

a national trust publication

Establishing and Operating an Easement Program to Protect Historic Resources

*by Elizabeth Watson and Stefan Nagel
updated by Julia H. Miller and Ross M. Bradford,
with contributions by Thompson Mayes*

The National Trust for Historic Preservation, a private, non-profit membership organization, champions preservation by providing leadership, education, advocacy, and resources to people working to preserve, improve, and enjoy the places that matter to them. Its Washington, DC headquarters staff, six regional offices, and 28 historic sites work with the Trust's 270,000 members and thousands of local community groups in all 50 states. For more information, visit the National Trust's website at www.nationaltrust.org.



NATIONAL TRUST
for HISTORIC PRESERVATION®

1785 Massachusetts Avenue, NW, Washington, DC 20036
202.588.6296 • Fax: 202.588.6038

www.nationaltrust.org



ISBN 978-0891335801



9 780891 335801

Establishing and Operating an Easement Program to Protect Historic Resources

by Elizabeth Watson and Stefan Nagel

updated by Julia H. Miller and Ross M. Bradford, with contributions by Thompson Mayes

When the first edition of *Establishing an Easement Program* was published in 1980, only a few organizations had a clear understanding of the concepts and procedures involved in accepting gifts of preservation easements. This booklet addressed that need by providing a useful discussion on the legal concepts behind easements, the tax benefits available to donors of easements, key considerations in establishing an easement program, and information on where to obtain further assistance. As time evolved, the thirst for this basic information continues. However, the need for detailed information on easement stewardship has also become apparent.

Establishing and Operating an Easement Program attempts to fill that void. This revised and updated version of *Establishing an Easement Program* not only includes updated information on the charitable giving rules as applied to easements, but it also provides expanded discussion on issues relating to the operation of easement programs. Organizations should also consult *The Conservation Easement Handbook*, published by the Trust for Public Land and the Land Trust Alliance, with assistance by the National Trust. The *Handbook* (1988, rev. 2005) provides in-depth discussion on how to manage an easement program, a guide to drafting easements, and a CD-ROM with sample documents. (See Resource Guide on page 23 for information on how to obtain these publications.)

Finally, while this publication is informative, it is important to keep in mind that the real estate, tax, and financial aspects of easements are complex, and specific laws governing easements can vary from one state to another. Any organization contemplating an easement program should consult an attorney who is familiar with preservation and conservation easements. It may also be helpful to contact organizations that have established easement programs, particularly others in the same state.

How Easements Work

An easement is a legal agreement between a property owner (the grantor) and the holder of the easement (the grantee), which governs the current and future owners' treatment of the property. It is an interest or right in a property that falls short of outright ownership. Essentially, when a person holds property, he or she possesses a "bundle" of rights. The bundle is called a "fee simple estate," and its owner is said to own the property "in fee simple." Each of the rights is sometimes referred to as a "less-than-fee interest." A property owner is freely allowed to give away, lease, or sell any of those rights, subject only to legal agreements that previous owners may have made, to state laws, and to local government regulations such as zoning. Also, a government agency empowered with the right of eminent domain



Lowell's Boat Shop in Amesbury, Mass., a working museum where skilled craftspeople continue to build wooden boats using traditional methods, is protected by a preservation easement.

— Photo by National Trust for Historic Preservation.

may condemn such rights. The most common example of easements are right-of-way easements and those used to provide public access for recreational uses such as hunting, fishing, hiking, or skiing.

Easements have been used for centuries in different forms. They originated in common law; that is, the law as it has evolved through court decisions regarding real property and contracts. The concept of using easements to protect historic and cultural resources, however, has only recently evolved into a useful tool for preservation and conservation. Scenic easements that limit development and types of uses on property along certain highways were purchased

Types of Easements

Preservation and conservation organizations may make use of two general types of easements:

- **Conservation easements**, which primarily protect open spaces and environmentally significant land, but may be used to preserve historic and scenic views, the surroundings of culturally significant structures, or archeological sites. The rights restricted by these and other easements are sometimes called “development rights” because property owners generally are prohibited from building on the open space.
- **Preservation easements**, which protect historically and/or architecturally significant buildings and the context for those buildings. Easements control changes to a building’s character-defining features, including additions, and require proper maintenance of the property. They may include aspects of a conservation easement, by controlling rights to develop the property in order to preserve the resource’s historic setting. Preservation easements generally fall into two categories, those that only protect the exterior of buildings and those that protect both the exterior and interior. Easements that protect interiors are less common and may protect all or only part of a building’s interior spaces, depending on the building’s degree of integrity. Interior easements raise special issues because of inherent difficulties in reviewing interior uses and spaces held in private ownership.

by the National Park Service and a few state agencies as early as the 1930s. It was not until 1964, however, that the Internal Revenue Service recognized a charitable contribution tax deduction for the value of the gift of an easement, which has been a major factor ever since in encouraging conservation and preservation organizations to establish easement programs. Moreover, Congress did not expressly authorize the deduction of easement donations from income, estate, and gift tax liability for conservation purposes in Section

170(h) of the Internal Revenue Code until 1976, and the Internal Revenue Service did not issue its first set of conservation easement regulations until 1986, which are codified as Section 1.170A-14 of the Treasury Regulations.

In a preservation or conservation easement, the grantor may agree to allow certain activities to take place on the property, to meet certain obligations, or to refrain from activities that affect the integrity of the property. These restrictions and obligations typically fall within three categories: maintenance obligations, absolutely prohibited activities, and activities that require the grantee’s review and approval. The rights the owner relinquishes in the easement, as well as any obligations, may affect the monetary value of the easement for tax purposes. The grantee, in return, accepts responsibility for enforcing the agreement. To ensure that the easement provisions are being observed, every easement must provide the grantee access for periodic inspections.

In addition to general provisions, some permitted or prohibited uses can be enumerated. Depending upon its purpose, an easement might restrict how a property may be used, for example, by allowing only residential use for certain buildings and prohibiting commercial or industrial uses. For undeveloped land, permitted uses might include farming, timbering, and other non-intensive uses. The organization and the owner might agree to exempt certain specified buildings from the easement requirements in order to allow the owner more freedom in operating a business or farm. The easement can prohibit subdivision or development of land or merely set limits and may specify the areas to be subdivided and the number of buildings allowed, together with controlling their design and siting.

Other activities that may be restricted or prohibited by an easement include road building or other construction activities, such as grading and excavation; dumping unsightly wastes; cutting trees and clearing the land; damming streams or filling in wetlands; or erecting most types of signs.

The property owner might further agree to allow limited public access or tours of a building a certain number of times per year. A landowner might make available a narrow strip of land along a stream for fishing access. If the donor of the easement plans to claim the donation as a charitable contribution for tax purposes, then the easement must contain public access provisions.

While easement holding organizations may accept donations of preservation and/or conservation easements, this booklet focuses primarily on preservation easements. Keep in mind, however, that easements are flexible and thus each easement is unique to the property it protects. Easements can be tailored to fit property characteristics and the needs of the property owner within the guidelines the organization sets for accepting easements and the specific requirements under the Internal Revenue Code, if a charitable tax deduction is contemplated.

Easement Programs

A preservation and conservation easement program helps to protect historically and architecturally significant buildings and their settings, and scenic and natural resources. The costs of establishing and operating such a program may be significantly lower than buying properties outright, particularly when easements can be acquired by donation. However, the benefits are the same.



Easement programs protect the buildings and settings of rural villages, historic urban buildings, sensitive environmental areas, and farmland. Environmental organizations also have used easements to protect marshes, unique geological formations, special wildlife and plant habitats, and other sensitive environmental resources.

An easement program enables a tax-exempt, charitable organization or public agency to protect buildings or land against potential adverse development or changes by acquiring partial interests in such properties. An easement assures a measure of protection for historical and culturally significant properties without burdening an organization with the greater costs and responsibilities of full ownership. The property remains in private hands and on the local tax rolls. The owner enjoys use of the property, subject to restrictions delineated in the easement document, and shares in the protection of a property for the benefit of the

general public and future generations, thus fostering a sense of private responsibility for preservation.

Easement programs also benefit the public by preserving the nation's cultural and natural heritage as well as open space and scenic resources. Indeed, many state legislatures have recognized these benefits, providing for their acquisition by public agencies as well as charitable nonprofit organizations.

Some regard easement programs as an intermediate approach for the protection of properties and areas, falling between full ownership and governmental land-use controls such as zoning. An easement program can reinforce local land-use plans, historic district ordinances, and other public environmental controls. By supplementing or providing for review of proposed land-use or design changes, easements help maintain and improve the quality of urban and rural environments. Placing easements on undevel-

oped properties surrounding a historic estate can substantially reduce or eliminate pressures to develop them, thereby protecting the context of that resource as well. Properties already developed can be protected against more intensive development. In urban areas, strategically placed easements can discourage land assembly that would enable the construction of large, incompatible developments, such as high-rise construction in low-density neighborhoods.

