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Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future

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Jess R. Phelps*

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> I was forced to fall back upon the unsatisfactory conclusion, that while, beyond doubt, there *are* combinations of very simple natural objects which have the power of thus affecting us, still the analysis of this power lies among considerations beyond our depth.[1]

I. INTRODUCTION

In May of 1910, the early preservationist William Sumner Appleton observed in the first *Bulletin of the Society for the Preservation of New England Antiquities* that "[o]ur New England antiquities are fast disappearing because no society has made their preservation its exclusive object."[2] The cover of this first bulletin bemoaned the fate of one lost antiquity—Boston's John Hancock House (built in 1737)—and described its teardown as "a classic in the annals of vandalism."[3] In 1863, amid limited public outcry, this historic landmark was torn down but its fate is now cited as contributing to the birth of the preservation movement.[4] By 1910, Appleton's newly formed Society for the Preservation of New England Antiquities (SPNEA) was poised to enter this void, proposing "to preserve the most interesting of [New

1. EDGAR ALLEN POE, *The Fall of the House of Usher*, *in* TALES OF IMAGINATION AND MYSTERY 245, 246 (Barnes and Noble 2003) (1839).
2. Soc'y for the Pres. of New England Antiquities, BULLETIN OF THE SOCIETY FOR THE PRESERVATION OF NEW ENGLAND ANTIQUITIES, May 1910, at 4 [hereinafter *May 1910 Bulletin*]. In 2002, the Society for the Preservation of New England Antiquities officially changed its name to Historic New England. Historic New England is the largest regional heritage organization in the United States, operating a network of thirty-six house museums, substantial collections and archives, and most relevant to this article, a leading preservation easement program. *About Us*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/about-us (last visited Feb. 1, 2012); *Program Areas*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/about-us/our-program-areas (last visited Feb. 1, 2012); *The Stewardship Program*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/preservation/preservation-easements (last visited Feb. 1, 2012).
3. *May 1910 Bulletin*, *supra* note 2, at 1. The John Hancock House in Boston's Beacon Hill was a high-style Georgian residence distinguished by its architecture and by its association to its namesake founding father. CHARLES B. HOSMER, JR., PRESENCE OF THE PAST 38 (1965).
4. *See* HOSMER, *supra* note 3, at 38–40 ("In dying the Hancock House contributed more to the preservation movement than it could ever have by remaining standing intact. Throughout the next five or six decades many preservationists used the Hancock Mansion as their rallying cry."); *see also* Michael Holleran, *Roots in Boston, Branches in Planning and Parks*, *in* GIVING PRESERVATION A HISTORY 81, 81–83 (Max Page & Randall Mason eds., 2004) (discussing the impact of the battle over the Hancock House in forming a constituency for preservation).

England's historic] buildings by obtaining control of them through gift, purchase, or otherwise, and then to restore them, and finally to let them to tenants under wise restrictions."[5]

In March of 1912, SPNEA's sixth bulletin featured better news. Earlier that year, SPNEA had purchased the Fowler House (1809) in Danvers, MA to secure its long-term preservation.[6] Upon purchasing this property, SPNEA was confronted with several profound questions: what does one do with a historic house once it has been saved, and perhaps more importantly, how does one pay for its continued maintenance?[7] Initially, SPNEA's solution was to operate the Fowler House as a historic house museum but continued ownership proved untenable by the late 1970s.[8] The organization then began exploring the idea of deaccessioning the Fowler House along with approximately twenty-five to thirty other museum properties.[9] In 1980 SPNEA sold the property, but by then the Massachusetts legislature had authorized a "new" preservation tool—the preservation easement[10]—which allowed the Fowler House to return to private ownership while preventing certain changes to the property.[11] By the end of 1981,

5. *See May 1910 Bulletin*, *supra* note 2, at 6.
6. *See* Soc'y for the Pres. of New England Antiquities, BULLETIN OF THE SOCIETY FOR THE PRESERVATION OF NEW ENGLAND ANTIQUITIES, March 1912, at 3 (detailing the acquisition made possible through a bargain sale funded by an unnamed donor). The Fowler House was the Society's second museum purchase, preceded a year earlier by the purchase of the Swett-Ilsley House (c. 1670) in Newbury, MA. *See* Bertram K. Little, *Retrospect: Fifty Years of Preservation*, ANTIQUES MAG. (SPECIAL ISSUE), May 1960, at 415, 466.
7. DONNA A. HARRIS, NEW SOLUTIONS FOR HOUSE MUSEUMS: ENSURING THE LONG-TERM PRESERVATION OF AMERICA'S HISTORIC HOUSES 3–4 (2007) (noting the challenges stemming from the large number of historic house museums in operation nationwide).
8. JANE C. NYLANDER & DIANE L. VIERA, WINDOWS ON THE PAST: FOUR CENTURIES OF NEW ENGLAND HOMES 17 (2d ed. 2009).
9. Jessica Neuwirth et al., *Abbott Lowell Cummings and the Preservation of New England*, 29 PUB. HISTORIAN 57, 65–67 (2007) (explaining SPNEA's deaccessioning process and that "SPNEA was over-extended beyond belief"). This process was not easy as the organization assessed all of its properties, taking into account the terms by which it acquired the property, each property's related collections and documentary materials, and whether the property had a dedicated endowment to underwrite its ongoing operation.
10. Throughout this Article, the term "easement" will be used generically as it is the general term used throughout enabling legislation and the applicable literature within this area. This is not a universal term, however, and to cite just one example of the variability that exists, in Massachusetts, a preservation easement is referred to as a "preservation restriction." *See* MASS. GEN. LAWS ch. 184, §§ 31–33 (2003).
11. NYLANDER & VIERA, *supra* note 8, at 219 ("Plagued with mounting maintenance costs, inadequate endowments, and the desire to find the best uses for historic buildings that were not being fully used as house museums, [Historic New England] made a decision in 1980 that dramatically changed the way owners in New England view the future of their historic homes. That year, four of the organiza-

SPNEA formally launched its preservation easement program (the Stewardship Program), which was designed to manage and monitor these properties.[12] The program soon began accepting donations of easements on privately owned properties which greatly expanded the scope and reach of the organization's efforts.[13] Perhaps somewhat surprisingly for an organization largely known for its historic house museum holdings, the program dovetailed quite nicely with SPNEA's original idea of obtaining control of significant historic properties and then letting them back to tenants "with wise restrictions"—an idea ahead of its time which would wait almost seventy years for the development of a legal mechanism to facilitate the attainment of this objective.[14]

Since the 1970s, easements have played a strong role in the preservation movement and have allowed preservation groups to preserve thousands of historic properties.[15] By utilizing this voluntary mechanism, preservation-minded property owners have been able to ensure the long-term protection of individual homes where local politics have

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tion's properties—the Fowler House (1809) in Danvers, Massachusetts; the Short House (c. 1732) in Newbury, Massachusetts; the Merrell Tavern (c.1790) in South Lee, Massachusetts; and the Sanford-Covell House (1870) in Newport, Rhode Island—were sold and returned to private ownership [through the Stewardship Program].").

12. Neuwirth et al., *supra* note 9, at 65–67. According to SPNEA's former Executive Director Abbott Lowell Cummings, "[t]he solution was a system of stewardship through a program of disposition with preservation covenants on houses with only marginal museum value. And this took several years, and I can't take any credit for this. But I have the greatest respect for the subsequent generations who developed the whole concept of stewardship [easements], which I think is the most important aspect of historic preservation today." *Id.* at 65.

13. NYLANDER & VIERA, *supra* note 8, at 219–27. One benefit of the preservation easement program which was immediately apparent is that it allowed the organization to expand its reach—and to better accomplish its goal of protecting New England's cultural heritage (i.e. by protecting houses in areas where the organization does not operate museums or otherwise have a physical presence). *See, e.g.*, Joseph P. Cornish, *Saving a Modern House*, HISTORIC NEW ENGLAND, Fall 2008, at 20–21 (discussing the protection of a mid-century modern resource through the Stewardship Program).

14. *See May 1910 Bulletin*, *supra* note 2, at 6.

15. *See* Julia H. Miller, *Historic and Cultural Resources Protection Under Historic Preservation Laws*, *in* HERITAGE RESOURCES LAW 17, 17–26 (Sherry Hutt et. al eds., 1999). Within the field of preservation law, it is a bit of an oversimplification but largely true that the more local the protection, the more authority or control the preservation controls can potentially exert. *Id.* For example, a listing on the National Register of Historic Places provides very limited protection against some governmental action, while inclusion within a local historic district can subject an owner to extensive preservation controls. Local historic ordinances and districts then are by far the most important preservation mechanism, and protect the majority of those historic homes that are subject to any preservation controls within the United States. *See, e.g.*, Byrd Wood, *Local Government and Historic Preservation*, F. J., Summer 2001, at 4.

frustrated efforts to adopt local preservation ordinances.[16] Moreover, easements have frequently gone beyond the exterior protections afforded by regulation of local historic districts to protect historic interior features which would almost certainly have lacked protection absent this treatment.[17] By preserving structures which would otherwise be vulnerable and by expanding the scope of protection to preserve interior elements, preservation easements have played a unique role, and when well crafted, they can be the most effective mechanism for protecting examples of our architectural history.[18]

Over the same period, the introduction of significant federal tax incentives has made easements substantially more attractive and more widely used by states, local governments, and non-profit organizations.[19] By the early 2000s, however, the increased reliance on these tax incentives was targeted by the IRS as a form of tax fraud or abuse—essentially as a tool for wealthy homeowners to gain lucrative tax breaks.[20] Criticism of exterior easements, or so-called façade easements, was particularly acute. Some of these easements protected exteriors already regulated by local historic districts where insensitive changes were either highly unlikely to occur or already

16. Stefan Nagel, *A Guide to Preservation and Conservation Easements*, FRANK LLOYD WRIGHT BUILDING CONSERVANCY BULLETIN, Summer 2002, at 8 (describing the primary role of homeowners as stewards of their individual properties); *see also* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 4 (2004) (discussing the current political climate and general resistance to government regulation—requiring individual conservation or preservation efforts).

17. Local historic district ordinances are normally, with some very limited exceptions, designed to exclusively protect the exterior or facades of historic structures to the extent they are publicly visible. *See, e.g.*, Robert W. Mallard, *Avoiding the "Disneyland Façade": The Reach of Architectural Controls Exercised by Historic Districts over Internal Features of Structures*, 8 WIDENER L. SYMP. J. 323 (2002) (explaining the lack of internal regulation of historic properties and the need for further action); Albert H. Manwaring, IV, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations*, 25 NEW ENG. L. REV. 291 (1990) (explaining the current limitations in internal landmarking through local historic districts or landmark commissions).

18. ELIZABETH BYERS & KARIN M. PONTE, THE CONSERVATION EASEMENT HANDBOOK 219 (2d ed. 2005).

19. *See* J. Myrick Howard, *Nonprofits in the American Preservation Movement*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 313, 340 (Robert E. Stipe ed., 2003).

20. *See, e.g.*, Joe Stephens, *Senators Vow to End Tax Breaks on Easements: Wealthy Homeowners Have Taken Advantage*, WASH. POST, Dec. 18, 2004, at A3; Dennis Hevesi, *Residential Real Estate: Preservation Group's Campaign Ruffles Feathers*, N.Y. TIMES, May 24, 2002, at B9; 2009 IRS ADVISORY COUNCIL PUB. REP. 8, 12, ("There is concern that any donor will hesitate to make a donation, regardless of the quality of the appraisal or the legitimacy of the donation, if the donor knows that he or she is thereby 'buying an audit.'").

prohibited.[21] In the view of the IRS and many others, very little was being given up by these property owners to receive what could often be considerable tax deductions.[22] In response, the IRS began to bolster its monitoring of easement donations and aggressively audit and challenge claimed deductions, causing the number of donors claiming the charitable deduction to plummet.[23] This enforcement activity made easement donations so fraught with risk that the IRS Advisory Council responded by recommending steps to reduce the uncertainty in this area to allow legitimate federally subsidized easement donations to once again proceed unhindered.[24] Beyond tax policy issues, the recent emphasis on fiscal austerity has also called the continued viability of this charitable deduction into question. This tax incentive may be severely reduced or even eliminated in future tax reform efforts.[25]

Thus, preservation easements as currently constituted are under severe threat. Given these challenges, this Article has two objectives. First, this Article will explore ways that easement-holding organizations can increase the public benefit they provide through their efforts to both raise public awareness of these benefits and to reinforce the value provided by the federal tax incentives. Second, this Article will move beyond the tax incentives and detail ways that easement-holding organizations can reduce their reliance on this mechanism—with an eye to further expansion of the role that easements can play within the preservation movement. To this end, this Article is organized into three primary parts. Part II will provide background information on easements, including the development of easements as a preservation

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21. Craig R. McCoy & Linda K. Harris, *Saving Treasures That Benefit Few: As Federal Law Helps Protect Private Property, the Public Often Gets Little*, PHILA. INQUIRER, Feb. 24, 2002, at A1 (discussing several easements applied to buildings or structures under little or no development threat and arguing that they provide no clear public benefit).
22. *Id.*
23. IRS ADVISORY COUNCIL, *supra* note 20, at 8 ("There is a belief that [the current IRS scrutiny of preservation easements], in which the IRS takes a very strict view regarding the value of these donations, is having the effect of diluting the intent of Section 170(h) of the Internal Revenue Code, which provides for a tax incentive by means of a charitable deduction for the donation of a historic easement."). *See* Richard Roddewig, Remarks at the 2011 Fitch Forum 9 (Feb. 5, 2011), *available at* http://content.fitchfoundation.org/LookingAhead_ChallengesAndOpportunitiesForNewYorkCityAndBeyond (last visited Feb. 1, 2012) (explaining the current climate surrounding preservation easements and the reduction in recent easement donations). *But see* Michael Steinitz, Dir., Mass. Hist. Comm'n, Remarks at the National Preservation Conference: A Case Study—Comments on Trends in Preservation Easements since 2003 at 1 (Oct. 20, 2011) (describing Massachusetts easement numbers as holding relatively constant—but largely driven by a surge in other forms of easement donations).
24. *See* IRS ADVISORY COUNCIL, *supra* note 20, at 8.
25. *See* Shea B. Airey, *Conservation Easements in Private Practice*, 44 REAL PROP. TR. & EST. L. J. 745, 759 (2010) (explaining the uncertain future of tax incentives for conservation easements).

tool, how easements are negotiated with individual donors, as well as a discussion of the role tax incentives play in facilitating easement donations. Part III will provide an overview of the recent legal developments in this area, discussing both IRS enforcement initiatives and their impact on the utilization of this tool. Finally, Part IV of this Article will discuss a variety of ways in which easement-holding organizations can refocus their efforts to maximize the level of public benefit obtained through easement donations, and also ways to move beyond such heavy reliance on these tax incentives. Ultimately, if easement-holding organizations are able to move beyond their current limitations, these groups can ensure not only the future viability of this mechanism but also significantly expand the already important role that easements play in protecting our nation's architectural heritage and historical memory.

