

ABSTRACT

Title of Document: EASEMENTS TODAY

Tyler Anthony Smith, Masters of Historic
Preservation, 2016

Directed By: Dennis J. Pogue, PhD, Adjunct Associate
Professor

Preservation easements are valuable tools as a means to protect historic properties, but easement holding organizations face a variety of administrative challenges. Historic New England, The L'Enfant Trust, The Maryland Historical Trust, and The Maryland-National Capital Park and Planning Commission provide examples of successful easement holding organizations. By examining their different operations it is possible to identify a variety of strategies for the successful administration of easement programs.

EASEMENTS TODAY:
Effective Administration of Easement Programs

By

Tyler Anthony Smith.

Dissertation submitted to the Faculty of the Graduate School of the
University of Maryland, College Park, in partial fulfillment
of the requirements for the degree of
Masters of Historic
Preservation
2016

Advisory Committee:
Dennis J. Pogue, Chair
Frederick C. Stachura

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Dedication

This project is dedicated to my wife Eryn Margaret Smith and our son Tobias Henry
Smith who arrived December 10, 2015.

Acknowledgements

I would like to especially thank Frederick Stachura for encouraging my interest in preservation easements, and Dennis Pogue for guiding me through the process of completing my final project. Jess Phelps was a tremendous help in sharing some of his thoughts about the development of preservation easements in the United States. Shantia Anderheggen was one of the hosts of an enlightening Preservation Roundtable at the 2015 National Trust conference, which pointed me in the direction of a number of extremely helpful resources. Kate Kenwright and Lauren Oswalt McHale invited me into the offices of the L'Enfant Trust and shared the specifics about what their jobs entail. Carissa Demore from Historic New England graciously answered my questions by phone and email; Kate Bolasky shared information about the easement program at the Maryland Historical Trust.

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Chapter 1: Introduction

Among the many tools available to encourage the preservation of America's historic resources, historic preservation easements stand out as potentially one of the most effective. Historic preservation easements are legal agreements between property owners and qualified holding organizations that convey with the title of the land, and are useful and flexible tools for preserving historic properties of all kinds. As a non-possessory real interest in real property, easements are a unique mechanism for preservation in that they are private agreements and are crafted to suit individual properties. Many easement programs are not reaching their full potential, however, primarily because of a lack of control or administrative capacity of the holding organizations. The success of a preservation easement is largely a measure of the easement holder's ability and capacity to enforce the binding legal agreement, but many easement documents are vaguely written, and they may be only loosely monitored, and/or inadequately enforced. Without a viable plan to administer the easement, both the property owner's and the easement holder's investment is threatened. Ideally, the parties form a partnership in preservation around the mutual goal of shared preservation values and conserving the heritage resources identified in the easement. The models provided by several successful easement programs provide the basis for determining best practices in formulating and administering easements, which may serve as guidance for other easement holders around the country.

The history of easement practice and its theoretical basis will provide context for four case studies. A variable among the case studies to note is that the requirements of an easement depend in part on state enabling law which grants authority and specifies terms and requirements. Despite this, useful comparisons between programs in different states can still be made.¹ Duties of the easement

¹ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

holding organization consist of three major categories; administration, monitoring, and enforcement.²

Hundreds of organizations and governmental agencies across the country accept and administer preservation easements at the local, state, regional and national levels. Historic New England (HNE), The L'Enfant Trust, The Maryland Historical Trust (MHT), and The Maryland-National Capital Park and Planning Commission (M-NCPPC) provide examples of successful easement holding organizations, and demonstrate a variety of ways that they may operate. Historic New England is a private non-profit regional organization that has obtained just over 100 easements.³ The Maryland Historical Trust acts as the State Historic Preservation Office, which has become a de-facto easement holding organization, administering nearly 700 historic preservation easements.⁴ M-NCPPC operates a relatively new easement program, currently overseeing 41 historic preservation easements, in conjunction with a Historic Property Grant Program.⁵ The L'Enfant Trust is a private city-based organization that received hundreds of donations beginning in the late 1970s and today administers over 1,130 historic preservation easements.⁶ These representative organizations vary in size and include a regional, state, county, and city programs. They vary in number of easements from 41 to 1,131. The programs have different funding mechanisms and they were founded at different times and for varying purposes. These organizations have different approaches to writing and creating easements, addressing maintenance and repair of easement properties, and enforcing compliance.

² Historic New England, 2016.

³ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁴ "Maryland Historical Trust Easement Program," Maryland Historical Trust, accessed February, 17, 2016, <https://mht.maryland.gov/easement.shtml>.

⁵ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

⁶ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

The success of preservation easement programs is largely a measure of the easement holder's administrative capacity to deal with a variety of issues. The strengths and weaknesses of each of the programs will be examined as a basis for providing recommendations for administering effective programs. The case studies provide models for building strong relationships with property owners, efficiently inspecting easement properties, using easement programs to support other preservation programs, and establishing legal precedent.

Chapter 2: Theory of Easements

Introduction

Historic preservation easements are an important tool designed to protect the exterior and/or interior of historic buildings, open space, landscapes, and vistas. They are meant to ensure that properties maintain their historic character and cultural value, often in perpetuity, against various threats, such as demolition, neglect, insensitive alterations, and development. Preservation easements are notable among preservation tools in that they are a mechanism for private preservation protection.⁷ As a private negotiated contractual agreement between two willing parties they are free from political pressure, faster at providing protection, and more flexible than public ordinance-driven processes like evaluation and designation.⁸

What Are Easements

Historic preservation easements are a form of easement in gross held by a historic preservation organization or governmental entity that grants specific legal rights to the easement holder over the subject real property. These easements are created by donation, purchase, as a quid pro quo in exchange for development approval or in some cases, by condemnation, or involuntary sale to a unit of federal, state or local government exercising its eminent domain authority.⁹

The qualified easement holding organization or public agency must commit to managing and enforcing the requirements stated in the legal agreement, to include ensuring compliance with the easement terms by future as well as current owners. Usually the easement reflects an agreement by the property owner to maintain the property, provide limited public access, relinquish partial development rights, and

⁷ "Maryland Historical Trust Easement Program," Maryland Historical Trust, accessed February, 17, 2016, <https://mht.maryland.gov/easement.shtml>.

⁸ Russel L Brenneman, *Private Approaches to The Preservation Of Open Land*. (The Conservation and Research Foundation, 1967).

⁹ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011)

obtain approval for any alterations or changes. The owner retains title and full use of the property, and remains responsible for property taxes.¹⁰

Preservation easements are useful and flexible tools for preserving historic properties of all kinds because every easement is unique in construction to reflect the preservation values of the property it protects. Because easements are created for individual site-specific properties they can be crafted to protect many different aspects of the property, or particular values of the property owner and easement holding organization. Easements can also be used for properties that do not easily fit into the preservation criteria framework of historic registers and districts.¹¹

Private Donation: Easements Fill a Gap in Preservation Tools

Preservation easements are unique preservation tools because they fill a gap in preservation property protections. Easements stand apart from many preservation tools because they are private and completely separate and apart from an adopted ordinance. Federal protections like the procedural laws set forth in Section 106 of the National Historic Preservation Act Preservation of 1966, or listing in the National Register of Historic Places trigger a review process when historic sites are endangered by federal government actions. But these measures provide no protection from the actions of private property owners, and preservation easements are often the only protection against property owners themselves.

Easements by nature recognize the individual agency of property owners in negotiating the contractual agreement, while preservation laws often limit the rights of property owners. While the results may be similar, the donation of a preservation easement is usually initiated by the property owner, who restricts some property rights only if he agrees to each of the specific terms. Protection through government

¹⁰ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

¹¹ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

regulation cannot be assured in perpetuity.¹² Preservation laws are subject to political will, and are often only as strong as their supporters. As economic and development pressures change with time, so may preservation laws and local ordinances.¹³ Unique to easements as a preservation tool, they run with the title of the property, often in perpetuity. Therefore, they apply not only to the owner who grants the easement but future owners as well, and may not be affected by changes in government regulation.

In some cases, such as the easement program administered by Historic New England (HNE), protection is extended to significant interior architectural features and fixtures. These features may include finishes, lobbies, staircases, floors, hallways, woodwork, lighting fixtures, fireplaces, hardware, decorative painting, other decorative elements, and even historic wallpaper. On the exterior, protected features may extend far beyond the walls of the structure, to include landscape features such as fences, stonewalls, designed gardens, and viewsheds.¹⁴ On the other hand, preservation laws as a rule are limited to the exterior of buildings, and then often only what is visible from a public way, sometimes excluding side and rear facades, and never applying to interior features.

Easements at their full potential are perhaps the most effective and legally binding in the kit of preservation tools, and can be used for the protection of important historic sites and resources against a variety of threats. The mission of the easement holding organization is the preservation of historic sites, and presumably these organizations have the resources for enforcing the restrictions detailed by the easement that property owners often lack. Depending on the nature of the easement, this may provide a mechanism to ensure that proposed projects take into account the restrictions outlined in the easement document. If the system is working as intended, the property owner is able to rely on the easement holding organization for this

¹² Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

¹³ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

¹⁴ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

protection while retaining private ownership. The easement holder may also provide preservation support to the property owner in the form of professional staff whose role may include monitoring the easement, conducting routine site visits, and providing professional advice on maintenance, methods of repair, and project review.