In addition, unlike zoning, easements may be tailored to protect the particular character-defining features of individual properties. They are also impervious to political pressures to weaken preservation ordinances or grant variances and exceptions, since the properties are safeguarded by organizations that are committed to protecting and maintaining easements and the easements are generally permanent.

Easements can protect a variety of buildings and settings, such as the open fields and outbuildings at the Cambus-Kenneth Farm in Danville, Ky.

— Photo by National Trust for Historic Preservation.

Protecting Historic Resources

Although the perception is that preservation easements primarily protect large, architecturally significant houses, preservation easements also protect a wide variety of other building types, such as historic textile mills or tobacco barns, or the fields and woodlots of a historic farmstead. Organizations, for example, can seek to protect one or more of the following resources through an easement:

- structures or areas of historical and architectural significance;
- structures or areas of visual importance;
- the surroundings of structures or open spaces within historic areas;
- historic views from structures, districts, and transportation routes;
- archeological sites;
- scenic views;
- floodplains, wetlands, and shore lands;
- steep slopes (to control soil erosion and water runoff);
- woodlands and timberlands;
- prime agricultural soils or productive farms;
- habitats for rare and endangered species;
- natural areas with distinctive physical features (e.g., bluffs, outcroppings, or barrens) or of particular scenic beauty;
- other open spaces especially valued by the community; and
- areas adjacent to these protected resources, to act as buffers.

Easements can also be useful estate planning devices. Through an easement, a property owner can protect land or buildings from incompatible changes while still being able to sell or bequeath his or her property. In other words, easements can be designed to meet the owner's present needs and also ensure that his or her wishes with regard to the future treatment and protection of the property are fulfilled. Furthermore, as discussed in more detail below, an easement donation may qualify the donor for various tax savings.

Legal Considerations

Easements are governed by state property law. Because that law can vary from state to state, certain characteristics of easements may be permissible in some states but not in others. Some states may impose specific requirements to perfect an easement or limit the terms upon which easements may be granted. For example, they may require that the easements' existence be considered by local tax assessors, establish specific notice and recording procedures, or limit the types of organizations authorized to accept easements.

Twenty-two states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have enacted the Uniform Conservation Easement Act, recommended by the National Conference of Commissioners on Uniform State Laws, or a variation of it: Alabama, Alaska, Arizona, Arkansas, Delaware, District of Columbia, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, Puerto Rico, South Carolina, South Dakota, Texas, U.S. Virgin Islands, Virginia, West Virginia, Wisconsin, and Wyoming. See "A Few Facts About the Uniform Conservation Easement Act," Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws (2007), posted at www.nccusl.org. The remaining states have enacted their own laws. (See Appendix A.)

Tax Considerations

A prospective donor will consider three levels of taxation in evaluating an easement: federal taxes; state taxes, which often reflect deductions available at the federal level; and local property taxes. Easement program administrators should be

prepared to discuss, in a general manner, the various tax benefits associated with easements. Donors must be encouraged to investigate these benefits further with their attorneys and tax advisers.

Federal Tax Provisions

The donor is allowed to take a charitable contribution deduction for federal income, estate, and gift tax purposes on the value of an easement that is donated to a tax-exempt charitable organization or public agency for defined "conservation purposes." Section 170(h) of the Internal Revenue Code authorizes federal charitable contribution deductions for gifts of preservation easements as "a qualified conservation contribution." Regulations interpreting section 170(h) of the code are published at Treas. Reg. § 1.170A-14.

The donor is entitled to a charitable contribution deduction in the amount of the fair market value of the donated interest. A charitable contribution will be deemed made for a conservation or preservation purpose if one of the following is protected by the donation:

- land areas for outdoor recreation or for the education of the general public;
- natural environmental systems, such as fish, wildlife, or plant habitat;
- open spaces (including farm land and forest land) where such preservation will yield a significant public benefit either in the form of scenic enjoyment for the public or where such preservation effort is pursuant to a clearly delineated government conservation policy; or
- "historically important land areas" or "certified historic structures."



Easement programs can help reduce development pressures. The Shaker community at Sabbathday Lake in Maine chose to sell their development rights in exchange for easements, enabling them to continue to own their property without succumbing to the pressure to subdivide and sell for residential development.

– Photo by Maine Preservation.

Certified Historic Structures

A certified historic structure is any structure, building, or land area that is individually listed in the National Register of Historic Places or any building that is located in a “registered historic district” and certified as contributing to the historical significance of the district by the Secretary of the Department of the Interior. This means that the building shares the qualities that enabled the district to qualify for its designation. To obtain certification as a contributing structure in a historic district, the owner must submit Part I of the Historic Preservation Certification Application to the state historic preservation officer (SHPO) in the state in which the property is located. The SHPO reviews the application and submits it to the National Park Service for certification. (The certification procedures are set forth at 36 CFR §67.4, which is available on the National Park Service’s website at www.cr.nps.gov. A list of state his-

toric preservation offices is available on the National Trust for Historic Preservation’s website at www.nationaltrust.org.)

If the historic district is not listed in the National Register, but has been established under a state or local law, the property may still qualify as a certified historic structure if it is a “contributing structure.” However, the law establishing the historic district must be certified by the Secretary of the Interior “as containing criteria that will substantially achieve the purpose of preserving and rehabilitating buildings of historic significance to the district” and “as meeting substantially all of the requirements for the listing of districts in the National Register.” Certification of local preservation laws is accomplished under the National Park Service’s Certified Local Government Program.

Certification of properties listed individually in the National Register is not required. However, if a property is only listed as an

individual landmark in a state or local register, the property will need to be listed in the National Register to qualify as a certified historic structure.

In 2006, section 170(h) of the Internal Revenue Code was amended to adopt certain reforms relating to facade easements in historic districts and the valuation of

National Register of Historic Places

The National Register of Historic Places is the official list of our nation’s historic and cultural resources. It includes districts, sites, buildings, structures, and other objects that are significant in American history, architecture, archeology, engineering, and culture. It is maintained by the Secretary of the Interior through the National Park Service. The Keeper of the National Register, located in the Department of the Interior, is responsible for listing and determining eligibility for listing in the National Register. However, the listing process generally starts with the state historic preservation office.



Even strong preservation ordinances may not always protect historic buildings in their entirety. In Washington, D.C., local law protected only the facades of historic buildings, as shown on the right of this photo, while an easement provided full protection for the entire exterior of the National Union Building, shown on the left of the photo.

— Photo by National Trust for Historic Preservation.

easements generally. See section 1213 of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006). The amendments include modifications relating to contributions of easements on buildings in historic districts, the valuation of easements, and annual deduction limitations and carryover periods.

Specifically, the 2006 amendments to the Internal Revenue Code impose additional requirements on buildings in historic districts. The easement, at a minimum, must restrict the entire exterior of the building and prohibit any change to the exterior that would be inconsistent with its historic character. In addition, both the donor and the organization accepting the easement must certify that the organization is qualified to accept the easement and that it has the resources to manage and enforce the restriction and a commitment to do so. Along with a qualified appraisal, the donor must submit to the I.R.S. photographs of each of the exterior facades of the building and a description of all restrictions on development.

Historically Important Land Areas

Donation of an easement for a “historically important land area” includes land that is either:

- independently significant (e.g., Civil War battlefield) and substantially meets National Register criteria (36 CFR 60.4); or
- adjacent to a property listed individually in the National Register of Historic Places where the physical or environmental features of the land area contribute to the historic or cultural integrity of the National Register property. Treas. Reg. 1.170A-14(d)(5).

Under section 1.170A-14(d)(5)(ii)(B) of the Treasury regulations, “historically important land area” also includes structures or land areas within a registered historic district, except buildings that cannot reasonably be considered as contributing to the significance of the district. Treas. Reg. 1.170A-14(d)(5)(ii)(B). Given that the 2006 amendments to the Internal Revenue Code redefine “certified historic districts” to include only buildings (and exclude structures and land areas) in registered his-

toric districts, it is likely that the IRS will revise its regulations to eliminate this interpretation.

To qualify under the Internal Revenue Code and its regulations, the preservation purposes must also be protected in perpetuity. This means, among other things, that states must have passed appropriate easement legislation to offset common law limitations, which only recognize easements that attach to adjacent lands (easement appurtenants). (See Appendix A.) The easement must also provide visual access to the property by members of the public. When a historic structure or land area is not visible from a public way, the easement must include terms of access, designed to ensure that the public has the opportunity to view the property preserved by the easement in a manner consistent with the nature and condition of the property. Also the rights of mortgagees must be carefully set out in the easement to avoid extinguishment of the easement deed in the event of foreclosure. A sample easement deed and associated commentary are included in the *Conservation Easement Handbook*, available from the Land Trust Alliance (www.lta.org).