II. BACKGROUND

A. What are Preservation Easements?

A preservation easement is a legal agreement whereby the owner of a historic property grants a third-party (a qualified non-profit organization or governmental body) a perpetual non-possessory interest in their property.[26] Through this agreement, the owner gives up certain rights to modify or alter historic aspects of the property to ensure its long-term preservation.[27] To this end, proposed alterations will often need to be reviewed and approved by an easement-holding organization.[28] The easement provides the easement holder with a right to access the property to perform periodic monitoring to ensure that the agreed terms are being upheld.[29] In exchange for the donation, the easement-holding organization pledges to enforce the easement against any violations—including taking necessary legal action against parties violating this agreement.[30] Since this agreement is perpetual, the easement will be recorded in the property's chain of ti-

26. NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 243–44 (2d ed. 2009).

27. *See* Martha Jordan, *Repairing Façade Easements: Is This the Gift That Launched a Thousand Deductions?*, 22 AKRON TAX. J. 101, 108–10 (2007).

28. BYERS & PONTE, *supra* note 18, at 224–25.

29. NAT'L TRUST FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 40 (2008) ("[easement monitoring] is perhaps the most critical component of a good stewardship program"); *see also* Joseph Cornish, *A Day in the Life*, HISTORIC NEW ENGLAND, Fall 2011, at 2–3 (describing a site visit to a protected property by an easement staff member).

30. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 40 (discussing the responsibility of easement-holding organizations to enforce their easements against violations).

tle and will be binding on all future owners.[31] In short, "[u]sing the traditional 'bundle of sticks' metaphor for property, we can describe the landowner as losing one of the sticks in her bundle. A[n] easement is in essence taking a stick out of the bundle and giving it to someone else"—in this case, a preservation organization who will then be responsible for monitoring and enforcing its newly received interest in the property.[32]

Despite this general definition, preservation easements are individualized to protect the attributes of a specific property and thus details can vary widely, particularly as easements protect properties from a range of chronological periods, which utilize a similarly wide range of construction methods and materials.[33] The process of drafting an easement to protect a Georgian farmhouse is certainly different from protecting a mid-century modern office complex and implicates different drafting challenges.[34] Additionally, preservation easements come in a variety of forms depending on the donor's objectives and the practices of the easement-holding organization. They can protect interior, exterior, and landscape features of the easement property, or all of these aspects combined.[35] Even within a single organization's easement portfolio, significant variations are likely to exist as easement templates evolve over time.[36] Finally, geographic considerations can add further complications as requirements for easements set forth by state legislation vary.[37]

Thus, easements can vary in protective impact, which affects the monetary value embodied in an easement.[38] A comprehensive easement (protecting exterior, interior and landscape elements) on a significant property otherwise unprotected is clearly more valuable than an easement protecting a single facade of a building already protected by a local historic ordinance.[39] In the end, the value of an easement

31. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741–42 (2002).
32. Jessica O. Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).
33. Paul W. Edmondson, V.P. & Gen. Couns., Nat'l Trust For Hist. Preservation, Presentation at ALI-ABA Program: Conservation Easements: The Urban Experience 2 (Mar. 7, 2008) (exploring the various characteristics or factors that vary from easement to easement and impact their strength and scope of coverage).
34. *See* BYERS & PONTE, *supra* note 18, at 219–22.
35. *Id.*
36. JEFF PIDOT, LINCOLN INSTITUTE OF LAND POLICY, REINVENTING CONSERVATION EASEMENTS 8–10 (2005) (explaining variations within a single easement holder's portfolio and the challenges this raises).
37. *See, e.g.*, MASS. GEN. LAWS. ch. 184 §§ 31–33 (2003) (laying out the unique legislative structure whereby all Massachusetts easements must be approved by the Massachusetts Historical Commission).
38. *See generally* Edmondson, *supra* note 33, at 2–3.
39. BYERS & PONTE, *supra* note 18, at 219–20 ("Although 'façade easements' continue to be useful tools, preservation organizations are increasingly recognizing the

(or alternatively its public benefit) largely depends on the negotiations between the donor and the easement-holding organization, as well as the easement-holding organization's subsequent monitoring and enforcement practices.[40] Obtaining a sense of this value requires close examination of the easement document to discover what exactly is being protected, understanding the scope of applicable local protections, and evaluating the easement-holding organization's practices and ability to enforce the easement over time.

B. Development of Preservation Easements as a Preservation Tool

1. Pre-Enabling Legislation

Despite the widespread adoption of easements as a preservation tool in recent years, they are a relatively recent phenomenon that did not exist at common law—which required conservation or preservation groups to obtain fee simple title to parcels they wished to protect.[41] At common law, two distinctions were drawn which led to the traditional reluctance to enforce land arrangements that were akin to the modern preservation easement: the judicial distinctions between affirmative and negative easements and between easements in gross and easements appurtenant.[42]

a. Affirmative Easements Versus Negative Easements

Courts traditionally upheld only affirmative easements: those which allow an individual the right to benefit from another's land in some way.[43] The classic example of an affirmative easement is one that grants an individual the right to cross another's land to access a neighboring parcel—an access easement.[44] Conversely, negative easements, which restrict a property owner's right to use her own

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value of preserving elements that were traditionally considered conservation resources . . . .").

40. Edmondson, *supra* note 33, at 2–3; NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 40.
41. Thompson Mayes, *Preservation Law and Public Policy: Balancing Priorities and Building an Ethic*, *in* A RICHER HERITAGE, *supra* note 19, at 157, 180–81 (explaining that easements evolved out of "the ancient common law of England"); *see also* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L. J. 2, 3 (1989) (discussing the traditional judicial reluctance to enforce these agreements which separated the rights to utilize land).
42. Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 126–27 (2010) (discussing common law challenges to the creation of conservation easements).
43. Dana & Ramsey, *supra* note 41, at 3.
44. *See* Tara J. Foster, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 PACE ENVTL. L. REV. 269, 270–71 (1988) (providing examples of affirmative easements).

property, were strictly prohibited under common law as violating the general principle of free alienability of real property.[45] Preservation easements, as they generally restrict the alteration of historic properties, are best described as a negative easement and were barred at common law.[46]

b. Easements Appurtenant Versus Easements in Gross

Beyond separating easements into the affirmative and negative categories, courts also looked at easements in the context of their relationship to the property in question.[47] At common law, "all easements were characterized as either *easements appurtenant* or *easements in gross*."[48] An easement was appurtenant if its benefits flowed to a neighboring parcel of land, and was considered in gross if the benefits flowed to an individual rather than a parcel of land.[49] Easements in gross had two primary restrictions at common law: (1) they did not "run with the land" (or bind successors); and (2) they were not assignable to other parties.[50] It is not entirely clear from the historical record why this distinction arose, but disparate treatment appears to have developed from the idea that easements in gross imposed unnecessary burdens on property ownership and interfered with the development of land to its highest and best use, divorced as they were from any connection with the underlying land.[51]

Despite some movement in American jurisprudence to harmonize the legal treatment of easements appurtenant and easements in gross, prior to the 1960s difficulties relating to easements in gross frustrated efforts by preservation organizations to obtain control of historically

45. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1080–81 (1996) (describing negative easements and explaining that the only two negative easements allowed at common law are those preventing neighboring landowners from either blocking the flow of air or light).

46. Lippmann, *supra* note 32, at 301–02.

47. *Id.*; *see also* MARILYN MEDER-MONTGOMERY, A LEGAL MECHANISM FOR PROTECTING CULTURAL RESOURCES 2–4 (1984) (discussing the historical development of law affecting easements from English and American common law to modern times).

48. MEDER-MONTGOMERY, *supra* note 47, at 3; *see also* Lippmann, *supra* note 32, at 300–01 (describing affirmative versus negative easements as another category of issues involved in determining whether a common law easement would be permissible).

49. Lippmann, *supra* note 32, at 301–02.

50. MEDER-MONTGOMERY, *supra* note 47, at 3 (explaining that assignment remained an issue well into the twentieth century with American courts divided on the issue).

51. Ross D. Netherton, *Environmental Consideration and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 543–44 (1979); *see also* MEDER-MONTGOMERY, *supra* note 47, at 2 (discussing the historic and economic factors leading to this disparate treatment).

significant properties short of obtaining fee simple title.[52] However, preservation-minded organizations still desired to protect historic properties without having to actually own the property.[53] In most states, prior to the 1960s the only way this could be accomplished was for the easement-holding organization to first acquire a fee simple interest in the underlying property, and then convey the property to a third party with restrictions placed in the deed such as a right of reentry.[54] The feasibility of using this approach on a widespread basis was limited because it required the easement-holding organization to first acquire title to the property to secure its preservation, which in many cases was impractical or even impossible. Despite this severe limitation, several significant easements were obtained through this mechanism, including easements on Boston's Old West Church and Charles Street Meetinghouse.[55]

2. *The Early Years*

Because common law prohibited the type of easements desired by preservation organizations, it would require legislative action to allow the current form of preservation easements to exist in any meaningful numbers.[56] To this end, state legislatures began authorizing this form of perpetual non-possessory property interest during the late 1960s and early 1970s.[57] The enactment of federal tax incentives during the same period allowed easements to become a viable preserva-

52. Mahoney, *supra* note 31, at 749.

53. MEDER-MONTGOMERY, *supra* note 47, at 3; *see also* BYERS & PONTE, *supra* note 18, at 10–13 (discussing the history of conservation easements and their future fate).

54. IPSWICH HISTORICAL COMM'N, SOMETHING TO PRESERVE 17 (1975) (noting "the experiences of Charleston, South Carolina, and of Savannah, Georgia, with revolving funds and restrictive resale provisions, along with those of both the Virginia Landmarks Commission and certain Maryland organizations in acquiring 'restrictions' or 'easements'" as antecedents to its efforts).

55. Neuwirth et al., *supra* note 9, at 71; *see also* Mahoney, *supra* note 31, at 749 (explaining that some scenic easements limiting development and uses of property were purchased by the National Park Service and a few state agencies as early as the 1930s). These early transfers were not without their problems and many bound by the agreements still vigorously challenge their validity today. *See* John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 333–34 (1997).

56. Dana & Ramsey, *supra* note 41, at 2; *see also* IPSWICH HISTORICAL COMM'N, *supra* note 54, at 19–21 (discussing the impact of recording acts on the development of early preservation easement programs); Jordan, *supra* note 27, at 106–07 (discussing tax deductions for gifts of façade easements).

57. Lippmann, *supra* note 32, at 305–07 (noting the development of state statutes authorizing conservation easements, including the first allowing governmental entities to hold easements—enacted first in Massachusetts in 1956). In 1969, Massachusetts also became the first state to allow non-profit organizations to hold conservation and preservation easements. *See* Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 385 (2001).

tion tool as homeowners could receive a charitable deduction for any loss in property value associated with their easement donation.[58] In these early years, despite the tax incentives and burgeoning recognition of this mechanism's potential, relatively few preservation easements were granted. The initial hesitation to use these types of easements was perhaps due to their "newness" and a general wariness as to whether there would be a market for encumbered properties.

3. The Easement Boom and Bust

By the late 1990s and early 2000s, the initial wariness of preservation easements had evolved into genuine enthusiasm.[59] Several new easement-holding organizations had entered the field and had begun to aggressively market the tax incentives associated with preservation easements—particularly façade easements.[60] In many instances these easements targeted houses located in local historic districts or homes already protected in some way by local preservation ordinances and design controls.[61] This form of easement was widely viewed as a questionable tax break for wealthy urban residents as the "loss" or "burden" associated with such a donation was often minimal and led some to call for the outright end to the federal tax deduction.[62]

By 2005, these concerns had become sufficiently widespread for façade easements to be specifically identified as an area of tax abuse by the IRS on its annual "Dirty Dozen" list of common tax schemes.[63] In direct response, "the IRS implemented a wide-ranging initiative to audit charitable deductions claimed by taxpayers who made donations of historic preservation easements . . . ."[64] Although outright abolition of the tax deductibility of easement donations did not occur, the debate over these easements has led the IRS to audit easement donors

58. ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 4 (2007) (explaining that charitable deductions for easement donations was not recognized by the IRS until 1964 (for the value of the gift), and it was not until 1976 when Congress specifically "authorize[d] the deduction of easement donations from income, estate and gift tax liability for [enumerated] conservation purposes").

59. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 1 (explaining the "high level of public scrutiny given over the past several years—by the Internal Revenue Service, the U.S. Congress, and the news media—to the practices of nonprofit conservation and preservation organizations, and particularly those who operate conservation and preservation easement programs").

60. *See* Roddewig, *supra* note 23, at 6.

61. *See id.*

62. *Id.* (explaining the current climate surrounding preservation easements and the reduction in recent easement donations).

63. Press Release, IRS, IRS Announces the 2005 Dirty Dozen (Feb. 28, 2005) *available at* http://www.irs.gov/newsroom/article/0,,id=136337,00.html (last updated Oct. 17, 2011).

64. IRS ADVISORY COUNCIL, *supra* note 20, at 8.

and to aggressively pursue enforcement activity, including the pursuit of technical violations of various IRS procedural requirements.[65] By the end of the decade, this aggressive enforcement effort had critically limited the use of federal tax incentivized easements as a meaningful preservation tool.[66]

C. How Are Preservation Easements Negotiated?

In light of the importance of negotiations in establishing an easement's scope of protection, understanding the negotiation process is critical. While there is no single path toward securing a preservation easement on a significant historic property, there are several common themes or features which are summarized below.[67]

1. Donor Motivation

Typically, an easement negotiation begins when an individual or family who cares deeply about their historic property contacts a nonprofit or governmental entity for guidance on how to ensure this resource's future—generally beyond their lifetime(s).[68] During the first contact, the prospective donor may have no knowledge of what an easement is, but is only looking for some mechanism to protect her property.[69] This concern can be driven by several factors, including:

65. Letter from Steven T. Miller, Comm'r Tax Exempt and Government Entities Div., IRS, to Paul W. Edmondson, V.P. and General Counsel, National Trust for Historic Preservation (Mar. 13, 2008) (on file with author).
66. *See* C. Andrew Lafond & Jeffrey J. Schrader, *Charitable Contributions of Conservation Easements*, J. ACCT., Nov. 2011, *available at* http://www.journalofaccountancy.com/Issues/2011/Nov/20103603.htm (last visited Feb. 1, 2012) (discussing recent declines in the number of façade easements donated).
67. The donation process described in this section essentially mirrors Historic New England's current easement negotiation process, although other groups also utilize similar processes. *See Donation Process*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/preservation/preservation-easements/donation-process (last visited Feb. 1, 2012).
68. Historic house museums are another group who occasionally consider donating preservation easements—particularly if they are making the difficult and sometimes unavoidable decision to return a historic house museum to private ownership. *See Additional Feature Stories*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/preservation/preservation-easements/easement-properties-1/additional-stewardship-property-feature-stories (last visited Feb. 1, 2012) (detailing the donation of the easement on the Fogg-Rollins House (c.1790)—originally intended as a house museum but marketed with an easement to best accommodate the deceased donor's intent when the museum use proved infeasible).
69. Alexandra Bevk, People in Glass Houses: The Practical and Conceptual Challenges of Public Access in Mid-Century Modernist Residences 99–110 (2008), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1098&context=hp_theses (web-published M.A. thesis, University of Pennsylvania) (discussing the range of options the donor considered in determining the future of the Fisher House, a Louis Kahn designed residence, left to the National Trust for Historic Preservation).

(1) the impending sale of the property to a non-family buyer; (2) the impending transfer of the property to a family member who the donor does not necessarily trust to preserve the property (or who the donor expects may sell the property outside of family control); (3) general concerns about the loss or demolition of historic properties in the area; and (4) a deep and lasting affinity for the historic character of the property.[70] Typically, a donation is not driven by a single factor, but by some combination which fuels the donor's motivation to act to protect their historic property.

2. *Initial Informational Visit and Background Research*

After explaining easements and seeing whether this mechanism meets the donor's objectives, the easement-holding organization will then schedule a site visit to evaluate the property and get an initial sense of whether it fits within the organization's preservation objectives. Typically, this visit will involve a preliminary discussion of which features should be preserved as well as collecting any background information on the property that has already been compiled by the owner.[71] After the site visit, the organization's staff may gather preliminary architectural research and perform preliminary title work to gain sufficient information to inform the organization's decision whether to proceed with negotiations.

3. *Deciding Whether to Accept the Donation*

After discussing easements with the donor and gathering background information on the property, the easement-holding organization will need to make the decision whether to commence formal negotiations with the property owner.[72] This decision is typically driven by the significance of the property, its structural condition and architectural integrity, any existing preservation controls in place, as well as the financial resources of the easement-holding organization.[73]

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70. Obviously these factors are not mutually exclusive and most easement donors have several of these concerns upon exploring an easement as a possible mechanism to achieve their preservation objectives. *See* Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47 (2011) (exploring easement donor motivation).
71. BYERS & PONTE, *supra* note 18, at 220–21.
72. Depending on the organization, there may be multiple rounds of votes. Historic New England's approval process consists of two levels of approval by the Stewardship Committee: a first vote to begin negotiations and a second vote to approve the easement as negotiated. The Stewardship Committee consists of architects, lawyers, and other preservation professionals. The trustees must also give their approval before accepting an easement donation. *See Donation Process*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/preservation/preservation-easements/donation-process (last visited Feb. 1, 2012).
73. BYERS & PONTE, *supra* note 18, at 221.

Generally, this decision will be governed by the organization's acquisition guidelines or formal policies the organization may have adopted governing the acceptance of donations.[74] Again, this is not a decision that can be made lightly as easement negotiations often involve extensive amounts of staff time over a period of years, and if ultimately successful, the organization will have a perpetual commitment to monitor and enforce the terms of the easement.[75]

4. Negotiating the Terms, Preparing, and Recording the Easement

After the decision has been made to proceed, the easement–holding organization will begin the process of negotiating the terms of the easement with the donor and donor's counsel.[76] The negotiation typically involves a discussion regarding which historic elements of the property are significant and merit protection.[77] Negotiations are typically focused on defining the protected features and great care needs to be taken in drafting these terms. Overall, "[t]he primary challenge in drafting a preservation easement is crafting the restrictions to protect the character-defining elements of the property without limiting the property so drastically that it becomes economically unviable."[78] Too little protection will render the easement ineffective and weak, while careless drafting can also have the opposite effect and render the property difficult to resell.[79]

When the easement's terms have been negotiated, the next step is to perform documentary photography which will provide a baseline record of the condition of the property and will document its exterior facades, landscape conditions, as well as any protected interior elements.[80] This is a lengthy process that can take as long as a week depending on the property. Visual documentation is typically in the form of large-scale print negatives of each image, which will then be recorded with the easement.[81] After the photography has been completed, several other exhibits must be prepared, including a site plan and a floor plan of the property, to provide a permanent record of the existing landscape and room configuration.[82] Last, after all terms have been negotiated and the supporting exhibits have been prepared,

74. *Id.*
75. WATSON & NAGEL, *supra* note 58, at 12.
76. BYERS & PONTE, *supra* note 18, at 221–24.
77. WATSON & NAGEL, *supra* note 58, at 12.
78. BYERS & PONTE, *supra* note 18, at 222–23.
79. WATSON & NAGEL, *supra* note 58, at 15 (explaining that most organizations do not restrict kitchens or bathrooms as restricting these areas could have an undue impact on the future marketing or sale of the property).
80. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 40.
81. WATSON & NAGEL, *supra* note 58, at 12.
82. *Id.*

the easement can be signed by the parties and recorded at the registry of deeds, thus attaching to the title and becoming a perpetual restriction binding upon all subsequent property owners.[83]

5. Endowment Contributions

Given the complex nature of these negotiations and the role the easement-holding organization is expected to play, an easement donation may be accompanied by a financial contribution to an organization's endowment.[84] This contribution is typically intended to defray the upfront costs of negotiating and recording the easement, to cover the costs associated with annual monitoring and inspection of the property going forward, and to contribute to the organization's legal defense fund, allowing for the easement's enforcement.[85] This contribution is often the last step in creating a preservation easement and is important in ensuring that the easement-holding organization has the resources to enforce its easements and live up to its obligations.[86]

6. Tax Considerations

If the donor wants to qualify for the federal tax deduction, a few additional steps must be taken.[87] First, both the donor and the easement-holding organization must ensure that the scope of protection meets IRS requirements.[88] Additionally, the value of the claimed deduction must be substantiated by a qualified appraisal.[89] Beyond

83. Easements are creatures of state law, so this timeline or typical donation may not be consistent from state to state. For example, in Massachusetts, the Massachusetts Historical Commission has the authority to review all perpetual preservation restrictions (the Massachusetts state law term for easements) and must approve these agreements before they can be recorded. *See* MASS. GEN. LAW ANN., ch. 184, §§ 31–33 (2003 & Supp. 2010).

84. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 39 (explaining that stewardship endowments are intended "to cover expenses relating to the monitoring and enforcing of easements over time").

85. *See* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005).

86. This endowment contribution is often made to governmental bodies holding easements in light of the expenses that this entails. *See* Press Release, State of Rhode Island & Providence Plantations Historical Pres. & Heritage Comm'n, Easement Guidelines, *available at* http://www.preservation.ri.gov/pdfs_zips_downloads/credits_pdfs/easements_pdfs/easement_guidelines.pdf (explaining that a contribution to the Commission's endowment fund must accompany an easement donation).

87. *See* Kathryn W. Howe, *Private Sector Involvement in Historic Preservation*, *in* A RICHER HERITAGE, *supra* note 19, at 279, 297–98.

88. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 34 (laying out best practices for organizations working with donors interested in claiming a federal tax deduction).

89. IRS, CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE 35–39 (2012) (explaining the requirements, specifically those relating to a qualified appraisal); Ste-

crafting the easement to meet all applicable IRS requirements, the easement-holding organization must also sign the donor's Form 8283 (non-cash charitable contribution form) and provide a contemporaneous acknowledgment letter (required of all charitable donations) to confirm that the charitable donation was received and may also need to assist the donor by providing additional information regarding the nature of the donation for IRS evaluation.[90] Compliance is critical to obtain the tax deduction and to avoid penalties associated with non-compliance.[91]

D. Understanding the Tax Motivations Behind Easement Donations

Given the regulatory climate currently surrounding preservation easements, some background on the nature of the federal tax deduction is also essential. Section 170 of the Internal Revenue Code governs all charitable giving, including the deductibility of non-cash gifts made to non-profit organizations (e.g., easements).[92] For an easement donation to qualify for the federal tax deduction three requirements must be met; the donation must be (1) of a qualified property interest; (2) to a qualified organization; and (3) exclusively for conservation purposes.[93]

1. Qualified Real Property Interest

The first requirement is that the donation must be a qualified real property interest.[94] Within the easement field, "[a] qualified real property interest is a 'perpetual conservation restriction,' which is a 'restriction granted in perpetuity on the use which may be made of real property."[95] Under this standard, an easement qualifies as a real

phen J. Small, *Proper—and Improper—Deductions for Conservation Easement Donations, Including Developer Donations*, TAX NOTES, Oct. 11, 2004, at 217–24 (explaining the need for easement-holding groups to review appraisals and other obligations owed by easement monitoring groups).

90. If the easement is a façade easement, additional requirements may apply, such as payment of the façade easement filing fee and the easement-holding organization certifying several other aspects of the donation. *See* NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 34–37 (establishing best practices for organizations receiving tax incentivized easement donations).

91. IRS, *supra* note 89, at 86–89 (explaining the potential penalties associated with inaccurate or improper easement deductions).

92. 26 U.S.C. § 170(c) (2006).

