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NOTES

LAND USE CONTROLS IN HISTORIC AREAS

I. Introduction

American society maintains its unity through a common core of shared traditions. This common consensus of values, customs and behavior patterns is reflected in our system of judge-made law, which, without the principle of stare decisis, would be an unjust legal system. Tradition, while helping us to interpret social changes and to choose political alternatives which will promote our national welfare, also gives us roots and a sense of togetherness — vital necessities for any political society. For these reasons, the preservation of structures which represent visible historical contacts with the origins of American tradition is a meaningful and necessary public task. With a good number of Americans now engaged in preserving early American buildings for artistic, educational and economic reasons, our courts should begin to encourage this work by providing it with adequate legal protection. In order to provide a groundwork for judicial recognition of the value of historic preservation, this Note will examine the historical basis for asserting particular architectural controls over private property; in addition, it will investigate the existing legal support for the historic district ordinance by discussing the experiences of two communities which have used the ordinance as an effective tool for urban renewal and aesthetic and economic progress. Such a tour de force requires a brief introductory discussion of the scope of the legal problems presented by architectural controls and the sources of law from which these controls originate.

A. Scope of Preservation

Historic preservation is the art of preserving, maintaining and restoring structures which represent the life patterns and social habits of early America. Such an art generates a peculiar set of legal difficulties arising from its purpose — to represent the past as a living form in contemporary society. Theoretically, all preservation activities are by nature conservative, since historically and economically valuable structures are major man-made resources that require the same degree of protection as natural resources. Functionally, preservation activities are educational and cultural, for old structures as nuggets of history tell sto-

2 Jacques Maritain best explains this common received state of moral principles:
   For a society of free men implies basic tenets which are at the core of its very existence. A genuine democracy implies a fundamental agreement between minds and wills on the bases of life in common; ... it must bear within itself a common human creed, the creed of freedom. J. MARITAIN, MAN AND THE STATE 109 (1951).
3 These two cities are Winston-Salem, North Carolina, and Nantucket, Massachusetts.
4 Historic preservation is difficult to define in lay or legal terminology. It is characterized as an art only in the Aristotelian sense of the term.
6 Examples of good architecture erected in earlier eras are necessary to the proper instruction of architects. See Whitehill, Education and Training for Restoration Work, in Historic
ries otherwise not told. The methods of construction and finishing used centuries ago, now lost to modern craftsmen, and the life styles and social habits of Americans cannot be presented properly by books alone, but are readily perceivable in presently existing American homes and surroundings. Any social activity which serves such meaningful purposes naturally deserves appropriate legal consideration.

The basic need in American historic preservation law is to develop a sound structure of legal property controls that will protect historic assets from unreasonable destruction. This Note intends to review the practical problems confronting lawyers who advise preservation groups. It will deal with the creation and administration of public land use control programs for preservation purposes, and will also explain the private land use controls available to lawyers as an adjunct of these public controls. In the course of developing this analysis, Nantucket, Massachusetts and Winston-Salem, North Carolina will be used as archetypes for intensive study.

B. Sources of Law

1. Private Law

Private land use controls are the lawyer's best means for insuring the preservation of old structures. Such private implements as restrictive easements for historic preservation, restrictive covenants attached to deeds granting remainder interests to historical societies, and other like controls are excellent weapons for preserving early buildings, provided that attorneys are able to adjust ancient forms to meet the special conditions of preservation work. To serve as appropriate guidelines, model forms for an easement for the preservation of exterior architectural appearance and a condominium declaration for historic properties, in addition to a historic district ordinance and state enabling legislation for such, have been drafted by the author and are submitted as appendices to this Note. In order to orient the reader to the role of these private land use controls in preservation work, four such controls will be briefly analyzed at the outset.

_Easements_ are non-possessory interests in real property which confer a right of use upon a person not in possession.7 These incorporeal hereditaments are certainly not unfamiliar to the legal profession, but the employment of them to restrict the alteration of the exterior appearance of an early structure, or to secure open spaces surrounding a vintage restored museum house, is new to lawyers.8 The non-possessory easement provides an appropriate means for obtaining control over areas adjacent to significant historic structures and is particularly useful where effective environmental control through public ordinances is absent.9

It is common policy for residential subdivision developers, by means of re-
strictive covenants running with the land, to create a set of architectural controls administered by a control committee. These controls are designed to promote the uniform development of each lot within a tract, and to prevent the erection of ugly and distracting structures. Unfortunately, the use of restrictive covenants running with the land to control historic architecture is rare in American preservation work, though no public policy reasons seemingly exist to prevent any person from attaching these restrictions to any historic structure which he has restored.

At common law, no tenant in possession holding a life estate could do waste as against his remainderman or reversioner. This simple medieval doctrine can effectively be applied to historic preservation planning projects by the use of reversions and remainder interests. In Williamsburg, Virginia, for example, Colonial Williamsburg, Inc., the non-profit corporation which has restored Virginia’s colonial capital, has purchased a number of historic structures under instruments reserving a life estate in the grantors, with remainders over to Colonial Williamsburg, Inc. As remainderman, the restoration corporation can prevent the alteration of the structure, and, in addition, can restore a structure for the life tenant’s occupancy, thus lowering the total cost of restoration. As of 1960, nine restored homes in Colonial Williamsburg were occupied by life tenants under this plan. In lieu of reserving a life estate and selling the remainder, preservation-conscious individuals can restore a structure and sell a life estate therein to another, reserving a reversion in themselves to control the exterior architectural features of the restored building. This Note will point out some ways to use the life-estate-remainder and life-estate-reversion systems effectively in a tax planning context.

Condominium ownership, in its strictest sense, is a creature of the civil law, and is not ordinarily considered a form of common law private land use controls. It has been introduced in the United States only recently, by way of horizontal property acts. The plan involves the division of ownership in any given condominium into common property and individual property. When the theory is applied to apartment houses, for example, each residential apartment is owned in fee by the purchaser, while the exterior, common hallways and grounds are owned by all apartment owners in common. Similar ownership arrangements are found, without the benefit of express enabling legislation, in country club type subdivisions.


This seems to be due to the lack of residential adaptive use restorations by commercial developers.

See Appendix C infra for an example of such use.
Id. at 58-59.
Id. at 2.
plication of divided ownership principles to neighborhoods containing historic buildings. This Note will deal with the possible employment of condominium ownership patterns in the field of historic preservation, particularly as a solution to the problem of maintaining historic structures once they have been restored.

2. Public Law

The public legal instrumentalities available to preservation planners are the state’s power of eminent domain and the so-called “police power” of the state. Eminent domain is the power of the sovereign to take private property for a public purpose. The police power of the state is its power to pass legislation for the health, safety, morals and general welfare of its citizens.

The power of eminent domain is limited only by the constitutional provisions which require that the sovereign justly compensate the private party whose property is taken for a public use. If historic preservation is a legitimate public use of property, then the state can appropriately “take” historic buildings for preservation purposes. Two cases in which the courts have found that the preservation of historic sites and structures is a public purpose are United States v. Gettysburg Electric Railway, which held that the United States could acquire the site of Lincoln’s Gettysburg Address by way of eminent domain, and Flaccomio v. Mayor & City Council of Baltimore, where the Court of Appeals of Maryland determined that the City of Baltimore could condemn an historic house for preservation purposes. With this basis, there can be little doubt that any government — federal, state or municipal — can condemn an historic site or structure for preservation purposes. One of the more recent cases in this area, involving the condemnation of valuable residential property for the restoration of Tryon’s Palace in New Bern, North Carolina, bluntly states:

The State has funds available to pay for the respondents' property which by the proper authorities has been found necessary for the purpose of restoring the palace. It was the first fixed capital of The Colony of North Carolina and its most notable and unusual architectural achievement. The power of the Legislature to provide for the restoration is beyond question.

However, eminent domain is available only when a public body intends to take custody, restore, and retain control of an historic property. Since most of the historic preservation work done in the United States is undertaken and controlled by private entities, the concept of eminent domain is not particularly


21 This concept was introduced into United States constitutional law by Chief Justice Taney in The License Cases, 46 U.S. (5 How.) 504, 578, 582 (1847).

22 U.S. CONST. amends. 5, 14.

23 160 U.S. 668 (1896).

24 Id. at 680-81.


26 Id. at 280-81, 71 A.2d at 14.

27 In re Application of Department of Archives & History, 98 S.E.2d 487, 490 (N.C. 1957).

28 W. MURTAGH, supra note 12.
useful in preservation law. This Note, therefore, will not expand on the subject of eminent domain; the great field of activity in public law at this time lies in the creation of historic districts through the exercise of the police power.

The use of municipal zoning restrictions (founded upon the police power) for the alteration or destruction of old buildings has increased in recent years. The usual means by which municipal corporations and other creatures of state government attempt to protect historic sites and structures is adoption of an historic district ordinance. These ordinances allow public authorities, under the rubric of legislating for the general welfare of the citizenry, to frustrate the outright destruction or alteration of important early buildings. Typically, they designate a portion of the jurisdiction as "an historic area," and establish a committee to review any proposed changes in the exterior architectural appearance of structures within that historic area. The committee has the power to disapprove any proposed changes, and to block demolition of historic structures for a limited period of time. The usual sanction for violating any provision of the historic district ordinance is the normal sanction for a zoning violation — either a fine, a jail term, or both. Such ordinances are no cure-all for preservation groups who want complete legal protection for their historic assets. At best, they serve as a basis for intelligent planning prior to development by lawyers, architects and investors. By a categorization of their working problems, historic district ordinances will be dissected in this article in order to find means by which planners can implement existing ordinances to ensure the protection of investment capital and the future maintenance of restored structures.

II. Land Use Problem in Historic Preservation

A. The Rationale for Historic Preservation

After this introduction to a topic of present specialized concern and hopefully future universal relevance, the philosophical premises which support the art of historic preservation deserve to be argued at some length. Generally speaking, the health of any political society is reflected in its attitude toward its received social and political traditions. The shared core values of any political society constitute a secular faith which sustains the society, and from which it draws a received tradition that tempers its present excesses. If a society conscientiously demolishes its received tradition, it is revolutionary; if it enshrines

30 Id.
31 Id. at 18-19.
33 For a pungent criticism of historic district ordinances, see Stipe, supra note 8, at 81-82.
34 For a straightforward description of the impact of the past on conservatives, radicals and reactionaries (and perhaps the best discussion available on the importance of attitudes toward the past in shaping current social phenomena), see E. Hoffer, The True Believer 70-72 (1958).
35 See J. Maritain, supra note 2, at 108-14.
36 See E. Hoffer, supra note 34. The radical believes in the malleability of human nature and would therefore erase the past.
this tradition and permits no departure from the life habits of its ancestors, it is reactionary.\textsuperscript{37} A political balance, of course, must be struck between these extremes, but without question the healthy society should be grounded on a solid basis of received common life-patterns, goals and values.\textsuperscript{38} It is this core value system which, in Aristotelian terms, is inherent in the constitution of a political society.\textsuperscript{39} The core values represented by an Aristotelian constitution must, in turn, be relevant to society in the present. Since, for the most part, this value system is embodied in an unwritten common tradition, the existing tangible representatives of the system must be maintained if the society is to continue any vital relationship with its tradition.\textsuperscript{40} It is at this point that the art of historic preservation becomes a socially relevant and necessary task.

Modern American society, which is in part a non-community of alienated and frustrated groups, suffers from a lack of unifying purpose.\textsuperscript{41} Far too many of today's Americans are rootless, cut off from the common core values of most citizens by certain economic and social conditions peculiar to an unstructured society. Being unable to relate themselves meaningfully to contemporary life, they look for revolutionary or reactionary solutions to current social problems. The fault does not lie solely with these individuals, for the form of the contemporary life itself must share some of the blame. Nonetheless, the existing unhealthy situation cannot be redressed unless the American tradition of values can be made relevant to the present.\textsuperscript{42} It is this task which remains to challenge historic preservation, for historic preservation stands to make American tradition relevant by representing America's past in terms of the structures which were witness to the formation of that tradition. It is the goal then of preservationists to make the past and the binding values it gives us relevant to an amorphous and rootless, yet searching modern America.

The foregoing discussion is valuable only insofar as it helps to explain the urgent social purpose behind historic preservation. It will not, however, lead us

\textsuperscript{37} Id. The reactionary's past is ideal. It never was, except in fantasy, the golden age he attempts to restore.

\textsuperscript{38} See J. Maritain, supra note 2, at 108-14. Maritain says "[T]he important thing for the body politic is that the democratic sense be in fact kept alive by the adherence of minds, however diverse, to this moral charter." Id. at 112.

\textsuperscript{39} See Aristotle, Politics, Bk. IV, i, § 10 (Barker ed. 1958), where the following definition is given:

A constitution may be defined as "an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed." Id.

This definition should not be understood as limiting constitutions to the eighteenth century notion of a written compact, since the constitutions of most Greek city states were entirely unwritten and customary. Modern written constitutions are really no more than memorials reflecting the customs and choice of government of a society.

\textsuperscript{40} This social necessity corresponds to the personal necessity to apprehend one's own life history, very aptly described by Gabriel Marcel:

However concrete my thinking may be, we have to acknowledge that my life, as it has really been lived, falls outside my thinking's present grasp. The past cannot be recaptured except in fragments made luminous by a lightning flash, a sudden glare, of memory, for which the fragments are present rather than past; ... .


\textsuperscript{41} This statement is particularly applicable both to black Americans and alienated youth, and to those citizens who have defined their well-being solely in terms of financial security.

\textsuperscript{42} See generally B. Goldwater, Conscience of a Conservative (1961), in which the political author restates some traditional principles of American life.
to legal solutions for the vexing problems raised by the imposition of architectural controls on private property by a municipal corporation. The predominant social purpose of preservation must be related to the language lawyers use to deal with the special abstractions governing legal thought. The primary purpose of preservation must be broken down into those categories which are judicially recognized as legitimate public purposes.

1. Educational Value of Historic Structures

A visit to Lincoln's New Salem\(^43\) does more to instruct a person in the manner of Abraham Lincoln and his times than any program of reading could hope to achieve. No one who has visited a major restoration, such as New Salem, can deny that any historic house museum is an invaluable educational tool. Political history makes more sense when the site of significant political decision-making can be seen, and social history can be taught more effectively by the use of exhibition houses and structures which show realistically the actual life patterns and working relationships of men in past eras. In more specialized educational areas such as architecture and the decorative arts, accurate restorations of past notable architectural works are especially essential to a thorough understanding of a course of instruction.\(^44\)

If historic preservation projects are a significant educational tool, then historic preservation serves a recognized public purpose.\(^45\) The state has long been concerned with the proper education of every citizen and spends a considerable portion of each tax dollar to provide for universal, free public education. Since the preservation of historic structures directly contributes to educating both young and old, historic preservation contributes to a public purpose which promotes the general welfare of the citizenry. Upon this logical basis, the state may legislate for historic preservation activities as protecting an educational activity.

2. Aesthetic Value of Historic Preservation

A great deal has been written in recent years on the subject of urban ugliness,\(^46\) characterizing American cities as generally filthy, polluted, run-down and overcrowded.\(^47\) It is evident that many American cities are appallingly ugly,\(^48\) and unfortunately smaller communities are as blighted as their megalopolitan neighbors.\(^49\) Since it is clear that a squalid working and living environment\(^50\)

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\(^{43}\) New Salem is an Illinois State Park, located three miles southwest of Petersburg, Menard County. It is an accurate and detailed reconstruction of the Illinois community in which Abraham Lincoln lived and worked from 1831 to 1837. For an excellent account of New Salem’s influence on Lincoln, see B. Thomas, Lincoln’s New Salem (1966).

\(^{44}\) W. Whitehill, supra note 6, at 32-33.

\(^{45}\) This argument in support of historic preservation activities originated with the first efforts of the Daughters of the American Revolution and the National Society of Colonial Dames early in this century. See C. Hosmer, Presence of the Past 131, 138 (1965).

\(^{46}\) See, e.g., P. Blake, God’s Own Junkyard (1964); E. Higbee, The Squeeze (1960); J. Jacobs, The Death and Life of Great American Cities (1961); I. Nairn, The American Landscape (1955).

\(^{47}\) See P. Blake, supra note 46, at 23-25 (1964).

\(^{48}\) See I. Nairn, supra note 46, for a photographic essay coupled with text showing an Englishman’s view of the causes of such ugliness.

