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## HISTORIC PRESERVATION LAW

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This manuscript will touch on the following historic preservation subjects:

1. Historic districts.
2. Historic landmarks.
3. Historic Preservation Commissions.
  - (a) Powers of Commission.
  - (b) Certificates of Appropriateness.
  - (c) Delayed demolition.
4. National Register of Historic Places.
  - (a) Federal tax credit from National Register listing.
  - (b) State tax credit from landmark/district designation.
  - (c) State tax credit for mill rehabilitation.
5. Ad valorem tax reduction/deferment from landmark or district designation.
6. Historic preservation covenants.
7. Historic preservation easements.
8. Historic covenant and easement tax deductions.

## 1. Historic Districts

Historic districts and landmarks are accorded special treatment in NCGS §160A-400.1, *et seq.* NCGS §160A-400.4 provides that a municipality may “...as part of a zoning or other ordinance...designate...one or more historic districts...” A historic district may be a “separate use district classification” or as an “overlay district.”

The statute provides further: “...where historic districts are designated as separate use districts, the zoning ordinance may include as uses by right, or as conditional uses, those uses found by the Preservation Commission to have existed during the period sought to be restored or preserved, or to be compatible with the restoration or preservation of the district.”

NCGS §160A-400.4 sets forth a procedure to establish a historic district, involving investigation, a report, analysis and recommendations concerning that reports by the State Historic Preservation Officer or designee, and a discretionary review by “...any local preservation commission or other interested body for its recommendations....”

NCGS §160A-400.2 confers upon counties the same powers as municipalities. The legal history preceding NCGS §160A-400, *et seq.* includes the adoption of the Old Salem Historic Preservation District by the City of Winston-Salem in 1948 without specific statutory authority, and local legislation authorizing Winston-Salem, Halifax and Edenton to create historic districts.

Local legislation enacted in 1965 authorizing Winston-Salem, Halifax and Edenton to create historic districts. N.C. Session Laws CH404 (1965). Subsequently, in NCGS §160A-395, *et seq.*, now §160A-400.1, *et seq.*, the General Assembly authorized municipalities to “...to designate one or more historic districts as a part of its general zoning ordinance.” In 1975, the City of Raleigh adopted the Oakwood Historic District ordinance.

The constitutionality of historic districts was squarely presented to our Supreme Court by A-S-P Associates, who brought an action challenging the validity of a Raleigh ordinance adopted in 1975 created the Oakwood Historic District. A-S-P Associates, owner of a vacant lot behind the Governor’s Mansion, originally zoned office and institutional, then subject to the new Historic District Overlay, cited the 14<sup>th</sup> Amendment and Article 1, Section 19 of the North Carolina Constitution. They relied on a line of cases which our Supreme Court admitted “...has indicated that a statute or ordinance based purely on aesthetic considerations, without any real or substantial relation to the public health, safety or morals, or the general welfare, deprives individuals of due process of law.”

A-S-P Associates contended that even if the ordinance was a valid exercise of the police power as applied to historic structures, it is invalid when applied to new construction on a vacant lot. The Court surveyed statutes, ordinances and case law nationwide, concluded that more than 500 cities and towns had passed local landmark or historic district ordinances.

It cited *Penn Central Trnsp. Co. v. New York City*,<sup>1</sup> which upheld “comprehensive governmental regulation of private property designed to preserve historic buildings in the City of New York.” While our Supreme Court did not endorse broadening the police power “...to include reasonable regulation of property for aesthetic reasons alone,” it had “no difficulty” in doing so, “...when the object of such control is the preservation of the State’s legacy of historically significant structures.”

It distinguished “purely aesthetic regulations” which “are concerned with good taste and beauty, from those dealing with historical preservation.” It held that historical preservation is a stimulus to the general welfare, the revitalization of deteriorating districts, and contributing to their economic and social stability, and of generating substantial tourist revenues. It quoted the “reasonableness” standard from *Euclid v. Ambler Realty*,<sup>2</sup> by noting that comprehensive regulation of the construction, reconstruction, alteration, etc. of the buildings and appointing a commission was “reasonable.”

## 2. Historic Landmarks

Designation of landmarks is provided for in NCGS §160A-400.5 and 400.6. Designation of landmarks refers to a designation of a specific site of “...special significance in terms of its historical, prehistorical, architectural, or

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<sup>1</sup> 438 U.S. 104, 98 S.E.2d 2646 (1978).

<sup>2</sup> 272 U.S. 365, 47 S. Ct. 114 (1926).

cultural importance, and to possess integrity of design, setting, workmanship, materials, feeling and/or association.” There is a detailed procedure for review, analysis and adoption of landmark designations.