The Charitable Deduction

How does the charitable contribution deduction work? Generally, in the case of appreciated real property, the deduction may not exceed 30 percent of the donor’s adjusted gross income in the year of the gift. Any excess may be deducted over five additional years or until the value of the donation is used up, whichever comes first. As an alternative, the donor is allowed to donate up to 50 percent of adjusted gross income, as long as the donation deduction is limited to the donor’s basis (typically the original purchase cost) in the property.



The 2006 amendments changed the deduction limitations for taxable years 2006 and 2007, enhancing the deduction limitation to 50 percent, rather than 30 percent of the donor's contribution base (the taxpayer's adjusted gross income without regard to any net operating loss cost carry back) in the year of the gift. Moreover, any excess deduction over this limitation may be carried forward under the same terms for up until 15 additional years or until the value of the donation is used up, whichever comes first. For qualified farmers and ranchers, the aggregate contribution limitation would be extended to 100 percent of the taxpayer's contribution base in the year of the donation, with a 15-year, carry-forward period. Extension of these changes beyond 2007 would require an act of Congress.

An easement may also reduce the value of a property owner's estate for federal estate tax purposes. If the easement is donated while the owner is alive, the value of the easement and any conse-

quent appreciation allocated to the easement is removed from the property owner's estate. If it is given to the organization by will or by the election of the owner's estate, then the value of the easement may be eligible as a charitable contribution deduction for federal estate tax purposes. In addition, land subject to a qualified easement may be excluded from taxation—40 percent of the land's restricted value up to \$500,000—if certain requirements are met. Unless the easement also meets the conservation purposes set forth under I.R.C. § 170(h) (A)(i-iii), (conservation and open space easements), the exclusion does not apply to historically important land areas or certified historic structures. See I.R.C. §§ 2055(f) and 2031(c).

Although the estate tax is projected to be eliminated by 2010 under the Economic Growth and Tax Relief Reconciliation Act of 2001, and then reinstated in 2011 with a \$1 million exemption and tax rate cap of 55 percent, tax-

payers should still consider using conservation easements as a tax planning tool, given the rising values of estates and the likelihood that Congress will make further adjustments along the way. The donation of conservation easements could reduce the value of an estate to the point that the beneficiaries can pay the taxes due without selling part or all of the property in order to do so. This tax benefit may be especially helpful for donors with relatively low taxable incomes who possess large amounts of land.

In addition, the federal gift tax or capital gains tax payable on property given or sold after it is placed under easement may be reduced because of the property's reduced valuation.

The tax benefits associated with the qualified rehabilitation of historic buildings, which were increased under the Economic Recovery Tax Act of 1981, as amended by the Tax Reform Act of 1986, have given rise to increased interest in the tax bene-

Constructed around 1710, the Sydenham House is one of only two 18th-century homes still standing in Newark, N.J. The National Trust holds an easement that restricts interior and exterior changes to the property.

— Photo by National Trust for Historic Preservation.



The location and use of a property can affect the value of an easement for tax purposes. The India House in lower Manhattan, which operates as a private club and restaurant, is protected by an easement.

— Photo by New York Landmarks Conservancy.

fits associated with the donation of easements on rehabilitation projects. The donation of easements on older commercial buildings in active business districts may yield substantial tax benefits to developers when the easements are donated prior to rehabilitation. The Internal Revenue Service has ruled, however, that the investment tax credit for the qualified rehabilitation of a historic structure is subject to partial recapture due to the donation or sale of a facade easement after rehabilitation is completed and the property is placed in service. Rev. Rul. 89-90, 1989-30 I.R.B. 4 (July 24, 1989).

Easement documents must be carefully prepared to conform with applicable federal income, estate, and gift tax requirements. If an easement merely complies with state and local real estate law, it may be valid and enforceable, but it may not qualify as a charitable contribution deduction for fed-

eral tax purposes if it does not meet requirements set out in the Treasury Regulations at § 1.170A-14 and I.R.C. Section 170(h). Indeed, failure to qualify the easement as a charitable contribution may subject the donor to federal gift tax liability.

State and Local Tax Provisions

Income and estate taxes at the state level often parallel the deductions available at the federal level, particularly when the donor's income and estate value are calculated from federal tax returns, as is the practice in many states.

An easement could also affect an owner's local property taxes by causing a corresponding decrease in value. The effect of an easement on local property taxes varies by state and locality and the circumstances surrounding individual properties. Alaska, California, Florida, Georgia, Iowa, Kansas,

Montana, Nebraska, Nevada, North Carolina, Ohio, Oregon, Tennessee, Virginia, and Wisconsin have enacted legislation requiring tax assessors to give full recognition to the reduced marketability of property encumbered by easements (*2 Back Forty*, Land Trust Exchange, no.3, p.9, August 1991).

In the absence of legislation or court rulings that require the assessor to consider an easement in calculating a property's assessment, the assessor may or may not recognize the effect of the easement on the property's value. In cases where a property has greatly increased in value since its last assessment, asking the assessor to consider the effect of an easement may cause the property to be reassessed in its entirety. This may in fact raise the property's assessment even after the easement is taken into consideration. Once an easement has been considered, however, any future increases in assessed value should

be caused only by inflation or a rise in demand for similarly limited property and not by comparison to nearby buildings or land not under easement. It might be helpful to tax assessors if the effect of easements on property value were informally discussed or explained in workshops sponsored by the organization, or if the assessors are provided a copy of *Appraising Easements*, which is available from the National Trust for Historic Preservation (www.preservationbooks.org).

Valuation of Easements

For federal tax purposes, the value of an easement is its fair market value at the time of the donation. There are several methods for determining the value of an easement; however, easements are generally valued by the “before and after” method of valuation: the fair market value of the property after the easement is imposed is subtracted from the fair market value of the property before the easement was donated. The difference is the value of the easement.

The specific terms of the easement, the location of the property, and the applicable zoning are all factors in determining the value of the easement for tax purposes. For example, an easement protecting a historic interior and requiring extensive renovation or rehabilitation work may have a higher relative value (expressed as a percentage of the fair market value of the building before the easement) than an easement that protects only a building’s exterior facade. An easement on a historic commercial building located in a major city’s central business district may have more value than an easement on a single family house in a neighborhood subject to regulation by a local preservation ordinance, depending upon the extent of the easements restrictions on

development rights. Also, an easement on a historic estate in an essentially urban area may be appraised at a higher value than an easement on an estate in a rural area, although comparable in size.

Purchasing an Easement

Although the vast majority of easements held by preservation organizations have been donated to the organization, it is possible to purchase an easement. Even if the cost of an easement is high in relation to the cost of buying the property outright, it may be more advantageous to purchase an easement because the expense of maintaining property owned in fee simple could, over time, prove to be too burdensome.

A few organizations have had success in purchasing exterior easements at low cost, often stipulating that the property owner use the easement purchase funds for exterior restoration. Historic Annapolis Foundation in Annapolis, Md., has worked out a barter system, exchanging various services such as grounds maintenance, historical research, or architectural drawings in exchange for exterior easements.

There are three alternatives to a conventional purchase of an easement:

1. Purchase and resale of the property. The organization can purchase a property in fee simple and sell it subject to an easement, the terms of which can be negotiated with the purchaser if desired. Preservation organizations have been successful in using this technique, although it can tie up large sums of money until the property is sold, and some organizations may find it difficult to raise the money needed to purchase a property upfront.

Overvaluations

Donors and their appraisers should be aware that they can be penalized for overvaluing their gifts. The 2006 amendments to the Internal Revenue Code lowered the threshold for overvaluation penalties for donors and imposed new overvaluation penalties for appraisers. The amendments also imposed new qualification standards for appraisals and appraisers. Easement appraisals must be prepared by a “qualified appraiser,” defined as an individual who (1) has earned an appraisal designation from a recognized professional appraiser organization (or has otherwise met minimum education and experience requirements established by the Secretary of the Treasury), and (2) regularly performs appraisals for compensation, and (3) meets any other requirements that the Secretary may establish. In addition, the law provides that an individual would not be considered a “qualified appraiser” for a specific appraisal—such as an easement—unless he or she “demonstrates verifiable education and experience in valuing the type of property” in question and has not been barred from practice by the IRS or the Treasury Department during the three previous years.

2. Installment plan. The organization may contract with the property owner to buy the easement in an installment sale transaction, enabling the organization to spread its outlay of funds over several years and the owner to spread out the capital gains from the sale.

