benefit of the covenant and the party who rests under the burden" [footnotes omitted] at C.J.S. Covenants § 25. Vol. 21.

[45] Refer to: Bruce, Jon W., and Ely, James W., Jr. §1.07 of The Law of Easements and Licenses in Land. Boston: Warren, Gorham and Lamont, 1995.

[46] C.J.S. Covenants § 51. Vol. 21.

breached a restrictive covenant means little if the money is compensation for the loss of a formerly protected historic resource. Until recently, covenants on property located within city limits in Georgia were statutorily restricted to a length of twenty years,[47] although the possibility of renewal or exception could exist.[48]

Traditionally, covenants generally imposed negative restrictions, as opposed to granting the privilege of affirmative action. These distinctions are especially relevant in the realm of preservation. A negative obligation placed on an historic tree would prevent subsequent owners from cutting it down. Such a provision acts to prohibit certain kinds of actions. In contrast, an affirmative obligation would require future owners to take proactive steps to fulfill a series of requirements. An owner whose historic structure is subject to an affirmative obligation might be compelled to maintain the structure according to prescribed standards. This distinction can have great consequences for the protection afforded an historic resource. Because of the voluminous information on this topic, further reading is advisable for those wishing to know more about covenants.[49]

[47] Refer to: "covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws nor in those areas in counties for which zoning laws have been adopted." O.C.G.A. § 44-5-60(b). This section was repealed in 1993, but the Georgia Supreme Court has held that covenants conveyed prior to the repeal were still bound by the twenty year restriction on enforceability. Bickford v. Yancey Development Co., Inc., 276 Ga. 814 (Ga. 2003)

[48] Refer to O.C.G.A. § 44-5-60(d) regarding the renewability of certain covenants and O.C.G.A. § 44-5-60(c) regarding the special exemption provided to certain covenants given for public benefit.

[49] There is much scholarship available that further delves into the law of real covenants. For a lengthier explanation of the differences between real covenants and easements, refer to Bruce, Jon W., and Ely, James W., Jr. "Easements Differentiated from Real Covenants," from §1.07 of The Law of Easements and Licenses in Land. Boston: Warren, Gorham and Lamont, 1995.

Equitable Servitudes

An equitable servitude places reciprocal burdens on adjoining landowners by agreement. It exists not as a matter of law, but of equity.[50] They are considered to represent an interest in land. Therefore, successful suits in court against someone whose actions are in direct contravention of the restrictions imposed by the equitable servitude result in the use of injunctions or other equitable remedies to ensure the continued effectiveness of the servitude. Equitable servitudes, which run with the land, are enforceable if the parties intended the promise to run, that there is adequate notice of the restriction (actual or constructive), and that the restrictions touch and concern the land. While there is no requirement of horizontal or vertical privity of estate for the burden to run, vertical privity of estate may be required for a court to be able to compel the enforcement of the benefit as a mater of equity.[51] Those using equitable servitudes would be well advised to file a record of the restriction at the county courthouse with all affected properties in order to prevent future owners from having the servitude thrown out over the issue of notice.

Licenses

The meaning of license in the realm of property law deserves a brief mention, if for no other reason than to explain why this legal tool is of little long-term benefit to preservationists. Under Georgia law, licenses exist under a variety of conditions. A person who is granted permission to enter the property of another – a neighbor invited over for a backyard cook-out – is

[50] In Georgia, most of the jurisdiction of the early courts of equity have long since passed on to the courts of law. Superior court judges, therefore, wield the ability to issue decrees of law and equity. As such, a superior court judge can issue an injunction that prohibits a property owner from commencing or continuing in an activity that is in contravention of a restriction on the property, such as through an equitable servitude.

[51] Privity of estate is a way of analyzing the relationship between landowners, based on ownership over time and/or common links derived from prior common ownership or agreements by prior owners affecting lands in question.

considered to have received a license to enter the private property of another. The person entering the land of the occupant is called a licensee. Licenses are often oral (or parol) in nature, compared to easements, which must be written down to satisfy the Statute of Frauds.[52] A license can expire or be abandoned or revoked unilaterally. Authorities differ on whether a license is actually an interest in property. It is generally not transferable to another person, and it is not necessarily exclusive in its scope. With such flimsy protections, licenses offer little assistance in meaningful protection of historic resources.[53]

Common Law Easements

In the days before legislatures created special conservation easements as distinct interests in property, easements existed in a variety of types, with many different potential influences on the properties that were touched by them and the people who were affected by them. The relationship between the different parties involved in an easement helps provide the starting point for an understanding of why easements were the tools subsequently adopted by the General Assembly as the best tool for encouraging the protection of environmental and cultural resources by third parties.

A brief set of hypothetical situations should help to illustrate the main issue regarding the potential spill-over affect of an *easement appurtenant*. Person Y subdivides his property into Blackacre, which fronts the road, and Greenacre, which is without any access to the road or any other public right of way. Person Y then sells Greenacre to Person Z and grants to Z an

[52] Refer to: "License Distinguished," § 21:3, from Georgia Jurisprudence. 2d Ed. Rochester, NY: Lawyers Coop Publ., 1995.

[53] For more reading about licenses, including a few exceptions to the general rules stated above, such as the irrevocable license, refer to: Backman, James H,., and Thomas, David A. "Licenses Affecting Real Property," § 5, A Practical Guide to Disputes Between Adjoining Landowners –Easements. New York: Mathew Bender & Co., 1990.

easement that permits travel across Blackacre to gain entry to Greenacre. The two properties are appurtenant – that is, they share a common boundary. A special relationship has arisen between the two parcels of land: Person Y's property was burdened by the agreement (the servient estate), while the benefit flowed to Person Z's property (the dominant estate). This benefit-burden relationship is a hallmark of easements appurtenant.

In comparison, Person A, who owns the partially wooded Whiteacre, might grant Person B, a friend from another county, an easement for hunting. Person A has therefore granted an *easement in gross*, since B does not own adjoining land that benefits from the burden placed on Whiteacre. The easement is personal to A, and not in a particular parcel of land owned by A. Over a century ago, the Georgia Supreme Court looked to a standard law treatise for guidance when it declared that "[a] n easement in gross**,** as the term is now commonly used, is a mere personal right in the land of another..."[54]

In the common law tradition, such easements were held to be limited to the life of the beneficiary and did not pass to heirs at death. Initially, A was not allowed to transfer the easement in gross to another during the span of his lifetime, either.[55] Eventually, a commercial exception arose, and, from there, other exceptions. The courts, ever concerned about additional burdens on the alienability of land, have not been inclined to extend such benefits liberally when there was not a direct and apparent relationship between neighboring lands.

The easement is a non-possessory interest in property that is legally enforceable in the courts. As such, easement agreements must be written down appropriately to meet the standard

[54] This comes from the case of Stovall v. Coggins Granite Co., 116 Ga. 376 (1902), which itself borrowed the definition from 10 Am. & Eng.Enc. Law (2d ed.), 403.
[55] Refer to: Bruce, Jon W., and Ely, James W., Jr. "Easement in Gross Defined," from §2.01[2] of The Law of Easements and Licenses in Land. Boston: Warren, Gorham and Lamont, 1995.

requirements of real property ownership imposed by the Statute of Frauds. The hypothetical situations demonstrate that both types of easements generally granted to the easement holder the right to engage in affirmative acts. Often, access to the servient property was the result. While negative easements for light or air were also used, at least under British common law, they were more restricted in use and far less common.

Other Restrictions in Property Deeds

Property lawyers have kept a few other tricks up their sleeves to help grantors who wish to influence how their property is used after it leaves their absolute control. Despite judicial disapproval of restraints on alienability, these devises have run the gauntlet and emerged intact. These tools include the right of reverter, the remainder interest, and right of first refusal.[56]

The right of reverter allows the grantor (or heirs) to ensure that the property continues in use to promote the purpose for which it was originally granted. This tool can be used to snatch the property from the beneficiary long after the grantor is dead. For instance, a grantor could give property to a city to be used solely for a school building, with a right of reverter if the property were ever used for another purpose. If, after sixty years, the city tore down the school building and attempted to sell the land to private developers for residential use, the ownership of the land would automatically revert back to the control of the heirs of the grantor. Obviously, the city would not likely choose to return the property voluntarily. The heirs of the grantor would have to take the initiative and press their claim in court. Heirs have certainly done so before in Georgia. [57]

[56] Refer to: Casner, A. James; Leach, W. Barton; French, Susan Fletcher; Korngold, Gerald; VanderVelder, Lea. Cases and Text on Property. 4th ed. New York: Aspen Publishers, 2000, pp. 312 *et seq.*

[57] This tool has been used by grantors in Georgia, and the reversionary interest has been triggered. It has also been implied by operation of law, such as in cases where testamentary trusts are deemed to fail. Land that U.S. Senator

Alternately, the conveyor of a parcel of land may retain a remainder interest. A remainder interest is often triggered by a death. Person A will dictate in her will that Person B will receive a life tenancy in Blackacre until his death, whereupon Blackacre will then be conveyed to Person C as the remainderman (that is, the person in whom the remainder interest is vested). This approach offers only minimal assistance to preservationists.

The right of first refusal allows for limited control over the future transfers of a parcel of land. When Person A sells Blackacre to Person B, subject to a right of first refusal that is vested in A, then B must offer Blackacre to A for potential purchase before B is allowed to sell the land to Person C. Person A can have some control over the way in which land is conveyed to as yet undetermined owners of Blackacre. Person A would generally be required to pay the fair market value. This tool is actually used quite frequently by preservationists today, especially in the sale of properties that have been spun through a revolving fund. The Historic Savannah Foundation regularly places such a clause in properties that it sells through its revolving fund, in addition to other legal tools, to ensure that future owners of an historic property will be up to the task of stewardship.

Preservation Uses for the Common Law Tools

These tools all have varying degrees of relevance for the preservationist of today. Licenses, because of their ephemeral nature and revocability, offer little in the way of concrete benefits that could bear up over extended periods of time. Restrictive covenants, equitable servitudes, and easements provide more lasting ways of protection.

Bacon had granted to Macon as trusteee for use as a city park for white residents reverted back to the heirs of the grantor when the city tried to integrate the park pursuant to federal law. Refer to: Evans v. Abney, 396 U.S. 435 (1970).

Restrictive covenants, in fact, are a common tool of preservationists in many communities. The Historic Savannah Foundation began to use restrictive covenants when it created its revolving fund. Since the organization's revolving fund predates the creation of statutory easements in Georgia, the covenants were, for a time, the only means of ensuring adequate future stewardship of properties resold by the foundation. Since the passage of the Georgia Façade and Conservation Easements Act of 1976, the Historic Savannah Foundation has used both restrictive covenants and easements in the resale of properties that pass through the revolving fund.[58]

Real covenants, however, have their shortcomings. In some cases, if substantial damage is done to the property before a court action is brought, the judge may award only monetary damages. Further, covenants have run into roadblocks regarding restrictions in perpetuity. This not only prevents preservationists from knowing that the resource has the guarantee of long-term protection, but also denies the individual whose property is subject to the restriction from being eligible for most tax benefits.

Equitable servitudes offer the promise of equitable remedies, but their limited applicability frustrates their potential. Servitudes often involve reciprocal burdens placed on neighboring properties. In some situations, a preservation organization or its friends will have the good fortune of owning a parcel of land adjacent to the one needing protection, allowing this tool to be employed. The lack of case law on this approach clouds its reliability as a strong protection method.

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[58] An email from the Historic Savannah Foundation (HSF) indicated that the HSF continues to use different legal tools to protect its local resources. Savannah has accumulated one of the largest holdings of easements in the nation. This was true even nineteen years ago. Refer to the survey information in the first thesis completed by a student in the master's program in historic preservation: Butler, Donna Ratchford. The Use of Easements on Historic Structures: A Survey and Analysis of Easement Holding Organizations in Georgia, Louisiana, North Carolina, South Carolina, and Virginia. Master's thesis. Athens, GA: University of Georgia, 1985, pp. 35-37.

Common law easements were similar to equitable servitudes in that they, too, had the ability to provide strong protections, but were often barred from widespread implementation because of their narrow range of use. Easements in gross were generally limited to the lifespan of the recipient, so perpetuity was a pipe dream under that approach. Easements appurtenant, in contrast, could offer the permanence sought after. Unfortunately, such easements would require fee simple ownership of property adjacent to the one to be protected. There was also serious doubt as to whether a court would honor an easement to protect the view of an architecturally notable structure on the neighboring property.[59] Vernacular structures would very likely have had a very hard time of it, indeed.

Preservationists needed a legal tool that offered a means of permanent protection of the resource, while achieving this protection at a fraction of the cost of fee simple acquisition of the property itself (or any neighboring lots). What was needed was…a type of genetically engineered easement in gross! In the end, the responsibility for ensuring a means of successful private sector preservation activity in perpetuity fell squarely on the shoulders of the Georgia General Assembly. Only statutory action could allow the creation of a new kind of interest in property that would be sure to stand up in the courts. In determining how to craft the new interest, the drafters of the new legislation decided to borrow from the common law and modify an existing one.

[59] Certainly the old English doctrine of ancient lights would not apply. American courts have looked with disfavor on the English common law idea of negative easements by prescription. Georgia's Supreme Court took a stance against the doctrine in Turner v. Thompson, 58 Ga. 268 (1877).

CHAPTER 4: THE LEGISLATIVE INCUBATOR AND THE BIRTH OF STATUTORY EASEMENTS

The Georgia Façade and Conservation Easements Act of 1976

The year 1976 was an important one for preservation in the state of Georgia. In that year, a bill appeared for the first time in the General Assembly advocating the enactment of statewide enabling legislation that would freely permit local governments to establish regulated historic districts. The bill, entitled HB 327, passed the House with a wide margin of support, but it never emerged for a vote on the Senate floor. Another four years would pass before the Georgia Historic Preservation Act of 1980 would finally become law.[60]

Yet the efforts of preservationists were not wholly without tangible success that legislative session. After the two houses and the governor reached agreement on the need for a new kind of private land use control, statutorily-authorized easements were born. The Georgia Façade and Conservation Easements Act of 1976 (GFCEA) allowed certain property owners to convey façade or conservation easements to their property.[61] Tax benefits were available for the donors.[62]

The act set forth specific qualifications for a structure to qualify for a grant of an easement. Three terms are given special definition: *façade*, *façade easement*, and c*onservation easement*. "Façade" was defined to include an "interior or exterior surface of a building which is

[60] Refer to Waters, John C. *Maintaining a Sense of Place*. Athens, GA: ICAD, 1983. p. 16.
[61] Originally, the act was included in the Official Code of Georgia § 85-1406 through § 85-1410. After the reorganization of the statute books, the GFCEA was located in O.C.G.A. § 44-10-1 through 44-10-5.
[62] At the time the General Assembly passed the act in early 1976, the primary tax benefits were derived from a reduction in property values and the resulting taxes based on the assessment. The U.S. Congress had not yet passed the Tax Reform Act of 1976, which allowed deductions of twenty-five percent on rehabilitations of income-producing properties. When the benefits of easement donations could be coupled with the financial attractiveness of this latter tax deduction, eve greater tax savings could be realized.

given emphasis by special architectural treatment".[63] This definition clearly focuses on buildings as the primary type of historic resource to be protected, notably allowing the protection of exteriors and interiors. The phrasing "given emphasis by special architectural treatment" suggests that high-style designs would be preferred over vernacular or folk forms. Indeed, there may well have been some question as to whether easements granted for some or all structures in the latter categories would have been enforceable.

The definition of "façade easement" implies that a broader range of historic resources could be eligible for easement protection.[64] It focuses on "any restriction or limitation on the use of real property…whose purposes is [sic] to preserve historically or architecturally significant structures or sites…" The term "sites" opens up the possibility of protection for cultural landscapes or archaeologically significant areas, although these specific types are not directly mentioned. In addition, the phrase "restriction or limitation" indicates that only a negative restriction could be placed on the resource. A property under an easement could therefore be protected from being willfully torn down by a subsequent owner, but the easement-holding organization would likely be incapable of enforcing an affirmative obligation that would compel the grantor or a subsequent owner to maintain the property. An owner who was seeking to remove the protected resource from the property could potentially enlist the help of demolition by neglect.

The definition of "façade easement" also placed serious explicit restrictions on the eligibility of sites for easements. For a property to be eligible for a façade easement, it had to be located within a local historic district that had been duly created by the municipality. Since the statewide enabling legislation for historic districts had yet to be signed into law in 1976, only a

[63] Refer to: Official Code of Georgia § 85-1407(a) (or, later, O.C.G.A. § 44-10-2(2)).
[64] Refer to: Official Code of Georgia § 85-1407(b) (or, later, O.C.G.A. § 44-10-2(3), which partially amended the original language).

small handful of Georgia municipalities had successfully created such districts. These select cities had been required to go through the laborious process of petitioning the General Assembly individually for special legislation to meet their needs.

Conservation easements, as defined under the GFCEA, offered a more expansive ability to transfer easements, since they did not seem to be as explicitly as location-limited as façade easements.[65] The Georgia attorney general came out in support of this interpretation of the statute.[66] Yet conservation easements were primarily intended for the protection of natural areas. The language dealing with eligible conservation sites declared the purpose to be "to preserve land or water areas predominantly in their natural, scenic, landscape or open condition or in agricultural, farming, forest or open space or to return land or water areas to such conditions or uses when such land is located within a historic district provided for in (a) above".[67] This seems at first glance to be an expansive definition, but it specifically omits any reference to structures or archaeological areas, or even historic landscape features. Areas that had traditionally been devoted to agricultural uses could be protected with a conservation easement, but they did not have to meet certain standards of age or historic integrity in order to qualify. There was some flexibility, in that historic resources located in rural or natural areas eligible for easement transfers could be protected from the threat of density, but there was little assurance that a court would fully uphold a conservation easement that attempted specifically to protect historic

[65] Refer to: Official Code of Georgia § 85-1407(c) (or, later, O.C.G.A. § 44-10-2(1)).
[66] "Where the purpose of a conservation easement is to preserve land or water areas predominantly in their natural, scenic, landscape, or open condition or in agricultural, farming, forest, or open space use, it is not essential that the land be located within a historic district." 1976 Op. Att'y. Gen. No. 76 -50.
[67] Presumably, the statute should have referred to the definition of façade easement, located in subsection (b), which provides the description of an "officially designated historic district". Subsection (a) lists the definition of "façade" only and provides no mention of historic districts.

resources located in a rural setting.[68] In the end, while preservationists were offered a new tool for their work, some serious built-in limitations constrained the application of the new tool.

Nonetheless, the statute was a step up from the common law approach. The new law provided explicit language to describe how the characteristics of the new easement departed from the traditional easement under the common law. The law suggested that the new property interest could function as an easement appurtenant in some situations, provided that there were adjoining dominant and servient properties. Crucially, however, the provisions went on to proclaim that, in the absence of a dominant parcel of land, the restriction on the servient parcel was to be enforceable in equity and in law as an easement in gross. Further, such easements were deemed to be granted in perpetuity, unless the text of the grant stated otherwise.[69] These two provisions echoed in part the sentiments of the Massachusetts Supreme Judicial Court in 1863 regarding restrictive covenants.[70]

Interestingly, the statute placed the statement of legislative purpose at the end.[71] The language underscored the importance of "the historical, cultural and aesthetic heritage" of Georgia, and, invoking the police power as a source of authority for the act, declared the preservation of such heritage to be "essential to the promotion of the health, prosperity and general welfare of the people". Any mention of the economic importance of preservation was absent. The provision continues to provide a broad and inclusive definition of resources worthy of protection: "places, districts, sites buildings, structures, and works of art having a special historical, cultural and aesthetic interest or value". This phrasing might serve to counterbalance

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[68] In fact, under standard statutory interpretation doctrines, a court may well have determined that the express limitations on façade easements imposed in O.C.G.A. § 44-10-2(3) would preclude protection for historic resources under a conservation easement in a rural area, based on the definition in O.C.G.A. § 44-10-2(1).
[69] Refer to: Official Code of Georgia § 85-1408 (or, later, O.C.G.A. § 44-10-4).
[70] Refer back to pages 22-23 *supra*.
[71] Official Code of Georgia § 85-1410 (or, later, O.C.G.A. § 44-10-1, which moved the legislative purpose to the first article).

the restrictive definitions earlier for "façade" and "façade easement". There were still several vague areas in the law regarding the extent to which easements could be used and the types of properties eligible for protection through use of the new tool.

The location of the statute changed – after the new state constitution went into effect on 1 July 1983 [72], there was a subsequent reorganization of the entire statutory record system. Easements landed in the newly created Title 44 (Property) and Chapter 10 (Historic Preservation). This change in location was merely reshuffling; the amendments that were made over time, however, were more substantial in their consequences. Georgia legislators had revisited the act in the ensuing years after 1976 to tweak a few provisions.

A comparison of the original text with the statute as it read in 1991 provides the reader with some interesting indications of which initial phrases merited alteration. Eligibility was expanded. For instance, owners of historic resources that were located outside of locally designated historic districts were initially unable to grant a facade easement, no matter how significant the site. This obstacle was somewhat lessened in 1980, when the passage of the Georgia Historic Preservation Act allowed cities and counties in Georgia to create local preservation commissions and historic districts more easily. The ensuing growth in the number of locally designated districts increased the number of properties eligible for easement donations. Yet there were still hundreds of thousands of properties across the state that would remain ineligible for protection through the grant of an easement, regardless of an owner's interest in such a donation. To address this dilemma, the statute was amended so that "historically or architecturally significant structures or sites" located outside of such districts would be considered eligible for easement transfers if they had been specially designated as possessing

[72] For an online version of the 1983 state constitution, complete with ratification and effectiveness dates and interactive user options, refer to: http://www.law.emory.edu/GEORGIA/gaconst.html

these special qualities by the state historic preservation officer.[73] This was still a cumbersome process, but it opened the door for the first time for the protection of historic properties in communities that were predominantly opposed to any public land use controls over historic resources.

The Uniform Conservation Easement Act of 1992

In the years following the passage of the GFCEA of 1976, the national popularity of the concept of statutorily-authorized easements increased substantially. Their applicability to various problems proved quite enticing, even moreso because they would allow transactions between private parties in the marketplace. This approach appealed to property rights activists, limited government advocates, and marketplace-oriented enthusiasts. The government role was reduced to creating a new legal interest in property legislatively and subsequently enforcing private agreements involving the new interest in the courts. Support for the concept encouraged the National Conference of Commissioners on Uniform State Laws (NCCUSL) to author a uniform model act, officially approved in 1981, which came to be called the Uniform Conservation Easement Act.[74] States interested in passing such an act thereafter had an easy-to-use template that, after some potential modification to account for the peculiarities of the law of a particular state, could be adopted rather easily. Legislators nationwide found the whole idea of conservation easements especially satisfying because it involved virtually no additional costs

[73] Refer to: O.C.G.A. § 44-10-2(3).

[74]NCCUSL is a body of lawyers, jurists, and academics seeking to promote interstate commerce and relieve the necessity of uniform laws at the federal level by offering up to the various state legislatures a series of model statutes on a wide variety of subjects in order to encourage the harmonization of state laws. NCCUSL's Uniform Conservation Easement Act is one example of just such a model statute. Refer to: http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm

imposed on the government coffers, and it offered an easy way to gain re-election supporters by voting in favor of a bill with many supporters and very few detractors.

The environmental movement nationwide was poised to receive a great boost through the use of conservation easements. The pace of governmental initiatives in proactively buying or otherwise protecting ecologically important lands proved less than adequate in the eyes of environmentalists. In Georgia, the enabling legislation of 1976 provided a mechanism for environmentalists to pursue such ends. Unfortunately, many potential areas for protection were located in rural areas, and there were questions regarding the full applicability of the GFCEA. In an opinion of the state attorney general, some advisory clarification helped to demystify the use of easements in these areas. Such opinions are not binding on courts, however, and there was no guarantee that the Georgia judiciary would completely agree with the determination of an officer of the executive branch. As a result, environmentalists and preservationists both found the act to be less helpful than expected, even with the addition of already discussed amendments.

In response to interest for the broader applicability of easements in order to extend their usefulness, as well as interest in more detailed guidelines to prepare against claims of statutory vagueness in court battles, the General Assembly decided to make major changes. Legislators were so impressed by NCCUSL's model statute that the original act was repealed in its entirety and replaced with the Uniform Conservation Easement Act of 1992.

In addition to reiterating the core provisions of the GFCEA, the UCEA of 1992 accomplished several new objectives. Perhaps the first change to catch the reader's eye is the one reflected in the new title of the act.[75] No longer is there a distinction between façade and conservation easements. All easements conveyed under the authorization of the 1992 legislation

[75] The title of the original act was located at Official Code of Georgia § 85-1406 (or, later, O.C.G.A. § 44-10-1). The title of the new act was, and is, located at O.C.G.A. § 44-10-1.

are deemed to be conservation easements, whether they apply to one hundred acres' worth of deciduous riparian buffer along the Kinchafoonee Creek or to the façade of an antebellum Greek Revival plantation mansion in Burke County.

The inclusion of affirmative obligations as a valid provision in easement deeds represents a pivotal change in the new law.[76] As noted earlier, only negative obligations were explicitly authorized in the language of the first statute. Easement-holding organizations seemed without recourse if the owner of an historic resource chose to let neglect and decay wreak havoc. While restrictive covenants could have potentially have been used in an attempt to impose an affirmative obligation, they would likely have expired and become unenforceable over time. Consequently, with the inclusion of the affirmative obligation phrasing, the new law guaranteed that *maintenance in perpetuity* could be included as a binding provision of an easement.

The range of historic resources specifically listed as eligible for easement protection in the act is more detailed in the new statute. In contrast to the earlier focus primarily on "historically or architecturally significant" characteristics, the list now reaches out to cover "the historical, architectural, archaeological, or cultural aspects of real property".[77] This provides a firmer basis for the use of easements for the protection of historic resources beyond the high-style houses that tend to garner the most attention.

Since the conservation easement is derived from common law precedent, there was concern that some decisions handed down from the bench would unnecessarily limit or misconstrue the new property interest. Even judges sometimes have sometimes lost their way in the thicket of common legal and equitable tools regarding property. The UCEA therefore includes wording that would assert precisely how far the specific protections of statutorily

[76] Refer to: O.C.G.A. § 44-10-2.
[77] *ibid.*

authorized easements would reach. This safety measure seeks to insure ample explanation, for the courts not only harbor long-held suspicions over restraints on the alienability of land, but also follow a general policy of strictly construing statutes in derogation of the common law. The third party right of enforcement is carefully laid out to ensure that an easement-holding organization could permit another Qualified Organization to step in and be recognized as having standing in enforcement actions to redress an alleged violation of the terms of the agreement.[78] This helps to skirt around the traditional concerns over the non-assignability of easements in gross and privity of estate. In addition, the new law devotes a good deal of ink to reinforce the validity of a conservation easement, despite having provisions that were at odds with long-held common law principles.[79] Included in this list of enforceable provisions, among other authorized traits already mentioned, are: property use restrictions of unlimited duration, restrictions that might not touch and concern the land, and easements that are not appurtenant to the servient estate.[80]

The carefully crafted definition of "holder" ensures that easement-holding entities have met the criteria for Qualified Organizations required under § 170(h) of the Internal Revenue Code. The organizations are therefore eligible to accept easements from grantors seeking to claim federal income tax deductions on their donations.[81] The importance of a little motivation cannot be underestimated. Part IV explores this issue more in-depth.

Another important new feature is the limitation of liability on the part of the easement holder.[82] Should a situation arise where the negative limitations and affirmative obligations

[78] Refer to: O.C.G.A. § 44-10-2.
[79] Refer to: O.C.G.A. § 44-10-5.
[80] The presumption that the easement was granted in perpetuity, unless stated otherwise in the easement deed, is reiterated at: O.C.G.A. § 44-10-3(b).
[81] Refer to: O.C.G.A. § 44-10-2.
[82] Refer to: O.C.G.A. § 44-10-3(e).

imposed by an easement, or attempts at enforcing these restrictions, were determined to have been the source of personal injuries or damage to property, the easement holder would not be held liable. The value of the easement itself would be unreachable by a plaintiff, nor would the other assets of the holder. This protection alleviates a potentially major source of financial disaster for organizations considering easement programs.