93. Treas. Reg. § 1.170A-14(a) (as amended in 2009).

94. *Id.*

95. *See* Airey, *supra* note 25, at 759 (quoting Treas. Reg. § 1.170A-14(b)(2) (1999)).

property interest, but it must be perpetual in order to qualify for the tax deduction.[96]

2. *Qualified Organization*

Next, the donation must be made to a qualified easement-holding organization. Under the applicable IRS regulations, an eligible organization must meet the following requirements in order to qualify:

> (i) the organization must be either a local, state, or federal agency, or public charity qualified under IRC § 501(c)(3); (ii) the organization must have a commitment to protect the conservation purposes of the donation . . . and (iii) the organization must have the resources to enforce the restrictions imposed by the easement.[97]

The first prong is easily met if the non-profit has already obtained 501(c)(3) status, however, the remainder require affirmative steps by the easement-holding organization. The second prong, commitment to protect the conservation purposes of the donation, is typically found within the organizational documents of the non-profit where the group expresses this commitment as part of its overall mission.[98] Lastly, as far as having resources to enforce the terms of the easement, the organization will essentially need to demonstrate that it will be able to uphold its end of the bargain.[99] At the current time, the IRS has not specifically required non-profits to set aside any dedicated funds in order to perform this role, but it is unlikely that without such funds the organization could live up to its monitoring and enforcement obligations.[100] Moreover, given the IRS scrutiny in this area, a donation of an easement to a group without a dedicated endowment will likely be closely examined, including an examination of whether the group monitors and enforces its existing easement portfolio as a measure of organizational commitment to the protection of the conservation purposes.[101]

3. *Exclusively for Conservation Purposes*

Lastly, the donation must be made "exclusively for conservation purposes."[102] There are four types of qualified conservation purposes that qualify a donated easement for federal tax benefits: easements that advance (1) the preservation of land areas for outdoor recreation

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96. Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements*, 46 REAL PROP. TR. & EST. L. J. 1, 3 (2010).
97. *See* C. Timothy Lindstrom, *A Guide to the Tax Aspects of Conservation Easement Contributions*, 7 WYO. L. REV. 441, 450 (2007).
98. *See id.*
99. Airey, *supra* note 25, at 765–66.
100. *See* Lindstrom, *supra* note 97, at 450–51.
101. McLaughlin, *supra* note 96, at 3.
102. Treas. Reg. § 1.170A-14(d)(1).

or education of the general public; (2) the protection of a relatively natural habitat of a fish, wildlife, or plant community or similar ecosystem; (3) the preservation of certain open space (including farmland and forest land) areas; and (4) the preservation of a historically important land area or certified historic structure.[103] Generally, an easement document will typically recite one or more of these purposes to explain which conservation purposes the agreement is seeking to advance.[104] Within the preservation context, the Internal Revenue Code provides that a donation will qualify as being made for a conservation purpose if it protects a "certified historic structure" or a "historically important land area."[105]

a. Certified Historic Structures

The issue of what structures will qualify as sufficiently "historic" under this standard determines whether an easement donor will be entitled to a tax deduction.[106] Under the Internal Revenue Code, a certified historic structure is "any building, structure or land area which is—[l]isted in the National Register [of Historic Places], or [l]ocated in a registered historic district . . . and is certified . . . as being of historic significance to the district."[107] The easier of the two routes is for the resource to be individually listed on the National Register as this alone will qualify.[108] However, if the property is only located within a registered historic district, the property must also contribute to the district, or in short, share those characteristics which give the district significance.[109] Historic districts come in two forms: National Register Historic Districts and local historic districts.[110] If the property contributes to a National Register Historic District, the property is of sufficient stature to qualify for the tax deduction.[111] If

103. *Id.*
104. Airey, *supra* note 25, at 767–68.
105. 26 U.S.C. § 170(h)(1)(C) (2006); § 170(h)(4)(A)(iv); § 170(h)(4)(B).
106. NAT'L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 6 (2010).
107. Treas. Reg. §§ 1.170A-14(d)(5)(iii)(A)–(B) (as amended in 2009).
108. *See* An Act to amend the National Historic Preservation Act of 1966, Pub. L. No. 96-515, § 201, 94 Stat. 2988 (1980) (codified as amended at 16 U.S.C. § 470a(1)(A) (2006)) (creating the National Register of Historic Places); *see also* Jordan, *supra* note 27, at 104–05 (explaining the process of listing a property on the National Register of Historic Places).
109. *See* Treas. Reg. §§ 1.170A-14(d)(5)(iii)(A)-(B) (as amended in 2009).
110. *See* NAT'L TRUST FOR HISTORIC PRES., BASIC PRESERVATION 4–6 (2006) (explaining the National Register of Historic Places as well as the differences between National Register Historic Districts and local historic districts); *see also* Tad Heuer, Note, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L. J. 768, 774–77 (2007) (explaining the regulatory differences between these district regimes).
111. NAT'L PARK SERV., *supra* note 106, at 6.

the property only contributes to a local historic district, the local preservation law under which the house is protected must first be certified by the National Park Service's Certified Local Government Program.[112] If the district is a "registered historic district" under either standard, the property owner must then apply for a certification of significance from the National Park Service to qualify the property as a certified historic structure.[113]

Overall, listing a house on the National Register or qualifying a property as contributing to a registered historic district can be an extensive process spanning several years from the point of nomination to final listing.[114] Given the time burdens and costs associated with this process, it can be difficult for a house not listed to move forward and gain this status, but it certainly is not impossible, depending on the property's ability to qualify as "historic" under these standards, and the owner's timetable for completing the project.

b. Historically Important Land Areas

Aside from certified historic resources, historically important land areas are the other category under which historic structures can qualify for favorable tax treatment. Historically important land areas are either independently significant,[115] or are adjacent to properties listed on the National Register of Historic Places where the physical or environmental features of the land area contribute to the integrity of the National Register property.[116] "Common examples of historically important land areas include traditional cultural places, archaeological sites, battlefields, and historic cultural and designed landscapes."[117] Given this description, it is not a surprise that property owners do not often rely on this route for qualifying for a tax deduction, but it is important to keep in mind as a potential option.

4. Other General Requirements

Beyond the three threshold requirements, Treasury Regulations contain several other requirements that apply to easement donors and

112. WATSON & NAGEL, *supra* note 58, at 5.
113. NAT'L PARK SERV., *supra* note 106, at 6.
114. *National Register of Historic Places Program: Fundamentals*, NAT'L PARK SERV., http://www.nps.gov/nr/national_register_fundamentals.htm (last updated June 13, 2011) (explaining the nomination process and time involved).
115. WATSON & NAGEL, *supra* note 58, at 6 (explaining that the significance of these land areas is evaluated under substantially the same criteria that govern National Register nominations).
116. *Id.*; Treas. Reg. § 1.170A-14(d)(5)(ii) (as amended in 2009); *see also* Turner v. Comm'r, 126 T.C. 16 (2006) (suggesting that land merely in close proximity to a certified historic structure will no longer satisfy the conservation purpose requirement).
117. NAT'L PARK SERV., *supra* note 106, at 7.

are "intended to ensure that the conservation purpose of the contribution of a conservation easement will be protected in perpetuity."[118]

a. Perpetual in Duration

Beyond meeting the general "perpetuity" test associated with the donation of a qualified real property interest, the terms of the easement document itself must support its perpetual status.[119] First, the easement must be recorded with documentation sufficient to establish the property's condition at the time of the donation, must be binding on subsequent owners, and must allow the easement-holding organization access to the property to monitor and enforce its property interest.[120] Second, if the property is subject to a mortgage, the lender must subordinate any mortgage agreements to the right of the easement holder to "enforce the conservation purposes of the gift in perpetuity."[121] Failure to obtain this subordination could allow the easement to be stripped off during the bankruptcy process, clearly impacting the perpetual nature of the easement. Lastly, the easement must have a provision addressing extinguishment of the property interest and governing the division of proceeds upon a terminating event.[122] In a situation where an easement property is condemned, the easement-holding organization must be entitled to receive a value proportionate to the value of the easement.[123] As the donation was subsidized through federal funds, these funds will need to accrue to the non-profit holder to advance the conservation purposes embodied in the original donation.[124]

b. Restrictions on Transfer

The easement must also contain an express provision prohibiting all future transfers of the easement by the easement-holding organization unless transferred to another organization with the commitment

118. McLaughlin, *supra* note 96, at 6.

119. This presumes that the state has passed enabling legislation allowing for perpetual easements. *See* WATSON & NAGEL, *supra* note 58, at 4 (noting that twenty-two states, the District of Columbia, Puerto Rico, and the United States Virgin Islands have enacted the Uniform Conservation Easement Act or some variation of the Act); *see also* McLaughlin, *supra* note 85, at 426 (explaining that forty-nine of the fifty states have removed common law impediments which would otherwise bar the creation of conservation easements).

120. *See* Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883, 887–91 (2005).

121. Treas. Reg. § 1.170A-14(g)(2) (1986).

122. *See* McLaughlin, *supra* note 85, at 480–86 (discussing the issues that have arisen in recent years surrounding extinguishment and division of proceeds provisions).

123. CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE *supra* note 89, at 16–17.

124. *See* McLaughlin, *supra* note 85, at 486 n.224.

of enforcing the perpetual agreement.[125] This is aimed at prohibiting "the donee and its successors or assigns from, for example, selling, releasing, or otherwise transferring the easement back to the donor or a subsequent owner of the land in exchange for cash or some other form of compensation" and essentially unwinding the donation.[126]

c. Prohibition of Inconsistent Use

The easement must also bar or limit uses that would not consistently serve conservation purposes associated with the donation.[127] This requirement is targeted at preventing an easement donor from explicitly retaining destructive uses (e.g., sub-surface mining) and still obtaining the deduction. To the extent that an easement allows future development on the site, it must require that development conform to local, state, or federal requirements for construction or rehabilitation within a historic district.[128]

d. Requirement of Donative Intent

The last general requirement is that the donation needs to be made with "donative intent."[129] The purpose of this requirement is to deny the charitable benefits to donors who are making the donation to receive favorable zoning or other explicit benefits as a component of a larger transaction or process instead of as a true donation.[130]

5. Other Specific Historic Preservation Requirements

Within the historic preservation context, several additional requirements apply. If the easement donor is seeking a tax deduction, the easement must provide some degree of visual public access to the property.[131] Typically, the fact that the property will be viewable from a public way is sufficient to provide "public access," although there is some debate as to whether this provides a public benefit sufficient to merit the tax deduction.[132] If the property is not viewable from a public way, the public access requirement goes further, man-

125. *See* McLaughlin, *supra* note 96, at 6. Notably, this provision barring transfer will not prohibit an easement-holding organization from including a provision allowing for judicial extinguishment under certain prescribed conditions. *See* Airey, *supra* note 25, at 778–79.
126. McLaughlin, *supra* note 96, at 6.
127. Treas. Reg. § 1.170A-14(e)(2)–(3) (1986).
128. Treas. Reg. § 1.170A-14(d)(5)(i) (1986).
129. *See* Lindstrom, *supra* note 97, at 506.
130. *See* Airey, *supra* note 25, at 767–68 (explaining that conservation easements are exclusively for conservation purposes).
131. Treas. Reg. § 1.170A-14(d)(5)(iv) (2011).
132. NAT'L PARK SERV., *supra* note 106, at 7 (discussing public access considerations and recommending working with a qualified easement-holding organization to balance public access and privacy concerns).

dating that the property be open for public tours several days per year (if the interior is protected) and requiring access to the house for research photography to be distributed to the public.[133]

In 2006, Congress issued new rules further limiting the form of preservation easements meriting the tax deduction.[134] These rules require that tax incentivized easements in registered historic districts: (1) protect the entire exterior of the building; (2) prohibit changes to the exterior that would be incompatible with the building's historic character; (3) be accompanied by a certification from the easement-holding organization that certifies (under penalty of perjury) that the organization is qualified to hold easements and have the resources and commitment to monitor the easement; and (4) provide detailed information to the IRS to prove the value of the deduction being claimed.[135] Essentially, the purpose of the rule changes was to place, for the first time, limits on the content of those easements meriting the tax deduction and to establish a basic "floor" in this area.

6. Explaining the Deduction

Ultimately, the value of an easement donation is determined through a qualified appraisal.[136] The "amount of a contribution deduction . . . generally is the fair market value of the easement at the time of the contribution," and the appraisal must occur no later than sixty days before the donation.[137] Fair market value is typically difficult to determine as sales of easements are not common, so easements are typically valued using "before and after" methodology.[138] Given that the deduction is tied to the value of the easement, valuation is a critical process and must be done carefully by a qualified appraiser to avoid penalties associated with overvaluation.[139] Valuation will hinge upon a number of factors

133. 26 U.S.C. § 170(h)(2)(C) (2006); Treas. Reg. § 1.170A-14(d)(5)(iv)–(v) (2011).

134. *See* Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C.).

135. *Id.* at § 1213, 120 Stat. at 1075–76 (codified as amended in 26 U.S.C. § 170 (2006)); *see also* NAT'L PARK SERV., *supra* note 106, at 4–5 (explaining recent federal tax law changes). Notably, the requirements governing the scope of façade easements apply only to buildings in registered historic districts—not individually listed properties. *Id.* at 4.

136. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 34–37.

137. NAT'L PARK SERV., *supra* note 106, at 9; Treas. Reg. § 1.170A-13(c)(3)(i)(A) (2011). This requirement is aimed to ensure that the value of the donated easement actually reflects the deduction received by the easement donor. *See* NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 34–37.

138. LAND TRUST ALLIANCE, APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 30–33 (3d ed. 1999).

139. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at app. at 51–53.

> such as how the easement affects the property's development potential, which may be determined by the extent to which local government restrictions already restrict changes to the property. Where there is no further development potential for the property or the building is already under local regulations subject to the same conditions as those in the easement (including, for example, binding review by a local historic commission to insure that the property's historic character is preserved), the easement may be of little or no value. On the other hand, for a property located in an area where there are few regulations governing changes to the exterior of historic buildings, the easement may result in significant protection for the property's historic character, possibly generating tax benefits to the donor.[140]

Again, after evaluating these factors, easements are generally valued on a before and after basis.[141] For example, if a property is initially appraised at $3 million and after the easement is placed on the property, it is worth only $2.7 million, the donor would have made a $300,000 non-cash charitable donation. If the donor is in the 35% marginal tax bracket, the calculation for the corresponding tax benefit would be: $300,000 x 35% = $105,000. Generally, the deduction claimed in a given year cannot exceed 30% of the taxpayer's adjusted gross income in the year of the gift.[142] However, any excess above this threshold can be deducted over five additional tax years, or until the value of the easement donation has been fully deducted.[143] Applying the example of a $105,000 deduction to a donor whose gross income is $100,000 would allow this donor to claim a $30,000 deduction during the year of the gift, and to then deduct the remaining $75,000 over the carry-over period. Depending on the value of the property involved and the degree to which the easement's scope of restrictions exceeds the scope of pre-existing local regulations, the deduction can significantly incentivize the protection of historic properties.

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140. NAT'L PARK SERV., *supra* note 106, at 4.
141. LAND TRUST ALLIANCE, *supra* note 138, at 30–33.
142. Alternatively, a taxpayer could deduct up to 50% of their adjusted gross income as long as the deduction is limited to the donor's basis in the property (i.e. purchase price). WATSON & NAGEL, *supra* note 58, at 6. Different rules apply to the donation of preservation easements through estate planning or associated with the rehabilitation of qualified rehabilitation projects, which are beyond the scope of this Article.
143. *Id*. In 2006, changes to the tax code allowed donors to deduct up to 50% of their adjusted gross income in the year of the gift and expanded the period in which donors could deduct any excess to a fifteen-year period. This extended deduction has been extended annually since 2006, but it is unclear whether this expanded benefit will continue into the future. *The Enhanced Easement Incentive*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/policy/tax-matters/campaigns/the-enhanced-easement-incentive (last visited Feb. 1, 2012).