\(^{49}\) See P. Blake, supra note 46, at 69-109, where the author has excellent photographs of rural ugliness.

\(^{50}\) One author calls this typically American urban and rural clutter and ugliness “goop.” I. Nairn, supra note 46, at 7.
leads to unproductive and inefficient human living, heavily financed urban renewal programs have attempted to wipe out this urban ugliness and thereby make cities more conducive to human survival. With this goal, it is surely within our society’s public purpose to create aesthetically adequate urban development.

It can also be argued that insofar as historic preservation projects contribute to the beautification of any community, they again serve a vital public purpose. The legitimacy of legislation for aesthetic ends was once doubtful. However, Wisconsin and New York have established, by judicial decision, that zoning ordinances for aesthetic purposes are not invalid simply because aesthetic considerations predominate. Many states have upheld minimum area and lot size requirements that have no purpose other than keeping open spaces in residential neighborhoods. In most jurisdictions, ordinances regulating large outdoor advertising signs have been sustained. Finally, Justice Douglas’s dicta in Berman v. Parker has been cited in support of all manner of aesthetic legislation. Since historic preservation makes a positive contribution to urban renewal, slum clearance and civic beauty, it promotes ends which are recognized causes for the legitimate exercise of the aesthetic legislative power of the state.

51 See J. Jacobs, supra note 46, for some thoughtful suggestions on integrating urban environment.


54 State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 222 (Wis. 1955) (municipal architectural controls, primarily aesthetic in character, sustained because they contributed to maintaining high property values).


58 See, e.g., Merritt v. Peters, 65 So.2d 861 (Fla. 1953) (sign ordinance sustained as valid aesthetic control); Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950) (city had right to remove overhanging signs erected prior to passage of sign ordinance); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) (ordinance sustaining sign ordinance as valid, although purely aesthetic in nature); Village of Larchmont v. Levine, 225 N.Y.S.2d 452 (Sup. Ct. 1961) (ordinance limiting signs to fronts of buildings only upheld); New York State Thruway Authority v. Ashley Motor Court, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961) (statute prohibiting billboards within 500 feet of thruway sustained).

59 This oft-quoted passage reads as follows: We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. Berman v. Parker, 348 U.S. 26, 33 (1954).
3. Economic Value of Historic Preservation

In order to justify a zoning measure, lawyers often contend that the measure will raise property values and increase business volume. Conversely, when lawyers seek to have a court set aside a zoning measure as an unconstitutional "taking" of private property without due process of law, they argue that the ordinance lowers property values, depresses business volume and causes economic hardship. The determining factor in sustaining or striking American zoning laws seems to be the ratio of private economic hardship to the degree of public good achieved by the proposed zoning measure.\(^6\) In simple terms, if the public economic good, measured by increased property value and business volume, outweighs the private economic hardship resulting from adoption of a particular ordinance, the ordinance serves a recognized public purpose.\(^6\)

Naturally, the balancing test described above presents a question of fact, and if historic district ordinances are to be sustained as proper exercises of the police power, they must be proven to increase general economic welfare. Sufficient data has been compiled in the past ten years from those communities which have adopted historic district ordinances to confirm what preservationists have surmised in the past, i.e., that the restoration of a group of related early structures in a neighborhood can materially raise property values.\(^6\) A good example of this is the old Church Hill area of Richmond, Virginia, which has been systematically developed as a restored residential community since 1958. By 1963, forty-one early homes in the area had been restored. As a representative example, the assessed valuation of a two block area of Grace Street was $85,290 in 1958. By 1963, eight old houses in the area had been restored. The restored property had risen 136% in assessed value, while the unrestored property in the same area had increased only 30%.\(^6\) A graphic display of the increase in property values in Church Hill is provided in Appendix E.

A profitable by-product of historic preservation activity is the attraction of many vacationers and the consequent increase in tourist revenues. According to the national Department of Commerce, any attraction which brings in an average of twenty-four tourists per day provides income equivalent to an industry with an annual payroll of $100,000. In North Carolina, as in twenty-eight other states, tourism is rated as one of the three largest industries. In 1963, more than $968,000,000 was spent on travel alone in North Carolina, and in neighboring Virginia, tourists spent more than $700,000,000 in the same year. More importantly, thirty percent of all vacationers list "visit to historic sites" as a prime factor in choosing their vacation plans.\(^6\) This sort of leisure-produced industry is

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\(^6\) The first case in which this ratio appeared was State \textit{ex rel.} Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).

\(^6\) See Opinion of the Justices to the Senate, 333 Mass. 773, 780, 128 N.E.2d 557, 562 (1955), sustaining the validity of the Nantucket-Siasconset Historic Districts Act, in which this equation is applied to historic districts.

\(^6\) For a good analysis of this point, see R. MONTAGUE & T. WRENN, PLANNING FOR PRESERVATION 11-17 (America's Soc'y of Planning Officials 1964).

\(^6\) See \textit{id.} at 11, 12.

\(^6\) These statistics and others like them showing the economic impact of tourism are compiled in \textit{id.} at 14-17.
a significant new source of revenue for those bypassed rural communities which have nothing to market but their past. But the marketability of historic assets depends upon the degree to which environmental controls reproduce the atmosphere of the historical period to which the community's early structures relate. In order to exploit this vast market, preservationists, rather than despairing over the loss of significant early buildings, ought to effectively seek appropriate legal protection for their valuable economic assets.

B. Environmental Control of Historic Sites

Preservation planners should attempt to create an environment for any restored structure which complements the building's significance, for nothing detracts from a purposeful restoration more drastically than hideous surroundings. Naturally, environmental control plunges historic preservationists into legal problems concerning the use of proper architectural and land use controls, since it is clearly impossible for small or medium-sized restoration projects to purchase sufficient real estate to screen off unsightly surroundings. In addition, since the aim of all historic preservation is to integrate restored structures into today's environment, some means of achieving satisfactory environmental control over the community in which restored structures are situated must be developed from the law.

The best way to illustrate the negative educational and aesthetic effect of uncongenial environment on a restored building of considerable architectural merit is to offer a few notorious examples. For instance, Fraunces Tavern, a lovely period piece from the first quarter of the eighteenth century, perches on the intersection of Broadway and Earle Streets in New York City, surrounded by high-rise office buildings. This notable old structure in which General Washington gave his Farewell Address to his officers, is impossible to relate to its present environment, and therefore cannot effectively tell its own story. Boston's Old Town House of 1712 is also overpowered by modern skyscrapers, and to that extent, fails to present a proper sense of its own history to viewers. A third example is the St. Joseph County, Indiana, Courthouse, the only surviving early example of John Van Osdell's handiwork, which at present is surrounded by a row of ugly office buildings and the county jail. Although the City of South Bend, Indiana, plans to remedy this condition in the near future, the 1855 courthouse has no exhibition value in its present location. These examples of poor environment point out the need for adequate environmental control that will produce an intelligent and sympathetic setting for the public exhibition and

65 D. Pratt & R. Pratt, A Guide to Early American Houses North 122 (1956). Fraunces Tavern was originally the residence of Etienne DeLancy, erected in 1719. The New York Sons of the American Revolution maintain the tavern as an eating spot and meeting room, and should not be faulted for New York City's indifference to the environment in which the building is located.
66 The 1855 courthouse was removed from the southwest corner of Washington and Main Streets in South Bend in 1906 to make room for the present courthouse. It was placed on a lot adjacent to the county jail, and then surrounded by modern commercial buildings.
67 Landscaping plans for the St. Joseph County-City Building call for demolition of the old jail and sheriff's residence, as well as several commercial buildings on the block, in order to create a terraced park featuring the 1855 courthouse.
appreciation of fine old American buildings. Restored early structures lost in
their present environment are little better than curiosities or relics; they fail to
achieve the economic, educational and aesthetic ends of historic preservation.

In contrast with these poor examples of environmental control, the restored
Moravian buildings of Winston-Salem, North Carolina, and Quaker buildings of
Nantucket, Massachusetts, are relevant to their environment. Winston-Salem
has protected its old Moravian district by means of an historic district ordinance,
operative since 1948. Nantucket has ensured the proper setting for such ex-
cellent restorations as the Jethro Coffin House and the Maria Mitchell House
through a 1955 historic district act. In addition, each community has attracted
private capital from investors willing to restore period buildings and to operate
them in a variety of socially useful ways. Since each community presents a
broad spectrum of legal problems in historic preservation, both will be studied
in detail later in this Note.

III. Public Controls — Historic District Ordinances

A. History and Analytical Basis for Historic Districts

Before studying the operation of modern land use controls in historic pre-
servation, the legal and historical basis for such controls must be established.
Land use controls can be viewed as arising from the incidents of land tenure. The
medieval institution of feudalism created a relationship between ruler and subject
grounded in a common interest in real estate. The various incidents of feudal
tenure were attached to and passed with the land. Until the statute, Quia
Empores was passed, no subject could transfer any interest in land, except
through surrender and substitution. Under this view of ownership, the King
and his tenants were commonly concerned with the rights incident to owner-
ship. Because of his superior position and since he derived income from the
land, the King could impose controls on land use to protect his revenue in-
terests. Evidence of the King's concern for land use in the best interest of the
sovereign can be seen as early as the thirteenth century, and continued as long
as land ownership was considered a part of the tenurial system.

Tenure constituted the basic land ownership relation in colonial America. Lord Baltimore of Maryland and William Penn of Pennsylvania, as chief tenants
of their domains, were enfeoffed of their proprietary colonies by the King,
and other proprietary colonies operated under a like scheme of ownership. Thus, in effect, the royal colonies were the personal feudatories of the King and quit rents were universally collected from freeholders in lieu of feudal services. Subsequently, the thirteen original states inherited this relationship of tenant to chief tenant, and until rationalistic philosophy overcame this medieval customary relationship, the state's right to direct land use went unquestioned.

The present day concept of the police power of the state, a poor substitute for the chief tenant's interest in controlling land use, was a product of late eighteenth century rationalism. That philosophy argued that if government was seen as a contract between autonomous individuals, then the power of government was limited except insofar as each autonomous individual consented to that power. Thus, since all land was absolutely owned by each individual, the government's power did not reach the land under ownership criteria, but its power to control land use was limited to the express purposes for which government was established, i.e., to provide for the health, safety and general welfare of its citizens. In such an atmosphere, the law of historic preservation began as a mere footnote under the power of the state to regulate the conduct of its citizens on the basis of the so-called "police power."

Private historic preservation in the United States began in 1853. In that year, the Mount Vernon Ladies Association sponsored the first private historic preservation project in America. This pioneer effort involved the use of Edward Everett's oratory in a series of paid speaking engagements to raise funds for the purchase, restoration and public display of Mount Vernon. The success of that project encouraged patriotic groups throughout the United States to make similar efforts. Several additional structures associated with famous patriots were purchased and restored by private associations before 1900. None-

<table>
<thead>
<tr>
<th>Name</th>
<th>Place</th>
<th>Date Preserved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Old South Church</td>
<td>Boston, Mass.</td>
<td>1872-76</td>
</tr>
<tr>
<td>Ford Mansion (1760's)</td>
<td>Morristown, N.J.</td>
<td>1876</td>
</tr>
<tr>
<td>Potts House, Valley Forge</td>
<td>Valley Forge, Pa.</td>
<td>1873</td>
</tr>
<tr>
<td>The Hermitage (1834) (A. Jackson House)</td>
<td>Nashville, Tenn.</td>
<td>1889</td>
</tr>
<tr>
<td>Lincoln's House (1841)</td>
<td>Springfield, Ill.</td>
<td>1883</td>
</tr>
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</table>

77 North and South Carolina are two such examples. See id. § 129.
78 An example is New York, which was the personal estate of the Duke of York, later James II. He subinfeudated Lord Berkeley and Sir George Carteret into what became New Jersey. See id. at §§ 112, 113, 115.
79 See generally J. LOCKE, D. HUME, J. ROUSSEAU, SOCIAL CONTRACT (E. Barker ed. 1960), which is a compendium of the doctrines of Locke, Hume and Rousseau concerning the social contract.
80 See Locke, An Essay Concerning the True Original, Extent and End of Civil Government in SOCIAL CONTRACT, supra note 79, at 56, where the author reasons: Men being, as has been said, by nature all free, equal, and independent, no one can be put out of his estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties . . . .
81 Id. at 82.
82 This philosophy was ultimately expressed by the Supreme Court in The License Cases, 46 U.S. (5 How.) 504, 582 (1847).
83 For a discussion of the restoration of Mount Vernon, see C. HOSMER, supra note 45, at 41-57 (1965). The State of New York had purchased the Hasbrouck House at Newburgh, New York in 1850 as a memorial to Washington. Id. at 35-36.
84 Robert E. Lee's Home, "Arlington," was incorporated into Arlington National Cemetery in 1864. Id. at 64. The following table shows some of the other patriotic restorations.
theless, at this time very few Americans appreciated early structures for their intrinsic historical and architectural worth, and it was only as a result of romantic patriotism that several architecturally notable buildings were saved before the turn of the century.

Preserving old buildings for their architectural merit dates from the first years of this century, and can be traced to the initial efforts of William Sumner Appleton, who established the Society for the Preservation of New England Antiquities solely to conserve important early examples of New England architecture. Each purchased house was staffed with a resident curator, who leased the structure from the Society, and the income from the leases was ploughed into additional purchases and restoration. This system enabled Appleton to save many notable buildings, by restoring them in a sympathetic environment, without turning them all into museum houses. By 1920, Appleton's notion of preserving houses for their artistic value was established as socially acceptable. An attempt was also made to develop historic houses as profit-making concerns.

With this foundation, groups throughout the eastern United States began to save architecturally valuable early American buildings.

At the close of World War I, Charleston, South Carolina, an ancient city blessed with an extraordinary number of homogeneous early neighborhoods, was ripe for extensive preservation activities. Since many of Charleston's early structures had been neglected and, for various reasons, were in danger of demolition, a woman's group, the Society for the Preservation of Old Dwellings, was organized in order to find a means of saving a few of the city's best old houses. Miss Susan Pringle Frost, the real estate dealer who did so much for Charleston town house, and her example was soon followed by other private parties. Naturally, these people wished legal protection for their investments, in order to keep the neighborhood from being modernized to an extent inconsistent with their restoration work. In 1931, Charleston adopted the first ordinance establishing an historic district in the United States. That pioneer ordinance created a single area subject to imposed restrictions, and insured that the affected prop-

Betsy Ross House (1750's) Philadelphia, Pa. 1892
Philipse Manor (1790) Yonkers, N.Y. 1895

Mount Vernon certainly stands on its own architectural merits, as does the Ford Mansion. Perhaps the most architecturally significant structure saved by any patriotic effort was Boston's Old South Meeting House.

For a biographical sketch of this remarkable Bostonian and his society, see C. Hosmer, supra note 45, at 237-59. Hosmer describes Appleton's private war to preserve and restore the seventeenth century Abraham Brown house in Watertown, Massachusetts, which eventually became a tea room.

Wallace Nutting had purchased five houses in 1915 and 1916 for public exhibition. The project failed to pay its way due to World War I's impact on tourism, and he sold out in 1918. Nutting owned the Ironmaster's House at Saugus, Massachusetts, and the Wentworth-Gardner House at Portsmouth, Massachusetts, among other properties. For discussion of Nutting's efforts, see id. at 195-96.

Charleston's early townhouses were concentrated in several distinct areas of the city. The oldest residential neighborhood was along Tradd and Meeting Streets and the Battery. Ansonborough, another early neighborhood, was located along East Bay between Wentworth and Calhoun Streets, thence west to Meeting.

Simons, Forty Years of Preservation, AM. INST. ARCH. J. December, 1960, at 26, 27.

See C. Hosmer, supra note 45, at 252-53, where the author describes Miss Frost's initial inquiries to Sumner Appleton regarding the proper means to fund restoration projects.

Simons, supra note 89, at 27.
property was protected by a provision requiring all alterations in the "exterior architectural features" of any structure erected prior to 1860 to be in conformity with the general pattern of early Charleston architecture. A Board of Architectural Review was empowered to issue certificates of appropriateness for any planned alteration, authorizing the property owner to undertake his renovation. The Board was limited to stopping demolition of early buildings for a period of thirty days, and to preventing incongruous alteration of any "exterior architectural feature" which was "subject to public view from the street." Since this ordinance empowered the Board to passively control the architectural design of a large number of buildings, it raised a number of legal issues:

1. Could a municipal corporation adopt such an ordinance, solely on the basis of its power to zone for the general welfare, without express enabling legislation from the state?