There is one provision that is less demanding in the newer version of the law. The final provisions state that easement deeds "may be recorded" with the office of the clerk of superior court at the courthouse in the county in which the property is located.[83] This differs from the wording of the original statute, which mandated that such filings occur in order for the easement to be considered to be valid. While filings may now be recommendatory, any Qualified Organization that is accepting an easement has every reason to ensure that the encumbrance is filed at the county courthouse. If a transfer of the property were to occur without notification of the easement holder, the fact that the easement has been recorded would place a new owner on constructive notice that the property is encumbered. A title search in the files at the courthouse, which is customary for the conveyance of real property, would provide potential owners the opportunity to discover this restriction on their own. While the easement can be enforceable even if there is failure to notify a subsequent purchaser, proper filing at the courthouse indicates that the holder has made a good-faith effort to notify all comers of the restriction and helps to minimize potential tension that could arise between the holder and surprised subsequent purchasers of the historic resource.

The recording of the easement also serves as notice to the local board of tax assessors that the restriction may have altered the economic value of the encumbered property, triggering an

[83] Refer to: O.C.G.A. § 44-10-8.

entitlement for reassessment to take into account this change in the ownership arrangement of the property interests and the new prohibitions on more intensive development in the future.[84] A reduced economic value of the encumbered property can lower the owner's state and local property tax burden.

Notably, the UCEA was amended in 1993 after only one year of existence due to concerns over the relationship between conservation easements in perpetuity and the power of eminent domain.[85] The phrasing of the law prevented entities with eminent domain from creating or expanding easements in perpetuity, but it also prohibited eminent domain from being implemented to alter or remove an easement as well. Such easements appeared to be immune to condemnation for the purposes of demolishing a protected historic resource. The earlier GFCEA had not directly addressed the matter. This new development proved quite unsettling to some entities empowered with eminent domain,[86] particularly the Georgia Department of Transportation and utility companies. There were fears that easements could be used as a means of obstructing major highway or utility projects by acquiring indestructible easements on historic resources located in the path of the planned development. There was even speculation that the original act violated the state constitution because of this potentially overbroad grant of immunity to conservation easements. This conjecture will likely remain untested, for no appellate court in Georgia ever considered the question, and an amendment to the UCEA quickly changed the wording during the legislative session the following year.

The amendment was careful to keep some doors open and to close others. Entities wielding eminent domain remained restricted from using their authority for the acquisition of

[84] Refer to: O.C.G.A. § 44-10-8. This provision mandating reassessment does not require that the property's value be lowered automatically.
[85] Refer to: O.C.G.A. § 44-10-3(a).
[86] While exceptions exist, the General Assembly has generally bestowed the power of eminent domain to cities, counties, utility companies, and certain state agencies, among others.

easements. Further, the amendment removed the immunity offered initially, and thus permitted entities like the state Department of Transportation and utility companies to condemn easements in perpetuity in order to further development projects.[87] The use of condemnation toward easements on historic structures for the purpose of demolishing or removing them is addressed further in Chapter 9.

[87] Stevens, Michael Paul. "Historic Preservations: P rohibit Power of Eminent Domain from Creating, Altering, or Affecting Conservation Easements." Note. 10 Ga. St. U. L.Rev. 207. September, 1993.

CHAPTER 5: EASEMENT DNA: ELEMENTS OF AN EASEMENT DEED

Even with the detailed provisions and clear guidance of the Uniform Conservation Easement Act of 1992 (as amended), a statutorily-authorized cultural easement will be of little use without careful drafting of the deed conveying the non-possessory interest. A well-written easement document will provide not only a lucid description of the important attributes of the resource being protected, but also a robust explanation of a host of legal rights and remedies available to the easement holder if the grantor or subsequent owners should violate the terms of the agreement. The provisions discussed in this chapter are illustrated in the exhaustive sample easement deed located in Appendix E.[88] While they are not handled in the same order in the deed as in this chapter, nearly all of the provisions may be found in this example upon a careful reading.

Because the statutorily-authorized easement has roots in the common law, even excellent easement deeds may be affected by some old common law doctrines. The lack of case law in Georgia creates some uncertainty in this area. Perhaps the biggest common law influence would be the doctrine of merger. When a single owner comes into possession of different interests in the same property, the interests are said to merge.[89] Merger could be applied to a situation where a Qualified Organization that holds a cultural easement on Blackacre later buys or receives fee simple ownership of Blackacre. The organization's easement would become extinguished under merger. If Blackacre were later sold to another party, a new easement deed would need to be

[88] The sample easement deed was made available through the kind support of Easements Atlanta. Other examples of easement deeds are relatively easy to discover, although they are generally less detailed than the one in Appendix E. For an example of an older generic easement (although apparently derived from an Illinois deed), with attendant documents and a helpful explanation of some of the provisions, refer to pp. 343-375 of "Historic Preservation Law." Robinson, Nicholas A., Chairman. Real Estate Law and Practice, Course Handbook Series, Number 168. Practicing Law Institute, 1979.

[89] Refer to: Bruce, Jon W., and Ely, James W., Jr. "Merger," from §10.09 of The Law of Easements and Licenses in Land. Boston: Warren, Gorham and Lamont, 1995.

drawn up to reserve this property interest in the Qualified Organization. If a new deed is not drawn up, the subsequent owner would take the land without any restrictions arising out of the original easement.

The full level of protections offered in an easement deed will be determined by a combination of what the statute affords, what common law principles permit, and what the grantor is willing to accept. While some provisions of a deed would be considered essential, such as the grant in perpetuity and the affirmative obligation to maintain the historic resource, others may require negotiation in order to convince the owner to donate the easement. For instance, the donor may want a limited right of reversion if the donation fails to qualify for the federal income tax deduction. Such minutiae can be worked out for each individual property; in general, however, convincing the donor to accept the maximum number of restrictions and obligations will allow for the most effective use of the easement.

Some elements are vital to a good easement deed. These include the description of the resource, the agreement of the owner to abide by the affirmative obligations and negative restrictions necessary for protection, the right of inspection, clarification on how the easement will be handled if the holder must assign it to another entity in the future, the way in which damage to the resource is addressed, the right of enforcement by the holder, and, of course, the fact that the conveyance represents a grant of a non-possessory interest in the property *in perpetuity*. These are in addition to the standard provisions required for transfers of property, such as the long-held requirements under the Statute of Frauds that real property conveyances be written and properly signed and witnessed.[90] The deed should require that any and all important correspondence between the holder and the grantor or assigns should be in writing. Amendments to the original deed would certainly need to meet the terms of the Statute of

[90] Refer to: O.C.G.A. § 44-6-200 *et seq.*

Frauds, but requiring other correspondence to be in writing would help prevent confusion in communication and provide a better paper trail in the unfortunate event of an enforcement action. The grantee would also want to address the consequences that might arise from any unknown encumbrances that exist on the property. Finally, if any liens are outstanding, the responsibility for paying them should be assigned wholly to the owner.

Description of the Resource

A carefully constructed description provides the necessary information for ensuring protection of the valued historic characteristics. This is often accomplished by writing about these attributes in great detail in an attachment that is incorporated by reference in the text of the deed itself. Photographs and scaled drawings can be included in the attachments to provide graphic representation of how the detailing appeared at the time of the grant of the easement. These illustrations can help enormously in the long-term work of preserving the details, as well as in any projects designed to restore or partially reconstruct them in the event of damage. Without these guiding elements, inappropriate alterations would be difficult to prove, making enforcement of the easement tremendously harder.

Dual Duties Imposed on the Grantor

In donating the easement, the grantor is promising to fulfill a series of requirements. Under the original statute, the donor and subsequent owners were held to certain negative restrictions, such as the prohibition against inappropriate alteration or demolition of the resource. After the advent of the new law, grantors and their assigns could also be held responsible for adhering to affirmative obligations that would compel proactive efforts to maintain the structure at the level of appearance and historic integrity from the time that the easement was originally

created. The option of demolition by neglect was thus no longer a way of extinguishing the easement on a protected resource. Easements written today should take advantage of both avenues of protection. Because of the varied types of resources throughout the state, the phrasing of these provisions will depend on the nature of the resource being protected. Affirmative obligations on the maintenance of an extensive set of historic formal gardens would likely need to be fairly detailed, for example, in order to guide preservation efforts. References to the official description of the property (mentioned above) or other historic drawings of the property would assist in this process.

The Right of Inspection

In order to ensure that the terms of the easement are being fulfilled, the holder has an obligation to monitor. Consequently, there should be a provision on the right of inspection. Typically, standard inspections are set at once a year, although there is a special allowance for short-notice inspections when there is an alleged violation of the easement. The phrasing is important in that the enforceable absolute right of the holder to conduct an inspection must not be abridged, but the holder should agree not to harass the property owner with frequent demands for inspection. Ideally, in order to maintain healthy relations between the two parties, inspection times should be mutually agreed upon in order to prevent hardship for the property owner or for tenants currently leasing a protected structure. In the event that an enforcement action is necessary to resolve a breach of the agreement discovered after inspection, the language can place the legal expenses and the cost of the repairs on the shoulder of the property owner. The right of access that comes from the monitoring obligations will generally be limited to the holder of the easement (or, possibly, another Qualified Organization with a third-party right of

enforcement). Most grantors, fearful of an implied right of access to the general public that could be construed to arise from the grant of the easement, would want a specific clause that denies any such right. This issue may be negotiable with the grantor, especially if the holder is accepting an especially notable interior easement protecting a former theater or bank lobby. Perhaps public access can be permitted on special occasions each year. Such provisions will generally be dependent on the amenability of the donor in allowing such access.

Handling Injury to the Resource

Damage to the property is a major concern. The restrictions of an easement, in combination with federal tax law provisions, can be used to remove any incentive for a future owner who seeks to demolish the resource in order to allow a more intensive and financially profitable use on the site. The owner could be required to pay the difference between the economic value of the property before the destruction and the economic value of the property after the destruction. While this does not remove the financial gain from increased future rents on the site that would result from a more intensive use, it does prevent the owner from enjoying any of the increase in the property value itself after removal of the encumbrance.

Whether intentional or unintentional, many types of damage would seriously threaten the integrity of the resource. The language of the easement should include several provisions addressing the aftermath of any such unwelcome developments. In the event of a cataclysmic conflagration, for instance, the property owner should be obligated to take short-term measures to stabilize what remains, and the easement holder must be able to hire a trained consultant of its choosing to inspect the property and assess the injury and the feasibility of repair. The assessment will provide guidance on whether the holder should pursue a course of restoration or,

if irreparable damage has occurred, whether the holder should consent to appear with the property owner before a court to petition for the extinguishment of the easement. The deed can prescribe specific provisions as to how such determinations are to be carried out, and how any remaining funds that were tied to the easement should be handled by the holder. The easement holder can also choose to retain a right of salvage in such cases in order to take possession of any notable elements that were not wholly destroyed.

Further, the deed can stipulate that the owner continue to pay for the typical protections and responsibilities that are inherent in property ownership generally. The owner should be reminded of the obligation to pay property taxes. In the event that the owner refuses, the holder can choose to step in and pay, then hold the owner responsible for reimbursement. Any lien attached to the property for nonpayment of taxes would not automatically extinguish the easement.

Liability issues should be addressed in the deed as a supplement to the protections offered in the UCEA.[91] The holder can require the grantor and assigns to give indemnification for any injuries to third parties that may arise out of the holder's ownership of the easement. To protect against other liability problems that may be deleterious to the resource, the grantor can covenant not to employ the resource as a place for use or storage of environmentally hazardous materials, as certified by existing federal, state, or local laws.

Also, while the UCEA does not directly address the issue of insurance, an easement deed that includes a requirement of at least a minimal level of insurance would likely be enforceable. The fee simple owner of the property should be required to acquire or pay for a reasonable level of casualty insurance – that is, at a level that would generally be expected on such a property absent the easement – in order to provide a basic level of financial protection for the resource. If

[91] Refer to: O.C.G.A. § 44-10-3(e).

there are local circumstances that suggest the need for additional insurance – such as a location in a one-hundred year flood plain or on the beach in a hurricane-prone area – an agreement can be phrased to work out the proper level of insurance. Local custom among other property owners can be used as guidance. Any insurance proceeds related to the value of the easement should be designated as solely for the use of the easement holder in order to permit the handling any damage to the protected attributes as best possible.

Rights in Derogation of the Common Law

All the promises made by the grantor would be for naught if the holder has no right of enforcement. The deed should invoke the right of enforcement granted by statute and explain how and when the easement holder may to go to court to enjoin activities which are explicitly prohibited or compel activities which are affirmatively required. Under the UCEA, the holder can assign the right of enforcement to a third party, if desired.[92] Such an action should also be handled with a detailed document that explains the rights and responsibilities of the assignment.

Of great interest to the holder and the property owner is the grant in perpetuity. While easements can be donated or sold for a specific term of years, only gifts that are unlimited in the duration of the property interest will allow the holder to pursue long-term protection of the resource and ensure that the donor will be eligible for tax benefits.[93] Perpetuity is the lynchpin of the entire easement agreement. The issue is of such importance to the private parties involved and to the General Assembly that the statute includes explicit clarification to potential grantors and grantees, as well as to the courts, of how this provision diverges from common law

[92] Refer to O.C.G.A. § 44-10-2.
[93] A grantor who does not donate the easement in perpetuity will remain ineligible for the federal income tax deduction. In addition, the language of the UCEA suggests that the benefits of the property tax reassessment may be substantially reduced by a donation of limited duration.

precedent[94] and how all easement deeds will be presumed from the outset to be perpetual in nature, absent any other controlling language in the deed.[95]

Drafting for the Possibility of Future Changes

The easement may well outlast the original Qualifying Organization that agreed to hold it. Inactivity or other reasons can cause a nonprofit that is very energized now to cease to exist in the not too distant future. In such cases, the organization should have named another entity qualified to accept easements. In Georgia, nonprofits are required to designate successor nonprofit organizations to all of their assets, should they undergo unincorporation. For nonprofits that operate an easement program as only one of many programs, the easements could be directed toward a special successor organization that has an emphasis on easements. Occasionally, municipalities are unincorporated and counties are consolidated, so any such governmental entities with easement holdings should have another Qualified Organization on record in the event that a successor is needed, so that the easements may be transferred relatively easily to another appropriate entity.

Additions or other alterations of the historic resource can be permitted, provided that the easement holder issues permission. Often, standard guidelines used in the preservation community, such as the treatments highlighted in the Secretary of the Interior's Standards, are incorporated by reference in the easement deed. Language may be employed in the deed that lists specific activities that may not be done, such as the placement of large awnings or advertising billboards on the exterior. Management of the grounds can be governed by the deed, including the replacement of trees or other landscape elements. Impermanent aesthetic changes

[94]Refer to: O.C.G.A. § 44-10-5. Note the third clause.
[95] Refer to: O.C.G.A. § 44-10-3(c).

may also be regulated, such as the unsightly accumulation of trash or trash canisters in front of a protected façade.

Because of the long-held distrust of restrictions on the alienability of real property, the courts and long-term public policy will have to come to grips with the consequences of an encumbrance granted in perpetuity. Cultural easements enjoy a unique status because of their restrictions of unlimited duration. As already discussed, courts can choose to extinguish easements for a few reasons. These situations require unusual circumstances, however, which are unlikely to arise frequently. As a result, the great majority of easements will continue in effect so long as the courts choose to validate them. Given the dramatic changes in the field of Anglo-American property law in the last two hundred years, any predictions on the state of the law after the passage of another two centuries would be little more than idle speculation. Because of the real possibility of unforeseeable shifts in the law, easement deeds should include two common contract provisions –amending authority and severability. If easements could not be modified, some of their protective terms may be rendered moot or unenforceable as the interpretation of the law evolves over time. Such changes in conditions would require a response to ensure maximum effectiveness of the easement, and including the power to amend would allow the strengthening of the agreement over time. So long as the parties involved in the easement – the grantor or subsequent owner and the holder (and, possibly, another Qualified Organization with third-party right of enforcement) – all agree on the proposed alteration of the deed[96] and file the amendment with the same office of the clerk of superior court where the original deed resides, the amending should be permissible. Finally, in the event that a court should pronounce a non-essential provision of the easement deed invalid, a severability clause

[96] This assumes that the proposed amendment does not attempt to remove any intrinsic part of the easement, such as the protection in perpetuity. For the sake of clarity, the amendment clause in the deed should emphasize that certain amendments would be unacceptable, even if all parties agreed.

will ensure the continuing effectiveness of the remainder of the requirements set forth in the document.

Depending on the motivations of a potential grantor, certain financial incentives can be dangled by the easement program as an incentive to donate. The inclusion of a limited right of reversion[97] may be needed in the negotiation process to sweeten the deal and convince the property owner to transfer the easement. This limited right of reversion will allow the property interest to return automatically to the grantor if a certain condition is not met. Such a trigger might include a certification of eligibility for the National Register or the non-denial of a particular tax benefit.[98] While a grant without any right of reversion would be preferable, sometimes such clauses will be necessary to catch the attention of the owner of a notable historic property with as-yet-unused development rights that have become economically very valuable. In municipally-run programs, there could be an alternate source of financial incentive available through federal funding. Community development block grants administered by the Department of Housing and Urban Development may be applied toward stabilizing and restoring downtown facades that were donated to the city by private owners. This kinds of optional provisions can be used as bargaining chips by the Qualified Organization that is seeking to acquire the easement.

[97] Refer to Chapter 3 for a brief review of the right of reversion.

[98] The use of this latter condition is not advisable, since it would take longer for the right of reversion to be extinguished. Any condition attached to the non-denial of a federal income tax deduction would remain in effect for five years – the maximum period that the IRS can look backwards in an audit of a taxpayer's annual tax returns. The IRS could potentially deny the deduction several years after the grant, causing the easement to be extinguished. It is better to structure the deed language so that the grantor shoulders the uncertainty.

PART III:

THE TRANSFER AND MAINTENANCE

OF CULTURAL EASEMENTS

IN GEORGIA

CHAPTER 6: A SURVEY OF EASEMENT ACQUISITION AND MONITORING PROGRAMS

The Idea behind the Survey

The original plans for an investigation into the current use of cultural easements in Georgia included grand designs for a broad-based survey of preservation and environmental nonprofits; local, state, and federal governmental agencies; individuals involved in the drafting and passage (and amendment) of Georgia's conservation easement legislation; and associations of real estate lawyers and Realtors® (among others). A variety of media, including notices in several local and state newsletters and a detailed questionnaire, were intended to reach the widest audience and potentially reveal the greatest amount of information on easement usage. The final analysis would provide allow not only an exhaustive look at easement acquisition and monitoring policies across Georgia, but also provide a near-comprehensive listing of current cultural easements and easement-holding entities in Georgia.

In the planning process, it became evident that a survey of this scope would not be feasible, given constraints of time, money, and research approval. Projects undertaken by students at the University of Georgia that involve the survey of groups of people, even professionals in a particular field, must undergo careful scrutiny to ensure that there is no potential harm for those potential participants. This review seeks to ensure that there are adequate types of physical, emotional, and privacy protection for those to be surveyed. Unfortunately, the implementation of this process can require a great deal of time and resources. In the case of this survey, prudence demanded that the scope of the project be scaled back to a level that would be more manageable, for reasons of official approval.

The final survey took on a different character than originally anticipated, but the results still proved informative. Because of the enthusiastic response of participants, enough comments were gleaned from across the state to provide some insight into the current perception and use of conservation easements across the state. Without the invaluable assistance of these voluntary answers, this section of the thesis would have been much the poorer.

In constructing a different survey, new considerations were weighed to determine how the most information could be gleaned from a relatively uncomplicated investigation. The most promising avenue was that of a straightforward and unsophisticated questionnaire[99] that could be emailed without cost to targeted individuals because of their professional or other involvement in organizations that were known to operate or were likely to be aware of easement acquisition and monitoring programs. Official authorization was granted for the survey and its attendant two-page, single-spaced explanation of the purpose and potential harms of the survey, including an implied waiver of liability for participation.[100] In order to reveal the most information possible under the circumstances, the entities targeted were either those located in major metropolitan areas in the state or were otherwise known to be active in programs that sought to protect important cultural or natural resources.[101]

[99] Refer to Appendix A for a copy of the questionnaire.
[100] Refer to Appendix B for a copy of the explanatory letter.
[101] Large urban areas were chosen because of anecdotal information about easement programs located there or because of other indicia of preservation activism in those communities, such as the existence of preservation nonprofits or preservation commissions. Cities, much moreso than counties, have chosen to create preservation commissions and locally designated districts in Georgia. In the end, 2000 U.S. Census numbers on incorporated areas in Georgia were used to target the ten largest-cities in Georgia, as well as a few others with track records of preservation initiatives. Rural areas were unfortunately left without much of a voice under this approach, but research constraints severely limited the scope of the survey.

Methodology

The methodology certainly has its shortcomings. As mentioned already, there is little emphasis on the state's rural cultu ral resources. This area of the state has a very large number of historic resources, and rural preservation is a strong interest of this author, but the unexpected constraints imposed on the survey gave little other choice than to exclude this aspect of easement protection from the survey. Part V notes the great need for further research in this area, especially since easements provide one of the only effective tools that offers a realistic chance of success in the protection of this increasingly endangered class of resources.

This survey is also quite general in nature. Most of the questions are open-ended, soliciting the personal knowledge or experience of the participants in relation to easements. This design was intentional, for many of the individuals who were targeted for questioning were not professional preservationists. Those receiving surveys included city planners and employees of the Department of Community Affairs (DCA), as well as state and local nonprofit preservation groups and the Georgia Historic Preservation Division.[102] The use of a detailed, multi-page questionnaire, in addition to the dense jargon of the two-page explanation and waiver of the cover letter, would very likely have discouraged respondents from completing the survey. The broad queries that were actually used apparently helped to minimize the disincentives from participation, because there was a large amount of feedback that helped to pinpoint clusters of easements as well as identify easement holders across the state. The table on the next two pages provides information on the various communities targeted across the state, as well as the type of

[102] In Georgia state government, the Historic Preservation Division (HPD) falls within the Department of Natural Resources. HPD is administered by the State Historic Preservation Officer, whose position was mandated by the National Historic Preservation Act of 1966. The Department of Community Affairs is a completely separate state agency, but its activities sometimes bring it into cooperation with preservationists across the state.

organizations contacted there and the response rate. This information can serve as starting point for those who have the time and interest to pursue the matter further. Future surveys, especially those that contemplate targeting an audience primarily of preservationists, should look to the well-crafted three-page survey form that Donna Ratchford Butler developed and used in her research for 1985 thesis on façade easements.[103]

Table 1: List of Survey Targets

LOCATION	NAME OF ENTITY	TYPE OF ENTITY	GEOGRAPHIC SCOPE OF ENTITY	RESPONSE?
ALBANY	Albany-Dougherty Planning Department	governmental agency	local	
	Thronateeska Heritage Foundation	nonprofit	local	
ATHENS-CLARKE COUNTY	Athens-Clarke Heritage Foundation	nonprofit	local	
	Athens-Clarke Planning Department	governmental agency	local	
	Georgia Land Trust Service Center	nonprofit	state	X
ATLANTA*	Atlanta History Center	nonprofit	local/regional	
	Atlanta Landmarks (Fox Theatre, et al.)	nonprofit	local/regional	X
	Atlanta Urban Design Commission	governmental agency	local/regional	X
	Better Hometowns Program (DCA)	governmental agency	state	X
	Easements Atlanta	nonprofit	local/regional	X
	Georgia Cities Foundation	nonprofit	state	
	The Georgia Conservancy	nonprofit	state	X
	Georgia Municipal Association	nonprofit	state	
	Georgia Trust for Historic Preservation	nonprofit	state	X
	Historic Preservation Division (DNR)	governmental agency	state	X
	The Nature Conservancy	nonprofit	state/national	X
AUGUSTA-RICHMOND COUNTY	Augusta-Richmond County ARTS	governmental agency	local	

[103] Butler, Donna Ratchford. The Use of Easements on Historic Structures: A Survey and Analysis of Easement Holding Organizations in Georgia, Louisiana, North Carolina, South Carolina, and Virginia. Master's thesis. Athens, GA: University of Georgia, 1985.

RICHMOND COUNTY	Historic Augusta	nonprofit	local	X
	(Land Trust)	nonprofit	local	
COBB COUNTY*	Cobb Land Trust	nonprofit	local	
	Cobb Landmarks and Historical Society	nonprofit	local	X
	Cobb Preservation Foundation	nonprofit	local	
COLUMBUS-MUSKOGEE COUNTY	Columbus-Muskogee County Planning Department	governmental agency	local	
	Historic Columbus	nonprofit	local	
EAST POINT*	Main Street East Point Program	governmental agency	local	
GAINESVILLE	Main Street Gainesville Program	governmental agency	local	X
MACON	Historic Macon/Macon Heritage Foundation	nonprofit	local	X
	Macon-Bibb County Urban Design Department	governmental agency	local	
MARIETTA*	Planning and Zoning Department	governmental agency	local	X
PEACHTREE CITY*	Peachtree City Planning Department	governmental agency	local	
ROME	Rome-Floyd County Planning Department	governmental agency	local	X
ROSWELL*	Historic and Cultural Affairs Department	governmental agency	local	X
SAVANNAH	Georgia Historical Society	nonprofit	state	X
	Historic Savannah Foundation	nonprofit	local	X
	Metropolitan Planning Commission	governmental agency	local	X
SMYRNA*	Community Development Department	governmental agency	local	
THOMASVILLE	Main Street Façade Incentive Grant Program	governmental agency	local	
	Thomasville Landmarks	nonprofit	local	
VALDOSTA	Main Street Valdosta Program	governmental agency	local	

**indicates cities and counties located within the Atlanta Metropolitan Statistical Area. Based on the 2000 U.S. Census, the Atlanta-Sandy Springs-Marietta, GA, Metropolitan Statistical Area included the following counties: Barrow County, Bartow County, Butts County, Carroll County, Cherokee County, Clayton County, Cobb County, Coweta County, Dawson County, DeKalb County, Douglas County, Fayette County, Forsyth County, Fulton County, Gwinnett County, Haralson County, Heard County, Henry County, Jasper County, Lamar County, Meriwether County, Newton County, Paulding County, Pickens County, Pike County, Rockdale County, Spalding County, Walton County.*

Source: http://www.census.gov/population/estimates/metro-city/03mfips.txt

NOTE: Attempts were made to contact other organizations, such as the Association of County Commissioners of Georgia, but all contact information proved incorrect.

Response

Response rates were unexpectedly high, perhaps evincing the strongly motivated mindsets of the participants in the areas of cultural and natural resource protection. Many responses indicated a general lack of easement programs in various cities. In such cases, the respondents generally chose not to complete the attached questionnaire, or only responded to select questions in a general email. While completion of the survey would have provided a better glimpse of what these respondents had heard or read about easements, their method of response underscored the general lack of activity regarding easement programs – and a lack of knowledge about easement use – across the state.

Survey Question 1 [104] *:*

The Historic Savannah Foundation currently possesses over 200 easements, making it the largest holder in the state in any category (among respondents). Based on information from third-party sources, the Economic and Community Development Department of the city of Macon acquired perhaps many dozen easements in the early 1980s, but the program there has reportedly been inactive for ten to fifteen years. The Historic Macon Foundation holds one easement. The Historic Augusta Foundation, which recently founded an easement program, possesses one easement, with the possibility of adding more in the near future. The nonprofits in Savannah, Augusta, and Macon (and, reportedly, others in the state as well) have several

[104] Most respondents chose not to answer Survey Question 8, instead opting to place such information in their answer to Survey Question 1. Thus, for the purposes of this review, the information from answers to Survey Question 8 is combined with the answers from Survey Question 1.

restrictive covenants.[105] Generally, these were accumulated on properties transferred through the local Revolving Fund.