3. Bargain sale. Because the money earned from the easement sale may be taxed, some owners of appreciated property may be willing to sell an easement at less than its full value—a technique called a bargain sale. The owner may be eligible for a charitable contribution deduction for the difference between the sale price and the appraised value of the easement, perhaps offsetting a portion of the capital gains tax, and the organization obtains the easement at a lower cost.



Landmarks Illinois has operated an easement program for more than 30 years and holds approximately 440 preservation easements on historic properties throughout the Chicago area including the Battledeck House, built in 1930 and located in Highland Park.

— Photo by Landmarks Illinois.

Although installment and bargain sales have been widely used in fee simple acquisitions, they have been used very little in easement purchases. Knowledgeable counsel should be consulted in such transactions.

Organizing and Operating an Easement Program

An easement program requires organization or agency involvement in a variety of activities: the organization must negotiate easement acquisitions, review owners' proposed actions, enforce the easements' provisions, and be prepared to defend against legal challenges should they arise. It is also important for the organization to promote public understanding of the easement concept and the program goals. Recall that an organization accepting a donation of an easement on a certified historic structure in historic district must certify under perjury, that it is

qualified to accept easements and has the resources and commitment to manage and enforce the easement in order for the donor to qualify for a charitable tax deduction. See Pub. L. 109-280, 120 Stat. 780 (2006) (establishing I.R.C. § 170(h)(4)(B)(ii)). Also, because easements must be perpetual in order to qualify for the federal tax deduction an organization must be prepared to assume these responsibilities on a permanent basis or make provisions to transfer the easement to another organization committed to managing and enforcing the easement.

Establishing an Easement Program

Easements provide a unique tool and opportunity for preservation organizations because they enable organizations to protect historic and culturally significant properties without investing large sums of money and assuming full own-

ership obligations. Not every organization, however, has the capacity or commitment to operate an easement program. Before deciding to accept an easement, therefore, it is necessary to determine whether your organization can assume the responsibilities of an easement holder. You need to consider whether such a program fits with your organization's mission, what the goals of your easement program would be, whether your organization has the resources to monitor and enforce easements over time, and how to structure the program.

Program Goals

Because an easement program requires a continuing commitment from the organization, it is important at the outset to examine your organization's charitable or public purposes. The proposed objectives of an easement program should be consistent and integrated with the organization's policies and resources.

Organizations should ensure that easements are accepted only on properties that are important in terms of the organization's overall purposes and fall within their ability to monitor and enforce over time. Organizations should also take into consideration their legal and ethical obligations to ensure that their resources are used efficiently and effectively to promote their charitable purpose.

In establishing specific goals for an easement program, organizations need to develop both short-term and long-term plans that identify the steps the organization must take to establish and operate its easement program. These plans should take into consideration the needs of the organization, the community in which it operates, and the ability of the organization to meet those needs. For example, a fundamental issue to consider is the role the organization would like to assume in the acquisition process. Will it hold the easements indefinitely? Will it pass them on to a government agency or another organization? Will it serve only as a matchmaker for other easement-holding organizations? Will it hold the easement with another organization? Other considerations include the type of resources that the organization would like to hold and the location of such resources.

Program Resources

Organizations should be aware that the costs of monitoring easements and administering easement programs are not insubstantial. Staff time, travel expenses, cost of producing baseline and property documentation, and potential enforcement costs must be calculated and considered when accepting an easement. Most easement programs require that an easement donor contribute to an "easement

endowment" or administration fund. The contribution may be based on one of several calculations:

- fee based on projected costs;
- flat fee, based on the average costs for administering each easement; or
- fee based on complexity of restrictions and nature and size of property or building protected.

The amount and adequacy of these funds must be identified before an easement is acquired.

Also keep in mind that the costs associated with monitoring an easement may vary depending upon the location and condition of the property and the likelihood for enforcement. For example, if the property is located in a remote location, it may be more difficult to monitor and enforce the easement. If the property is in poor condition, it may require extensive time and money to review plans and conduct site visits. Indeed, in some cases, a property may be in such poor condition that its historic integrity would be lost as a result of rehabilitation. If development is contemplated, the costs of monitoring the easement are likely to be higher and enforcement may become a key concern. In general, reviewing requests for alterations to properties protected by easement is very time consuming. Organizations should track time spent on reviewing projects in order to understand the amount of staff time that is actually devoted to easement properties.

Standards and Procedures

The development of objective, well thought-out standards and procedures defines the easement program. Obviously, organizations with efficient easement programs will be more successful in

Acquisition Criteria

Preservation easement holders typically accept easements pursuant to an easement acquisition criteria policy adopted by the organization's board of directors. As with any easement program, the organization should assess the property's conservation or preservation values—its overall significance to the organization and the public-at-large and the need to preserve the property due to outside threats, such as demolition, adverse impacts on viewsheds, long-term neglect, and so forth. In many instances, determinations of significance to justify acceptance of an easement are based on existing governmental designations for historic properties, such as the National Register of Historic Places, state registers, local landmark designations, or local historic districts. In some cases, it may be worthwhile to check with appropriate local, state, or federal agencies and other institutions to see if studies already exist. For example, the local planning department may have conducted or may know of studies on a number of these resources. The state historic preservation office is also an important reference with respect to historic resources.

convincing owners to donate easements over time. Each step in the process, including initial contact with the property owner, procedures for evaluating and approving easements, procedures for monitoring and enforcing easements should be developed up front. Similarly, an organization should have established criteria for accepting easements and official policies for addressing conflicts of interest and resolving disputes as they arise.

Organizations should have prepared written materials that describe the purposes and goals of the program and the process used for accepting easements. These materials should include information on the criteria and screening processes used by the organization for accepting easements and

Generating Publicity

Preservation organizations may generate favorable publicity for their easement programs in a number of ways. In addition to press releases and media coverage, organizations may hold events recognizing a particular donor with a ceremony or hold small receptions from time to time for several donors. Many organizations publicize easements and their programs by attaching a small plaque to buildings or by erecting a small sign on the property. Others post maps of their easements on their website, describing the organization's properties protected by easements.

describe any particular policies regarding requirements under an easement including:

- requests for stewardship contributions,
- title search requirements,
- the process for negotiating an easement and drafting legal documents,
- the need for baseline documentation and property appraisals,
- tax considerations including how to substantiate and report tax-deductible donations of easements, and
- long-term management and monitoring requirements.

The easement program staff, aided by publications and maps, should be able to explain clearly the many options that can be incorporated into the easement. How will an easement preserve my property? How may I best provide for my own and my children's continued use of the property? How will an easement affect my property's marketability? How may I best take advantage of the tax savings?

Keep in mind, however, that while the organization should work closely with potential donors, it is important that the organization not give tax advice to the donor. Organizations should always inform the donor, in writing, of the need to retain separate counsel in order to ensure that the donor's interests are properly protected.

Acquiring the Easement

Once a potential donor has expressed interest, the easement program staff should evaluate the property's characteristics. This will help determine whether a property meets the organization's acceptance criteria and identifies the portions of the property to be protected if the donor or organization decides not to give or accept an easement over the entire property. A tour of the building or land with the property owner will help the staff discover how the donor feels about the property, what the donor's concerns are about the easement, and how knowledgeable the donor is about the property's history, significance, and resources. This helps to establish a basis for negotiating the easement provisions. At this point, it would also be helpful to have an informal estimate made of the property's value and to have the property owner consult legal and financial advisers.

As with all easement projects, the first step in developing a preservation easement is to define the nature of the resource to be protected. What are the character-defining elements of the historic place? What aspects of the building need to be protected? Is a later addition historically significant, or could it be removed or changed?

In answering these questions, preservation organizations apply criteria similar to those they would use in other contexts, such as when designating or regulating

buildings. Particularly useful are the criteria of significance used by the National Park Service in evaluating qualification of properties for the National Register of Historic Places, including 36 CFR §60.4, National Register Bulletin 15: *How to Apply the National Register Criteria for Evaluation* and Preservation Brief 17: *Architectural Character: Identifying the Visual Aspects of Historic Buildings as an Aid to Preserving Their Character*.

Baseline Documentation

Baseline documentation is a record of the property's character-defining features that serves as the basis for determining the features that will be protected under the easement and is used by the organization to monitor and enforce the easement over time. It typically contains photographs, maps and floor plans, the National Register nomination form on the property, if available, and a narrative describing the property and its features and the condition of those features. Baseline documentation is typically gathered at the time the easement is drafted.

Baseline documentation for historic buildings needs to be sufficiently detailed to identify the protected character-defining elements. Ideally, photographic documentation should meet the standards of the Historic American Building Survey (HABS) of the National Park Service. Photographs of each protected facade, interior rooms, special interior features such as woodwork or plasterwork, and exterior landscape features should be a part of the baseline documentation. Floor and site plans should also be included if the room arrangement or site is protected by the easement. For easements that protect land, the baseline documentation should



include a detailed map of the area protected by the easement. Specific features, such as roads, water features, and structures, should be noted. In many instances, aerial photography is used to record the current state of the land that is protected. Although a formal land survey, which can be expensive, often is not required, it may be desirable or necessary in order to obtain an accurate map.