2. Could an historic district ordinance be applied to modern buildings in order to protect surrounding early structures from non-conforming modern architectural styles?

3. Was an historic district ordinance forbidden "aesthetic zoning," and therefore an unconstitutional taking of private property under the fourteenth amendment to the Constitution?

Since Charleston's historic district ordinance enjoyed such wide public support, no one challenged it in court. It remained for another city to confirm in court the right to protect historic structures in this manner.

New Orleans adopted the Vieux Carré Ordinance in 1937, pursuant to a 1936 Louisiana constitutional amendment specifically authorizing the city to do so. This historic district ordinance did not go unchallenged. A businessman named Impastato, operator of an establishment in the Old French Quarter of New Orleans called the Napoleon House, put up an outside privy in his courtyard for the convenience of his patrons. The Vieux Carré Commission charged him with violating the historic district ordinance, since he had changed the "exterior architectural features" of his period building without permission. Impastato resisted the citation on the ground that the Vieux Carré Ordinance applied only to exterior features which could be viewed from the street. His contention was that the privy in his courtyard could not be seen from the street, and was therefore exempt from the ordinance's certification process. His conviction was affirmed by the Louisiana Supreme Court, which held that the term "exterior" applied to any outside feature on any historic building, whether or not it could be seen from the street. The Vieux Carré Ordinance lacked the "public view" limitation present in the earlier Charleston ordinance. In a companion case, City of New Orleans v. Pergament, the Louisiana high court,

92 J. Morrison, supra note 29, at 16, 133-34.
93 Id. at 17n.11, 157-58.
94 Id. at 40. The Napoleon House was reputed to be the house which was to be used to shelter Bonaparte if he successfully escaped his jailers at Elba.
95 City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559 (1941).
96 Id. at 210-11, 3 So.2d at 559, 561.
97 198 La. 852, 5 So.2d 129 (1941).
sustaining the conviction of a gas station owner for erecting a sign not authorized by the Vieux Carré Commission, determined that the historic district ordinance provisions against certain types of advertising signs were applicable to modern as well as ancient structures within the protected area.\textsuperscript{98}

In 1953, the Louisiana Supreme Court finally passed on the constitutionality of the Vieux Carré Ordinance. In \textit{City of New Orleans v. Levy},\textsuperscript{99} the alleged violator of the ordinance's provisions against non-conforming advertising signs complained that the ordinance as such constituted an unlawful taking of his property without due process of law. Since the ordinance was enacted under the authority of a state constitutional amendment, no question was raised as to New Orleans's power to adopt the ordinance, provided it did not violate the due process clause of the fourteenth amendment. Levy's primary assault was directed to the patently aesthetic provisions of the ordinance, which he argued were an unconstitutional exercise of the police power of the state and city. The court answered him in the following manner:

Perhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carré Commission Ordinance. But, as pointed out in the Pergament case, this legislation is in the interest of and beneficial to the inhabitants of New Orleans generally, the preserving of the Vieux Carré section being not only for its sentimental value \textit{but also for its commercial value}, and hence it constitutes a valid exercise of the police power.\textsuperscript{100} (Emphasis added.)

In this fashion, the court removed the Vieux Carré Ordinance from the prohibited area of "aesthetic zoning" into the admittedly lawful public purpose of promoting economic welfare. Since \textit{Levy} the Vieux Carré Ordinance has remained free from objection.

In 1939, San Antonio, Texas, created the La Villeta historic district, following the outlines of the Vieux Carré Ordinance.\textsuperscript{101} In 1946, Alexandria, Virginia, adopted a special zoning ordinance which protected the old portion of that city from incongruous architectural alterations.\textsuperscript{102} Winston-Salem, North Carolina, followed suit in 1948 with its first Old Salem ordinance. All of these early ordinances concerned a single homogeneous cluster of early buildings which could be protected by placing architectural controls on an area of land, or a zone. All structures within the specified area were protected. This system would not, however, protect scattered historic houses in a large urban complex, for its operation on such a scale would be constitutionally oppressive. The shortcomings of the typical historic district ordinance were overcome in Philadelphia, Pennsylvania, in 1955, by the adoption of an ordinance patterned after English prototypes. The Philadelphia Historical Commission was empowered to list and classify every historic building in Philadelphia, and could prevent the alteration or demolition of any such structure by refusing to certify alteration or destruc-

\textsuperscript{98} Id. at 858, 5 So.2d at 131.
\textsuperscript{99} 64 So.2d 798 (La. 1953).
\textsuperscript{100} Id. at 802-03.
\textsuperscript{101} J. Morrison, \textit{supra} note 29, at 17.
tion of the building. Such an ordinance operated like a floating performance standard type zoning ordinance; it attached wherever a conforming structure was situated. It did not, however, control the environment surrounding an isolated historic structure. Because this floating ordinance was an apt means for controlling the destruction of Philadelphia's early buildings, the Society Hill restoration project successfully redeveloped that deteriorating Philadelphia neighborhood.103

By the mid-1950's two distinct forms of historic district ordinances had evolved in the United States. The zone type district served to protect homogeneous urban neighborhoods by establishing architectural controls over an area of the affected community. The floating type zone could be used to protect individually important structures in isolated locations. Each type depended on the establishment of a commission to administer the architectural control system through certification of a proposed alteration or destruction of affected buildings. By 1957, eleven cities had established an historic district ordinance of some type,104 and except for New Orleans's Vieux Carré Ordinance, none had been tested in the appellate courts.

The trend toward enactment of these historic district ordinances was clear. By 1965, fifty-one cities had created historic districts,105 and the basis for this substantial increase can be traced to two cases which materially influenced historic preservation law. In 1955, two advisory opinions handed down by the Massachusetts Supreme Judicial Court declared that the Massachusetts General Court could pass acts creating the Nantucket and Beacon Hill historic districts without violating the due process clause of the fourteenth amendment.106 In confirming the validity of the proposed Nantucket-Siasconset historic district,

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104 Those cities were:

<table>
<thead>
<tr>
<th>City</th>
<th>Date Adopted</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charleston, S.C.</td>
<td>1931</td>
<td>Single-zone</td>
</tr>
<tr>
<td>New Orleans, La.</td>
<td>1937</td>
<td>Single-zone</td>
</tr>
<tr>
<td>San Antonio, Tex.</td>
<td>1939</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Alexandria, Va.</td>
<td>1946</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Winston-Salem, N.C.</td>
<td>1948</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Natchez, Miss.</td>
<td>1951</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Annapolis, Md.</td>
<td>1952</td>
<td>Single-zone</td>
</tr>
<tr>
<td>St. Augustine, Fla.</td>
<td>1953</td>
<td>Single-zone</td>
</tr>
<tr>
<td>St. Croix, V.I.</td>
<td>1951</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Frederick, Md.</td>
<td>1955</td>
<td>Single-zone</td>
</tr>
</tbody>
</table>

In addition, two state-created districts, enacted in 1955, were in operation: Nantucket-Siasconset and Beacon Hill. J. Morrison, supra note 29, at 129-86.

105 Some of the more important cities and communities having such districts were:

<table>
<thead>
<tr>
<th>City</th>
<th>Date Adopted</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Providence, R. I.</td>
<td>1960</td>
<td>Floating zone</td>
</tr>
<tr>
<td>Richmond, Va.</td>
<td>1960-62</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Mobile, Ala.</td>
<td>1962</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Mackinac, Mich.</td>
<td>1957</td>
<td>Single-zone</td>
</tr>
<tr>
<td>Los Angeles, Cal.</td>
<td>1962</td>
<td>Floating zone</td>
</tr>
<tr>
<td>Lake Forest, Ill.</td>
<td>1962</td>
<td>Floating zone</td>
</tr>
<tr>
<td>Lexington, Ky.</td>
<td>1958</td>
<td>Single-zone</td>
</tr>
</tbody>
</table>

For a full list and summaries of the provisions of each ordinance, see id.

the court addressed itself to the formidable problem of the effect of the architectural controls used in the historic district ordinance:

If the proposed act is to be construed as a taking of the property of owners affected by it, manifestly it is unconstitutional, since no provision is made for compensation... On the other hand, there may be many regulations and restrictions upon the use of private property under the so-called police power which do not amount to a taking of the property and which rest upon the general power to legislate for the public safety, health, morals, and welfare. We are of opinion that the proposed act is not a taking. There is no provision for a formal taking, and title will remain in the owner as will also the possession and usufruct for nearly all purposes... The court proceeded to hold that the proposed legislation would not be an unconstitutional deprivation of property rights as guaranteed by the fourteenth amendment. It found that restricting the exterior architectural appearance of Nantucket’s early buildings to conform to Nantucket’s general style of early eighteenth century architecture was a right of the state within its power to legislate for the general welfare of citizens of the Commonwealth and of Nantucket. This argument rested in part on the eminent domain cases discussed earlier in this Note, since the court cited Flaccomio for the proposition that historic preservation was a public purpose for which the power of eminent domain could be exercised. However, to find the requisite concern for the general welfare of the citizenry, the court relied on the recognized commercial value of Nantucket’s history. It stated:

It is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town, and we assume that the boundaries of the districts are so drawn as to include only areas of special value to the public...

The Nantucket and Beacon Hill advisory opinions determined that the historic district’s set of architectural controls were constitutionally valid means of protecting economically valuable historic sites and structures.

In 1957, Santa Fe, New Mexico, adopted an historic district ordinance for old Santa Fe, without benefit of specific state enabling legislation. The enacted historic district ordinance set out guidelines for the adoption of a set of administrative standards with respect to old Santa Fe architectural details. One standard adopted by the Historic Style Committee demanded that no windowpanes in the historic district have an area larger than thirty square inches. An entrepreneur decided to install a plate glass display window in a remodeled Spanish-American pueblo, despite the fact that the terms of the ordinance required him to divide up the window with lattice work to simulate the small-

108 Id. at 781, 128 N.E.2d at 562.
109 Id.
110 See text accompanying notes 22-27 supra.
112 Id.
paned glass of the seventeenth century. He first installed the dividers, but re-
moved them before the restoration was approved, and was subsequently convicted
of violating the historic district ordinance. On appeal to the New Mexico
Supreme Court, he argued that Santa Fe could not adopt the ordinance
without state enabling legislation. He claimed alternatively, in a direct consti-
tutional challenge to the ordinance that the provisions requiring him to install
small-paned glass in his period pueblo were unconstitutional aesthetic zoning
requirements. The court observed that there were no appropriate definitions for
the term "general welfare." It decided that the eminent domain cases (de-
claring historic preservation a public purpose) made any attempt to preserve
historic landmarks an act affected with a public interest. Therefore, it rea-
soned that a municipal ordinance establishing architectural controls over his-
toric structures was an act exercised for a legitimate public purpose. In dis-
posing of the absence of specific enabling legislation, the court, relying on the
city's expressed power to zone, stated:

Since the legislature can preserve such historical areas by direct legislation
as a measure for the general welfare, it follows that municipal ordinances
protecting such areas are authorized under enabling legislation granting
power to zone for the public welfare. We, therefore, hold that the purpose
of the Santa Fe historical zoning ordinance is within the term "general
welfare" as used in the municipal zoning enabling legislation.

Passing to the specific requirements for small-paned window glass, the court
held that such requirements were constitutional, since the size of window panes
was merely one of many components of the historic architecture of old Santa
Fe. It limited its review of the legislative delegation of power to the Historic
Style Committee to a determination that there existed a reasonable basis for
establishing architectural details for old Santa Fe. It is noteworthy that state
enabling legislation had been passed between the time of the alleged violation
and the appellate opinion in this case; no doubt, this action by the state had
some influence on the outcome of this decision.

In summary, the meaning and constitutional validity of historic district
ordinances have been before appellate courts often enough to permit some in-
ferences of general application. First, historic preservation is a public purpose,
for which public funds and public apparatus may be licitly used. Second, nothing
in the due process clause of the fourteenth amendment prohibits the establish-
ment of special architectural controls for preserving historic structures. Third,
the "general welfare" clause found in most state zoning enabling acts delegates
sufficient authority to municipal corporations to permit them to authorize his-
toric districts without express state enabling legislation. In conjunction with a

114 Id. at 15.
115 Id. at 17.
116 Id.
117 Id.
118 Id.
119 Id. at 17-18.
120 See N.M. STAT. ANN. ch. 92 (1961), as amended, N.M. STAT. ANN. §§ 14-21-1 to -5
reinterpretation of the state's interest in controlling land use, arising from its position as chief tenant in its domain, the validity of architectural controls as applied to historic structures seems to be established. With this basis in mind, it will be fruitful to look to historic district ordinances in operation to determine whether or not they provide an apt means for protecting private investment in historic structures.

B. Administration and Practice—Winston-Salem

Perhaps the oldest and best known community preservation program in America is that operated by Old Salem, Inc., in and for Winston-Salem, North Carolina. That program's vitality cannot be understood without some discussion of the history of Winston-Salem and the Moravian communal settlement of Salem.

In 1753, twelve Moravian pioneers left Bethlehem, Pennsylvania, to occupy Wachovia, a 100,000-acre tract of land in west-central North Carolina Colony which was purchased from the Earl of Granville in 1753. The Moravian Church had voted to acquire this tract in order to establish a major Moravian settlement in the south. The Moravians organized three principal towns in Wachovia: Bethabara, the site of the pioneer Moravians' first clearing; Bethania, three miles northwest of Bethabara; and Salem, the principal Moravian community in Wachovia. This last community did not materialize until 1765, when Salem was surveyed according to the plan of Frederick William Marshall. Marshall was the Oeconomus, or principal Moravian leader, in Wachovia. He arranged and planned the layout of Salem, and designed most of its public buildings. The distinctive appearance of such early buildings as the Single Brothers' House and the Single Sisters' House, as well as the Home Moravian Church, can be traced to his blend of English and Germanic design elements.

Salem was a planned religious community. It survived because, to a great extent, the best of its early buildings remained in church hands until well into the twentieth century. The communal living plan of the Moravians did not survive much beyond the early nineteenth century, and the Moravian settle-


122 The Unitas Fratrum, or Moravians, were the original followers of Jan Hus, the Bohemian reformer who defied the Roman church in the early fifteenth century. The Moravians were driven from their homelands in 1621 with only a pitiful remnant surviving the general slaughter of Moravian leaders in that year. This remnant eventually settled on the land of Count Zinzendorf in Saxony. In 1749, England recognized the Moravians as coeval with the English Established Church, granting them permission to settle anywhere in British North America. It was this legislation which ultimately led to the purchase of Wachovia. This early history is discussed in W. Murtagh, Moravian Architecture and Town Planning (1967).

123 Several of Marshall's plans are extant. His distinctive sense of design is best shown in the elevation for the Home Moravian Church. See id. at 126.

124 See Old Salem (1968) (Illustrated folder explaining the Old Salem restoration, published annually by Old Salem, Inc.).

125 E.g., the Home Moravian Church (1801); The Single Brothers' House (1769-1786); Boys' School (1794); Vorsteher's House (1797); Single Sisters' House (1786) (owned by Salem College, an affiliated school).
ment itself was absorbed into the city of Winston, North Carolina, in the twentieth century. It became a run-down urban neighborhood, although its architectural virtues were well-publicized among architectural historians. In 1947 a grocery store owner announced that he planned to build a supermarket on a vacant lot just north of the Fourth House. Mayor George Lentz then appointed a "Citizens Group for the Preservation of Historic Salem," consisting of fifteen members, to determine how the old Moravian community of Salem was to be saved from destruction through neglect and architectural modernization.