Some Atlanta-based organizations noted their inventories. Easements Atlanta possesses about thirty easements. The Fox Theatre is unprotected by an easement, and most of Midtown Atlanta is reported to be lacking in easements. The Georgia Trust holds twenty-six easements from across the state, fifteen of which were acquired through its Revolving Fund. The Georgia Conservancy holds no easements, but the Nature Conservancy has received donations of twenty easements across the state. There were reports that the Cobb Preservation Foundation and the Cobb Land Trust may each possess one or more easements, but this information could not be confirmed. All other respondents reported that there were no easements in their possession. Many respondents cited other organizations that were included as targeted entities in the survey.

Survey Question 2:

The experiences of respondents with easement programs varied. Some respondents had extensive experience with established easement programs (at least one of those as a student intern). Several had never participated in any such program at all. Others were beginning new programs and were conducting research on issues like effective monitoring polies and fee structures for easement acceptance.

[105] Since the questionnaire focused only on easements, none of the questions specifically asked about other private land use controls, such as restrictive covenants. Several respondents volunteered this information, however.

Survey Question 3:

Easements were considered to be the most effective private legal tool for preservation efforts. Organizations used other methods as well, such as restrictive covenants, five-year agreements, and a right of first refusal, but the perpetuity provision of easements received strong reviews.

Survey Question 4:

In terms of improving incentives for easement donations, the most common response was an increase in the tax benefits of donation. Better breaks in property and income taxes were cited specifically. Also, one respondent suggested the use of different tax benefit programs together to catch the interest of potential donors.

Survey Question 5:

Monitoring was identified as a primary problem in easement programs. There was a general response that understaffed offices had difficulty in finding time to ensure effective monitoring. Sometimes, interns or volunteers were used, filling a strong need for monitors. This type of approach, however, raised the concern of wide variation in the overall quality of monitoring.

Inconsistency in the language of conservation easement deeds was also a concern. Each deed is a separate document and may be tailored to fit the preservation needs of a particular property, but poorly worded deeds may fail to employ the full level of protection – or may cause the deed to be invalid.

Changes in ownership also registered as a problem. A couple of responses focused on the problem of keeping track of changes in ownership, as well as in ensuring that new owners were fully aware of the affirmative duties and negative restrictions that ran with their property.

One respondent explained that people were initially afraid of the paperwork and the use of lawyers, and these initial concerns hurt easement donations. Another pointed out a similar vein – that not enough advocacy had been done to promote easement programs. The owners of significant resources had not been systematically approached, nor had associations of professionals (e.g., lawyers, accountants, and real estate agents) been contacted to set up informational sessions that could address the way in which easement donations would be of help to their current and prospective clients.

Survey Question 6:

Some respondents extolled the general benefits of easements. For instance, landowners may retain their land, while receiving tax benefits. Preservationists may rest assured that the historic resource is protected in perpetuity. The neighbors may rely on the continued presence of the property as it currently stands, and the community may anticipate the future enjoyment of the positive externalities of the resource. Another respondent noted that, despite the initial concerns over hefty paperwork and the involvement of lawyers, the process generally went much more smoothly than many grantors had anticipated. Finally, one comment suggested that the fees collected at the time that an easement was accepted could be used to augment the general budget of a nonprofit easement holder. (Note: This is last approach should be handled with great care. Easement holders may want to set aside all acquisition fees into a special fund for monitoring and enforcement actions only.)

Survey Question 7:

Unfortunately, only seven responses touched on this question. Of those, three chose not to provide rankings in their answers. Nonetheless, the responses point out that the three areas of greatest concern are: the lack of awareness about easement programs, general distrust of less than fee simple ownership, and the lack of adequate financial incentive to the potential donor. Many who responded professed a lack of awareness about easement programs, and the distrust of less than fee simple ownership may well have roots in the lack of widespread knowledge about the firm protections offered by conservation easements. Together, these two responses suggest that public outreach and advocacy need to be high on the list of any Qualified Organization seeking to start or renew an easement program. The lack of adequate financial incentive for prospective donors cannot be easily resolved without legislative action in favor of more generous tax treatment. Nonetheless, better advocacy of existing tax benefits, including the ability to couple different strategies together, would help to disseminate this information to many potential donors who are not yet aware of such opportunities. The chart below displays the responses on this particular question.

Survey Question 7

QUESTION	Response #1	Response #2	Response #3	Response #4	Response #5	Response #6	Response #7
The lack of awareness about easement programs	1	X		3	1	1	X
The cost of monitoring easements		X					
The potential cost of litigation to enforce an easement			X	2			
The lack of trained staff to oversee an easement program					2		
The cost of attorneys' fees in acquiring an easement						3	
General distrust of less than fee simple ownership	2	X		1		2	
The lack of adequate financial incentive to the potential donor	3		X		3		X
Other			X*				X**

**most donors can still reap greater financial benefit from the sale of the property than from tax benefits arising out of a donation.*

***potential donors in less populated areas may have difficulty finding a Qualified Organization willing to accept and monitor an easement.*

Note: Some respondents used an "X" to indicate importance instead of numerically ranking their answers.

State Governmental Activities

Governmental entities in Georgia are entitled to participate in easement acquisition programs. Cost, maintenance, and monitoring have apparently discouraged participation. The limited information revealed through the survey suggests that no state agency has received an easement in perpetuity.[106] There is neither any indication that any state agency is in the process of seeking out individual easements in perpetuity or in the process of creating an easement acquisition and maintenance program. These may be due to limited funds within state agencies and the success of several nonprofit easement programs across the state. This latter potential cause would be especially unfortunate, for a state-level Qualified Organization is direly needed to help acquire and monitor easements in areas of the state that do not have strong nonprofit-operated programs and which are unlikely to see new ones created in the near future.

The reader should note, however, that the Historic Preservation Division (HPD) requires the recipients of all grants-in-aid to sign a preservation agreement. The agreement binds the recipient of the funds (referred to as the subgrantee) for five years to a series of conditions. These conditions include a continued responsibility over the five years to maintain the property, a requirement to receive SHPO approval before "visual or structural alterations" are made, a right of the SHPO to inspect the property, a limited obligation to ensure public enjoyment of the property, and compliance with a series of federal laws against discrimination. This agreement unfortunately offers substantive protection for only five years. The property owner is therefore not eligible for any federal income tax deductions, because the historic resource may be

[106]One would not hazard to say that this assertion is accurate at any level, based on the limited responses and restrictions on the survey. There is evidence that HPD once held an easement on the historic Franklin House in Athens, but it was reportedly extinguished because of defects in the language of the deed. This information requires further verification. It was likely governed by the earlier Georgia Façade and Conservation Easement Act of 1976, which might explain some of the problems with the deed. Although discussions of downtown designation are now moving ahead in Athens, the Franklin House has never been located in such a district, and the ability to acquire an easement on it pre-1992 was severely limited.

demolished after the agreement expires. While helpful, the agreement does not offer the long-term benefits to grantor and grantee that are conveyed by an easement in perpetuity.

Local Governmental Activities

As a rule, local governments have followed the lead of state government and chosen to remain aloof from the easement arena. Several that responded indicated that they held no easements. In Savannah, this result was an active choice based on the presence of the successful program operated by the Historic Savannah Foundation. An economy of scale of sorts can be developed around an easement program. Cooperation among different governmental and nonprofit preservation organizations can allow for selective excellence in the programs that each operates. Concentrating easements in the hands of one holder can make the hiring of a part-time or full-time monitor more feasible, as well as provide a more centralized clearinghouse for information about easements in that community. Savannah provides as stellar example of such an approach.

The governments of Macon and Augusta have taken an activist approach in easement acquisition. Each city decided to employ an easement program to aid in the revitalization of the historic downtown. With access to community development block grants from the Department of Housing and Urban Development, these two cities were able to tap into a substantial funding source that neither could muster very easily independently. The program was set up so that owners of downtown buildings would donate easements for the façades to the city, and the city would subsequently expend municipal funds for restoration and maintenance. By acquiring a property interest via the easement, the city was able avoid legal challenges based on the transfer of public funds to private parties.

Unfortunately, no response could be elicited directly from either city government on the status of their easement programs. Information pieced together from other respondents, as well as other sources, helped to flesh out some of the history. Both cities acquired several dozen façade easements – under the original state enabling legislation – by the time their programs were reviewed by Donna Ratchford Butler in 1985.[107] In the intervening time, however, the information revealed in other survey responses suggests that the level of activity appears to have decreased markedly. Few, if any, easements have been acquired in recent years. The state of monitoring is unknown. With local governments across Georgia facing budget problems, there is a possibility that funds for the inspection of easements will be cut, even though easement holders have an obligation to monitor. The long-term effectiveness of municipal and county easement programs may be suspect, based on these observations.

State Nonprofit Activities

There has been a strong amount of state-level activity in easement acquisition. Notably, the Georgia Trust for Historic Preservation has led the way. Beginning in 1982, the Georgia Trust agreed to accept easements on historic resources from sites across the state when the resource was not located within a locally designated historic district. Easements were not actively solicited, but those that had no local governmental protection were considered for acceptance. In this way, the Georgia Trust was able to acquire several easements.

The Georgia Trust entered a new phase in its easement program when it began a state-level revolving fund in 1992. With the resale of each property, restrictive covenants and

[107] Butler, Donna Ratchford. The Use of Easements on Historic Structures: A Survey and Analysis of Easement Holding Organizations in Georgia, Louisiana, North Carolina, South Carolina, and Virginia. Master's thesis. Athens, GA: University of Georgia, 1985.

easements have been placed on the site to ensure protection in perpetuity. The number of easements held by the Georgia Trust will continue to increase as the success of the Revolving Fund allows more buildings to be directed toward new owners. The donation of a $500,000 challenge grant from the Robert W. Woodruff Foundation in 1997 helped to expand the capacity for revolving properties.[108] With an increase in turn-over, an increase in easement acquisition is sure to follow. The Georgia Trust now has twenty-six easements, and fifteen have been acquired since 1992 from Revolving Fund properties. The rate of easement acquisition through the Revolving Fund is therefore greater than by alternative approaches.

Local Nonprofit Activities

The local nonprofit sector has seen the lion's share of easement activity since the passage of the first enabling legislation in 1976. In part, the existence of well-developed organizations at the local level, such as in Savannah, have allowed some advantage in operating a range of preservation programs that include easements. The reluctance of other organizations also seems to play a large part in some communities. When there is no other entity willing to handle easements, the nonprofits seem to be choosing to step in – even moreso in recent years – and fill the gap.

Savannah operates one of the most successful easement programs in the nation. It has had a great deal of experience in dealing with historic properties. One of the secrets to its success lies in its Revolving Fund. Begun in 1959, the HSF Revolving Fund has retained special private land use protections on each property that it has handled. Prior to 1976, there were no statutorily-authorized easements that could be granted, but covenants and other tools were

[108] http://www.georgiatrust.org/ramb1.html

employed. After 1976, easements were added to the arsenal, thereby adding protection in perpetuity to properties revolved through the fund after that date.

Savannah has another local advantage – the presence of the Savannah College of Art and Design (SCAD). SCAD offers one of the three programs in studies in historic preservation in Georgia, thus providing a ready supply of potential interns for the HSF. Indeed, these interns often help to fulfill the monitoring on the protected properties. The use of individuals who are presumably relatively new to preservation might result in somewhat erratic monitoring. The intern program does mean, however, that the inspections are much more likely to be carried out, and it also provides budding preservationists with first-hand experiences in the operation of an easement program – knowledge that can be carried to future jobs and advisory boards.

Over time, the HSF has unsurprisingly accumulated hundreds of easements. Now that the ability to grant easements is less restricted, thanks to the UCEA of 1992, easements could be acquired more easily outside of the city's sole historic district. There are many excellent historic properties in Savannah that do not fall under the aegis of the Metropolitan Planning Commission, so they are given no municipal protection. Until this situation changes, easements will remain the best way of reaching out and ensuring the preservation of these resources.

Macon provides an interesting counterpoint to Savannah. The Historic Macon/Macon Heritage Foundation (MHF) operates in a city with a rich cultural heritage, yet it possesses only one easement. Even this one was not actively pursued, but was rather a donation on a particularly important building in the downtown area. The MHF made a decision echoing that of the Metropolitan Planning Commission in Savannah – since the city of Macon was operating a vigorous façade acquisition program, the nonprofit chose to focus its resources on other initiatives. The degree to which the Savannah experience actually influenced this decision is

unknown. However the decision was reached, the result suggests that, in all but the largest urban areas, the consolidation of active easement efforts into the hands of one program seems to offer the best chance of success.

Atlanta has proved unique in Georgia in that it has witnessed the creation of a nonprofit organization – Easements Atlanta – dedicated solely to the acquisition and maintenance of easements in the city of Atlanta. Other local nonprofits have slowly accumulated a few easements on important buildings in their communities, but limited funds and staff have generally served as a stumbling block toward major acquisition programs. Some notable landmarks – such as the Fox Theatre – are not protected by easement, but they do enjoy protection under the designation of the Urban Design Commission. Easements Atlanta has had to step up and remind the owners of some protected properties that the easements are no mere slips of paper. The Peachtree Manor Building and the Glenn Building were both shielded from demolition because (1) easements had been granted on their facades and (2) Easements Atlanta fulfilled its duty to protect the easements. Because the organization has easement acquisition and monitoring as its primary mission, it is not distracted by other major programmatic initiatives. This model could be used quite effectively in other communities and even at a state level.

Interest in easement programs seems to be on the increase. Current programs are operating with sustained or increased momentum, and nonprofit organizations in Athens and Augusta are both initiating their own easement programs.[109] The survey results demonstrate that nonprofit-based efforts unquestionably outperform easement programs operated by other categories of Qualified Organizations in Georgia. Since there is lamentably only one state-level

[109] No response was received directly from the Athens-Clarke Heritage Foundation (ACHF), but information in other theses and in a recent newsletter of the organization indicated that the ACHF not only possesses a few easements already, but actively plans to engage in easement acquisition and monitoring efforts in the near future.

organization with an active program, and most of its recent easement acquisitions seem tied to its Revolving Fund, local preservation nonprofits currently serve as the work horse of easement-based protection.

For-profit Activities

Interestingly, the respondents to the survey did not provide even a hint of any for-profit organizations directly involved in using easements as a preservation tool. There are likely some developers who have seen fit to use easements in isolated instances, but there was no mention of any person or company that regularly engaged in such work. While this field has traditionally been the province of state agencies and nonprofits, there is a decided niche for those seeking a lucrative career in this area. More will be said about this in the following chapter.

CHAPTER 7: INTERPRETING THE RESULTS OF THE SURVEY

General Trends

Conservation easements have offered a unique, alternate approach to preservation since their first arrival on the scene in 1976. Their popularity has increased even more in recent years as cities like Macon and nonprofits like the Georgia Trust have incorporated easement programs into their preservation activities. There is an absence of appellate court decisions on easement-related litigation, but this absence of solid case precedent has not hindered efforts directed toward even more widespread easement usage. Because of a lack of comprehensive reporting (in the media or in legal texts) on county superior court proceedings, anticipating test cases is not a promising pastime. Fortunately, the care with which the statute was crafted offers the assurance of substantial legal protection if any challenges should arise.

Easement programs are not without their share of problems, however. Substantial hidden costs can provide serious obstacles for entities attempting to start and manage an easement program. The initial easement acquisition process itself generally involves a great deal of discussion and negotiation between the parties, and attorneys' fees for each side can quickly mount as the wording of the easement agreement is debated. Documentation of the state of the facility must also be carried out thoroughly and reliably. The monitoring process also is not without costs. Knowledgeable monitors must be willing and able to inspect the easement on a regular basis in order to ensure that the property owner is carrying out the terms of the agreement. Further documentation may be necessary to allow for snapshots of the conditions on site over time.

Finally, while many easement agreements prescribe that the costs of any enforcement action be paid by the property owner, the enforcer must first prevail in court and show that defendant had not properly adhered to the easement agreement. The interim costs rise quickly, seriously impairing an organization's ability to fulfill other parts of its mission. Acquiring sufficient fees upfront in order to enable monitoring and enforcement is crucial to continued operation of easement programs. Often, government agencies that accept easements as Qualifying Organizations do not ask for such funds, and become dependent on allocations from the agency's budget. In times of cutbacks, funding for easement programs is apparently one of the first on the chop block.

Court Challenges

To date, no cases have arisen from the superior courts for the consideration of the Georgia Court of Appeals or the Georgia Supreme Court regarding cultural easements. The enabling legislation is quite strong, but an endorsement of the Georgia court of last resort would help end speculation about any issues of unconstitutionality or vagueness.

There have been a few cases promising extensive legal action that grew out of a few anti-easement real estate development projects. The imbroglio over the Glenn Building near Five Points in downtown Atlanta is an example of just such a case. The Turner Company filed a request with the city of Atlanta to condemn a conservation easement on the façade of the vacant, ten-story, 1920s neoclassical office building held by Easements Atlanta in order to allow for the

building's demolition and the construction of a new and much larger mixed-use tower. At present, Turner has shelved the proposal, perhaps for economic and other reasons.[110]

PHOTO OF GLENN BUILDING[111]

Mixed-Heritage Resources

Precious little information appeared from the responses regarding what may be termed "mixed resources". This concept, which has been embraced at the international level by the World Heritage Committee, acknowledges that there are many important sites that bear both

[110] Refer to Appendix F, which provides a copy of the letter from Easements Atlanta to then-Atlanta Mayor Bill Campbell regarding the organization's stance on attempts by Turner to obtain a condemnation of the façade easement from the City of Atlanta.
[111] Refer to the website of the Atlanta Preservation Center: http://www.preserveatlanta.com/glennbuilding.htm

cultural and natural significance.[112] In Georgia, especially because of the state's predominate rural heritage, there is many a cultural resource that is inseparably tied to the site's important natural assets. Trying to sever one set of a property's notable attributes from the other without recognizing – and protecting – the inextricable bond between the two is akin to removing a pound of flesh from someone without spilling "a jot of blood".[113]

Conservation easements in Georgia seem especially adept at addressing such sites of mixed heritage. The Uniform Conservation Easement Act of 1992 explicitly simplified the designation process by discarding the earlier dichotomy between façade and conservation easements (which seemingly placed interior and landscape easements in uneasy categories) and re-characterizing all important heritage sites as eligible for conservation easements that could be tailored with detailed provisions to fit the specific attributes of the property. This fundamental change in terminology, as part of the wholesale restructuring of statutory easement law in 1992, opened wide the door for joint preservation of cultural and natural assets.[114] Unfortunately, the scanty evidence available suggests that few such joint-purpose easements have been created.

The issues of economies-of-scale and expertise may offer the best explanations regarding the missed opportunities in this area. An example from South Carolina offers a clue. Anecdotal evidence suggests that a large Ashley River plantation near Charleston – perhaps Middleton Plantation – has been handled similarly.[115] The historic house and grounds have been protected under separate easement from the several thousand acres of forest and other environmentally-

[112] Refer to the World Heritage List for an example of how resources have been categorized into three kinds of properties: cultural, natural, and mixed. The current list is available at: http://whc.unesco.org/toc/mainf17.htm

[113] Refer to the pronouncement of Portia's judgment awarding to the moneylender Shylock a pound of flesh from an unfortunate debtor, but not a "jot of blood", in Act IV, Scene I of William Shakespeare's *Merchant of Venice*. The quote begins: "Tarry a little; there is something else/This bond doth give thee here no jot of blood/The words expressly are ' a pound of flesh:' …"

[114] For more detailed treatment on how the easement creation powers were expanded after 1992, refer to Chapter 4.

[115] Based on information obtained by the author from an interview with Dr. Hans Neuhauser, who is the director of the Georgia Land Trust Service Center, located in Athens, Georgia. Fall Semester 2003.

important ecosystems. A preservation organization monitors the easement on the former, while an environmental organization supervises the latter. Most nonprofit preservation groups, being already hard-pressed to find the funds and expertise to be adequate stewards of architectural easements, would be unable to provide the kind of regular expert monitoring for ecological areas at a level to conform with rapidly developing surveillance standards from within the environmental community. Alternately, ecologically-oriented nonprofits would be similarly tempted to neglect the cultural attributes of a property because of a dearth of expertise and money.

Mixed heritage sites that encompass enormous swaths of land may well be best protected under this bifurcated approach. Sites that are much smaller, however, are likely more suited to single-entity control of both sets of resources. Perhaps the economy of scale previously noted could manifest itself in this arena in the form of a regional easement holding organization that accumulates enough cultural and natural easements to permit adequate protection of both. At present, any agreements between different nonprofits to split monitoring duties for a mixed-heritage location should be carefully crafted to avoid ambiguity and minimize future disagreements over appropriate allocation strategies for endowment funds or other jointly-managed resources.

Another area of potential conflict in conservation easement law lies in the sometimes antagonistic relationship between historic preservationists and environmental conservationists. Most historic resources share an integral relationship with their environment, from clusters of sharecropper cabins bordering old farm fields to old gold mining sites along alluvial streams of the north Georgia mountains. In such situations, if one group engages in the protective measures and restoration on the site in regards to its particular goals, the viability of the other group's

goals for the site may be seriously threatened. Balancing these competing interests can prove quite difficult, especially when one side refuses to discuss compromises or has no reason to listen to the entreaties of the other party. Greenwood Plantation in southwest Georgia served as a typical example of this stand-off. The multi-thousand acre site, long owned by the Whitney family of the northeast as a retreat and quail plantation, was to be handed over to an environmental conservation organization in order to guarantee good stewardship of a large, rare example of the virgin longleaf-pine and wiregrass ecosystem that once blanketed the coastal plain.[116] The current structures on the property include several architecturally significant buildings, some of which predated even the Whitneys' ownership. The well-known New York architectural firm of McKim, Mead and White was responsible for designing additions to the antebellum plantation house, which still survives. These historic structures were originally not a part of the discussions in the management transfer. Preservationists became concerned that the historic structures would be neglected, and eventually deteriorate and collapse over time. Efforts on the part of the Georgia Trust helped to avert this unnecessary outcome, but the case study illustrates how the differing goals of the two movements can sometimes lead to disagreement on management approaches.[117]

[116] Refer to: "the LA letter." Monthly newsletter of the Georgia Chapter of the American Society of Landscape Architects. Vol. XIII, Issue 10. October 2002, p. 1. Refer also the Georgia Trust's involvement in the restoration after the tragic 1993 fire: http://ecommerce.marist.edu/foy/esopus/essays/thomasville.htm

[117] Information on the buildings of Greenwood Plantation may be found at the National Register listing on-line: http://www.nationalregisterofhistoricplaces.com/GA/Thomas/districts.html. To learn more about The Greentree Foundation's entrusting of environmental stewardship responsibilities on to The Nature Conservancy, refer to the oppress release: http://nature.org/pressroom/press/press723.html

PHOTO OF GREENWOOD PLANTATION[118]

Perhaps the international arena offers an illustration of how these feuding parties can work to avoid such bickering and attempt to work in partnerships to achieve complementary results. The World Heritage Committee, which oversees the World Heritage List of sites with exceptional cultural or natural significance such that they are the common heritage of humanity, permitted Western-based categorical designations only as cultural or natural for the first twenty years of the List's existence. [119] Because of regular debate over the limitations of this approach, a third inclusive category for sites of both natural and cultural significance was created to provide

[118] Source: http://nature.org/pressroom/press/press723.html#

[119] The World Heritage Committee and List were created by the World Heritage Convention, which was created and ratified during the early 1970s as the international community began to develop a greater awareness of cultural and natural treasures after a series of threats – from the systematic destruction of heritage in World War II to natural disasters to incredible development pressures in rapidly urbanizing areas – awakened the international awareness.

for sites that possessed such prominence. In Georgia, conservation easements have a similarly broad applicability.[120] Partnerships between preservationists and conservationists could not only allow each group to achieve its desired goal, but enhance the impact of the cooperation through shared talent, greater educational outreach, and leveraged resources.

The Critical Issue of Monitoring

Monitoring is a very important responsibility entrusted to an entity receiving an easement. Many recipients do not plan adequately for this critical component, and thus face unexpectedly large commitments of time and money in order to police the easements effectively. Because of very limited budgets, a very common response under such circumstances is to monitor haphazardly, if at all.[121] A host of potential problems can result.

Obviously, the most disastrous short-term consequence is destruction of the resource which the easement sought to protect. Subsequent owners of the resource with ill intent may well carry out their plans, even when the holder of the easement operates a reasonably effective monitoring approach. Yet, when vigilance is an integral component in a monitoring program, efforts at intentional demolition can often be caught in their early stages and court orders can be sought to enjoin the owner from further destruction.

Monitoring also serves to protect a resource under more common conditions. An owner's inattention to empty structures can lead to injury – and eventually demolition – by neglect. Most

[120] For greater detail, refer to Chapter 4, which provides an explanation of how the UCEA of 1992 created more flexible easement designation rules that substantially expanded the limited joint-designation abilities under the original GFCEA of 1976.

[121] Information from the easement survey of preservation-related organizations located Part III revealed that many easement programs find themselves struggling to monitor effectively. Some must at least occasionally rely on volunteers or student interns to conduct inspections. Such an approach is better than no inspection, but it can result in the use of individuals with potentially minimal levels of training. Responses in particular to survey question five, and, to a lesser extent, to survey question seven, confirmed this trend.

easements will place affirmative obligations on an owner to maintain a property.[122] Watchful monitoring can help discover such problems. Reminders (or court orders, if necessary) will serve to rectify such problems. Honest, though misguided, attempts by owners to fix problematic features of the structure without adequate advice may impact some of the legally protected elements. Again, effective monitoring will allow agreeable and legally permissible solutions to be found.

Failure to monitor over an extended period of time may result in the destruction of the easement itself. Because statutory easements remain rather new in the area of property law, no case law has been made yet in Georgia on this point. Many railroad companies were granted easements on which they constructed their rail lines. The state of Georgia was very active in helping the fledgling industry grow.[123] Changed economic circumstances sometimes caused the railroad companies to end active use of the lines. As time passed, disuse and neglect encouraged land owners whose property neighbored the rail line to petition the courts to declare the abandonment of such easements.[124] Such claims could be won, but a series of tough requirements first had to be met.[125] One of them included evidence that the former easement holder had shown, not just non-use, but an intent to abandon the easement.[126] If cultural easement holders fulfill their monitoring duties, and do so pursuant to written communication

[122] In Appendix E, an example of a conservation easement document is provided.
[123] Refer to: Bartley, Numan V. The Creation of Modern Georgia. Athens, GA: University of Georgia Press, 1983, p. 63. In Georgia, huge amounts of state funds went to support railroads as they expanded. The state even owned its own company – Western and Atlantic line. The New Georgia Guide. Sponsored by the Georgia Humanities Council. Athens, GA: University of Georgia Press, 1996, pp.233-234.
[124] For an example of a Georgia case in which the court outlines the steps necessary to show that a railroad had abandoned its easement, refer to: Atlanta C. S. R. Co. v. Jackson, 108 Ga. 634 (1899).
[125] For an explanation of the general unwillingness of courts to employ the abandonment of easement approach, refer to: Backman, James H,., and Thomas, David A. "Abandonment of Easement," § 1.05[5]. A Practical Guide to Disputes Between Adjoining Landowners –Easements. New York: Mathew Bender & Co., 1990.
[126] Refer to: Atlanta, B. & A. R. Co. v. Coffee County, 152 Ga. 432 (1921).

with the fee simple owner of the historic property, then the problem of abandonment should not trouble them.

In others, adjacent owners were able to establish ownership over sections of line through adverse possession and adverse use. Adverse possession on property generally is more difficult in Georgia than in some other states, since a claim of right is required in addition to the other requirements.[127] Yet this is not an insurmountable obstacle.[128] If a claimant were to be successful in quieting title to a parcel of land under a theory of adverse possession, she would likely take the land free of the easement. It helps if the easement deed had been filed with the office of the clerk of superior court in the county in question, so that any adverse possessor would be on constructive notice of the presence of the easement.