The Drawbacks

There are several potential downsides to preservation easements, however. Some of which stem from the ambiguities of the easement documents, which may be vague about the terms and the responsibilities of both parties. In other situations, lax monitoring and enforcement on the part of the easement holding party, and simple misunderstanding of the terms of the agreement on the part of owners, has led to often contentious confrontations. Easements can be forgotten or overlooked by property owners; sometimes, a single property may have multiple easements with different requirements. The donation of preservation easements has also led to the scrutiny on the part of the Internal Revenue Service (IRS), sometimes resulting in legal action taken against the property owners. All of these factors can create a web of complex problems for both easement holders and property owners.¹⁵

A negative perception of historic preservation easements is reflected in the 2005 IRS “Dirty Dozen” list of tax scams, which included historic preservation easements. The IRS created an internal easement task force specifically to “attack all aspects of the problem of conservation easements.”¹⁶ This was a reaction to the overvaluation of historic preservation easements and abuse in using the action as a tax deductible charitable donation.¹⁷

The case of *The United States of America v. Peter F. Blackman*¹⁸ is particularly instructive when it comes to conflicts over the interpretation of the terms of easements. In this case previous owners had granted Historic Green Springs, a

¹⁵ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011).

¹⁶ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011).

¹⁷ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011).

¹⁸ *The United States v. Peter Blackman*, No. 042404, 2005, Virginia Supreme Court, Jun. 9, 2005.

preservation organization, an easement on Eastern View Farm in 1973. Blackman wished to renovate and rehabilitate the manor house, and he submitted several sets of renovation plans to the National Park Service, which had oversight of the Historic Green Springs Easement. The NPS repeatedly denied aspects of Blackman's plan but he elected to undertake work without the agency's final approval. After he removed the porch of his home, a temporary restraining order was issued to stop Blackman from continuing work. This resulted in a controversial legal case that was decided in favor of the National Park Service.

Conclusion

Historic preservation easements afford opportunities to protect historic sites when no other legal protections exist, and they may provide stricter provisions than existing regulations. They provide a tool that fills a gap in the protection provided by other preservation tools, if they are correctly administered. Sometimes, if not crafted precisely, easements can be difficult to understand thus have the potential for varying interpretations. Court cases such as *U.S v. Blackman* illustrate many of the issues related to easement enforcement, as well as portray the position of sometimes beleaguered easement holders. Taken together, the conflict and uncertainties help to explain why some property owners are reluctant to become involved in preservation easements. Thorough understanding of easement provisions is required for the creation of effective and enforceable legal documentation.

Chapter 3: The Development of Preservation Easements

Introduction

Preservationists from early on in the movement often acquired historic properties as a means of protecting them through direct control. Historic New England is an example of one such organization that acquired many properties for that reason. Preservation groups have tried a variety of methods to make this financially sustainable. This preservation method is a major contributor to the great many historic house museums that were established throughout the 20th century. Generally speaking acquiring and maintaining historic properties requires substantial financial resources, and it has proven a difficult path for many historic house museums.¹⁹ One solution to the burden of full ownership and direct control of historic sites was the development of preservation easements and the use of less than fee interests.

Early Easements

The legal precedent for preservation easements is rooted in English and American common law. Easements under English Common Law can be traced back to Roman law regarding praedial servitude or equitable servitude.²⁰ Today easements are sometimes referred to as an equitable servitude because the easement imposes affirmative obligations on the owner of the subservient property that can be enforced by equitable remedies given to the third-party holder of the easement.²¹ Historically praedial servitude applied in rural situations that addressed soil and mineral rights, and urban circumstances that involved the right to co-maintenance of a party wall, or the right to sunlight. Historically the parties were referred to as the dominant owner who was reaping the benefits, and the servient owner who granted servitude. Rarely did the servient owner need to comply with affirmative duties, with the one exception

¹⁹ Jess Phelps, e-mail message to author. April 14, 2016.

²⁰ Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

²¹ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011).

of continued repair and support of structures like party walls common to both estates. *Praedial Servitude* evolved into easements.²²

English common law established the concepts behind two types of easements. Easements appurtenant give an adjacent property owner some element of control over or use of another's property, such as in the case of an access road running across an adjoining owner's land. Easements in gross give a third party who is not an adjacent landowner some element of control over or use of another's property; such as when a conservation group accepts an easement protecting wildlife in a remote area.²³ Traditionally these easements had two deficiencies, as they did not convey with the property when it changed hands, and they did not constitute interests assignable to other individuals. Today's easements differ in that they do run with the land and have interest that is assignable to third parties, which is a particularly important feature for preservation easements.²⁴

Easements appertuant and easements in-gross developed differently under English common law due to historical and economic factors. Before English industrialization neighboring owners of farms, grazing land or streams employed easements appertuant to allocate the benefits and burdens of owning land. Law did not hesitate to enforce these agreements or allow burdens to run with the land. There was a belief that easements fostered orderly development of land and enhanced local economies. Easements in-gross increased as economic bases diversified and common-law rules proved too rigidly restrictive in adapting to new desirable land arrangements.²⁵

²² Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

²³ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011)

²⁴ Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

²⁵ Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

With English colonization of America common law precedents also crossed the Atlantic. Nineteenth century rulings of the American courts paralleled England's in that easements often ran with the title of the land. American courts narrowed the legal distinction between appurtenant, and in-gross easements in the mid-nineteenth century. Courts ruled that easements in-gross ran with the land when the dominant owner possessed rights to identified profits. Profits included removing soils or minerals for personal and commercial use. Easements which did not provide the holder with identifiable profits were subject to intense judicial scrutiny, especially when easements appeared to personally benefit the holder while burdening the land without encouraging development.²⁶ Easements began to be interpreted as negative and positive; positive easements gave easement holder rights to affirmative acts, and negative easements gave holders restrictive veto power to prevent the servient owner from specific activities. Following English precedent American courts limited enforceability of those easements which placed burdens on the servient estate without endowing benefits on a dominant estate to the original parties of the agreement. Common law generally discouraged non possessory easements as negative easements. An easement which restricted use but did not provide benefit was a valid legal agreement but did not apply to the successors as Blackman argued in *U.S. v. Blackman*.²⁷

The goals of preservation easements in America were influenced by deed restrictions developed at the end of the nineteenth and early twentieth century. At that time deed restrictions were used to control land use and encourage predictable land use patterns. They were appealing because of the fast changing nature of the nation's neighborhoods and urban areas, and property owners were given some assurance about the long-term character of developing areas. Zoning controls were in effect an extension of this thinking and motive, because they regulated the way land was used.

²⁶ Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

²⁷ *The United States v. Peter Blackman*, No. 042404, 2005, Virginia Supreme Court, Jun. 9, 2005.

Today's preservation easements often have similar objectives, regulating historic resources as well as property use.²⁸

Easement holding organizations in the United States have gone through their own evolution in the last century. Over the course of the twentieth century, the merits of this form of protection became apparent to many interested in resource protection. The New Deal and public works projects innovated and experimented with property around projects like scenic byways. The use of conservation easements to protect scenic lands in America occurred rarely in the early 1900s, and organized programs like the National Park Service (NPS) did not utilize conservation easements until the 1930s.²⁹ The NPS has generally used easements in three ways: to protect views from parkways, to protect national parks, and to protect historic structures.³⁰ During the Great Depression the NPS purchased conservation easements along the Blue Ridge Parkway and the George Washington Parkway, in Virginia, the Rock Creek Parkways in Washington, D.C., and the Natchez Trace Parkway in Mississippi, to protect the views. These are referred to as "scenic" easements, and they limited tree cutting, dumping of waste, and the construction of new structures within the viewshed.³¹ A system of less-than-fee interests was developed, meaning that the NPS purchased as much interest in, or as many legal rights associated with the property as possible, short of outright ownership.³² The first historic preservation easement was acquired by NPS in 1966 to ensure the preservation of Tudor Place, in Washington, DC. It was granted to the U.S. Department of Interior by Armistead Peter, III, a descendent of the original owner.³³

²⁸ Jess Phelps, e-mail message to author. April 14, 2016.

²⁹ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011,) 10.

³⁰ Jess Phelps, e-mail message to author. April 14, 2016.

³¹ Jess Phelps, e-mail message to author. April 14, 2016.

³² Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

³³ Charles Fisher, "Easements to Protect Historic Properties: A Useful Preservation Tool with Potential Tax Benefits," accessed November 25, 2015. [2010.http://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf](http://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf).

Precedent for using preservation easements also came from the establishment of local historic districts under state enabling legislation. This encouraged the preservation of large areas of historic fabric through government control. The idea was embraced early in cities like Charleston, SC, New Orleans, LA, and Galveston, TX. The regulatory controls of local historic districts has been largely based on aesthetics. Historic district restrictions generally apply only to publicly visible features, and are difficult to establish in some areas, particularly in rural settings.³⁴

States soon followed the National Park Service in encouraging the use of preservation easements. During the 1950s through the 1970s legislatures and lawyers experimented and advocated for governments and non-profits to acquire non-possessory property restrictions. Several states began experimenting with enabling legislation to overcome the common law barriers to property interests of this type. In order for an easement to be recognized as a valid and enforceable property right, the state must have enacted specific legislation that permits their use.³⁵ Massachusetts established easement-enabling legislation for governmental entities in 1956 and for non-profits in 1969. The enabling legislation enacted by the states put easements on firm ground, but this recognition was slow to encourage easement donations³⁶

While private restrictions on the use of property had existed for some time, preservation and conservation easements did not become widely used until the rise of the environmental movement.³⁷ Twentieth-century zoning approaches and recognition of environmental conservation boosted the popularity of both land conservation easements and preservation easements. The growth in use of conservation easements dramatically expanded in the early twentieth century as the land trust movement took hold and protected massive amounts of acreage nationally, including substantial parts

³⁴ Jess Phelps, e-mail message to author. April 14, 2016.