In 1948, Winston-Salem passed its first comprehensive zoning ordinance, which included among its provisions the first historic district ordinance for the protection of Moravian Salem. While the ordinance would prevent the immediate destruction of significant Moravian buildings in old Salem, it did not ensure that any building would be restored or properly exhibited. A few Salem buildings, already safeguarded by private bodies, welcomed the protection of the historic district ordinance. These included the Home Moravian Church maintained by the Moravians; the Boys' School, dating from 1794, in the hands of the Wachovia Historical Society; the Single Sisters' House which served as a dormitory for Salem College; and the Fourth House, restored by the Colonial Dames in 1940. Subsequently, in December, 1949, "The Temporary Salem Investigating Committee" was created by Winston-Salem's mayor to devise methods to restore old Salem. Committeeman James A. Gray (later President of Old Salem, Inc.) borrowed $30,000 in order to purchase certain properties, holding them as agent until a tax-exempt organization could be formed to take over restoration of old Salem. As a result, Old Salem, Inc. was chartered in 1950, and was charged with the redevelopment and restoration of old Salem. The corporation's immediate need, naturally, was adequate funding. As the years and project advanced, this need was adequately met. The corporation acquired $170,000 through private donations between 1950 and 1953, and in the latter year added $400,000 by way of a massive fund-drive. Then in 1960, $2,000,000 was raised for further reconstruction and restoration projects, and in 1967 $2,500,000 of additional capital was collected in a fund raising campaign to finance the complete restoration of Moravian Salem.

By July, 1968, Old Salem, Inc. had acquired control of eighty separate properties in Salem. Six properties were obtained as gifts, eight properties

126 E.g., T. Waterman & F. Johnston, supra note 121.
127 The Restoration of Salem as of July 8, 1968 (memorandum prepared by Old Salem, Inc., 1968) at 1.
128 Letter from James A. Gray, President of Old Salem, Inc., to Thomas J. Reed, September 23, 1968, on file with the Notre Dame Lawyer.
130 For a historical discussion of the Fourth House, Salem's earliest structure, see D. Pratt & R. Pratt, A Guide to Early American Homes South 77 (1956). However, Old Salem, Inc., did consider additional work in 1966-67 on Fourth House, returning its exterior to the original half-timbered appearance. See Old Salem 9 (1967) (annual report for Old Salem, Inc.).
131 The following table shows donors of property to Old Salem, Inc:

<table>
<thead>
<tr>
<th>Property</th>
<th>Donor</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Vogler House (1819)</td>
<td>Mrs. James A. Gray, Sr.</td>
</tr>
<tr>
<td>Anna Catharina House (1772)</td>
<td></td>
</tr>
</tbody>
</table>
were and are leased by Old Salem, Inc.;132 and the balance were acquired by purchase, except for those structures which were erected by the corporation on the property of other owners by license.133 Since 1948, one-hundred non-conforming structures have been removed from Moravian Salem, and thirty buildings have now been fully restored. Old Salem, Inc. has worked out a plan of co-ownership for three structures which are being reconstructed or restored by private individuals. Under this plan property is purchased by the corporation for preservation purposes and then sold to private individuals for redevelopment, with the corporation absorbing the cost of clearing out non-conforming structures. The private parties are responsible for redevelopment under a series of covenants running with the land, which grant Old Salem, Inc. the right to repurchase the property in the event of failure to reconstruct.134 This overall development program has attracted $1,147,048 in endowment funds in the last twenty years to ensure continued maintenance of exhibition restored buildings. Old Salem, Inc.'s consolidated balance sheet for 1967 shows assets totalling

<table>
<thead>
<tr>
<th>Property Description</th>
<th>Lessor</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vacant lot behind John Vogler House</td>
<td>Fred F. Bahnsen, Jr.</td>
<td></td>
</tr>
<tr>
<td>Two lots between Salt St. &amp; Old Salem Rd.</td>
<td>James A. Gray, Sr.</td>
<td></td>
</tr>
<tr>
<td>Two lots between Salt St. &amp; Old Salem Rd.</td>
<td>P. H. Hanes, Sr.</td>
<td></td>
</tr>
<tr>
<td>Old Salem Concrete Lot on Academy St.</td>
<td>Virginia Shaffner Pleasants</td>
<td></td>
</tr>
<tr>
<td>Bank of Cape Fear Bldg. (1847)</td>
<td>R.R.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Heirs of Miss Katherine Hanes</td>
<td></td>
</tr>
</tbody>
</table>

See The Restoration of Old Salem as of July 8, 1968 (Memorandum prepared by Old Salem, Inc., 1968) at 2.

132 These are enumerated in id. at 2-3 and include the following:

<table>
<thead>
<tr>
<th>Property Description</th>
<th>Lessor</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salem Tavern (1784)</td>
<td>Wachovia Hist. Soc'y</td>
<td>50 years</td>
</tr>
<tr>
<td>Boys' School (1794)</td>
<td>Moravian Church</td>
<td>25 years</td>
</tr>
<tr>
<td>Community Store (1775)</td>
<td>Moravian Church</td>
<td>20 years with option for 20 additional</td>
</tr>
<tr>
<td>Single Brothers' House (1769-1786)</td>
<td>Moravian Church</td>
<td>40 years</td>
</tr>
<tr>
<td>614 S. Main Bldg.</td>
<td>Moravian Church</td>
<td>3 years to July 1, 1969</td>
</tr>
<tr>
<td>First &amp; Second House sites</td>
<td>Moravian Church</td>
<td>50 years</td>
</tr>
<tr>
<td>Fourth House</td>
<td>Nat'l Soc'y of Colonial Dames</td>
<td>40 years</td>
</tr>
<tr>
<td>Lot on S. Trade St.</td>
<td>Winston-Salem</td>
<td>1 year</td>
</tr>
<tr>
<td></td>
<td>Southbound R.R.</td>
<td>renewable</td>
</tr>
</tbody>
</table>

133 The licensed structures mentioned in id. at 3 are:

<table>
<thead>
<tr>
<th>Structure Description</th>
<th>Property Owner</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Fire-Market House</td>
<td>Moravian Church</td>
<td></td>
</tr>
<tr>
<td>South Hall (Single Sisters' House (1786))</td>
<td>Salem College</td>
<td></td>
</tr>
<tr>
<td>Inspector's House (1810)</td>
<td>Salem College</td>
<td></td>
</tr>
<tr>
<td>Home Moravian Church (1800)</td>
<td>Moravian Church</td>
<td></td>
</tr>
<tr>
<td>Steiner House (1823)</td>
<td>not mentioned</td>
<td></td>
</tr>
</tbody>
</table>

134 Letter from James A. Gray, President of Old Salem, Inc., to Thomas J. Reed, September 30, 1968, on file with the Notre Dame Lawyer. The instrument itself is a standard North Carolina warranty deed with a series of repurchase rights attached to covenants to restore (or reconstruct), to maintain, and to use for residential purposes. In addition, Old Salem, Inc. has the right of first purchase at market value in case the promisor decides to transfer his interest. See also The Old Salem Gleaner, Summer-Fall 1968, at 1, col. 3, which describes the properties under the co-operative agreement. They are listed as:

<table>
<thead>
<tr>
<th>Property Description</th>
<th>Restorer</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Joshua Boner House (1844)</td>
<td>Mr. and Mrs. P. Huber Hanes, Jr.</td>
<td></td>
</tr>
<tr>
<td>Jacob Christman House (1825)</td>
<td>Thomas A. Gray—William L. Gray</td>
<td></td>
</tr>
</tbody>
</table>
$5,538,856, including all restored properties owned, leased or licensed. All this has been accomplished in a neighborhood which only two decades ago was apparently foredoomed to become a slum.

Winston-Salem's original land use protection pattern was founded upon the 1948 Old Salem Ordinance. That ordinance created a Board of Architectural Review, consisting of five members serving staggered three-year terms. Membership on the Board was carefully specified to include representatives of the Wachovia Historical Society, the American Institute of Architects, the Garden Club, the City-County Planning Board and a member at large. Certificates of appropriateness were required for any alteration to the exterior architectural features of any structure in the district. The Board had its first confrontation with a non-conforming property owner in 1949. A property owner in the historic district began excavating to lay the foundation for an addition to a non-conforming commercial building without consulting the Board of Architectural Review. The Building Inspector halted the work, insisting that the property owner present his plans to the Board for approval. The owner complied, the Board vetoed the proposed addition as incongruent, and the aggrieved freeholder threatened to block enforcement of the ordinance in court. At that point, James A. Gray intervened to purchase the property as agent for a future development corporation, thus averting a serious court challenge to the ordinance, which was not backed by special state enabling legislation.

The 1948 ordinance was a single zone type, since it prescribed architectural controls for a designated land area, as opposed to prescribing controls for structures meeting certain qualifications. Though the ordinance had not faced serious challenge in the courts, statewide agitation for historic district enabling legislation in 1965 resulted in the introduction of appropriate legislation in the North Carolina General Assembly. However, a legislative faction blocked adoption of the state-wide enabling bill, and the general act was redrafted into special legislation authorizing Winston-Salem, Edenton and Halifax to create state-enabled historic districts. In 1966, Winston-Salem adopted a revamped historic district ordinance similar to the single zone type district of the 1948 ordinance, but with the added support of the 1965 state legislation.

Several conclusions can justly be drawn from Winston-Salem's experience with historic district ordinances: first, popular support for an historic district ordinance is the best insurance that its terms and conditions will be honored; second, architectural controls are vital to attracting private investment capital into an old, deteriorating but historic neighborhood; and third, a blighted...

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135 For a copy of this balance sheet and an endowment fund statement, See Old Salem (1967), supra note 130, at 19-20.

136 The membership of the board intentionally excludes anyone on the staff of Old Salem, Inc. to avoid a conflict of interests. Letter from James A. Gray, President of Old Salem, Inc., to Thomas J. Reed, September 23, 1968 on file with the Notre Dame Lawyer.

137 See text following note 130 supra.

138 Letter from James A. Gray, President of Old Salem, Inc., to Thomas J. Reed, September 23, 1968, on file with the Notre Dame Lawyer.


140 This necessity is reinforced by the experiences of Schenectady, New York and Providence, Rhode Island, both of which have undertaken major renewal-preservation projects. See Hammerschlag, A Tale of Two Cities College Hill and Downtown Providence 1970, Am.
urban neighborhood can be rehabilitated and transformed into a money-making tourist attraction by a non-profit corporation, provided the corporation can be assured that historic structures will not be demolished before they can be purchased and restored. Consequently, the citizens of Winston-Salem have achieved, through Old Salem, Inc. and the historic district ordinance, comprehensive and tasteful renewal of a deteriorating part of their city with neither massive infusions of federal aid nor destruction of historic buildings. Winston-Salem has achieved two goals through its restoration of old Salem: it has created a viable educational and economic asset in the oldest district of town, and, in so doing, it has preserved one of the most important communities of early American structures in the South.

C. Administration and Practice — Nantucket

Old Salem, Inc., restored a neighborhood of great historical importance in a large urban center by solving problems peculiar to urban life. The problems Nantucket overcame were in part also unique, because Nantucket itself is a singular island situated off the Massachusetts coast. It was settled early in the seventeenth century by Massachusetts Puritan missionaries who intended to convert the local Indians. Nantucket appealed particularly to Quakers, who were persecuted on the mainland for their un-Puritanical convictions, but word of its excellent fishing grounds also drew other settlers from the mainland, and by the end of the seventeenth century a considerable fishing settlement had grown up around Sherburne Harbor on Nantucket Island. When the Harbor was closed up by a hurricane, the islanders established a new town called Nantucket on the west side of the island, and several fishing stations were built on the island's east side, the most important being Siasconset. By 1750, Nantucket men had begun the business that would enrich the island — commercial whaling. Whaling required lengthy sea voyages, which not only took Nantucket men away for several years at a time, but also deterred them from entering the professions or skilled trades. As a result, Nantucket's building style became fixed in the eighteenth century mold. Its Quaker population, being by nature conservative, could not accept the destruction of useful buildings, no matter how old; consequently, the greater part of Nantucket's eighteenth century off-center homes were maintained and used, rather than destroyed. With the addi-
tion of a series of excellent post-colonial and classic revival mansions erected by wealthy sea captains during the thirty years before the Civil War, Nantucket became one of the loveliest communities in North America. Fortunately, with the sole exception of that part of Nantucket Town consumed by the Great Fire of 1846, most of this infinitely valuable architectural heritage survived the collapse of commercial whaling during the Civil War. In fact, very little construction was undertaken on Nantucket even between the Civil War and the twentieth century; its beauty and historical importance were conserved, without conscious effort, by an accident of geography which isolated Nantucket from land-bound commercial development.

In the years after whaling collapsed, Nantucket became increasingly dependent upon "summer folk" for its revenues, since the island had no native industry which would support its population. After World War II, the tourist trade itself created enormous pressures on the Island's restricted land area. Many of its best homes and shops were threatened with destruction in order to provide space for "Coney-Island" type accommodations for low-budget tourism. Determined to arrest the commercialization of their island, a number of residents sought legislative relief in the form of an historic district ordinance. In 1955, following the advisory opinions discussed earlier in this Note, the Nantucket and Siasconset historic districts were established by law. Since the island had no comprehensive zoning ordinance, the architectural controls provided by the historic district act became the only building restrictions on the island. These historic districts were of the usual single zone type, administered by a commission of five uncompensated citizens through a certification program of architectural controls. In addition to controlling the exterior architectural appearance of early structures the act also provided for restrictions on outdoor advertising signs. Its immediate effect was to halt the gradual destruction of old Nantucket.

At that time, very few Nantucket buildings were in the hands of preservation organizations. With the exception of several splendid restorations by private parties, few Nantucket structures had been preserved or restored in any viable fashion. The Nantucket Historical Society struggled to maintain the Jethro Coffin House, a seventeenth century timber-frame building of considerable historical value, in addition to two other structures. Maria Mitchell's House, which dated from 1791, had been preserved by an association devoted to

148 The principal effort for legal controls was provided by Henry B. Coleman, George W. Jones, and Walter Beinecke, Jr. See Historic Districts Commission Annual Report for 1961 (1962).
149 See notes 106-12 supra and accompanying text.
150 The applicable state and local regulations are: (1) Massachusetts Department of Public Safety building code applicable only to public buildings; (2) State and local fire ordinances; and (3) Health Department sanitation regulations.
152 Acts & Resolves of Mass. ch. 601, § 6 (1955). The ordinance also provides the penalty of a $10 to $500 fine to be imposed on any violators.
153 These included the Thomas Macy House, the Elihu Coleman House, and the Major Josiah Coffin House.
154 They were the Lydia S. Hinchman House and the 1800 House. Brief descriptions of these three structures appear in D. Pratt & R. Pratt, supra note 65, at 43.
memorializing the first woman astronomer in the United States. Yet these efforts barely tapped the supply of important early buildings available for adaptive use and tourist promotion. Because of a clear need for investment capital, the Nantucket Historical Trust was incorporated in 1957 to provide a source for funding the redevelopment of significant early Nantucket structures. The prime backer of the Nantucket Trust was Mr. Walter Beinecke, Jr., who, possessing considerable financial resources of his own, has been the principal source of funds for commercial redevelopment on Nantucket.

Mr. Beinecke's efforts have been impressive. He has purchased most of Nantucket's business district in order to restore its pristine early appearance, and eventually he plans to turn over the restored handicraft shops and business buildings to the Nantucket Trust. In a commendable effort to upgrade the type of visitor Nantucket will attract, Mr. Beinecke has built a marina for yachtsmen on Nantucket's waterfront, and has also cancelled the lease on wharf space for one ferry from Hyannis in order to keep tourist traffic to a manageable level. At the same time, the Nantucket Trust has been at work restoring some of the island's most important landmarks. This intensive commercial activity has created a dispute among islanders concerning the economic power Walter Beinecke wields on the island. This past summer, some citizens have been wearing buttons bearing the slogans "No man is an Island" and "Ban the B" as a measure of their protest, but few seriously doubt that restoring Nantucket's prime early architectural creations is good for the island.

Since 1955, Nantucket land values have skyrocketed so that it is practically impossible to acquire land within the historic district for new construction at this stage of development. Furthermore, old and restorable residential properties are extremely scarce. In conjunction with the appreciation in land values, the tourist trade has also boomed. In 1967, more than 200,000 persons visited the island, and Nantucket realized $20,000,000 from this influx. The island's 3,500 year-round residents are joined every summer by 12,500 summer citizens. One indication of the volume of restoration and reconstruction on Nantucket can be gleaned from the following table showing the yearly issuance of certificates of appropriateness for the historic districts over a six-year period.