There is also the possibility that an adverse user could cause the easement to be extinguished.[129] The adverse user must carry the burden of showing that the property was adversely used for a period of time that satisfies the statute of limitations. In the case of a cultural easement, the adverse use would probably involve substantial alteration or outright demolition of the elements that were specifically listed in the description of the historic resource in the easement deed without any objection by the holder. Thus, the chronic failure to monitor not only resulted in the alteration or destruction of the resource, but also the loss of the easement and the ability to require restoration or remuneration. The foregoing discussion is conjecture at present, since there is no Georgia case law directly on point, but it points to the need for vigilant

[127] In Georgia, an adverse possessor of real property must meet a series of stringent requirements, including some form of a claim of right. For information on acquisition of an easement by prescription, refer to O.C.G.A. § 44-9-1.
[128] A subsequent owner of the land make take possession without actual notice of the easement, probably because of a faulty title search on the property. The subsequent owner would be deemed to be on constructive notice, but the facts of the particular situation, such as representations by the seller of the lack of encumbrances, may demonstrate to a court that the subsequent owner should be treated as having successfully adversely possessing the property in question.
[129] Backman, James H, and Thomas, David A. "Long-Term Adverse Use," § 1.05[6]. A Practical Guide to Disputes Between Adjoining Landowners –Easements. New York: Mathew Bender & Co., 1990.

monitoring on the part of easement-holding entities in order to prevent the undesirable result of having to test the potential legal validity of such arguments in court.

Assignment of Ownership

Easements may be forever, but organizations can come and go. In smaller communities, where the departure of a handful of individuals could threaten the very existence of an easement-holding nonprofit, potential transferors should be especially careful in the planning of the transfer. Easement deeds can be constructed to control the future transfer of the easement to other organizations, should the initial nonprofit cease to exist.[130] Further, nonprofits in Georgia are required by state law to include in their articles of incorporation the name successor organizations to organizational assets in case of dissolution.[131] Potential transferors should inquire into the designated organizations. While a nonprofit's articles of incorporation are always subject to revision, the difficulty of the process, among other reasons, makes such changes unlikely. In any case, the potential transferor – or her attorney – may investigate the named successor organizations as well in order to ascertain their current ability and general organizational interest in adequately continuing the management of the easement, should they come into possession of it at some future point.

Ownership of historic resources by apparent nonpersons is a very small piece of the preservation law puzzle, but it offers an interesting twist on general notions of ownership. There is a smattering of trees scattered throughout Georgia that have received local fame from their

[130] The ability to control the future transfers of the easement will be potentially limited by certain other common law strictures, such as the Rule against Perpetuities. The current Georgia version of this law, based on a model act, is located at O.C.G.A. § 44-6-200 *et seq.* Georgia has had a legislatively prescribed variant of the Rule against Perpetuities for over one hundred fifty years. The Anglo-American court have long been concerned with the power of the dead hand of the grantor to control possession of property far into the future. Statutorily-enabled easements are unlikely to receive a warmer welcome from the judiciary.

[131] Refer to O.C.G.A. § 14-3-1302. More information can be found on-line at the website for the Georgia Secretary of State: www.sos.state.ga.us/corporations

alleged self-ownership.[132] These "trees that own themselves" were said to have been conveyed the soil in which they grew from some previous human owner who had been smitten with their age and beauty. An actual property deed on file at the county courthouse affirming this conveyance is a rare sight. Having not been involved in any litigation, these trees (or their erstwhile agents) have yet to appear in court to argue the matter of standing. Nonetheless, legal fiction has been long used to recognize corporations as persons with standing and legal rights. In maritime law, ships have also been conferred such privileges. Even parcels of land have occasionally made appearances in court – not always successfully – to plead their cases.[133] In the unlikely event that courts chose to recognize fee simple ownership in trees of historic significance (or court-appointed guardians/conservators) and a related limited standing for trees, there is the possibility that lesser interests in property would also be recognized. If so, conservation easements could be granted to such permanent historic resources themselves. At present, such tactics offer little reality of success. More reliable protection for someone seeking to donate an easement on such an important landscape feature would be better served to donate it to a qualified recipient of easements.

For-profit Strategies

Notably absent from the responses was any discussion of private-sector, for-profit easement transfer strategies. This suggests that the economic benefit from facilitating the conveyance of easements is currently not lucrative enough to exist as a stand-alone operation.[134]

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[132] Athens, Georgia, is home to one of the more famous of these trees (or, at least, the scion of the famous one). Refer to Reap, James K. A Pictorial History of Athens, 1801-2001. Virginia Beach, VA: The Donning Company, 2001.

[133] For an illustrative case, refer to: United States v. 5.00 Acres of Land, 673 F.2d 1244 (11th Cir. 1982).

[134] Any entity that wished to be legally allowed to declare a profit in this area could not itself be eligible for acquiring easements under the Internal Revenue Code. Perhaps there will one day be enough money involved,

Such intermediaries may one day appear on the scene if the financial incentives become sizeable enough. Preservation-entrepreneurs could easily take a conservation easement-based model used by environmentalists and adapt it for profitable use in cultural heritage protection. More will be said about this opportunity in the Recommendations of Chapter 12.

Summation

The hidden costs of easement maintenance have surprised several groups and seems to have deterred others from accepting many – if any – easements. Documenting the historic elements protected by the easement requires a good deal of initial effort. Further, the periodic monitoring requires someone of some competence in the field for adequate inspections. Monitoring may even require substantial follow-up documentation to allow comparisons over time of the condition of the protected elements. Finally, in the event that legal action is needed to redirect the owner back toward the requirements of the easement, a substantial amount of funds may be required to pay for the cost of legal representation – even if the defendant must pay for the easement holder's attorneys' fees if the court should rule against the defendant.

The survey reveals that there is an apparent economy of scale for the acquisition and monitoring of easements. Those programs enjoying the most success have several easements in their possession, which encourages them to devote time and resources into monitoring them. Even the best programs still have difficulty finding the funding and human resources to conduct extensive, professional surveys of each easement on an annual basis. Yet those organizations which possess several easements are more likely to employ someone part-time or as a summer intern to handle inspections.

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however, for intermediaries to help the owners of historic sites locate a nonprofit with an appropriate easement-acquisition program.

PART IV:

MOTIVATIONS FOR THE CONVEYANCE OF CULTURAL EASEMENTS

CHAPTER 8: FEDERAL TAXATION ISSUES

Unsurprisingly, the use of easements on property can have substantial tax consequences at the federal, state, and local levels. Several different types of taxes may be affected. Since easements are directly affecting land, property taxation may be the most obvious, but income and estate taxes also can be reduced under certain circumstances. Understanding these issues allows the preservationist to promote the use of easements because of the financially attractive tax benefits that can result for potential transferors. While easement transferors may have other motivations as well, the carrot of tax incentives can help in the negotiation phase by showing the favorable economic consequences of a charitable donation.

Easements and Property Valuation

The property owner agrees to place a conservation easement in perpetuity on an historic structure or landscape in Georgia for the purpose of preventing future owners from irreparably altering or destroying the resource. This restriction invariably prevents alternative uses for the property, such as for much higher density development. An easement on an historic three-story warehouse in a downtown business district prevents demolition of the warehouse and construction of a twenty-story office building on its site. Similarly, a façade and open space easement on an early twentieth century forty acre farmstead would prevent the land from being converted into a heavily-developed subdivision of one hundred sixty houses on one-quarter acre lots. In situations where these alternative uses with higher density would potentially occur, the market value of the land substantially exceeds the market value of the existing building. The theoretical economic rational actor, motivated purely out of the profit motive, would buy such

sites as an investment in order to demolish the existing structure and take advantage of the more financially valuable land use. An easement places a permanent restriction on the property by protecting the existing resource. This restriction prevents any alternative use of the property that would alter the protected characteristics of the cultural resource, often resulting in a lowered market value for the land. The pre-easement value of the land potentially has been reduced substantially. In the hypothetical situation above regarding the farmstead, the easement may well permit only single-family, residential use of the house. The land may be zoned by the county for high-density single-family dwellings, but the private easement restriction ultimately controls. In such a case, the market value of the land may fall from tens of thousands of dollars an acre to only two to three thousand dollars an acre, based on the value of the land in agricultural use.

Estate Taxation

Wealthy individuals whose estates will be exposed to substantial tax liability may find welcome relief through use of a deduction from the grant of an easement. Under current federal law, the estate tax is imposed only on estates whose net worth exceeds a certain threshold. That threshold in 2001 was $675,000, with a built-in schedule for increases in the threshold over time.[135] Congress decided to accelerate the increases, such that the threshold rose to $1,000,000 in 2002, and $1.5 million in 2004. The legislation prescribes that the threshold will again rise to $2.5 million in 2006 and to $3.5 million in 2009. In 2010, current law directs that the estate tax will be eliminated completely.[136] Because of a sunset provision, however, the 2002 threshold of

[135] Refer Internal Revenue Code § 2010(c).
[136] Refer I.R.C. § 2010(c).

$1,000,000 will be re-established at midnight on 1 January 2011.[137] The debate in Congress continues vociferously over new legislation that would make the elimination of the estate tax permanent from 2011 onward. The explosive mix of increasingly partisan politics, a looming federal budget crisis, and expensive strategic commitments abroad makes the future of the estate tax anything but predictable.[138]

Nonetheless, the current law results in substantial tax consequences for individuals who own properties possessing a high market value. The owners of many historic properties have seen the economic value of their properties appreciate substantially since first acquired, with the result that, upon the death of the owners, the estate tax will be triggered. Some owners of historic properties fall into the land-rich, money-poor category. The heirs would be forced to sell the property in order to pay the substantial estate tax. Even taxpayers whose estates will have no cause for worry about cash shortages generally have little desire to hand over their wealth unnecessarily to the Internal Revenue Service. For all such taxpayers, easements provide a potential way of limiting estate tax liability.

There has been a good deal of publicity over the financial hardship that this tax may impose on many family-run farms. Farms today require high levels of capital investment necessary for operation, with expenditures on costly tractors and a variety of seeding, spraying, harvesting, and harrowing devices. In cases where title of the land and capital equipment are vested in one individual, the concentration of assets would be of such a value to trigger the estate tax upon that person's death. Since these farm operations may lack liquidity, in some instances,

[137] The "sunset" was required by the Byrd Rule, which limits the effects of certain tax law changes to not more than ten years without a 2/3 majority rule in the U.S. Senate.

[138] Absent any change in the current law, one shudders to consider what gruesome tales will be sparked by the special tax treatment during the waning days of December 2010. At the very least, the law will not reward an heir who seeks to come into an inheritance by expediting the demise of a benefactor. Refer to O.C.G.A. § 53-3-

the only way to satisfy the taxes would be the sale of part or all of the farm and equipment.[139] Georgia, where agriculture remains a major industry, is presumably home to many who would suffer under this tax.[140] At the very least, this presumption points to a major undercurrent of interest in Georgia for ways of limiting the reach of the estate tax.

In many cases, conservation easements provide just such a method, especially since such easements can even be imposed after the death of a property owner as part of an after-death tax planning strategy. The reasoning illustrated above would be of particular usefulness to farmers who wish to transfer their lands to their children in order to maintain the family farm. The limitations on the land use would decrease potential tax liability for transfers under the estate tax, as well as help a testator to restrict subdivision of the farm property by subsequent owners. Further, in a hint of what is to come in the next chapter, the potential for lowered property taxes may allow agriculture to remain an economically viable activity for the land.

Income Taxation

A brief review of the structure of the federal income tax is in order. After a taxpayer has calculated her Adjusted Gross Income (AGI)[141] on the front side of Form 1040 Taxable Income, she the deducts her personal exemption and either the standard or itemized deductions to arrive at her *taxable income*. Itemized deductions on Schedule A of Form 1040 include not only extraordinary medical expenses, home mortgage interest, state taxes, and other miscellaneous deductions, but also charitable contributions.

[139] Under the right circumstances, one may be able to ease the immediate estate tax burden by paying the tax, plus interest, over fifteen years under I.R.C. § 6166, or by claiming a special use valuation of the property under I.R.C. § 2032A, or by seeking to discount the value of the farm through use of a family limited partnership.
[140] Such results depend on the way the family has structured its business; certain corporate forms can help to mitigate these consequences.
[141] AGI explanation

The charitable donation of an easement permits a tax deduction, and there is no attendant restriction that precludes the donor from also making simultaneous use of other preservation tax programs. Depending on the structure of the business and the arrangement of property ownership, the owners of historic structures who intend to use them as income-producing properties could conjoin the tax deductions from the easement with the rehabilitation tax credit, which would allow a tax credit of up to twenty percent.[142] So long as the protections prescribed by the easement are not violated, these two tax reduction approaches can work well together.

A transferor who chooses to entrust an easement to a Qualified Organization in Georgia via donation is eligible for a tax deduction for this in-kind gift. The deduction is equal to the value of the easement – that is, the difference between the fair market value of the property before the easement (including the value of the potential development rights for a more intensive or higher density use of the property) and the reassessed fair market value after the encumbrance is agreed upon. There are different methods available to determine this post-donation value, and the results from these different methods can produce wide variations.[143]

Charitable deductions are subject to certain limitations. While standard easement transfers would not normally be cause for concern, recipients should be aware of the possibility of such restrictions. The case of Ottawa Silica Co. v. United States, 699 F.2d 1124 (Fed. Cir. 1983), provides an illustration of just such a catch. At first glance, all seemed above board in this case. The grantor donated the land in question to a local school district, which was a Qualified Organization under the requirements of the Internal Revenue Code. The company thereafter claimed a deduction for the land. The IRS denied the deduction, and won in court.

[142] Refer to I.R.C. § 47(a).

[143] For an in-depth discussion of these different methods for historic properties generally, refer to: Hirschy, Susan Alden. Historic Property Appraisals: Residential Real Estate Valuation. Master's Thesis. Athens, GA: University of Georgia, 1991.

The court found that the donor granted the land with the knowledge that the school district would not only construct school buildings on the site, but also build roads to the school that would run over another landowner's property, thereby providing crucial a access to the donor company's remaining property. That property that would otherwise have been much less accessible, barring extensive contracting costs and uncertain negotiations with the neighboring landowner. The court found that the company, which sought to develop its remaining land into subdivisions, received a substantial benefit from the "donation" because of the subsequent acts of the school district. Since the company would be receiving special benefits that went above and beyond the general benefits to other members of the public, the deduction was disallowed. The court added that, instead of the donation resulting in a purely public purpose, there was strong evidence of a *quid pro quo.* Such details in the tax law provide yet another reason for retaining an attorney to assist in the preparation of the easement deed and the investigation of any especially tricky aspects of the transaction.

An additional factor influencing the value of the deduction to the grantor is the relationship of the donation to the owner's basis in the property. The owner of an improved structure has probably been taking advantage of allowable deductions for depreciation of the value of the building.[144] These deductions are taken from the owner's basis, which is generally determined from the owner's purchase price for the property, plus any improvements on the property during the ownership period.[145] The recovery of basis results in non-taxable income. For instance, assume Sally purchased a home for use as a primary residence ten years ago for

[144] Because of revisions in the Internal Revenue Code (IRC), the schedule for depreciation can be accelerated. The periodic tweaks in IRC have resulted in the emergence of a more technical term than depreciation that embraces the full reach of the new benefits: Accelerated Cost Recovery System (ACRS).

[145] Some improvements may not be immediately deductible. Residential, owner-occupied structures are not eligible for several deductions that are available to commercial properties. These residential owners must wait until the resale of their property to realize the additions of basis to their buildings.

$100,000. She has added a new room at a cost of $20,000. When she sells her house tomorrow for $200,000, she may subtract $120,000 from the selling price and designate it as the recovery of her basis in the house, which will be nontaxable. The only remaining $80,000 representing the appreciation of the value of the house will be treated as taxable long-term capital gain.[146] Donations may be set against basis to allow the owner to recoup some of the nontaxable basis for re-use in other investment opportunities.

Some restrictions are noteworthy on the applicability of such deductions. A taxpayer who has relatively little adjusted gross income to report to the IRS will not benefit greatly from a tax deduction. Further, even those who stand to benefit mightily might be precluded from taking the full value of the deduction immediately. In any one taxable year, such persons may be taking advantage of several other deductions, and the total value of these combined deductions may exceed allowable deductions. The IRS will generally allow such taxpayers to carry over their excess deductions to be applied to future income for the next five years, however.[147] While inflation and the time-value of money will potentially influence an individual easement grantor's preferences for when to take advantage of income-sheltering techniques, discussions with a certified public accountant or tax lawyer can help to determine the taxpayer's best approach from the point-of-view of her overall tax liability.

Unfortunately, tax benefits are not guaranteed in perpetuity. The preservation movement has already learned firsthand that what Congress giveth, Congress can take away. By the mid-1980s, public outcry had begun to bring attention to various tax loopholes available to a wide variety of interest groups. Some groups argued that the rehabilitation tax credit had become primarily a cash cow for wealthy investors seeking to hide their income in real estate in order to avoid

[146] The gain in this hypothetical is also protected by the $250,000 (or $500,000 for married couples) exclusion for primary residences.
[147] Under the Internal Revenue Code, the appreciation schedule can be accelerated.

paying their fair share of federal income tax. Therefore, supposedly motivated to make the tax code less complicated and more equitable, Congress flew into action. A raft of changes in the early 1980s increased the penalties for exaggerated deductions. Finally, changes to the tax law in 1986 made the rehabilitation tax credit less attractive to potential investors looking for tax shelters[148], and the level of investment activity in preservation projects dropped substantially.

Congress did not entirely eliminate the program, however. The rehabilitation tax credit still exists up to the present day. Now set at the reduced rate of twenty percent of rehabilitation costs, the credit still provides a significant economic incentive for investors interested in income-producing historic properties. There is no indication that Congress plans to reduce or revoke the tax deduction available through easement donations. Because of the strong lobbying abilities of both historic preservationists and environmental conservationists, perhaps any proposal for such an adverse change can be blocked.

The taxpayer's benefits from the deduction may be impacted by the Alternative Minimum Tax (AMT), which was enacted by Congress in the late 1960s to try to ensure that most taxpayers with sizeable income streams could not escape most or all taxation through some skilful legerdemain.[149] Because the AMT was not indexed to the rate of inflation, many middle-income families have become subject to the tax unknowingly. The economic value of the charitable deduction to the taxpayer will depend on the other tax liabilities incurred during the year of the transfer of the easement. A potential donor may need to arrange to donate the easement in a future year in order to get the most use out of the deduction. Pitfalls like the AMT demonstrate the importance of seeking out good tax advice in order to for donors to maximize the financial benefit from the transfer.

[148] Tax Reform Act of 1986, Pub. L. 99-514; 99th Cong.
[149] Refer to I.R.C. § 55. A good explanation of the AMT is available in Klein, William A.; Bankman, Joseph; and Shaviro, Daniel N. Federal Income Taxation. 13th Ed. New York: Aspen, pp. 559-568.

CHAPTER 9: STATE AND LOCAL TAXATION ISSUES

Some tax issues tied to conservation easements at the state level are reflections of federal tax policy. These taxes may therefore be given brief treatment here, since the mechanics of their operation were detailed in the previous chapter. Certain state tax incentives, however, are entirely different in scope and application. These require more discussion to illustrate their function and to highlight how they respond to transfers of easements.

In Georgia, taxes relevant to potential easement transferors are levied by the State, counties, and cities. The State of Georgia, at present, imposes both income and estate taxes on its residents. These taxation powers are held only at the state level. Thus, while several large cities across the nation also have the authority to levy their own income taxes, the General Assembly has yet to empower Atlanta or any other local government in Georgia to do so. Property taxes are meted out at both the state and local levels.

Estate Taxation

State-level estate taxation also shares a special relationship to federal estate taxation. Georgia long linked its estate tax to the credit allowed for such taxes by the federal estate tax laws. Because of the major changes that Congress enacted at the federal level, however, the state level tax was dragged along for the ride. As a result, state revenue from the estate tax began to drop as the threshold began to move upward. Under the Economic Growth and Tax Relief Reconciliation Act of 2001, ("EGTRRA") P.L. 107 -16, Congress mandated that the deduction for state estate taxes would decrease at twenty-five percent a year over four years. Accordingly, being the third year of this series of reductions, Georgia has lost seventy-five percent of its

annual estate tax revenue. That lost revenue is actually going to the federal government, and not the estate of the deceased taxpayer. Unlike several other states, the Georgia General Assembly has yet to "uncouple" its estate tax from the federal credit. Next year, there will therefore be no Georgia estate tax. Unless future legislation chooses to reverse this progression, estate tax liability under state law will soon be a non-issue.

Income Taxation

In Georgia, the state income tax is piggybacked onto the federal income tax. Thus, after a Georgia taxpayer has completed her personal federal income tax return, she must take her Adjusted Gross Income and insert it on her state income tax return.[150] From there, she may have to add back certain deductions allowed on her federal return that must be included under Georgia law.[151] Fortunately for the Georgia taxpayer, the charitable grant of a conservation easement on an historic property in Georgia to a Qualified Organization is not a deduction that is lost to the taxpayer. Business entities, such as corporations, must also pay state income tax.[152]

Property Taxation

Property taxation provides an interesting example of federalism at work. The federal government is constitutionally prohibited from directly taxing real property, except as apportioned by population.[153] Historically, the federal government has chosen not to attempt any

[150] For a general reference, refer to the Georgia Personal Income Tax Return Form 500.
[151] This process becomes slightly more complicated for Georgia residents who have source income from a state other than Georgia. Additionally, nonresidents may own property and earn income in Georgia, and their level of taxation is derived from a special formula.
[152] Generally, state taxation of corporate income is similar to state taxation of personal income. Some business entities, such as partnerships, act as flow-through organizations and, thus, are not taxed. The partners themselves will be taxed on a pro-rated share of the partnership's income.
[153] Refer to "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken," from the United States Constitution, Art. I, section 9, clause 4.

forays into this possible source of government revenues, deciding instead to stay out of direct property taxation altogether.[154] Georgia and its local governments do not have such restrictions, however, and government coffers have come to rely substantially on property taxes. While no longer the largest source of state revenues nationwide, state property taxes nonetheless represent an enormous percentage of the monies flowing into the State Department of Revenue's office. [155]

Local assessors typically value real property based on what is purported to be its highest and best use. This approach typically operates under the assumption that the owner should seek only the most intensive, profitable use of the property. As a result, many historic buildings in urbanizing areas are faced with dual dilemmas. First, the unused development rights on the property become increasingly valuable, and the revenue from the "hopelessly outdated" structure on the site begins to pale in comparison to the projected profits if the land were put to its highest and best use. Second, because of the increased economic value of the site, there is an attendant steep rise in the property tax. This has a very real impact: while the first problem is a case of lost profits, the second actually imposes a hefty financial burden on the owner. This burden may compel the owner either to redevelop the property personally or sell the site to someone else who will.

By encumbering a property with an easement, a private landowner can reap substantial property tax benefits. The UCEA notes that, once an easement is placed on a property, the owner is entitled to a reassessment.[156] The statute does not mandate that the reassessment will

[154] The notable exception would be in Pollack v. Farmers' Loan & Trust Co. 157 U.S. 429, affd' on rehearing, 158 U.S. 601 (1895). In the instant case, the U.S. Supreme Court determined that the federal income tax in existence at the time resulted in an unconstitutional direct tax. The Court's invalidation of this tax led the way for the ratification of the Thirteenth Amendment on 3 February 1913, which expressly permitted the federal government to impose an income tax without apportioning it by population among the several states.

[155] Refer to the casebook Hellerstein, J., and Hellerstein, W. State and Local Taxation. 7th ed. West Publishing Co., 2001.

[156] Refer to: O.C.G.A. § 44-10-8.

actually lower the value of the land, but it sets up an appeals process to the board of equalization and beyond in hopes of helping the easement grantor realize a tax benefit from the restriction of the land's current and future uses.

The state property tax freeze is not strictly related to easement transfers, but it can be used as part of a bundle of tax planning devices in order to help a property owner. In order to qualify for the tax freeze, an owner must make improvements in the property (in preservation terms, perhaps construction work related to rehabilitation or restoration) that must meet a threshold percentage of the owner's adjusted basis in the property.

As a final note on property taxation issues, the status of the transferor as a governmental entity or nonprofit has important implications on tax liability. By way of illustration, there would be no property tax benefit in such a situation, because government and nonprofit organizations are exempted from property tax altogether in Georgia. Thus, a church which donates an easement on its façade to a local preservation nonprofit will not enjoy a reduction in property taxes because it is already exempted from all property taxes under state law.[157] This particular financial incentive for a transferor is thus of no consequence in these particular situations. Benefits other than tax reduction will have to be employed when seeking to convince these entities to donate easements.

[157] Nonprofits – including religious institutions – may still be required to pay property taxes on property they own that produces unrelated business income. This tax is called the Unrelated Business Income Tax (UBIT). Government policy has chosen to use the UBIT to prevent nonprofits from having an unfair advantage when they participate in activities that are tangential to their primary mission. By entering the marketplace and competing with for-profit, private actors, the nonprofits sacrifice their tax exemption to the extent of these non-exempt activities.

CHAPTER 10: OTHER MOTIVATIONS

Modern economic theory teaches that self-interest should serve as the primary motivation for the rational actor in society.[158] Fortunately for the preservation movement, not everyone primarily motivated by economics. The results of the survey on cultural easements indicate that tax-motivated donations are surely the most common, but conveyors of easements have a variety of other motivating factors. There has apparently never been a survey that specifically investigated the intent of easement donors, but there is fair anecdotal evidence that many, if not most, possess mixed motives in making their contributions. This happy result is favorable to preservation organizations, since existing tax incentives are often not in themselves economically beneficial enough to provoke large numbers of donations from otherwise disinterested owners of historic properties.

Altruism

Altruism underlies a fair number of easement donations. Many owners of historic properties view themselves as stewards of important cultural resources, and they donate easements to demonstrate tangible evidence of their belief.[159] They also realize that donating an easement protects their property, not just in their lifetimes, but in perpetuity. This powerful factor is especially important in areas where the surrounding land-use patterns are rapidly changing in ways that put a premium on dense development and new construction or otherwise threaten the existence of the resource in the near future. Further, since an easement is forever, it

[158] This is an integral part of any modern-day elementary economics textbook.
[159] Donna Ratchford Butler, in her research in 1984-85 in the early days of statutorily-authorized easements in Georgia, discovered similar undercurrents. While tax motivations certainly fueled many donations, others were donated even though the grantor received little or no tax benefit.

prevents unscrupulous heirs from altering the property in ways that are against the wishes of grantor. Trends in the field of trusts and estate law, especially in recent years, indicate that grantors and testators increasingly value the ability to control the way in which their gifts are used and managed.[160]

Family Ties

The long-standing family ties to the land can also play a role in the granting of an easement. In some instances, a property has been in the same family for several generations, and the current owner desires to encourage this tradition of family ownership. Easements on family farms, for instance, can help to protect the historic homestead and outbuildings, as well as preserve the agricultural landscape that has been so long associated with the property. For farms in the path of rapid suburban growth, easements can serve as a way of protecting valued resources and permanently preventing subdivision of the land into quarter-acre tracts and cul-de-sacs. In doing so, property values can be reassessed at a lower level and the land can potentially remain economically viable for continued agricultural use in the face of escalating property taxes.[161]

[160] A brief treatment of this subject may be found in Family Property Law texts.

[161] Other legal principles may later come into play in such situations, depending on how intensively the surrounding lands develop into residential dwellings. "Coming to the nuisance" is a generally effective response to new neighbors who sue over the unpleasant externalities of many farming operations. Over time, however, the level of development may increase tremendously, and the courts may eventually rule adversely to the farmers because of changed circumstances. Also, future changes in the economics of agriculture may result in shifts away from current crop strategies, such as row crop farming. Therefore, such easements should be crafted with care to provide some flexibility in the future to adapt to new conditions, lest the courts be forced to consider revocation of parts or all of the easement.

