

A preservation law guide . . .

Best Practices for Preservation Organizations Involved in Easement and Land Stewardship

An introduction to using *Land Trust Standards and Practices* as a benchmark for historic preservation organizations



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For further information, contact the National Trust's Law Department at 202-588-6035 or send an email to law@nthp.org. Also visit our web site at www.PreservationNation/easements.

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The National Trust is grateful for the assistance and cooperation of the Land Trust Alliance. Additional information is available from the Land Trust Alliance, 1660 L Street NW, Suite 1100, Washington, DC 20036, 202-638-4725, www.lta.org. The National Trust is also grateful to the Claneil Foundation, of Plymouth Meeting, PA, and the Graham Foundation of Chicago for their support for this publication.

Cover Photo: Eastman Hill Stock Farm, Maine, protected by a conservation and preservation easement co-held by the National Trust for Historic Preservation and the Greater Lovell Land Trust. [NTHP]

Best Practices for Preservation Organizations Involved in Easement and Land Stewardship

An introduction to using *Land Trust Standards and Practices* as a benchmark for historic preservation organizations

PREFACE

The preservation of America's rich cultural resources, whether historic buildings, significant landscapes, or archaeological sites, depends not only on the enthusiasm and dedication of the board members, staff, and volunteers involved with preservation organizations, but also on the sound and ethical implementation of that enthusiasm in practice. Good governance and effective preservation practices are especially important in view of 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 that operate conservation and historic preservation easement programs. This public attention has led to the adoption of the first major reforms in 25 years to the laws relating to historic preservation easements. Preservation organizations generally, and those organizations with easement and other types of real property stewardship programs in particular, should expect continued attention to these issues.

The best way for preserva-



tion organizations to ensure that they are following the highest level of standards and practices is for them to evaluate their own activities against commonly accepted governance and stewardship practices (including acquisition practices), determine where strengths and weaknesses may exist, correct existing problems, and adopt formal standards and procedures to prevent future problems. A preservation organization, for example, should consider whether its board of directors or trustees is effective in managing and overseeing its activities and whether adequate internal mechanisms are in place to ensure that the organization makes the best choices possible. Some questions for any preservation organization to contemplate

include:

- Does the organization's board actively monitor its finances and affairs?
- Does the organization have mechanisms in place to make certain that its actions are always consistent with the organization's mission?
- Does the organization have policies in place to prevent conflicts of interest?
- Does the organization provide the public with information about its program activities and finances?
- Are the organization's fundraising practices consistent with its mission and charitable purpose?
- Are the organization's real property transactions designed to promote the

As is the case with land trusts, it is important for historic preservation organizations engaged in the stewardship of historic places—whether through the use of easements or other types of real property stewardship—to follow effective standards and practices for both governance and protection activities.

Photo: Lundale Farm Spring House, Chester County, Pennsylvania, a National Trust easement property [NTHP].

long-term protection of historic resources and land given to the organization for future conservation?

- Does the organization have effective internal control and risk management systems in place?
- Does the organization practice sound financial management and ensure that it meets all legal and regulatory requirements, and ethical standards?

But what standards should preservation organizations use in answering these types of questions? There are, in fact, a number of nonprofit standards that provide useful guidance for general governance, such as those developed by the Better Business Bureau's Wise Giving Alliance and the Alliance for Nonprofit Management. However, for historic preservation organizations engaged in the acquisition and stewardship of historic properties (particularly through the administration of preservation easements), we believe that there is no better set of standards to use than the *Land Trust Standards and Practices*, developed by the Land Trust Alliance (the Alliance) in 1989 and most recently revised in 2004. Although designed for land trusts, these standards provide an excellent framework

for preservation organizations as well, because of the many similarities between the two types of organizations. Indeed, the National Trust's Board of Trustees formally adopted the *Land Trust Standards and Practices* in 2005, and the National Trust measures its own acquisition and stewardship practices against these guidelines.

Rather than develop a parallel set of "Standards and Practices" for historic organizations, this publication builds on the excellent work done by the Land Trust Alliance in developing *Land Trust Standards and Practices*, by providing guidance on the application of these standards and practices to historic preservation organizations. This publication provides a brief summary of the recommended practices for each standard and then highlights special issues and concerns relevant to historic preservation organizations.

We urge all preservation organizations engaged in easement and real property stewardship to evaluate their governance operations and their acquisition and stewardship practices against *Land Trust Standards and Practices*, with consideration to the special application issues noted in this publication. Use of *Land Trust Standards and Practices*

across the land conservation and historic preservation fields will help to ensure consistency of practice, and greater public confidence in the work of both types of organizations in advancing the public's interest in conservation of the built and natural environments.

The Land Trust Alliance has developed additional in-depth guidance and training programs to help land trusts and other conservation organizations understand and apply the principles of *Land Trust Standards and Practices*. This publication is not intended in any way to substitute for these excellent resources, but is instead intended to introduce the framework of *Land Trust Standards and Practices* to historic preservation organizations, and to provide some basic commentary about special considerations that may apply in the historic preservation context.

—Paul W. Edmondson
Vice President &
General Counsel
National Trust for
Historic Preservation

Background: What are *Land Trust Standards and Practices*?

Land Trust Standards and Practices are the ethical and technical guidelines for the land trust community, developed by the Land Trust Alliance (the Alliance) in 1989 and subsequently revised in 1993, 2001, and 2004. As explained by the Alliance in its introduction to the 2004 edition, *Land Trust Standards and Practices* were first created “at the urging of land trusts who believed a strong land trust community depends on the credibility and effectiveness of all its members and who understand that employing best practices is the surest way to secure lasting conservation.” The most recent version responds to the specific experiences and concerns of land trusts throughout the country, as they have matured over the years.

Land Trust Standards and Practices are organized into 12 standards, with each standard supported by specific practices to advance those standards. The first seven standards focus on issues relating to organizational strength, and the remaining five standards focus on land transactions. The practices are guidelines, recognizing that there is more than one way to implement a practice, depending on the size, nature, and scope of the organization. While *Land Trust Standards and Practices* were developed primarily for nonprofit, tax-exempt land trusts, they provide important guidance for any nonprofit organization and are especially useful for preservation organizations that hold easements or that are engaged in other types of real estate

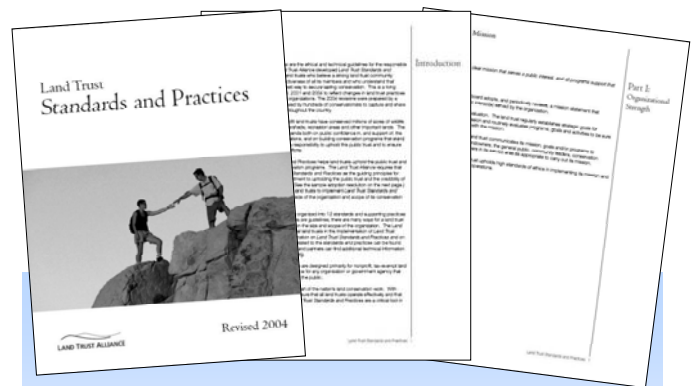
transactions. They may also be useful as guidance for governmental organizations involved in land conservation or historic preservation.

Land Trust Standards & Practices are reproduced throughout this publication, with additional commentary to provide specific guidance for historic preservation organizations. In this version, the word “organization” has been substituted for “land trust,” so that the text of *Land Trust Standards and Practices* reads as encompassing the broad range of conservation and preservation organizations engaged in land or easement stewardship activities.

Organizations should also refer to *The Land Trust Standards and Practices Guidebook: An Operating Manual for Land Trusts*, published by the Land Trust Alliance. The *Guidebook* provides extended commentary by the Alliance and examples of policies and implementation procedures developed by land trust organizations. *The Conservation Easement Handbook* (2005), published jointly by the Alliance and the Trust for Public Land, is another invaluable resource. (The *Handbook* includes a chapter on historic preservation easements written by the National Trust for Historic Preservation). Finally, a list of other resources that may be of interest to preservation organizations is located at the end of this publication. Organizations unclear about their legal responsibilities under federal, state, or local laws are strongly urged to consult their attorneys.

More information on *Land*

Trust Standards and Practices is available directly from the Land Trust Alliance’s web site, www.lta.org.



Land Trust Standards and Practices provide comprehensive standards and practices in organizational operations and governance, as well as for technical and transactional activities.

CONTENTS OF *LAND TRUST STANDARDS AND PRACTICES*

PART 1 ORGANIZATIONAL STRENGTH

- Standard 1** Mission
- Standard 2** Compliance with Laws
- Standard 3** Board Accountability
- Standard 4** Conflicts of Interest
- Standard 5** Fundraising
- Standard 6** Financial and Asset Management
- Standard 7** Volunteers, Staff and Consultants

PART 2 LAND TRANSACTIONS

- Standard 8** Evaluating and Selecting Conservation Projects
- Standard 9** Ensuring Sound Transactions
- Standard 10** Tax Benefits
- Standard 11** Conservation Easement Stewardship
- Standard 12** Fee Land Stewardship

FROM LAND TRUST STANDARDS AND PRACTICES . . .

PART I: ORGANIZATIONAL STRENGTH

Standard 1: Mission

The organization has a clear mission that serves a public interest, and all programs support that mission.

Practices

- A. Mission. The board adopts, and periodically reviews, a mission statement that specifies the public interest(s) served by the organization.
- B. Planning and Evaluation. The organization regularly establishes strategic goals for implementing its mission and routinely evaluates programs, goals and activities to be sure they are consistent with the mission.
- C. Outreach. The organization communicates its mission, goals and/or programs to members, donors, landowners, the general public, community leaders, conservation organizations and others in its service area as appropriate to carry out its mission.
- D. Ethics. The organization upholds high standards of ethics in implementing its mission and in its governance and operations.

STANDARD 1: MISSION— Considerations for the Historic Preservation Organization.

General Comments: This standard—and the accompanying list of recommended practices—should be considered essential common-sense guidance for *any* nonprofit organization, including historic preservation organizations. Like any other nonprofit entity, *every* preservation organization should have a clear mission that frames its programs and activities to ensure that they advance the public interest. Each preservation organization should be proactive in establishing strategic goals and periodically evaluating its programs and activities against those goals. It should communicate its mission and explain its activities to the public, and coordinate with community leaders

and other preservation organizations. Also, it should maintain high standards of ethics, both in its activities and its governance. (Note that other practices provide more detailed guidance about some of these concepts, particularly in the governance area.)

Pointers for Preservation Organizations: While these concepts may be considered to be universally applicable to nonprofit organizations, two points are worth emphasizing for preservation organizations that pursue their mission through the acceptance of preservation easements:

➤ The first point relates to *Practice 1B, Planning and Evaluation*: Preservation organizations with easement programs should routinely step back and evaluate how well those programs are fulfilling the mission of historic preservation. Is the preserva-

tion organization following an easement acquisition strategy that addresses real threats to historic resources or neighborhoods? Is the preservation organization effectively protecting the resources for which it has accepted stewardship responsibilities? Are the organization's representatives diligent in negotiating strong easements, or are they too willing to accommodate property owners' interests in order to close an easement donation? These are tough questions that a preservation organization's board should be prepared to ask on a regular basis—and to insist on changes being made, when the mission of historic preservation is not being fully served. (See also *Standard 8, Evaluating and Selecting Conservation Projects*.)

➤ The second point relates to *Practice 1C, Outreach*: Preservation organizations generally operate within a framework or network that includes *other* preservation organizations (at the statewide, local, or national level—including both nonprofit and governmental organizations). As a general rule, close coordination—and cooperation—with other preservation organizations is essential to ensure that the public’s interest in historic preservation is being properly advanced.

An inherent conflict with an organization’s preservation mission may exist when two preservation organizations “compete” for easements. Too often the result is that one competitor has discounted preservation interests (i.e. by accepting a weaker easement, or accepting fewer resources for future stewardship). This does not mean that multiple easement-holding organizations should coexist in any specific community—only that coordination and cooperation between different preservation organizations may best advance the public interest. The National Trust’s easement policy, for example, recognizes this by requiring—as a condition of easement acceptance—that the suitability of alternative easement-holding organizations (particularly at the state, local, or regional levels) be explored. (See also *Standard 8, Practice 8I, Evaluating Partnerships; Practice 8H, Evaluating the Best Conservation Tool*.)



The term “preservation easement” is commonly used to describe a type of conservation easement—a private legal right given by the owner of a property to a qualified nonprofit organization or governmental entity for the purpose of protecting a property’s conservation and preservation values. Conservation easements are used to protect land that has outdoor recreational value, natural environmental value (including natural habitat), open space (including farmland, forestland, and land with scenic value), or land that has historic, architectural, or archaeological significance. Preservation easements are conservation easements whose principal purpose is to protect a property with historic, architectural, or archaeological significance, although the easement may also protect natural land values as part of a property’s historic setting. (Correspondingly, other types of conservation easements held by conservation organizations or land trusts typically are given for the purpose of protecting natural characteristics of a property, but they may also protect historic resources, such as historic farmland or archaeological sites.)

—Excerpt from “Preservation Easements, An Important Legal Tool for the Preservation of Historic Places,” (National Trust 2006).

Photo: Lowell’s Boat Shop, Amesbury, Massachusetts. The National Trust holds an easement on this historic property, donated by the Trust for Public Land. [NTHP]

FROM LAND TRUST STANDARDS AND PRACTICES . . .

Standard 2: Compliance with Laws

The organization fulfills its legal requirements as a nonprofit tax-exempt organization and complies with all laws.