³⁵ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

³⁶ Jess R. Phelps, *Preserving National Historic Landmarks Preservation Easements and the NPS*. 27-37

³⁷ Thompson Mayes, "Chapter 5: Preservation Law and Public Policy: Balancing Priorities and Building an Ethic," in *A Richer Heritage*. (University of North Carolina Press, 2003).

of some states; over ten percent of the State of Maine came under easement control.³⁸ Preservation and conservation easements are closely related.³⁹ Often efforts to protect land areas and natural landscapes have included cultural landscapes, historic sites and resources. For example the Maryland Historical Trust holds 698 historic preservation easements covering 8,847 acres.⁴⁰

While conservation easements are often purchased by private land trusts or units of federal state, or local government, historic preservation easements are seldom bought and sold. Instead, historic preservation easements are typically placed on properties through a charitable donation of the easement to a qualifying historic preservation organization. Only in rare circumstances are historic preservation easements purchased or condemned by governmental units.⁴¹

Twentieth century American courts recognized the need to modify restrictive common-law precepts concerning easements to conform with modern land use goals. Easements began to be interpreted to reflect the interest of the parties, and non-commercial easements in-gross were determined to constitute real property interests.⁴² The interpretation of preservation easements as real property interest was important in establishing the donation of easements as a qualifying tax deductible charitable donation.

The Tax Reform Act of 1976

In the Tax Reform Act of 1976, Congress added specific incentives to the Internal Revenue Code to encourage the preservation of America's natural and historic heritage. One of the provisions modified the charitable donations rules to

³⁸ Jess R. Phelps, *Preserving National Historic Landmarks Preservation Easements and the NPS*. 27-37

³⁹ Charles Roe, "Chapter 7 Where Do We Go From Here?" in *A Richer Heritage*. (University of North Carolina Press, 2003) 480.

⁴⁰ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

⁴¹ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011).

⁴² Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources*. (Denver, CO: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984).

allow a charitable contribution deduction for a “lease, option to purchase, or easement” to a qualifying organization “exclusively for conservation purposes.” This language authorized an income tax deduction for the charitable donation of a less-than-fee interest in real estate.⁴³ One of the IRS’s requirements for a charitable donation is that the property is listed in the National Register at the time of donation. Therefore limiting the deduction to National Register properties this fundamentally changed the way many people think about historic preservation easements. Although the Tax Reform Act did not directly affect all easement holding organizations, the standards established by the IRS in recognizing qualified easement donations and holding organizations is often used even in situations where a deduction is not applicable.

In 1977, the tax code was further amended to require that leases, options, or easements be “in perpetuity” to qualify for deductible donation.⁴⁴ Most easements are in perpetuity, but sometimes an easement may last for only a defined period of time and are referred to as term easements. Usually term easements are a condition of a grant funded project. While term easements may be a more appropriate requirement, they are uncommon, and do not qualify as a tax deductible donation. Easements in perpetuity have become common practice.⁴⁵

Conservation and preservation easements were widely used in the late 1970s and 1980s. Roddewig suggests this was due to heightened interest in historic preservation easements by preservation organizations and developers. A number of local and regional historic preservation organizations emerged in the United States during the 1970s. Groups such as the L’Enfant Trust, The New York Landmarks Conservancy, Historic Annapolis, Historic Georgetown, and the National Trust for Historic Preservation were organized around saving endangered landmarks and historic districts, and lobbied for enactment of landmark and historic district

⁴³ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011)

⁴⁴ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 12.

⁴⁵ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

ordinances. By the early 1980s as a result of the enactment of the 1976 Tax Reform Act many preservation groups had developed easement donation programs, and began accepting the country's first wave of historic preservation easements. Developers took advantage of the tax reform, and were able to use easement donations in combination with the investment tax credit for the rehabilitation of income-producing historic structures, and approached many preservation organizations about accepting historic preservation easement donations.⁴⁶

In the late 1980s the rate of preservation easement donations fell. The Economic Recovery Tax Act of 1986 contained amendments to the tax code that significantly decreased the tax benefits associated with the ownership of income-producing real estate. Combined with the recession in 1987 and 1988 the number of historic rehabilitation projects involving income producing properties decreased, along with the number of historic preservation easement donations. The slower rate of historic preservation easement donations after 1988 is illustrated by the smaller number of buildings that were certified as significant contributors to historic districts. Certification was an important first step in donating a historic preservation easement; in 1995 the National Park Service only certified one such building.⁴⁷

The donation of historic preservation easements increased again in the late 1990s and early 2000s. As the commercial property markets recovered and expanded, the number of National Park Service certifications began to rebound: eight in 1996, 13 in 1997, 26 in 1999, 84 in 2000, 153 in 2001, and 327 in 2002. Historic preservation organizations promoted the use of easements and the pace of easement donation accelerated again between 2003 and 2005. A number of states also began to offer state tax incentives to complement the federal charitable donation deduction. Preservation organizations such as the L'Enfant Trust in Washington, D.C., and the Trust for Architectural Easements aggressively promoted the donation of historic preservation easements targeted at single-family homeowners. The promotional

⁴⁶ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 15.

⁴⁷ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 17.

efforts often involved claiming that the IRS had adopted a so-called “15 percent rule” and would not challenge an easement valuation at or below this percentage. This claim was based on the IRS’s discussion of its Philadelphia market study, published on the IRS website, which found that easements typically decreased property values by 10 to 15%. In response to the claims by preservation groups the IRS removed the reference from its website.⁴⁸

Pushback

At the same time some preservation organizations were promoting the donation of historic preservation easements, the practice received negative media attention. In February of 2002 *The Philadelphia Inquirer* ran a dramatic series of articles on the questionable aspects of donating historic preservation easements, and abuses in conservation and easement programs. The first article, “Saving Treasures that Benefit Few,” questioned the public benefits that accompany the donation of conservation and historic preservation easements. The inquiries fundamentally changed historic preservation easement donation. Among the issues raised in the article were whether “the public is sacrificing tax revenue to save buildings or land from threats that are hardly menacing;” whether the donation of façade easements actually burdened buildings already under local historic district control; that easements actually enhanced rather than decreased the value of the lands protected; that only the wealthy benefited; and that appraisals supporting easement valuation were inflated. Later articles repeated the claims and drew attention to conflicts of interest, such as board members of easement-holding organizations becoming easement donors or sellers, and charitable donations of cash made to easement-holding organizations that were subsequently used to buy easements on properties owned by board members. Other newspapers around the country also published investigative articles critical of tax deductions for easement donation and alleged overvalued appraisals. In December 2004, *The Washington Post* ran a series of articles picking up on and expanding *The Philadelphia Inquirer’s* allegations of

⁴⁸ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 21.

abuses by easement organizations and criticisms of the policy underpinning of the charitable donation rules for easements.⁴⁹

In June 2004, the Treasury Department and the IRS issued a statement from IRS Commissioner Mark W. Everson in a press release stating that they had “uncovered numerous instances where the tax benefits of preserving open spaces and historic buildings have been twisted for inappropriate individual benefit.” In 2005, the IRS included historic preservation easements on its so-called list of tax scams, and created an internal easement task force to “attack all aspects of the problem of conservation easements.” After a long delay the Tax Court issued its decision in *Whitehouse Hotel v. Commissioner* in October 2008, the first Tax Court decision issued in more than 17 years involving the valuation of a historic preservation easement. The year 2009 saw four more decisions involving valuation of conservation and historic preservation easements: *Hughes v. Commissioner*, *Kiva Dunes Conservation LLC v. Commissioner*, *Bruzewicz v. United States*, and *Simmons v. Commissioner*. As a result appraisals of historic preservation easements made in support of charitable donations have become increasingly complex. Easement appraisals are now more than ever under an intense spotlight, not only from the IRS but also from the conservation and historic preservation communities and state appraiser licensing agencies.⁵⁰

It is important to note that while tax issues with historic preservation easements have received wide, and often damaging, media coverage, it is a rather specific issue that does not affect all historic preservation easements, or easement holding organizations. There are a variety of ways that historic preservation easements are acquired. Among the historic preservation easements that are donated not all of them are motivated by supporting a charitable donation. Of the historic preservation easements that are motivated by tax reasons the IRS has targeted the most obvious and egregious examples, focusing on the technical aspects of the

⁴⁹ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 23.

⁵⁰ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 29.

easement documents. While damaging to the reputation of preservation easements generally, many easement holding organizations have been unaffected, continue to operate, and serve a legitimate purpose. Today easements are often acquired as the result of a quid pro quo for grant funding, and revolving fund projects.

Conclusion

For a variety of reasons, preservation easements have not been as heavily utilized as other forms of conservation easements, but have been successful in protecting thousands of properties nationally.⁵¹ In 2008 the National Trust for Historic Preservation estimated that there may be as many as 15,000 historic preservation easements in place around the country.⁵² Given that there are hundreds of easement holding organizations in the U.S. and that the four easement holding organizations used as case studies hold nearly 2,000 easements, the number could actually be much higher.

The development of preservation easements in the United States has an interesting and complex legal history, which reflects the country's interest in conservation and preservation. The recognition of the easements as a qualified charitable donation and tax deduction in 1976 spurred debate about the role and value of historic preservation easements. The history and use of easements can be interpreted as a continual series of refinements and innovations developed and tested through a corpus of easement law. Out of this dusty history developed today's easement holding organizations. Historic New England was one of the first preservation organizations experimenting with easements as a preservation tool and acquired its first in the 1940s. MHT operates as a State Historic Preservation Office pursuant to the National Historic Preservation Act of 1966. The L'Enfant Trust was founded in 1978 just after the Tax Reform Act of 1976. M-NCPPC historic preservation easement program was established in 2008 in conjunction with the Historic Property Grant Program. The programs that have been selected as case

⁵¹ Jess Phelps, e-mail message to author. April 14, 2016.

⁵² Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011) 6.

studies for this project each emerged out of a particular period of this history, which has directly affected their missions and the ways in which they operate.