### 3. Historic Preservation Commission

A necessary prerequisite to designating historic landmarks is the creation of a Historic Preservation Commission by the local government. NCGS §160A-400.7.

(a) Powers of Commission. The powers of a Historic Preservation Commission are to “review and act upon proposals for alterations, demolitions or new construction with historic districts or for the alteration or demolition of designated landmarks....” NCGS §160A-400.8

(b) Certificate of Appropriateness. No exterior portion of any building or other structure which has been designated a landmark or is in a historic district “shall be erected, altered, restored, moved or demolished...until after an application for a Certificate of Appropriateness as to exterior features has been submitted to and approved by the Preservation Commission. The Certificate of Appropriateness applies to interior features where the owner consents to the same. NCGS §160A-400.9(b). A Certificate of Appropriateness Q and A from Capital Area Preservation, from Raleigh, North Carolina, is attached.

The city, county historic preservation commission “or other party aggrieved” may institute appropriate actionable proceedings to prevent unlawful

demolition, destruction, material alteration, remodeling or removal by retraining order. NCGS §160A-400.11.

(c) Delayed Demolition. An application for a Certificate of Appropriateness authorizing the relocation, demolition or destruction of a registered landmark or a building, structure or site within a historic district, may not be denied except where, under NCGS §160A-400.14(c), it is "...determined by the State Historic Preservation Officer as having statewide significance as defined in the criteria of the National Register of Historic Places. That subsection (c) provides an exception where the Commission "...finds that the owner would suffer extreme hardship or be permanently deprived of all beneficial use or return by virtue of the denial." The statute provides, however, for a delay for a period of up to 365 days from the date of approval. During that period, the Preservation Commission will attempt to negotiate with other parties to find a means of preserving the building or site.

#### 4. National Register of Historic Places

The National Register program is separate and independent from local historic districts or historic landmarks designation. The National Historic Preservation Act of 1966 set up the National Register Program, administered by the National Park Service. The local work in reviewing and nominating properties is actually performed by the State Historic Preservation Office. The National Register listing is honorary and places no obligation or restriction on a

private owner unless that owner receives a federal benefit, such as a tax credit, in which event federal preservation standards are applicable.

### 5. Tax Credits

There are state and federal tax credits which can reduce the cost of a certified rehabilitation of certain income-producing historic structures by 40%. There is no federal tax credit for rehabilitation of a non-income-producing property. There is a state income tax credit of up to 30% over five years against the costs of a qualified rehabilitation of a non-income-producing property, which includes an owner-occupied residence. NCGS §105-129.35 to 105-129.38. The state tax credit for non-income-producing properties applies only if the rehabilitation expenses exceed \$25,000, within a 24-month period, apply only to “work upon or within a historic structure,” e.g., excluding acquisition costs, new addition, or site work. This credit applies only to a building listed in the National Register of Historic Places or within certain designated historic districts. See the National Register Facts Sheet.

Add: 36 CFR Part 60 (interim rule), 36 CFR Part 61 (final rule), North Carolina Administrative Code T07: 04R.0300.

On June 29, 2006, the General Assembly enacted House Bill 474, entitled “Mill Rehabilitation Tax Credit,” to be codified as NCGS §105-129.70, to establish a state tax credit for an income-producing rehabilitated mill property. Eligible sites include a certified historic structure located in this state that “...was used as a manufacturing facility or for purposes ancillary to manufacturing, as a

warehouse for selling agricultural products, or as a public or private utility.”

There is an add-on provision which does not appear to meet the foregoing criteria but sweeps in a certified historic structure that “...at one time served as a State training school for juvenile offenders,” the latter being granted a credit equal to 40% of the rehab expenses.

## 6. Ad Valorem Tax Reduction and Deferment

Property designated as a historic structure or site or designated as a local historic landmark is designated a special class of property under the North Carolina Constitution, which thus allows a statutory tax reduction of 50%. NCGS §105-278. There is a current-year and three-year rollback if the eligibility for historical classification is lost.

Real property and easements used “wholly and exclusively held and used for nonprofit historical preservation purposes by a nonprofit historical association or institution” are held under the Historic Preservation Agreements Act, NCGS §121-34, *et seq.* (which applies to agricultural conservation easements as well) are exempt from state taxation.

## 7. Historic Preservation Covenants

Real estate may be sold subject to protective covenants. Real estate law tells us that such covenants will run with the land to the grantee, its heirs and assigns, forever. An individual owner of a historic property may encumber a sale to another individual with covenants relating to historical preservation.

A “preservation agreement” is described in NCGS §121-35 as a right granted “...appropriate to preservation of a structure or site historically significant for its architecture, archeology or historical associations.”