Practices

- A. Compliance with Laws. The organization complies with all applicable federal, state and local laws.
- B. Nonprofit Incorporation and Bylaws. The organization has incorporated according to the requirements of state law and maintains its corporate status. It operates under bylaws based on its corporate charter or articles of incorporation. The board periodically reviews the bylaws.
- C. Tax Exemption. The organization has qualified for federal tax-exempt status and complies with requirements for retaining this status, including prohibitions on private inurement and political campaign activity, and limitations and reporting on lobbying and unrelated business income. If the organization holds, or intends to hold, conservation easements, it also meets the Internal Revenue Code's (IRC) public support test for public charities. Where applicable, state tax-exemption requirements are met.
- D. Records Policy. The organization has adopted a written records policy that governs how organization and transaction records are created, collected, retained, stored and disposed. (See 9G.)
- E. Public Policy. The organization may engage in public policy at the federal, state and/or local level (such as supporting or opposing legislation, advocating for sound land use policy, and/or endorsing public funding of conservation) provided that it complies with federal and state lobbying limitations and reporting requirements. The organization may not engage in political campaigns or endorse candidates for public office.

STANDARD 2: COMPLIANCE WITH LAWS: Considerations for the Historic Preservation Organization.

General Comments: As with the previous standard, this one—together with its list of recommended practices—sets out basic organizational guidance that should be met by *any* nonprofit organization, including historic preservation organizations. A preservation organization that fails to live up to its legal obligations as a nonprofit tax-exempt organization does so not only at its own peril: it may also imperil the validity of donations—including ease-

ment donations—given to it by members of the public. Consequently, preservation organizations should be extremely diligent in ensuring that they meet this standard and its recommended practices.

This standard should be cross-referenced to standard 9, which emphasizes that land and easement *transactions* must comply with all applicable legal requirements, and with standard 10, which relates to compliance with federal and state tax law requirements. Because the federal tax rules relating to historic preservation easement

transactions are complex, and have recently changed—as described more fully in the commentary to standards 9 and 10—historic preservation organizations must be extremely attentive to be sure that they are in full compliance.

Pointers for Preservation Organizations: Beyond the general admonition to follow the law, several points are worth emphasizing specifically for historic preservation organizations involved in easements and other land stewardship activities:

➤ The first point relates to *Practice 2C, Tax Exemption*: Following the reminder of practice 2C, preservation organizations should ensure that they follow all applicable reporting requirements under federal and state law. For most preservation organizations, this includes Internal Revenue Service (IRS) Form 990 (“Return of Organization Exempt from Income Tax”). Form 990 is the principal form for reporting income by non-profits to the IRS and state governments, and is required to be made readily available to the public. (It is also often required to be filed with state charitable registration forms.) Not only does the form help the IRS and state agencies regulate the activities of charitable organizations, but it also serves to make nonprofits accountable to the public by providing detailed information on an organization’s financial condition and sources of income.

And now, due to recent changes, Form 990 also serves as a specific source of information about a preservation organization’s easement program: Historic preservation organizations that hold easements should be aware of—and fully comply with—new reporting requirements concerning their easement program, included in Schedule A of Form 990 and effective as of tax year 2006. (See sidebar, **this page**.)

➤ The second point also relates to the same practice (*Practice 2C, Tax Exemption*): General rules for tax-exempt organizations prohibit such organizations from using their resources to confer “private inurement” in the form of excess benefits to individuals

NEW IRS REPORTING REQUIREMENTS FOR NONPROFIT ORGANIZATIONS WITH EASEMENT PROGRAMS

Preservation organizations with easement programs should be aware that, starting with tax year 2006, Schedule A to the Form 990 Federal Tax Return for Tax Exempt Organizations includes new disclosure requirements relating to conservation and historic preservation easements. Organizations holding easements must attach a schedule with detailed information about the organization’s easements, and about the organization’s practices with respect to inspection, monitoring, and enforcement. For any easement on historic buildings or structures acquired after August 17, 2006, the organization must also report whether the easement complies with the new “special rules” provisions of the Pension Protection Act of 2006. (See discussion at *Standard 10, Tax Benefits*, below.)

The applicable provisions of Form 990 Schedule A and Instructions for tax year 2007 are printed below. Please note that, effective for tax year 2008, additional disclosure requirements will be included in a new Form 990 Schedule D. Organizations should double-check the IRS’s web site, www.irs.gov/charities, for current forms and information.

2007 Form 990, Schedule A

Part III, Line 3c:

“Did the organization receive or hold an easement for conservation purposes, including easements to preserve open space, the environment, historic land areas or historic structures? If ‘Yes,’ attach a detailed statement.”

2007 Form 990, Schedule A (Instructions)

Part III, Line 3c:

Conservation easements. Answer “Yes” if the organization received or held one or more conservation easements during the year. In general, an *easement* is an interest in the land of another. A *conservation easement* is an interest in the land of another for purposes that include environmental protection; the preservation of open space; or the preservation of property for historic, educational, or recreational purposes. For more information see Notice 2004-41, 2004-28 I.R.B. 31.

Attached schedule. If “Yes,” the organization must attach a schedule that includes the following information.

1. The number of easements held at the beginning of the year, the acreage of these easements and the number of states where the easements are located.
2. The number of easements and the acreage of these easements that the organization received or acquired during the year.
3. The number of easements modified, sold, transferred, released, or terminated during the year and the acreage of these easements. For each easement, explain the reason for the modification, sale, transfer, release or termination. Also, identify the recipient (if any), and show if the recipient was a qualified organization (as defined in section 170(h)(3) and the related regulations at the time of transfer).
4. Show the number of easements held for each of the following categories:
 - a. Easements on buildings or structures;
 - b. Easements that encumber a golf course or portions of a golf course;
 - c. Easements within or adjacent to residential developments and housing subdivisions, including easements related to the development of property; and
 - d. Conservation easements that were acquired in a transaction described under *Purchase of Real Property from Charitable Organizations* in Notice 2004-41 [so-called “conservation buyer” programs] and if the organization acquired any such easements during the year.
5. The number of easements and the acreage of these easements that were monitored by physical inspection or other means during the tax year.
6. Total staff hours and a list of expenses devoted to (legal fees, portion of staff salaries, etc.) incurred for monitoring and enforcing new or existing easements during the tax year.
7. Identify all easements on buildings or structures acquired after August 17, 2006, and show if each easement meets the requirements of section 170(h)(4)(B) [i.e., the “special rules” for easements on historic structures in registered historic districts].

While it would be unfair to suggest that preservation organizations are particularly susceptible to violating these fundamental rules for nonprofit organizations, the higher degree of public interest and attention recently given to preservation organizations engaged in the promotion and acceptance of conservation easements suggests that all such organizations would be well advised to avoid any contract, consultancy, or other arrangement that might be considered to result in private inurement or impermissible private benefit.

with significant influence over the organization (“insiders”), including founders, directors, certain employees, and major donors. Other rules proscribe the diversion of a nonprofit organization’s resources for “impermissible private benefit,” rather than to benefit the public. While it would be unfair to suggest that preservation organizations are particularly susceptible to violating these fundamental rules for nonprofit organizations, the higher degree of public interest and attention recently given to preservation organizations engaged in the promotion and acceptance of conservation easements suggests that all such organizations would be well advised to avoid any contract, consultancy, or other arrangement that might be considered to result in private inurement or impermissible private benefit. See also *Standard 4, Conflicts of Interest*, and particularly *Practice 4C, Transactions with Insiders*. Regardless of whether a particular transaction may be justified as technically “legal,” remember that it may not be seen by the public as proper or ethical, and ultimately may damage the reputation of the preservation organization and undermine public support for the preservation movement.

As noted below in the discussion about ethics, the Land Trust Alliance, through its Standards and Practices Cur-

riculum, has a useful course and coursebook on “Avoiding Conflicts of Interest and Running an Ethical Land Trust,” (Land Trust Alliance 2006), which specifically addresses the issue of private inurement and impermissible private benefit.

➤ A final point for preservation organizations to keep in mind relates to *Practice 2D, Records Policy*: For some preservation organizations, the suggestion that the organization should adopt a written records policy that governs the creation, collection, retention, storage, and disposal of records may seem an unnecessary burden. However, every preservation organization should have a formally adopted, written records policy. The establishment and adherence to procedures governing the creation, storage, and ultimate disposition of records is critically important for audit purposes and may be essential for programmatic purposes, such as the maintenance of easement documentation. This is especially true for organizations administering historic preservation easements because of the complexities of proper baseline documentation, and the importance of maintaining good baseline records for future easement administration. (See also standard 11).

It may be tempting for preservation organizations

operating on a shoestring budget to forgo expenses relating to good recordkeeping practices, such as hiring extra staff when necessary, or ensuring that critical records are kept in secure areas and under proper conditions. Good recordkeeping policies, however, foster documentation of organizational history and promote public accountability and confidence. They also help to ensure that records are well maintained, despite high staff turnover or heavy reliance on volunteers. Organizations can reduce recordkeeping costs with the use of volunteer help. However, clear policies and measures must be in place to ensure accuracy and consistency at all times.

Good record retention policies also are helpful in determining appropriate practices for the disposal of records—and can avoid legal problems that might arise from an *ad hoc* disposal approach. (In this context, it is appropriate to include a reminder that a relatively new federal requirement applicable to nonprofit organizations in the Sarbanes-Oxley Act of 2002 makes it a penalty to destroy records knowingly “with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.”)

Standard 3: Board Accountability

The organization board acts ethically in conducting the affairs of the organization and carries out the board's legal and financial responsibilities as required by law.

Practices

- A. Board Responsibility. The board is responsible for establishing the organization's mission, determining strategic direction and setting policies to carry out the mission, and, as required by law, the oversight of the organization's finances and operations.
- B. Board Composition. The board is of sufficient size to conduct its work effectively. The board is composed of members with diverse skills, backgrounds and experiences who are committed to board service. There is a systematic process for recruiting, training and evaluating board members.
- C. Board Governance. The organization provides board members with clear expectations for their service and informs them about the board's legal and fiduciary responsibilities. The board meets regularly enough to conduct its business and fulfill its duties, with a minimum of three meetings per year. Board members are provided with adequate information to make good decisions. Board members attend a majority of meetings and stay informed about the organization's mission, goals, programs and achievements.
- D. Preventing Minority Rule. The organization's governing documents contain policies and procedures (such as provisions for a quorum and adequate meeting notices) that prevent a minority of board members from acting for the organization without proper delegation of authority.
- E. Delegation of Decision-Making Authority. The board may delegate decision-making and management functions to committees, provided that committees have clearly defined roles and report to the board or staff. If the organization has staff, the board defines the job of, oversees and periodically evaluates the executive director (or chief staff person). (See 3F and 7E.)
- F. Board Approval of Land Transactions. The board reviews and approves every land and easement transaction, and the organization provides the board with timely and adequate information prior to final approval. However, the board may delegate decision-making authority on transactions if it establishes policies defining the limits to that authority, the criteria for transactions, the procedures for managing conflicts of interest, and the timely notification of the full board of any completed transactions, and if the board periodically evaluates the effectiveness of these policies.

STANDARD 3: BOARD ACCOUNTABILITY: Considerations for the Historic Preservation Organization

General Comments: In recent years, considerable public attention has been devoted to corporate governance practices in both the for-profit and nonprofit sectors—to some degree responding to public scandals and reports of questionable activities in both sectors. The enactment in 2002 of the Sarbanes-Oxley Act

(which relates primarily to publicly traded corporations) has generated discussion about the extent to which nonprofit organizations should *also* be held to higher levels of board accountability. As a result, over the past several years a number of articles and books have been written to help nonprofit organizations apply concepts from Sarbanes-Oxley to improve governance standards in the nonprofit sector. The guidance

provided by *Land Trust Standards and Practices*—not only in standard 3, but also in the other standards relating to organizational management (standards 1 through 7)—stands as a helpful compilation of the essential governance principles that *any* nonprofit should follow as a matter of good corporate governance. Preservation organizations should pay close attention.

The board accountability

If the board's approval of property or easement acquisitions is delegated to management, that delegation must be in writing and subject to criteria set—and regularly reviewed—by the board.

standards incorporated in standard 3 reflect the important responsibilities held by a nonprofit organization's governing board and its individual directors. While recognizing that legal requirements and obligations may vary from state to state (and that organizations will vary in terms of their size, structure, and complexity), standard 3 and its associated practices emphasize that boards and board members have essential fiduciary responsibilities for the organization's finances and operations—and that they must take those responsibilities seriously.

Pointers for Preservation Organizations:

➤ As a general matter, it may be helpful for preservation organizations to use the list of practices set out above to evaluate their own governance structures and standards, to consider ways to strengthen the effectiveness of the board,

its committees, and its internal control and risk management systems. (The National Trust, for example, has conducted a board-level governance review, examining many of the same principles set out in *Land Trust Standards and Practices*, and as a result revised a number of its board-level policies and structures to improve transparency and accountability.)

In particular, the board should analyze the level of involvement and attention that individual board members exercise. Are board members active and engaged in exercising their governance responsibilities, or do they defer to management or a small group of active board members? Also, is the board fully involved in financial oversight and ensuring that proper systems exist for financial accountability? Does the organization have sound auditing practices? Does it have

procedures in place for bringing issues or irregularities to the attention of the board?

➤ Preservation organizations with easement or other real property stewardship programs should, in particular, pay attention to *Practice 3E, Delegation of Decision-Making Authority*, and *Practice 3F, Board Approval of Land Transactions*. The important obligations (including financial obligations) that come as a result of agreeing to take on real property or easement stewardship responsibilities have significant operational, financial, and liability implications for a preservation organization, and the board should have clear policies that set out acquisition standards. If the board's approval of property or easement acquisitions is delegated to management, that delegation must be in writing and subject to criteria set—and regularly reviewed—by the board.

Photo: The Mill at Waterford, Virginia, protected by an easement held by the National Trust. The National Trust's board has established formal policies stating easement acquisition criteria, and specific delegations of authority to the President to accept easements pursuant to those criteria. [NTHP]



Standard 4: Conflicts of Interest

The organization has policies and procedures to avoid or manage real or perceived conflicts of interest.