III. RECENT LEGAL DECISIONS: THE CURRENT REGULATORY CLIMATE

IRS enforcement activity in the realm of preservation easements has caused a great deal of uncertainty about the future ability of easement-holding organizations to use this important preservation tool.[144] This enforcement activity has largely occurred in two principal categories: (1) structural issues identified or alleged by the IRS; and (2) procedural issues that the IRS has utilized to reject tax deductions claimed by easement donors.

A. Structural Issues

Structural issues relate to the IRS's concerns about the operations of certain easement-holding organizations, which in the IRS's view are highly suspect for potential tax fraud or abuse.[145] A significant amount of IRS activity in this area relates to recent and significant enforcement actions against the Trust for Architectural Easements (TAE, formerly known as the National Architectural Trust).[146] Over the past fifteen years, TAE, formed specifically to hold preservation easements, quickly obtained over eight hundred easements on properties across the United States by aggressively marketing the available tax incentives.[147] Their success led to editorials in many prominent newspapers detailing the group's practices, such as this editorial from the *Washington Post* noting that

> the practice of peddling these donations has turned into a lucrative business for some supposedly non-profit groups. [Specifically, one example is] . . . the operations of one local non-profit, the [TAE], which in the past four years took in nearly $17.5 million in "contributions"—actually administrative fees. In 2003 alone, [TAE] paid more than $5.5 million to a for-profit facilitation company—which pitches the easements and processes the paperwork—owned by the non-profit's founders.[148]

144. *See, e.g.*, IRS, *supra* note 89.

145. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29 (recounting the recent IRS pressure on historic preservation easement-holding organizations and the need to improve or implement best practices within the field); *see also* Steven Miller, Comm'r, Tax Exempt/Government Entities, IRS, Remarks Before the Spring Public Lands Conference (Mar. 28, 2006) (explaining that the IRS was investigating 500 easement donors, approximately seventy-five of which involve façade donations on historic structures).

146. Formerly the National Architectural Trust, the Trust for Architectural Easements changed its name in 2007 to avoid confusion with the National Trust for Historic Preservation. *See FAQs*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/easements-faq/National-Architectural-Trust-Related.html (last visited Feb. 1, 2012).

147. *See About the Trust*, TRUST FOR ARCHITECTURAL EASEMENTS, http://www.architecturaltrust.org/about-the-trust (last visited Feb. 1, 2012).

148. Editorial, *A For-Profit Façade*?, WASH. POST, Dec. 14, 2004, at A26.

Based on its own investigations of the group's practices, the IRS began strongly objecting to practices used by TAE and several other easement-holding organizations, particularly the active promotion of the tax incentives. In some instances, these practices involved training and then recommending the same appraisers for valuing easements (which, in turn, could have impacted the value of the corresponding tax deduction).[149] Relatedly, the IRS challenged specific components of TAE's "business model" by focusing on the fact that many easements secured by TAE protected only the partial exteriors of buildings already protected by local historic ordinances—easements of limited preservation value.[150] The IRS also challenged TAE's practice of requiring an endowment contribution from all of its easement donors which was directly linked to the value of the tax deduction received (often 5–10% of the tax deduction received).[151] In the IRS's view, all of these factors indicated that TAE was improperly marketing preservation easements as a tax scheme and using this as a revenue tool for the organization's founders.[152]

In early 2011, the IRS announced that it had sought and obtained an injunction against TAE barring various easement practices this organization had been using to obtain easements.[153] Specifically, the IRS restated its position that TAE was promoting a scheme to encourage "taxpayers in Boston, New York City, Baltimore, and Washington D.C. to claim unwarranted charitable tax deductions for donations of façade conservation easements on historic buildings."[154] The injunction specifically barred TAE from "promoting the existence of a 10 to 15 percent valuation range and from accepting donations of easements that [TAE] know[s] or [has] reason to know lack a conservation purpose as defined by federal tax law."[155] Other practices barred under the injunction include any kind of participation in the appraisal process[156] and representing to the easement donor that they

149. Joe Stephens, *Tax Break Turns into Big Business*, WASH. POST, Dec. 13, 2004, at A01 (explaining TAE's business model).
150. Joe Stephens, *Trust Barred from Pushing Tax Break*, WASH. POST, July 21, 2011, at B5 (detailing the injunction issued by Judge Kessler permanently restricting TAE from using several promotional practices).
151. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, D.C. Federal Court Bars Company from Promoting Alleged Tax Scheme Involving Improper Easements on Historic Buildings, *available at* http://www.justice.gov/opa/pr/2011/July/11-tax-933.html (last visited on Feb. 1, 2012).
152. *See, e.g.*, Fred A. Bernstein, *Rushing for Tax Breaks on Historic Homes*, N.Y. TIMES, Dec. 14, 2004, at A1 (explaining TAE's operations and the IRS's creation of a special compliance project to evaluate preservation easements and promoter practices).
153. Dep't of Justice, *supra* note 151.
154. *Id.* According to the IRS, these activities led to charitable deductions in excess of $1.2 billion and lost tax revenue of up to $250 million. *Id.*
155. *Id.*
156. *Id.*

can expect to receive a charitable deduction based on a diminution in the value of their property or that the donation will necessarily result in any deduction whatsoever.[157] Beyond barring these specific practices, the injunction also required TAE to submit to independent monitoring of their easement program for two years to ensure that the organization complies with the requirements of the injunction.[158] Overall, the IRS's focus on "structural" issues shows what the IRS feels is necessary to ensure that easement donations are providing a public benefit and are not instead serving as an abusive tax shelter.[159]

B. Procedural Issues

Beyond disapproving of the practices of some organizations, the IRS has also rejected easement donations based on a failure by the taxpayer or easement-holding organization to comply with IRS procedural requirements. These enforcement actions fall into three principal categories: (1) appraisal issues; (2) issues with acknowledgement letters; and (3) issues relating to the perpetuity of the easement-holding organizations.

1. Appraisal Issues

In recent years, failure by donors to substantiate the value of their easement gifts through a qualified appraisal has been a common reason for rejected easement deductions.[160] This emphasis on appraisals makes sense because the appraisal value (or the loss of property value associated with the donation) directly correlates with the amount that the taxpayer can claim as a tax deduction. Thus, taxpayers have a clear economic incentive to seek a high appraisal and maximize the value of their charitable deduction, which can lead to abuses.

Appraisal challenges quickly get complicated and are difficult matters to pursue through traditional enforcement activity. First, appraising a donated easement is a complex undertaking.[161] Easements are ideally valued on a fair market value basis, but because preservation easements are rarely sold, the appraiser must rely on a before-and-after analysis of the property's value to determine the value of the

157. Dep't of Justice, *supra* note 151.
158. *Id.*
159. *See* NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 34–36.
160. *See* 26 U.S.C. § 170(f)(11)(C) (2006); *see also* Friedberg v. Comm'r, 102 T.C.M. (CCH) 356 (2011) (rejecting deduction based on improper appraisal methodology and thus was not a qualified appraisal); Whitehouse Hotel P'ship v. Comm'r, 615 F.3d 321 (5th Cir. 2010) (vacating judgment of the U.S. Tax Court and remanding for further proceedings a decision by the IRS that donated easement had zero value).
161. IRS ADVISORY COUNCIL, *supra* note 20, at 9 ("[t]he difficulty of easement valuation resulted in a series of examinations and subsequent litigation").

donated easement.[162] This comparison of values relies upon the sales of comparable encumbered properties and in many areas it is difficult to find good points of comparison.[163] It is often difficult to even find an appraiser with experience in assessing and valuing preservation easements, and given the enforcement activity around this area, this difficulty has only increased.[164] Additionally, prior to 2004 the IRS formally examined few easement appraisals, and thus very few tax court decisions provided guidance.[165] Further complicating this analysis is the fact that many appraisals of easements on historic properties were utilizing a perceived "safe harbor" benchmark under which many appraisers considered that any deduction less than 10–15% of a property's overall value would readily be affirmed by the IRS—a benchmark which the IRS has recently clearly disavowed.[166]

Given the issues surrounding the appraisal of donated easements, this is not the area currently garnering the most IRS attention. For one, fighting an appraisal case from the IRS's perspective is a difficult proposition. It requires specialized expertise regarding historic property values and is resource intensive, potentially requiring an outside appraiser to consult on the valuation question.[167] With both the time and effort that goes into fighting an appraisal dispute, there are likely limits on the IRS's ability to bring a large number of appraisal challenges.

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162. LAND TRUST ALLIANCE, *supra* note 138, at 7–10.

163. IRS, *supra* note 89, at 9. Generally, this methodology is as follows: "[t]o the extent that there is a substantial record of sales of easements comparable to the donated easement, the FMV is based on the sales price of such comparables. If there is no [such record], the value is generally the difference between the FMV of the underlying property before and after the easement is transferred." *Id.*

164. TYLER ET AL., supra note 26, at 245 ("[f]ew appraisers are experienced in evaluating easements and therefore do not have comparable information from which to extrapolate values").

165. McLaughlin, *supra* note 16, at 113–14 (listing all IRS appraisal cases prior to 2004); *see* LAND TRUST ALLIANCE, *supra* note 138, at 9–10 (explaining the early history of appraisals and the IRS's positions regarding these issues). *But see* Roddewig, *supra* note 23, at 5–6 (explaining that the current wave of enforcement activity is not the first as a similar wave happened in the early to mid-1980s, and the reason that there was not much enforcement during the 1990s was largely driven by the limited number of donated easements).

166. IRS ADVISORY COUNCIL, *supra* note 20, at 10 (citing Chief Counsel Memorandum 200738013 (Sept. 21, 2007) which "denied there was ever a 'safe harbor,' informal or otherwise"); *see also* LAND TRUST ALLIANCE, *supra* note 138, at 9–10 (discussing the 10% deduction "benchmark" after *Hilborn v. Comm'r*, 87 T.C. 677 (1985) (upholding 10% deduction for a donation of a façade easement on a historic building in the Vieux Carre historic district in New Orleans)).

167. *See* Roddewig, *supra* note 23, at 8–9 (explaining that this fact coupled with the dwindling number of donated easements will likely cause the IRS to divert resources away from this area toward more pressing issues).

2. *Acknowledgment Letters*

Another area of recent focus has been the closer scrutiny of the procedural requirements associated with the donation of an easement under I.R.C. § 170(h).[168] One such requirement is that the easement be documented by a contemporaneous written acknowledgement of the donation, which must be obtained by the taxpayer in the year in which the deduction is claimed.[169] In short, the charitable organization receiving the donation must provide the donor a letter substantiating his easement donation.[170] This letter must provide the amount of any cash contribution, a description of the easement donated, a statement that no goods or services were provided in return for the donation, and a description of the value of goods and services provided (if applicable).[171] At first glance, this seems a relatively simple requirement but it can easily trip up an easement-holding organization.[172] In the past few years, the IRS has rejected multiple easement donations due to the taxpayer's failure to receive this written acknowledgement, which demonstrates the growing trend toward very close scrutiny to ensure technical compliance with applicable IRS regulations.[173]

3. *Perpetuity Issues*

Under the Internal Revenue Code, to qualify for a tax deduction the easement must be perpetual in duration.[174] In recent years, the IRS has closely examined easements to determine whether they truly meet this standard.[175] Several categories of perpetuity challenges have been raised by the IRS: (1) issues with the subordination of mortgages;[176] (2) issues with the status of condemnation and extinguish-

168. IRS, *supra* note 89, at 29–31.
169. 26 U.S.C. § 170(f)(8) (2006) (requiring a contemporaneous written acknowledgement for all charitable contributions in excess of $250); Treas. Reg. § 1.170A-13(f)(1) (as amended in 1996).
170. Treas. Reg. § 1.170A-13(f)(1) (as amended in 1996).
171. 26 U.S.C. § 170(f)(8) (2006).
172. *See* Addis v. Comm'r, 374 F.3d 881, 887 (9th Cir. 2004) ("[t]he deterrence value of section 170(f)(8)'s total denial of a deduction comports with the effective administration of a self-assessment and self-reporting system").
173. DiDonato v. Comm'r, 101 T.C.M. (CCH) 1739 (2011) (rejecting donation because the settlement agreement offered as the written gift acknowledgement failed to comply with the §170(f)(8) requirements); Schrimsher v. Comm'r, 101 T.C.M. (CCH) 1329 (2011) (same).
174. 26 U.S.C. § 170(h)(2)(C) (2006); Treas. Reg. § 1.170A-14(b)(2) (as amended in 2009).
175. IRS, *supra* note 89, at 14–16.
176. *See* 1982 East v. Comm'r, 101 T.C.M. (CCH) 1380 (2011) (upholding IRS rejection of deduction due to failure to subordinate mortgages to the preservation easement with regard to condemnation and insurance proceeds).

ment proceeds;[177] and (3) issues relating to the status of the easements should the easement holder cease its operations.[178] These challenges are notable as the IRS has assessed the practical impact of many of the commonly used boilerplate easement provisions to see whether these provisions could have the possible impact of failing to establish the perpetual nature of the agreement.

a. Subordination of Mortgages

One such issue involves the treatment of mortgages under the terms of the easement.[179] Overall, an easement is not perpetual if a secured lender has a security interest that is superior to the easement in priority, as this could lead to an easement being stripped off through foreclosure or bankruptcy proceedings.[180] Failure to subordinate a lender's security interest to the easement is a firm basis for the IRS to reject an easement deduction as the easement could easily be rendered void should the property enter foreclosure.[181] Typically, a party desiring to donate an easement on an encumbered property will need to have the lender agree to subordinate their interest to the terms of the preservation easement. Depending on the financial institution this may or may not be possible.

b. Condemnation and Extinguishment Proceeds

Another issue that has recently come to the forefront relates to the allocation of proceeds through the extinguishment process.[182] In short, if a property encumbered with an easement is destroyed by a catastrophic event or condemned through judicial action, the value of the public investment represented by the tax deduction will need to be carried through and accrued to the easement-holding organization.[183] For example, a property owner donates an easement and receives a tax deduction equivalent to roughly 3% of the property's value.