Chapter 4: Historic New England

Introduction

Historic New England (HNE) currently owns and operates 36 historic sites and holds easements on 102 properties. HNE's easements are comprehensive and nearly all include interior, providing an unusual degree of protection.⁵³ HNE obtained its first easement in 1947 on the Charles St. Meeting House. Historic New England is one of the oldest preservation organizations in the country, and has an important history prior to the development of its easement program. Originally the Society for the Preservation of New England Antiquities (SPNEA), the organization was founded in 1910 by William Sumner Appleton, a prominent Boston architectural historian and former real estate broker. Appleton's stated goal for the six New England states was to save buildings "which are architecturally beautiful or unique, or have special historical value." Appleton purchased structures, restored them, and placed covenants on them requiring that their original uses be retained, setting a precedent from which the organization's preservation easement's developed.⁵⁴

Acquisition

The easement on the Charles Street Meeting House is an illustration of the development of legal tools for preservation protection. Prior to states' adopting enabling legislation for the purpose, the main mechanism for protection was direct acquisition. Properties could be sold with deed restrictions, which meant that the purchase agreement stipulated that the property would revert to the former owners if certain terms were violated.⁵⁵ Using acquisition as a means of protection HNE began experimenting with a restrictive resale program, of which the Charles Street Meeting House was a part. Located in the Beacon Hill district of Boston, the Charles Street Meeting House was designed by the prominent architect, Asher Benjamin, and built in 1807. The Meeting House was owned by the Charles Street Meeting House Society

⁵³ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁵⁴ Diane Lea, "Introduction. Americas Preservation Ethos: A Tribute to Enduring Ideals." In *A Richer Heritage*. (University of North Carolina Press, 2003) 4.

⁵⁵ Jess Phelps, e-mail message to author. April 14, 2016.

from 1939 until 1847. The Society granted the building to SPNEA in 1947 as a condition of conveyance to the Massachusetts Universalist Convention. During the brief ownership of the property by SPNEA restrictions were placed on the deed to preserve the building's exterior. Other preservation groups in Annapolis and Charleston adopted similar methods based on the HNE model, which were referred to as restrictive resale programs.⁵⁶

In the 1970s HNE used restrictive resale methods when they sold nine historic properties. Although the process was similar to those used to preserve Charles Street Meeting House, the motivations were significantly different because HNE had full ownership of the properties for some time. HNE deemed that most of these structures either were inappropriate for conversion into museums, or had limited endowments to cover maintenance expenses, and thus were determined to be better preserved by private owners.⁵⁷ The restrictive resale program allowed for the structures to be protected, while relieving HNE from financial and maintenance responsibilities.⁵⁸

Historic New England established a formal preservation program in 1981; there were three major motivations for creating the program. The first was to meet the need for an organization at the regional level with the resources to work with property owners and to accept preservation easements. Second was to promote easements as a preservation tool with the benefit of allowing properties to remain on municipal tax rolls, thus shifting the cost to private property owners and away from the easement holding organization.⁵⁹ Finally the program aimed to take advantage of tax savings that recently had been made available to historic property owners.⁶⁰

In 1982 HNE accepted an easement on the Phelps Farm, which marked the first time they received a preservation easement from a private donor.⁶¹ The

⁵⁶ Jess Phelps, e-mail message to author. April 14, 2016.

⁵⁷ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁵⁸ Jess Phelps, e-mail message to author. April 14, 2016.

⁵⁹ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁶⁰ Carissa Demore, e-mail message to author. March 14, 2016.

⁶¹ Carissa Demore, e-mail message to author. March 14, 2016.

organization continues to accept easement donations, including, but not limited to, properties on or eligible for listing in the National Register of Historic Places. HNE acquired their one hundredth easement in December 2015. Many of the properties are bequeathed in wills as a result of HNE's focus on estate planning. HNE is selective in accepting donations and the easement committee votes whether to enter into negotiations with an owner to create a historic preservation easement. Historic New England generally only accepts easements on properties that are historically and architecturally intact. Given the nature of the program, HNE has found itself with a portfolio of properties heavily concentrated in elite 18th-century and high style houses. HNE has indicated its desire to continue to acquire preservation easements, but with a particular interest in filling notable gaps in its portfolio: uneven geographic representation (currently none in Vermont) and a lack of more modest vernacular structures.⁶²

Funding for HNE comes from an endowment originally created using the proceeds of the sale of the organization's historic properties. It is standard practice for the owners of properties who are donating a preservation easement to make a contributing endowment, to aid in covering the cost of administering the program. Historic New England has been generally unaffected by scrutiny from the IRS. This is most likely because while owners may have benefited from tax deductions, the donation of easements was primarily motivated by the desire to preserve the structures and not for potential financial benefits.⁶³

The motives of property owners who donate preservation easements play a critical role in the structure of NHE's easement program. The program requires the owner to be willing to place restrictions on their property and pay a substantial endowment for doing so. The donation process requires a substantial amount of work from the property owners who also are required to pay a \$500 non-refundable application fee. This attracts a specific profile of wealthy property owners. Owners are primarily motivated by the historic importance of their homes, which are often

⁶² Carissa Demore, e-mail message to author. March 14, 2016.

⁶³ Carissa Demore, e-mail message to author. March 14, 2016.

high profile as well as high style, and the easement donations are accompanied by an endowment contribution. The easement program is focused on building relationships with property owners and providing technical preservation expertise. Comparing HNE to the other case studies illustrates their commitment and resources devoted to maintaining those relationships. The associated tax benefits from donating an easement are secondary to Historic New England's program. This differs significantly from the easement programs administered by M-NCPPC's and MHT, which operate in coordination with funding programs for historic site property owners.⁶⁴

Monitoring

The credibility of the program relies on HNE's thorough administration and the ability to pursue legal action if needed.⁶⁵ The organization's vigilance in administering the easement and developing relationships with the property owners has almost eliminated the need for legal action.⁶⁶ The monitoring and administration is implemented by a full-time staff, the first of whom was hired in 1983.⁶⁷ The largest complement of dedicated staff is in the Southern Office, where five employees oversee 40 properties. Three of the staff work full-time on the existing easements while the other two are part-time. Of the case studies, this is by far the highest ratio of staff to easement properties. The large staff is made possible by the endowment and endowment contributions associated with donation of the easement.⁶⁸

Historic New England conducts regular annual inspections of their easement properties. HNE is unique among American preservation organizations in that it holds interior, exterior, and landscape easements on many of its properties. Their easement inspection process, therefore, requires an intensive meeting with the owner that generally takes from 45 minutes to two hours, during which the inspector assesses the

⁶⁴ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁶⁵ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁶⁶ Carissa Demore, e-mail message to author. March 14, 2016.

⁶⁷ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

⁶⁸ Carissa Demore, e-mail message to author. March 14, 2016.

conditions of the property inside and out. The fact that HNE's easements include interiors is a major administrative hurdle that requires coordination with the property owners to arrange for the interior access and leads to even more time spent on the annual inspections. Each annual site visit is followed by a status report that outlines the protected features of the property, their condition as of the date of the inspection, and any additional observations and treatments recommendations. HNE keeps a copy of the report and any associated correspondence in their files and sends a letter with a copy of the report to the property owner. Each report and letter are tailored specifically to each property and their restrictions.

Enforcement

Violations of Historic New England's preservation easements generally have consisted of projects that have not been reviewed in advance, but which usually are approved after the fact. In instances where the action is not approved, HNE will seek remediation efforts. Few situations have required legal action due largely to the HNE's effort to develop good relationships with easement property owners. Just one case arose in the last decade, which involved removing the barn doors from a carriage house at a property in Boston; the dispute was settled out of court. HNE has the financial stability and resources to pursue legal action if necessary, but the investment in staff, regular and engaged relationships with property owners has largely avoided the need.

Conclusion

HNE is the "gold standard" of historic preservation easement programs. The prestigious history of the organization attracts donors who willingly pay application fees and make donations to the organizations endowment fund. Its large staff and significant resources has allowed the organization to develop sustaining relationships with property owners and largely avoid the need to pursue legal action. The quality and nature of the program builds on itself. Current and future owners of HNE's easement properties are most likely deeply interested and invested in the history of their property.

Chapter 5: Maryland Historical Trust

Introduction

The Maryland Historical Trust serves as the State Historic Preservation Office (SHPO), and its easement program is shaped by the state's preservation policies and funding structure. In addition to carrying out the duties laid out by the National Historic Preservation Act of 1966, MHT administers an ambitious easement program that holds 698 easements on at least 845 properties encompassing 8,847 acres across the state. This poses a difficult task for limited staff. MHT is unique among the case studies in that it acquires easements in a variety of ways associated with different motives, including: donation, as mitigation for a state or federally funded or permitted project, and as a method of protecting the state's investment in historic properties that receive capital grants, bond bills, or loans. This is accomplished by one permanent full-time staff member with the assistance of a contractual easement inspector and easement processor.⁶⁹

Acquisition

As the SHPO, the Maryland Historical Trust serves as the default easement-holder, and has considerable experience utilizing the enabling laws within their jurisdiction to secure the long-term protection of significant properties.⁷⁰ The variety of motives involved in how MHT acquires easements creates a diverse portfolio of properties and brings with it the attendant administrative challenges. MHT holds easements on a wide variety of properties in all parts of the State, making it nearly impossible for the MHT to develop design guidelines that would be relevant to all or even most of the easement properties. The terms of each easement are different as well, meaning that the specific requirements for alterations vary from property by property. MHT makes an important distinction between donating and conveying preservation easements, stipulating that when an easement is conveyed as a

⁶⁹ Kate Bolasky, e-mail message to author, March 2, 2016.

⁷⁰ Jess R. Phelps, *Preserving National Historic Landmarks Preservation Easements and the NPS*. 27-37.

requirement of receiving funding it may be ineligible for charitable deductions. MHT accepts interior easements in addition to exterior.⁷¹

In September of 2015 MHT filed suit against a property owner regarding the replacement of windows in *Maryland Historical Trust v. Jerry Holly*. The easement acquired in 1977 used vague language, and when arguing the case both parties referred to the language of the easement. Mr. Holly claimed the easement exempted him from receiving permission to replace the windows citing,

Maintenance, reconstruction, repair, repainting or refinishing of said exterior, damage to which has resulted from casualty loss, deterioration or wear and tear shall be permitted without such written permission of the Officer provided that such maintenance, reconstruction, repair, repainting or refinishing is performed in a manner that will not materially alter the appearance there of as it is as of this date.