Practices

- A. Dealing with Conflicts of Interest. The organization has a written conflict of interest policy to ensure that any conflicts of interest or the appearance thereof are avoided or appropriately managed through disclosure, recusal or other means. The conflict of interest policy applies to insiders (see definitions), including board and staff members, substantial contributors, parties related to the above, those who have an ability to influence decisions of the organization and those with access to information not available to the general public. Federal and state conflict disclosure laws are followed.
- B. Board Compensation. Board members do not serve for personal financial interest and are not compensated except for reimbursement of expenses and, in limited circumstances, for professional services that would otherwise be contracted out. Any compensation must be in compliance with charitable trust laws. The board's presiding officer and treasurer are never compensated for professional services.
- C. Transactions with Insiders. When engaging in land and easement transactions with insiders (see definitions), the organization: follows its conflict of interest policy; documents that the project meets the organization's mission; follows all transaction policies and procedures; and ensures that there is no private inurement or impermissible private benefit. For purchases and sales of property to insiders, the organization obtains a qualified independent appraisal prepared in compliance with the Uniform Standards of Professional Appraisal Practice by a state-licensed or state-certified appraiser who has verifiable conservation easement or conservation real estate experience. When selling property to insiders, the organization widely markets the property in a manner sufficient to ensure that the property is sold at or above fair market value and to avoid the reality or perception that the sale inappropriately benefited an insider.

STANDARD 4: CONFLICTS OF INTEREST: Considerations for the Historic Preservation Organization.

General comments: By any standard, one of the basic tenets of good corporate governance is that steps should be taken to identify and avoid conflicts of interest by board members, staff members, and other individuals with special influence. Consistent with the ethical concepts set out in standard 1, standard 4 emphasizes these principles, and the associated practices provide helpful guidance for implementation.

The need for effective standards and practices for nonprofit organizations in this area has recently been empha-

sized by the IRS in draft guidance on "good governance practices" for tax-exempt organizations (released February 2007). According to the IRS, the board of directors of a nonprofit organization should adopt and regularly evaluate a conflict of interest policy that: (1) requires directors and staff to act solely in the interests of the organization without regard for personal interests; (2) includes written procedures for determining whether a relationship, financial interest, or business affiliation results in a conflict of interest; and (3) prescribes a certain course of action in the event that a conflict of interest is identified. In addition, IRS guidance states that "directors and staff

should be required to disclose annually in writing any known financial interest that the individual, or a member of the individual's family, has in any business entity that transacts business with the charity."

The IRS now requires organizations applying for tax-exempt status to disclose whether they have adopted a conflict of interest policy, and the IRS has even developed an example of a conflict of interest policy for nonprofit organizations. (See **sample policy following this commentary**.) Note, however, that this is simply one example: many organizations have far more detailed—and in some cases, far more restrictive—conflict

of interest policies. The National Trust, for example, has adopted a detailed conflict of interest policy that states a general rule against financial or related transactions between the National Trust and its trustees.

Regardless of the views of the IRS or state regulators about the need for strong conflict of interests policies and practices, the confidence of the public in the work of a nonprofit organization—whether a land trust, preservation organization, or any other public interest entity—is critically important to the success of the organization. That confidence can quickly be lost if an organization’s activities are tainted by a real or perceived conflict, or by what might be seen as a lax approach to insider transactions. Consequently, strong standards and adherence to good practices and procedures in this area should be the norm for any nonprofit organization.

Pointers for Preservation Organizations: On more than one occasion over the past several years, articles in major U.S. newspapers have raised serious questions about insider transactions between nonprofit organizations and members of their boards or other individuals with special influence. Several of these articles specifically involved organizations engaged in either historic preservation or natural land conservation. Regardless of the circumstances, these reports are an important reminder of the point noted above: that public trust can be quickly put at risk by lack of attention to potential conflicts of interest.

For preservation organizations with active easement or

other real property stewardship programs, several specific areas are worth highlighting:

➤ As noted in *Practice 4A, Dealing with Conflicts of Interest*, it is extremely important for every preservation organization to have a clear and effective written conflict of interest policy, applicable to directors, staff, substantial contributors, and others with influence, and with good disclosure, recusal, and review procedures. It is one thing, however, to have a strong policy: it is even *more* important to establish an organizational culture in which potential conflicts are recognized and avoided as a normal part of the organization’s business practice. Transactions involving a board member or other insider should be rare exceptions. (See comments on insider transactions, below.)

➤ Regarding *Practice 4C, Transactions with Insiders*: As noted earlier under the commentary to *Practice 2C, Tax Exemption*, preservation organizations should be particularly wary of entering into contracts, consultancies, or other arrangements with insiders (or “disqualified persons,” in tax-parlance) that might be construed as resulting in “private inurement” by providing benefits in excess of what would be considered a fair return for the services provided.

Beyond this legal standard, however, preservation organizations should consider the questionable appearance created by contracts or beneficial business arrangements with directors or other insiders even when compensation is not excessive. Arrangements with directors or other insid-

ers (or their relatives) may be appropriate in some limited instances (and, of course, are sometimes provided on an extremely discounted basis). However, an organization that engages in business arrangements on more than an occasional basis with insiders may be seen by the public as less than independent, and possibly little more than a conduit for a for-profit business carried out by the insider.

➤ Beyond the question of business relationships, board members or other insiders involved with preservation organizations may occasionally become (or seek to become) involved in easement transactions (as donors) or property transactions (either as donors or purchasers). As is the case with land trusts, it is desirable that the directors of preservation organizations have a strong preservation ethic, and in some cases directors may become interested in directly participating. Real property and easement transactions involving insiders, however, must be carried out in a manner that assures transparency and avoids even the appearance of conflicts. Special deals, or special contractual arrangements with insiders or individuals with special influence, should be avoided. Deals that may indirectly benefit board members (or their family members or business interests)—such as by protecting land adjacent to their own land—should be carefully evaluated as to whether they raise conflict of interest or private inurement concerns. Even the donation or sale of property at a bargain rate to the preservation organization by a board member or other person of

An organization that engages in business arrangements on more than an occasional basis with insiders may be seen by the public as less than independent, and possibly little more than a conduit for a for-profit business carried out by the insider.

influence can give rise to problems. Such transactions may not be consistent with an organization's mission or in the organization's best interest financially to accept the property.

In certain situations, when it is in the best interest of the organization, transactions may proceed if subject to careful scrutiny, and if steps to avoid actual conflicts between the interests of a board member and the organization are taken. In other words, a transaction may go forward provided that all opportunities for self-dealing or compromise have been removed. An organization, for example, could eliminate potential conflicts regarding the donation of a historic property by obtaining independent appraisals by qualified appraisers, marketing properties on the open market, and selecting sales agents through a competitive process. (In any event, the director in question should recuse himself or herself from any decision-making on these transactions and generally not participate in board discussion.)

If a board member has donated an easement on a property, an organization may wish to take measures to ensure that an independent entity is responsible for any decisions made with respect to the property while the member sits on the board, and that all costs are reimbursed. Some preservation organizations, for example, have successfully entered into agreements with other easement-holding organizations to handle monitoring, inspection, and enforcement of easements donated by board members or other insiders. Easement-holding organizations should particularly be wary of any situation in which a board member seeks permission to make changes to property protected by the easement, or to change the terms of the easement itself.

➤ Finally, it is worth noting that many preservation organizations operate financial assistance programs, including grant programs, revolving loan funds, and other loan programs for historic properties, and in some cases programs designed to encourage

investment in rehabilitation tax credit projects. In carrying out financial assistance or similar programs, transactions with directors and other insiders should be avoided when possible, particularly when direct personal interests are involved. Personal loans to board members or other insiders should not be permitted.

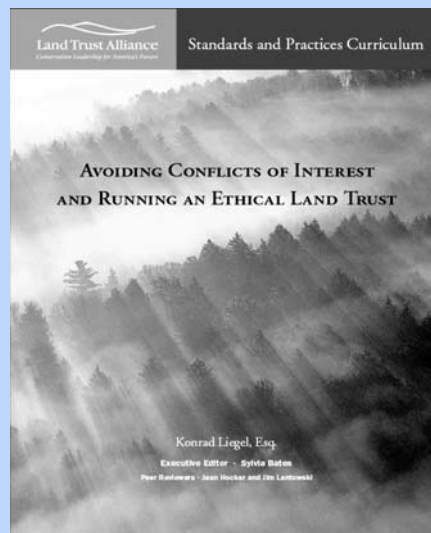
In some cases, a director may also have a relationship (such as being a board member) with another nonprofit organization seeking financial support, and in those cases transactions may be permitted if strict conflict of interest procedures (including review and recusal provisions) are followed to ensure that the loan, grant, or other form of assistance is in fact made in the ordinary course of the organization's activities, that no special influence was used by the interested director, that the director in question did not participate in any way in the decision, and that the terms are those that would ordinarily apply to other nonprofit organizations receiving similar assistance.

ADDITIONAL RESOURCES . . .

The Land Trust Alliance has developed a course book on "Avoiding Conflicts of Interest and Running an Ethical Land Trust" as the first course in its Standards and Practices Curriculum. (The Curriculum will help land trusts and other conservation organizations implement *Land Trust Standards and Practices*.)

The course book, written by Konrad Liegel and published in 2006, provides practical guidance to organizations for conducting an organizational self-assessment on handling conflicts of interest, developing a statement of ethics, dealing with conflicts of interest, addressing transactions with insiders, and dealing with private inurement and impermissible private benefit issues. These materials provide an important additional resource for preservation organizations engaged in easement and other land stewardship programs.

More information is available at www.lta.org.



**IRS SAMPLE CONFLICT OF INTEREST POLICY
FOR A TAX-EXEMPT ORGANIZATION**

Article I - Purpose

The purpose of the conflict of interest policy is to protect this tax-exempt organization's (Organization) interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the Organization or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

Article II - Definitions

1. Interested Person

Any director, principal officer, or member of a committee with governing board delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.

2. Financial Interest

A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

- a. An ownership or investment interest in any entity with which the Organization has a transaction or arrangement,
- b. A compensation arrangement with the Organization or with any entity or individual with which the Organization has a transaction or arrangement, or
- c. A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Organization is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

Article III - Procedures

1. Duty to Disclose

In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors and members of committees with governing board delegated powers considering the proposed transaction or arrangement.

2. Determining Whether a Conflict of Interest Exists

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the governing board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

3. Procedures for Addressing the Conflict of Interest

- a. An interested person may make a presentation at the governing board or committee meeting, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.
- b. The chairperson of the governing board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.
- c. After exercising due diligence, the governing board or committee shall determine whether the Organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.
- d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the governing board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Organization's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination it shall make its decision as to whether to enter into the transaction or arrangement.

4. Violations of the Conflicts of Interest Policy

- a. If the governing board or committee has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.
- b. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the governing board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Cont'd...

Cont'd...

Article IV - Records of Proceedings

The minutes of the governing board and all committees with board delegated powers shall contain:

- a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the governing board's or committee's decision as to whether a conflict of interest in fact existed.
- b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

Article V - Compensation

- a. A voting member of the governing board who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.
- b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.
- c. No voting member of the governing board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

Article VI - Annual Statements

Each director, principal officer and member of a committee with governing board delegated powers shall annually sign a statement which affirms such person:

- a. Has received a copy of the conflicts of interest policy,
- b. Has read and understands the policy,
- c. Has agreed to comply with the policy, and
- d. Understands the Organization is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Article VII - Periodic Reviews

To ensure the Organization operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

- a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.
- b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Organization's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

Article VIII - Use of Outside Experts

When conducting the periodic reviews as provided for in Article VII, the Organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the governing board of its responsibility for ensuring periodic reviews are conducted.

Standard 5: Fundraising

The organization conducts fundraising activities in an ethical and responsible manner.

Practices

- A. Legal and Ethical Practices. The organization complies with all charitable solicitation laws, does not engage in commission-based fundraising, and limits fundraising costs to a reasonable percentage of overall expenses.
- B. Accountability to Donors. The organization is accountable to its donors and provides written acknowledgement of gifts as required by law, ensures that donor funds are used as specified, keeps accurate records, honors donor privacy concerns and advises donors to seek independent legal and financial advice for substantial gifts.
- C. Accurate Representations. All representations made in promotional, fundraising, and other public information materials are accurate and not misleading with respect to the organization's accomplishments, activities and intended use of funds. All funds are spent for the purpose(s) identified in the solicitation or as directed in writing by the donor.
- D. Marketing Agreements. Prior to entering into an agreement to allow commercial entities to use the organization's logo, name or properties, the organization determines that these agreements will not impair the credibility of the organization. The organization and commercial entity publicly disclose how the organization benefits from the sale of the commercial entity's products or services.

**STANDARD 5: FUNDRAISING:
Considerations for the Historic Preservation Organization.**

General Comments: Fundraising activities are critical to the long-term success and stability of preservation organizations, as with other types of nonprofit organizations, and standard 5 serves as an important reminder that organizations engaged in easement and other types of real property stewardship programs must engage in legal and ethical practices at all times in conducting their fundraising activities. See also *Standard 2, Compliance with Laws*. It is also extremely important that the pursuit of funding should not become an organization's mission; rather, fundraising should be used to further the organization's mission. See *Standard 1, Mission*.

Pointers for Preservation Organizations: For preservation organizations that ac-

tively solicit easement donations, there is a direct connection between funding solicitation and easement solicitation, because part of the easement solicitation generally includes the solicitation of a cash donation for a stewardship fund or easement endowment. Consequently, any preservation organization engaged in the solicitation of easements should consider standard 5 and its associated practices as applicable not only to funding solicitations, but also to the solicitation of easement donations. All solicitation activities must comply with the legal and ethical standards and practices noted here.