The primary challenge in drafting a preservation easement is to craft the restrictions so that character-defining elements of the property are protected but the restrictions are not so onerous that the property becomes economically unviable. There must be sufficient flexibility in the easement to allow new uses for character-defining buildings, such as tobacco barns on farms no longer used to grow tobacco. Because most easements are perpetual, it is also important to

keep the long-term nature of the easement in mind when drafting the restrictive provisions.

Preservation easements are typically structured to include four types of restrictive provisions: affirmative maintenance provisions; absolute prohibitions; actions that may be undertaken only with prior notice to, and the approval of, the easement-holding organization; and reserved rights that are retained by the property owner. Preservation easements also, of course, contain boilerplate provisions, such as those governing applicable law and rules of construction and procedures governing contract violations, subsequent deeds and transfers, and so forth. In some instances, however, even boiler plate language may need to be tailored to address concerns specific to the nature of the property being protected.

Affirmative Maintenance Provisions

Affirmative maintenance provisions require the property owner to maintain the resources protected by the easement. These provisions are critically important to an easement protecting a building for the simple reason that if a building is not maintained, it will deteriorate over time and be lost. The provision requires the property owner to maintain the property in a good and sound state of repair: to keep painted surfaces painted so that the subsurface is protected; to maintain the roof, gutters, and downspouts so that water does not penetrate the building; and to maintain lawn and garden areas so that weeds and unwanted trees do not grow around the building.

Determining the point at which a failure to maintain the building has become a violation is difficult.

Easements must be monitored on a frequent basis to ensure that owners are complying with the terms of the easement. During inspections, photographs of the property, such as this image of the John H. Doughty House in Absecon, N.J., are taken to document the current condition of the property.

— Photo by National Trust for Historic Preservation.



Easement provisions should require that additions and new construction be compatible in terms of scale, material, and design. The National Trust, which holds an easement on this residence in Waterford, Va., worked with the owner to develop a compatible side addition to the main house which was built around 1803.

— Photo by National Trust for Historic Preservation.

Some holders provide advice about maintenance during easement inspections, such as suggesting a schedule for repainting walls or replacing the roof. If the property owner fails to adhere to a maintenance schedule or does not act on the holder's suggestions over a period of time appropriate to the type of work suggested, the holder may treat the failure to maintain as a violation of the easement.

Absolute Prohibitions

Absolute prohibitions are those actions that a property owner is absolutely prohibited from performing and that the holder has no discretion to permit. These are usually limited to the most damaging acts, such as tearing the buildings down, subdividing the property, or engaging in mining or dumping. Most holders limit the absolute prohibitions to a few critical requirements.

Provisions Permitting Change

The third type of provision permits the owner to perform certain activities only following advance notice and written approval by the holder. Typically, this provision prohibits alterations to the exterior of the building without the approval of the holder. The range of activities constituting an alteration varies with each easement. Holders must consider their capacity to respond to requests for approval when determining the level of activity that will require approval. Responding to requests for approval can be very time consuming, especially when larger projects such as additions are proposed. The cost of responding must be factored into the cost of accepting an easement.

The standards for reviewing proposed changes are typically set forth in the easement. Many organizations use the Secretary of the Interior's Standards for the Treatment of Historic Properties or the Secretary of the Interior's

Standards for Rehabilitation to determine if a change is appropriate. The Standards for the Treatment of Historic Properties include treatments for restoration and preservation as well as rehabilitation, and therefore provide more options for the treatment of the property. "Restoration" returns the building to its appearance at an earlier point in time. "Rehabilitation" returns a building to a state of utility for efficient contemporary use while preserving its character-defining features. Both standards, updated and amended from time to time by the National Park Service, provide useful criteria for holders and property owners.

The easement typically specifies that the property owner must submit sufficient information to enable the holder to assess the requested change. Information may include architectural or landscape plans, specifications, designs, and material samples. Holders may also reserve the right to consult with other entities, such as



governmental agencies, nonprofit preservation and conservation organizations, and/or other advisors, concerning the appropriateness of a requested change. Some easements may even contain clauses that require an organization to respond to a request within a certain number of days or the request is deemed approved. Organizations should carefully review existing easements in their portfolios and become familiar with such deadlines.

- *Additions and new buildings:* One of the more difficult issues is the treatment of additions or the construction of a new building on the property. The preservation community recognizes two basic philosophies in reviewing additions—either the addition should be historicist and look like the existing building, or it should be clearly differentiated so that it does not appear to be part of the historic resource. Regardless of whether

the treatment is historicist or differentiated, the easement provisions should require that additions and/or new construction be compatible in terms of scale, materials, and design, and should typically be subordinate to the main building protected by the easement.

- *Interior protections:* Some preservation easements protect significant interior features, such as woodwork, plasterwork, decorative painting, stairways, or room arrangement. The National Trust for Historic Preservation, for example, includes interior protections in the language of the easement that permits changes with approval, recognizing that woodwork or other features may need to be removed and reinstalled as systems are upgraded over time, and that plaster may need to be replaced. Typically, interior easements provide for greater flexibility in kitchens, bathrooms, and other

utilitarian rooms that are frequently modified; the easement may even exclude them from the review process altogether.

The goals of both the donor and holder determine whether any portion of the building's interior will be subject to the easement. The holder may conclude that a property's historic value lies in the interior and thus embrace the opportunity to protect its significant features. Some donors may be reluctant to include restrictions on interior modifications due to concerns regarding the future marketability of the property or the challenge of meeting public-access requirements, even though it may increase the easement's appraised value.

If the easement donor takes a tax deduction for the easement, and interior protections are included, the easement must comply with the Internal Revenue Service requirements for public access to the features

Easements can also be used to protect significant interior features of a building, such as the interior of the Hodgson House in New Canaan, Conn., designed by Philip Johnson.

— Photo by National Trust for Historic Preservation.

protected. (See discussion on charitable tax deductions above.) State law may also determine whether a “fixture” constitutes realty or simply personal property. The distinction is important because under most state laws, an easement can only protect features that are part of the real estate. In some states, for example, a chandelier or garden statuary may be considered personal property rather than a fixture, and therefore may not be protected under the easement.

- *Replacement materials:* Easements should also address requirements relating to requests to substitute original materials with new materials. One of the most common requests is to replace wood siding with vinyl siding. This request is routinely denied, as vinyl typically changes the character of the building, obliterates original trim details, and may lead to moisture problems with the underlying structure. Far more difficult are requests for substitute roofing materials. Original materials, such as slate, may be prohibitively expensive to replace or repair. However, if patterned with colored slates or distinctive shapes, the roof may be such a character-defining feature that it needs to be preserved or restored in kind.
- *Accessibility and building code compliance:* Requests for change may also be spurred by the need to provide accessibility to the building for individuals with disabilities or to meet building code standards. Although these requirements would appear to be at odds with historic preservation objectives, in fact, in almost all cases, modifications necessary to meet accessibility or building code requirements

can be made in a manner that will not adversely affect the character-defining elements of the building. Preservation organizations, the United State Access Board, and state historic preservation offices usually provide materials and advice to assist property owners in identifying how access and code compliance can be met while protecting historically significant features.

- *Archeological resources:* Archeological resources are commonly found around historic buildings. Preservation easements, therefore, typically require holder approval to make any permanent substantial topographic changes, such as excavation for the construction of roads and recreational facilities, so that archeological sites that may be found on the property are protected. Archeological resource provisions may require an archeological survey prior to the approval of the excavation and may specify whether the property owner or the easement holder will pay for the archaeological work.
- *Landscapes:* Significant landscape features such as fences and stone walls that contribute to the character of the property may also be protected, as well as large old trees or important shrubbery such as old boxwoods. Generally, the removal of trees is approved only when the property owner provides evidence, such as a qualified arborist’s report, that the tree is diseased or damaged or poses a threat to other resources.
- *Changes in use:* Preservation easements may also prohibit a change in use without the approval of the holder. Typically a house will be required to be

maintained as a single-family residence. If maintaining the house as a single-family residence becomes economically insupportable, a change may be allowed that permits the conversion to a compatible use, such as a bed-and-breakfast or condominiums. The change in use is typically reviewed to determine whether it would require modifications to the physical fabric of the house, such as additional bathrooms or fire exits, that would affect the character-defining features.

Reserved Rights and Maintenance

The fourth type of restrictive provision governs the property owner’s reserved rights. This provision frequently specifies the type of maintenance work that the property owner may perform without consulting with the easement holder. For example, the provision may specify that the owner has the right to maintain and repair the buildings provided that he or she uses the same materials, colors, and workmanship.