The state argued that the existing windows could have been repaired without being replaced. Section 6 of the easement contains a provision that maintenance and repair was to preserve the historic, aesthetic, and cultural character and appearance.⁷² The argument highlights the ambiguous language used in the easement document.

Monitoring

MHT faces the challenge of monitoring a large number of diverse easements dispersed throughout the state. The program is administered by one permanent, full-time staff person, the easement administrator. The administrator supervises two contractual positions: easement processor and easement inspector. Ideally, the easement inspector conducts on-site inspections of at least 150 historic preservation easement properties annually, which means that all the properties would be inspected within a five-year period; this is in contrast to the annual inspection schedule of HNE,

⁷¹ "Maryland Historical Trust Easement Program," Maryland Historical Trust, accessed February, 17, 2016, <https://mht.maryland.gov/easement.shtml>.

⁷² *Maryland Historical Trust v. Jerry Holly*. Circuit Court for Prince George's County. (September 25, 2015).

the L'Enfant Trust, and the MNCPPC.⁷³ The geographic spread, variety and number of easement properties, and limited staffing makes the task difficult. The Maryland Historical Trust uses a standard Easement Property Inspection Checklist to document each site visit, and keeps the records on file. The checklist is a generic form that contains a list of basic building elements and includes both an exterior and interior section. Correspondence with the property owners is also kept on file.⁷⁴

The easements require approval for all construction, including reconstruction, improvement, enlargement, painting and decorating, alteration, demolition, maintenance or repair of any structure. MHT follows a standard review process when considering proposed changes or alterations to the properties. The submission of a Change or Alteration Application form is required one week prior to an Easement Committee meeting. The MHT consults the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (36 CFR Part 68) in determining what changes are appropriate for each easement property.⁷⁵

In support of his argument in *MHT v. Jerry Holly*, Mr. Holly demonstrated that in 1985 he replaced the attic windows at Bellefields with vinyl windows identical to the windows at issue in the case. Despite numerous inspections by MHT, which included the attic, a finding of no “material alteration” was noted in the inspection document. Numerous pictures were admitted into evidence both “before” and “after” the most recent changes made by Mr. Holly. In response, MHT introduced a letter to Mr. Holly from 1988, which documented that the deteriorating condition of the windows was of longstanding, and suggested that the windows needed refinishing or replacement.

Enforcement

As with all easement holding organizations the ability to enforce the terms of the easement is critical for protecting individual properties as well as establishing a model for enforcing other easements. The loss of the recent legal battle in *MHT v.*

⁷³ Kate Bolasky, e-mail message to author, March 2, 2016.

⁷⁴ Kate Bolasky, e-mail message to author, March 2, 2016.

⁷⁵ “Maryland Historical Trust Easement Program,” Maryland Historical Trust, accessed February, 17, 2016, <https://mht.maryland.gov/easement.shtml>.

Jerry Holly demonstrates the many challenges faced by the Trust in terms of enforcement.⁷⁶ In this case the property owner of Bellefields, a historic house with an MHT easement, replaced 45 single-pane, divided-light wood windows, with double-pane vinyl windows without seeking or obtaining permission of MHT. The easement was granted in October of 1977 and Mr. Holly acquired the property in 1984. MHT claimed that replacing the windows violated two provisions of the easement, Section 5 and Section 6. The Prince George’s County Circuit Court ruled in Mr. Holly’s favor.⁷⁷

Mr. Holly presented evidence that the repair would be “ungodly expensive” and that replacing the divided-light windows in kind would have cost an additional \$80,000. Mr. Holly also claimed that “from ten feet away you can’t tell the difference.” The Court ruled that MHT failed to produce any evidence of the financial feasibility of repair short of replacement, even though the Trust was on record in 1988 advising the owner that repairs were warranted at that time, which almost certainly would have been less costly⁷⁸

The court found that the evidence produced at trial clearly indicated that replacing the windows qualified as maintenance or repair. The evidence showed that the old windows had deteriorated to the point where the wood sills had rotted, and that the wind and rain penetrated the interior of the house. While not authentic, the new windows had the appearance of multiple mullions and their installation did not change the rough window openings in the building. The judge noted that if the openings had been altered, such as by expanding the space to joint two windows, or to form one large bow or bay window, such would clearly be a material alteration. The court found that the new windows did not materially alter the appearance of Bellefields, and ruled that Mr. Holly complied with the more general provisions of

⁷⁶ *Maryland Historical Trust v. Jerry Holly*. Circuit Court for Prince George’s County. (September 25, 2015).

⁷⁷ *Maryland Historical Trust v. Jerry Holly*. Circuit Court for Prince George’s County. (September 25, 2015).

⁷⁸ *Maryland Historical Trust v. Jerry Holly*. Circuit Court for Prince George’s County. (September 25, 2015).

Section 6 of the easement.⁷⁹ The questionable decision demonstrates that the court and judge did not have a thorough understanding of preservation principles, or the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (36 CFR Part 68). The decision emphasizes the need for explicit clarity in the language of the easement document.

Conclusion

The Maryland Historical Trust represents a state level easement holding organization. It faces the challenging task of administering a large number of diversely motivated and constructed easements that have become the responsibility of the SHPO. The recent decision of the Prince George's County Circuit Court in *MHT v. Jerry Holly* identified potential problems in easement administration that all easement programs should be aware of and take measures to address. There are several aspects of this case worth noting in regard to easement administration: the contentious relationship between the property owner and easement holder, issues of clarity in the easement document pertaining to reserved and retained rights, , and the precedent set by inspections that overlooked changes to the attic windows. MHT will not appeal the case, hoping to avoid establishing unfavorable precedent at a higher court. The decision was a blow to the preservation community, but provides an opportunity for easement holding organizations to strengthen their programs in response as the case identified a number of weaknesses in the way the easement was administered and drafted.

⁷⁹ *Maryland Historical Trust v. Jerry Holly*. Circuit Court for Prince George's County. (September 25, 2015).

Chapter 6: The L'Enfant Trust

Introduction

The L'Enfant Trust is a private, non-profit foundation established in 1978 to preserve and protect the historic character of Washington, D.C. The Trust was founded in response to the unchecked demolition of historic properties that was occurring in Washington during the 1970s.⁸⁰ The organization was selected as a case study for this investigation because it represents an easement holding organization operating at the city level. It is remarkable for several reasons: the large number of easements it holds in comparison to its small staff; its success in enforcing historic preservation easements through legal action; and its leading role in the history of easement holding organizations as related to tax issues.

Acquisition

The Trust operates a variety of programs, but the traditional focus of the organization has been its easement program, which covers more than 1,130 properties. More recently the L'Enfant Trust has launched a Historic Properties Redevelopment Program, which utilizes a revolving fund to acquire and rehabilitate historic properties in Historic Anacostia. This underserved neighborhood in Washington has been targeted for the initial initiatives of the program with the goal of having a positive impact on community revitalization. The L'Enfant Trust also engages in community outreach, offering public education programs and technical preservation support.⁸¹

The easement program is focused on managing its portfolio of properties and providing historic preservation resources to property owners and the public.⁸² The L'Enfant Trust is a widely recognized preservation organization and a model for efficient administration of an easement program. The organization was also the

⁸⁰ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

⁸¹ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

⁸² "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

subject of *Simmons v. Commissioner* a major legal case regarding IRS scrutiny of an easement held by the L'Enfant Trust, regarding the manner in which property owners are awarded tax relief in exchange for their easement donation.⁸³

Tax relief is a major motivator of easement donation to the L'Enfant Trust. The easements held by the Trust also provide stricter protections than local ordinances. The Trust's history of acquiring easements has been heavily influence by tax legislation regarding the donation of preservation easements. In recent years the Trust has received few easement donations because of the decline in the real estate market, the fear on the part of potential donors of heightened scrutiny by the IRS, and the difficulty in finding qualified professionals willing to appraise the value of the donations.⁸⁴

Stricter Protections than Local Ordinances

It is often the case that easements provide stricter protections than those stemming from local government preservation ordinances. The L'Enfant Trust makes this distinction by explaining how the preservation protection offered by their organization differs from that provided by D.C.'s historic preservation laws. One significant difference is that D.C.'s preservation ordinance has sometimes only provided protection for the historic facades of buildings, resulting in the maintenance of a four-inch historic wall of brick behind which an entirely new building may be built. This practice has been approved on numerous occasions by the D.C.'s Historic Preservation Review Board. The L'Enfant Trust does not accept façade easements and has been able to preserve entire buildings where D.C. preservation law has not applied.⁸⁵

⁸³ *Dorothy Jean Simmons v. Commissioner of Internal Revenue*, 2009 No.10-1063, United States Court of Appeals, September 15, 2009.

⁸⁴ Richard J. Roddewig, *Appraising Conservation and Historic Preservation Easements*. (Chicago, IL: Appraisal Institute, 2011).

⁸⁵ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

Tax Benefits

Easement programs such as the one administered by the L'Enfant Trust have witnessed a significant decline in the numbers of voluntary donations as a result of IRS scrutiny. In summary, the IRS has audited tax payers and rejected tax deductions on the basis that they have been inappropriately valued, or in some cases are valueless, meaning they are not “exclusively for conservation purposes.” Since the actions taken by the IRS were against individuals rather than easement holding organizations, this increased fear among individual donors.⁸⁶

The L'Enfant Trust was involved in a victory for preservation easement holding organizations in the case of *Simmons v. Commissioner*. A three-judge federal appeals court in Washington, D.C., ruled that an individual was entitled to a tax deduction, rejecting several arguments the IRS had presented in multiple cases. Essentially the IRS argued that the easements were not protected in perpetuity because the easement document gave the L'Enfant Trust the right to approve changes and to abandon some or all of its rights, but did not delineate the consequences if the L'Enfant Trust dissolved. The IRS also questioned the mechanism for mortgage subordination. The court's reasoning regarding these arguments was that no preservation organization would create an easement that allowed for the property to be maintained without change, or in a frozen state, and that there was a negligible possibility that the L'Enfant Trust would abandon its easements based on its history. Furthermore, the easement document stated that it would survive termination of the existence of the Grantor or Grantee, and the court reasoned that this adequately addressed the possibility of the L'Enfant Trust dissolving. The court also determined that the easement adequately established that the mortgage lenders agreed to subordinate their interest.⁸⁷

The decision of the court with reference to the *Simmons v. Commissioner* case illuminated four critical features that tax-exempt preservation organizations should include in their easement documents. First, the easement should include a

⁸⁶ Mathew A. Eisenstein, “The Significance of *Simmons v. Commissioner*: DC Ruling Supports Preservation Easements,” September 22, 2011.