➤ *Practice 5A, Legal and Ethical Practices*, notes that organizations should "not engage in commission-based fundraising." This reflects an ethical standard recognized by prominent associations of fundraising professionals, such as the Association of

Fundraising Professionals (AFP). As reflected in AFP's Code of Ethical Principles and Standards of Professional Practice, "percentage-based compensation and finders' fees may encourage abuse, imperil the integrity of the voluntary sector, and undermine the philanthropic values upon which it is based." Accordingly, AFP's Standards of Professional Practice prohibit its members from accepting compensation based on a percentage of charitable contributions, or that includes "finders' fees." AFP fundraising standards and implementing guidelines recognize that performance-based compensation through an established bonus system may be appropriate, but only if consistent with prevailing practices, if based on criteria that reflect overall goals, and if based on a policy approved by the organization's governing board.

As noted above, preserva-

tion organizations should consider the principles of standard 5 as applicable to all public solicitations, including solicitation of easement donations. Consequently, staff or outside consultants used to promote easement donations (and accompanying cash donations for stewardship) should not be compensated under a percentage-based system. If bonus systems or other performance-based practices are used, they should be carefully reviewed to ensure that they are based on criteria reflecting overall program objectives and not simply the volume or cash value of contributions. Any performance-based program should also be reviewed and appropriately limited to ensure compliance with private inurement rules, and should in all cases be expressly approved by the organization's board.

In sum, compensation of individuals involved in soliciting easement donations and associated cash contributions should be structured to comply with both legal and ethical standards that promote the program objectives of the preservation organization,

and not the financial interests of the solicitor.

➤ *Practice 5C, Accurate Representations*, also deserves special mention. Preservation organizations need to ensure that *all* representations made to prospective easement donors (including general representations made to the public) are accurate and not misleading. This is particularly the case with respect to representations regarding tax benefits, which for many donors may be the key motivational factor in deciding whether to donate an easement (and to make a related cash contribution for future stewardship). See also *Standard 10, Tax Benefits*. This practice should be considered as applying not only with respect to the organization, but also to promoters, consultants, and others acting on behalf of the organization (or with whom the organization cooperates).

The IRS and congressional oversight committees have expressed particular concern with questionable promotional practices relating to the donation of preservation easements, including the use of promotional materials that encourage prospective donors

to assume that large deductions will be available for the donation of simple façade easements in locally regulated historic districts in which changes to the property are already tightly controlled under the local preservation law. While in some cases significant deductions may be available even in these circumstances, in other cases they may not be—and preservation organizations should be careful to avoid promotional activities and public solicitations that over-promote tax benefits. The IRS has warned that it will not tolerate “promoters of potentially abusive easement donations” and that it plans to use “all civil and criminal tools at [its] disposal to combat abuses . . . by [p]romoters and other persons involved in these transactions, including managers of a preservation organization.” Statement of Steven T. Miller, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, before the Subcommittee on Oversight of the House Committee on Ways and Means, June 23, 2005.

Any preservation organization engaged in the solicitation of easements should consider standard 5 and its associated practices as applicable not only to funding solicitations, but also to the solicitation of easement donations. All solicitation activities must comply with the legal and ethical standards and practices noted here.

Standard 6: Financial and Asset Management

The organization manages its finances and assets in a responsible and accountable way.

Practices

- A. Annual Budget. The organization prepares an annual budget that is reviewed and approved by the board, or is consistent with board policy. The budget is based on programs planned for the year. Annual revenue is greater than or equal to expenses, unless reserves are deliberately drawn upon.
- B. Financial Records. The organization keeps accurate financial records, in a form appropriate to its scale of operations and in accordance with Generally Accepted Accounting Principles (GAAP) or alternative reporting method acceptable to a qualified financial advisor.
- C. Financial Reports and Statements. The board receives and reviews financial reports and statements in a form and with a frequency appropriate for the scale of the organization's financial activity.
- D. Financial Review or Audit. The organization has an annual financial review or audit, by a qualified financial advisor, in a manner appropriate for the scale of the organization and consistent with state law.
- E. Internal System for Handling Money. The organization has established a sound system of internal controls and procedures for handling money, in a form appropriate for the scale of the organization.
- F. Investment and Management of Financial Assets and Dedicated Funds. The organization has a system for the responsible and prudent investment and management of its financial assets, and has established policies on allowable uses of dedicated funds and investment of funds.
- G. Funds for Stewardship and Enforcement. The organization has a secure and lasting source of dedicated or operating funds sufficient to cover the costs of stewarding its land and easements over the long term and enforcing its easements, tracks stewardship and enforcement costs, and periodically evaluates the adequacy of its funds. In the event that full funding for these costs is not secure, the board has adopted a policy committing the organization to raising the necessary funds. (See 6F, 11A and 12A.)
- H. Sale or Transfer of Assets (Including Land and Easements). The organization has established policies or procedures on the transfer or sale of assets, including real property. (See 4C, 9K and 9L.)
- I. Risk Management and Insurance. The organization assesses and manages its risks and carries liability, property, and other insurance appropriate to its risk exposure and state law. The organization exercises caution before using its land to secure debt and in these circumstances takes into account any legal or implied donor restrictions on the land, the organization's mission and protection criteria, and public relations impact.

STANDARD 6: FINANCIAL AND ASSET MANAGEMENT: Considerations for the Historic Preservation Organization.

General comments: As charitable entities, historic preservation organizations have an obligation to the public—and to their donors specifically—to advance their

charitable purpose and mission through efficient and effective operations. To meet this obligation, an organization must engage in sound financial and asset management practices. In this respect, preservation organizations and land trusts are no different from most other nonprofit organizations, and

the provisions of standard 6 and its associated practices provide a clear restatement of good governance principles in this area.

Pointers for Preservation Organizations: Of the various practices outlined in standard 6, one particularly worth noting for historic preservation organizations involved in

easement or real property stewardship activities relates to the matter of securing necessary funds for future stewardship costs:

➤ *Practice 6G, Funds for Stewardship and Enforcement*, states that organizations engaged in easement or real property stewardship should have a “secure and lasting source” of dedicated or operating funds sufficient to cover the costs of stewardship “over the long term,” and for necessary enforcement. If such funding is not “secure,” the organization’s board must commit the organization to raising the necessary funds.

For preservation organizations accepting easement donations qualifying for federal tax incentives, this obligation is not a new one: IRS regulations have long stated that a qualified donee organization must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.” Treas. Reg. § 1.170A-14(c). Easement-holding organizations are not presently required by the IRS to maintain a dedicated source of funds to maintain easements, such as an easement endowment or dedicated stewardship fund. However, the organization must have resources available to monitor

and enforce the easement, which may be provided through the organization’s regular budgeting process. (Practice 6G echoes this distinction by similarly stating that the funding may be provided either with “dedicated” or “operating” funds.)

The IRS requirements noted above were reinforced by Congress in 2006 specifically in the context of historic preservation easements. Under the new “Special Rules” applicable to the donation of easements in registered historic districts enacted as part of the Pension Protection Act of 2006 [codified as IRC § 170(h)(4)(B)(ii)(II)], a donor granting this type of historic preservation easement and the donee organization accepting the easement must enter into a written agreement certifying—under penalty of perjury—that the easement-holding organization “has the resources and commitment” to manage and enforce the easement’s restrictions. (See *Standard 9, Ensuring Sound Transactions*.)

Most preservation organizations that accept donations of easements—as do most land trusts—already recognize and respond to the obligation to have a secure source of funding for future stewardship costs by requesting that

easement donors provide a cash contribution to accompany the easement donation. This practice ordinarily includes funding both for monitoring and enforcement. The National Trust strongly recommends that preservation organizations accepting easements follow this practice. (The organization, however, should be careful about assuring the donor that the accompanying cash donation is deductible; while most organizations specify that the cash donation is voluntary, the IRS has on at least one occasion suggested that the accompanying cash donation is actually a non-deductible fee if required as a condition for acceptance of the easement.)

How should a preservation organization calculate the amount of a cash stewardship contribution that should accompany an easement contribution? Different preservation organizations have used different methods to calculate the amount—in some cases, basing the contribution on a percentage of the appraised value of the easement itself, in other cases basing the recommended contribution on a percentage of the entire property’s value, and in other cases using estimated annual costs to calculate a sum that would produce enough income to

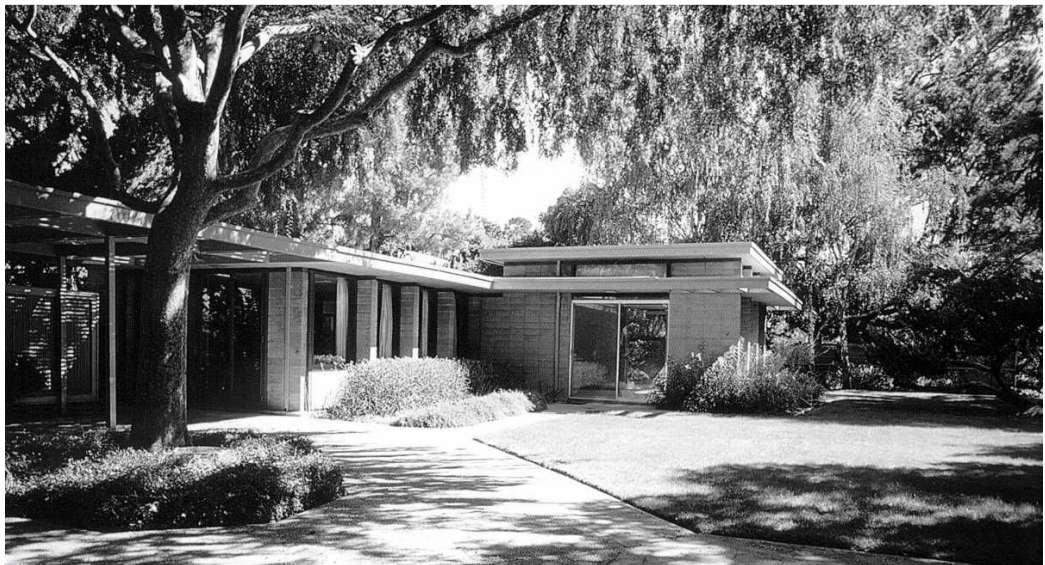
Most preservation organizations that accept donations of easements—as do most land trusts—already recognize and respond to the obligation to have a secure source of funding for future stewardship costs by requesting (or requiring) that easement donors provide a cash contribution to accompany the easement donation. This practice ordinarily includes funding both for monitoring and enforcement. The National Trust strongly recommends that preservation organizations accepting easements follow this practice.

allow such costs to be covered. The National Trust strongly advises against basing the cash stewardship contribution on the value of the easement, since that may be perceived as giving the donee organization a vested interest in having the donor claim a high value for the easement. The National Trust's practice—and one that it recommends to other preservation organizations—is to base the stewardship amount on esti-

imated annual costs of monitoring and enforcement. This ensures that cash receipts accompanying easements are high enough to cover future costs, but not so high that they might encourage organizations to accept easements primarily because of the revenues they bring to the organization.

Finally, a preservation organization that accepts fee interests in historic properties or land areas for stewardship

should be equally attentive to the need to address future costs. Although circumstances sometimes require a preservation organization to acquire (by purchase or donation) a property without adequate funds set aside for future costs of site administration, it is best to have a dedicated endowment or other source of funding for future stewardship costs. See also *Standard 12, Fee Land Stewardship*.



The National Trust's practice—and one that it recommends to other preservation organizations—is to base the stewardship amount on estimated annual costs of monitoring and enforcement. This ensures that cash receipts accompanying easements are high enough to cover future costs, but not so high that they might encourage organizations to accept easements primarily because of the revenues they bring to the organization.

Photo: The Ginzton House, a modernist house in Los Altos Hills, California, is protected under the National Trust's easement program. Future stewardship costs for this easement will be covered through the National Trust's easement endowment, which is based on estimated annual costs of monitoring and enforcement. [NTHP]

Standard 7: Volunteers, Staff and Consultants

The organization has volunteers, staff and/or consultants with appropriate skills and in sufficient numbers to carry out its programs.

Practices

- A. Capacity. The organization regularly evaluates its programs, activities and long-term responsibilities and has sufficient volunteers, staff and/or consultants to carry out its work, particularly when managing an active program of easements.
- B. Volunteers. If the organization uses volunteers, it has a program to attract, screen, train, supervise and recognize its volunteers.
- C. Staff. If the organization uses staff, each staff member has written goals or job descriptions and periodic performance reviews. Job duties or work procedures for key positions are documented to help provide continuity in the event of staff turnover.
- D. Availability of Training and Expertise. Volunteers and staff have appropriate training and experience for their responsibilities and/or opportunities to gain the necessary knowledge and skills.
- E. Board/Staff Lines of Authority. If the organization has staff, the lines of authority, communication and responsibility between board and staff are clearly understood and documented. If the board hires an executive director (or chief staff person), the board delegates supervisory authority over all other staff to the executive director. (See 3E.)
- F. Personnel Policies. If the organization has staff, it has written personnel policies that conform to federal and state law and has appropriate accompanying procedures or guidelines.
- G. Compensation and Benefits. If the organization has staff, it provides fair and equitable compensation and benefits, appropriate to the scale of the organization.
- H. Working with Consultants. Consultant and contractor relationships are clearly defined, are consistent with federal and state law, and, if appropriate, are documented in a written contract. Consultants and contractors are familiar with sections of *the Land Trust Standards and Practices* that are relevant to their work.

STANDARD 7: VOLUNTEERS, STAFF AND CONSULTANTS: Considerations for the Historic Preservation Organization.

General comments: Like most nonprofit organizations, preservation organizations typically rely on a combination of paid staff, volunteers, consultants, and contractors to carry out their work. In fact, there are many models for successful staffing of preservation programs.