**TABLE OF CERTIFICATES ISSUED 1956 - 1961**

<table>
<thead>
<tr>
<th>Year</th>
<th>Certificates</th>
<th>Signs Approved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1956</td>
<td>234</td>
<td>104</td>
<td>338</td>
</tr>
<tr>
<td>1957</td>
<td>107</td>
<td>71</td>
<td>178</td>
</tr>
<tr>
<td>1958</td>
<td>139</td>
<td>46</td>
<td>185</td>
</tr>
<tr>
<td>1959</td>
<td>95</td>
<td>35</td>
<td>130</td>
</tr>
<tr>
<td>1960</td>
<td>86</td>
<td>38</td>
<td>124</td>
</tr>
<tr>
<td>1961</td>
<td>83</td>
<td>36</td>
<td>119</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>744</strong></td>
<td><strong>330</strong></td>
<td><strong>1076</strong></td>
</tr>
</tbody>
</table>

155 Beinecke's efforts have received national exposure in TIME, July 26, 1968, at 77, and in LIFE, September 6, 1968, at 47-51.
157 This compilation is made from figures appearing in Annual Report, supra note 148.
In 1967, the Historic Districts Commission approved ninety-six restoration projects. It also issued a guidebook for restoration projects designed to present the essentials of appropriate architecture for the historic district. Since the Commission has established a program which permits certain alterations to be carried out without advance certification, this guidebook facilitates the property owner’s compliance with Commission architectural standards. It is apparent that the system of fairly administered architectural controls has been a significant factor in the economic redevelopment scheme which has restructured Nantucket life. Without the Historic Districts Commission, Nantucket’s renaissance would have been financially risky, if not impossible.

Despite the achievements of the past thirteen years, Nantucket’s situation remains legally unsatisfactory. The island has no comprehensive zoning ordinance or building code. No one controls the height, area and lot size requirements for new construction outside the historic district, and no one can compel a recalcitrant property owner to maintain his historic structure. Private architectural controls are practically nonexistent on the island. Finally, the role that individual land owners must play in the Nantucket redevelopment program has not been determined, and this accounts for some of the resentment shown by islanders toward Mr. Beinecke’s efforts. Whether Nantucket can control its redevelopment program will depend in large part on the degree of mutual cooperation between the Nantucket Trust, Mr. Beinecke, and other private parties on the island. It will also depend upon the early adoption of proper island-wide land use controls.

The foregoing discussion of Nantucket’s redevelopment leads to a threefold conclusion. First, public protection of historic structures through an historic district act, by itself, is insufficient to protect the non-commercialization of a rural historic area; comprehensive zoning measures are also needed to protect the historic area from over-development. Second, one man’s efforts, no matter how effective and well-intentioned, cannot sustain a community redevelopment program; Nantucket has to find a means of cooperative redevelopment through Mr. Beinecke’s existing programs. Third, a community which depends on tourism for its principal source of income cannot afford to permit its historic assets to be neglected; in order to survive, it must adopt effective architectural control measures. Nantucket, like many rural American communities, has essentially nothing to market but its history. Its experiences in preserving that history should provide valuable insights for other small towns in similar situations.

IV. The Course of Development

A. Condominium Ownership for Preservation Purposes

No historic district ordinance can require individual property owners to maintain their historic houses and structures. The limit of public control is

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158 Guidebook for Old and Historic Districts of Nantucket and Siasconset, supra note 142.
159 These inadequacies are explained in letter of David A. Seaman, General Counsel for Historic Nantucket Trust, to Thomas J. Reed, August 28, 1968, on file with the Notre Dame Lawyer.
reached when government prevents the demolition or unapproved alteration of such structures. It remains for private parties to restore and maintain early buildings; yet unfortunately, private investment capital has not been fully committed to the development of historic areas. If non-profit corporations and individual entrepreneurs can risk capital on redeveloping old and historic buildings, then investment institutions and profit-making corporations should be encouraged, by a broader consideration of the commercial uses of historic preservation, to likewise do their part in redeveloping old neighborhoods. With this goal in mind, new forms of risk-sharing must be worked out, because the mortgage investment possibilities in historic preservation work are not yet clear. One means of providing the proper investment protection for commercial development of historic structures may lie in the condominium ownership plan.

As explained earlier in this Note, \(^{160}\) the condominium plan offers a shared interest in real estate to a group of persons. If properly organized, individual property owners can obtain proper mortgage arrangements, even while common property is provided for in the common-ownership plan. \(^{161}\) This form of ownership affords a means by which the exterior architectural features of historic buildings may be maintained, even when a recalcitrant property owner will not do so voluntarily. In that respect, the condominium plan is superior to any set of comparable residential restrictive covenants, which only provide for a personal right of action against a non-conforming neighbor. Appendix D to this Note contains a form for a declaration of condominium ownership designed expressly for single-unit country club type condominiums. Such condominiums may be created without express enabling legislation, since each dwelling house and lot is separately owned in fee, with an easement reserved in favor of the property owners' association on each property for historic preservation purposes. The forced maintenance provisions in the declaration are designed to provide a means of maintaining all dwelling houses, despite the insolvency or unwillingness of any individual property owner. In order to form a condominium of this type, a commercial developer, after purchasing and restoring an historic neighborhood or group of houses, must make a declaration of ownership plan. \(^{162}\) He must then cause the formation of a non-profit corporation to administer common property for each property owner. The articles and by-laws should be recorded with the declaration. The easement appurtenant to each individual dwelling house should also be recorded, and in most cases, held in trust.

At this time, the tax consequences of condominium type development are not fixed. \(^{163}\) The non-profit association that administers and maintains common property derives its funds from membership assessments which do not appear to be "ordinary and necessary business expenses" for condominium members. \(^{164}\)

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160 See text accompanying notes 15-19 supra.
161 See D. Berman, supra note 18, at 27, 51-52.
162 For the methods and procedures for setting up a condominium, see id. at 39-81 and the checklist at 83-86. A sample declaration of ownership plan is provided in Appendix D infra.
164 See Int. Rev. Code of 1954, § 162, which is clarified in Treas. Reg. § 1.162-1(a), T.D. 6690 (1963). However, the interest deduction on mortgage payments is available to...
If the condominium also leases dwelling units or commercial property to tenants, it is likely to be considered a corporation for tax purposes. It is also not clear just who, if anyone, is entitled to take a deduction for depreciation, since under the plan in Appendix D, individual residential unit owners are not holding their own homes for use in a trade or business or for investment. It would be correct to say, however, that a condominium such as the planned community described in Appendix D would be considered a corporation for tax purposes, and its income would be taxable as such. However, if the expense of maintaining common property is exactly matched by membership assessments, the corporation will have no net taxable income—a most desirable consequence for a non-profit association.

B. Easements for Preservation Purposes

Easements can serve as suitable means for the acquisition of open spaces surrounding an historic property. They can also be purchased to enjoy the right to control the exterior architectural features of any historic building. Although preservation groups can acquire, under easements, use rights that would be otherwise unobtainable, the cost of acquiring these rights limits their use to a secondary position. The form given in Appendix C is adapted to acquisition of architectural control rights over a structure adjacent to an historic house museum and illustrates the sort of incorporeal rights that can be acquired by this type of instrument. Perhaps the greatest use of easements in historic preservation will lie in acquiring open spaces, for it is conceivable that vacant land can be kept so at a reasonable price if developmental pressure is not severe. Certainly, an easement appurtenant to every residential unit in the condominium plan outlined in Appendix D is the device which makes the plan work in terms of maintaining historic buildings. Without doubt these controls could also be employed in standard residential restrictive covenants.

As to the tax consequences of such easements, one inducement for the donation of incorporeal use rights to a tax-exempt organization is the probability of deducting the fair market value of the easement as a charitable contribution. Since an easement conveyed to the federal government for a view appurtenant to a highway has already been ruled to be a charitable contribution, it would seem that similar rulings could be obtained in favor of ease-
ments for historic preservation purposes. At any rate, the uses of easements in historic preservation appear to be limited only by the ingenuity of counsel and the bargaining power of the persons involved.

C. Retained and Terminable Interests

As explained earlier in this Note, Colonial Williamsburg has long used a life estate-remainder conveyance pattern to assure maintenance of its valuable structures. Such a conveyance pattern is available to any preservation group which desires to restore early American buildings for adaptive use. Since the grantor can restrict the use of any property within the broad limits of public policy, he can retain effective control over maintenance of the restored structure. This aspect of the retained interest pattern appeals most directly to the non-profit corporation that has acquired an old structure for restoration which cannot be exhibited as an historic house museum. On the other hand, the owner of an historic building can convey a remainder in fee to a tax-exempt organization, insuring its perpetual preservation, while retaining a life estate. Under special revenue rulings, such a transaction results in an immediate tax benefit to the grantor, for he may deduct a portion of the value of the remainder interest in the property as a charitable contribution in the taxable year of the grant. A grant of this nature may be in the best interest of persons who own an historic house which is not desired by their heirs. At any rate, the life estate-remainder plan provides another means of providing for the preservation of early structures and should be a factor in estate planning for preservation-minded persons.

D. The Historic District Revisited

Much of this Note has been devoted to analyzing the historic district ordinance as a legal instrument. It is clearly evident that historic district ordinances will become more common in the future; as hostility to historic preservation diminishes, more communities will attempt to limit the destruction of their landmarks. With this growth in mind, a model historic district enabling act and ordinance have been drafted and included as Appendices A and B to this Note. Since many preservation groups have no understanding of the legal mechanics behind an historic district ordinance, these forms have been provided as models for adaption to local conditions. It should be noted that it would be unwise to borrow the forms without consulting with experienced lawyers who are familiar with local municipal corporations law. But insofar as the flexible definition section of the statute and ordinance can be adapted to any state’s municipal zoning structure, an attorney should have no trouble in adjusting the models to suit his state’s constitution and zoning enabling legislation.

The historic district ordinance is an apt tool for controlling the destruction of historic structures. If properly administered, it can ultimately control public

171 See text accompanying notes 12-14 supra
indifference to early architectural works. Certainly any community which has a considerable number of historically noteworthy structures should seek this type of protection as the demand for such structures increases.

V. Conclusion

Historic preservation's legal future cannot be deduced from the handful of cases construing historic district ordinances. It cannot be limited by present day positivist-hangover conceptions of the role of the state in controlling land use. The law of architectural controls is an infant whose potential reaches far beyond the control of the appearance of an old building. As the judicial understanding of property rights changes in accordance with development in social policy, new and creative efforts in the area of civic beautification will be permissible. One line of growth has been specifically explored by this Note — the preservation of notable old buildings for the sake of saving America's tradition. This line of activity is by no means the only way in which architectural controls can develop; it is merely the first to be accepted by the courts as legally protectible. The goal to be realized in the use of these controls — be it in the historic zoning field or another — is the elimination of existing ugliness in American structures. This ugliness must be recognized as one of the root causes for the declining attractiveness of our great cities. It cannot be protected as a constitutionally authorized way of living, nor as a right inherent in our concept of personal liberty.

However, the immediate public task to be fulfilled is not that of controlling land use. What must be first achieved in America is an understanding of the value of homogeneous community life. Until the public at large realizes the necessity for creating a psychologically tolerable environment for urban and rural living, the activities of preservationists and of public authorities will be mere excursions into a morass of alienation.

Thomas J. Reed
APPENDIX A

MODEL ENABLING LEGISLATION FOR HISTORIC DISTRICT ORDINANCES

A BILL FOR AN ACT AUTHORIZING ANY LOCALITY TO DESIGNATE AND PROTECT HISTORIC STRUCTURES BY MEANS OF AN HISTORIC DISTRICT ORDINANCE

Be it enacted by the General Assembly of the State of Indiana:

Section 1. Short Title. This Act shall be known and may be cited as the Historic District Enabling Act.

Section 2. Legislative Findings. The General Assembly finds that the historic heritage of this State is among its most valued and important educational, cultural and economic assets. It is the intent of the General Assembly to authorize the protection of historic sites and structures by local governing bodies in order:

(a) to safeguard the heritage of the State by preserving sites and structures which reflect elements of the State's cultural, social, economic, political or architectural history;
(b) to stabilize and improve property values;
(c) to strengthen the economy; and
(d) to promote the preservation of historic sites and structures for the education and the general welfare of the residents of this State.

Section 3. Definitions. As used in this Act—

(1) Alteration means any material change in the exterior architectural features of any structure less than demolition, removal or construction of any such structure. Any renovation of the interior of such structure which has no appreciable effect upon the exterior architectural features of such structure shall not be deemed an "alteration."

(2) Applicant means any person, persons, association, partnership or corporation who applies for a certificate in order to make any environmental change on property subject to any historic district ordinance.

(3) Building Inspector means any person or agency charged with the administration of any building code or with the issuance of building or demolition permits.

(4) Certificate means any certificate required as condition precedent to any environmental change undertaken within any historic district under the provisions of section 7 of this Act.

(5) Commission means an Historic District Commission established under the provisions of sections 5 and 6 of this Act.

(6) Environmental Change means any alteration, demolition, removal or construction of any structure subject to the provisions of any historic district ordinance.

(7) Exterior Architectural Features means the architectural style, general design, and general arrangement of the exterior of a building or other structure subject to the provisions of an historic district ordinance. The term includes the color, the kind and texture of the building material, and the type and style of the doors, light fixtures, signs and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior architectural features" means the style, material, size and location of all signs.

(8) Governing Body means any local legislative body which is empowered to enact zoning ordinances.

(9) Historic District means any real property and appurtenant fixtures subject to the provisions of an historic district ordinance adopted pursuant to the provisions of section 5 of this Act.

(10) Locality means any village, town, city or county or other local governmental unit whose governing body is empowered to enact zoning ordinances.

(11) Member means any member of any Commission established under the provisions of section 4 of this Act.

1 The enacting clause is that required by Indiana Const., Art. 4, § 1, and can be changed according to the requirements of the appropriate jurisdiction.
(12) **Review Body** means any body which is empowered by law to review amendments or variances for any zoning ordinance from which an appeal may be taken to a court.

(13) **Structure** means any building or fixture including but not limited to the following: houses, stores, warehouses, churches, schools, barns and other like buildings; fences, outhouses, pumps, grave stones, light fixtures and other like fixtures; markers, display boards, display panels, outdoor signs and other like outdoor advertising fixtures.

Section 4. **Historic District Commission.** (a) Any governing body in any locality may establish an Historic District Commission, which shall be responsible for the survey of historic sites and structures within the locality.

(b) The Commission shall consist of not less than three (3) nor more than nine (9) members chosen by the governing body of the locality.

1. Members shall be appointed for such terms as the governing body shall direct, providing that no member shall serve for a term of more than four (4) years. All members shall be eligible for re-appointment.

2. Members shall be qualified by reason of special interest, knowledge or training in such fields as history, architecture or other like fields of special knowledge or interest.

3. Members shall reside within the county in which the locality is situated.

(c) The Commission or its delegate shall make a survey of all structures within the locality which are more than one hundred years old. It shall also include in the survey any other sites or structures it finds to be of special historical, cultural or architectural interest. The purpose of such survey is to determine whether or not an historic district ordinance is required for the locality.

(d) The Commission or its delegate shall, upon completing the survey required in subsection (c) above, make a report to the governing body of the locality. Such report shall include the following items:

1. Whether the Commission recommends the adoption of an historic district ordinance for the locality;

2. the composition of any historic district or districts established by any proposed historic district ordinance;

3. the land use patterns of one hundred years ago, or of any other period selected by the Commission as representative of the most historically important period of the locality, and therefore the most appropriate period to which to restore historic structures;

4. the number and type of structures surveyed; and

5. any other recommendation the Commission may have concerning the adoption of an historic district ordinance.

(e) The Commission shall hold a hearing upon the adoption of its survey report, at which any person whose property is or may be affected by adoption of such historic district ordinance may appear and offer evidence supporting or contradicting the proposed report of the Commission. After taking such testimony, the Commission shall send its survey report and all additional material to the governing body for further action.

Section 5. **Establishment of Historic District.** (a) Upon receipt of the Commission's survey report and any additional material accepted under section 4(e) above, the governing body shall vote upon the adoption of an historic district ordinance. If the Commission recommends the adoption of such an ordinance, the governing body may enact an historic district ordinance by majority vote. If the Commission does not recommend the adoption of such an ordinance, the governing body may enact an historic district ordinance by vote of two-thirds of the full membership of the body. If the governing body does not enact an historic district ordinance, the Com-

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2 Substitute language embodying whatever method of choosing local appointive officers is customary in the jurisdiction.
mission may then be dissolved by majority vote of the governing body.

(b) Any historic district ordinance adopted under the provisions of this section shall include the provisions of sections 6 through 9 of this Act with respect to the powers and duties of the Commission and the requirements for certification.