Casualty Loss and Insurance

Certain “boilerplate” provisions of the conservation easement require different treatment when buildings are being protected. Because buildings are subject to casualty damage or destruction, the provisions relating to casualty loss and insurance requirements are often tailored to address the potential loss of the primary resource protected by the easement—the historic building. Typically the easement will require that if the protected buildings are damaged or destroyed by fire, hurricane, or other cause, the property owner will notify the holder and will perform only emergency work until the perma-



ment repairs can be approved. Often the provision requires an assessment of the feasibility of restoring the damaged buildings and a process for determining if the buildings should be restored. If the property owner and holder agree, then the property is restored or, if the decision is not to restore the building, the easement may be extinguished. When the property owner and the holder do not agree, mediation may be provided, or the parties may go to court to seek a judicial decision.

A holder's decision on whether restoration is required tends to be influenced by the availability of insurance proceeds to pay for the work. The insurance requirement in the easement therefore becomes critically important. Many preservation easements require that the property be insured by a qualified insurance company for loss or damage, and that the insurance limits of liability be sufficient to restore the building if damaged. The insurance may need to be replacement-type insurance that

will pay for the replacement of lost elements in like-kind materials and workmanship.

Drafting and Recording the Easement

The organization may draft the easement with the assistance of a lawyer. However, a lawyer representing the owner's interests should review and approve the document as well. The owner is responsible for obtaining legal representation, financial advice, and a formal appraisal. Well-written conservation and preservation easements that spell out the responsibilities of both grantor and grantee are available from the National Trust for Historic Preservation and Land Trust Alliance. *The Conservation Easement Handbook*, 1988, rev. 2005, published by the Land Trust Alliance and the Trust for Public Land, with assistance from the National Trust, includes a "Conservation Easement Drafting Guide," which includes sample provisions for preservation ease-

ments. Many organizations keep a reference file of tax and property lawyers, accountants, appraisers, and other specialists familiar with easements to assist the owner in obtaining competent guidance.

Appraisals

If the easement donor wishes to secure a tax deduction for the donation, it is essential that the donor establish clearly and accurately the value of the easement for tax deduction purposes, with thorough documentation by a qualified appraiser. Note that the threshold for overvaluation penalties for donors has been lowered by the 2006 amendments to the Internal Revenue Code, and a new provision imposes penalties on appraisers who knew or who "reasonably should have known" that an appraisal would be used in connection with a tax return if the claimed value results in a substantial or gross valuation misstatement. Moreover, new qualification

Historic Charleston Foundation holds protective covenants on more than 130 structures and has been entrusted with nearly 200 preservation easements over commercial and residential properties in and around the city, including North Adger's Wharf. These buildings originally served as warehouses and factors' offices and were converted to residences in the 1940s.

— Photo by Historic Charleston Foundation.



Historic Charleston Foundation holds preservation easements on several properties along Broad Street in Charleston's historic district.

— Photo by Historic Charleston Foundation.

standards for appraisals and appraisers have been established. (See “Tax Considerations,” above.)

The organization also may be interested in obtaining an accurate, well-documented appraisal if it intends to use the value of a donated easement to match a grant from government funding programs such as the federal Land and Water Conservation Fund, Historic Preservation Fund, or from state programs. Such easements must be held by public agencies, and they generally have involved some type of physical public access, e.g., hiking or skiing trails, although it may be possible to use the easement value as a match when the easement protects a public view, that is, one that provides scenic access.

Recording the Easement

Once the easement document or deed of easement is satisfactory to all concerned, it is recorded in the office of the local recorder of deeds and any other repositories

that may be required by state statutes. The National Trust holds a number of easements and requires that both the organization and the owner retain copies of the deed and countersigned copies of the photographs, written descriptions, and other documentation, with the owner expected to transfer everything to subsequent owners. There may be specific requirements in state legislation for notifying government agencies, such as the local planning commission, of an easement transaction, but if there are not, the organization may wish to do so as a courtesy. Many organizations, for example, notify the local government by letter that they have accepted an easement within the government's jurisdiction, enclose a map locating it, briefly describe its provisions, and offer to speak with a staff member to answer any questions the government administrators may have.

Reasonable expenses related to the donation of the easement borne by the donor are not deductible as charitable contributions, but may be deductible as miscellaneous expenses. These expenses would include legal and accounting assistance, survey costs, and recording and appraisal fees. Many organizations now require the property owner to assist in its easement acquisition and future monitoring and enforcement costs as well, including the cost of staff time, travel, and indirect expenses.

Monitoring and Enforcing the Easement

The organization's continuing responsibility to the donor, the public, the protected resources, and other donors in the area is to maintain a monitoring program to assure that easement provisions are observed. In addition to major violations, properties under easement can be subject to subtle degradation over time through minor alterations that can add up to substantial



change. A monitoring program is carried out, in part, by periodic on-site inspections and frequent contact with the property owner. Organizations should create written and electronic publications that explain their monitoring programs and work requiring advance approval, and that describe the procedures and requirements for submitting requests for alterations.

Easement Inspections

Ongoing contact with the property owner and periodic inspections of the property are critical components of an effective easement enforcement program. Violations of easements are more likely to occur when the property owner has little or no contact with the organization holding the easement—especially when the owner has purchased property subject to an easement—or when property owners did not understand the limitations imposed

by the easements. Thus, it is important to educate both initial and subsequent property owners about the consequences and responsibilities of an easement.

Indeed, inspections serve the additional and equally important function of reminding the property owner of the responsibilities imposed by the easement. They provide a formal mechanism for maintaining the relationship between the organization and the property owner and can help to clear up misunderstandings that could be harmful to the property.

Most organizations perform inspections once a year or more frequently if it is determined that there is a possibility of violations. More frequent inspections may be required when the property owner is undertaking a rehabilitation or construction project. The possibility of court challenges, particularly in areas experiencing development

pressures, warrants a careful inspection and enforcement program, complete with written records.

Changes in ownership should be carefully monitored. Easement holding organizations should meet new owners at the first opportunity to explain their organization's program and the responsibilities of the owner and the organization under the easement. A new owner may have learned of the easement from the previous owner or through a title search. However, he or she may not fully understand the scope or significance of the easement.

In order to track possible transfers in ownership before they occur, some organizations rely on informal means and their inspections while others include provisions in their easement deeds requiring notification whenever a transfer of ownership is pending. A third alternative is to include a right of first refusal in the easement.

Utah Heritage Foundation holds a number of easements on historic sites, including this residence in Salt Lake City. The organization conducts regular inspections of the sites to confirm that they are being maintained in accordance with the easement agreement.

— Photo by Utah Heritage Foundation.



The Virginia Department of Historic Resources started an easement program in 1966 to provide long-term legal protection for privately owned historic landmarks. Pictured here is Clifton (1800–1874), located in Rockbridge County, Va.

— Photo by Virginia Department of Historic Resources.

This allows the organization to preempt an offer made by another buyer by matching or exceeding it. This is not a right that need be exercised; it acts as a formal way of assuring that the organization will be notified of any pending transaction. If the right of first refusal is used, it should be carefully formulated so as not to burden the property owner. Generally, the organization should be allowed a limited time to respond—perhaps as little as 72 hours.

Reviewing Proposed Changes

Most easements require approval by the organization before the property owner may proceed with certain actions, such as making substantial alterations to a building. As part of the approval process, an organization will need to review the owner's plans and, in some cases, may need to conduct an on-site visit. This requires sufficient knowledge on the part of staff to conduct the review and to respond within a reasonable

period of time. In situations where extensive work is contemplated, a property management plan may be developed prior to acceptance of the easement. Although more work at the outset, this allows the organization and the owner to agree on changes in advance and thereby reduces staff time commitments in the future.

As discussed above, consideration of the goals of the easements and thus an organization's preservation philosophy and the terms for evaluating changes to the property should be addressed during the negotiation of the easement. However, not every change can be anticipated at the drafting stage. Decisions on their acceptability must be made subsequent to the agreement on a case-by-case basis. The purpose of the easement is to assure maintenance of the elements that give a property significance. In reviewing proposals for alterations the organization should consider the following questions: Does the

proposed alteration contribute to the integrity of the property? Is the change really necessary to make the property function for contemporary use? Is the change reversible? The organization may need to consider denial or modification of the proposed change to assure consistency with the purpose of the easement.

It is advisable to include precise standards for review of alterations and changes in the easement document. A well-drafted document references the Secretary of Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. The federal easement regulations require use of the Secretary's Standards when restrictions to preserve a building or land within a registered historic district permit future development on the site. Treas. Reg. 1.170A-14(d)(5)(i).