Non-Preservation Motives

Some owners may ardently wish to protect important natural resources on the property. Such owners may have no family connection with the land, but may nonetheless seek to protect ecological functions, such as riparian buffers, important wildlife habitat, or areas of steep slopes.[162] Preservationists can work together with conservationists in these situations when the property includes cultural resources in need of protection. The donor may well be amenable to extend the coverage of the grant to include these other resources. If so, the preservationists and conservationists, with the assent of the donor, should then draw up a clear explanation of documentation prerequisites and monitoring duties of the respective assets of the property in order to ensure a cohesive relationship between the two groups in the future. Because limited financial ability of the holder is one of the most prevalent problems among natural and cultural easement holders today, fee management and enforcement strategies in particular should be discussed and written down in precise language in order avoid a future conundrum over allocation of funding as best possible.

Fraud

Dishonesty is also an unfortunate, but real, possibility in the granting of easements. A few rogues out there attempt to perpetrate fraudulent transfers of easements in order to take advantage of tax incentives, defective easement grants, or other ill-begotten benefits. Fortunately, most attempts to convey an easement with illegal intentions should be easy to detect. Handling contested claims to title has been one of the longest areas of court expertise

[162] Dr. Eugune Odum, the father of ecology, wrote a great deal on the subject. Refer to his text: Odum, Eugene. Basic Ecology. New York: Saunders College Pub., 1983. Also, the Office of Public Service and Outreach at the Institute of Ecology at the University of Georgia has a great deal of informative material on this topic located on the web: http://outreach.ecology.uga.edu/community/greenspace/toolkit.pdf

under the common law, resulting in some long-standing hard and fast rules in the United States governing the use of documentation in the transfer of property. Courthouses have been repositories of property records since the founding of the republic. Thorough title searches on candidate properties therefore provide a very effective means of ensuring that an erstwhile grantor actually has fee simple ownership of the property in question and, thus, has the legal right to convey a lesser interest in the land, such as the easement.

PART V:

CONCLUSIONS

CHAPTER 11: POTENTIAL DEVELOPMENTS

Future Legislative Action

The future may bring with it surprises in preservation law that substantially impact the use of conservation easements as a tool for preservation in Georgia. Perhaps the most substantive effects would result from changes in the Uniform Conservation Easement Act of 1992, the Georgia Historic Preservation Act of 1980, or the various sections of the federal and state tax codes dealing with easement donations. The weakening of public land use regulations would certainly reinforce the importance of easements. Alternately, the strengthening of such governmental regulations through expanded applicability or much more widespread implementation, or the increase in easement monitoring and maintenance costs, would likely cause a decrease in the level of easement donations.

The complete overhaul of the state's enabling legislation granting local historic designation powers is not unimaginable. In recent years, a proposal before the state House of Representatives sought to amend the Georgia Historic Preservation Act of 1980 extensively by adding detailed conservation district provisions modeled on that of other states.[163] The proposed new legislation would have given local governments an alternative to existing designation powers by allowing for the creation of conservation districts that would give affected landowners almost free rein with their properties – and would have severely reduced the powers of local preservation commissions in any meaningful enforcement of effective design standards within

[163] The name "conservation district" should not be confused with conservation easements, for the two concepts are quite independent of each other. There is no mandate that historic properties within such a conservation district must be protected with conservation easements. For information on the proposed amendment, refer to: Georgia House of Representatives. HB 509 – Georgia Conservation District Act. Jamieson, Mary Jeanette; Ashe, Kathy B. (46th); Cummings, Bill (27th); Day, Burke (153rd); Porter, DuBose; Bordeaux, Tom, sponsors. As of 15 March 2000. This bill did not gain the necessary support in the legislature and failed to pass.

these districts. Politicians would be able to show themselves as supporters of preservation by authorizing such districts through local ordinance, but not have to worry about phone calls from property owners upset over their restricted ability to alter or demolish their properties. The passage of this proposal would very likely have lowered the bar for historic resource protection, with the consequence of placing historic neighborhoods at risk as selective alteration or demolition irreparably altered the context, and potentially destroyed the stabilizing effect on property values for which broad-based local designation plans have become known. Future sessions may well see the issue revisited. Even if the current law is safe from wholesale replacement, amendments catering to special interest groups may well slip through committee and receive final approval. Any alterations that restrict the abilities of local governments to protect their historic resources will heighten the importance of private sector land use controls, such as easements.

The Importance of Procedural Reviews

Currently, procedural reviews play an integral part in the fight to protect historic resources from demolition. Procedural reviews certainly do not guarantee the protection of targeted resources, but notable successes have occurred.[164] Importantly, even for resources that are moved or destroyed, thorough research and documentation provides at the very least for greater information on the resource(s) affected.[165] Currently, these procedural reviews are

[164] Refer to Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), where the U.S. Supreme Court determined that a comprehensive review was required under §4(f) of the Department of Transportation Act of 1966.
[165] Thanks to §106 review under the National Historic Preservation Act of 1966, a huge number of archaeological excavations are funded to study sites slated for demolition or new construction. As a result, several important finds have expanded the general understanding of both European settlement patterns and pre-Columbian cultures. In 2002, a major find just a few miles north of historic downtown Savannah confirmed the existence of a major trading post between the early English settlers and Native Americans. The post was run by a Creek woman named Mary Musgrove, whose very existence had been subject to debate before the dig. Musgrove served as interpreter to General James Oglethorpe, the founder of the colony. Her efforts influenced the early history of Georgia

triggered when historic sites are threatened by projects involving significant federal involvement. The determination of a site's historic status is generally based on the site's eligibility for the National Register of Historic Places. If conservation easements could be accepted as alternative grounds for evidencing a site's historic character, then procedural reviews could be triggered more easily. Because efforts at developing a groundswell of support for important historic resources require a good deal of time, easier triggering of procedural reviews would be of great benefit. Publicity campaigns and grass roots organizing can occur during the period needed for the review process, allowing elected officials to receive greater input from constituents on the importance of protecting and restoring such resources in order to further the quality of life of a particular community.

Court Rulings

The Georgia appellate courts have yet to rule on the appropriateness of the condemnation of conservation easements through the use of eminent domain, even though the number of easements has steadily grown since their statutory authorization. Now that two major preservation nonprofits in the state attach easements to the properties that go through their revolving funds, and two other well-managed nonprofits are developing their own active easement programs, the number of easements statewide has every indication of rising even more rapidly than before. The mere existence of more easements does not automatically translate into inevitable appellate court rulings in the immediate future. If there are any such contested cases,

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tremendously. Upon completion of the excavation, the site will be buried and developed for use as a new container shipping site for the bustling modern port of Savannah. For more information, refer to: Toner, Mike, staff writer. "Dig unearths historic Savannah trading post." *Atlanta Journal-Constitution.* 25 July 2002, as well as "The Rambler." Newsletter of the Georgia Trust for Historic Preservation. November/December 2002, p. 11.

however, they might most likely to arise in areas where large concentrations of easements overlap with escalating real estate values.

Atlanta and other major urban centers in Georgia have experienced remarkable growth as their economies boom and their populations swell. These tremendous development pressures can cause land values to skyrocket. Several of these urban areas also have very strong preservation groups and well-run easement programs. A test case for the easement law might lie in a situation where an historic structure protected by easements prevents the realization of a major new construction project. The conflict over the Glenn Building illustrates how some developers would rather try to harness the eminent domain powers of local governments, instead of incorporating the historic assets into the project.[166] Thus far, however, the courts have not yet had to delineate the line between one governmental policy favoring historic preservation and another in support of growth and new development. In the case of the Glenn Building, perhaps the presence of a well-drafted easement deed and a vocal easement-holding organization vigilantly carrying out its legal responsibilities (as well as the cooling of the neighborhood's real estate market) helped to prevent a potentially expensive trip to the courts. Nonetheless, should the Georgia courts eventually hand down some supportive legal precedent on point, preservationists will be able to bolster their future defenses, and those who would demolish protected historic resources for private financial gain would be more readily deterred.

[166] For information generally on the Glenn Building, refer to the letter from Easements Atlanta on the topic in Appendix D. The letter offers the further example of the Peachtree Manor Building in the Biltmore Hotel block, on which Easements Atlanta also had an easement. The developer of this site initially claimed that the honoring of the easement would preclude any economic use of the property, but Easements Atlanta was successful in protecting its property interest. As described in the letter, the developer was able to include the protected resource as part of the planned development, and the site has since become a prime example of the economic viability of such old-and-new-construction projects.

Easement Destruction

The enabling legislation that created statutory easements in Georgia specifically tied such easements to the real property on which the easements would be placed. The easements thus are said to run with the land and apply to all future owners and occupants of the property. It would be improper therefore to attach an easement on a specific structure that is to be moved to a new location. Any effort to do so would also run into an addition restriction imposed by the statute: Such properties must be part of a locally designated historic district or certified by the state historic preservation office under the original Georgia Façade and Conservation Easements Act of 1976.[167] Easements granted under the original act are likely still governed by the language of the original act as it stood at the time the easement was granted. Fortunately, a provision of the UCEA protects the validity of otherwise enforceable easements granted prior to the enactment of the UCEA in 1992.[168] Two of the major qualifications under the GFCEA – local designation and SHPO certification – grew out of the criteria used for listing a property on the National Register of Historic Places. Those familiar with the regulations governing the National Register know that a potential resource can lose its eligibility if it has been moved. Only under dire circumstances, where relocation is the only way of saving the resource, can eligibility survive unimpaired.[169] An easement granted under the original act could potentially be inadvertently extinguished if its eligibility were rescinded, although this is unlikely.

[167] The second option was added by amendment to the original 1976 act. These two requirements for eligibility were discussed at length in Chapter 4.

[168] Refer to: O.C.G.A. § 44-10-6(b). This section allows for potential retroactive application, but its retroactive reach is limited by the U.S. Constitution and other federal and state law. It ensures the legal enforceability of existing valid easements, but it likely does not automatically cause easements that were fatally defective under prior state law to spring to life (assuming arguments in equity do not apply).

[169] There are many structures on the National Register that have been moved from their original site. Indeed, several have been moved several times. These structures are of such vintage that they have become re-eligible. They have stood upon their current site for the last fifty years, and have re-established their eligibility under the Secretary of the Interior's Guidelines at the new site.

Some problems have arisen in the realm of easement law that defy easy resolution. One arises out of the underlying mechanisms of the law, in that property law for centuries was intended to apply primarily to land and not to buildings. Edifices could be constructed or removed, but the land remained. Federal income tax law reflects this impermanence/permanence split: the value of buildings (included in the category of "wasti ng assets") may be depreciated. In contrast, since land represents a non-wasting asset, it can never be so treated.[170] The crux of the matter comes down to the involuntary destruction of a protected site, such as by fire or flood. When a lightning strike or an arsonist's match reduces an historic house to smoldering ashes, the easement holder is helpless to act. An easement document may require that a qualified preservation expert inspect and assess the site for possible remedial measures.[171] If a resource has experienced irreparable damage, a court may extinguish the property interest which the easement granted. Arson thus represents a very real threat to important historic resources under attack.

A combination of tax law principles regarding recapture and easement deed provisions can remove any incentive for the fee simple owner to participate *sub rosa* in such conduct.[172] For instance, consider the case of a property whose economic value increases from $100,000 to $1,000,000 after the destruction of the historic building on the site and judicial extinguishment of the easement. The owner of the property would seem prepared to enjoy a substantial windfall; however, the governing legal rules can require that the difference in value before and after the loss of the easement must be tendered to the organization that held the easement.[173] Since the

[170] There are very unlikely exceptions, but they do not warrant detailed discussion here.
[171] Refer to the Sample Conservation Easement in Appendix E.
[172] *ibid.* Also refer to 26 CFR 1.170A-14(g)(6)(i-ii) for the relevant IRS restrictions upon the extinguishment of a qualified conservation easement.
[173] Refer to the Sample Conservation Easement in Appendix E.

owner of the property would be unable to profit, the financial incentive for any mischief is removed.

Historic properties face many different kinds of threats, ranging from intentional destruction on the part of economically-motivated stakeholders to the unforeseeable havoc wreaked by natural disasters. Sadly, even the best efforts will be insufficient to guard against all eventualities. To ensure that such irreversible loss is minimized as much as possible, easement-holding organizations must monitor their holdings with vigilance and hope for the best.

Conflicts between Preservation Programs

Several problems exist at the intersection of two different preservation tools. When cultural easements and locally designated preservation districts or landmarks co-exist, a variety of unintended consequences present themselves. This seemingly happy confluence of protection methods can reduce the incentives to both public and private actors to embrace preservation fully. The availability of different valuation methods may help to support a taxpayer's claim for a charitable deduction on an easement donation[174], but the IRS has been vigilant in monitoring these kinds of deductions.

A landowner whose property is located inside existing preservation districts or is designated individually as a landmark may lamentably be incapable of receiving much benefit from the donation of an easement donation. Assuming the local preservation commission has powers commensurate with those authorized by the Georgia Historic Preservation Act of

[174] An entire thesis has been written on the benefits and drawbacks of different valuation approaches. Hirschy, Susan Alden. Historic Property Appraisals: Residential Real Estate Valuation. Master's Thesis. Athens, GA: University of Georgia, 1991. Note the "Discussion of Historic Preservation Easement Valuation" on pp. 211 -215. Also helpful is the discussion of how some of the valuation approaches have fared, based on the meager case law (unfortunately, only through 1983), in "A Handbook on Historic Preservation Law." Duerkson, Christopher J., ed. Baltimore: The Conservation Foundation and The National Center for Preservation Law, 1983, pp. 486-499.

1980[175], it can veto any attempt by the landowner to destroy or inappropriately alter the historic resource. These protections have the same effect as an easement, a fact not lost to the local real estate market. Since the preservation commission can single-handedly prevent a lot with a three-story Queen Anne house from being redeveloped into a ten-story high rise apartment building, the economic effect of house's location in the historic district is to lower the fair market value of the property to one involving the house as the only acceptable structure on the lot.

This is typically the same effect that an easement would have on an otherwise unprotected property. Zoning can affect investment backed expectations, based on the permissible use of a particular parcel of land. Preservation districts arguably can have the same effect, especially in Georgia communities that have elected to create locally designated historic commissions (and districts), but not local zoning controls.[176] In cases where the house is included in a locally designated historic district before the owner decides to donate an easement, the economic value of the house property has already been lowered by the creation of the historic district. If the owner still decides to donate the easement, there may be very little tax benefit available. Since the property could not have been redeveloped into the high rise apartment complex regardless of the easement, the donor is unable to claim that the easement itself caused a loss in value of the property. That loss had already occurred when the historic district was established, and, since it was done under the auspices of the police power, no compensation would be due the property owner from the local government.[177] There is a serious financial disincentive for private owners to grant easements when public preservation-based land use controls are in effect. This result unfortunately deters easement donations, even though the

[175] Refer to O.C.G.A. § 44-10-20 et seq.
[176] The Georgia Historic Preservation Act of 1980 was written to permit communities that were averse to establishing general zoning controls to be able develop local historic districts.
[177] The seminal case upholding the constitutionality of historic districts as an exercise of the police power, in the face of a takings claim, is Penn Central Transportation Co. v. City of New York. 438 U.S. 104 (1978).

preservation commission could fail in its responsibility to protect the property effectively or the local city council could choose to rescind the entire preservation ordinance.

The question therefore focuses on the degree to which the IRS would argue that a pre-existing local designation would pre-empt the ability of a property owner to claim a deduction for the donation of an easement. The IRS could take the position that part or all of the claimed deduction was unwarranted, based on the theory above. Unfortunately, there does not seem to be a clear definition of the position, based either on administrative rulings or case law. The IRS does not seem to have claimed that ALL easements donated on historic resources located in locally designated historic districts are invalid, but the boundaries of current policy are unfortunately quite vague. The argument will apparently hinge on the determination of the highest and best use of the property in question.[178]

Property owners have become especially sensitive to the potential revocation of their deductions after the Internal Revenue Service began to take a strong interest in this area. The IRS began policing easement donations vigorously in the 1980s, based on evidence that real estate appraisers had been offering highly inflated easement valuations, and the resultant deductions claimed by easement grantors were sometimes as much as 200% of their actual value.[179] Georgia was not spared the onslaught. A prior thesis in this subject area from that time period pointed to problems that the Historic Savannah Foundation experienced. The IRS flatly

[178] A case directly on point cannot be easily found. In Hilborn v. Commissioner, 85 T.C. 677 (1985), the effect of the strict controls of the Vieux Carre Commission in New Orleans were discussed. But, subsequently, in Griffin v. C.I.R., T.C. Memo. 1989-130, (1989), the different effects of the comparably less restrictive rules governing historic buildings in the Lafayette Square Historic District (in the Central Business District on the west side of Canal Street), versus the Vieux Carre (French Quarter) Historic District, were litigated. The IRS won the latter, but a series of fact-specific issues may limit the decision.

[179] The figure is based on a Government Accounting Office (GAO) report. Refer to: Tyler, Norman. Historic Preservation: An Introduction to its History, Principles, and Practice. New York: W.W. Norton, 2000, p. 189. Caveat: the figure is most likely correct, but the citation was unverifiable.

denied any deductions for twelve of eighty-six easement grants as of 1985.[180] The IRS had investigated several of its residential donations. The tax deductions which the grantors had claimed were denied in their entirety, based on reasoning that the local designation placed the structures for residential use only, rendering the development rights in question valueless prior to the easement donation. Congress itself intervened in 1986 when it reformed the tax laws to reduce the allowable tax credit to twenty percent, based on allegations that the preservation credit had been abused as a tax shelter for the wealthy. There is little likelihood that Congress or the IRS will change its stance on this issue in the near future.

The entire issue of overlap between easements and local designation has been questioned by at least one preservation law authority. Dorothy Miner, the former legal counsel for the Landmarks Preservation Commission of New York City, opined in an interview with Julie Camille Morgan (University of Georgia M.H.P. '92) that easements should only be used in interior spaces that lack public access.[181] Ms. Miner posited that easements should generally never be used to protect publicly accessible interiors, when landmarking is an option, because the use of the easement would undermine the landmarking process. This analysis could potentially be applied to exteriors as well. Such an approach may work well for a city with an unquenchable preservation *ethos* like New York City, but it would be a poor transplant to Georgia. The designation of interiors is certainly not viewed with the same gusto in the Empire State of the South as in the major city of its namesake to the north. There also is the real possibility that local historic districts, even in a city like Savannah, could become victims of land use politics.

[180] Refer to: Butler, Donna Ratchford. The Use of Easements on Historic Structures: A Survey and Analysis of Easement Holding Organizations in Georgia, Louisiana, North Carolina, South Carolina, and Virginia. Master's thesis. Athens, GA: University of Georgia, 1985, p. 36.
[181] Morgan, Julie Camille. An Analysis of the Use of Preservation Easements for Historic Interiors. Master's thesis. Athens, GA: University of Georgia, 1999, p. 13.

In the face of such uncertainty, Georgian preservationists would be best served to advocate the unrestricted acquisition of easements on all possible kinds of cultural resources.

The Dilemma of Property Value Reassessment

The last section highlighted one area where the potentially negligible effect on property value would adversely impact easement acquisition efforts. Another problem is the way in which the Uniform Conservation Easement Act phrases the entitlement to reassessment. The language of the act allows a great deal of interpretive leeway for local tax assessors as they handle potential changes to property value after the creation of an easement in perpetuity. Too often, the grantor of an easement receives the revaluation of the property, but the new encumbrance created by the donation of the easement is determined by the assessors to have a negligible economic effect. The act does ensure that the property owner can appeal the decision to the board of equalization and beyond. The appeals process may easily result in a lengthy delay and legal fees, but it does not guarantee that the aggrieved property owner will receive a revaluation in the end.

The greater use of easements in recent years suggests that tax assessors in some communities are becoming more receptive to economic argument that easements generally produce a reduction in property value. Perhaps efforts by preservationists to promote easement awareness programs would help to accelerate the rate at which tax assessors can be convinced that the restrictive effects on development rights have a definite economic consequence.

CHAPTER 12: RECOMMENDATIONS

Based on the survey results and on other findings during the research for this thesis, several areas of improvement remain in order for preservationists to make full use of the protections offered through cultural easements. The following list highlights the most important conclusions from this study. Each recommendation is discussed in greater detail on the following pages.

1. Different regions of Georgia will likely continue to have disparate policies toward public land use control for the sake of preservation. Because local designation will be unavailable in many of these areas, nonprofits in particular must step forward to ensure the effective protection of important historic resources in these areas by employing easements and other private land use tools.

2. Document drafting could prove to be the Achilles heel of easements. Poorly written, imprecise easement deeds will be most at risk should the easement holder have to go to court to enjoin potentially injurious activities. Qualified Organizations must secure a capable lawyer who will tailor an easement deed to the property in question to provide for maximum protection.

3. Different entities can serve as Qualifying Organizations for the purpose of establishing easement acquisition and monitoring programs. In Georgia, however, nonprofits have demonstrated the most success in operating such programs with the necessary level of commitment required. Nonprofits should shoulder the bulk of easement program administration.

4. Easement education is crucial in the promotion of preservation generally and in the increase of the number of willing donors specifically. State preservation groups should approach preservation nonprofits (or, alternately, receptive city governments) lacking an easement program and advocate the benefits of such programs. State preservation groups and university-based preservation programs should organize regular easement education and program management conferences.

5. Easement-holding organizations must determine which properties in a community are especially good candidates for easements. The owners of these sites should be targeted as potential donors, and community connections should be exercised to encourage easement donations from these individuals.

6. Revolving funds has been the single most influential allied preservation program in allowing Qualified Organizations in Georgia to acquire significant numbers of easements. Nonprofits seeking to develop large holdings of easements would be well-served to set up a revolving fund as a steady source of easements.

Easements and Georgia Geography

Recommendation 1. Different regions of Georgia will likely continue to have disparate policies toward public land use control for the sake of preservation. Because local designation will be unavailable in many of these areas, nonprofits in particular must step forward to ensure the effective protection of important historic resources in these areas by employing easements and other private land use tools.

Explanation: Some areas of the state will continue to lack local preservation commissions with designation powers because of popular sentiment against land use controls. While the UCEA enables counties in Georgia to create historic commissions and historic districts, the overwhelming majority of commissions and districts were created by cities.[182] As a result, historic resources in unincorporated areas have received very little, if any, protection from governmentally-administered programs. Special recognition programs like the Centennial Heritage Farm Awards, administered by the Georgia Historic Preservation Division, have helped to bring attention to resources in these largely rural areas, but all such programs are voluntary.[183] In response to the nationwide fervor over right to farm acts, the Georgia legislature amended its state nuisance law in order to help protect farming areas generally from frequent nuisance suits, including farms that possess many historic agricultural resources, but the law does not specifically provide support for preservation.[184] It is imperative, therefore, that nonprofits in particular must step forward to ensue the effective protection of important historic resources in these areas by employing easements and other private land use tools. Since a conservation easement in Georgia can protect both natural/agricultural and cultural property, an agricultural

[182] The list of cities and counties that have passed local preservation ordinances, located in Appendix G, provides a clear sense of the urban-bias toward such public land use regulations in Georgia. There are some joint-city county preservation commissions. Notably, several of the counties on the list are located in the Atlanta Metropolitan Statistical Area. Compared to most of Georgia's 159 counties, these suburbanized counties possess an atypically large number of residents living in relatively close proximity, even though these residents are "out in the county", so to speak. The number of predominately rural counties with local preservation ordinances is rather slim.

[183] The Georgia Trust for Historic Preservation often publishes an annual notice about new recipients of he Centennial Heritage Farm Award in "The Rambler", its newsletter. For an example of such an article, read "Centennial Farms: Still Farming After All These Years" on page 10 of the November/December 2002 edition. For additional information, refer to the website of the Georgia Historic Preservation Division: www.hpd.dnr.gov

[184] This act seeks to protect farmers from nuisance suits filed by neighbors who generally arrived on the scene recently and object to the externalities of agriculture. It does not specifically seek to protect historic agricultural resources. Refer to: O.C.G.A. § 41-1-7.

conservation easement can be used to protect an historic farmstead. The important values can be protected, and the owner can take advantage of the tax benefits.[185]

Partnerships between preservation organizations and interest private landowners will be the preferred method of protection in these areas, and conservation easements provide an excellent tool. This approach is especially helpful for farmers who wish to continue to work on their historic farmstead despite the construction of new nearby subdivisions due to proximity to a rapidly sprawling urban center. Such easements would likely prevent the land from being developed at high densities as well as protect important historic features of the historic agricultural farm and landscape, thus lowering the market value of the land and entitling the farmer to the tax benefits discussed previously.[186]

Issues Arising out of Document Drafting

Recommendation 2. Document drafting could prove to be the Achilles heel of easements. Poorly written, imprecise easement deeds will be most at risk should the easement holder have to go to court to enjoin potentially injurious activities. Qualified Organizations must secure a capable lawyer who will tailor an easement deed to the property in question to provide for maximum protection.

Explanation: The documents drafted to transfer an easement must be crafted with care. While a generic easement form may be used for the template, each easement grant must be carefully

[185] Refer to: Lenburg, Myra, and Rogers, Norman, Jr. "Farmland Preservation: Combining Land Conservation and Planned Giving," in *Probate & Property*. Vol. 17, No. 5. Published by the Real Property, Probate and Trust Law Section of the American Bar Association. September/October 2003, p. 18. Other tax strategies that involve a combination of conservation easements and other legal tools are also discussed in the article, which runs from pp. 16-21.

[186] Refer to: Lenburg, Myra, and Rogers, Norman, Jr. "Farmland Preservation: Combining Land Conservation and Planned Giving," in *Probate & Property*. Vol. 17, No. 5. Published by the Real Property, Probate and Trust Law Section of the American Bar Association. September/October 2003, pp. 16-21.

tailored to cover the unique cultural attributes of the resources and to address any other unusual circumstances affecting the property. As discussed earlier in Chapter 5, the text should provide detailed descriptions of the resource in question, as well as how it is to be protected. Attendant documents, such as photographs, plats, other maps providing relevant information, paint samples, and the like, should be incorporated by reference to guide future efforts at restoration or in litigation to enforce the easement.

Some degree of discretion is advised in drafting for unforeseen events. For instance, a conservation easement that attempts to protect in perpetuity an historic farmstead and feedlot might result in problems if the deed declares that the feedlot should remain forever in active use. Changing economic conditions might cause such mandates to become prohibitively expensive to uphold. Other unexpected developments, such as neighboring suburbanization, might give rise to a legal challenge on the continued operation of the feedlot, based on common law nuisance principles. Including a limited ability to amend in the deed, pursuant to the agreement of all the parties, will allow future stewards of the property to honor the preservation precepts underlying the easement, while permit them to respond to unexpected and seemingly insurmountable new dilemmas.

Qualifying Organizations: The Good and the Bad

Recommendation 3. Different entities can serve as Qualifying Organizations for the purpose of establishing easement acquisition and monitoring programs. In Georgia, however, nonprofits have demonstrated the most success in operating such programs with the necessary level of commitment required. Nonprofits should shoulder the bulk of easement program administration.

Explanation: In Georgia, by far, the two types of entities most active in easement programs are city governments and preservation nonprofits. There is little indication that other eligible entities (e.g., state agencies) will choose to begin an active easement acquisition and maintenance program in the near future.[187] If the past is any guide, preservationists interested in creating new easement programs should target city governments and nonprofits, particularly the latter, as agents of change.

Of these two programs, preservation-oriented nonprofit organizations will remain preferred recipients of conservation easements, for the simple reason that they embrace preservation as a primary objective and exist in order to carry out that mission. The role of local governments will likely remain fairly small for the foreseeable future. Local governments would include easement acquisition and maintenance as just a small part of the large number of tasks assigned to them. Periods of budget cuts and financial duress, as well as shifting political winds, could subject easement programs to chronic underfunding, poor enforcement, or even transfers.[188] Given such uncertainties, nonprofits, which can be organized to embrace preservation as a primary objective, provide a much more reliable repository for easements.

[187] The prior discussion of the current law on Qualifying Organizations, based on the Uniform Conservation Easement Act of 1992 and § 170(h) of the Internal Revenue Code, explained the current eligibility requirements for potential Qualifying Organizations.

[188] Restrictions in the UCEA of 1992 and the Internal Revenue Code prevent easements from being assigned to non-qualifying organizations. This concept was discussed in greater detail in Chapter 4. There is the possibility, however, that a local governmental agency could try to dump its easements on an admittedly qualified organization, but one without the resources to monitor them appropriately. In such a situation, there is a real risk that the transfer would not include adequate funds from the governmental agency for assisting in the operation of a successful easement program.