(c) An historic district established by an ordinance adopted pursuant to this section may be a separate geographic area district, designated by ordinance as an Historic Land Use District. Such Historic Land Use District shall be administered by the Commission as a separate land use classification, including among permitted land uses, those uses found by the Commission in its Survey Report to have been present in the area during the historical period sought to be restored or preserved, or those uses compatible with the authentic preservation and restoration of sites and structures of that period. Other land uses within the Historic Land Use District shall be considered non-conforming.

(d) An historic district established by an ordinance adopted pursuant to this section may be an Historic Performance Standard District. Any structure and appurtenant open spaces found by the Commission in its Survey to have been in existence as of one hundred years ago, and any other site or structure of especial historical, cultural or architectural interest may be included in an Historic Performance Standard District. The provisions of any historic district ordinance adopted pursuant to this section shall extend to any designated site or structure, and to adjacent structures which materially affect the exterior architectural features of a protected site or structure.

(e) An historic district ordinance adopted pursuant to this section may establish one or more historic districts of either or both of the foregoing kinds.

(f) The governing body shall, upon adoption of an historic district ordinance pursuant to this section, publish a list of affected sites, structures and areas. Any person aggrieved by the inclusion of a site or structure within the protection of the historic district ordinance may bring suit to enjoin the inclusion of his site or structure within the protection of the ordinance in the Court.\(^3\)

Section 6. Powers and Duties of Commission Upon the Adoption of the Historic District Ordinance.

(a) The Commission shall administer any historic district or districts established by an historic district ordinance. It shall set standards for the granting of certificates by the building inspector pursuant to section 8 of this Act, and shall review applications for certificates in the manner provided in that section. The Commission may grant a certificate unconditionally or conditionally upon the applicant's acceptance of the Commission's changes in his application. The Commission may deny any applicant a certificate for cause.

(b) If the Commission should be charged with administering an Historic Land Use District, it shall publish the land uses permitted within such district, according to the data disclosed in its survey of the area. Applicants who desire a variance from any such land uses shall apply to the review body in the manner provided for in the case of any other zoning variance.\(^4\)

(c) The Commission shall have the following additional powers:

1. to meet from time to time to review applications for certificates or for other purposes by call of the chairman or by motion from any Commission member;

2. to maintain such records of structures protected by the historic district ordinance as may be necessary for the administration of any such district or districts;

3. to recommend to the governing body such changes in the administration of the historic district ordinance as may be necessary for the protection of the area designated by such ordinance.

---

3 Insert the appropriate court of general jurisdiction which can take jurisdiction over the subject matter of the action.

4 It is intended that variance machinery applicable to regular zoning ordinances should be followed in the land use administration of historic districts.
or regulations concerning the historic district or districts as the Commission thinks appropriate;
(4) to publish and make available to the public a booklet listing the standards of certification for alteration or construction of any structure within any historic district or districts administered by the Commission. The booklet shall discuss the exterior architectural features of primary concern to the Commission;
(5) to exercise any other power not contrary to law, which is necessary or expedient for the execution of the Commission's powers and duties under this Act.

Section 7. Certificate of Appropriateness Required.
(a) No person owning, renting or occupying property included in an historic district shall make any environmental change unless a certificate has been issued by the building inspector stating that the proposed environmental change is appropriate, and authorizing the applicant to undertake such environmental change.
(b) Any person violating the provisions of this section shall be subject to the procedures set forth in sections ——— of Acts of ———, ch. ——— concerning municipal corporations as amended.5
(c) In addition, the Commission may bring an action in any court of competent jurisdiction to enjoin any violation of this section.

Section 8. Procedure for Obtaining Certificate of Appropriateness.
(a) Any applicant requesting an environmental change shall apply in writing to the building inspector for a certificate.
(b) If it appears that the environmental change proposed by the applicant is:
   (1) appropriate to the purposes for which the historic district was established, or
   (2) is necessary to enable the applicant to make reasonable use of his property, the building inspector shall certify the proposed environmental change as appropriate. In reaching this determination the building inspector shall be guided by the standards set out by the Commission in its booklet as prescribed in section 6(c) (4) of this Act.
(c) If the building inspector finds that the environmental change proposed by the applicant does not meet the standards of section 8(b), he shall forward the application to the Commission for further consideration. He shall notify the applicant in writing within ten (10) days of his decision to forward the application to the Commission.
(d) Upon receipt of an application from the building inspector, unless the Commission shall direct the building inspector to issue the certificate as applied for, the Commission shall set a date of hearing for the applicant, which shall not be within seven (7) days of the date of notice of hearing, nor more than thirty (30) days after the date of application for the certificate. Notice of hearing shall be by registered letter addressed to the applicant at the address stated in the application. The letter may contain requirements for supplemental information, including but not limited to, any photographs, plans, floor plans, elevations and detail drawings of any structure or portion thereof to be subject to environmental change. If the applicant is unable to furnish any or all required supplemental information by the date set for a hearing on his application, the applicant may request such a delay in the hearing as may be reasonable for obtaining the same. The Commission may also grant a request for delay for any other good cause.
(e) If upon hearing by the Commission, it shall appear that the environmental change proposed in the application meets the standards of section 8(b) above, the Commission shall direct the building inspector to issue a certificate to the applicant.
(f) If upon hearing by the Commission, the application for a certificate is disapproved, the Commission may, at its discretion, direct the building inspector to issue a conditional certificate to the applicant, which, if the applicant accepts the

5 Insert the appropriate reference to the penalty clause of the Building Code Act.
changes in his plans recommended by the Commission, shall become an unconditional certificate.

(g) If upon hearing by the Commission, the application for a certificate is disapproved, and no conditional certificate is issued, or the applicant refuses to accept the changes in his plans recommended by the Commission, the applicant may appeal such disapproval to the review body. The applicant shall have ten (10) days from the date of his hearing before the Commission to file a notice of appeal with the review body and the Commission.

(h) An application for a certificate on appeal from the Commission will be reviewed by the review body at its next regular session following the filing of an appeal by the applicant. The review body shall send the applicant notice by registered mail at least ten (10) days prior to the meeting, of his right to attend and be heard at the session. If the application is approved by the review body, pursuant to the standards of section 8(b) above, the review body shall direct the building inspector to issue a certificate to the applicant. The review body may also direct the issuance of conditional certificates as provided for in subsection (f) above.

(i) If an application for certification is disapproved by the review body, or if the issuance of a conditional certificate is directed by the review body, and the applicant refuses to accept its conditions, the applicant may appeal the adverse determination in accordance with the provisions of sections ———, ch. ———, relating to municipal corporations. Appeal shall be limited to questions of law and fact presented by the report of the Commission and review body. Findings of fact made by the Commission and the review body shall not be set aside unless such findings are clearly erroneous.

(j) In any case involving the denial of a certificate by the Commission or the review body, or the issuance of a conditional certificate by either body, all findings of fact and conclusions of law of the Commission and/or the review body shall be set forth in writing.

(k) If an applicant prevails on appeal to the courts, any court finding in favor of the applicant shall order the building inspector to issue a certificate to the applicant.

(l) An application for a certificate shall be presumed to have been approved if no action has been taken by the building inspector or the commission within thirty (30) days after the date of filing of the application.

Section 9. Ninety Day Waiting Period for Demolition or Removal. The Commission shall have the power to enforce a ninety (90) day waiting period following the preliminary approval of a certificate for the demolition of a structure included in an historic district, or for its removal out of the protection of an historic district, during which time the Commission shall conduct negotiations with the owner and any other party in an effort to find a means of preserving the structure which is to be demolished or removed. The ninety (90) day waiting period may be waived if the Commission shall determine that the structure under consideration for demolition or removal is of no particular historic or architectural significance, and that the structure does not contribute to the maintenance of the educational and cultural value of the locality.

Section 10. Supervision of Certification. The building inspector or his appointed representative shall periodically inspect any undertaking authorized by a certificate. If the building inspector shall detect any violations of the conditions or standards prescribed in the certificate, or any uncertified environmental change of any structure within the protection of the historic district ordinance, he shall report such violation to the Commission for appropriate action under section 7(b) and (c) of this Act.

Section 11. Certain Changes Not Prohibited. Nothing in this Act shall be con-

6 Insert the reference to the Zoning Appeals statute: authorizing appeals from municipal zoning administrative bodies to the courts.
strued to prevent the ordinary maintenance or repair of any exterior architectural feature of any structure included within an historic district which does not involve a change in design, material, color or outer appearance thereof, nor to prevent any environmental change which the Building Inspector shall certify is required by the public safety because of an unsafe or dangerous condition.

Section 12. Retroactivity. This Act shall not apply to any environmental change which shall occur prior to the date on which the structure involved is effectively included within an historic district.

Section 13. Severability. Should any section, clause or provision of this Act be declared by any court to be unconstitutional or invalid for any reason, such declaration shall not affect the validity of the Act as a whole, nor any part thereof other than the part so determined to be unconstitutional or invalid.

Section 14. Repealer. All laws and clauses of laws in conflict with this Act are hereby repealed to the extent of such conflict.

Section 15. Effective Date. This Act is hereby declared to be an emergency and shall become effective when passed.⁷

⁷ This is the form in Indiana for immediate adoption of any statute. Insert appropriate state effective date provisions.
APPENDIX B

MODEL HISTORIC DISTRICT ORDINANCE FOR CITY OF SWINTON

I. Ordinance Conforming to Model Act.

A. Ordinance Establishing Commission. The Common Council of the City of Swinton hereby ordains:

Section 1. Historic District Commission. There shall be a Swinton Historic District Commission, consisting of five (5) members appointed by the Mayor and Common Council, which shall discharge the powers and duties of an historic district commission under section 4 of the Historic District Enabling Act.

Section 2. Commission, Members, and Term. Members shall serve a term of four years, except that initial appointments to the Swinton Historic District Commission shall be for the term indicated in the case of initial members, beginning on or after November 1, 1969. Members shall be the following:

<table>
<thead>
<tr>
<th>Member</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mrs. Elsie Potsherdl</td>
<td>Two (2) years</td>
</tr>
<tr>
<td>Hon. Al Grabs</td>
<td>Two (2) years</td>
</tr>
<tr>
<td>Dr. Richard Grubb</td>
<td>Three (3) years</td>
</tr>
<tr>
<td>Carlton Lusk</td>
<td>Three (3) years</td>
</tr>
<tr>
<td>Rev. Calvin Hobart</td>
<td>Three (3) years</td>
</tr>
</tbody>
</table>

Section 3. Survey.
(a) The Swinton Historic District Commission shall make a survey of the historic sites and structures of Swinton, and shall report to the Common Council by November 1, 1970 whether an historic district ordinance would be in the best interests of the City of Swinton.
(b) Such Survey shall include the required items contained in sections 4(c) and 4(d) of the Historic District Enabling Act.

B. Ordinance Establishing Historic Districts. The Common Council of the City of Swinton hereby ordains:

Section 1. Historic Land Use District Established. The 12 blocks more or less comprising the original plat of the City of Swinton is designated the Old and Historic Swinton District, to be an Historic Land Use District pursuant to the provisions of section 5(c) of the Historic District Enabling Act.

Section 2. Historic Performance Standard District Established. The following sites and structures not included within the geographic area of the Old and Historic Swinton District are hereby designated an historic performance standard district, pursuant to the provisions of section 5(d) of the Historic District Enabling Act. (herein insert the location and proper designation of each affected property)

Section 3. Powers and Duties of Historic District Commission. The Historic District Commission shall administer the Old and Historic Swinton District and the performance standard district in accordance with the provisions of section 5(b) of the Historic District Enabling Act, which incorporates by reference sections 6 through 9 of the Historic District Enabling Act, which are hereby incorporated by reference.

Section 4. Certificate Required. No person owning, renting or occupying property included in either historic district shall make any environmental change

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1 This ordinance for the mythical city of Swinton, is intended to be used with the Historic District Enabling Act, which provides for the appointment of the Historic District Commission to survey the locality for preservation purposes.
unless a certificate has been issued by the city building inspector, pursuant to sections 7, 8, 9, and 10 of the Historic District Enabling Act, which are hereby incorporated by reference.

Section 5. Effective Date. This ordinance shall be effective when passed.

MODEL HISTORIC DISTRICT ORDINANCE FOR CITY OF NEW CASTLE

I. Resolution Proposing Investigation of Historic Areas.

BE IT RESOLVED by the Common Council of the City of New Castle assembled, that:

(a) the Common Council propose the designation of the 16 blocks more or less comprising the original plat of the City of New Castle as the New Castle Historic District.

(b) the New Castle City Planning Commission, as designated agent of the Common Council, shall carry out an investigation into the propriety of designating said original plat as an historic district, return to be made to the Common Council by one year from and after the adoption of this resolution.

II. Historic District Ordinance. The Common Council of the City of New Castle hereby ordains:

Section 1. That the Zoning Ordinance of the City of New Castle adopted May 11, 1934, as amended, is hereby amended by adding a chapter designated chapter 14, immediately following the last chapter of the present ordinance, to wit:

CHAPTER 14 NEW CASTLE HISTORIC DISTRICT

Section 14.01 Purpose. The Common Council finds that the historic heritage of New Castle is among its most valued and most important educational, cultural and economic assets. It is the intent of the Common Council to:

(a) protect the heritage of the City of New Castle by preserving historic sites and structures located within the City of New Castle, since the historic properties within New Castle reflect elements of the cultural, social, economic, political or architectural history of New Castle, as evidenced by the report of the New Castle City Planning Commission of July 2, 1968, and

(b) stabilize and improve property values in the City of New Castle, and

(c) strengthen the local economy of New Castle and Ticonderoga County, and

(d) promote the use and preservation of historic sites and structures situated within the original plat of New Castle for the education, welfare and pleasure of the residents of the City of New Castle and the residents of this State.

Section 14.02 Definitions. As used in this Act—

(1) Alteration means any material change in the exterior architectural features of any structure situated within the Historic District, less than demolition, removal or construction of any such structure. Any renovation of the interior of such structure which has no appreciable effect upon the exterior architectural features of such structure shall not be deemed an "alteration."

(2) Applicant means any person, persons, association, partnership or corporation who applies for a certificate in order to undertake any environmental change on property subject to this ordinance.

(3) Building Inspector means the New Castle Building Inspector.

(4) Certificate means the certificate required as condition precedent to any environmental change undertaken within the historic district as required by section 14.07 of this ordinance.

2. The model historic district ordinance for the mythical city of New Castle is intended to be used in cities where no state-wide enabling legislation exists. As such, it embodies the standards set out in the Model Act in ordinance form to ensure constitutional delegation of authority under City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).
Commission means the New Castle Historic District Commission established by sections 14.04 and 14.05 of this ordinance.

Environmental Change means any alteration, demolition, removal or construction of any structure subject to the provisions of this ordinance.

Exterior Architectural Features means the architectural style, general design, and general arrangement of the exterior of a structure, including the color, the kind and texture of the building material, and the type and style of the doors, light fixtures, signs and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior architectural features" shall be construed to mean the style, material, size and location of all such signs.

Governing Body means the Common Council of the City of New Castle.

Historic District means the New Castle Historic District as established and defined under sections 14.03, 14.04 and 14.05 of this ordinance.

Locality means the City of New Castle.

Member means any member of the Commission.

Review Body means the New Castle Zoning Board of Appeals.

Structure means any building or fixture situated within the historic district, including but not limited to the following: houses, stores, warehouses, churches, schools, barns, and other like buildings; fences, outhouses, pumps, grave stones, light fixtures and other like fixtures; markers, display boards, display panels, outdoor signs and other like outdoor advertising fixtures.

Section 14.03 New Castle Historic District Designated. The following is hereby designated the New Castle Historic District:

All that land lying within the original plat of the City of New Castle, being the same surveyed and platted by Jonathan Abercrombie, November 10, 1808, recorded as the "Platt of Newcastle-on-Ticonderoga," Ticonderoga County Registry of Deeds, Book A, vol. 23, January 15, 1809, containing all the land lying between Fourth Street on the north, Front Street on the south, the Ticonderoga River on the east and Washington Street on the west, to be entered on the master map in red.

Section 14.04 Historic District Single Use District. From and after the effective date of this ordinance, the historic district shall be a single use district. The Commission shall recommend to the Governing Body those uses which shall be permitted within the historic district, conforming to the period of 1835-1845, which is hereby declared to be the period of the restoration of any structure situated within said historic district. All uses found by the Commission to be appropriate to said period shall be permitted within the historic district.