Violations and Remedies

An easement is a legal document that allows an organization to pursue redress in the courts if its provisions are violated. The easement authorizes the organization to compel the owner by court action to make repairs or to restore the property to its prior condition and may authorize the organization to make repairs to correct the violation at the owner's expense. Depending on the circumstances, the organization may also seek an injunction to stop an owner's proposed action or may seek monetary damages in compensation for irreversible actions.

As soon as the organization learns of a threatened or actual violation, it should obtain legal counsel to assist in evaluating its rights and possible remedial actions. The organization and its legal advisers should consider the nature of the violation, especially whether it was willful or unintentional and if it is reversible. It should also consider two key questions: can it be fixed? and when should it be fixed? This might apply to such a change as paint color. If it cannot be fixed, what then? The organization must consider its responsibilities toward the property and other owners in the area. It might also consider the effect of any remedial action on the public's understanding of the easement program's effectiveness and good intentions. The course to pursue is not always clear. Even when the violation is of a type where remedial action is not necessary or is voluntarily corrected by the owner, the organization should document the violation and may wish to obtain a statement from the owner agreeing to refrain from future violations.

The possibility that permanent damage could be done without the organization's knowledge is a

troublesome one. For example, what good is the easement when the owner decides to destroy the stand of 200-year-old trees or the original parts of an old building that the easement was designed to protect? Collecting monetary damages might give other owners pause before destroying protected features, but retribution will not bring back the irreplaceable. This problem suggests that state, regional, and national organizations may need local assistance in supervising their easement properties, either through a cooperating local organization, a friendly support system within the community, or preferably both.

As any building inspector or architectural review commission is well aware, violations will happen. The best chance for saving the situation is to catch a violation early. The use of small signs, plaques, or markers can help promote a community's awareness of the program and identify the properties that should be closely observed.

Conclusion

An easement program offers one way to provide substantial, flexible protection for an area's resources. Although easements alone cannot achieve complete protection for these resources, they do provide an effective means for ensuring that historically and culturally significant properties will be protected in the long-term. However, the viability of easements and easement programs—and the availability of tax deductions and other incentives to encourage the donation of easements—depends on the successful efforts of preservation organizations to attract easements and to ensure that those easements are diligently monitored and enforced. This requires the establishment



and operation of professional programs along with considerable ingenuity, flexibility, persistence, patience, and dedication.

It may be years before an easement program's value is fully appreciated, not only in protecting land and buildings directly, but in creating a preservation and conservation ethic in the community. However, the fruits of these efforts have already become apparent, as some governments have backed away from fully enforcing restrictions in preservation ordinances, while preservation easement organizations continue to enforce their easements with zeal. Over the long haul, it may indeed prove true that, apart from full ownership, easements are the most effective means for protecting historic resources.

Frequent contact with property owners along with annual monitoring visits ensures that easement violations are quickly recognized and addressed. The property pictured above, located in Chicago, is protected by an easement held by Landmarks Illinois.

— Photo by Landmarks Illinois.

Acknowledgments

This booklet was initially prepared by A. Elizabeth Watson, Rural Project, Office of Preservation Services, National Trust for Historic Preservation, Washington, D.C. in 1980. Stefan Nagel, Associate General Counsel, National Trust for Historic Preservation, revised the publication in 1991 and again in 1995. The publication, in its current form, was revised and updated in 2007 by Julia H. Miller, Special Counsel and Education Coordinator, and Ross M. Bradford, Assistant General Counsel, National Trust for Historic Preservation, with special contributions by Thompson Mayes. The appendix on State Easement Legislation was updated with the assistance of Brian E. Branton in 1995 and Margaret Engoren Gray in 2007.

Appendix A— State Conservation Easement Laws

Generic Easement Legislation [Authorizing Conveyance of Perpetual Conservation and Preservation Easements in Gross to Qualified Agencies and Organizations]. Note: “UCEA” denotes Uniform Conservation Easement Act or a variation thereof.

Alabama: Ala. CODE §§ 35-18-1 TO 35-18-6 (1997). UCEA.

Alaska: Alaska Stat. §§ 34.17.010 to 34.17.060 (1999). UCEA.

Arizona: Ariz. Rev. Stat. Ann. §§ 33-271 to 33-276 (1985).

Arkansas: Ark. Code Ann. §§ 15-20-401 to 15-20-410 (West 2001).

California: Cal. Civ. Code §§ 815 to 816 (West 1994).

Colorado: Colo. Rev. Stat. §§ 5 38-30.5-101 to 38-30.5-111 (West 1990).

Connecticut: Conn. Gen. Stat. §§ 47-42a to 47-42c (West 2005).

Delaware: Del. Code Ann. tit. 7, §§ 6901 to 6906 (2007).

District of Columbia: D.C. Code Ann. §§ 42-201 to 42-205 (LexisNexis 1996). UCEA.

Florida: Fla. Stat. Ann. § 704.06 (LexisNexis 2006); Fla. Stat. Ann. § 193.501 (LexisNexis 2006).

Georgia: Ga. Code Ann. §§ 44-10-1 to 44-10-8 (2006). UCEA.

Hawaii: Hawaii. Rev. Stat. Ann. § 6E-15 (LexisNexis 2006); Hawaii. Rev. Stat. Ann. § 198-1 to 198-6 (LexisNexis 2006).

Idaho: Idaho Code Ann. §§ 55-2101 to § 55-2109 (1986). UCEA.

Illinois: 765 Ill. COMP. STAT. 120/0.01-120/6.

Indiana: Ind. Code § 32-23-5-1 to § 32-23-5-8 (2002). UCEA.

Iowa: Iowa Code §§ 457A.1 to 457A.8 (2005).

Kansas: Kan. Stat. Ann. §§ 58-3810 to 58-3817 (1992). UCEA.

Kentucky: Ky. Rev. Stat. Ann. §§ 382.800 to 382.860 (LexisNexis 1988). UCEA.

Louisiana: La. Rev. Stat. Ann. §§ 9-1271 to 9-1276 (1986). UCEA.

Maine: Me. Rev. Stat. Ann. tit. 33, § 476-479B (1985). UCEA.

Maryland: Md. Code Ann., Real Prop. § 2-118 (West 1980).

Massachusetts: Mass. Gen. Laws Ann. ch. 184, §§ 26 to 33 (West 1994).

Michigan: Mich. Comp. Laws §§ 324.2140 to 324.2144 (1994).

Minnesota: Minn. Stat. § 84C.01 to 84C.05 (1985). UCEA.

Mississippi: Miss. Code Ann. §§ 89-19-1 to 89-19-15 (1986). UCEA.

Missouri: Mo. Rev. Stat. § 67.870 to 67.910 (2006). (open space conservation).

Montana: Mont. Code Ann. §§ 76-6-201 to 76-6-211 (1985). (open space conservation).

Nebraska: Neb. Rev. Stat. §§ 76-2,111 to 76-2,118 (1995).

Nevada: Nev. Rev. Stat. §§ 111.390 to 111.440 (1989). UCEA.

New Hampshire: N.H. Rev. Stat. Ann. §§ 79-B:1 TO 79-B:11 (1991); N.H. Rev. Stat. Ann. §§ 477:45 to 477:47 (1992).

New Jersey: N.J. Rev. Stat. Ann. §§ 13:8B-1 to 13:8B-9 (west 1980).

New Mexico: N.M. Stat. § 47-12-1 to 47-12-6 (1978); N.M. Stat. § 47-12A-1 to 47-12A-6. UCEA.

New York: N.Y. Envtl. Conserv. Law §§ 49-0301 to 49-0311 (McKinney 1991).

North Carolina: N.C. Gen. Stat. §§ 121-34 to 121-42 (2004).

North Dakota: N.D. Cent. Code § 55-10-08 (1983).

Ohio: Ohio Rev. Code Ann. §§ 5301.67 to 5301.70 (Anderson 1990).

Oklahoma: Okla. Stat. tit. 60, § 49.2 to 49.6 (1999).

Oregon: Ore. Rev. Stat. § 5 197.467, §§ 271.715 to 271.795 (1993). UCEA.

Pennsylvania: 32 PA. STATUTES §§ 5051 to 5059 (2001).

Puerto Rico: P.R. Laws Ann. 785-785p (2004).

Rhode Island: R.I. Gen. Laws § 42-45-9.1 (1994); R.I. Gen. Laws § 45-36-1 to 45-36-2 (1991).

South Carolina: S.C. Code Ann. §§ 27-8-10 to 27-8-80 (1991). UCEA.

South Dakota: S.D. Codified Laws §§ 1-19-B-56 to 1-19-B-60. UCEA.

Tennessee: Tenn. Code Ann. §§ 11-15-107 to 11-15-108 (1993); Tenn. Code Ann. §§ 66-9-301 to 66-9-309 (1993).