Easement Education

Recommendation 4. Easement education is crucial in the promotion of preservation generally and in the increase of the number of willing donors specifically. State preservation groups should approach preservation nonprofits (or, alternately, receptive city governments) lacking an easement program and advocate the benefits of such programs. State preservation groups and university-based preservation programs should organize regular easement education and program management conferences.

Explanation: The survey results indicated a strong need to promote education about the use of conservation easement programs in Georgia in order to provide basic understanding of how easement programs work, as well as to dispel numerous misperceptions related to such land-use controls. State nonprofits, state governmental agencies involved in preservation-related activities (e.g., the Historic Preservation Division and the community development programs of the Department of Community Affairs), and university-based preservation programs (in Georgia, this includes the University of Georgia, Georgia State University, and the Savannah College of art and Design) must take the lead in easement education and outreach.

Several types of public outreach are warranted, based on the feedback. Perhaps most important, local preservation groups need to arm themselves with the facts and figures about easement acquisition programs. Preservation commissions and nonprofits are eligible to hold easements, but they should become adequately informed about the operation of easement programs before setting out unawares in a tricky area of the law. The acquisition process, including effective easement conveyance documents, must be studied. Seminars for local tax assessors would increase the likelihood that an easement grantor would receive appropriate reductions in property taxes. Otherwise, the program will receive a negative reputation that can

hinder future acquisitions. Likewise, seminars for Realtors® and tax attorneys on the benefits of easements could help promote greater easement awareness in a community and allow greater access to targeted groups of potential donors.

Effective education programs can help dispel perception-based barriers among tax officials and potential grantors regarding the appropriateness of using easements to protect certain types of historic resources. For instance, a great deal of this thesis covered the important financial incentives available to those who donate easements. Without these tax advantages, many easements (indeed, perhaps most) would never exist. The applicability of these incentives depends on the fulfillment of certain conditions, however, such as the certification of the property as historic by the State Historic Preservation Officer and the reassessment of the property value by local tax assessors. High-style architecture that has maintained its historic integrity will generally have little difficulty in obtaining the necessary approval. Vernacular utilitarian structures will often require more work to qualify because of a variety of reasons: potential modifications over time, a lack of historical documentation, biases against vernacular architecture generally, and so on. Cultural landscapes will fare even worse, since they may prove even more difficult to document or to verify for purposes of integrity. The assumption that many landscapes are merely "unimproved" land will likely make many suspicious of providing tax advantages to such properties. In such cases, easement documents should highlight the protection of natural as well as cultural assets. Depending on the location and size of the property, the protection of ecological functions, such as water quality, riparian buffers, and steep slopes, should be incorporated into the easement document.

Targeting Potential Donors

Recommendation 5. Easement-holding organizations must determine which properties in a community are especially good candidates for easements. The owners of these sites should be targeted as potential donors, and community connections should be exercised to encourage easement donations from these individuals.

Explanation: Motivations for easement donations have been previously discussed. An organization with an acquisition program would enjoy the most success by targeting individuals who own important historic resources and are likely to be convinced that the transfer of an easement on their property would be of benefit to themselves. Experience suggests that most tax-motivated and many altruism-based donations will come from particular kinds of (often wealthy) donors. Sometimes, such donors may even be persuaded to purchase an important historic property and then donate an easement, and find a financially rewarding use for the property because of the tax benefits.

Also, the management of an easement program is not without substantial costs, funds must be found to meet these expenses if a program is to be viable. The critical importance of fees for the acceptance of easements has already been discussed. These fees may unfortunately be prohibitive for the owners of some historic properties. Unless the entity seeking the easement can find an alternate source of funds to pay for the costs tied to the acceptance of the easement, other methods of protection should be considered. An organization saddled with the responsibility of monitoring too many easements with too little funds will run the serious risk of failing to monitor and enforce vigilantly.

This exact issue has already emerged as a notable problem for many preservation groups operating easement programs. Results from the survey showed that one of the biggest

shortcomings of most easement-holding organizations was effective monitoring. This generally was attributed to the lack of funds to ensure adequately trained staff to oversee the various holdings. Disturbingly, this funding problem exists even though drawn-out legal battles with intransigent fee simple owners of protected properties have not arisen. While most easement deeds likely placed the onus of paying for enforcement actions on violating fee simple owners, an easement-holding organization may well have to pay for expensive litigation expenses during the course of the legal wrangling, and not receive reimbursement until the court issues its final decree. Should such a scenario happen, the easement holder could quickly incur serious financial debts that would adversely impact other organizational activities. Ensuring adequate acceptance fees before assuming responsibility for an easement is vital for the future security of the easement and the organization.

Revolving Funds and Easements

Recommendation: 6. Revolving funds has been the single most influential allied preservation program in allowing Qualified Organizations in Georgia to acquire significant numbers of easements. Nonprofits seeking to develop large holdings of easements would be well-served to set up a revolving fund as a steady source of easements.

Explanation: Some of the most successful easement acquisition programs have been tied to revolving funds for historic properties. The Revolving Fund of the Georgia Trust for Historic Preservation has allowed the Georgia Trust to acquire fifteen easements in addition to those which the Georgia Trust had acquired otherwise.[189] The Historic Savannah Foundation maintains one of the most extensive easement holdings in the nation, with its acquisitions currently numbering around two hundred. These were amassed over the many years of operation

[189] Email from Georgia Trust. Fall semester 2003.

of its Revolving Fund.[190] In Georgia, many easement holding organizations have received outright donations of easements (solicited or otherwise). Revolving funds, however, offer a guaranteed way of acquiring easements while furthering other preservation goals. The funds oversee the purchase and resale of historic properties in a targeted area, while retaining the important legal restrictions binding on all future owners.[191]

Revolving funds are especially useful mechanisms for implementing private land use controls because the deed to a property sold this way can be further modified to include a restrictive covenant and a right of first refusal, in addition to an easement. As Chapter 3 pointed out, these different tools entitle the nonprofit to different rights and remedies if subsequent owners violate limitations placed on the property. The nonprofit would be able to avail itself of a wider variety of legal approaches if and when it found the need to intervene at some point in the future to protect the resource in question. Nonprofits seeking to develop large easement programs would therefore be well served to operate their own Revolving Funds.

[190] Email from Historic Savannah Foundation. Fall semester 2003.

[191] No evidence suggests that revolving funds currently purchase easements outright with money from the revolving fund. Easements acquired outside of those from a revolving fund generally are donated, but money from the organization's general fund could be used for the purchase of an easement outright. Grantors who do not donate their easements stand to lose any tax benefits attendant to a donation.

POSTSCRIPT: FURTHER RESEARCH OPPORTUNITIES

The research into conservation easements that provided the basis for this thesis has revealed a much richer and broader subject area than anticipated. Moreover, thanks to initial time constraints and additional onerous burdens imposed by the Human Subjects Research office, there were certain limits on the ability to explore this topic to the utmost end. There are therefore a number of related areas that could bear further study. A few of these opportunities are discussed below.

Mixed-Heritage Sites

Cultural resource preservation and environmental conservation organizations, in Georgia and beyond, have missions with many overlapping aims. These groups must often avail themselves of common legal tools, such as conservation easements, as they strive to achieve their goals. Preservationists have sometimes allied themselves with conservationists at specific sites. On the Eastern Shore of Maryland, the Maryland Historical Trust and the Maryland Environmental Trust jointly hold an easement protecting a colonial-era residence and over one thousand acres of environmentally important coastal property.[192] An understanding over the protection of space-sharing ecological and cultural resources at Greenwood Plantation near Thomasville, Georgia, provides an example closer to home. A more in-depth look into the existence of such partnerships and their successes and failures would offer guidance on the future creation of such coalitions. In addition, preservation activists would benefit greatly from a study of how environmentalists have made use of conservation easements, restrictive covenants, land

[192] Refer to: Stokes, Samuel N.; Watson, A. Elizabeth; and Mastran, Shelley S. Saving America's Countryside: A Guide to Rural Preservation. 2nd Ed. For the National Trust for Historic Preservation. Baltimore, MD: Johns Hopkins UP, 1997, pp. 226-227.

trusts, wetlands mitigation banks, and other private land use strategies. Environmentalists have been particularly good at reaching out to potential donors. By imploring these individuals to donate, through tapping into their altruism and tax motivations, an enormous amount of land has been placed under protection. Fee arrangements for the acceptance of conservation easements are quite advanced among environmental organizations, and studying such fee structures would potentially preclude a lot of trial and error among preservation groups. Further, environmentalists have been quite successful in establishing entities for holding and monitoring these acquisitions in a variety of rural, suburban, and urban settings. In Athens, there is even an organization named the Georgia Land Trust Service Center (GLTSC) that strives to ensure that the numerous land trusts throughout the state are able to function as effective stewards of their custodial properties.[193] A study of the operation of the GLTSC would be of great help in revealing how ecologically-minded land trusts have adapted to the contours of easement law, as well as in providing an assessment of whether a similar organization could be created to assist preservation-oriented nonprofits in creating and managing cultural easements. Such an entity would likely be of great service to preservationists in Georgia. The information gathered to support the present thesis, both from general research on cultural easements and the survey itself, indicated an absence of any organization that could serve specially as a clearinghouse for easement information. The isolation resulting from the decentralization of cultural easement programs across the state has caused unfortunate mistakes and commendable success strategies not to be widely shared. These growing pains have already been felt by environmental conservation colleagues, and the preservation movement in Georgia could stand to learn a great deal from their advice.

[193] More information on the Georgia Land Trust Service Center may be found by visiting the organization's website: www.gltsc.org

Comprehensive Survey of Easements Holdings and Holders in Georgia

Chapter 6 briefly touched on the diverse types of historic resources found across Georgia. The research for this thesis confirmed the need for different preservation strategies for different areas. Rural areas face very different challenges than those seen in urban cores. Suburban areas face a combination of the problems of the other two. Because of limitations on this thesis, however, there is comparatively little information provided here on current strategies employed in these different locales. Additional studies into two specific areas would be of particular help to preservationists in the near future. The first involves a survey of plans in rural communities for the protection of cultural resources. Local ordinances creating preservation commissions and historic districts are least common in these areas, and progressive depopulation over the last several decades has left many structures underutilized or abandoned.[194] Large numbers of historic structures and landscapes stand to be completely lost if effective preservation strategies are not developed to address these problems. Conservation easements and other private land use tools would likely serve as the front line in the defense of these resources.[195] Surveys of city and county agencies, as well as rural development programs run by state governmental agencies, would likely yield particularly insightful information. This project would require extensive planning and laborious pre-clearance procedures with the Human Subjects Research office, so anyone wishing to pursue such a topic should set out with strong determination and several semesters' worth of time to devote to the research.

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[194] Refer to Appendix G, which shows the current list of cities and counties in Georgia that have enacted local preservation ordinances. Source: Founder's House.

[195] For other research on protecting rural heritage, refer to Cassady, Jane Tyson. Preserving Cultural and Historic Landscapes: A Study of Preservation Policies and Techniques. Master's Thesis. Athens, GA: University of Georgia, 1997. Land trusts and conservation easement get special treatment, beginning on p. 82. Also read Chapter 5 in Stokes, Samuel N.; Watson, A. Elizabeth; and Mastran, Shelley S. Saving America's Countryside: A Guide to Rural Preservation. 2nd Ed. For the National Trust for Historic Preservation. Baltimore, MD: Johns Hopkins UP, 1997, pp. 214-252. This second source provides a good deal of information on the use of easements and other voluntary approaches for rural preservation.

Coordination Among Easement Holding Organizations in Urban Growth Areas

A second area of great interest would be in locations that have been, or are about to be, enveloped in the outward sprawl of rapidly expanding metropolitan service areas (MSAs).[196] While several urban areas in Georgia are experiencing such growth, Atlanta is undoubtedly the most illustrative. Because of its sheer size and the varied types of communities included in its rural-to-urban transect, metropolitan Atlanta encompasses a phenomenal range of existing governmental and non-governmental rural, suburban, and urban preservation-minded groups. Some are very local in scope, while others view the entire region or even the state as within the confines of their mission.[197] U.S. Census projections for the next twenty years only foresee greater changes in the character of these areas, as well as the expanse included in the Atlanta MSA.[198] The degree of success of preservation efforts in this region depends on the ability of these groups to coordinate efforts and to respond to demographic and land-use changes in their service areas. Research into how changes of the last twenty years have affected preservation efforts would offer some helpful guidance on future goals and partnerships.

For-profit Strategies

As mentioned more than once already, the goals of preservationists and environmentalists are often achieved by using tools common to both camps. While environmentalists have been

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[196] "The general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core." Refer to: http://www.census.gov/population/www/estimates/aboutmetro.html The official text of the revised 2000 standards of an MSA appeared on 27 December 2000 in 65 F.R. 82228.

[197] Although it is less than comprehensive, a sampling of entities based in the Atlanta area with preservation-related goals can be found in Chapter 4. This listing provides a glimpse of the wide-ranging interests and geographic scopes of the entities located there.

[198] The Atlanta Regional Commission projects that the population of the thirteen-county metro Atlanta area will grow 62% to 6,005,000 by 2030. http://www.centralatlantaprogress.org/DoingBusiness_Labor_Profile.asp Notably, this thirteen-county approach is much more limited than the MSA designation used by the U.S. Census.

quite successful in encouraging the use of governmental land use controls in order to ensure the protection of important natural resources, they have also resorted to innovative private sector solutions to resolve the shortcomings of government action. One model in particular would bear closer scrutiny as a candidate for adaptive use on the part of preservationists.

A new approach to natural resource protection – called a wetland mitigation bank – has emerged in Georgia. This type of conservation method has begun to prove economically viable, especially in the river basins of the Etowah and Chattahoochee around rapidly-growing Atlanta.[199] This is due in part to the no-net-loss wetlands strategy of the Army Corps of Engineers (COE), which oversees construction along U.S. waterways.[200]

Wetland mitigation banks have developed as an innovative solution to meet the no-net-loss policy of the COE in areas where absolute restrictions on land development become difficult to maintain for economic, political, or other reasons. The COE has the authority to regulate waterways under the Rivers and Harbors Act of 1899.[201] In cooperation with the U.S. Environmental Protection Agency (EPA)[202], the COE works to implement Section 404(b)(1) of the Clean Water Act.[203] When a developer's project would unavoidably destroy existing wetlands, and no on-site mitigation is possible, the COE requires that the developer purchase

[199] For a strong explanation of how a public-private wetland mitigation bank arrangement can operate successfully in Georgia, refer to the article in the journal "Stormwater" that highlights recent efforts in Griffin, Georgia: http://www.forester.net/sw_0107_griffin.html

[200] While the U.S. Army Corps of Engineers (COE)'s definition of wetlands has been curtailed by court rulings, notably the decision of the U.S. Supreme Court in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (U.S. 2001), the no-net loss policy remains in effect at present.

[201] Refer to: 33 USC 403 et seq.

[202] While there had been some hostility between the COE and EPA on how each was to implement the law on point, an agreement between the two helped to create a cohesive policy. Refer to: Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines. (February 6, 1990).

[203] To read the text of the Clean Water Act, refer to 33 USC 1344. EPA's regulations regarding sites for dredged or fill material may be found at: 40 CFR part 230. The COE regulations on permits for the discharge of dredged or fill material may be found at: 33 CFR parts 320-330.

equivalent wetlands mitigation units to facilitate the protection or regeneration of wetlands elsewhere within that specific river basin.[204]

This particular approach would appear to have no direct application to preservation at present, since a destroyed historic structure cannot simply be regenerated.[205] Yet preservation commissions across the state regularly approve the demolition of many historic buildings seemingly protected in locally designated historic districts. Often, these structures have been substantially and irreparably modified since construction and the historic integrity has subsequently been destroyed. As such, they would be ineligible for listing on the National Register. Future research could study the wetland mitigation bank model in depth and investigate whether a similar preservation program could be feasibly created. Individuals or groups seeking to demolish buildings completely lacking in historic integrity could be required to contribute a "preservation exaction" to the local preservation commission or, better, to a local organization that could serve as a "preservation credit bank". This preservatio n credit bank could then be structured in a number of ways, from providing outright grants for other preservation projects to offering low-interest loans for similar projects to creating an endowment for an easement acquisition and monitoring program in the community. Such an approach would require careful review of state and local laws to ensure that public funds not be dispensed for purely private benefit. The funds may need to be limited in use to projects within the historic district. This potential system would require a good deal of research into the economics and

[204] For a detailed explanation of how a mitigation bank is created and managed, refer to: http://h2osparc.wq.ncsu.edu/info/wetlands/mitbank.html A wealth of links for further reading may be views on the U.S. Environmental Protection Agency's website at: http://www.epa.gov/region4/water/wetlands/technical/mitibanks.html

[205] Because of the ecological functions of wetlands, the reconstruction of destroyed wetlands in a different part of a river basin can help mitigate the loss (although this is certainly location-dependent). In preservation, however, this is a very different matter. Even though the Guidelines of the Secretary of the Interior explicitly endorses "Reconstruction" as an official treatment, the unique nature of the original construction, as well as critical contextual importance of the original location, strongly negate any policies for widespread demolition and reconstruction. Even the mere relocation of a structure can be grounds for the removal of a site from the National Register.

legality of how wetland mitigation banks operate and whether the model would be suited for transfer to the preservation field.

In a model more closely resembling the mitigation bank strategy, a "credit system" could be set up to operate independently of any governmental program. The for-profit "preservation mitigation bank" (PMB), which would receive special licensing and certification from the Georgia Historic Preservation Division, would select historic resources in need of protection. The structures would be rehabilitated in accordance with the Standards of the Secretary of the Interior.[206] The PMB could then sell or operate the structures, taking advantage of any state or federal tax benefits available along the way.[207]

But this would only be the prelude. The rehabilitation project itself would result in the creation of a certain number of preservation credits that would be added to the inventory of credits held by the bank.[208] Thereafter, if a developer receives approval from the local preservation commission to demolish an historic resource that has lost all of its integrity (the type already being demolished at present) or to construct any new infill in an historic district, the commission can condition its approval on the purchase of a certain number of preservation credits from a PMB. A series of standards for evaluating such sites would be necessary, of course, in order to ensure equal application of the law to different sites and different developers, but this has already been accomplished in other areas of public land use law and should be no

[206] This could be ensured by involving approval through the SHPO office, similar to the way the SHPO office currently approves tax credit projects. Alternately, a SHPO-certified, independent consultant could be allowed to review such projects if the SHPO office is determined to be unable of handling such inspections in a thorough, but quick, time frame.

[207] For example, if the rehabilitated property were to be used by the PMB as an income-producing property, the for-profit PMB would be eligible to take advantage of the twenty percent federal tax credit. For more on this tax credit, refer to Chapter 8.

[208] A formula can be designed by the SHPO to allow for a reasonably standardized method of awarding credit to rehabilitation projects. The formula would take into account a variety of factors, such as those used as criteria for the National Register, as well as the estimated costs of the project. This formula could then be applied by the SHPO's office across the state to different resources, yet be able to produce fair results that would not be arbitrary and capricious in nature. While this might seem difficult at first, the wetlands mitigation banks have been quite successful in assigning such a formula to areas where they are restoring or creating wetlands.

insurmountable hurdle here. The preservation commission could also employ the credit system in other ways, such as in levying preservation credit fines for intransigent property owners who irreparably alter an historic resource, in direct contravention of the directives of the commission. This system would help to drive home the message that all extant resources – and the context in which they are found – possess some degree of cultural value. By requiring the use of credits to engage in any construction in historic areas, the underlying mission of preservation can be promoted through this avenue of education and outreach.

This approach carries with it a major caveat, however. There is the danger that preservation commissions would become more amenable to issuing demolition permits to structures in locally designated historic districts under their jurisdiction. Vernacular commercial and domestic architecture may need explicit protections, since these resources are widely underappreciated. Given that the Georgia Historic Preservation Act of 1980 encourages historic commissions to be comprised of a wide cross-section of local skills and professional talents, this bias against the vernacular would likely be reflected on commissions as well.[209] If Georgia were to create a Preservation Mitigation Bank system, therefore, stringent safeguards would be needed to ensure that any demolition permits granted for existing historic resources would be based on careful appraisal of the historic and structural integrity of the resource.

[209] Refer to O.C.G.A. Section 44-20-24.

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APPENDIX A:

THE SURVEY FORM FOR NONPROFITS AND GOVERNMENTAL AGENCIES

Questionnaire

1. Please list any cultural or natural sites protected by conservation easements that you are aware of, as well as the organization or agency that monitors the easements.

2. What involvement have you had with easement programs?

3. Has your community found easements to be a useful tool in the protection of historic and natural structures?

4. What incentives would encourage your community to employ easements more effectively?

5. Based on your experiences and reports you have heard from others, what do you identify as the problems with easement programs?

6. Based on your experiences and reports you have heard from others, what do you identify as the benefits of easement programs?

7. What do you consider to be the three most significant barriers to the wider use of easements in Georgia? (rank 1 to 3)

____ The lack of awareness about easement programs
____ The cost of monitoring easements
____ The potential cost of litigation to enforce an easement
____ The lack of trained staff to oversee an easement program
____ The cost of attorneys' fees in acquiring an easement
____ General distrust of less than fee simple ownership
____ The lack of adequate financial incentive to the potential donor
____ Other: _____
____ Other: _____
____ Other: _____
____ Other: _____

8. Are you aware of any other individuals or groups that have played a role, now or in the past, in easement acquisitions and transfers?

THANK YOU FOR YOUR TIME!

APPENDIX B:

THE WAIVER FORM TO ACCOMPANY
THE SURVEY

Fall 2003
2360 W. Broad Street, Apt. B-7
Athens, GA 30606-5608

Dear Sir/Madam:

Greetings. I am Christopher Fullerton, a student in the joint-degree program in law and historic preservation at the University of Georgia. As part of my studies, I am conducting a research project that will be published as a thesis with a focus on "The Use of Conservation Easements in the State of Georgia." Professor John C. Waters, the director of the Program in Historic Preservation in the College of Environment and Design, has encouraged me to initiate this project regarding the use of such easements in perpetuity specifically for the protection of historic and natural resources. Because conservation easements are tools generally used by private individuals and organizations, there is no mandatory statewide database listing the easements that currently exist. With the cooperation of those involved in easement transfers and monitoring, I plan to help create a voluntary listing of easements in Georgia to illustrate their varied uses, as well as allow for better recordkeeping and facilitate partnerships and joint ventures in use of easements in the future.

There is also little more than anecdotal feedback about the effectiveness of easements as a tool in the furtherance of resource protection. This project seeks to elicit information from individuals and groups that have knowledge of easement transfers and easement programs currently in existence in Georgia in order to help consolidate information about the successful and unsuccessful programs in which different individuals and groups have participated. Please consider answering of a series of simple questions regarding conservation easements and their use in Georgia. The questionnaire should take no more than a few minutes of your time.

According to University policy, I am obliged to point out that you can choose not to participate in this questionnaire (attached). If, however, you choose to return your completed questionnaire, your decision to return the form will be considered to represent your consent, as per the following paragraph. Although it is highly unlikely that you will find any of the questions troubling, feel free to skip any questions that you feel uncomfortable answering. This form is traveling over the Internet, and there is a possibility of an insecure connection. The questionnaire requests no confidential information, however. Following is a simple implied consent statement regarding participation:

I agree to take part in a research study entitled "Research into the Use of Conservation Easements in the State of Georgia", which is being conducted by Christopher Fullerton, School of Environmental Design of the University of Georgia (706-296-0127) under the direction of John C. Waters, Director, Program in Historic Preservation (706-542-4720). I do not have to take part in this study; I can stop taking part at any time without giving any reason, and without penalty. I can ask to have information related to me returned to me, removed from the research records, or destroyed.

Further, this questionnaire is not intended to distract you from your on-the-job duties. Should your employer disapprove of your participation in this research at the office, please accept my apologies for bothering you. If, however, your employer finds no fault with your participation, then the return of your completed questionnaire will be considered to represent the necessary consent.

Thank you for your time. Your answers will be of great help in understanding the role of conservation easements as a tool in the field of historic preservation. If you have any questions do not hesitate to ask now or at a later date.

Regards,

Christopher Fullerton, J.D./M.H.P. '04
706-296-0127
christopher_fullerton@yahoo.com
Law/Graduate student, University of Georgia

Additional questions or problems regarding your rights as a research participant should be addressed to Chris A. Joseph, Ph.D. Human Subjects Office, University of Georgia, 606A Boyd Graduate Studies Research Center, Athens, Georgia 30602-7411; Telephone (706) 542-3199; E-Mail Address IRB@uga.edu

APPENDIX C:

THE GEORGIA FAÇADE
AND CONSERVATION EASEMENTS
ACT OF 1976
(AS ORIGINALLY PASSED AND AS IT APPEARED
IN 1991)

The Georgia Façade and Conservation Easements Act of 1976
(as originally passed)

85-1406 Façade and Conservation Easements Act of 1976; short title
This law [§§ 85-1406 through 85-1410] shall be known and may be cited as the ¨ Façade and Conservation Easements Act of 1976.¨

85-1407 Same; definitions
As used in this law [§§ 85-1406 through 85-1410] unless the context otherwise requires, the following definitions apply:
(a) ¨Façade¨ [means] an interior or exterior surface of a building which is given emphasis by special architectural treatment.
(b) ¨Façade easement¨ means any restriction or limitation on the use of real property expressly recited in any deed or other instrument of grant or conveyance executed by or on behalf of the owner of real property whose purposes is to preserve historically or architecturally significant structures or sites located within an officially designated historic district pursuant to the applicable provisions of any local political subdivision´s authority to provide for such districts and to provide for special zoning restrictions therein.

85-1408 Same; interest in land, how acquired; duration
Such façade 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. Where such façade and conservation easements are not acquired for the benefit of any dominant tract of land, they shall be enforceable against the servient estate, both at law and in equity, as an easement in gross, and as such they may be assignable to any governmental body or charitable or educational corporation, trust or organization as aforesaid. It shall be presumed that such façade or conservation easements are created in perpetuity, unless the instrument of conveyance creating such façade or conservation easements 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.

85-1409 Same; assessment of real property to reflect encumbrance of easements
The instrument of conveyance of such façade or conservation easement shall conform to the formalities of a registerable deed to land and be recorded in the office of the clerk of the superior court of the county where the land lies. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the façade or conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of such encumbrance on the next succeeding digest of such county. Any owner who so records and is aggrieved by a revaluation or lack thereof under this section may appeal to the board of equalization and may appeal from the decision of the board of equalization in accordance with the provisions of section 92-6912.

85-1410 Same; legislative purpose

The General Assembly hereby finds, determines and declares that the historical, cultural and aesthetic heritage of this State is among its most valued and important assets and that the preservation of this heritage is essential to the promotion of the health, prosperity and general welfare of the people.

In accordance with this finding, it is hereby declared to be the purpose and intent of the General Assembly to encourage and promote the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural and aesthetic interest or value.

The Georgia Façade and Conservation Easements Act of 1976

(as it appeared in 1991)

44-10-1. Short title.

This article shall be known and may be cited as the ¨ Façade and Conservation Easements Act of 1976.¨

44-10-2. Definitions.

As used in this article, the term:

(2) ¨ Façade¨ means an interior or exterior surface of a building, which surface is given emphasis by special architectural treatment.

(3) ¨ Façade easement¨ means any restriction or limitation on the use of real property which is expressly recited in any deed or other instrument of grant or conveyance executed by or on behalf of the owner of real property 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 or historically or architecturally significant structures or sites which have been designated as such by the state historic preservation officer.

44-10-3. Legislative purpose and intent.

The General Assembly finds, determines, and declares that the historical, cultural, and esthetic heritage of this State is among its most valued and important assets and that the preservation of this heritage is essential to the promotion of the health, prosperity, and general welfare of the people. In accordance with this finding, it is declared to be the purpose and intent of the General Assembly to encourage and promote the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, and esthetic interest or value.