177. *See* Kaufman v. Comm'r, 136 T.C. 294 (2011) (upholding IRS rejection of deduction, in part, due to failure of easement to guarantee a portion of the proceeds upon extinguishment to the easement holder).
178. Comm'r v. Simmons, 646 F.3d 6 (D.C. Cir. 2011) (rejecting IRS denial of deduction because the preservation organization had some flexibility to allow change to protected features and did not expressly spell out what would happen to the easement if the holder would no longer exist as an organization).
179. Treas. Reg. § 1.170A-14(g)(2) (as amended in 2009).
180. *Id.*
181. *Id.* This subordination must also be recorded with the easement in the applicable public registry in order to be perpetual. *See* IRS, *supra* note 89, at 16.
182. Treas. Reg. § 1.170A-14(g)(6)(ii).
183. IRS, *supra* note 89, at 14–16. This reflects the fact that the easement vests an immediate property interest in the easement organization and, in the IRS's view, should vest an immediate interest in the easement-holder which allows the holder to recover a percentage of the proceeds, and have such right before any lenders or creditors with security interests in the property. *Id.*

Should this easement eventually be extinguished, the terms of the easement must mandate that this 3% will go to the preservation organization and be earmarked for its preservation mission. In a few reported decisions, the IRS has seized upon a failure to account for the extinguishment proceeds as a basis for rejecting an easement donation on perpetuity grounds.[184]

c. *Durability of Easement-Holding Organizations*

A more recent IRS tactic has been to challenge the perpetuity of an easement based upon a failure to account for what would happen if the easement-holding organization should discontinue its operations.[185] In *Simmons v. Commissioner*, the IRS argued that an easement donation should be rejected as its terms did not account for the disposition of the easement if the holder ceased to exist.[186] The D.C. Circuit upheld a lower court's decision that this argument lacked merit for several reasons. First, the easement-holding organization had been operating for a number of years and had been monitoring and enforcing its easements, which made abandonment a remote possibility.[187] In addition, the Court found testimony by the District of Columbia's State Historic Preservation Officer ("SHPO") to be significant.[188] According to the SHPO, D.C. law provides that abandoned preservation easements revert to the state, who will attempt to assign the easement to another preservation organization, and if no non-profit is available the state will assume this obligation.[189] This provides a backstop that prevents the abandonment of easement obligations, but only exists if proper enabling legislation is in place.

In *Simmons*, the IRS also argued that the easement lacked perpetuity because the holder had the flexibility to approve alterations to protected features, which in the IRS's view would essentially allow the organization to nullify the easement through its approval process.[190] This argument was also rejected. Amicus briefs from several preservation groups explained that "this type of clause is needed to allow a charitable organization that holds a conservation easement to accommodate such change as may become necessary 'to make a

184. *See* Kaufman v. Comm'r, 136 T.C. 294 (2011) (upholding the IRS's rejection of deduction, in part, due to the failure of the easement to guarantee a portion of the proceeds upon extinguishment to the easement holder).

185. *See* Comm'r v. Simmons, 646 F.3d 6 (D.C. Cir. 2011).

186. *Id.* at 9.

187. *Id.* at 10.

188. *Id.*

189. *Id.*

190. *Id.* at 9.

building livable or usable for future generations.'"[191] In sum, recent IRS enforcement activity is causing easement-holding organizations to scrutinize their easement templates and reevaluate whether easement provisions plainly specify the agreement's intended perpetual status. It is also clear that this activity has had a chilling effect on preservation easements because donors have become extremely leery of the audit risk and the potential for a lengthy and costly defense of their charitable deduction.[192]

IV. WHAT CAN EASEMENT-HOLDING ORGANIZATIONS DO?

Given the current strict regulatory climate, the real issue confronting easement-holding organizations is how to ensure they can continue their critical work in securing the preservation of privately owned historic properties. It is the purpose of Part IV to address this question and lay out a number of ways preservation groups can adjust their efforts to expand the level of public benefit they provide—to both justify the value of the federal tax incentives and, at the same time, move beyond their exclusive reliance on this mechanism.

A. Moving Beyond Reliance on Federally Subsidized Easement Donations

Federally subsidized easement donations are not the only way to secure the protection of a significant historic property. This section lays out three alternative routes toward securing an easement donation: voluntary donations, planned giving, and easements obtained through regulatory processes or conditions of government grants.

1. Voluntary Donations

Not all easement donors are motivated by a desire to obtain financial benefit in exchange for their donation.[193] Many if not most donors are solely motivated by the desire to preserve their property and to see

191. *Id.* at 10 (referring to amicus briefs by the National Trust for Historic Preservation, L'Enfant Trust, and Foundation for the Preservation of Historic Georgetown).

192. Matthew A. Eisenstein, *The Significance of* Simmons v. Commissioner, F. BULL., Sept. 22, 2011, http://www.preservationnation.org/forum/library/public-articles/the-significance-of-simmons.html (last visited Feb. 1, 2012) ("By attacking preservation easement programs at the taxpayer level—instead of revoking the tax-exempt status of easement holding organizations engaging in abusive practices—the IRS has deterred many owners of historic properties from donating easements, even to legitimate tax-exempt organizations. . . . Donations of preservation easements in fact have dwindled and, in some communities, have virtually ended.").

193. Steinitz, *supra* note 23, at 2 ("The numbers aren't big, but non-tax advantaged volunteer donations of easements by private property owners continue to happen regularly.").

that it is protected from insensitive alterations or demolition.[194] This is often the case where a family has a long-term association with a property or has invested substantial time and energy in restoring a property.[195] Ownership of real property—particularly a family home—can be an emotional attachment.[196] Homes are often the setting of family memories and a family's sense of its own history and place in the world.[197] When it comes time to convey a house outside of a family, owners frequently seek a way to ensure its preservation prior to this sale.[198] In such cases, tax incentives are often not necessary to induce the donation. Preservation organizations routinely receive easement donations on significant properties on this basis.[199]

IRS scrutiny has called the viability of non-tax deduction easements into question as well, albeit to a much different degree.[200] While non-tax-deduction donors do not receive a direct benefit from their donation, they often claim a charitable deduction for any amount

194. Abby Goodnough, *Amid Historic Homes, New England Moves to Protect a Modern Heritage*, N.Y. TIMES, Dec. 3, 2011, at A22, *available at* http://www.nytimes.com/2011/12/04/us/new-england-moves-to-preserve-a-more-recent-heritage.html (discussing the motivations of Polly Flansburgh and the Hoover family to donate easements protecting modern homes in Lincoln, MA where neither donor received a tax deduction relating any diminution in value associated with the donation of the easements).

195. *See, e.g.*, Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW 441, 455 (1999) ("Landowners genuinely may be motivated to protect their environmentally unique property and devoted to the promise of preserving their lands in its present state for perpetuity.").

196. *See, e.g.*, Wendell Berry, *The Making of a Marginal Farm*, in AMERICAN EARTH: ENVIRONMENTAL WRITING SINCE THOREAU 507, 507–08 (Bill McKibben ed. 2008) (describing his attachment to landscape and its impact on the development of his writing and life); *see also* JAMES L. GARVIN, A BUILDING HISTORY OF NORTHERN NEW ENGLAND 1–3 (2001) (discussing the benefits of historic homes and ownership of such properties).

197. Russell W. Belk, *The Role of Possessions in Constructing and Maintaining a Sense of Past*, 17 ADVANCES CONSUMER RES. 669, 670 (1990) ("[P]ossessions like furniture[ ] [and] houses . . . act as unchanging objects providing the security of the familiar in our lives . . . .").

198. Nagel, *supra* note 16, at 8 (discussing the benefits associated with the donation of a preservation easement).

199. *See, e.g.*, *Additional Feature Stories*, HISTORIC NEW ENGLAND, http://www.historicnewengland.org/preservation/preservation-easements/easement-properties-1/additional-stewardship-property-feature-stories (last visited May 24, 2012) (detailing several significant properties protected through voluntary easement donations).

200. *See* Scheidelman v. Comm'r, 100 T.C.M. (CCH) 24 (2010) (affirming IRS determination that stewardship contribution accompanying a historic preservation easement was essentially a mandatory payment and thus not a deductible as a charitable contribution). *But see* Kaufman v. Comm'r, 136 T.C. 294, 314–22 (2011) (rejecting IRS argument on the same grounds and allowing charitable deduction for endowment contribution).

they contribute to the organization's endowment.[201] The IRS has recently argued that these payments provide an impermissible benefit to the donors or are otherwise conditional payments made in association with the easement donor receiving some advantage (i.e. a quid pro quo arrangement).[202] Given the preservation organization's need for funds to properly monitor and enforce its easements, the IRS's focus on endowment contributions is perhaps even more troubling than the heightened attention to easement donations, particularly where an owner is not otherwise claiming a tax benefit associated with the underlying donation. To date, no decision has disallowed a deduction for a donation to an easement-holding organization's monitoring fund when given with a voluntarily donated easement, and given the equities involved, it seems unlikely that this will ever become a real point of emphasis.

2. *Planned Giving*

Donation routes that are motivated by factors other than a donor's sense of history and a desire to preserve his family's legacy should also be considered. Of all possible avenues for easement-holding organizations, planned giving has particularly strong potential. Planned giving allows easement-holding organizations to approach donors in a setting where the future disposition of the house is the only issue, rather than having concerns split between the preservation motivation and the need for current income.[203] There are two ways planned giving can be exploited by easement-holding organizations: (1) through the donation of an easement via the donor's estate, and (2) through the donation of real property to be re-sold with an easement. The first variation is similar to a typical voluntary donation, although the preservation organization will need to provide the donor with proper language (for the will) to facilitate this transaction.[204] This is not an ideal situation because it is much easier to avoid confusion about the intended scope of coverage while the donor is still alive, and there are inevitable delays in the probate process and easement re-

201. BYERS & PONTE, *supra* note 18, at 61 (explaining contributions to endowment funds are linked to monitoring and enforcing easements).
202. *See Kaufman*, 136 T.C. at 317–21.
203. *See Gifts of Heritage*, NAT'L TRUST FOR HISTORIC PRES., http://www.plan.gs/Article.do?orgId=5136&articleId=11051 (last visited Feb. 1, 2012); MICH. HISTORIC PRES. NETWORK, GIFTS OF HERITAGE TO THE MICHIGAN HISTORIC PRESERVATION NETWORK (2010) *available at* http://www.mhpn.org/giftforms/GiftsofHeritage Guidelines.pdf (last visited Feb. 1, 2012) (explaining MHPN's planned giving program).
204. Stefan Nagel, *Law Review: Testamentary Easements—Look Before You Leap*, FRANK LLOYD WRIGHT BUILDING CONSERVANCY BULL., Spring 1997, at 13 ("The text of the easement document should be developed in detail with the potential donee organization . . . .").

cording.[205] Depending on the resources of the donor, however, this may be the only way that a donation can be facilitated, particularly if the donor desires to maintain full control over the property during their lifetime.[206] This is a rational response from the donor's perspective, as there is no threat to the property as long as the donor is alive to ensure the property's preservation.

The second variation—the donation of fee simple title to the property—typically occurs as follows: a preservation-minded homeowner will leave property to the easement-holding organization through their estate. Upon receiving title to the property, the easement-holding organization will place an easement on the property and then resell the property with the proceeds going to support its general preservation mission. Again, the scope of restrictions is typically not an issue of concern to an easement donor, which may allow an easement-holding organization to obtain strong protection for the donated resource. Receiving the donation of real property is a complicated process and requires a certain level of commitment by the preservation organization. Theoretically, if the property does not meet the organization's acquisition standards the gift could be declined, but in reality discussions between the donor and the easement-holding organization should at least make the organization aware of the potential gift, assess its willingness to take on the project, and relay this to the donor.

If the organization has a solid preservation mission, their efforts will generally resonate with donors who care deeply about their historic homes and this can go a long way toward facilitating the transaction. This mission affinity coupled with the fact that as an easement-holding organization, the group can protect the property going forward may lead to unique planned giving opportunities that might not otherwise be possible for a preservation organization absent such a program.

3. *Exacted Easements*

Another route for realizing easements is through regulatory exactions or other mechanisms that require the donor to grant an easement in exchange for a corresponding benefit.[207] Through various regulatory processes (including a federal Section 106 review designed to avoid and minimize the impacts of federally funded projects on his-

205. *Id.* (explaining the level of authority that needs to be vested in the executor to speed up this process).