Section 14.05 New Castle Historic District Commission. There shall be a New Castle Historic District Commission, consisting of five (5) members appointed by this governing body.

3 This district is designed as a single-area geographic district. When a performance standard district is contemplated in lieu of, or in addition to, a geographic area district, add the following section:

Section ——— Performance Standard District Designated. (a) The following structures are hereby designated structures of special historical interest, being more than 100 years old, and of cultural or historical importance to the City of New Castle. (here insert names and property description)

(b) Structures listed above shall be subject to the provisions of sections 14.05 through 14.11 of this Ordinance, and shall constitute an historic performance standard district. The provisions of this ordinance shall extend to the designated structure, appurtenant open spaces, and to adjacent structures which materially affect architectural features of any structure protected by this section.

4 If a performance standard district is contemplated, designate this section as subsection (a) and add the following as subsection (b): (b) The provisions of this section shall not apply to any historic performance standard district established or designated by this ordinance.
(a) Except in the case of charter members, members shall serve for an initial term of four (4) years and until their successor is appointed and qualified.

(b) Members shall be qualified by reason of special interest, knowledge or training in such fields as history, architecture, or other like fields of special knowledge or interest. Members shall be eligible for re-appointment.

(c) Members shall be residents of the City of New Castle.

(d) The charter members of the Commission shall be the following persons, to serve for the term indicated, from and after October 31, 1968:

<table>
<thead>
<tr>
<th>Member</th>
<th>Term:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henry S. Winston</td>
<td>Two (2) years</td>
</tr>
<tr>
<td>Mrs. Matilda Hawley</td>
<td>Two (2) years</td>
</tr>
<tr>
<td>Hon. Eustace Frinkley</td>
<td>Three (3) years</td>
</tr>
<tr>
<td>Donald J. Gramespacher</td>
<td>Three (3) years</td>
</tr>
<tr>
<td>Smoot Crachitt</td>
<td>Three (3) years</td>
</tr>
</tbody>
</table>

Section 14.06 Powers and Duties of Commission. The Commission shall administer the historic district. It shall review all applications for any certificate filed with the building inspector pursuant to the provisions of section 14.07 of this Ordinance. The Commission shall have the power to grant a certificate unconditionally to applicants, or conditionally, upon the applicant's acceptance of the Commission's changes in his application. The Commission may deny any applicant a certificate for cause.

The Commission shall have the following additional powers:

(1) to meet from time to time to review applications for certificates or for other purposes by call of the chairman, or by motion from the Commission members;

(2) to maintain such records of structures within the historic district as may be necessary for the administration of the historic district;

(3) to recommend to the governing body such changes in the size, administration or regulations concerning the historic district as the Commission thinks appropriate;

(4) to publish and make available to the public a booklet listing the standards of certification for alteration or construction of any structure within the historic district, which discusses the exterior architectural features of primary concern to the Commission in issuing a certificate;

(5) to exercise any other power not contrary to law, which is necessary or expedient for the carrying out of the Commission's powers and duties under this Act.

Section 14.07 Certificate of Appropriateness Required. No person owning, renting or occupying property within the historic district shall make any environmental change unless a certificate has been issued by the building inspector stating that the proposed environmental change is appropriate and authorizing the applicant to undertake such environmental change. Any person violating the provisions of this section shall be subject to the procedures set forth in sections ............... of Acts of .........., ch. ............. § ............. concerning municipal corporations as amended. In addition, the Commission may bring an action in any court of competent jurisdiction to enjoin any violation of this section.

Section 14.08 Procedure for Obtaining Certificate of Appropriateness. (a) Any applicant requesting an environmental change shall apply in writing to the building inspector for a certificate.

5 Here insert the appropriate reference to the penalty clause of the Building Code Act.
(b) If it appears that the environmental change proposed by the applicant is:

(1) appropriate to the purposes for which the historic district was established, or

(2) is necessary to enable the applicant to make reasonable use of his property, the building inspector shall certify the proposed environmental change as appropriate. In reaching this determination, the building inspector shall be guided by the standards of the Commission as prescribed in any publication issued under the provisions of section 14.06(4) of this ordinance.

(c) If the building inspector finds that the environmental change proposed by the applicant does not meet the standards of 14.08(b) he shall forward the application to the Commission for further consideration. He shall notify the applicant in writing within ten (10) days for his decision to forward the application to the Commission.

(d) Upon receipt of an application from the building inspector, unless the Commission shall direct the building inspector to issue the certificate as applied for, the Commission shall set a date of hearing for the applicant, which shall not be within seven (7) days of the date of the notice of hearing, nor more than thirty (30) days after the date of application for the certificate. Notice of hearing shall be by registered letter addressed to the applicant at his residence or place of business, or if the applicant is a corporation, at the address stated in the application. The letter may contain requirements for supplemental information, including but not limited to any photographs, plans, floor plans, elevations and detail drawings of any structure or portion thereof to be subject to environmental change. If the applicant is unable to furnish any or all required supplemental information by the date set for a hearing on his application, the applicant may request such a delay in the hearing as may be reasonable for obtaining the same. The Commission may also grant a request for delay for any other good cause.

(e) If upon hearing by the Commission, it shall appear that the environmental change proposed in the application meets the standards of 14.08(b), the Commission shall direct the building inspector to issue a certificate to the applicant.

(f) If upon hearing by the Commission, the application for a certificate is disapproved, the Commission may, at its discretion, direct the building inspector to issue a conditional certificate to the applicant, which, if the applicant accepts the changes in his plan recommended by the Commission, shall become an unconditional certificate.

(g) If upon hearing by the Commission, the application for a certificate is disapproved and no conditional certificate is issued or the applicant refuses to accept the changes in his plans recommended by the Commission, the applicant may appeal such disapproval to the review body of the governing body. The aggrieved applicant shall have ten (10) days from and after the date of his hearing before the Commission to file a notice of appeal with the review body and the Commission.

(h) An application for certificate on appeal from the Commission will be reviewed by the review body at its next regular session following the filing of an appeal by the applicant. The applicant shall receive at least ten (10) days prior to the meeting of the review body, written notice by registered mail of the hearing. If the application is approved by the review body, the building inspector shall issue a certificate to the successful applicant. The review body may also direct the issuance of conditional certificates as provided for in 14.08(f) above.

(i) If an application for a certificate is disapproved by the review body, the aggrieved applicant may appeal to the circuit court of Ticonderoga County, in the
manner prescribed by ......... of Acts, ch. ...........,\(^6\) relating to municipal corporations. Appeal shall be limited to questions of law and fact presented by the report of the Commission and review body. Findings of fact made by the Commission and the review body shall not be set aside unless such findings of fact are clearly erroneous.

(j) In any case involving the denial of a certificate by the Commission and review body, or the issuance of a conditional certificate by the Commission or the review body, the findings of fact and conclusions of law of such Commission or review body shall be set forth in writing.

(k) If an applicant prevails on appeal to the court, the court shall order the building inspector to issue a certificate to the applicant.

(\(l\)) An application for a certificate shall be presumed to have been approved if no action has been taken by the building inspector or the commission within thirty (30) days after the date of filing of the application.

Section 14.09 Ninety Day Waiting Period for Demolition or Removal. The Commission shall have the power to enforce a ninety (90) day waiting period following the preliminary approval of a certificate for the demolition of a structure within the historic district, or for its removal out of the historic district, during which time the Commission shall conduct negotiations with the owner and any other party in an effort to find a means of preserving the structure which is to be demolished or removed. The ninety (90) day waiting period may be waived if the Commission shall determine that the structure under consideration for demolition or removal is of no particular historic or architectural significance, and that the structure does not contribute to the maintenance of the educational and cultural value of the historic district.

Section 14.10 Supervision of Certification. The building inspector or his appointed representative shall periodically inspect any undertaking authorized by a certificate within the historic district. If the building inspector shall detect any violation of the conditions or standards prescribed in the certificate, or any uncertified environmental change of any structure within the historic district, he shall report such violation to the Commission for appropriate action under section 14.07 of this Ordinance.

Section 14.11 Certain Changes Not Prohibited. Nothing in this Act shall be construed to prevent the ordinary maintenance or repair of any exterior architectural feature in the historic district which does not involve a change in design, material, color or outer appearance thereof; nor to prevent the environmental change of any exterior architectural feature which the building inspector shall certify is required by the public safety because of an unsafe or dangerous condition.

Section 14.12 Retroactivity. This Ordinance shall not apply to any environmental change within the historic district which shall occur prior to the date on which the structure involved is effectively included within an historic district.

Section 14.13 Severability. Should any section, clause or provision of this Ordinance be declared by any Court to be unconstitutional or invalid for any reason, such declaration shall not affect the validity of the Ordinance as a whole nor any part thereof other than the part so decided to be unconstitutional or invalid.

Section 14.14 Repealer. All ordinances and clauses thereof in conflict with this Ordinance are hereby repealed to the extent of such conflict.

Section 14.15 Effective Date. This Ordinance is effective from and after July 30, 1968.

\(^6\) Here insert the reference to the Zoning Appeals statute authorizing appeals from municipal zoning administrative bodies to the courts.
APPENDIX C

MODEL EASEMENT FOR PRESERVATION OF EXTERIOR ARCHITECTURAL APPEARANCE OF HISTORIC STRUCTURE

THIS CONVEYANCE MADE on the ....... day of ..................., 19 ........, between Rufus Putnam and Eileen Putnam of the City of New Castle, Ticonderoga County, State of .................., hereinafter called the GRANTOR, and the Ticonderoga County Historical Association, Inc., hereinafter called the GRANTEE.

WITNESSETH: WHEREAS, the GRANTOR is the owner in fee simple of certain real estate situated within the City of New Castle upon which a structure of historical importance stands, adjacent to the New Castle Historic District, and to the property commonly known and described as the Howard House historic house museum, and is more particularly described as follows:

All of lots 23 and 24, Howard's First Addition to the City of New Castle, as surveyed and platted by Henry Howard, April 24, 1821, recorded as the “Plat of Howard's First Addition to the Town of New-Castle” Registry of Deeds, Book 5, p. 145 December 15, 1821.

Now being used as a residence for a single family, all conforming to uses permitted under law.

AND WHEREAS the said Howard House Historic House Museum is included in the said New Castle Historic District and is a structure of historical importance, and the GRANTEE wishes to preserve the environment in which said Howard House Historic House Museum now exists to further the purposes of the GRANTEE in exhibiting and displaying an historic structure of great educational and cultural value, and therefore to prevent any unsightly developments that will tend to mar or to detract from such environment, and to prevent environmental change which would materially affect the exhibitional value of said Howard House Historic House Museum by altering its surroundings, and to protect the exterior architectural features of adjacent structures, and to that end to exercise such reasonable controls over the property within such restricted area as is described hereafter as may be necessary and expedient to accomplish such objectives,

NOW, THEREFORE, in consideration of the sum of ............... paid by the GRANTEE to the GRANTOR, receipt whereof is hereby acknowledged, the GRANTOR hereby sells, transfers, grants and conveys to the GRANTEE an easement and right in perpetuity to preserve the exterior architectural features of any structure located on the below described real estate:

All of lots 23 and 24, Howard's First Addition to the City of New Castle and all fixtures thereunto, as surveyed and platted by Henry Howard, April 24, 1821, recorded as the “Plat of Howard's First Addition to the Town of New-Castle,” Registry of Deeds, Book 5, p. 143, December 15, 1821.

Which property is hereby designated as a “restricted area” within which area the following definitions, restrictions and covenants shall apply.

I. DEFINITIONS

(1) Alteration means any material change in the exterior architectural features of any structure situated within the above-described easement, less than demolition, removal or construction of any such structure. Any renovation of the interior of such structure which has no appreciable effect upon the exterior architectural features of such structure shall not be deemed an "alteration."

(2) Environmental Change means any alteration, demolition, removal or construction of any structure situated within the above-described property.

1 This model easement form has been drafted by the author; the terms, descriptions and locations used are only for purposes of representation.
(3) **Exterior Architectural Features** means the architectural style, general design, and general arrangement of the exterior of a structure, including the color, the kind and texture of the building material, and the type and style of the doors, light, fixtures, signs and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior architectural features" shall be construed to mean the style, material, size and location of all such signs.

(4) **Structure** means any building or fixture within the restricted area including but not limited to the following: houses, stores, warehouses, churches, schools, barns and other like buildings; fences, outhouses, pumps, grave stones, light fixtures and other like fixtures; markers, display boards, display panels, outdoor signs and other like outdoor advertising fixtures.

(5) **Party of the First Part** means the Grantor, his heirs, executors, administrators, successors and assigns.

(6) **Party of the Second Part** means the Grantee, its successors, trustees, receivers and assigns.

**II. RESTRICTIONS**

(1) The Party of the First Part shall not make any environmental change without first obtaining the approval of the Party of the Second Part in writing. The Party of the First Part shall make written application for permission to undertake any environmental change to the Party of the Second Part, and upon the approval by the Party of the Second Part, may commence such desired environmental change.

(2) The Party of the First Part shall be required to furnish the Party of the Second Part such supplemental information accompanying his request for environmental change as the Party of the Second Part may require, including but not limited to any photographs, plans, floor plans, elevations and detail drawings of any structure or portion thereof to be subject to environmental change.

(3) The Party of the Second Part shall not permit the premises to be used for any purpose not described below:

   (a) single family residence; or
   (b) professional offices; and
   (c) uses incidental to any of the above permitted uses, including accessory buildings; and
   (d) telephone, telegraph or electric lines or pipe lines for the purpose of transmitting messages, heat, light, power and other like utilities; and
   (e) any use existing on the premises at the time of the execution of this easement.

(4) The Party of the First Part shall not dump ashes, trash, sawdust or any unsightly or offensive material upon the restricted area, except as is incidental to the uses prescribed in subparagraph (3) above.

(5) The Party of the First Part shall not place any outdoor advertising fixtures of any kind upon such restricted area, except one sign of not more than eight (8) square feet in area to advertise the sale, hire or lease of the property, and/or one sign of not more than eight (8) square feet in area advertising the location and nature of any professional services to be offered by the Party of the First Part.

(6) The Party of the First Part shall not remove or destroy any trees or shrubs on the land covered by this easement, except as may be incidental to the uses permitted by subparagraph (3) above.

(7) The conditions of this easement shall not prevent any permanent excavation or works necessary to the occupation or use of the restricted area for purposes of the uses permitted in subparagraph (3) above.

(8) The grant of this easement does in no way grant the right of the Party of the Second Part or its members to enter such area for any purpose.

TO HAVE AND TO HOLD the said easement hereby granted unto the GRANTEE forever.
III. COVENANTS

The GRANTOR warrants that he holds the above-described premises included in the restricted area by good and perfect title; having good right and lawful authority to sell and convey the same; that the premises are free and clear from all liens and encumbrances whatsoever, except as hereinafter set forth.

The GRANTOR warrants for himself, his heirs, executors, administrators, grantees, successors and assigns that they will neither lease nor convey any other easement in any way affecting said restricted area without first securing the written permission of the GRANTEE, its successor and assigns.

And ___________________________ being the owner and holder of a certain mortgage lien which is (insert description of lien or liens) against said premises, does hereby join in and consent to said conveyance free of said lien.

And for the consideration aforesaid, I ___________________________ wife of the said GRANTOR, hereby release to the GRANTEE, its successors and assigns all the rights of and to both Dower and Homestead in the granted easement.

IN WITNESS WHEREOF the GRANTOR and the GRANTEE and all persons joining in and consenting to this conveyance set out their hands and seals this, the _______th day of ________________________, 19________.  
________________________________________________________________________(SEAL)
________________________________________________________________________(SEAL)

ATTEST:
________________________________________________________________________
Secretary

ACKNOWLEDGEMENT

On the ______th day of ________________________, 19________, the above named ___________________________ appeared before me, a Notary Public, and acknowledged the foregoing instrument to be their free act and deed.

________________________________________________________________________
Notary Public
APPENDIX D

DECLARATION FORM FOR CONDOMINIUM FOR HISTORIC PROPERTIES

DECLARATION OF CONDITIONS OF OWNERSHIP

PREAMBLE

Section 1. Heritage Restorations, Inc., makes the following declaration of architectural controls and building restrictions relating to the Tract more particularly described in section 2 below and commonly known as “Chalmers’ Row.”