⁸⁷ *Dorothy Jean Simmons v. Commissioner of Internal Revenue*, 2009 No.10-1063, United States Court of Appeals, September 15, 2009.

commitment to protect the donated easement specifically for conservation purposes. In other words, that the holding organization would consent to changes only if they were in keeping with its preservation mission. Second, the easement should not allow for the organization to abandon the agreement. Third is a provision for administering the easements in the event that the holding organization ceases to exist. When holding organizations go out of business or are dissolved the easement should specify where the easements go, and who will administer them. This is important in establishing the effectiveness of easements in perpetuity. And fourth, that easements are explicit in the need for mortgage subordination.⁸⁸

A particularly important aspect of the *Simmons v. Commissioner* case revolved around the question of the accuracy of appraising the value of the property, and thus the resulting tax benefit.⁸⁹ Easement appraisals assign the monetary value based on the change in property value before and after the easement agreement. There is a specific process for determining the value of preservation easements and qualified appraisers who are familiar with approved methods should be consulted regarding the issue. A major argument made by the IRS in tax court has claimed that easements have zero value because they duplicate existing preservation laws. However, the argument that preservation easements often provide greater protections than existing legal frameworks was upheld, and *Simmons v. Commissioner* is interpreted as a victory for preservation easements and could encourage continued donations.⁹⁰

Revolving funds

The L'Enfant Trust currently receives few donations of preservation easements, and their focus has shifted toward their Historic Properties Redevelopment Fund. The revolving fund follows the model pioneered in cities such as Annapolis and Charleston, which were at the forefront of using revolving funds. A

⁸⁸ Mathew A. Eisenstein, "The Significance of *Simmons v. Commissioner*: DC Ruling Supports Preservation Easements," September 22, 2011.

⁸⁹ *Dorothy Jean Simmons v. Commissioner of Internal Revenue*, 2009 No.10-1063, United States Court of Appeals, September 15, 2009.

⁹⁰ Mathew A. Eisenstein, "The Significance of *Simmons v. Commissioner*: DC Ruling Supports Preservation Easements," September 22, 2011.

requirement of the L'Enfant Trust's revolving fund projects is the placement of a perpetual preservation easement on the rehabilitated property.

Monitoring

The L'Enfant Trust has a full-time staff of three, and a large portion of their work is devoted to providing assistance to the owners of properties under easement in the form of technical preservation advice and architectural design review.⁹¹ Unlike the other case studies The L'Enfant Trust hires a photographer to document the sites on an annual basis. It takes two months for the photographer to document all the easement properties, which is generally carried out in January and February when foliage does not obscure the buildings. The staff members then review the photos and compare them to previous years. This process is unique among the case studies because it eliminates the use of inspection forms and relies on photographic documentation. No annual report is shared with the property owners. The L'Enfant Trust has an annual mailing of postcard-sized literature reminding property owners of their easement responsibilities and the resources available to them through the Trust. The L'Enfant Trust utilizes a database to organize files on each property, which tracks photographic documentation, work permits, and correspondence.⁹²

Enforcement

When the L'Enfant Trust is faced with an easement violation they first bring it to the attention of the property owners. A variety of letter templates have been developed and are kept on file to address different degrees of violation. The L'Enfant Trust has also been successful in filing suit against a noncompliant property owner. This was the case of *The L'Enfant Trust v. Sheri L. Orlowitz*, which was decided in 2007.⁹³ Under the agreement the property owner, Sheri L. Orlowitz, had agreed not to undertake "any alteration" that would "materially alter or change the appearance of

⁹¹ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

⁹² Kate Kenwright, e-mail message to author, October 12, 2015.

⁹³ *The L'Enfant Trust v. Sheri L. Orlowitz* (D.C. Superior Court December 19, 2006)

the façade” without first consulting and obtaining consent from the Trust. Ms. Orlowitz nevertheless painted her property in a manner that dramatically altered its appearance. The L’Enfant Trust filed the action to require Ms. Orlowitz to repaint the property and pay the Trust’s attorney’s fees. They were successful in the action and the Honorable Russell Canan of D.C. Superior Court ordered that the property be repainted to its original appearance, and that the defendant was to pay \$80,484.80 to cover the cost of enforcing the deed.⁹⁴ While an expensive and time consuming process, the case demonstrated the L’Enfant Trust’s ability to follow through on the terms of the easement.

Conclusion

The L’Enfant Trust represents a city-sized easement program that has been extremely active over the years. As a case study, it provides insight into several aspects of operating an easement program. The history of the L’Enfant Trust reflects national trends in the fluctuating rates of easement donation. The organization illustrates how preservation easements are able to provide more protection than preservation ordinances. The Trust also played a significant role in clarifying the role and responsibilities of easement holders by their involvement in *Simmons v. Commissioner*, and established a successful legal precedent for maintaining the right of an easement holder to enforce easements when necessary.

⁹⁴ *The L’Enfant Trust v. Sheri L. Orlowitz* (D.C. Superior Court December 19, 2006)

Chapter 7: The Maryland-National Capital Park and Planning Commission (M-NCPPC)

Introduction

The M-NCPPC's historic preservation easement program represents a public program at the county level, which currently holds 41 easements. The first easements under the program were recorded in 2009 as part of the county's Historic Property Grant Program, and more easements are acquired each year with every round of Historic Property Grants. The method of acquisition as a quid pro quo shapes the way the easement program operates.⁹⁵

Quid pro quo

M-NCPPC's easement program was created to protect the M-NCPPC's investment in historic properties as required by the Historic Property Grant Program. A preservation easement is required of any property that chooses to accept grant funding. The intent was to use easements as a tool to ensure the continued preservation and maintenance of properties that received commission dollars. This is a common practice; MHT also requires easements on properties that receive capital grants, bond bills, or loans. The M-NCPPC program is unusual with respect to giving publicly funded grants to private individuals. Many organizations require the donation or conveyance of an easement in exchange for investment in the property to ensure that values associated with the project are honored. The easements themselves are similar to those of other programs but the relationship of the two programs shapes the portfolio of easement properties, and the way the easements are administered.⁹⁶

⁹⁵ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

⁹⁶ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

Acquisition

M-NCPPC generally accepts exterior easements that include architectural features, along with open space and designed landscape features. If the easement includes interior features it may protect elements such as staircases, floors, woodwork, fireplaces, historic wallpaper, and decorative painting and hardware. Of the 41 easements currently held by M-NCPPC, five include interior protections on elements such as room configuration, mantels, paneling, and molding. Like the other case studies M-NCPPC does not accept easements that are limited to facades or in the term of its application.⁹⁷

If the property meets the criteria for the federal preservation easement charitable tax donation the owners may apply. Not all easement properties are eligible for this tax advantage, however, because they are not individually listed in the National Register or as contributing structures in a National Register Historic District. This contrasts with MHT's policy that differentiates between donation and conveyance, where easements that have been conveyed through public grant programs are ineligible for the charitable donation tax benefits. All M-NCPPC easement properties, on the other hand, have been the recipient of a preservation grant of which the easement was a requirement. M-NCPPC recommends that individuals who have donated easements and want a federal tax deduction should seek the assistance of qualified professional advisors on the matter.⁹⁸

A distinctive characteristic of M-NCPPC's easement program in comparison with the other case studies is its portfolio of easement properties. All of the properties have been recipients of at least one preservation grant award. The grant program was designed with the intention of assisting the properties with the greatest need for preservation work (not necessarily financial need), and the urgency of need for

⁹⁷ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

⁹⁸ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

financial assistance is articulated in each grant application. A number of modest houses, historic schools, and churches have preservation easements monitored by the program. Because tax incentives hold less appeal to owners of modest homes and churches, these structures are often excluded from donation based easement programs. While including financially unstable or needy properties in the program has its own challenges, it provides M-NCPPC with the unique opportunity to preserve underrepresented structures in the field of preservation.⁹⁹

Dominion and Control

M-NCPPC recently requested a Private Letter Ruling from the IRS regarding the taxation of historic property grant funds. Property owners receive a Tax Form 1099 from M-NCPPC with grant funding. It is unclear whether grant funds constitute taxable income. The Private Letter Ruling was hoped to clarify the issue. The IRS response, however, was that the case was too fact-specific to the property owners individual tax liability. An argument could be made that the easement program (which applies to all properties that have received a grant) establishes dominion and control over the property by M-NCPPC. To prove that the easement program establishes sufficient dominion and control it needs to demonstrate that it effectively exercises its non-possessory rights over easement properties. And this demonstration needs to stand up to close examination by the IRS. If it does, the grant money is not taxable income. But if it doesn't and the grant money is subject to income tax, it would call the feasibility grant program into question. In order to continue administering the grant program it is important that M-NCPPC demonstrates the easement program has dominion and control over the easement properties. This involves making sure that the easement program enforces the obligations set forth in the easement documentation.¹⁰⁰ Currently the dialogue with the IRS is ongoing.

⁹⁹ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016,

¹⁰⁰ Frederick Stachura, conversation with author, April 24, 2016.