44-10-4. Acquisition by governmental bodies, etc.; nature and duration of easements.

Façade 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. Where such façade and conservation easements are not acquired for the benefit of any dominant tract of land, they shall be enforceable against the servient estate, both at law and in equity, as an easement in gross; and as such they may be assignable to any governmental body or charitable or educational corporation, trust, or organization as aforesaid. It shall be presumed that façade or conservation easements are created in perpetuity unless the instrument of conveyance creating the façade 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.

44-10-5. Form of instrument conveying easement; recording; assessment to reflect encumbrance; appeal.

The instrument of conveyance of a façade or conservation easement shall conform to the formalities of a recordable deed to land and shall be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the façade or conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding digest of the county. Any owner who records a façade or conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board of equalization and may appeal from the decision of the board of equalization in accordance with Code section 48-5-311.

APPENDIX D:

THE UNIFORM CONSERVATION EASEMENT ACT OF 1992
(as originally passed and as it appeared through the regular session of the General Assembly in 2003)

The Uniform Conservation Easement Act of 1992
(as originally passed)

44-10-1.
This article shall be known and may be cited as the ' Georgia Uniform Conservation Easement Act.'

44-10-2.
As used in this article, the term:
(1) ' Conservation easement' means a nonpossessory 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, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.
(2) ' Holder' means:
(A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or
(B) A charitable corporation, charitable association, or charitable trust, the purposes or powers of 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; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.
(3) ' Third-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.

44-10-3.
(a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain.
(b) No 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.
(c) Except as provided in subsection (c) of Code Section 44-10-4, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.
(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.
(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

44-10-4.
(a) An action affecting a conservation easement may be brought by:
(1) An owner of an interest in the real property burdened by the easement;
(2) A holder of the easement;
(3) A person having a third-party right of enforcement; or
(4) A person authorized by other law.
(b) The easement holder shall be a necessary party in any proceeding of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property.
(c) This article does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

44--10-5.
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 the 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.

44-10-6.
(a) This article applies to any interest created after July 1, 1992, which complies with this article, whether designated as a conservation or facade easement, or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise.
(b) This article applies to any interest created before July 1, 1992, if such interest would have been enforceable had such interest been created after July 1, 1992, unless retroactive application contravenes the Constitution or laws of this state or the United States.
(c) This article does not invalidate any interest, whether designated as a conservation or preservation or facade easement or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state.

44-10-7.
This article shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of this article among states enacting it.

44-10-8.

A conservation easement may be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county. Any owner who records a conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board of equalization and may appeal from the decision of the board of equalization in accordance with Code Section 48-5-311.

The Uniform Conservation Easement Act of 1992
(as amended, through 2003)

44-10-1.
This article shall be known and may be cited as the ' Georgia Uniform Conservation Easement Act.'

44-10-2.
As used in this article, the term:
(1) ' Conservation easement' means a nonpossessory 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, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.
(2) ' Holder' means:
(A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or
(B) A charitable corporation, charitable association, or charitable trust, the purposes or powers of 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; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.
(3) ' Third-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.

44-10-3.
(a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created, altered, or affected by condemnation.
(b) No 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.
(c) Except as provided in subsection (b) of Code Section 44-9-113, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.
(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.
(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

44-10-4.
(a) An action affecting a conservation easement may be brought by:
(1) An owner of an interest in the real property burdened by the easement;
(2) A holder of the easement;
(3) A person having a third-party right of enforcement; or
(4) A person authorized by other law.
(b) The easement holder shall be a necessary party in any proceeding of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property.
(c) This article does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

44--10-5.
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 the 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.

44-10-6.
(a) This article applies to any interest created after July 1, 1992, which complies with this article, whether designated as a conservation or facade easement, or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise.
(b) This article applies to any interest created before July 1, 1992, if such interest would have been enforceable had such interest been created after July 1, 1992, unless retroactive application contravenes the Constitution or laws of this state or the United States.
(c) This article does not invalidate any interest, whether designated as a conservation or preservation or facade easement or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state.

44-10-7.
This article shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of this article among states enacting it.

44-10-8.
A conservation easement may be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county. Any owner who records a conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board of equalization and may appeal from the decision of the board of equalization in accordance with Code Section 48-5-311.

Source: Unannotated Georgia Code (Current through 2003 Regular Session of the General Assembly)
http://www.legis.state.ga.us/cgi-bin/gl_codes_detail.pl?code=44-10-1

APPENDIX E:

A SAMPLE CONSERVATION EASEMENT DEED

Note -- Appendix E is courtesy of:

James H. Rollins
HOLLAND & KNIGHT
One Atlantic Center, Suite 2000
1201 West Peachtree Street, N.E.
Atlanta, Georgia 30309-3400

STATE OF GEORGIA

COUNTY OF FULTON

DEED OF GIFT AND AGREEMENT FOR AN ARCHITECTURAL, FACADE AND PRESERVATION EASEMENT

THIS DEED OF GIFT AND AGREEMENT FOR AN ARCHITECTURAL FACADE AND PRESERVATION EASEMENT (hereinafter referred to as this "Agreement" or this "Deed and Agreement"), made as of the ____ day of _____, 2000, by and between _____, a _____, the address of which is: _____
_____ ("Grantor") and EASEMENTS ATLANTA, INC., a Georgia nonprofit corporation, the address of which is: c/o Atlanta Preservation Center, 537 Peachtree Street, N.E., Atlanta, Georgia 30308 ("Grantee").

W I T N E S S E T H:

WHEREAS, the Grantee is a not for profit corporation chartered by the State of Georgia (the "State") in order to facilitate public participation in the preservation of sites, buildings and objects significant in American and State history and culture;

WHEREAS, the Grantee is authorized to accept easements in order to protect property significant in American and State history and culture;

WHEREAS, the Grantor is the legal and equitable owner in fee simple of certain improved real property in Fulton County, Georgia, and more particularly described on Exhibit "A" attached hereto and made a part hereof by this reference (the "Premises");

WHEREAS, the Premises includes that building commonly known as _____, _____, Atlanta, Georgia 303__, (the "Improvements"), which [was listed in the National Register of Historic Places on _____, 19_, or is eligible for listing on the National Register of Historic Places or is a certified historic structure];

[WHEREAS, it is anticipated that the Improvements will be enrolled on the National Register of Historic Places maintained by the Department of the Interior, and the easements granted herein are subject to a right of reversion in favor of Grantor in the event that Grantor shall not receive, on or before the date in 200_ on which Grantor shall file its federal income tax return, a satisfactory

certification from the Department of the Interior that the Premises have been so enrolled;]

WHEREAS, the Premises are historically and architecturally significant, and Grantee has determined that the grant of an architectural and preservation easement by Grantor to Grantee with respect to the Premises will assist in preserving and maintaining the Premises, their historical and architectural significance and the architectural ensemble of the State by protecting, enhancing and perpetuating the special historical, cultural and/or aesthetic interest and/or value of the Premises;

WHEREAS, to this end, Grantor desires to grant to Grantee, and Grantee desires to accept, an architectural and preservation easement on the Premises, and Grantor further desires that this gift to Grantee qualify as a "qualified conservation contribution" as defined in section 170(h) of the Internal Revenue Code of 1986, as amended (the "Code");

WHEREAS, Grantor further desires that this gift to Grantee constitute a "conservation easement" as defined in O.C.G.A. § 44-10-2(1);

[WHEREAS, the Improvements are in a state of disrepair and Grantor is in the process (the "Rehabilitation") of repairing and refurbishing the Improvements and rehabilitating them in a manner consistent with the purposes of this Deed and Agreement and consistent with that certain set of plans and specifications prepared by for Grantor relative to the Rehabilitation of the Improvements (the "Plans");]

[WHEREAS, Grantee has reviewed the Plans.]

NOW, THEREFORE, in consideration of the charitable gift made hereby and Ten Dollars ($10.00) and other good and valuable consideration, paid by each party hereto to the other, the receipt and sufficiency of which are hereby acknowledged by Grantor and Grantee, and in further consideration of the mutual promises and representations made herein, Grantor and Grantee hereby agree as follows:

GRANTING CLAUSE

Grantor does hereby grant and convey unto Grantee an easement in perpetuity (which easement is more particularly described below) in and to the Premises and the Facades (as hereafter defined), upon the terms and conditions set forth herein.

TO HAVE AND TO HOLD the easement granted and conveyed by this Deed and Agreement to the use, benefit and behoof of Grantee, its successors and permitted assigns FOREVER.

The easement as described in this Deed and Agreement shall constitute a binding servitude upon the Premises, and to that end Grantor binds itself, its successors and assigns, to Grantee, its successors and permitted assigns, to fully do and perform the covenants, stipulations and agreements set forth in this Deed and Agreement, each of which aids significantly in the preservation of the Improvements and contributes to the public purpose of maintaining and assuring the present and future historic integrity of the Premises. Each covenant, stipulation and agreement contained herein shall be deemed to run as a binding servitude, in perpetuity, with the land and shall survive any termination of Grantor's or Grantee's existence.

Grantor reserves to itself, its successors and assigns, forever, the fee title to the Premises and the right to exclusive use and occupancy of the Premises, all to the extent not inconsistent with the terms and provisions of the easement granted and conveyed hereby.

I. Description of Facades.

In order to make more certain the full extent of Grantor's obligations and the restrictions on the Premises (including the Improvements), and in order to document the external appearance of the Improvements as of the date hereof, it is stipulated by and between Grantor and Grantee that the exterior surfaces of the Improvements as of the date hereof (including, without limitation, the exterior walls, roofs and chimneys, if any) are those depicted in the photographs attached hereto and incorporated herein as Exhibit "B", being essentially those exterior surfaces of the Improvements which are visible by the public, but, in the event of uncertainty, the exterior surfaces of Improvements visible in the photographs in Exhibit "B" shall control. [Grantor shall deliver or cause to be delivered to Grantee additional photographs, in content reasonably satisfactory to Grantee, of the exterior surfaces of the Improvements (including, without limitation, the exterior walls, roofs and chimneys, if any) on the Premises after the Rehabilitation has been completed.] The exterior surfaces of the Improvements as shown on Exhibit "B" are hereinafter referred to as the "Facades".

II. Standards for Review.

In exercising the authority granted to Grantee by this Deed and Agreement to inspect the Premises, the Improvements or the Facades, to review and approve any construction, alteration, repair or maintenance, or to review casualty damage and to reconstruct or approve reconstruction of the Improvements or Facades following casualty damage, Grantee shall apply the Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings published and issued by the Secretary of the United States Department of the Interior (the "Secretary"), as the same may be amended from time to time (the "Standards") and State or local standards considered appropriate by Grantee for review of work

affecting historically or architecturally significant structures or for construction of new structures within historically, architecturally or culturally significant districts. Grantor agrees to abide by the Standards in performing all restoration, rehabilitation, repair and maintenance work on the Improvements. In the event the Standards are abandoned or materially altered or otherwise become, in the sole judgment of Grantee, inappropriate for the purposes set forth above, Grantee may apply reasonable alternative standards and notify Grantor of the substituted standards.

III. Covenants of Grantor.

In furtherance of the easement granted herein, Grantor covenants on behalf of itself, its successors and assigns, with Grantee, its successors and assigns, such covenants being deemed to run as a binding servitude, in perpetuity, with the land, to do (and refrain from doing) upon the Premises each of the following covenants, each of which contributes to the public good in that each aids significantly in the preservation and protection of the Premises or in the preservation of the historic district in which the Premises are located:

(1) Grantor shall not demolish, remove or raze the Improvements or the Facades or any part thereof.

(2) Without the express prior written permission of the Grantee, signed by a duly authorized representative thereof, Grantor shall not undertake or permit to be undertaken any construction, maintenance, repair, alteration or remodeling or any other activity on or with respect to the Premises which would not comply with the Standards or would cause the Secretary not to certify the Improvements as being consistent with the historic character of the Premises. [Grantor shall complete the Rehabilitation in accordance with the Standards and the Plans in all material respects, and after completion of the Rehabilitation,] Grantor shall not, without the express prior written permission of Grantee, materially alter in any way the exterior appearance of the Improvements, and specifically, but without limiting the generality of the foregoing, Grantor shall not:

(a) increase or decrease the height of the Improvements;

(b) adversely affect the structural soundness of the Improvements;

(c) make any changes in the Facades, including the alteration, partial removal, remodeling or other physical or structural change with respect to the appearance or construction thereof, including any change in the color, material or surfacing;

(d) construct any additions to or extensions of the Improvements;

(e) erect or place anything on the Premises or on the Improvements which would prohibit the Facades from being visible from street level, except for temporary structures during any period of approved alteration, restoration, or maintenance of the Improvements; or

(f) erect, construct or move anything on the Premises that would encroach on the open land area surrounding the Improvements and interfere with a view of the Facades or be incompatible with the historic or architectural character of the Improvements or the Facades.

Notwithstanding the foregoing, Grantor may, with the express prior written permission of the Grantee based on plans and specifications provided by Grantor at Grantor's expense, undertake any restoration or rehabilitation of the exterior of the Improvements in accordance with the Standards if such rehabilitation can be reasonably expected by the Grantee to result in the Secretary certifying such rehabilitation as being consistent with the historic character of the Premises or the historic district, if any, in which the Premises are located.

(3) Grantor shall at all times maintain the Premises and the Improvements which are a part of the Premises (including, without limitation, the Facades) in a good and sound state of repair and shall undertake a regular maintenance program to preserve the structural soundness and prevent deterioration of the Improvements. The obligation to maintain the Improvements includes the requirement to replace, rebuild, repair and reconstruct the Facades whenever necessary in accordance with the Standards and to have the exterior surfaces of the Improvements at all times appear to be and actually be the same as the Facades.

(4) The Premises shall be used for such purposes as are permissible under the zoning and other general laws of the City of Atlanta, Georgia, as such purposes may be changed from time to time. The Premises shall not be subdivided, nor shall the Premises ever be demised or conveyed other than as a unit, except that the Premises may be made subject to a declaration of condominium.

(5) No utility transmission lines or devices, including satellite receiving dishes, other than those existing on the date hereof may be installed on the Premises in a manner as to cause them to be visible by the public from the exterior of the Premises.

(6) No dumping of ashes, trash, rubbish or any other unsightly or offensive materials which are visible from public roads or streets shall be permitted on the Premises.

(7) Except for those permitted exceptions shown on Exhibit "C" hereto, Grantor warrants to Grantee that no lien or encumbrance that has priority

over this Deed and Agreement exists on the Premises as of the date hereof. Grantor shall immediately cause to be satisfied or released any lien or claim of lien that may hereafter come to exist against the Premises which would have priority over any of the rights, title or interest of Grantee hereunder.

(8) Any subsequent deed or other legal instrument by which Grantor divests itself of either the fee simple title to or its possessory interest in the Premises, or any part thereof (excluding, however, space leases and licenses to tenants in the ordinary course of Grantor's business) shall be made subject to the restrictions and agreements contained in this Deed and Agreement. Such restrictions and agreements need not be included verbatim but may be incorporated by reference to this instrument in that deed or instrument. Grantor shall provide Grantee with written notice of any transfer of title to the Premises; provided, however, that failure to give said notice will not affect the easements or rights hereby created.

(9) Grantor will not display or place on the Premises signs, billboards, awnings or advertisements, except (i) such plaques or other markers as are appropriate for commemorating the historic importance of the Premises; (ii) such signs or markers as are necessary to direct and restrict the passage of persons or the parking of vehicles upon said Premises; (iii) a sign or signs stating the address of the Premises; (iv) such signs or markers as are necessary to advertise conspicuously the commercial or other use of the Premises; and (v) such signs, or markers as are necessary to advertise conspicuously the availability of the Premises for sale or rent, which signs or markers referred to in (i) - (v) of this paragraph shall be in conformity with design approval by the applicable design authority, if any. Grantee may provide and maintain a plaque on each of the street facades of the Premises not to exceed eight by twelve inches in size, mounted flush on the front exterior of the facade, with design approval by any applicable authority pursuant to established procedure, giving notice of the history of the building and the grant of this preservation easement.

(10) The Premises shall be landscaped in a manner compatible with the style and period of the Improvements. No living trees greater than 12 inches in diameter at a point four feet above the ground within 150 feet of the Improvements shall be removed unless immediate removal is necessary for the protection of any persons coming onto the Premises or of the general public, for the prevention or treatment of disease, or for the protection and safety of the Improvements. Any tree of the aforementioned size which must be removed shall be replaced within a reasonable time by a new tree of a the same species or, with the express written consent of Grantee, with an alternative species.

(11) No grading, excavation or other disturbance of the ground on the Premises shall be undertaken without the prior written approval of Grantee, which approval may be conditioned upon performance of a qualified archeological

investigation if, in the judgment of Grantee, such grading, excavation or disturbance might affect significant archeological resources on the Premises.

IV. Rights of Grantee Generally.

(1) Representatives of Grantee shall be permitted at all reasonable times to inspect the Premises, including the interior of the Improvements on the Premises to the extent required to insure maintenance of the structural soundness of the Improvements and compliance with this Deed and Agreement. Inspection of the interior will not, in the absence of evidence of deterioration, take place more often than annually and will be made at a time mutually agreed upon by Grantor and Grantee and in such a manner as will not interfere with the use and occupancy of the Premises by Grantor's tenants. Grantor covenants not to withhold unreasonably its consent in determining a date and time for such inspection.

(2) In the event of a violation of any covenant or restriction herein, Grantee may, following reasonable notice to Grantor, institute suit to enjoin by ex parte, temporary, and/or permanent injunction, such violation and to require restoration of the Premises to their prior condition, or, if necessary, following reasonable notice to Grantor, representatives of the Grantee may enter upon the Premises, correct any such violation, and hold Grantor responsible for the cost thereof. Such cost until repaid shall constitute a lien on the Premises.

(3) Grantee shall have all legal and equitable remedies to enforce Grantor's obligations hereunder, and, in the event Grantor is found to have violated any of its obligations, Grantor shall reimburse Grantee for any actual and reasonable costs or expenses incurred in connection with the enforcement by Grantee of Grantee's rights hereunder, including court costs and attorney's, architectural, engineering and expert witness fees.

(4) The exercise by Grantee of one remedy, or the failure to exercise any remedy, shall not have the effect of waiving or limiting the use of any other remedy at any other time.

V. Casualty Damage or Destruction.

(1) In the event that the Premises or any part thereof shall be damaged or destroyed by casualty, Grantor shall notify Grantee in writing within one (1) day of the damage or destruction, such notification to include what, if any, emergency work has already been completed. For purposes of this Deed and Agreement, the term "casualty" is defined as such sudden damage or loss as would qualify for a loss deduction pursuant to Section 165(c)(3) of the Code (construed without regard to the legal status, trade or business of Grantor or any applicable dollar limitation). No repairs or reconstruction of any type, other than temporary emergency work to prevent further damage to the Premises and to protect public

safety, shall be undertaken by Grantor without Grantee's prior written approval. Within thirty (30) days of the date of the damage or destruction, Grantor shall submit to Grantee a written report prepared by a qualified restoration architect and, if required, a qualified engineer, acceptable to Grantor and Grantee, which report shall include the following:

(a) an assessment of the nature and extent of the damage;

(b) a determination of the feasibility of the restoration of the Facades or reconstruction of the damaged or destroyed portions of the Improvements; and

(c) a report of such restoration or reconstruction work necessary to return the Premises to the condition existing at the date hereof [or the date of completion of the Rehabilitation].

(2) If in the opinion of Grantee, after reviewing such report, the purpose and intent of the easement granted hereby will be served by such restoration or reconstruction, Grantor shall, within such time as Grantee may reasonably direct, complete the restoration or reconstruction of the Premises in accordance with plans and specifications approved by Grantee up to at least the total of the proceeds of the casualty insurance covering the loss. Grantee has the right, but not the obligation, to raise funds toward the cost of restoration or reconstruction of the Premises above and beyond the total of the casualty insurance proceeds for the purpose of restoring the appearance of the Facades, and, if such additional funds are raised and applied to the restoration or reconstruction of the Premises, Grantee shall have a lien on the Premises to the extent of any funds so advanced.

(3) In the event of casualty damage to the Premises which is of such magnitude and extent as to render repairs or reconstruction of the Improvements impossible using all applicable insurance proceeds and other funds that may be raised by Grantee, as determined by Grantee by reference to bona fide cost estimates, or if in the opinion of Grantee, restoration or reconstruction would not serve the purpose and intent of this Deed and Agreement, then:

(a) Until such time as the easement granted by this Deed is extinguished as provided in Article VI below, Grantor shall continue to comply with the provisions of this Deed and Agreement and obtain the prior written consent of Grantee in the event Grantor wishes to alter, demolish, remove or raze the Improvements or construct new buildings on the Premises; and

(b) Grantee may elect to choose any salvageable portion of the Facades and remove them from the Premises at Grantee's cost and expense,

and Grantor shall deliver to Grantee a good and sufficient bill of sale for such salvaged portions of the Facades.

VI. Extinguishment by Judicial Proceeding.

Notwithstanding any other provision of this Deed and Agreement to the contrary, no restriction contained herein will lapse or be extinguished, whether upon partial or total destruction of the Improvements resulting from a casualty, condemnation or loss of title to all or a portion of the Premises, or otherwise, unless and until each of the following requirements is met in full:

(a) A court of competent jurisdiction in the State enters a final judgment finding that a change in conditions makes the continued use of the Premises or a part thereof for preservation or conservation purposes impossible, that the easement granted by this Deed and Agreement is extinguished and that the proposed use by Grantee of any proceeds received by Grantee as a result of such extinguishment is a use consistent with the conservation purposes of the original contribution; and

(b) Grantee shall have received in full the payment due as a result of the extinguishment of the easement determined in accordance with Article VII below.

VII. Value of Grantee's Interest.

(1) Grantor acknowledges that, upon the execution and recording of this Deed and Agreement, Grantee shall be immediately vested with a real property interest in the Premises with a fair market value equal to the "Current Value" (as defined herein) of this easement at the date of recording of this Deed and Agreement.

(2) In the event this easement is extinguished in whole or in part, whether from destruction of the Improvements resulting from a casualty, condemnation or loss of title, or otherwise, Grantor shall pay Grantee an amount equal to the then-Current Value of this easement multiplied by the percentage of the easement which has been extinguished as determined by Grantor and Grantee or, failing such agreement, by the court ordering extinguishment of the easement. Such payment shall be due from the first proceeds of any casualty insurance, condemnation award, sale in lieu of condemnation, title insurance, or other awards or proceeds related to the extinguishment of the easement, as the case may be, and, if those proceeds are insufficient, Grantee shall have a lien on the remainder of the Premises to the extent of any such deficiency. The amount remaining due shall be paid from the first proceeds of sale, lease, exchange, refinancing or other disposition of the Improvements or the Premises if, as and when those proceeds (whether in cash or in property) are received by Grantor.

(3) As used herein, "Current Value" shall mean the product of the "Original Percentage" times the then fair market value of the Premises (assuming that the Premises are not encumbered by this easement and are restored to their condition prior to the casualty or condemnation, as the case may be). The "Original Percentage" shall be the percentage obtained by establishing the deduction allowed to the Grantor for federal income tax purposes for the gift of this easement under Section 170 of the Code and dividing that deduction by the appraised value of the Premises, as determined pursuant to Section 170 of the Code, immediately prior to the gift of this easement.

(4) Grantor agrees to obtain and furnish Grantee with copies of the before and after appraisals required under Section 170(h) of the Code, to report the gift of this easement as a gift under Section 170(h) of the Code, and to notify Grantee of the amount of the deduction claimed. For the purposes of the computation of the Original Percentage, the amount of the deduction claimed will be conclusively presumed to be the amount of the deduction allowed unless Grantor can establish that part or all of the deduction claimed was disallowed by the Internal Revenue Service, in which case the Original Percentage shall be determined on the basis of the deduction actually allowed.

VIII. Representations and Warranties of Grantee.

The easement granted herein is being granted, and the promises made by Grantor with respect to such easement are given, in consideration of and reliance upon the following covenants, representations and warranties of Grantee:

(1) Grantee is, at the time of this conveyance, and will remain a "Qualified Organization" (as hereafter defined) and has sufficient resources that will enable Grantee to enforce the restrictions and obligations of Grantor under this Deed and Agreement if such enforcement shall he necessary. As used herein, the term "Qualified Organization" means a unit of federal, state or local government or a local or national organization, the purposes of which, inter alia, are to promote preservation or conservation of historical, cultural or architectural resources and which is a qualified organization under Section 170(h) of the Code. Grantee shall hold this easement "exclusively for conservation purposes" as such term is defined in the Code.

(2) Grantee covenants that Grantee will not transfer the easement granted to it pursuant to this Deed and Agreement, whether or not for consideration, except to an organization which is a Qualified Organization and then only if, as a condition of such transfer, the transferee enters into an agreement, enforceable against the transferee, by which the transferee agrees to continue to carry out the conservation purposes set out in this Deed and Agreement.

(3) In the event that Grantee shall at any time in the future become the fee simple owner of the Premises, Grantee covenants and agrees to create a new easement and agreement containing restrictions and provisions substantially similar to those contained herein and either to retain such easement in itself (if permitted by law) or to convey such easement to a Qualified Organization.

(4) Grantee agrees that, in the event that an unexpected change in conditions surrounding the Premises makes impossible the continued uses of this easement for the purposes contemplated herein, then any proceeds or property received by the Grantee on account of such event will be used by Grantee in a manner consistent with the Grantor's conservation purpose in granting, and Grantee's conservation purpose in accepting, this Deed and Agreement.

(5) Grantee acknowledges the receipt from Grantor of the documentation listed below and further acknowledges the sufficiency of that documentation in establishing the condition of the Premises at the date of delivery of this Deed and Agreement. The documentation received by Grantee includes, without limitation, the following:

(a) A plat of survey of the Premises dated _____, 199_, prepared by bearing the seal of (G.R.L.S. No.____);

(b) a copy of the title policy issued by _____, dated effective as of 199_ insuring the title of Grantor (the "Owner's Title Policy");

(c) photographs attached as Exhibit "B" and all other photographs; and

[(d) the Plans.]

The execution of this Deed and Agreement shall constitute a certification by Grantor and Grantee that the documents listed above are an accurate representation of the condition of the Premises at the time of transfer of the property rights contained in this Deed and Agreement, [subject, however, to the continuing performance of the Rehabilitation which is presently underway.]

(6) Grantee, at any time and from time to time, within twenty (20) days after Grantor's written request, will execute, acknowledge and deliver to Grantor a written instrument stating that Grantor is in compliance with the terms and conditions of this Agreement, or, if Grantor is not in compliance with this Agreement, stating what violations of this Agreement exist. Grantor agrees to make such a request only for reasonable cause. If this Agreement lapses, Grantee shall execute and deliver to Grantor a written instrument to that effect which shall be in form and substance acceptable to counsel for Grantor.

(7) Grantor shall have all legal and equitable remedies, including the right to restrain Grantee temporarily or permanently from any violation of the terms of this Agreement, necessary or appropriate to enforce Grantee's obligations under this Agreement. Grantee's liability to Grantor, however, shall be limited to Grantee's rights in the Premises and shall not be personal to Grantee or subject Grantee's other property to any claim by Grantor, its successors or assigns.

[(8) Grantee acknowledges that it has reviewed and approved the Plans for the Rehabilitation, and Grantee further acknowledges that the Rehabilitation, as shown on the Plans, is consistent with and complies with the provisions of this Deed and Agreement.]

IX. Assignment, Successors and Assigns.

(1) This Deed and Agreement shall extend to and be binding upon Grantor, its successors, assigns and representatives, and all other persons hereafter claiming by, under or through Grantor, whether or not such persons have signed this instrument or had any interest in the Premises at the time it was signed. Anything contained herein notwithstanding, a person or entity shall have no obligation pursuant to this Deed and Agreement if and when such person or entity shall cease to have any interest (present, partial, contingent, collateral or future) in the Premises or any portion thereof by reason of a bona fide transfer for value.