Regardless of the model used, preservation organizations must ensure that they have both the *capacity* and the

competence to carry out their charitable mission. This obligation entails maintaining adequate staff, consultants, or volunteers to implement and operate the organization's programs, particularly when easements are involved. Organizations must ensure that staff and any volunteers are adequately trained and that the performance of individuals is periodically reviewed. For organizations that operate easement stewardship programs, staff members and volunteers responsible for easement monitoring and review must have the skills nec-

essary to address maintenance issues for historic properties, and to assess alteration proposals. They should be familiar with and understand the Secretary of the Interior's Standards for the Treatment of Historic Properties or comparable standards that may be used for monitoring and reviewing the easement property.

Pointers for Preservation Organizations: Staff should be provided with fair compensation and benefits and operate with written personnel policies in accordance with state and federal law. See *Standard*

2, *Compliance with Laws*. As noted in the discussion regarding *Standard 5, Fundraising*, preservation organizations should be aware that the use of percentage or commission-based compensation systems for the solicitation of easement or cash donations has the potential to encourage activity that could compromise the organization's under-

lying mission (*Standard 1*), create conflicts of interest (*Standard 4*), and result in violations of the IRS's private inurement rules (*Standard 2*).

➤ In meeting standard 7 requirements, preservation organizations need to ensure that consultants and independent promoters also act responsibly and in accordance with the level of authority

given. A preservation organization that relies on consultants or independent promoters to solicit donations of easements and related cash contributions has a responsibility to ensure that those individuals act legally and ethically.

A preservation organization that relies on consultants or independent promoters to solicit donations of easements and related cash contributions has a responsibility to ensure that those individuals act legally and ethically.

PART II: LAND TRANSACTIONS

Standard 8: Evaluating and Selecting Conservation Projects

The organization carefully evaluates and selects its conservation projects.

Practices

- A. Identifying Focus Areas. The organization has identified specific natural resources or geographic areas where it will focus its work.
- B. Project Selection and Criteria. The organization has a defined process for selecting land and easement projects, including written selection criteria that are consistent with its mission. For each project, the organization evaluates its capacity to perform any perpetual stewardship responsibilities.
- C. Federal and State Requirements. For land and easement projects that may involve federal or state tax incentives, the organization determines that the project meets the applicable federal or state requirements, especially the conservation purposes test of IRC §170(h).
- D. Public Benefit of Transactions. The organization evaluates and clearly documents the public benefit of every land and easement transaction and how the benefits are consistent with the mission of the organization. All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the organization satisfies any federal, state or local requirements for public benefit.
- E. Site Inspection. The organization inspects properties before buying or accepting donations of land or easements to be sure they meet the organization's criteria, to identify the important conservation values on the property and to reveal any potential threats to those values.
- F. Documenting Conservation Values. The organization documents the condition of the important conservation values and public benefit of each property, in a manner appropriate to the individual property and the method of protection.
- G. Project Planning. All land and easement projects are individually planned so that the property's important conservation values are identified and protected, the project furthers the organization's mission and goals, and the project reflects the capacity of the organization to meet future stewardship obligations.
- H. Evaluating the Best Conservation Tool. The organization works with the landowner to evaluate and select the best conservation tool for the property and takes care that the chosen method can reasonably protect the property's important conservation values over time. This evaluation may include informing the landowner of appropriate conservation tools and partnership opportunities, even those that may not involve the organization.
- I. Evaluating Partnerships. The organization evaluates whether it has the skills and resources to protect the important conservation values on the property effectively, or whether it should refer the project to, or engage in a partnership with, another qualified conservation organization.
- J. Partnership Documentation. If engaging in a partnership on a joint acquisition or long-term stewardship project, agreements are documented in writing to clarify, as appropriate, the goals of the project, roles and responsibilities of each party, legal and financial arrangements, communications to the public and between parties, and public acknowledgement of each partner's role in the project.
- K. Evaluating Risks. The organization examines the project for risks to the protection of important conservation values (such as surrounding land uses, extraction leases or other encumbrances, water rights, potential credibility issues or other threats) and evaluates whether it can reduce the risks. The organization modifies the project or turns it down if the risks outweigh the benefits.
- L. Nonconservation Lands. An organization may receive land that does not meet its project selection criteria (see 8B) with the intent of using the proceeds from the sale of the property to advance its mission. If the organization intends to sell the land, it provides clear documentation to the donor of its intent before accepting the property. Practices 4C, 9K and 9L are followed.
- M. Public Issues. An organization engaging in projects beyond direct land protection (such as public policy, regulatory matters or education programs) has criteria or other standard evaluation methods to guide its selection of and engagement in these projects. The criteria or evaluation methods consider mission, capacity and credibility.

STANDARD 8: EVALUATING AND SELECTING CONSERVATION PROJECTS: Considerations for the Historic Preservation Organization.

General Comments: This standard—and the following standard 9—govern the critical and substantive project work of an organization. Although standard 8 uses terminology specific to *conservation* projects, the standard and practices apply equally to *preservation* projects. Appropriate preservation terminology should simply be substituted in place of conservation-specific language in applying the standard and practices to preservation organizations.

Pointers for Preservation Organizations:

➤ *Practice 8A, Identifying Focus Areas* and *Practice 8B, Project Selection and Criteria*, encourage preservation organizations, like conservation organizations, to identify focus areas to ensure that each project supports the organization's mission, and to formalize the criteria in writing. The criteria for accepting full ownership of a historic property and for accepting easements are typically very different, each having its own distinct purposes and set of responsibilities. For easement acquisition, most preservation organizations use criteria that are both geographic and resource based. Many local preservation organizations tie

their easement acquisition or acceptance criteria to properties located in a limited area, such as a city or county. Statewide organizations usually limit their work within their specific state. Acceptance may also be limited by type or significance of the resource, such as limiting projects to properties listed in an official historic register such as the National Register of Historic Places, a state historic register, and/or a local historic preservation ordinance. Some easement-holding organizations tailor their easement programs to protect a specific building type—such as Frank Lloyd Wright buildings, or they may focus on low-income neighborhoods, such as former mill villages in need of revitalization. Others strategically focus on historic buildings such as individually designated landmarks that are not otherwise protected under state or local law. The National Trust focuses its easement acquisition policy on National Historic Landmarks because it is a national organization, although it also retains easements on properties of state or local significance that are given to it for resale through its Gifts of Heritage program. Acquiring full ownership of a historic property requires a greater degree of planning and resources than holding an easement. In some instances, acquisition of full

ownership of a property occurs with the understanding that the organization will retain the property and open it to the public, typically as a house museum. In other instances, historic properties are acquired through revolving funds. In both cases, organizations should consider what organizational resources and additional funding may be needed to steward properties under full ownership. See also *Practice 8G, Project Planning* and *Standard 12, Fee Land Stewardship*.

➤ *Practice 8D, Public Benefit of Transactions*—which requires that organizations evaluate and document the public benefit of every transaction—has a specific application in the preservation area. If a historic property is not visible from the public right-of-way, or if interior protections are included, such as downstairs rooms with significant woodwork or plasterwork for which there is no public access prior to the easement, the organization must evaluate the public benefit and determine if limited public access should be required as a part of the easement. For tax-benefited easement projects, some degree of public access may be required to demonstrate that there is a public benefit. The Internal Revenue Service regulations provide some guidance on the level of public access that may

Acquiring full ownership of a historic property requires a greater degree of planning and resources than holding an easement. . . . Organizations should consider what organizational resources and additional funding may be needed to steward properties under full ownership.

be appropriate given the individual circumstances of each property. [See sidebar.] If the project is not tax motivated, the organization must determine the public benefit and an appropriate level of public access. Although many commentators recognize an inherent public benefit in the mere preservation of the resource, even absent any actual public access, organizations will be in a better position to demonstrate the public benefit of holding the easement if it requires some level of public access. Generally, public access need not be onerous—for example, it may be provided through a house or garden tour operated by a local preservation organization, or through a special open house day advertised in a local newspaper. The owner of the property should be asked to keep a record of public access so that it can be noted when the easement is inspected.

➤ Because preservation organizations typically protect buildings, *Practice 8E, Site Inspection*, is important not only to identify hazardous materials, as provided for in *Practice 9C, Environmental Due Diligence*, but also to determine the condition of the property from a preservation standpoint. Accepting an easement on a severely deteriorated historic building may make it difficult to enforce the easement, particularly if the easement only requires the property owner to maintain the property to its current condition. Character-defining features on a severely deteriorated building may continue to be lost, even though the condition may not be a violation of the easement. In order to avoid this problem, some

IRS REQUIREMENTS FOR PUBLIC ACCESS FOR HISTORIC PRESERVATION EASEMENTS QUALIFYING FOR CHARITABLE TAX DEDUCTIONS

Treasury Regulation 1.170A-14(d)(5)(iv) Historic Preservation—Access

(iv) Access. (A) In order for a conservation contribution described in section 170(h)(4)(A)(iv) and this paragraph (d)(5) to be deductible, some visual public access to the donated property is required. In the case of an historically important land area, the entire property need not be visible to the public for a donation to qualify under this section. However, the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is so visible. Where the historic land area or certified historic structure which is the subject of the donation is not visible from a public way (e.g., the structure is hidden from view by a wall or shrubbery, the structure is too far from the public way, or interior characteristics and features of the structure are the subject of the easement), the terms of the easement must be such that the general public is given the opportunity on a regular basis to view the characteristics and features of the property which are preserved by the easement to the extent consistent with the nature and condition of the property.

(B) Factors to be considered in determining the type and amount of public access required under paragraph (d)(5)(iv)(A) of this section include the historical significance of the donated property, the nature of the features that are the subject of the easement, the remoteness or accessibility of the site of the donated property, the possibility of physical hazards to the public visiting the property (for example, an unoccupied structure in a dilapidated condition), the extent to which public access would be an unreasonable intrusion on any privacy interests of individuals living on the property, the degree to which public access would impair the preservation interests which are the subject of the donation, and the availability of opportunities for the public to view the property by means other than visits to the site.

(C) The amount of access afforded the public by the donation of an easement shall be determined with reference to the amount of access permitted by the terms of the easement which are established by the donor, rather than the amount of access actually provided by the donee organization. However, if the donor is aware of any facts indicating that the amount of access that the donee organization will provide is significantly less than the amount of access permitted under the terms of the easement, then the amount of access afforded the public shall be determined with reference to this lesser amount.

If a historic property is not visible from the public right-of-way, or if interior protections are included, such as downstairs rooms with significant woodwork or plasterwork for which there is no public access prior to the easement, the organization must evaluate the public benefit and determine if limited public access should be required as a part of the easement. For tax-benefited easement projects, limited public access may be required to demonstrate that there is a public benefit.

For historic buildings or structures, it is important to ensure that the entire building or structure is protected by the easement. This does not mean that no changes may be made to portions of the building of lesser significance, but that all proposed changes must be reviewed and approved by the easement-holding organization to ensure compatibility. Easements that are limited to only the front façade of a structure or building may not adequately protect significant characteristics, such as rooflines, side walls, and rear elevations.

preservation organizations have required that properties be rehabilitated prior to accepting an easement. Others require a rehabilitation agreement at the time the easement is granted, with an express understanding that the baseline documentation for the easement will be updated once the rehabilitation has been completed, and that the property will be maintained to a standard based on its rehabilitated condition. See also the discussion under *Practice 8K, Evaluating Risks*, below.

➤ *Practice 8F, Documenting Conservation Values*, requires organizations to document the conditions and characteristics of the conservation values and the public benefit of each property. For preservation organizations, these values may be documented in a designation report, such as the National Register for Historic Places nomination form. However, if the designation report is older, it may not include character-defining features that have achieved significance since the nomination form was prepared, and the easement-holding organization may need to perform an independent analysis of significance to update the designation report. See also *Practice 11B, Baseline Documentation Report*, for specific information about baseline documentation for historic properties.

➤ *Practice 8G, Project Planning*, emphasizes that projects involving the acquisition and stewardship of easements and other real property interests must be individually planned so that the property's important conservation values are identified and protected. Model preservation easement forms are useful to organiza-

tions because they establish a standard for organizations to begin the process of drafting easements. Models also create continuity among an organization's easement collection, which makes the management and enforcements of easements easier. Preservation easement-holding organizations should use model easements as a guide to drafting easements, but each easement must be individually tailored to ensure that the easement protects the significant character-defining elements of the property.

For historic buildings or structures, it is important to ensure that the entire building or structure is protected by the easement. This does not mean that no changes may be made to portions of the building of lesser significance, but that all proposed changes must be reviewed and approved by the easement-holding organization to ensure compatibility. Easements that are limited to only the front façade of a structure or building may not adequately protect significant characteristics, such as rooflines, side walls, and rear elevations. Similarly, easements that protect only the appearance of the property, without requiring approval for substitute materials, may not adequately protect significant values.

(Note that the principle that a historic preservation easement should protect the entire building is now incorporated in the Internal Revenue Code for certain historic buildings for which tax incentives are sought. See *Appendix A*, which reviews the new "special rules" in the tax code for buildings within historic districts.)

➤ Significant interiors of historic buildings should also be considered in project planning. Although many preservation easement-holding organizations choose not to protect interiors, some require that the interior be protected if it is particularly significant. If the interior is not protected, an easement-holding organization may be faced with the destruction of highly significant interiors, such as intact eighteenth century woodwork, even though the exterior of the building is protected. The protection of the interior, however, must be balanced against the organization's capacity to meet future stewardship obligations. A preservation organization considering interior protections should evaluate its ability to manage requests to make alterations to a property's interior elements and to inspect interior spaces on a regular basis. See also the discussion above under *Practice 8D, Public Benefit of Transactions*.

Preservation organizations may also need to evaluate conservation values, as discussed further with respect to *Practice 8I, Evaluating Partnerships* (see below).