Section 2. The Developer owns lots 24 through 36 inclusive of the original plat of New Castle, Ticonderoga County, State of ......................., as shown on the original “Platt of Newcastle-on-Ticonderoga,” recorded in the Ticonderoga County Registry of Deeds, Book A, vol. 23, January 15, 1809.

Section 3. In consideration of the premises, the Developer establishes the following general plan for the protection of the several historic structures located within the Tract; for the protection of the property adjacent to each historic structure, and for the benefit of the Tract and all successors in interest of the Developer. The Developer intends that every condition in this declaration shall inure to the benefit of, be binding upon, and pass with each residential unit in the Tract for the benefit of each residential unit, the Developer and its successors in interest.

CONDITIONS OF OWNERSHIP

ARTICLE I. DEFINITIONS

Section 1. The following definitions shall apply to terms used in this declaration:

(a) Alteration means any material change in the exterior architectural features of any structure situated within the Tract, less than demolition, removal or construction of any such structure. Any renovation of the interior of such structure which has no appreciable effect upon the exterior architectural features of such structure shall not be deemed an alteration.

(b) Association means the Chalmers’ Row Neighborhood Association, Inc. as established by Article II of this declaration.

(c) Common Property means all property in which Association members are co-tenants, and any easement for historic preservation purposes appurtenant to any lot in the Tract and held in trust for the members by the Association.

(d) Control Committee means the Architectural Control Committee established by Article III of this Declaration.

(e) Developer means the Heritage Restorations, Inc., a corporation organized under the .................... General Corporations Act of .................... as a stock corporation.

(f) Environmental Change means any alteration, demolition, removal or construction of any structure situated within the Tract.

(g) Exterior Architectural Features means the architectural style, general design and general arrangement of the exterior of a building or other structure situated within the Tract, including the color, the kind and texture of the building material, and the type and style of the doors, light fixtures, signs and other appurtenant fixtures. In the case of outdoor advertising signs, “exterior architectural features” shall be construed to mean the style, material, size and location of all such signs.

(h) Residential Unit means the structure and lot owned by any successor in interest of the Developer designed for occupancy by a single family as its place of residence, subject to the easement for historic preservation purposes held by the Association for the benefit of the members.

(i) Structure means any building or fixture situated within the Tract, including but not limited to the following: houses, stores, warehouses, churches, schools, barns, and other like buildings; fences,outhouses, pumps, grave stones, light fixtures and other like fixtures; markers, display boards, display panels, outdoor signs and other like outdoor advertising fixtures.

(j) Tract means lots 24 through 36 inclusive as shown on the original plat of New Castle, Ticonderoga County, .................... more particularly described in Preamble, sections 1 and 2.
ARTICLE II. ASSOCIATION

Section 1. Association Established. There shall be an association of every owner of a residential unit in the Tract, to be known as the Chalmers' Row Neighborhood Association, Inc. The Association shall be a not-for-profit corporation, organized under the .................... General not-for-profit Corporation Act of .................

Section 2. Membership. Each owner of a residential unit in the Tract shall be a member of the Association. Membership shall be appurtenant to each residential unit, and transfer of title to the residential unit shall also transfer membership to the successor in interest of the transferor of the residential unit.

Section 3. Powers of Association. (a) The Association shall manage the common property of the members. It shall have the power to make any environmental change in any structure situated on common property recommended by the Control Committee.
(b) The Association shall have the powers set forth in its Articles of Incorporation and By-Laws, which documents constitute Appendices A and B to this Declaration. It shall have such other powers as are granted by law to not-for-profit corporations.
(c) The Association shall have legal title to common property as trustees in favor of the residential unit owners.
(d) The Association shall have the power to make necessary environmental changes to maintain the character and historic atmosphere of any structure, including any structure within a residential unit, if a residential unit owner should fail to maintain the exterior architectural features of any such structure.
(e) The Association shall have the power to assess the members for the maintenance of residential units and common property, as more particularly set out in Appendices A and B.
(f) The Developer has caused the Association to be incorporated for the benefit of its successors in interest.
(g) Lien in Favor of Association. The Association shall have a lien against each of the lots in the Tract to secure the full and faithful performance of these conditions of ownership, including the provisions of Article IV, section 4 relating to mandatory repairs to exterior architectural features. If any owner of any residential unit in the Tract should fail to perform any condition set forth in this Declaration, the interest of the defaulting owner may be foreclosed by the Association in the same manner as a mortgage. If any residential unit is redeemed after foreclosure under this section, it shall be subject to this lien as to additional future non-performance or default. This lien shall apply to the Grantee of a Sheriff's Deed after foreclosure, and to any mortgagee of any owner who takes title to a residential unit in lieu of foreclosure. This lien may be foreclosed as a mortgage with power of sale in accordance with the provisions of section .................... Code of Civil Procedure as amended. It is understood, however, that this lien shall be subordinate to and inferior to any prior or subsequent lien created by a bona fide lending institution on the interest of any defaulting owner.

ARTICLE III. CONTROL COMMITTEE

Section 1. Control Committee Established. (a) There shall be an Architectural Control Committee appointed by the Association. It shall consist of three (3) members appointed by the Association.
(b) Initially one member shall be appointed for a term of one year, one member shall be appointed for a term of two (2) years, and one member shall be appointed for a term of three (3) years. Thereafter appointments in any case shall be for a term of four (4) years. Members of the Control Committee shall be appointed for as many additional terms as the Association desires.
(c) Vacancies during the term of any member shall be filled by interim members chosen by the Association to complete the unexpired portion of the term of the member vacating his position.

Section 2. Powers and Duties. (a) No environmental change proposed by any residential unit owner for any structure shall be undertaken unless the Control Committee shall approve the same in writing, after examining all relevant data to determine the appropriateness of the recommended environmental change.

(b) The Control Committee shall determine the appropriateness of any proposed environmental change in accordance with the standards set down in any historic district ordinance affecting the tract. In addition, the Control Committee shall issue a publication containing the standards of appropriateness for any environmental change undertaken within the Tract.

(c) The Control Committee shall be responsible for recommending mandatory repairs to the exterior architectural features of any structure situated within the Tract to the Association. If such mandatory repairs are recommended, the Control Committee shall supervise any approved mandatory repairs.

(d) Should the Control Committee refuse to approve an application for environmental change for any residential unit owner, the aggrieved owner may present his case to the members of the Association. The Association may overrule the Control Committee as to the appropriateness of any proposed environmental change applied for by any residential unit owner by two-thirds (2/3) vote of all voting members.

(e) All recommendations for mandatory repairs under the provisions of Article IV, section 4 made to the Association shall be approved if two-thirds (2/3) of all voting members of the Association vote for the undertaking of such mandatory repairs.

(f) The Control Committee shall be responsible for recommending and supervising approved environmental change to common property, other than the easement appurtenant for historic preservation, held by the Association as trustee for residential unit owners. Recommended environmental change to common property shall be approved by majority vote of all residential unit owners.

Section 3. Prohibited Land Uses and Permitted Land Uses. (a) The following land uses are expressly authorized for residential unit owners:

1. Single family residential;
2. Multiple family residential in such units as are approved for such use by the Association;
3. Professional offices;
4. Any land use incidental to the approved uses listed in subsection (a) (1) through (3) above, and not included in prohibited land uses listed in subsection (b) below.

(b) The following land uses are prohibited:

1. No outside drying or laundry areas shall be permitted;
2. No tent, shack, trailer, basement, garage or outbuilding nor any other form of temporary residence on any lot in the Tract shall be used for either permanent or temporary residence;
3. No gas, oil, sulphur or water wells shall be operated on any lot;
4. No structure shall be used for the carrying on of any slaughter house, rendering plant, abattoir or other like enterprise, nor shall any structure or any lot be used for the manufacturing of goods, retail or wholesale merchandising, sales on consignment, or any other like industrial or commercial use;
5. No farm animals, including, but not limited to, turkeys, geese, ducks, chickens, pigeons or fowls of any type, nor pigs, goats, rabbits, hares, horses, cattle or other like domestic animals shall be kept on any lot in the Tract.

Section 4. Permitted and Prohibited Environmental Change. (a) The following
environmental changes are permitted, with the concurrence of the Control Com-
mittee or the Association:

(1) Interior changes to any residential unit which does not materially alter or
affect the exterior architectural features of such unit;
(2) ordinary conservatory repairs to any exterior architectural feature which does
not involve the inappropriate alteration of such feature in context with the structure
or other structures in the Tract;
(3) any environmental change undertaken in accordance with the standards of
the Control Committee as enumerated in its publication setting down such stan-
dards for residential unit owners;
(4) any other environmental change not prohibited in subsection (b) below.

(b) The following environmental changes are prohibited:

(1) No fence, rail or hedge over 36 inches shall be placed in front of the set-back
line on any lot, as shown in the master map included in Appendix ....................
No fence, wall, rail or hedge shall be over 72 inches in height elsewhere on any
lot in the Tract.
(2) No radio post, radio pole, or flag pole shall be erected constructed or placed
upon any lot.
(3) No outside television or radio antenna shall be constructed installed or main-
tained on any lot in the Tract.
(4) No environmental change not approved
by
the Control Committee or the
Association as prescribed in Article III, section 2 above.

(c) It is the purpose of establishing this system of permitted and prohibited en-
vironmental changes to provide a means by which suitable standards for appropriate
exterior architectural features for every unit in the Tract can be maintained. The
Developer intends by this system of controls to preserve the exterior architectural
features of all units in the Tract to conform to the exterior architectural features
of each unit during the decade 1835-1845, in accordance with its basic develop-
mental scheme for Chalmers' Row.

ARTICLE IV. COMMON PROPERTY

Section 1. Common Property Created. Common property shall consist of all prop-
erty described in this Article. Common property shall be held by the Association
in trust for the members of the Association.

Section 2. Nature of Ownership. (a) Each residential unit owner shall own an
undivided 1/14th interest in an equitable fee simple in all real property held in
common, as described in the Master Map for the Tract (Appendix ...............).
(b) Each residential unit owner shall own an undivided 1/14 interest in equitable
fee in the easement appurtenant to common property over each residential unit
for historic preservation purposes.
(c) The Association shall own all common property in legal fee as Trustee in
favor of the members. The declaration of Trust describing the powers and duties
of the Association and its Board as Trustee in favor of the members is appended
as Appendix .............

Section 3. Insurable Interest. The Association, as Trustee, shall have an insurable
interest in any structure on common property, and shall provide for adequate in-
surance protection against the hazards of fire, wind, water, tornado, Acts of God
and other perils to eighty percent of the value of any structure situated on common
property. The Association shall also have an insurable interest in the exterior
architectural features of any unit in the Tract, to the extent its interest in preserving
the appropriateness and harmony of the Tract appears, against the same perils.

Section 4. Mandatory Repairs. (a) If the Control Committee finds that any
residential unit owner has permitted the exterior architectural features of his unit
to become inappropriate through alteration or deterioration as required by Article III, section 4 of this Declaration the Control Committee shall issue notice to the residential unit owner of mandatory repairs. Such notice shall outline in sufficient detail, the nature of the inappropriate exterior architectural features of the unit, and the estimated cost for such repairs as are necessary to conserve the exterior architectural features of the unit.

(b) The residential unit owner notified pursuant to subsection (a) above shall have thirty (30) days to initiate action to comply with such notice. If the residential unit owner fails to initiate action within thirty (30) days, or alternatively, initiates action within the required period, but does not complete the required course of conservation within a reasonable time, the Control Committee shall recommend to the Association that the Association undertake or complete the conservatory repairs so required, in accordance with the provisions of Article III, section 2(c). The Association shall then acquire a lien against the residential unit in accordance with the provisions of Article II, section 4 of this Declaration.

ARTICLE V. REGULATIONS

Section 1. Extension of Conditions of Ownership. All the conditions of ownership contained in this Declaration shall terminate on the 1st day of January 2018, unless a majority of residential unit owners shall have executed and recorded a consent to continue this Declaration at any time within six (6) months prior to that date. If any residential unit owner desires to be relieved of the conditions contained in this Declaration at that time, such owner may elect to conform to the provisions of Article V, section 7 relating to right of first refusal.

Section 2. Notice of Claim of Breach. The Association may execute, acknowledge and record in the Registry of Deeds of Ticonderoga County, a Notice of Claim of Breach at any time a breach of any condition of ownership may occur. Such notice shall set forth the facts of such breach, describing the lot or lots upon which such breach has occurred, and setting forth the name of the owner or owners involved. Such notice, when recorded, shall be notice to all persons of such breach, providing that an action on the breach has been commenced within sixty (60) days after recording of the notice. If no action on the breach has been initiated within sixty (60) days of recording of notice of breach, the notice will be void and the breach will be waived.

Section 3. Partition Prohibited. No residential unit owner in the Tract shall partition or attempt to partition or sever his interest in common property. Subject to the earlier termination of this section as provided in Article V, section 1, this section will be terminated upon the death of the last surviving descendant now living of Mr. Joseph P. Kennedy of Hyannisport, Massachusetts.2

Section 4. Protection for Mortgages and Title Insurance Companies. (a) Any residential unit owner in the Tract, or any corporation insuring the lien of any encumbrance on any residential unit may presume conclusively that no breach exists under these conditions of ownership, providing such encumbrance is recorded in the Registry of Deeds for Ticonderoga County prior to the commencement of any action to establish such breach, and not within sixty (60) days after the recording of any notice.

(b) No breach of any condition of ownership created by this Declaration shall impair or invalidate any encumbrance created by any mortgage or trust deed made for value which may then exist upon any residential unit. Any such mortgage or trust deed shall be prior and superior to any rights created by this Declaration in

1 This condominium form has been drafted by the author; the terms, descriptions and locations used are only for purposes of representation.
trust deed shall be prior and superior to any rights created by this Declaration in favor of the Association or any residential unit owner. However, if any such mortgage or trust deed is foreclosed, or if the mortgagee acquires title to any residential unit in satisfaction of his indebtedness, then the successor in interest of the mortgagor and the interest so transferred shall be subject to any condition of ownership contained in this Declaration, free from the effect of any breach of any condition occurring prior to his succession to the interest.

Section 5. *Waiver and Legal Action in the Event of Breach.* (a) The conditions of ownership set forth in this Declaration are to be covenants running with the land. A breach of any condition of ownership which continues may be enjoined, abated or remedied by appropriate proceedings by the Association, or in the event of its failure to undertake action, by any residential unit owner.

(b) A waiver of any breach of any condition of ownership shall not be construed as a waiver of a succeeding breach of any other condition of ownership.

Section 6. *Interpretation of Declaration.* All terms and conditions contained in this Declaration shall be construed in a manner calculated to achieve the purposes of this Declaration.

Section 7. *First Refusal in the Event of Sale or Lease.* (a) No residential unit owner shall sell or lease his residential unit, or any portion thereof, without first giving written notice of his intention to do so to the Association. The notice shall set out the terms, conditions, price or rental of the residential unit and membership, and the name and address of the prospective buyer or tenant. The Association shall have thirty (30) days after receipt of notice to purchase or lease the interest upon terms not less favorable to the residential unit owner than those set forth in the notice. This right of first refusal shall not be used by the Association for the purpose of discriminating against any prospective buyer or tenant on the basis of his race, religion or national origin.

(b) This section shall not apply to a sale or lease by the Developer, or to a sale by foreclosure or to the acquisition of title by a lender in lieu of foreclosure.

(c) Subject to the earlier termination of this section as provided for in Article V, section 1, this section shall terminate in accordance with the provisions of Article V, section 3.

ARTICLE VI. AMENDMENTS

Section 1. These conditions of ownership may be amended at any time by any instrument in writing signed by the owners of a majority of residential units, or by two-thirds (2/3) of the Directors of the Association. Such amendment shall be effective when recorded.

IN WITNESS WHEREOF, Heritage Restorations, Inc., a corporation, as Developer, sets out its hand and seal, this the ..........th day of ...................., 19......
Heritage Restorations, Inc.
By..................................................
James O. Kalliguchi, President
## COMPARATIVE PROPERTY VALUES OF RESTORED AND UNRESTORED SINGLE FAMILY DWELLINGS ON CHURCH HILL IN THE 2300 AND 2500 BLOCKS OF E. GRACE STREET, RICHMOND, VA.

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2. Assessed value of land and improvements in thousands of dollars.
3. With one exception.