Texas: Tex. Nat. Res. Code Ann. §§ 183.001 to 183.005 (Vernon 1978).

U.S. Virgin Islands: V.I. Code Ann. 12-15-601 to 12-15-607 (Michie 2006).

Utah: Utah. Code Ann. §§ 9-8-501 to 9-8-506, §§ 57-18-1 to 57-18-7 (1992).

Vermont: Vt. Stat. Ann. tit. 10, §§ 821 to 823, 6301 to 6308 (1989).

Virginia: Va. Code Ann. §§ 10.1-1009 to 10.1-1016, 10.1-2207 (1993). UCEA.

Washington: Wash. Rev. Code §§ 84.34.200 to 84.34.250 (1993).

West Virginia: W. Va. Code §§ 20-12-1 to 20-12-8 (1995).

Wisconsin: Wis. Stat. § 700.40 (1980). UCEA.

Wyoming: Wyo. Stat. Ann. §§ 34-1-201 to 34-1-207 (year unknown). UCEA.

Appendix B— National Easement Information Sources

The Archaeological Conservancy was formed to identify, acquire, and preserve significant archeological sites in the United States for future research and to preserve the cultural heritage. The organization provides educational services to the general public on preservation methods. For more information contact: The Archaeological Conservancy, 5301 Central Avenue, N.E., Suite 902, Albuquerque, NM 87108-1517, (505) 266-1540. www.americanarchaeology.com.

The Land Trust Alliance was founded by local, regional, and state land trusts to provide services to help land trusts protect land through its array of programs, information dissemination, public policy and land trust awareness. Its programs include a quarterly journal, national conferences, books and materials among others. For more information contact: The Land Trust Alliance, 1660 L Street NW, Suite 1100, Washington, DC 20036 (202) 638-4725. www.lta.org.

The National Conference of Commissioners on Uniform State Laws is an organization of state appointed commissioners who provide their expertise for the drafting and adoption of uniform and model state laws. For more information contact: The National Conference of Commissioners on Uniform State Laws, Conservation Easement Act, 211 E. Ontario Street, Suite 1300, Chicago, IL 60611 (312) 915-0195. www.nccusl.org.

The National Trust for Historic Preservation accepts a limited number of easements on nationally significant property according to criteria established by the National Trust's Board of Trustees. For information about the National Trust's easement program, contact: Administrator, Easement Program, National Trust for Historic Preservation, 1785 Massachusetts Avenue, N.W., Washington, DC 20036 (202) 673-4035. www.nationaltrust.org.

The Nature Conservancy, an international environmental organization, works to protect the habitat of rare plants and animals. The conservancy provides information on preservation strategies and techniques, including the use of easements for conservation. For more information contact: The Nature Conservancy, 4245 North Fairfax Drive, Suite 100, Arlington, VA 22203-1606 (703) 841-5300. www.nature.org.

The Trust for Public Land (TPL) works closely with urban and rural groups and public agencies to acquire and preserve open space, share knowledge of non-profit land acquisition processes and to establish new methods of land conservation and environmentally sound land use. For more information contact: The Trust for Public Land, 116 New Montgomery Street, 4th floor, San Francisco, CA. 94105 (415) 495-4014. www.tpl.org.

The National Park Service publication, *Federal Historic Preservation Laws* brings together the major federal historic preservation laws that govern national programs to coordinate and support public and private efforts to identify, evaluate, and protect historic and archeological resources. Of particular note is Section 170(h) of the Internal Revenue Code of 1986 that describes the qualifications of a conservation easement. Available from U.S. Government Printing Office, Washington, DC 20401 1-866-512-1800. Stock number 021-000-00193-7. bookstore.gpo.gov.

Selected Bibliography

Legal Considerations in Establishing a Historic Preservation Organization. Collette C. Goodman. Washington, D.C.: National Trust for Historic Preservation, 1991 Rev. ed. Available from the National Trust's Preservation Books. Order number 2114. To order call: (202) 673-4286 or go to www.preservationbooks.org.

Appraising Historic Properties. Judith Reynolds. Washington, D.C.: National Trust for Historic Preservation, 1995. Available from National Trust's Preservation Books. Order No. 2187. To order call: (202) 673-4286 or go to www.preservationbooks.org.

Starting a Land Trust: A Guide to Forming a Land Conservation Organization. Alexandria, Va.: Land Trust Alliance, 2000. Available from the Land Trust Alliance, 1660 L St. NW, Suite 1100, Washington, DC 20036. (202) 638-4725. www.lta.org.

Appraising Easements: Guidelines for the Valuation of Historic Preservation and Land Conservation Easements. 3rd ed. Washington, D.C.: National Trust for Historic Preservation and

Land Trust Alliance, 1999. Available from the Land Trust Alliance, 1660 L St. NW, Suite 1100, Washington, DC 20036. (202) 638-4725. www.lta.org.

Easements and Other Legal Techniques to Protect Historic Houses in Private Ownership. Thomas A. Coughlin. Washington, D.C.: National Trust for Historic Preservation. Reprint from *Preservation Law Reporter*, 1988. Call (202) 673-4035 to obtain a copy.

The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs. 2nd ed. Janet Diehl and Thomas S. Barrett. Alexandria, Va.: Land Trust Exchange and Trust for Public Land, 2005. Available from the Land Trust Alliance, 1660 L St. NW, Suite 1100, Washington, DC 20036. (202) 638-4725. www.lta.org.

The Federal Tax Law of Conservation Easements. 4th ed. Stephen J. Small. Alexandria, Va.: Land Trust Exchange, 1997. Available from the Land Trust Alliance, 1660 L St. NW, Suite 1100, Washington, DC 20036. (202) 638-4725. www.lta.org.

Offices of the National Trust for Historic Preservation

Headquarters

1785 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-6296

Southern Field Office

1785 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-6107
(District of Columbia, Maryland,
Virginia, West Virginia)

Midwest Office

53 West Jackson Blvd., Suite 350
Chicago, IL 60604-2103
(312) 939-5547
(Illinois, Indiana, Iowa, Michigan,
Minnesota, Missouri, Ohio, Wisconsin)

Northeast Office

Seven Faneuil Hall Marketplace,
4th Floor
Boston, MA 02109-1649
(617) 523-0885
(Connecticut, Maine, Massachusetts,
New Hampshire, New York, Rhode
Island, Vermont)

Northeast Field Office

6401 Germantown Avenue
Philadelphia, PA 19144
(215) 848-8033
(Delaware, New Jersey, Pennsylvania)

Southern Office

William Aiken House
456 King Street
Charleston, SC 29403-6247
(843) 722-8552
(Alabama, Florida, Georgia,
Kentucky, Louisiana, Mississippi,
North Carolina, South Carolina,
Tennessee, Puerto Rico,
Virgin Islands)

Mountains/Plains Office

535 16th Street, Suite 750
Denver, CO 80202-2910
(303) 623-1504
(Colorado, Kansas, Montana,
Nebraska, North Dakota, South
Dakota, Utah, Wyoming)

Southwest Office

500 Main Street, Suite 1030
Fort Worth, TX 76102-3943
(817) 332-4398
(Arkansas, New Mexico, Texas,
Oklahoma)

Western Office

The Hearst Building
5 Third Street, Suite 707
San Francisco, CA 94103
(415) 947-0692
(Alaska, Arizona, California,
Hawaii, Idaho, Nevada, Oregon,
Washington, Pacific island
territories)

Preservation Books are published
by the National Trust for Historic
Preservation. For a complete list
of titles call or write:
Preservation Books,
National Trust for
Historic Preservation
1785 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-6286
FAX (202) 588-6223,
or visit our web site at
www.preservationbooks.org.

Copyright 2007 National Trust
for Historic Preservation

Richard Moe
President
National Trust for
Historic Preservation

Peter Brink
Senior Vice President
Programs

Katherine Adams
Director
Center for Preservation
Leadership

Elizabeth Byrd Wood
Editor

Ron Woods
Business Manager

National Trust Forum is a
membership program for
preservationists—from board
members to students, from
architects to educators, from
preservation commissioners to
planners, from volunteers to
restoration contractors. Forum
membership provides you with
the knowledge, tools and
resources to protect your
community. As a Forum member
you receive a subscription to
Preservation magazine, Forum
Journal, and Forum News.
Benefits also include discounts on
conferences and all publications
listed in the Preservation Books
catalog as well as participation
in financial/insurance assistance
programs, technical advice and
access to Forum Online, the
online system designed for
the preservation community.
To join send \$115 to:
National Trust Forum
National Trust for
Historic Preservation
1785 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-6296
www.forumnthp.org

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold or otherwise made available with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.



NATIONAL TRUST
for HISTORIC PRESERVATION®