➤ *Practice 8H, Evaluating the Best Conservation Tool*, encourages organizations to work with the property owner to select the best conservation tool for the property. For preservation organizations, the first protection tool that often occurs to property owners is to convert the property to a historic house museum. Preservation organizations should consider carefully whether the property justifies the commitment of resources that may be necessary to op-

erate and maintain the property as a historic site. Is there sufficient funding for maintenance? Is there sufficient public interest to justify a visitation program? Could the property be better protected in the long term by remaining in private ownership subject to a preservation easement? Or, on the other hand, is the property so significant that it should be open to the public and made available for public visitation? The property may be better protected if the organization refers the owner to another organization with more expertise in the protective tool that appears to be the most appropriate.

➤ For many preservation organizations, negotiation

over the terms of a donation can be a challenging exercise, requiring a delicate balancing of the organization's interest in ensuring strong protections and the donor's interest in maintaining some flexibility, while still adhering to state and federal law and tax rules. Organizations should be prepared to walk away from a donation if the property owner is unwilling to protect the property's character-defining features in a manner consistent with sound preservation practices and the organization's own objectives. Preservation organizations should be particularly wary of entering into arrangements where the donor's primary objective is to obtain the

weakest level of protection possible while still qualifying for a charitable tax deduction.

➤ If the primary values on a property are not preservation values, such as natural habitat, important agricultural lands, or archaeological resources, it may be more appropriate to refer the property owner to an organization that has the necessary expertise to protect those resources, such as a local land trust or similar conservation-oriented organization.

➤ *Practice 8I, Evaluating Partnerships*, encourages organizations to determine whether they have the skills and resources to protect important values, or whether they should refer the project



Increasingly, preservation and conservation organizations are partnering to protect properties that include both historic resources and natural resources, such as historic farms that have both historic buildings and important open space or woodlands.

The National Trust works in partnership with the Damariscotta Lake Watershed Association to preserve the Geiringer property in Damariscotta, Maine. [NTHP]

to, or partner with, other qualified organizations. Increasingly, preservation and conservation organizations are partnering to protect properties that include both historic resources and natural resources, such as historic farms that have both historic buildings and important open space or woodlands. These partnerships take a variety of forms, and may consist of co-holding easements, holding compatible easements on different parcels of the same property, or having specific and limited review authority written into the protective covenants for the specific expertise needed for the resource.

➤ Partnerships should be carefully documented, as indicated by *Practice 8J, Partnership Documentation*, to ensure that

each organization understands its rights and obligations. For preservation organizations partnering with other organizations that have different missions, it is particularly important for each organization to know when it must take the lead on inspections and enforcement, and how they will be coordinated with the other organization.

➤ *Practice 8K, Evaluating Risks*, encourages organizations to examine risks to the protection of conservation values, including surrounding land uses. Preservation organizations are periodically offered the ownership of or easements on properties that have been surrounded by incompatible growth. If the property has become so overwhelmed by neighboring growth that its long-term,

economically viable use is in question, it may be impossible to preserve the property on site. For example, the imposition of an easement on a historic residential property that was formerly in a rural context, but is now surrounded by sprawling new commercial development, may not adequately protect the property if it can no longer be occupied as a residence and has no other economically viable use. Although moving historic properties is generally discouraged, it may be the best option for long-term protection, while protection in place could lead to long-term disinvestment in the property. See also the discussion in *Practice 8E, Site Inspections*, and the discussion of *Environmental Due Diligence for Hazardous Materials* in *Practice 9C* below.

Standard 9: Ensuring Sound Transactions:

The organization works diligently to see that every land and easement transaction is legally, ethically and technically sound.

Practices

- A. Legal Review and Technical Expertise. The organization obtains a legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced with real estate law. As dictated by the project, the organization secures appropriate expertise in financial, real estate, tax, scientific, and land and water management matters.
- B. Independent Legal Advice. The organization refrains from giving specific legal, financial and tax advice and recommends in writing that each party to a land or easement transaction obtain independent legal advice.
- C. Environmental Due Diligence for Hazardous Materials. The organization takes steps, as appropriate to the project, to identify and document whether there are hazardous or toxic materials on or near the property that could create future liabilities for the organization.
- D. Determining Property Boundaries. The organization determines the boundaries of every protected property through legal property descriptions, accurately marked boundary corners or, if appropriate, a survey. If an easement contains restrictions that are specific to certain zones or areas within the property, the locations of these areas are clearly described in the easement and supporting materials and can be identified in the field.
- E. Easement Drafting. Every easement is tailored for the property according to project planning (see 8G) and: identifies the important conservation values protected and public benefit served; allows only permitted uses and/or reserved rights that will not significantly impair the important conservation values; contains only restrictions that the organization is capable of monitoring; and is enforceable.
- F. Documentation of Purposes and Responsibilities. The organization documents the intended purposes of each land and easement transaction, the intended uses of the property and the roles, rights and responsibilities of all parties involved in the acquisition and future management of the land or easement.
- G. Recordkeeping. Pursuant to its records policy (see 2D), the organization keeps originals of all irreplaceable documents essential to the defense of each transaction (such as legal agreements, critical correspondence and appraisals) in one location, and copies in a separate location. Original documents are protected from daily use and are secure from fire, floods and other damage.
- H. Title Investigation and Subordination. The organization investigates title to each property for which it intends to acquire title or an easement to be sure that it is negotiating with the legal owner(s) and to uncover liens, mortgages, mineral or other leases, water rights and/or other encumbrances or matters of record that may affect the transaction. Mortgages, liens and other encumbrances that could result in extinguishment of the easement or significantly undermine the important conservation values on the property are discharged or properly subordinated to the easement.
- I. Recording. All land and easement transactions are legally recorded at the appropriate records office according to local and state law.
- J. Purchasing Land. If the organization buys land, easements or other real property, it obtains a qualified independent appraisal to justify the purchase price. However, the organization may choose to obtain a letter of opinion (see definitions) from a qualified real estate professional in the limited circumstances when a property has a very low economic value or a full appraisal is not feasible before a public auction. In limited circumstances where acquiring above the appraised value is warranted, the organization documents the justification for the purchase price and that there is no private inurement or impermissible private benefit. If negotiating for a purchase below the appraised value, the organization ensures that its communications with the landowner are honest and forthright.
- K. Selling Land or Easements. If the organization sells land or easements, it first documents the important conservation values, plans the project according to practice 8G, and drafts protection agreements as appropriate to the property. The organization obtains a qualified independent appraisal that reflects the plans for the project and protection agreements and justifies the selling price. (The organization may choose to obtain a letter of opinion from a qualified real estate professional in the limited circumstance when a property has a very low economic value.) The organization markets the property and selects buyers in a manner that avoids any appearance of impropriety and preserves the public's confidence in the organization, and in the case of selling to an insider (see definitions) follows practice 4C. (See 6H for sales of other assets.)

(Cont'd)

Practices (Cont'd)

- L. Transfers and Exchanges of Land. If the organization transfers or exchanges conservation land or easements, the organization considers whether the new holder can fulfill the long-term stewardship and enforcement responsibilities, ensures that the transaction does not result in a net loss of important conservation values and, for donated properties, ensures that the transfer is in keeping with the donor's intent. If transferring to a party other than another nonprofit organization or public agency, the consideration is based on a qualified independent appraisal (or letter of opinion when the property has a very low economic value) in order to prevent private inurement or impermissible private benefit.

STANDARD 9: ENSURING SOUND TRANSACTIONS: Considerations for the Historic Preservation Organization.

General Comments: The success of a preservation organization is measured in how effectively it protects historic places. For those organizations that engage in real property and easement transactions, the soundness of the transactions will not only determine whether the individual resource is protected, but also whether the organization—and the movement—is ultimately viewed as successful. Standard 9 and its associated practices, if followed, will assist in ensuring that the individual transactions are effective in protecting historic places.

Pointers for Preservation Organizations:

➤ *Practice 9A, Legal Review and Technical Expertise*, requires legal review of every land and easement transaction appropriate to its complexity by an attorney experienced in real estate law. Preservation law is not a widely known area of the law and some preservation transactions require knowledge of specialized preservation provisions of the tax code, or of state or federal law. Preservation organizations have found that

they may need to develop the expertise of local lawyers in order to facilitate preservation transactions in their communities. A variety of sources are available to educate lawyers about historic preservation law, including the educational programs of the American Law Institute/American Bar Association, the State Historic Preservation Offices, and the National Trust's law department.

➤ Related to practice 9A, *Practice 9B, Independent Legal Advice*, provides that the preservation organization should refrain from giving specific legal, financial, and tax advice, and should remind each party to a transaction—in writing—about the need to obtain independent legal advice. Although the lawyer representing the preservation organization may be more experienced and knowledgeable about preservation law than the lawyer representing the other party, it is essential that the other parties be represented by counsel to ensure that their interests are protected. In particular, as discussed further in *Practice 10C, No Assurances on Deductibility or Tax Benefits*, organizations should be particularly careful not to provide assurances relating to tax benefits to which the owner may—or may not—

be entitled.

➤ *Practice 9C, Environmental Due Diligence for Hazardous Materials*, requires that the organization take steps to identify and document whether there are hazardous or toxic materials that may create liabilities for the organization. For preservation organizations that accept full ownership of historic buildings or that operate revolving funds, it is important to know whether the buildings contain asbestos, PCBs, underground storage tanks, lead paint, or other hazardous materials because of the remediation costs, as well as the potential for long-term liability. Many preservation organizations acknowledge the reality that historic properties may have some of these materials by affirmatively choosing to remediate conditions such as underground storage tanks or asbestos prior to reconveying the property. These remediation activities fulfill their mission of preserving properties and returning them to a state of usability. See also *Practice 8E, Site Inspection*, and *Standard 11, Conservation Easement Stewardship*.

➤ *Practice 9E, Easement Drafting*, is closely related to *Practice 8G, Project Planning*, but goes further than Practice 8G by specifying that an

easement should allow only permitted uses and/or reserved rights that will not significantly impair important conservation values. For preservation easement-holding organizations, the primary concern is how to draw the balance in the easement between preserving character-defining elements, while not restricting the property to such a degree that it has limited usability. For example, often an easement will permit additions or other modifications to a historic building, provided that the addition is approved by the easement-holding organization in advance to ensure that it meets preservation standards for compatibility. In order to provide an objective measure of compatibility,

many easements specifically reference the *Secretary of the Interior's Standards for the Rehabilitation of Historic Properties*, 36 C.F.R. Part 67, or standards based on the Secretary of the Interior's Standards. The Rehabilitation Standards permit new additions that do not destroy character-defining historic materials, that are differentiated from the old portions of the building and that are compatible with the massing, size, scale and architectural features of the property. Regardless of the standard chosen, easements should be drafted with both the long-term preservation and viability of the property in mind.

➤ Historic preservation easements typically *require* the property owner to maintain

the property, and specifically permit maintenance activities *without approval* provided that the maintenance work is consistent with preservation standards, and does not, for example, change the historic materials of the building.

➤ All easements should be individually tailored to protect the character-defining elements of the particular historic property. As discussed in *Practice 8G, Project Planning*, and in *Standard 10, Tax Benefits*, easements on historic buildings should protect the entire building, including rooflines, side and rear facades. Ancillary or outlying structures of significance should also be protected, as should any significant features of a property's landscape or setting. The National



All easements should be individually tailored to protect the character-defining elements of the particular historic property. As discussed in Practice 8G, Project Planning, and in Standard 10, Tax Benefits, easements on historic buildings should protect the entire building, including rooflines, side and rear facades. Ancillary or outlying structures of significance should also be protected, as should any significant features of a property's landscape or setting.

The easement for Cambus-Kenneth farm in Kentucky, was drafted to protect a variety of resources, including these significant outbuildings that pre-date the main residence. [NTHP]

Preservation organizations should be wary of failing to record an easement deed until some later date, particularly if that date crosses a tax year for the taxpayer (which could affect the deductibility of an easement donation). Transactions should be promptly recorded—or they may not be fully enforceable and the property could become encumbered by mortgages or liens in the interim.

Trust provides a sample historic preservation easement, and most preservation organizations are willing to share examples of easements that have been drafted to address specific circumstances. See also the discussion of protecting interiors at *Practice 8G, Project Planning*.

➤ *Practice 9G, Recordkeeping*, is of particular importance for preservation easement-holding organizations because easements that protect historic properties often have provisions that permit approved additions, modifications or new construction, as discussed above in *Practice 9E, Easement Drafting*, that must be documented. The organization should maintain a record of approval for a specific alteration, including any conditions on the approval, so that the organization can determine if changes have been made to the property that have not been approved or that are inconsistent with any condition or approval. Because these records may be introduced as evidence in an enforcement action, it is critically important that they be maintained pursuant to an established recordkeeping policy that will support their credibility.

➤ *Practice 9H, Title Investigation and Subordination*, requires that liens and mortgages on the property be disclosed or subordinated prior to the recording of any easement or deed to the preservation organizations. Organizations should check the title for all properties it accepts to ensure that it is acquiring good title, and should make arrangements to obtain a list of all encumbrances to title of properties on which it accepts

easements. Because preservation restrictions usually protect buildings in active use, the properties are often subject to mortgages. In order for the property owner to convince the mortgage holder to subordinate, it has sometimes been helpful for the preservation organization to discuss the easement terms with the bank and to specifically note that the easement may actually protect the bank's interest, because the property is inspected regularly, and the owner is prohibited from making inappropriate changes that might diminish the value of the property.

➤ Although it may appear obvious, *Practice 9I, Recording*, requires real property and easement transactions to be legally recorded at the appropriate records office according to local and state law. Preservation organizations should be wary of failing to record an easement deed until some later date, particularly if that date crosses a tax year for the taxpayer (which could affect the deductibility of an easement donation). Transactions should be promptly recorded—or they may not be fully enforceable and the property could become encumbered by mortgages or liens in the interim. Similarly, once recorded, the easement should not be rescinded by the easement-holding organization, except pursuant to the extinguishment processes covered in *Practice 11K, Extinguishment*.