(2) As used in this Deed and Agreement, the term "Grantor" shall mean the Grantor named herein, any subsequent owner of the Premises and their respective heirs, executors, successors, assigns and legal representatives. If there is more than one Grantor, all undertakings hereunder shall be deemed joint and several. As used herein, the term "Grantee" shall mean the Grantee named herein, and its successors and permitted assigns.

X. Reservation.

(1) Grantor reserves the free right and privilege to use the Premises for all purposes not inconsistent with the grant made herein. Nothing herein shall be construed to grant the right to enter upon the Premises to the general public or to any persons other than Grantee and its representatives for the purposes set forth herein.

(2) Nothing contained in this Agreement shall be interpreted to authorize, require or permit Grantor to violate any ordinance relating to building materials, construction methods or use. In the event of any conflict between any such ordinance and the terms hereof, Grantor shall promptly notify Grantee of such conflict, and Grantor and Grantee reasonably shall agree in good faith upon such modification to the Grantor's obligations which are consistent with sound

preservation practices and Grantor's continued ownership and operation of the Premises.

(3) This Agreement is limited to the Facades and does not include the interior of the Improvements.

(4) Grantor and Grantee acknowledge and agree that for all purposes hereunder the Premises are encumbered by the easements, agreements, exceptions and other instruments reflected on Exhibit "C" attached hereto and made a part hereof by this reference, all of which Grantee acknowledges are not, and shall not be, objectionable to Grantee, and Grantee consents to the existence thereof.

XI. Acceptance.

Grantee hereby accepts the right and interest granted to it in this Deed and Agreement.

XII. Grantor's Insurance.

Grantor shall maintain, at its own cost, insurance against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death and property damage of a type and in such amounts as would, in the reasonable opinion of Grantee, normally be carried on a property such as the Premises. If available to Grantor without additional unreasonable cost or expense, such insurance shall include Grantee's interest and name Grantee as an additional insured and shall provide for at least thirty (30) days notice to additional insureds before cancellation and that the act or omission of one insured will not invalidate the policy as to the other insured. Furthermore, Grantor shall deliver to Grantee certificates or other such documents evidencing the aforesaid insurance coverage at the commencement of this grant and a new policy or certificate at least ten (10) days prior to the expiration of such policy. Grantee shall have the right to provide insurance at Grantor's cost and expense should Grantor fail to obtain the required insurance.

XIII. Taxes.

Grantor shall pay immediately, when first due and owing, all general taxes, special taxes, special assessments, water charges, sewer service charges and any other charges which may become a lien on the Premises, including, but not limited to, any taxes, assessments or other charges assessed against Grantee on account of Grantee's ownership of the easement conveyed by this Deed and Agreement. Grantee shall have the right, but is in no event required or expected, to make or advance, upon three (3) days' prior written notice to Grantor, in the place of Grantor, any payment relating to taxes, assessments, water or sewer charges or other governmental or municipal charge, fine, imposition or lien asserted against

the Premises and may do so according to any bill, statement or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement or assessment or into the validity of such tax, assessment or other charge. Such payment, if made by Grantee, shall become a lien on the Premises of the same priority as the tax, charge or assessment would have had if not paid.

XIV. Release and Indemnification.

(1) Grantor shall be responsible for, and shall release, defend and hold harmless Grantee, its agents, employees or independent contractors, from and against any and all liabilities, damages, costs, charges and expenses which may be claimed against Grantee, and Grantor covenants that Grantee shall have no liability, damage, loss or expense resulting from Grantee's interest in the Premises granted by this Deed and Agreement by reason of loss of life, personal injury or damages to property occurring in or around the Premises.

(2) Grantor shall indemnify, hold harmless and defend at its own cost and expense Grantee, its agents, employees or independent contractors, from and against any and all claims, liabilities, expenses, costs, damages, losses and expenses (including reasonable attorney's, architect's and engineer's fees and disbursements) incurred in, arising out of or in any way relating to the enforcement of Grantor's covenants and agreements under this Deed and Agreement, including, but not limited to, Grantor's obligations to maintain, repair and rehabilitate the Premises, pay taxes and charges assessed against the Premises, and keep the Premises insured. In the event Grantor is required to indemnify Grantee pursuant to the terms of this Deed and Agreement, the amount of such indemnity, until discharged, shall constitute a lien on the Premises.

(3) No substances deemed environmentally hazardous under any law relating to environmental conditions, including federal, state and local environmental statutes, ordinances and regulations, shall be generated, treated, processed, stored or disposed of, or otherwise present in, on or under the Premises in such a way as to violate any law relating to any such substance; and no activity shall be undertaken on the Premises which would cause a release or threatened release of hazardous material onto the Premises. Grantor, and Grantor's successors and assigns, hereby agree unconditionally to indemnify, defend and hold Grantee, its successors and assigns, harmless against any loss, liability, damage, expense or claim arising from any type of clean-up, detoxification, repair or removal demanded by any federal, state or local authority under any hazardous material law with respect to the Premises, and against any liability to any third party in connection with any violation of a hazardous material law arising from the generation, treatment, processing, storage, removal, clean-up or disposal of any hazardous material.

XV. Consents and Approvals.

(1) Any notice which either Grantor or Grantee may desire or be required to give to the other party under this Agreement shall be in writing, addressed to the party to which such notice is required to be given at its address set forth above, or at such other address as such party may have designated by notice duly given as provided in this paragraph. Such notice shall be deemed to have been properly given or served for all purposes (i) if hand delivered, effective upon delivery, (ii) if mailed, by United States registered or certified mail, postage prepaid, return receipt requested, effective two (2) business days after mailing, or (iii) if sent by overnight commercial courier service, effective the next business day after delivery to such express courier service.

(2) If Grantee's prior consent or approval is required by this Agreement for any action proposed by Grantor, and if Grantor shall request the consent of Grantee to such action by written notice to Grantee setting forth in detail such proposed action, if Grantee shall fail to respond to such notice by written approval or rejection given to Grantor within sixty (60) days after the giving of such notice, then the consent of Grantee to the action described in the notice shall be deemed to have been given.

(3) Whenever the consent of Grantee is required under this Agreement, such consent shall not be unreasonably withheld, and Grantor shall bear the reasonable cost of Grantee's review, including, but not limited to, the cost of inspections, reasonable architectural fees and Grantee's administrative expenses in processing Grantor's request.

XVI. General Provisions.

(1) This Deed and Agreement shall be governed by, and construed in accordance with, the laws of the State of Georgia.

(2) Whenever appropriate herein or required by the context or circumstances, the term "Grantor" shall be read in the plural, and masculine pronouns shall be construed as feminine or neuter, the singular as plural, and vice versa.

(3) For purposes of furthering the preservation of the Premises and the Facades and of furthering the other purposes of this instrument, and to meet changing conditions, Grantor and Grantee may jointly amend the terms of this instrument in writing; provided, however, that no such amendment shall limit the perpetual duration or interfere with the preservation and conservation purposes of the easement granted herein. Any amendment shall become effective only upon recording in the Deed Records of Fulton County, Georgia.

(4) If any of the provisions of this Agreement or the application thereof to any person or circumstances shall to any extent be invalid or

unenforceable, the remainder of this Deed and Agreement, or the application of such provision or provisions to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected thereby, and every provision of this Deed and Agreement shall be valid and enforceable to the fullest extent permitted by law.

[XVII. Limited Right of Reversion.

Notwithstanding anything to the contrary contained herein, Grantee acknowledges and agrees that the easement granted herein is subject to a limited right of reversion for the benefit of Grantor in the event that Grantor does not receive, on or before the date in 1994 on which Grantor shall file its 1994 federal income tax return (the "Filing Date"), a satisfactory certification (the "Certification") from the Department of the Interior that the Premises are enrolled on the National Register of Historic Places. Accordingly, in the event that Grantee does not receive the Certification on or before the Filing Date, then all right, title and interest of Grantee in the Premises arising out of this Deed and Agreement shall immediately and irrevocably revert to Grantor, and this Deed and Agreement shall thereupon terminate and be of no further force and effect, without the requirement of any additional documentation or actions on the part of Grantor or Grantee. If the Certification is not received by Grantor by the Filing Date, Grantor may, at its option, record an instrument in the records of Fulton County, Georgia, placing the world on notice thereof. Grantor represents that, to its knowledge, it has taken all actions required to be taken by Grantor as of the date hereof in order to obtain the Certification, taking into account the current incomplete status of the Rehabilitation. Grantor shall pursue enrollment on the National Register of Historic Places diligently and in good faith and shall notify Grantee promptly upon receipt of the Certification. Furthermore, upon receipt of Certification, Grantor shall execute and file an instrument in recordable form for the purposes of (a) acknowledging receipt of such certification and (b) establishing that Grantor no longer has a right of reversion hereunder. The filing of such instrument shall constitute notice that the easement granted herein is no longer subject to the aforesaid right of reversion and shall remain irrevocably vested in Grantee.]

IN WITNESS WHEREOF, Grantor has executed, sealed and delivered this Deed of Gift and Agreement for an Architectural, Facade, and Preservation Easement, and Grantee has caused these presents to be accepted and signed in its corporate name by its duly authorized officer, as of the day and year first above written.

GRANTOR:

Signed, sealed and delivered _____

in the presence of:

_____
Witness

_____
Notary Public

Commission Expiration Date:
_____

(NOTARIAL SEAL)

a Georgia limited partnership

By: _____
a Georgia corporation,
general partner

Its:_____

Attest:_____

[CORPORATE SEAL]

GRANTEE:

Signed, sealed and delivered
in the presence of:

_____
Witness

_____
Notary Public

Commission Expiration Date:
_____

(NOTARIAL SEAL)

EASEMENTS ATLANTA, INC.
a Georgia nonprofit corporation

By: _____

Its:_____

[CORPORATE SEAL]

APPENDIX F:

LETTER TO MAYOR CAMPBELL FROM EASEMENTS ATLANTA REGARDING THE GLENN BUILDING

Note -- Appendix F is courtesy of:

James H. Rollins
HOLLAND & KNIGHT
One Atlantic Center, Suite 2000
1201 West Peachtree Street, N.E.
Atlanta, Georgia 30309-3400

EASEMENTS ATLANTA, INC.
537 Peachtree Street, N.E.
Atlanta, Georgia 30308

January 17, 2001

The Honorable Bill Campbell
Office of the Mayor
City of Atlanta
55 Trinity Avenue, SW
Atlanta, Georgia 30335-0300

Re: The Glenn Building

Dear Mayor Campbell:

We are writing in response to the letter of December 28, 2000, to you from Alec Fraser of Turner Properties, Inc., and in response to the subsequent media and lobbying blitz by Turner, advocating Turner's desire to tear down yet another piece of Atlanta's historic downtown - the 1920's era Glenn Building. Easements Atlanta, Inc. is the holder of a historic preservation façade easement protecting the Glenn Building and is being cast in the role of the villain standing in the way of Turner's vision for how downtown Atlanta should look and feel.

We respectfully disagree with that characterization. The very purpose of Easements Atlanta is to help foster the vibrancy and livability of Atlanta by enabling the preservation and redevelopment or reuse of the older buildings that make up the historic fabric of the city. Easements Atlanta shares with the City of Atlanta and Turner the goal of making all of the city, including Marietta Street, a more vibrant, people-friendly part of Atlanta. We share with the City, Turner, the editors of *The Atlanta Journal-Constitution*, and many, many others the desire to see downtown Atlanta revitalized and flourishing.

Easements Atlanta believes, however, that the revitalization of downtown Atlanta will best be served, not by tearing down Atlanta's historic structures, but by preserving Atlanta's few remaining historic buildings and incorporating our history into the development of the new. As the editors of *The Atlanta Journal-Constitution* noted in the January 10 editorial, Atlantans have been too quick to raze the old, as is abundantly evident from the multitude of street level parking lots that dot the downtown and Midtown areas where many of Atlanta's former architectural treasures once stood. The owners of each of those now-lost buildings presumably used exactly the same rationale that Turner now advocates for razing the Glenn Building - that preservation would be too expensive and that the old could not possibly be incorporated into whatever grand design the owners had in mind. We now are, or should be, more conscious that our historical

fabric, once lost, is irreplaceable and that the new, in many cases, is far from an improvement over the old.

Mr. Fraser acknowledges in his letter that the Turner project can incorporate the Glenn Building but argues that Turner would rather demolish the Glenn Building because he and Turner believe that demolition is "the best improvement alternative." Easements Atlanta respectfully disagrees with this conclusion, as well, but, more to the point, demolition is simply not an option in the face of Easements Atlanta's façade easement, and Mr. Fraser's contention that the easement could somehow be "transferred" to another building is simply wrong.

Easements Atlanta is legally obligated to maintain the Glenn Building façade easement.

It is the policy of the federal government, through the Federal Historic Preservation Tax Incentive Program, and the State of Georgia, through the Georgia Uniform Conservation Easement Act, to foster preservation of historic properties using conservation or façade easements. Under the federal program, one of the incentives allows a property owner to contribute an easement protecting, in perpetuity, the historic façade of his property and take a charitable contribution deduction equal to the value of the easement. The value of the easement is equal to the amount by which the fair marked value of the unencumbered historic building is diminished as a result of the permanent restrictions placed on the building by the easement, which prohibits demolition or alteration of the façade. Easements Atlanta is a 501(c)(3) corporation authorized by the IRS to accept charitable contributions of façade easements as a "qualified donee organization".

The donation of a façade easement amounts to the transfer of a property right in the historic structure. As a result of the owner's donation of the easement on the Glenn Building, Easements Atlanta in effect holds an ownership interest in the building's historic façade. Easements Atlanta does not have regulatory authority over the Glenn Building or any other historic properties that can be relaxed or relinquished, or that could be somehow "transferred" to another deserving property as Mr. Fraser suggests. Rather, Easements Atlanta owns the property rights in the Glenn Building façade resulting from the easement donation, which was donated in perpetuity in return for a substantial federal tax deduction, and Easements Atlanta, as a qualified donee organization, is charged by the IRS with the responsibility for maintaining and preserving that charitable donation <u>in perpetuity</u>, as the terms of the donation and the federal tax regulations require.

Condemnation of Easements Atlanta's property rights in the Glenn Building façade to facilitate the construction of Turner Tower, a private development, is not an option.

Mr. Fraser is also wrong in his suggestion that the City can or should attempt to condemn Easements Atlanta's property interest in the Glenn Building. Turner Tower is a private development. And, when all is said and done, Turner is requesting that the city condemn private property so that it can expand retail space and have an open plaza at the main entrance of Turner Tower. No matter how arguably beneficial a private development may be, the City has no authority to exercise the power of eminent domain for the benefit of a private property owner, and Easements

Atlanta will defend its property rights vigorously, if the City allows itself to be used to further Turner's development plan.

It is ironic that *The Atlanta-Journal Constitution* has joined Turner in pressuring Easements Atlanta to give up its easement. One of the primary reasons Turner feels the need to tear down the Glenn Building, which is situated on the east (Spring Street) end of the Marietta Street block between Spring and Techwood, is that the AJC refuses to give up its unsightly and inherently dangerous driveway on the west (Techwood) end of the block. If the AJC driveway were moved, not only would Turner have all the space it claims to need, but a terrible hazard to pedestrian traffic going to and from Phillips Arena and the CNN Center would be eliminated. If the City were to consider condemnation of anything for the benefit of Turner, it ought to be the AJC driveway, which represents a real, substantial threat to public safety.

The Glenn Building can be successfully renovated and reused.

Contrary to what Mr. Fraser and Turner would have everyone believe, it is commercially reasonable to renovate and use the Glenn Building. The most notable opportunity is a loft conversion of the type that has helped to bring life-after-working-hours to the downtown. What better use would there be for the Glenn Building than for residential units whose occupants could patronize the retail establishments in the Fairlie Poplar District?

Nor has the Glenn Building any different or greater problems than any of the other numerous buildings in the Fairlie-Poplar district dating from the same era that have been successfully rehabilitated and put to viable commercial use. All of the 1920's vintage commercial buildings in Atlanta had asbestos and lead paint. All had inadequate ventilation, elevators and service access by modern standards, yet many of those old buildings – the Rhodes-Haverty, Muses, Bona-Allen and William-Oliver Buildings, to name but a few - are today the cornerstones of the City's downtown renewal program. The Glenn Building has no greater problems and poses no greater rehabilitation hurdles than did any of those successful redevelopments.

Developers who know how to work with our city's older buildings have been and continue to be interested in the Glenn Building, and leading architects in the city, particularly those without a vested interest in Turner's proposed tower, do consider the Glenn Building to be architecturally significant. What has hindered the development of the Glenn Building, and the reason it has been vacant for 15 years, is not its physical limitations or any lack of architectural merit but rather is a result of the failure of the past and present owners of the building to recognize that the market value of the building was purposefully driven down by the donation of the façade easement, which limits what the property owner can do with the property, so that redevelopment and preservation of the building could start from a lower, more economical cost basis. That was part of the package of tax and other incentives built into state and federal law to promote historic preservation.

Clearly the unrestricted right to tear down the Glenn Building and to use the land underneath would be worth a great deal, particularly to Turner. Part of that value was donated away long ago, however, in the form of the façade easement and the prohibition on demolition, which are not going to go away, and the value of the Glenn Building is, consequently, much lower with those

restrictions. If the Glenn Building is offered for sale at its true value, recognizing the effect of the façade easement, it can, of course, be economically developed.

Turner knew from the beginning of its planning to develop the Glenn Building Block that it lacked the right to demolish the Glenn Building. Turner constructed its parking deck so that the building could be preserved because of the conservation easement owned by Easements Atlanta. Now that Turner would like to build Turner Tower with a grand lobby and additional lobby-level retail space, it is asking the City to assist its private efforts with a public condemnation.

A recent example – the Peachtree Manor.

One of the most beautiful elements in the development of the Biltmore Hotel block is the rehabilitated Peachtree Manor at the corner of Peachtree and Sixth Streets, which, like the Glenn Building, has been for many years protected by a façade easement. In 1992 that building, along with the rest of the Biltmore block, was owned by the GLG Group, which wanted to demolish the Peachtree Manor to make way for the GLG Park Plaza, a much ballyhooed project that was supposed to transform Midtown Atlanta. The representatives of GLG made exactly the same arguments for tearing down the Peachtree Manor then as Mr. Fraser, on behalf of Turner, makes for tearing down the Glenn Building now. GLG, like Turner, said that the Peachtree Manor could not possibly be incorporated into the grand GLG Park Plaza Design. GLG, like Turner insisted that the Peachtree Manor was too dilapidated, had too much asbestos and lead paint, did not have sufficient access or elevators, could not be economically reconfigured and generally was impossible to use. GLG, like Turner, tried to use political connections and negative publicity to pressure Easements Atlanta into relinquishing the easement on the Peachtree Manor. The easement was not relinquished despite the pressure, and the Peachtree Manor, unlike the GLG Park Plaza that was supposed to replace it, stands today as an example of how the old can be successfully incorporated into the new. We can all see now that the GLG arguments about the infeasibilty of preserving a historic building within a modern development were simply wrong. Turner's arguments about the infeasibility of preserving the Glenn Building are equally wrong.

Easements Atlanta fully supports the development of Turner Tower, so long as that development either includes the Glenn Building or leaves the Glenn Building unaffected, and we have offered to cooperate with Turner in developing a plan to harmoniously incorporate the Glenn Building into the Turner Tower design and enhance the overall Marietta Street streetscape for the benefit of Tuner and the City as a whole. Turner has not expressed any interest in taking advantage of this offer for a cooperative effort. We believe that, since the City has a direct interest both in preservation of the City's historic fabric and in the development of the downtown area, it would be appropriate for the City to take the lead in sponsoring the development of a plan that sensitively incorporates the valuable old into the exciting new.

We would prefer to use the resources of Easements Atlanta to assist Turner, but we are obligated to use those resources to enforce the easements donated to Easements Atlanta and to protect the properties subject to those easements if they are threatened. We trust that the City of Atlanta will support Easements Atlanta in its obligation to protect what is left of our architectural heritage and will join us in challenging Turner and other developers in the City to embrace and adapt our beautiful old buildings rather than continue our unfortunate tradition of demolishing the old to make way for the new.

Yours truly,

Timothy J. Crimmins, President
Easements Atlanta, Inc.

James H. Rollins, Vice President
Easements Atlanta, Inc.

cc: Powell A. Fraser
Atlanta City Council Members
Atlanta Urban Design Commission Members
Easements Atlanta Board of Directors
Michael Dobbins (Commissioner of Planning, City of Atlanta)
Karen Huebner (Executive Director, Atlanta Urban Design Commission)
Carl Patton (President, Georgia State University)
David Patton (Chairman, NPU "M")
John Aderhold (Partner – Underground Atlanta)
Dexter King (President – MLKing, Jr. Center for Non-Violence & Social Change)
Gail Collins (Executive Director, Fairlie Poplar Task Force)
James B. Carson, Jr. (Chairman, Carter)
Kenneth D. Bleakly (President, COPA)
Richard T. Reinhard (President, Central Atlanta Progress)
Sam Williams (President, Metro Atlanta Chamber of Commerce)
Tommy Dortch (Chairman, Fulton County Recreation Authority)
Davetta Johnson-Mitchell (Executive Director Atlanta Fulton County Recreation Authority)
Spurgeon Richardson (President – Atlanta Convention & Visitors Bureau)
Dan Graveline (Executive Director – Georgia World Congress Center)
Greg Paxton (Executive Director – Georgia Trust for Historic Preservation)
Rick Beard (Executive Director – Atlanta History Center)
Boyd Coons (Executive Director – Atlanta Preservation Center)
Frank Catroppa (Superintendent – National Parks Service)
Thomas G. Cousins (Chairman & CEO – Cousins Properties, Inc.)
Cynthia Tucker, Editorial Page Editor, Atlanta Journal-Constitution

APPENDIX G:

LIST OF GEORGIA LOCAL GOVERNMENTS WITH HISTORIC PRESERVATION ORDINANCES

Georgia Cities and Counties with Historic Preservation Ordinances

March 2004

1. Acworth
2. **Albany**
3. **Americus**
4. **Ashburn**
5. **Athens-Clarke County**
6. **Atlanta**
7. **Augusta-Richmond Co.**
8. **Avondale Estates**
9. **Bowdon**
10. **Brunswick**
11. Camilla
12. **Carrollton**
13. **Cartersville**
14. **Cedartown**
15. Clayton County
16. **Cobb County**
17. Colquitt
18. **Columbus**
19. **Conyers**
20. **Cordele**
21. **Covington**
22. Culloden
23. **Dahlonega**
24. **Dalton**
25. **Darien**
26. Dawsonville
27. **Decatur**
28. **DeKalb County**
29. **Douglas**
30. **Douglasville**
31. Dublin
32. Eatonton
33. **Elberton**
34. Euharlee
35. Fannin County
36. Fayetteville
37. **Fitzgerald**
38. **Flowery Branch**
39. **Fort Oglethorpe**
40. **Fort Valley**
41. Gainesville
42. **Grantville**
43. **Greensboro**
44. Griffin
45. Hahira
46. Hampton
47. **Harlem**
48. **Hartwell**
49. **Hawkinsville**
50. **Heard County**
51. **Hinesville**
52. **Hogansville**
53. Holly Springs
54. **Jefferson**
55. Jones County
56. **Kennesaw**
57. **La Grange**
58. **Lavonia**
59. **Lexington**
60. **Lilly**
61. **Lincolnton**
62. Ludowici
63. Lumpkin
64. Macon
65. **Madison**
66. Marietta
67. **Marshallville**
68. McDonough
69. **McDuffie County**
70. McIntosh County
71. **Milledgeville**
72. **Monroe**
73. **Montezuma**
74. **Monticello**
75. Moreland
76. **Moultrie**
77. Newnan
78. Oxford
79. Parrott
80. Pike County
81. **Plains**
82. Porterdale
83. Reidsville
84. Richland
85. **Rome**
86. Roopville
87. **Roswell**
88. **Savannah**
89. Senoia
90. Social Circle
91. **Sparta-Hancock Co.**
92. **St. Marys**
93. **Stone Mountain**
94. **Taylor County**
95. Talking Rock
96. **Thomaston**
97. **Thomasville**
98. **Tifton**
99. **Troup County**
100. Tybee Island
101. **Valdosta**
102. Vienna
103. **Walker County**
104. Warm Springs
105. **Washington**
106. Waycross
107. Wayne County
108. **West Point**
109. **Winder**

GAPC
Georgia Alliance of Preservation Commissions
University of Georgia • School of Environmental Design • Founders Garden House
325 South Lumpkin Street • Athens, Georgia • 30602-1861 • (706) 542 4731

Bold indicates **Certified Local Governments (69)**

APPENDIX H:

GRANT-IN-AID PRESERVATION AGREEMENT
FROM THE GEORGIA
HISTORIC PRESERVATION DIVISION

PRESERVATION AGREEMENT

This agreement is made the 1st day of October, 2001, by the Taliaferro County Board of Commissioners (hereafter referred to as the "Subgrantee") and in favor of the State acting through the State Historic Preservation Officer (hereafter referred to as the "Grantee") for the purpose of the preservation of a certain Property known as the Taliaferro County Courthouse, located in Crawfordville, Taliaferro County, Georgia, which is owned in fee simple by the Subgrantee and is listed or is eligible for listing on the National Register of Historic Places.

The Property is comprised essentially of grounds, collateral, appurtenances, and improvements and is known as the Taliaferro County Courthouse. The property is more particularly described as follows:

A building of brick structure located on the courthouse square in Crawfordville, Taliaferro County, Georgia; containing one acre, more or less; bounded on the North by Broad Street, South by Commerce Street, East by Monument Street, and West by Alexander Street.

In consideration of the sum of Twenty-Five Thousand Dollars ($25,000.00) received in grant-in-aid assistance through the Grantee from the State of Georgia, the Subgrantee hereby agrees to the following for a period of five (5) years:

1. The Subgrantee agrees to assume the cost of the continued maintenance and repair of said Property so as to preserve the architectural, historical, or archaeological integrity of the same in order to protect and enhance those qualities that made the Property eligible for listing in the National Register of Historic Places.

2. The Subgrantee agrees that no visual or structural alterations will be made to the property without prior written permission of the Grantee.

3. The Subgrantee agrees that the Grantee, its agents and designees shall have the right to inspect the property at all reasonable times in order to ascertain whether or not the conditions of this agreement are being observed.

4. The Subgrantee agrees that when the property is not clearly visible from a public right-of-way or includes interior work assisted with Georgia Heritage Grant funds, the property will be open to the public, for the purpose of viewing the grant-assisted work, no less than 12 days a year on an equitably spaced basis and at other times by appointment. Nothing in this agreement will prohibit the Subgrantee from charging a reasonable, nondiscriminatory admission fee, comparable to fees charged at similar facilities in the area.

5. The Taliaferro County Board of Commissioners agrees to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000(d)), the Americans with Disabilities Act, and with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). These laws prohibit discrimination on the basis of race, religion, national origin, or handicap. In

implementing public access, reasonable accommodation to qualified handicapped personals shall be made in consultation with the Grantee.

To comply with the Americans with Disabilities Act, and with Section 504 of the Rehabilitation Act when interior public access is required at least 12 days per year and at other times by appointment, it is <u>not</u> required that a recipient make every part of the property accessible to and useable by persons with disabilities by means of physical alterations. That is, for public access periods, videos, slide presentations, and/or other audio-visual material and devices should be used to depict otherwise inaccessible areas or features.

6. The Subgrantee further agrees that when the Property is not open to the public on a continuing basis, and when the improvements assisted with Georgia Heritage Grant Funds are not visible from the public way, notification will be published in newspapers of general circulation in the community area in which the Property is located giving dates and times when the Property will be open. Documentation of such notice will be furnished annually to the State Historic Preservation Officer during the term of the agreement.

This agreement shall be enforceable in specific performance by a court of competent jurisdiction.

_____ _____

Signature of HPD Director Date

_____ _____

Signature of Subgrantee **Date**

_____

Witnessed by Notary Public

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Uniform Conservation Easement Act of 1992 (O.C.G.A. § 44-10-1 through 8)

Georgia Historic Preservation Act of 1980 (O.C.G.A. § 44-10-20 et seq.)

United States Constitution.

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