Monitoring

One advantage of donating a preservation easement to M-NCPPC is the support and assistance of professional staff that is offered to property owners. Ideally each of the easement properties is inspected annually by a staff member. Before visiting program staff contact the property owner to schedule a convenient time and review the easement file. If the property has an exterior only easement the owner is welcomed but not required to be present. If the easement covers interior portions of the property, the owner must be present to allow access into the building. The administration of easements that include interiors require more time and organization for both staff members and property owners. The inspection usually lasts between 30 minutes and two hours. Each inspection aims to accomplish several things: an evaluation of the protected elements outlined in the easement, photographic documentation of existing conditions, an assessment of general maintenance and potential problems, and an opportunity to discuss possible upcoming work with the property owner. The inspection is recorded on a standard form similar to that of the Maryland Historical Trust. After each visit, a packet of follow-up materials is sent to the property owner, which includes a letter, a copy of the inspection form, an Optional Owner Statement, and photographs of problem areas and recommendations as needed. The Optional Owner Statement provides property owners with a chance to give feedback about the inspection process and notify staff about potential future projects.¹⁰¹

All county historic sites are provided with a level of protection required by county code which includes a review process that limits changes and/or alterations. This includes the process of obtaining Historic Area Work Permits, following *Secretary of the Interior's Standards*, and the oversight of the Historic Preservation Commission. Easement properties require an extra level of review by an easement committee and are subject to stricter regulation. Generally the process of modifying or altering properties with preservation easements would follow the same process that

¹⁰¹ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

the other county historic sites require. In addition to the regulations applied to the easement properties as county historic sites, review of projects by the easement committee is required. As with all county historic sites staff work with property owners to provide technical assistance and guidance through the review process to ensure that the historic structures and landscapes are appropriately protected. Reserved rights of the property owner's allow regular maintenance like painting without approval from the easement holder.¹⁰²

When easement properties require work beyond regular maintenance, proposed projects should be brought to the attention of staff. An example would be the installation of solar panels. If it is determined that M-NCPPC approval is required, property owners are directed to submit an Easement Change Alteration Proposal Application. The application, which is similar to those used by the organizations detailed in the other case studies, is reviewed by the easement committee within 30 to 90 days. If the alteration is approved the changes are documented and included in the easement property file.¹⁰³

Enforcement

As a qualified easement holder, M-NCPPC has the legal authority to enforce the requirements of its easements. The easement documents outline courses of action that M-NCPPC can take in order to enforce the terms of the agreement. The photographic and written record created through the process of annual monitoring is important for this purpose. A typical example of an enforcement issue would be the requirement that the owner must repair a structurally unstable porch. Provisions for enforcement are written into the easement document. Filing suit against a property owner would not be the first course of action. Minor violations of historic preservation easements may be dealt with by bringing property owners into

¹⁰² "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

¹⁰³ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

compliance through minor amendments of the easement, and involved dialogue with property owners to address specific violations and problems. As with the other easement programs a critical element to M-NCPPC's success is whether it has the resources and will to use its enforcement powers. So far, M-NCPPC has not had to pursue legal action regarding violations of preservation easements.¹⁰⁴

Conclusion

The M-NCPPC preservation easement program provides an example of a recently established public county level program available to a wide array of property owners. As a case study it can provide unique insights into easement administration. The current communications with the IRS regarding a Private Letter Ruling requires a general review of how the easements are monitored and potentially enforced to demonstrate dominion and control over the easement properties. While the Private Letter Ruling may be specific to M-NCPPC, the demonstration of dominion and control over historic preservation easement properties may be of interest to other easement holding organizations.

¹⁰⁴ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

Chapter 8: Conclusion and Recommendations

Examining the operations of the four selected easement programs provides the basis for identifying a variety of strategies for successful administration. To some, the creation of a preservation easement may be the end of a long process, but to the easement holder it is the beginning of a perpetual responsibility to monitor the resource. Property owners and easement holders must make long term plans to uphold their respective responsibilities for the duration of the agreement, which includes committing the necessary resources both for maintaining the property and for establishing an efficient system of monitoring and enforcement.¹⁰⁵ After analysis of the case studies it is possible to make recommendations for effective administration of an easement program.

Easement holding organizations face a variety of administrative challenges. One is the need for long term planning, as most easements are held in perpetuity. Another is consistent and frequent site visits to document the property, and to ensure that the terms of the easement are respected. While ideally a positive relationship between easement holder and property owner avoids the need for enforcement, the ability to enforce the legal agreement when necessary is crucial. The case studies also demonstrate successful strategies for effective administration.

The weaknesses and administrative challenges faced by the easement programs studied can provide important lessons. The challenges MHT faces are illustrated by the *Maryland Historical Trust v. Jerry Holly*, a case in which the court ruled that replacing windows was regular maintenance and permitted under the language of the easement document without requiring permission from the easement holder. While a serious setback for MHT, several lessons can be learned from their defeat. The first is the importance of carefully creating the easement documents with specific language, clearly defining prohibited activities, reserved rights of the property owner, actions requiring approval of MHT, and defining seemingly self-evident terms such as regular maintenance and repair. Second, is the need for meticulous and regular inspections. This was highlighted by the fact that two of the

¹⁰⁵ Jess Phelps, e-mail message to author. April 14, 2016.

attic windows had been replaced previously and the change was overlooked by inspectors. Third, is building trusting relationships with property owners to increase open and clear communication between them and the easement holding organizations.¹⁰⁶

The L'Enfant Trust is a nationally recognized easement holding organization. But despite their large portfolio of properties under easement the Trust has experienced a serious decline in the number of donated easements. This is the result of the 2008 real estate market crash, combined with the increased scrutiny of the IRS in the late 2000s. As a consequence, they have shifted their mission toward rehabilitation projects financed by a revolving fund. A requirement of their recent revolving fund projects has been the conveyance of a preservation easement on the rehabilitated properties. The acquisition of easements has continued through this process, but at a much slower rate. This is a significant change in the mission of the organization and the method of acquiring historic preservation easements.¹⁰⁷

M-NCPPC is the newest of the programs under discussion, but it has acquired a significant portfolio of easements over a relatively brief period. M-NCPPC's entire easement portfolio is made up of properties that have received funding from the historic property grant program. A number of other programs around the country also have adopted a quid pro quo model for the acquisition of preservation easements. While the grants provide resources for tackling aspects of building preservation often the money does not cover the cost of total rehabilitation. This creates a sticky situation in which easement donors are required to maintain properties to the easements standards while sometimes requiring more resources than the historic property grant provides. The M-NCPPC easement program grows annually with every round of historic property grants. It is important to consider what the back end of a process like this looks like, as the administrative, monitoring, and enforcement duties will continue to grow apace. As time passes and easements continue to be

¹⁰⁶ *Maryland Historical Trust v. Jerry Holly*. Circuit Court for Prince George's County. (September 25, 2015).

¹⁰⁷ "Conservation Easements," The L'Enfant Trust, accessed October 5 2015, <http://www.lenfant.org/conservation-easement.html>.

conveyed at a rate of about 10 per year the administrative responsibilities will take up more and more attention of staff, and may well require creating a specific position and budget dedicated to performing the duties of an easement administrator and inspector.¹⁰⁸

The administrative challenges faced by MHT and M-NCPPC are caused in part by limited funding and staff. One important distinction in the case studies is the matter of finances. MHT and M-NCPPC are state and county organizations with government funding, while HNE and the L'Enfant Trust are both private non-profits. Like many easement-holding organizations, HNE and the Trust set aside special endowments or stewardship funds, to ensure that the organization has a long-term designated funding source to satisfy its easement obligations.¹⁰⁹ Historic New England is funded through an endowment that is underwritten by the contributions made by property owners. The L'Enfant Trust a private non-profit requests that donors make a "fair share contribution" to the organization.¹¹⁰ Increased funding and staffing to effectively draft, monitor, and enforce easements is an obvious solution. But given the reality of the situation for many easement holding organizations this may well not be possible. Therefore, finding ways to administer easements in a more efficient manner is the primary concern, and the four case studies examined here provide many lessons, both to avoid and to emulate. HNE is a successful model for building positive relationships with property owners, which has resulted in HNE having largely avoided legal action.¹¹¹ MHT monitors approximately 700 diverse easements over a large geographic area, with minimal staff, and with predictable results. The L'Enfant Trust has established an efficient system of monitoring a large number of properties, and also has also been successful in establishing legal

¹⁰⁸ "Preservation Easement Program," Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

¹⁰⁹ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

¹¹⁰ "Preservation Easement Program," Historic New England, accessed November 25, 2015, <http://www.historicnewengland.org/preservation/preservation-easements>.

¹¹¹ Carissa Demore, e-mail message to author. March 14, 2016.

precedent for other easement organizations through the outcome of the cases, *The L'Enfant Trust v. Sheri L. Orlowitz*, and *Simmons v. Commissioner*. While relatively new and understaffed, the M-NCPPC's easement program draws strength from the organization's existing documentation of county historic sites through designation and issuing Historic Area Work Permits. The case studies provide replicable models for other easement holding organizations based on organizational structure and level of funding.

Recommendations

Based on the challenges and successes of the case studies it is possible to make recommendations for administering effective easement programs. The recommendations are organized into the three main activities of administration; drafting easement documents, monitoring properties, and enforcing violations. In drafting easement documents it is critical that it uses clear language, and completely addresses the technical aspects of the legal mechanism. Reference resources are available for those undertaking the task of creating a preservation easement. Clear language is important in delineating the responsibilities of the easement holder and property owner. The easement must specifically address what is allowed and prohibited by the document. Ambiguous language can prove to be a critical mistake. The character defining features of a property should be explicitly defined in a way that is understandable to those unfamiliar with preservation practices.