➤ *Practice 9J, Purchasing Land*, states that if the organization buys land, easements or other real property, it obtains a qualified independent appraisal to justify the purchase price. (A letter opinion

may be appropriate in some circumstances.) An appraisal is particularly helpful in ensuring that the organization is well informed about market value and can justify the purchase price to its members and the public. However, an appraisal may add to the transaction costs and, particularly for historic properties that do not have ready comparables, may need to be critically reviewed to ensure that the properties used for comparables have similar characteristics, particularly in the context where property with a deteriorated building may be being sold for the value of the underlying land.

➤ *Practice 9K, Selling Land or Easements*, has several specific applications for historic preservation organizations. Although preservation organizations rarely sell easements, they do frequently operate programs, such as revolving funds, that actively acquire and resell historic properties—subject to easements or restrictive covenants—in order to save those properties. The properties may also be sold subject to rehabilitation or restoration agreements that require the new owner to rehabilitate the property to an acceptable standard, as discussed in *Practice 8E, Site Inspection*. Organizations operating revolving funds often rely upon a real estate professional to establish market price for acquiring the property, particularly if the property has been on the open market. In reselling the properties, most revolving funds market the properties as widely as possible so that they can ensure that they are receiving the fair market value for the restricted

property. Wide and public marketing also ensures that the organizations avoid any appearance of impropriety that might occur if they sold only to a select group of insiders. Additional information on revolving funds is available through the National Trust's Preservation Books service.

➤ *Practice 9L, Transfers and Exchanges of Land*, has special relevance for two situations currently facing the preservation community. In recent years, a number of preservation organizations have been faced with closing historic properties that had been previously open to the public. In some cases, these properties have been transferred to another preservation organization. In other cases, they have been conveyed to private individuals or corporations for

private use, such as residential. In these cases, it is essential that the preservation organization fulfill its mission by ensuring that the property is adequately protected before conveying it out of public ownership, usually through a historic preservation easement. It is also important to proceed with closing a historic site in a public process, including consultation with interested parties, such as the State Historic Preservation Officer or the state Attorney General's office, in planning the future of these sites.

➤ In a few cases, preservation easement-holding organizations have sought to dissolve, requiring the transfer of easements to another holder. While these examples are rare, organizations should include—and tax rules may require—language in their ease-

ments that addresses the transfer of the easement if the current easement-holding organization ceases to exist. Under all circumstances, the process of transferring easements must be performed in a manner that ensures the long-term stewardship of the preservation easements. As with the closing of a historic site, it may also be important to consult with public agencies such as the State Historic Preservation Officer and the state Attorney General's office. If properly performed, such a transfer can strengthen the easements and the capacity of the new holding organization. See also the discussion under *Practice 11G, Contingency Plans/Backups* and *Practice 11H, Contingency Plans for Backup Holder*.

Organizations should include language in their easements that addresses the transfer of the easement if the current easement-holding organization ceases to exist. Under all circumstances, the process of transferring easements must be performed in a manner that ensures the long-term stewardship of the preservation easements.

Standard 10: Tax Benefits

The organization works diligently to see that every charitable gift of land or easements meets federal and state tax law requirements.

Practices

- **A. Tax Code Requirements.** The organization notifies (preferably in writing) potential land or easement donors who may claim a federal or state income tax deduction, or state tax credit, that the project must meet the requirements of IRC §170 and the accompanying Treasury Department regulations and/or any other federal or state requirements. The organization on its own behalf reviews each transaction for consistency with these requirements.
- **B. Appraisals.** The organization informs potential land or easement donors (preferably in writing) of the following: IRC appraisal requirements for a qualified appraisal prepared by a qualified appraiser for gifts of property valued at more than \$5,000, including information on the timing of the appraisal; that the donor is responsible for any determination of the value of the donation; that the donor should use a qualified appraiser who follows Uniform Standards of Professional Appraisal Practice; that the organization will request a copy of the completed appraisal; and that the organization will not knowingly participate in projects where it has significant concerns about the tax deduction.
- **C. No Assurances on Deductibility or Tax Benefits.** The organization does not make assurances as to whether a particular land or easement donation will be deductible, what monetary value of the gift the Internal Revenue Service (IRS) and/or state will accept, what the resulting tax benefits of the deduction will be, or whether the donor's appraisal is accurate.
- **D. Donee Responsibilities — IRS Forms 8282 and 8283.** The organization understands and complies with its responsibilities to sign the donor's Appraisal Summary Form 8283 and to file Form 8282 regarding resale of donated property when applicable. The organization signs Form 8283 only if the information in Section B, Part 1, "Information on Donated Property," and Part 3, "Declaration of Appraiser," is complete. If the organization believes no gift has been made or the property has not been accurately described, it refuses to sign the form. If the organization has significant reservations about the value of the gift, particularly as it may impact the credibility of the organization, it may seek additional substantiation of value or may disclose its reservations to the donor. (See 5B for other gift substantiation requirements.)

STANDARD 10: TAX BENEFITS—Considerations for the Historic Preservation Organization.

General Comments: The donation of property or easements for preservation and conservation purposes is encouraged by a variety of tax benefits at the federal, state, and local level. In order to ensure that these important tools continue to be supported by the public, by relevant governmental agencies, and by legislators, preservation and conservation organizations should work to see that

these tax incentives are properly applied. In recent years, the federal tax incentives for both preservation and conservation easements have been the subject of media attention and scrutiny from Congress, resulting in the first changes to the law in this area in 25 years. See Appendix A, *Summary of Changes Relating to Preservation Easements in the Pension Protection Act of 2006*.

Standard 10 does not set out or restate the specific tax requirements applicable to the donation of easement or fee interests in historic properties,

but it describes a standard of organizational behavior that will assist historic preservation organizations in compliance. Applying this standard and its practices will help to ensure that tax benefits are properly used, and will assist in building public support for these important incentive programs.

Pointers for Preservation Organizations:

➤ *Practice 10A, Tax Code Requirements*, indicates that the preservation organization should notify potential land or easement donors, preferably

in writing, that the project must meet the requirements of the relevant tax code. As discussed in *Practice 9B, Independent Legal Advice*, the donor should also be advised to be represented by counsel.

Although the donor and his or her counsel will have a strong motivation to ensure that the transaction meets the donor's tax requirements, practice 10A also states that the recipient organization, *on its own behalf* reviews each transaction for consistency with those requirements. The preservation organization cannot simply ignore or avoid an obvious compliance problem, as discussed more fully below in *Practice 10B, Appraisals*, and *Practice 10D, Donee Responsibilities – IRS Forms 8282 and 8283*.

For historic preservation organizations, the new requirements of the Pension Protection Act of 2006 should be fully understood, and all easement transactions for any tax-advantaged easement donation should comply with these new requirements as applicable. In order to assist preservation organizations to understand the changes in the law, this publication includes a summary of the new requirements (see sidebar, p. 37), as well as a detailed analysis (Appendix A), and a restatement of Section 170(h) of the Internal Revenue Code

(and several related Code sections) with the changes indicated (Appendix B).

➤ *Practice 10B, Appraisals*, states that organizations should provide notices to donors about specific appraisal requirements, and also states that the organization will not knowingly participate in projects where it has significant concerns about the tax deductions. For many preservation organizations, the *past* practice has been to take a distanced “hands-off” approach to appraisals and to leave the appraisal process entirely to the donor, his or her appraiser, and the IRS. In part as the result of the public scrutiny created by the perception that some owners and appraisers were using inflated appraisals, most organizations now require the submission of the appraisal for the organization's review, as provided in 10B. The preservation organization should advise a donor if the organization believes the appraisal is inadequate or overvalued. If the organization's concerns are not addressed and the transaction has not yet been finalized, the organization should be prepared to walk away from the transaction. If the transaction has already taken place and the donor refuses to address the organization's concerns, a preservation organization in these circumstances should be

prepared to distance itself from an unsatisfactory gift substantiation, for example by notifying the donor in writing that it does not view the appraisal as representing the fair market value of the donation. Although preservation organizations are not responsible as appraisal experts or advisors to donors, this practice is designed to ensure that—on the other hand—they do not ignore situations in which it appears that an easement is not properly valued.

Preservation organizations should be particularly attentive to appraisal valuations for easements on buildings in locally regulated historic districts, where the regulation of the property may provide many of the same prohibitions as the easement provisions. This is not to suggest that such easements are valueless from either a valuation standpoint or a substantive appraisal standpoint; however, the applicable Treasury Regulations state quite specifically that the valuation analysis for historic properties should take into account “any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use.” *Under no circumstances should a valuation be based on any type of “rule of thumb” or estimated percentage range.*

The applicable Treasury Regulations state quite specifically that the valuation analysis for historic properties should take into account “any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use.” Under no circumstances should a valuation be based on any type of “rule of thumb” or estimated percentage range.

Preservation organizations should also be aware that the 2006 amendments modified the Internal Revenue Code definitions of what constitutes a qualified appraisal and a qualified appraiser, and increased the penalties for overvaluations. See Appendix A, *Summary of Changes Relating to Preservation Easements in the Pension Protection Act of 2006*.

➤ *Practice 10C, No Assurances on Deductibility or Tax Benefits*, reiterates the concepts discussed in *Practice 5C, Accurate Representations*, that preservation organizations should not make assurances of deductibility, value or tax benefits. As discussed, preservation organizations should avoid the over-promotion of the tax benefits (or promote an overly simplified statement of tax benefits available for donations). Although an organization cannot and should not provide assurances as to the value of a particular donation or whether that donation will be deductible, it can help to ensure that its actions and those taken by the donor are consistent with the require-

ments of the law. See IRC § 170(h) and Section 1.170A-14 of the Treasury Regulations.

➤ *Practice 10D, Donee Responsibilities – IRS Forms 8282 and 8283*, states that an organization that has significant reservations about the value of a gift, particularly as it may impact the credibility of the organization, should seek additional substantiation of value or disclose its reservations to the donor. The practice underscores the concept that preservation organizations should review a copy of the appraisal to ensure that the organization does not have significant reservations about the value of the gift prior to signing the Form 8283. In fulfilling this requirement, preservation organizations should require the submission of a copy of the appraisal as part of its standard practice. Given the IRS's concerns relating to the substantiation of easements, preservation organizations should exercise extreme care to ensure that they are not parties to fraudulent transactions.

**SUMMARY OF CHANGES TO HISTORIC PRESERVATION EASEMENT TAX RULES
IN THE
PENSION PROTECTION ACT OF 2006**

(See Appendix A for a Detailed Description)

**Pension Protection Act of 2006
Public Law 109-280, August 17, 2006**

Summary of Principal Changes

- New “Special Rules” for certified historic buildings in registered historic districts (see below)
- Disallowance of deductions for non-building structures and land areas in registered historic districts (unless on the NR or qualifying as a historically important land area)
- Tax reduction for donations of easements on any building that has been used to obtain historic rehabilitation tax credits
- New qualifications for “Qualified Appraisers” and “Qualified Appraisals”
- Lower thresholds for overvaluation penalties for taxpayers
- New overvaluation penalties for appraisers

“Special Rules” (For Contributing Buildings in Registered Historic Districts)

- Easements must protect the entire exterior of a property (including the front, sides, rear and “height”)
- Easements must prohibit changes that are “inconsistent” with the historical character of the building's exterior
- The donor and donee must enter into an agreement certifying *under penalty of perjury* that the easement-holding organization is qualified to accept easements, *and* has the resources and commitment to manage and enforce the easement
- The owner must provide the IRS more detailed substantiation to prove the value of the donation, including photographs of the entire exterior, and “a description of all restrictions on the building”
- The taxpayer must pay a new filing fee of \$500 if he or she claims an easement deduction in excess of \$10,000

Other Changes

- Elimination of deductions for non-building structures or land areas in registered historic districts
 - Does NOT eliminate deductions for structures or land areas that separately qualify because they are on the National Register, or that separately qualify as “historically important land areas”
 - Raises application questions for adjacent historic settings
- New reduction for easements on buildings that have also qualified for the rehabilitation tax credit
 - Not an elimination, but simply a percentage reduction of the charitable contribution for the deduction, using the ratio of (1) the sum of the RTC credits for the last 5 years divided by (2) the FMV of the building on the date of the contribution
 - Note that conveyance of an easement *within* the 5 year recapture period will most likely still be considered by the IRS to be a “partial disposition” resulting in a ratable recapture of the RTC.
- New Appraiser and Appraisal Qualifications . . .
 - Appraisers must (1) either have earned an appraisal designation from a recognized professional appraiser organization or otherwise met minimum education and experience requirements set by the Treasury, and (2) demonstrate verifiable education and experience in valuing a specific type of property
 - IRS Notice 2006-96 provides interim guidance
- New Overvaluation Penalty thresholds
 - Substantial Valuation Misstatements threshold reduced from 200% to 150% of the amount determined to be the “correct” amount of the value
 - Gross Valuation Misstatements threshold reduced from 400% to 200%
 - Reasonable cause exception for gross valuation misstatements eliminated
- New Appraiser Penalties for Overvaluations if appraiser “knew or reasonably should have known” that it would be used for a return resulting in a substantial or gross valuation misstatement

Standard 11: Conservation Easement Stewardship

The organization has a program of responsible stewardship for its easements.