206. *Id.*

207. Steinitz, *supra* note 23, at 2–3 (providing a list of non-tax incentivized easements seen in Massachusetts, including voluntary donations, easements as a condition of a funding grant, easements as a condition of sale of public property, purchased easements, easements conveyed as an outcome of a state or federal regulatory process, and easements conveyed as a condition of a local permit).

toric properties), the conveyance of an easement has occasionally been required by the federal government within the terms of a major project.[208] In Massachusetts, this has been a common requirement for archaeological sites, but such an exaction could also be used in the preservation context (e.g., to protect a historic structure located within a portion of a larger proposed development).[209] Municipalities have also required the grant of an easement in return for a building permit or approval, and this practice is becoming increasingly common.[210]

> A typical scenario has been a subdivision application for a historic farm or estate for which the local controlling board requires that the historic residence or farmstead complex be retained on one of the subdivided parcels, and that it be permanently protected through a preservation easement as a condition of approval.[211]

Beyond regulatory or exacted easements, state or town funding entities also routinely require easements as a condition of grant funding.[212] Depending on the amount of the grant, the granting agency may require a perpetual restriction with the idea that because the governmental body is providing funds to support preservation work it should receive assurance that this work will have lasting impact.[213] Using regulatory or grant-funding options will require substantial upfront effort on the part of the easement-holder, as it will need to convince the regulatory authority to transfer the monitoring and enforcement functions of the easement. This is often permissible under the statutes authorizing or requiring the easement, but not necessarily the authority's first instinct.[214] Funding these easements may also be a problem. The exacted easement or grant-funded easement may not come with funds to support the monitoring and enforcement of the easement, but presumably this can be arranged on a fee-for-services basis with the applicable authority. Given the fiscal restraints facing towns and the realities associated with governmental monitoring of their easement portfolios, the assignment of these responsibilities to a third party may make sense for both parties and present another viable alternative to tax incentivized donations.

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208. Lippmann, *supra* note 32, at 310–11 (discussing and naming this variety of easements "exacted easements"). It should be noted that easements donated pursuant to exactions face different considerations—particularly with regard to owner motivation and tax benefits. *See* Airey, *supra* note 25, at 780.
209. Steinitz, *supra* note 23, at 2.
210. *Id.*
211. *Id.*
212. *Id.*
213. *See, e.g.*, *Massachusetts Preservation Projects Fund*, MASS. HISTORICAL COMM'N, http://www.sec.state.ma.us/mhc/mhcmppf/mppfidx.htm (last visited Feb. 1, 2012) (requiring grant of preservation restriction in association with grants ranging from $5,000 to $100,000).
214. *See, e.g.*, MASS. GEN. LAWS. ch. 267 (2001).

Increasing emphasis on non-tax deduction easements is admittedly not the easiest proposition and will require easement-holding organizations to invest more time and effort in those projects and to commit to working more closely with governmental authorities. Without question, the tax incentives make a willing donor's decision to protect a historic property an easier decision, and in some cases can be a necessary motivating factor.[215] Even though acquiring non-tax deduction easements is more burdensome for the easement-holding organization, this should not discourage such groups from actively seeking easements on this basis. These easements help diversify its efforts and reduce its reliance on federal tax incentives.

B. Expanding the Role Easements Play Within the Preservation Movement

Beyond reducing reliance on the federal tax deduction, a critical challenge to both preserving the existing tax incentives as well as increasing the impact of this tool is to expand our thinking about what easements effectively can do. Currently, easements largely focus on architectural significance. Any attention given to the occupants is largely anecdotal rather than a focused effort to think about the property within a greater context. Perhaps this perspective is too limited and efforts should be made to integrate easements into larger preservation efforts designed for protecting a larger measure of a property's historical value.

1. Preservation Easements as Part of a Larger Effort

While protecting a property is a valuable exercise in itself, moving beyond this limited paradigm may provide tangible benefits. One way to do this is to view easements as a single component of a larger effort to preserve the stories associated with the property and its past and present inhabitants.

a. Oral Histories

One clear way to accomplish this objective is to interview donors and record their stories. Obtaining oral histories will capture the stories of individuals who may know more about the property than anyone else—after all, they have lived in the property. Regardless of the age of the property, resident experiences can help bring the house to

215. Dan McCall, The Role of Easements in Historic Preservation: Implications of Valuing a Property Right as a Commodity 4 (2004) (unpublished seminar paper, Georgetown University Law Center), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1006&context=hpps_papers (last visited March 24, 2012) (explaining that the loss of tax benefits for easements would, not surprisingly, lower the number of easements donated).

life for future generations. Arguably, the twentieth century history of a property is as valuable as its eighteenth century story, and once the opportunity to record the story has been lost, it is lost forever. Oral histories are particularly interesting when working to protect significant structures of the recent past. When working with this type of property, one is often working with the people who commissioned its construction. This can provide first-person insight into its design and function. Conducting an oral history can also inform the easement-holding organization in determining the easement's scope of restrictions and can draw attention to features that would otherwise have gone unnoticed or unappreciated without the specific narrative detail. These oral histories can be shared with the general public (e.g. through the easement-holding organization's website), and also with local historical societies, libraries, and archives who will also value and safeguard this resource. Placing an emphasis on oral history has the potential to add to the value that easement-holding organizations provide as part of broader and more integrated efforts to preserve the history of a property and a community.[216]

b. Collection of Material Objects Associated with the Property

Beyond recording oral histories, there are other methods that an easement-holding organization can use to make its efforts more comprehensive in scope, such as working to collect objects or artifacts associated with the properties through either donation or purchase. If the easement-holding organization has a museum or archives, it could adopt a priority on preserving and collecting items associated with its easement properties. Even if a group lacked this capability internally, the group could partner with a local historical society or similar organization in this effort. Preserving and presenting examples of furniture, wallpaper, images, documents, and other objects of material culture associated with the property would allow the easement to have greater value in capturing a complete history. Easement donors would likely respond to such an effort and offer desired objects through either lifetime or planned gifts. The easement-holding organization is often best situated to broker this transaction for either its own collections or those of its partner organizations. In sum, paying attention to the material objects associated with the property would move easement-holding organizations toward an integrated preservation focus that includes the property itself, associated material objects,

216. This need not be an expensive proposition and this may afford an opportunity to engage volunteers with easement-holding organizations. *See* Howard Levin, *Authentic Doing: Student-Produced Web-Based Digital Video Oral Histories*, 38 ORAL HIST. REV. 6 (2011) (explaining student-led effort to document elders stories of the most significant twentieth century events).

and the associated stories, to add to the recorded history of the property.

c. Public Awareness and Transparency

Easement-holding organizations can also do more to make protected houses accessible to the public. While some easements require that a property be open to the public for a specific number of days annually, many easements do not include this requirement.[217] This does not, however, foreclose the possibility that properties lacking a formal public access requirement could be accessible for permissive tours. Of particular interest are those properties with historically significant interior elements. Buildings with exterior protection could readily be featured on walking tours (even self-guided) without owner permission. Beyond traditional tours, the easement-holding organization could sponsor a general open house day where a large number of easement properties would be made available for viewing. Overall, the nature of the public program that will best fit the organization's needs will hinge upon the types of easements held by the organization (interior, exterior, landscape) as well as its geographic footprint (i.e. whether the easements are confined to a single neighborhood, spread across multiple states, or even national in scope). Regardless of what programming an organization could ultimately offer, if easement properties were made more available for public viewing and appreciation and utilized as a teaching tool, the value of such preservation programs could be more widely understood.

One of the major criticisms of easement-holding organizations has been related to a general lack of transparency, particularly as federal tax incentives have financed a large number of these easements.[218] Organizations should be sensitive to a donor's privacy concerns, but on the other hand there is very little information available to the public about what has been protected through these tax incentives. On the land conservation side, organizations are taking a first step toward remedying this transparency problem.[219] For the last several years,

217. BYERS & PONTE, *supra* note 18, at 233–34 (explaining public access requirements in tax incentive easements); Nagel, *supra* note 16, at 8 (explaining that this determination is largely up to the property owner and their desire to open the property up to the general public).

218. James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 LAW & CONTEMP. PROBS. 51 (2011) (explaining the lack of transparency in the easement-holding information publicly available and the National Conservation Easement Database's role in addressing this issue).

219. Press Release, The Trust for Public Land, Easement Database is a Big Boost for Conservation Effort (Oct. 24, 2011) *available at* http://www.tpl.org/news/press-releases/2011-press-releases/easement-database-a-boost-for-conservation.html (last visited Feb. 1, 2012).

conservation groups have been working to develop a national database that will list and provide information on lands that have been protected through tax-incentivized conservation easements.[220] The idea behind the database is that these properties should not be protected in a vacuum; the information should be publicly available to provide information about what land has been preserved.[221] This idea could be valuable in the context of preservation easements. A similar database could include information about each protected property, the scope of protection, and any other information regarding the history of easement properties. The database could include links to scanned National Register of Historic Places nominations when applicable.[222] This database would vastly expand the public's ability to access information about preservation easements. By providing the general public access and information about what easement-holding organizations are working to protect, easement-holding organizations can expand the public benefit they provide and grow a larger constituency in support of such programs.

2. *Reorienting Thinking Regarding What Should Be Protected*

In broadening our thinking about the role that easement-holding organizations can play, the scope of features to protect in individual properties could also expand. Tools exist for informing an alternative viewpoint to ensure that important historic features are not overlooked when drafting easement agreements. One recent example of such an alternative approach is using the idea of a "storyscape" to inform thinking. This involves looking at the role of properties within individual or collective memory as a prism for evaluating preservation priorities.[223] This concept urges preservationists to think more broadly about what is being valued and whether there is a disconnect between what is normally preserved and what is valued by those who actually live in a given location.[224] This critique should prompt consideration of how easement programs currently operate.[225]

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220. *See, e.g.*, Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237 (2009).
221. *National Conservation Easement Database*, THE CONSERVATION REGISTRY, http://nced.conservationregistry.org (last visited Feb. 1, 2012).
222. PIDOT, *supra* note 36, at 13–17.
223. NED KAUFMAN, *Protecting Storyscape*, *in* PLACE, RACE, AND STORY: ESSAYS ON THE PAST AND FUTURE OF HISTORIC PRESERVATION 38, 43 (2009) ("[p]ersonal storyscapes may include buildings of recognized architectural value but will almost certainly include sites . . . that indeed may hardly seem to be 'sites' at all—a street corner or a park bench, for example, or even a flower box").
224. *Id.* at 42 (explaining that outsiders may miss many of these sites because they lack aesthetic significance—but rather it is the stories they tell that give them importance).
225. *Id.* at 38–45.

For example, when negotiating interior restrictions with a donor who wants to preserve some flexibility by not restricting all available interior space, the organization could focus on which rooms the various stories recounted by the owner actually occurred to help prioritize and to make an informed decision. What characteristics of the structure or property help tell these important stories? Whose stories are most important, the story of the earliest owner, an immigrant family from the 1880s, or perhaps the family currently living in the property? In many instances, this story-centric approach may not lead to significant variations from what would normally be protected, but by thinking in these terms such considerations are not completely divorced from the decision-making process. Again, by moving beyond the idea that easements only protect architectural features, easement-holding organizations can begin thinking critically about how to use this tool more broadly.

Utilizing easements as part of a greater effort to preserve a more detailed picture of a resource's history and expanding the lens as far as what to protect are both obviously not cost-neutral and would require easement-holding organizations to perform substantial background research on prospective properties while negotiating the easement, and to work more closely with other actors within the preservation field. However, by broadening an easement or at least an easement-holding organization's role, its value can be appreciated by a larger portion of the population, adding political support for the federal tax incentives. This type of approach may also facilitate additional preservation opportunities, including working with donors for whom protecting only limited architectural features was not sufficient motivation but who see real value in such an integrated vehicle for preserving their overall legacy.

C. Improving the Quality of Easements and Easement-Holding Organizations

Beyond diversifying donation options and expanding the role that easements play within the preservation movement, easement-holding organizations can further improve preservation efforts by focusing on improving the quality of the easements that they secure as well as prioritizing their preservation efforts to provide more meaningful and targeted protection to significant cultural resources.

1. Strengthening Easements

As discussed in section II.A, easements vary widely from property to property and from organization to organization. An easement negotiated by one organization may protect the landscape, interior, and exterior elements of a property, while another group may only secure

its exterior façade.[226] Other factors which impact the strength of an easement include whether the easement prohibits additions, prevents subdivision, restricts changes in use, imposes affirmative maintenance obligations (including restoration when catastrophic events occur), or allows for public access.[227] The increased IRS attention to easements, while obviously presenting substantial challenges, can be exploited as an opportunity for easement-holding organizations to negotiate easements with more stringent terms.[228] In the current environment, the donor clearly has more of an incentive to agree to a greater degree of protection to mitigate their substantial audit risk. This puts easement-holding organizations in a position to negotiate strong easements (e.g. securing the protection of interior elements rather than merely protecting the façades of historic structures).[229] Such an approach would go a long way toward eliminating IRS criticisms of easement-holding organizations and maintaining support for the federal tax incentives.

2. *Prioritizing Efforts*

In addition to strengthening the terms of negotiated easements, easement-holding organizations should strategically target properties that merit easement protection and work proactively to secure the preservation of the most critical resources. One way to do this would be to prioritize preservation efforts by mapping out important properties and develop a strategic plan to guide efforts to preserve these properties. This goes beyond having a policy that only provides the criteria under which donations are accepted, but would place an emphasis on evaluating threats and opportunities and deciding how to best obtain those easements most critical to its mission. This plan could consider factors such as historic significance, the integrity of the property, whether the organization currently protects any comparable

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226. Edmondson, *supra* note 33, at 4 ("Preservation easements can be structured in different ways, and those variations will affect both substantive rights of the property owner, the preservation values to be protected by the stewardship organization, and valuation."); *see also* Roddewig, *supra* note 23, at 9 (discussing the need to "get back to the basics" and "get back to the kinds of buildings that [preservationists] were focused on early on," that is, "on buildings threatened by high density subdivision and development").