## 8. Historic Preservation Easements

A historic preservation easement granted to a preservation entity, such as Preservation North Carolina, is recorded at the Register of Deeds, runs with the land, binding on the owner and subsequent owners. Historic preservation easements are advocated by the historic preservation community as a means of assuring that “the property will not be changed in a way that would compromise its historic and architectural integrity.” The owner retains the fee simple interest in the property and can convey it subject to the easement.

If a historic preservation easement is given in perpetuity, the donor is eligible for a tax deduction based on a donation to a qualified 501C3 charitable non-profit (IRS Code of 1954 as amended, Section 170, and IRS Regulations, Section 1.170A-14). The State of North Carolina also offers an income tax credit for easement donations. NCGS §105-151.12. The value of the gift effects a reduction in the value of the donor’s estate for federal estate tax purposes. The easement may also be the basis for a reduced local property tax appraisal based on the “...true value of the land and improvement less any reduction in land caused by the agreement.” NCGS §121-40.

A sample protective covenant and rehabilitation agreement which is used by Preservation North Carolina is attached. (Preservation North Carolina is a non-profit corporation which, operating either as itself or through an affiliate, the Historic Preservation Foundation of North Carolina, Inc. acquires endangered

properties, stabilizes and/or rehabs them and resells them, subject to protective covenants.)

There is a vast amount of information readily accessible about the foregoing topics, available both on-line and from various agencies. The National Park Service website for information about the National Register of Historic Places is [www2.cr.nps.gov/pad/fapap.htm](http://www2.cr.nps.gov/pad/fapap.htm) . The program is administered locally by the State Historic Preservation Office. It has printed materials available. The local telephone number is (919) 733-6545. Landmark Designation is administered locally by Capital Area Preservation. Telephone (919) 833-6404. Capital Area Preservation has information sheets on Landmark Designation, Certificates of Appropriateness, and a Historic Preservation Easements Q & A, among other topics. Preservation North Carolina has sample form preservation covenants, easements and tax credit information available on request. The local Preservation North Carolina telephone number is 919) 832-3652. Additional tax credit information may be obtained from the State Historic Preservation Office, telephone (919) 733-6547.. Another useful website is the USGS Environmental Affairs Program, USGS Guide to Federal Environmental Laws and regulations, [http://water.usgs.gov/eap/env\\_guide/cultural.html](http://water.usgs.gov/eap/env_guide/cultural.html). Also, see the attached comprehensive list of web site contacts.

For more information on the preservation of historic homes, visit the following websites:

The National Trust for Historic Preservation  
[www.nationaltrust.org](http://www.nationaltrust.org)

Resources for Historic Properties  
[www.historicproperties.com](http://www.historicproperties.com)

Historic Preservation Resource  
[www.preservationdirectory.com](http://www.preservationdirectory.com)

Resources for Historic Home Lovers  
[www.oldhouses.com](http://www.oldhouses.com)

North Carolina State Historic Preservation Office  
[www.hpo.dcr.state.nc.us/bibliog.htm](http://www.hpo.dcr.state.nc.us/bibliog.htm)

Historic Preservation Tax Credits in North Carolina  
[www.hpo.dcr.state.nc.us/tchome.htm](http://www.hpo.dcr.state.nc.us/tchome.htm)  
[www.hpo.dcr.state.nc.us/credits.htm](http://www.hpo.dcr.state.nc.us/credits.htm)  
[www.hpo.dcr.state.nc.us/ta90nc.htm](http://www.hpo.dcr.state.nc.us/ta90nc.htm)  
[www.hpo.dcr.state.nc.us/tafaq.htm](http://www.hpo.dcr.state.nc.us/tafaq.htm)  
[www.hpo.dcr.state.nc.us/standard.htm](http://www.hpo.dcr.state.nc.us/standard.htm)

Preservation North Carolina  
[www.presnc.org](http://www.presnc.org)  
[www.presnc.org/learnmore/relatedsites.html](http://www.presnc.org/learnmore/relatedsites.html)

Capital Area Preservation  
[www.cappresinc.org](http://www.cappresinc.org)

The Preservation Society of Chapel Hill  
[www.chapelhillpreservation.com](http://www.chapelhillpreservation.com)

Historic Preservation Society of Durham  
[www.preservationdurham.org](http://www.preservationdurham.org)

The Alliance for Historic Hillsborough  
[www.historichillsborough.org](http://www.historichillsborough.org)

Raleigh, A National Register of Historic Places  
[www.cr.nps.gov/nr/travel/raleigh/preservation.htm](http://www.cr.nps.gov/nr/travel/raleigh/preservation.htm)

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