In order for preservation easements to remain effective in perpetuity, through a succession of property owners and possible legal scrutiny from the IRS or developers, it necessary to keep the long-term nature of the easements in mind when carefully drafting the documents.¹¹² While each preservation easement is unique, they all are composed of a limited number of basic elements. Often organizations utilize an easement template or refer to resources that provide guidance on what to include. It is critical that easement documents are drafted by a competent preservation attorney. A major challenge in drafting a preservation easement is to craft the restrictions so that

¹¹² Elizabeth Watson, and Stefan Nagel "Establishing and Operating an Easement Program to Protect Historic Resources," (A Nation Trust Publication).

character-defining elements of the property are protected but the restrictions are not so onerous that the property ceases to be economically viable. In addition to providing baseline documentation, the instrument should explicitly state which activities are prohibited, and which are allowed, as well clearly defining maintenance obligations, and amendment policies.¹¹³

The physical features of the property that will be preserved are generally identified when the easement is granted. Baseline documentation provides a crucial reference for the easement holding organization in carrying out their monitoring responsibilities. Ideally baseline documentation will include maps, photographs, descriptions of significant features, a legal description of the property, and other supporting documentation like National or State Register nomination forms.¹¹⁴

Prohibited activities or absolute prohibitions are those that are inconsistent with the purpose of the easement. Prohibited activities that could damage or destroy significant historic or architectural features could include demolition, removing historic elements, erecting other buildings or structures, and dumping trash. Sometimes preservation easements may prohibit changes in use; this is often the case when preservation easements address land conservation issues.¹¹⁵

Conditional activities or provisions permitting change require the approval of the easement-holding organization. All of the organizations examined in the case studies provide change request forms on their websites. These conditional activities should be enumerated; they may include such things as modifications to the exterior, including additions, permanent and substantial topographical changes, cutting or removing live trees and shrubs, installing signs or billboards, and changing the use of the structure. Holders must consider their capacity to respond to requests for approval

¹¹³ Thomas S., Barrett, and Stefan Nagel, *Model Conservation Easement and Historic Preservation Easement, 1996: Revised Easements and Commentary from the Conservation Easement Handbook*, (Washington, D.C.: Land Trust Alliance, 1996).

¹¹⁴ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

¹¹⁵ Thomas S., Barrett, and Stefan Nagel, *Model Conservation Easement and Historic Preservation Easement, 1996: Revised Easements and Commentary from the Conservation Easement Handbook*, (Washington, D.C.: Land Trust Alliance, 1996).

when determining the level of activity that will require approval. Responding to requests for approval can be 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.¹¹⁶

Allowed activities or reserved rights do not require further approval and are permitted by the owner as a matter-of-right, with no oversight or involvement of the easement holder. Examples of these include the right to use, enjoy, maintain, and repair the property. It is important that the allowed activities are clearly defined.¹¹⁷

Maintenance obligations or affirmative maintenance provisions include general maintenance of the structure, but may be more extensive and specific depending on the nature of the resource – to include landscapes or interiors for example. A successful easement strikes a balance between allowing owners enough independence to successfully preserve and use the property, but not enough to significantly alter structures. It is important for the easement to specify what is considered general or regular maintenance. Maintenance obligations can include general requirements like maintaining the structural soundness of the building, or be as specific as keeping vines off of the structure, or cleaning gutters. Some easement 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 can treat the failure as a violation of the easement.¹¹⁸

Preservation easements may address other issues, including public access requirements for maintaining property insurance, subordination of liens and mortgages, and steps the easement holder can take to enforce the agreement.

¹¹⁶ Elizabeth Watson, and Stefan Nagel *“Establishing and Operating an Easement Program to Protect Historic Resources,”* (A Nation Trust Publication).

¹¹⁷ “Preservation Easement Program,” Maryland-National Capital Park and Planning Commission, accessed March 14, 2016, <http://www.pgplanning.org/Assets/Planning/Historic+Preservation/Easement+Program/Preservation+Easement+Program.pdf>.

¹¹⁸ Elizabeth Watson, and Stefan Nagel *“Establishing and Operating an Easement Program to Protect Historic Resources,”* (A Nation Trust Publication).

Technical issues like obtaining mortgage subordination can be difficult, and the ability to do so can make or break the document. Take *Simmons v. Commissioner* for example. One of the arguments made by the IRS was that the easement did not support a tax deduction because the easement document did not adequately establish that the mortgage had been subordinated, in which case the easement was not perpetual. In order for easements to stand up to intense legal scrutiny it is important that programs follow through with the technical requirements of qualified easements.

An easement may also include a public benefit or public access clause that specifies a number of days the property must be open to the public, or that a structure remain visible from a public right-of-way.¹¹⁹ Many easements will also include a section that outlines the process for amending the legal document. This is an important clause that allows easements to change over time. Modifying easements requires careful planning and drafting. Modifications can improve stewardship through allowing some flexibility. For example, climate change is one issue that will require some preservation easements to be modified in the future. Careful drafting of preservation easements is required to make sure both parties understand the agreement, and that future owners are held to the easements original intentions. Vague language makes enforcement difficult or impossible and may initiate an action for court interpretation.¹²⁰

Resources are available to easement holding organizations. Publications like Barrett, Thomas S., and Stefan Nagel. *Model Conservation Easement and Historic Preservation Easement*, from the Land Trust Alliance, *Appraising Conservation and Historic Preservation Easements*, by Richard Roddewig, and *Establishing and Operating an Easement Program to Protect Historic Resources* published by the

¹¹⁹ "Preservation Easements," National Trust for Historic Preservation, accessed November 25, 2015, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/>.

¹²⁰ Thomas S. Barrett, and Stefan Nagel, "Model Conservation Easement and Historic Preservation Easement, 1996: Revised Easements and Commentary from the Conservation Easement Handbook," (Washington, D.C.: Land Trust Alliance, 1996).

National Trust provide guidance and helpful information for understanding the ins and outs of the legal and technical aspects of operating an easement program. The National Trust for Historic Preservation also hosts a Preservation Easement Roundtable at its annual conference in which easement administrators from across the country are able to network and share concerns.

In monitoring historic preservation easements creating thorough documentation, establishing efficient work flows, and building positive relationships with property owners allow programs to operate smoothly. Documentation of easement properties is a necessary first step in creating a detailed record of conditions over time. Monitoring begins with establishing detailed baseline documentation. Annual inspections remind property owners of the easement, and identify noncompliance quickly. The regular inspection of easement properties should be a top priority

Creating efficient workflows are especially important when administering easement programs with little funding and few staff. The L'Enfant Trust has demonstrated a tremendous capacity for monitoring over a thousand easements with minimal staff.¹²¹ Creating databases that meet the fundamental needs of the organization can save money and time. This could include tracking things like change in property ownership, issuing building permits, and photographic records. Partnerships with other interested parties like permitting offices can provide useful information to easement holders. An efficient workflow allows staff to manage their time effectively and have the greatest impact.

However if resources allow, regular communication with property owners can go a long way towards effective monitoring through building positive relationships. Historic New England has been able to avoid the need for legal action for years through investing involved relationships with property owners. These relationships encourage clear and frequent communication between the parties and are at the foundation of building a partnership in preservation.

¹²¹ Kate Kenwright, e-mail message to author, October 12, 2015.

Enforcing historic preservation easements is a challenge. Successful enforcement relies on the careful drafting of the easement documents, thorough and meticulous easement inspections, and the capacity to address violations and enforce the legal provisions of the document. When organizations are faced with violations of historic preservation easements it is important that they have an established plan of action. This way, when a violation is identified organizations do not have to wait to determine an appropriate response. Clear policies lay out the measures the easement holder can take in addressing non-compliance before it happens. It is important to have them in place so the holding organization can approach every violation in a consistent and methodical way.

Often there are measures that can be taken before legal action is required. The most common easement violations are changes made to easement properties without oversight of the easement holding organizations. Often these changes are appropriate and can be approved by the easement holding organizations after the fact, bringing property owners into compliance. Sometimes amending the easement is the most appropriate strategy. The flexibility to be creative in addressing violations can benefit both parties. Although this does not mean programs should be lenient when it comes to enforcement.

It is critical that easement holding organizations have the capacity to pursue legal action if necessary. The ability to take violations to court is at the core of what makes preservation easements a powerful tool. Legal action also can have a positive impact by establishing precedent for other cases. A track record of successful suits assures other property owners of easement properties that the easements will be enforced. If legal action is not pursued in a timely manner it becomes more difficult to enforce all preservation easements held by the preservation organization.

Examining the successes and challenges of the case studies regarding easement creation, monitoring, and enforcement can inform the future strategies of easement holding organizations. The organizations portrayed in the case studies have all been effective in at least some aspect of drafting, monitoring, and enforcing historic preservation easements. Pulling from each of their administrative approaches and relevant sources it is possible to make recommendations and to suggest ways of

making operating procedures more effective and efficient. The program's missions and structures were shaped by the preservation needs during the time in which they were founded. While easements are sometimes seen as obstructionist or draconian, if they are backed up by thoughtful and thorough administration, as demonstrated by the case studies, they can provide an effective and unique preservation tool.

Appendix: Comparative Chart

Easement Programs	M-NCPPC	MHT	The L'Enfant Trust	Historic New England
Organization Type	Historic Preservation Section of County-Wide Planning Division	State Historic Planning Office part of the Maryland Department of Planning	City Based Private Nonprofit	Regionally Based Private Non-Profit
Year program founded	2008	1966	1978	1947
Number of Easements	41	698	1,130	102
Method of Acquisition	Quid Pro Quo of Historic Property Grant Program	Donation, Mitigation, and Quid Pro Quo	Private Donation	Private Donation
Rate of Acquisition	Approximately 10 per year.	Data Unavailable	Correlated with 1976 tax reform law; no easements donated in last several years	Three easements donated in the last year.
Number of Staff	Administered by staff of the Historic Preservation Section in addition to many other duties.	One permanent, full-time staff person; two staff who work part-time on the program.	Three full-time staff, who are also committed to other programming; one part-time photographer.	The Southern Office has three full-time and two part-time staff who oversee 40 properties.
Regularity of Inspections	Annually	150 annually, 5 year rotation	Annually	Annually
Funding	Public	Public	Private	Private

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