227. Edmondson, *supra* note 33, at 2–3.

228. *Id.*

229. Wendy Nicholas, *Collaborating to Save Whole Places*, F. J., Fall 2010, at 7 (explaining the disconnect between preservation and conservation easements in protecting the land but not the structures and vice versa); *see also* BYERS & PONTE, *supra* note 18, at 219 (quoting Paul Edmondson, general counsel of the National Trust for Historic Preservation: "Preservation easements increasingly protect all the character-defining elements that collectively define a historic 'place.' Whether the elements are old stone walls, historic outbuildings, or landscape features, preservation easements have the capacity to protect an entire site.").

structures, the level of threat, and the stories or artifacts associated with the property. National Register status could provide a starting point toward identifying the most important resources, but relying on public input could also play an important role in setting priorities.[230] After identifying the critical targets, the organization can move to identify strategies to secure the protection of the resources, which will obviously vary from property to property and owner to owner. In the end, it is critical that groups move beyond a passive approach (waiting to hear from prospective donors and negotiating protections with these self-selecting prospects) to working proactively to protect the most significant and threatened structures and to develop individualized strategies to secure their protection.[231]

D. Improving the Range of Financial Mechanisms Utilized

The last way that easement organizations can work to improve their operations is by exploring other financial tools at their disposal and becoming more willing to raise funds designated toward securing easements.[232] As many preservationists have noted in recent years, a key to increasing our effectiveness is to more thoroughly explore conservation finance tools and see if they can be successfully applied to the preservation context.[233] This admittedly may present challenges. For one, rightly or wrongly, land conservation initiatives are widely perceived to provide a greater public benefit, while preservation battles have generally been more local in scope and perceived benefit.[234] However, this potential difficulty does not mean that preservationists should not attempt to adopt a number of the strategies used by the land trust community.[235]

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230. BARBARA KURZE & ELIZABETH SHERVA, MOBILE INFORMATION TECHNOLOGY: SUPPORTING THE PRESERVATIONIST AND REACHING THE PUBLIC 1, 17–18 (2011), *available at* http://www.historicnewengland.org/events-programs/looking-forward-symposium/papers/Mobile%20Technology_Kurze%20-%20Sherva.pdfKurze%20-%20Sherva.pdf (discussing the role that mobile technology can play in engaging the public and obtaining input in what is valued by the general public).

231. *See, e.g.*, Valerie Talmage, *Lessons from Land Conservation*, F. J., Fall 2010, at 11, 14 (recommending that preservation groups "[a]dopt a strategic approach by articulating what is most important to protect and then determining the means best suited to accomplish the goals"); Nicholas, *supra* note 229, at 9–10 (addressing the lack of survey information on the preservation side of the equation).

232. NAT'L TRUST FOR HISTORIC PRES. *supra* note 29, at 16–17.

233. Talmage, *supra* note 231, at 17 ("Preservationists can learn a lot from conservationists. If those . . . in the preservation movement adopt some of conservation's best practices and work collaboratively with conservation partners, we will be more effective in saving buildings along with land.").

234. McLaughlin, *supra* note 16, at 5–6 (discussing the growth of land trusts and the amount of protected acreage).

235. Talmage, *supra* note 231, at 13.

1. *Purchasing Easements*

Easement-holding organizations have typically relied almost exclusively on donated easements, but purchasing an easement is an option if the requisite funds can be raised.[236] Generally, easements can be purchased in several ways: (1) through outright purchase of the property, and placing an easement on the property before reselling; (2) purchasing an easement (which typically involves compensating a property owner for the loss in property value); and (3) purchasing an easement through a bargain sale (acquiring the easement at less than full loss in value).[237] The approach which will best fit a given situation will largely be driven by the donor's motivations and the resources available for the project. The latter two of these initiatives have potential since they can be implemented without having to raise the full purchase price (i.e. less than a fee simple interest in the property effectively secures the property's preservation).

Before beginning such initiatives, the organization will need to spend considerable time and attention in setting priorities and have clear standards for purchasing easements to avoid the impression that these efforts are benefiting its board members or are being driven by other improper motivations. However, if these standards are successfully implemented, a willingness to consider purchasing easements will allow groups to be proactive in their preservation efforts and perhaps provide easement-holding organizations the ability to protect threatened historic homes that might otherwise be insensitively altered or demolished absent such an intervention.[238]

2. *Separating the Endowment Contribution from the Easement Donation*

As discussed in subsection II.C.5, many easement-holding organizations often recommend that donors make a contribution to the organization's endowment to cover the ongoing costs of monitoring the easement.[239] In the case of an easement donor who is not seeking to receive federal tax incentives, this is often a difficult proposition. Persuading a donor to both donate a restriction on their property and pay the easement-holding organization's costs in exchange for securing

236. BYERS & PONTE, *supra* note 18, at 125–32.

237. WATSON & NAGEL, *supra* note 58, at 9. Historic Annapolis, Inc. has an alternative mechanism that has some promise—utilizing a barter system to exchange various preservation services in exchange for exterior easements. *Id*.

238. *See* J. MYRICK HOWARD, BUYING TIME FOR HERITAGE: HOW TO SAVE AN ENDANGERED HISTORIC PROPERTY 39–47 (2007) (explaining that the most important thing that preservation groups can do is to buy time and using creative acquisition tools is the best way to buy this time).

239. NAT'L TRUST FOR HISTORIC PRES., *supra* note 29, at 39 (discussing the funding needs of stewardship organizations).

this protection strictly limits the potential donor pool. If an easement-holding organization is unable to fund an easement purchasing program, fund raising to cover the endowment contribution or monitoring and legal defense costs could be explored as this would at least eliminate the donor's out-of-pocket expenses and increase his willingness to donate easements to the organization.[240]

3. Partnering with Land Trusts to Protect Whole Places

Partnering with other non-profit groups that have aligned interests—particularly the land trust community—may also yield positive results.[241] Building such partnerships may prove helpful as the conservation group may have greater financial capacity, or may engage a wider cross-section of funders than a project focused exclusively on land or heritage preservation.[242] This mechanism has been routinely used by some preservation organizations with great success.[243] It makes perfect sense that land trusts and preservation organizations would make good partners as one is focused on protecting the natural heritage and the other is focused on the built heritage of a given

240. STORY CLARK, A FIELD GUIDE TO CONSERVATION FINANCE 162–77 (2007) (discussing transfer fees, or fees triggered by the sale of properties, as an alternative to contribution requirements imposed on easement donors at the time of the transaction).

241. This is not a new concept as historic preservation and land conservation groups have a long history of close relationships and partnerships. *See* Sean McCarrick Fagan, An Analysis of the Evolution of Theory and Management in the Trustees of Reservations 28 n.52 (2008) (web-published M.A. thesis, University of Pennsylvania), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1102&context=hp_theses (discussing the long relationship between SPNEA (now Historic New England) and the Trustees of Reservations); Roberta Lane, *Making No Little Plans: Community Planning for Whole Places*, F. J., Fall 2010, at 42, 46–47.

242. Jennifer Goodman, *Diverse Partners Save and Revive Daniel Webster's Farm*, F. J., Winter 2009, at 45 (discussing how the New Hampshire Preservation Alliance (a preservation easement-holding organization), the Trust for Public Land (a land trust), and a private entrepreneur combined efforts to protect through conservation and preservation easements Daniel Webster's farm—a highly significant structure associated with the legendary politician); Thompson M. Mayes & Ross M. Bradford, *Combining Preservation and Conservation Values: Six Illustrative Examples*, F. J., Fall 2010, at 24, 26 (explaining combined effort between the National Trust for Historic Preservation and a local land trust to protect buildings and land in rural Maine).

243. Land trusts are receptive to this type of project and may implement or seek out such partnerships on their own accord. *See, e.g.*, Press Release, The Trustees of Reservations, Historic Oscar Palmer Farm Sold to Local Couple (May 24, 2011) *available at* http://www.thetrustees.org/about-us/press-room/press-releases/oscar-palmer-sale.html (last visited Feb. 1, 2012) (describing efforts to protect landscape and built features and TTOR's efforts to work the Westport Historical Commission in this initiative).

site.[244] Working in tandem can ensure that entire historic sites are protected through complimentary preservation and conservation easements and can help preservation groups carry out projects they could not accomplish on their own.[245] Thus, further exploration of such partnerships may provide alternative funding mechanisms to support preservation efforts.

4. Exploring Revolving Funds

A final approach may be to reevaluate revolving funds, a preservation tool widely used in years past, and see if the concept can be "retooled" as a fiscal tool for obtaining preservation easements rather than the underlying properties.[246] Typically, revolving funds are pools of funds designated for the purchase of threatened historic properties.[247] In the 1970s and 1980s, many groups created revolving funds as a way of purchasing threatened homes, renovating them, and then re-selling them to a private party.[248] The "revolving" aspect of the fund was that the proceeds obtained from the sale of restored properties would fund the organization's future project(s), thus preserving a continuing pool of resources to carry out meaningful preservation work.[249] Preservation easements were typically placed on the restored historic properties as a way to secure the investment and ensure that the work of the fund had lasting impact.[250] Although many significant easements were obtained through this mechanism, revolving funds, with several very notable exceptions, did not have long-term vitality.[251] Some revolving funds were unable to achieve reasonable turnaround times and ended up holding on to properties for extended periods of time, eliminating the fund's ability to take on

244. Stephanie K. Meeks, *Introduction*, F. J., Fall 2010, at 5 ("there is almost always a natural synergy between the work of preservationists and conservationists.").

245. Nicholas, *supra* note 229, at 7–10.

246. *See* JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW 29 (NTHP 2000, rev. 2008).

247. *See id.*

248. J. Myrick Howard, *Revolving Funds: In the Vanguard of the Preservation Movement*, 11 N.C. CENT. L. J. 256, 256 (1980).

249. *See* Howard, *supra* note 19, at 336–39.

250. *See, e.g.*, *What We Do: Preservation Easements*, HISTORIC BOSTON, INC., http://historicboston.org/info/easements/index.html (last visited Feb. 1, 2012) (discussing the role preservation easements play in their day to day operations).

251. Howard, *supra* note 19, at 313, 337–39.

additional projects.[252] This led to this tool's diminished scope and importance.[253]

Despite earlier issues, revolving funds do present opportunities. First, revolving funds allow an organization to be proactive and target properties that align with the organization's objectives. A preservation easement revolving fund could be designed to buy purchase options on properties, rather than the properties themselves.[254] Once the organization has optioned a property, the group can look for a preservation-minded buyer, exercise its option, and then sell the property with an easement in place. The Preservation Trust of Vermont recently implemented such a program and has already made its first purchase of an option on the Mollony-Delano House (c. 1820) in Essex, Vermont.[255] Using a revolving fund in this creative way ensures the organization is not risking too much of its operating capital and avoids the substantial risk that the organization will obtain a property that it cannot sell. This unique process bypasses extensive carrying costs that can drain the program of operational freedom.

V. CONCLUSION

While federal tax deductions are an important tool for organizations operating easement programs, recent IRS enforcement activity has called the future of this incentive into question—at least as currently constituted. Even if these incentives continue, the presence of continued regulatory uncertainty will make federally subsidized easements less viable unless enforcement activity decreases or easement-holding organizations begin to change how they protect privately-owned homes. However, these challenges provide easement-holding organizations a chance to step back and evaluate their accomplishments of the past thirty years. Many significant structures have been protected, but preservation easements lag far behind in numbers, im-

252. *See* Olivia Mitchell, An Evaluation of Historic Preservation Revolving Loan Funds and Recommendations for the Establishment of Future Programs (2011) (web-published M.A. thesis, University of Pennsylvania), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1175&context=hp_theses.

253. Despite these issues, a few revolving funds have had notable success. Historic Boston, Inc. and the Providence Revolving Fund are two examples of revolving funds engaged in the critical work of purchasing endangered historic buildings, restoring them, and then reselling them for private use—although typically with some form of preservation easement restricting future alternations to the exterior facades of the encumbered buildings. *See* HISTORIC BOSTON, INC., http://www.historicboston.org/ (last visited on Feb. 1, 2012); PROVIDENCE REVOLVING FUND, http://www.revolvingfund.org (last visited Feb. 1, 2012).

254. Talmage, *supra* note 231, at 13 (recommending that preservation groups begin to consider establishing "more (and more robust) preservation revolving funds").

255. *See* THE PRES. TRUST OF VT., http://www.ptvermont.org (last visited Feb. 1, 2012) (explaining their establishment of a revolving fund to purchase options on threatened properties).

pact, and public awareness when compared to land conservation efforts. The public has yet to fully "buy in" to the concept of preservation easements and are suspicious of efforts to provide funds to protect private residences.

For this perception to change, easement-holding organizations need to fundamentally re-evaluate the role they play within the preservation movement and determine whether a larger role is possible. There are a variety of ways that easement-holding organizations can shift their thinking and practices to expand the benefit provided through their programs. Similarly, there are clear alternatives to securing the preservation of significant historic resources via reliance on the federal tax incentives. In the end, the efforts of easement-holding organizations to respond to these challenges and reimagine the possibilities of preservation easements will go a long way toward fulfilling SPNEA's original vision of obtaining control of the most significant historic properties and "let[ting] them to tenants under wise restrictions."[256] Perhaps more importantly, these efforts can also expand upon this vision to protect the underlying stories and preserve a more meaningful spectrum of our collective architectural heritage.

256. *See May 1910 Bulletin*, *supra* note 2, at 6