Practices

- A. Funding Easement Stewardship. The organization determines the long-term stewardship and enforcement expenses of each easement transaction and secures the dedicated or operating funds to cover current and future expenses. If funds are not secured at or before the completion of the transaction, the organization has a plan to secure these funds and has a policy committing the funds to this purpose. (See 6G.)
- B. Baseline Documentation Report. For every easement, the organization has a baseline documentation report (that includes a baseline map) prepared prior to closing and signed by the landowner at closing. The report documents the important conservation values protected by the easement and the relevant conditions of the property as necessary to monitor and enforce the easement. In the event that seasonal conditions prevent the completion of a full baseline documentation report by closing, a schedule for finalizing the full report and an acknowledgement of interim data [that for donations and bargain sales meets Treasury Regulations §1.170A-14(g)(5)(i)] are signed by the landowner at closing.
- C. Easement Monitoring. The organization monitors its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property, and keeps documentation (such as reports, updated photographs and maps) of each monitoring activity.
- D. Landowner Relationships. The organization maintains regular contact with owners of easement properties. When possible, it provides landowners with information on property management and/or referrals to resource managers. The organization strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement's existence and restrictions and the organization's stewardship policies and procedures. The organization establishes and implements systems to track changes in land ownership.
- E. Enforcement of Easements. The organization has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The organization takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense. (See 6G and 11A.)
- F. Reserved and Permitted Rights and Approvals. The organization has an established procedure for responding to landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.
- G. Contingency Plans/Backups. The organization has a contingency plan for all of its easements in the event the organization ceases to exist or can no longer steward and administer them. If a backup grantee is listed in the easement, the organization secures prior consent of the backup grantee to accept the easement. To ensure that a backup or contingency holder will accept an easement, the organization has complete and accurate files and stewardship and enforcement funds available for transfer. (See 11H.)
- H. Contingency Plans for Backup Holder. If an organization regularly consents to being named as a backup or contingency holder, it has a policy or procedure for accepting easements from other organizations and has a plan for how it will obtain the financial resources and organizational capacity for easements it may receive at a future date. (See 11G.)
- I. Amendments. The organization recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The organization has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the organization's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.
- J. Condemnation. The organization is aware of the potential for condemnation, understands its rights and obligations under condemnation and the IRC, and has appropriate documentation of the important conservation values and of the percentage of the full value of the property represented by the easement. The organization works diligently to prevent a net loss of conservation values.
- K. Extinguishment. In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the organization notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the organization or in easements.

STANDARD 11: CONSERVATION EASEMENT STEWARDSHIP—Considerations for the Historic Preservation Organization.

General Comments: Preservation organizations with easement programs must have viable stewardship practices in place to ensure that the easements will protect the historic properties over time. This responsibility includes taking measures to ensure long-term funding and to establish and operate programs and practices to monitor and enforce easements and to respond to requests for alterations, when contemplated under the terms of an easement. Contingency plans should be in place to transfer easements to another organization in the event that the organization ceases to exist or can no longer undertake its stewardship responsibilities. Finally, organizations should have policies in place to address legal changes to an easement such as proposed amendments to easements as well as condemnations and extinguishment.

Pointers for Preservation Organizations:

➤ *Practice 11A, Funding Easement Stewardship*, requires organizations to secure funds to cover the current and future expenses of easement transactions. As discussed more in *Practice 6G, Funds for Stewardship and Enforcement*, most preservation organizations request a cash payment, often called a “stewardship fee” or “endowment contribution,” to cover expenses relating to the monitoring and enforcement of easements over time. These payments are calculated in a variety of ways, but in all cases should be determined in

a manner that covers the perpetual obligation to monitor and enforce the easements. As noted in the commentary to standard 6, stewardship fees should not generally be calculated on the amount of the appraised value of an easement. This practice is discouraged because it may create an incentive for organizations to support the overvaluation of an easement donation in order to derive a greater financial benefit.

➤ *Land Trust Standards and Practices* specify that stewardship expenses may be covered either with dedicated or operating funds. The National Trust strongly recommends, however, that monies obtained through easement donations and other sources be invested in a stewardship fund that is held separately from the organization’s operating budget. The fund should be sufficient to cover costs to create baseline documentation (see below) and monitor easements, including staff time, travel costs, review of notices and requests for approvals, and any professional services that might be required such as survey work or photography. Staff time should include hours spent to visit properties, document conditions, answer questions, address violations, and maintain records. Larger fees (to cover additional staff time) may be required to review proposed work when major rehabilitation is anticipated. Reserves should be available to cover potential enforcement costs, as needed.

➤ Stewardship funds should be designed to preserve principal and encourage growth to cover anticipated expenses, which are likely to

increase over time. Policies should be in place to administer fund withdrawals for operating expenses and emergencies. If the principal is accessed to meet emergency costs, then the organization should have a plan in place to replenish the fund to meet future expenses.

➤ *Practice 11B, Baseline Documentation*, discusses the need for a baseline documentation report. As discussed under *Standard 9, Ensuring Sound Transactions*, every easement stewardship program should require that baseline documentation on a property is completed prior to executing an easement. For historic properties, such documentation should include photographs, textual descriptions, site plans, floor plans, and any other materials that record the condition of the protected character-defining features of the property at the time the easement is granted. The documentation should be tied to the protective provisions of the easement. For example, if the easement protects the interior of a property, inclusion of floor plans and detailed documentation of interior features would be necessary. If the easement, in comparison, only protects the exterior, exterior documentation should be sufficient. Likewise, if the easement protects significant landscape features, then the baseline should record the location and condition of any walls, walkways, gardens, trees, and other character-defining elements. Baseline documentation may also be consistent with existing preservation databases, such as the Historic American Buildings Survey and the Historic American

Monitoring is perhaps the most critical component of a good stewardship program. For preservation organizations, it is critically important to document the inspections with photographs and inspection reports so that physical changes to the historic property, particularly buildings, can be tracked over time and addressed. The most frequent violation of preservation easements is the failure to maintain a historic property.

Engineering Record. For information on documenting historic buildings and sites, see the “Secretary of the Interior’s Standards for Architectural and Engineering Documentation,” available from the National Park Service’s web site: <http://www.cr.nps.gov>.

➤ Keep in mind that it is important to update the baseline documentation of properties when a major rehabilitation to the building has been performed after the easement is in place. Usually this should happen at the conclusion of the project, after the changes to the property have been reviewed by the easement-holding organization to ensure that they are consistent with the approvals given.

➤ *Practice 11C, Easement Monitoring*, is perhaps the most critical component of a good stewardship program. For preservation organizations, it is necessary to document the inspections with photographs and inspection reports so that physical changes to the historic property, particularly the buildings, can be tracked over time and addressed. The most frequent violation of preservation easements is the failure to maintain a historic property. Regular monitoring visits and thorough documentation is necessary for the organization to be able to determine if the property is deteriorating through a failure to maintain. In addition, the monitoring process provides organizations with the opportunity to discuss these maintenance issues with the owner and to provide helpful advice before the maintenance problem becomes so severe that it constitutes a violation of the easement. Regular monitoring is

also one of the elements relevant in the determination of whether an organization has the requisite “commitment” to the enforcement of easements as required under federal tax rules.

➤ *Practice 11E, Enforcement of Easements*, describes another key responsibility of any easement-holding organization. If a violation involves performance of a prohibited act, such as constructing an addition without the organization’s permission, then the organization must be prepared to compel the owner to take corrective action. While these types of violations can often be resolved through consultation, an organization should be prepared to take legal action if necessary. Preservation organizations should have policies and procedures in place for deciding when and what legal action should be taken. See *Standard 3, Board Accountability*.

Failure to enforce an easement when a violation has occurred may seriously jeopardize the credibility of the easement-holding organization, and also may cause the public to question the public value of easements. In some states, an organization that fails to enforce easement obligations may be subject to review, or possibly sanction, by the state’s Attorney General (who may be entitled to enforce charitable trusts or other obligations on behalf of the public).

➤ *Practice 11F, Reserved and Permitted Rights and Approvals*, covers rights that are often included in preservation easements. For example, an easement may permit alterations to the property with written approval by the ease-

ment holder. As noted above, requests by owners are typically reviewed by preservation organizations for compliance with specific standards identified in the easement, such as the Secretary of the Interior’s Standards for Rehabilitation or the Secretary of the Interior’s Standards for the Treatment of Historic Properties. See *The Secretary of the Interior’s Standards for Rehabilitation*, reproduced on the following page.

➤ For preservation organizations, responding to requests for approval can constitute a large component of a preservation organization’s stewardship program—especially when major rehabilitations are contemplated. Under most easements, a property owner will be required to submit information sufficient to enable the holder to assess the requested change, such as architectural or landscape plans, specifications, materials, and a schedule for completion. Organizations are encouraged to develop criteria for submitting requests for alterations of easement properties so that the organization can more efficiently review such requests. Materials submitted by property owners may lack all the information necessary to review the request properly, and easement holders should be prepared to request additional information as necessary and to consult with their historic preservation partners, such as a State Historic Preservation Officer, where advice or support is needed.

➤ *Practices 11G, Contingency Plans/Backups* and *11H, Contingency Plans for Backup Holder*, contemplate the need for organizations to ensure

that the easements will be noted above with respect to preservation easement-enforced even if the or- *Practice 9L, Transfers and Ex-* holding organizations have ganization ceases to exist. As *changes of Lands*, in a few cases sought to dissolve or to cease

**THE SECRETARY OF THE INTERIOR'S STANDARDS
FOR REHABILITATION OF HISTORIC PROPERTIES
(36 CFR PART 67)**

The Secretary of the Interior's Standards for Rehabilitation are often used by historic preservation organizations as the criteria for reviewing proposed changes to historic structures protected by historic preservation easements.

**The Secretary of the Interior's
Standards for Rehabilitation**

The Standards that follow were originally published in 1977 and revised in 1990 as part of Department of the Interior regulations (36 CFR Part 67, Historic Preservation Certifications). They pertain to historic buildings of all materials, construction types, sizes, and occupancy and encompass the exterior and the interior of historic buildings. The Standards also encompass related landscape features and the building's site and environment as well as attached, adjacent, or related new construction.

The Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility.

1. A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
2. The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
3. Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
4. Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.
5. Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.
6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.
7. Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.
8. Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.
9. New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.
10. New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

Easement-holding organizations, including preservation organizations, are strongly encouraged to address amendments in their easement policies. Organizations should exercise extreme caution in amending an easement. The primary concept of Practice 11I is that amendments are only appropriate if they are reviewed through a thoughtful process, and they either strengthen the values protected by the easements or have not less than neutral outcome.

holding easements, requiring the transfer of easements to another holder. This process must be performed in a manner that ensures the long-term stewardship of the preservation easements, and requires the careful review—and sometimes revision—of each easement to ensure that the easement meets the standards of the receiving organization. All easements should be written to permit the assignment by the easement-holding organization to another organization, and if a backup holder is specifically named, the backup holder should approve the easement and ensure that the easement meets its standards.

➤ Although property owners may initially not appreciate the need for assignment of an easement, in the case of a dissolution the alternatives may not be in the interests of the property owner. Without an assignment, the property owner may be left in the position of having a cloud on the title of his or her property (or to have the easement assumed by the state corpora-

tions division, if that is the practice under state law). Depending on state law, it may also be important to consult with public agencies such as the State Historic Preservation Officer and the state Attorney General's office. If properly performed, such a transfer can strengthen the easements and the capacity of the new holding organization.

➤ *Practice 11I, Amendments*, is another important issue for preservation organizations involved in easement stewardship. Easement-holding organizations, including preservation organizations, are strongly encouraged to address amendments in their easement policies. *Organizations should exercise extreme caution in amending an easement.* The primary concept of Practice 11I is that amendments are only appropriate if they are reviewed through a thoughtful process, and they either strengthen the values protected by the easements or have not less than neutral outcome. Because amendments may also have a financial consequence, organiza-

tions must evaluate potential private benefit and inurement issues.

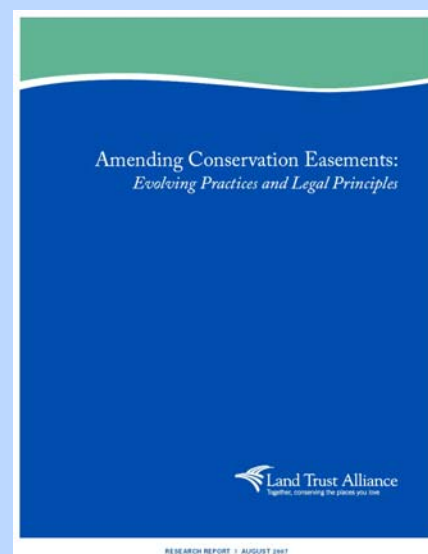
As part of an amendment process, it is essential to recognize and consider all the values protected by the easement, including preservation and conservation values. For example, amending an easement to permit a subdivision may not diminish the character of the primary historic building on the property, but may diminish the character of the overall historic property, including the context and setting of the historic building. In order to ensure that the organization is not missing an important value, it is advisable to consult with other preservation and conservation partners—such as with local and state conservation organizations, the local historic preservation commission, and the State Historic Preservation Office. In some instances it may be necessary to seek the advice of the attorney general for the state in which the easement is located to ensure that the amendment is legally permissible and is consistent

ADDITIONAL RESOURCES...

The Land Trust Alliance has published *Amending Conservation Easements: Evolving Practices and Legal Principles*, an important new resource for easement-holding organizations seeking additional guidance on this complex subject. The report is a compilation of research and dialogue among leading attorneys, practitioners, and academics on the issues of how, when, and if conservation easements should be amended. The report is not intended to serve as the definitive authority on the subject, but is instead an effort to summarize the “state of the art” on amending easements.

The report is designed to complement *Land Trust Standards and Practices*. Preservation organizations faced with questions about amending preservation easements should find it a helpful source of information.

The report is available from the Land Trust Alliance, and may be accessed from the Alliance's web site at www.lta.org.



with the public interest. In certain states, it may be necessary to have judicial review of an amendment to an easement.

➤ *Practice 11J, Condemnation and Practice 11K, Extinguishment*, both relate to the termination of easements. For preservation organizations, particularly those in urban areas, a special consideration is the occasional situation when a property protected by an easement is on the proposed location of a government project, and the government has the right to condemn the historic property. Although the easement-holding organization may not be able to stop the condemnation or preserve the building on site, if the project is a federal undertaking, the organization may be able to use the consultation process set out in Section 106 of the National Historic Preservation Act to negotiate alternative protections or mitigation for the loss

of the easement-protected property, such as moving the building to another location. Similarly, for state-sponsored projects, the organization may be able to use comparable state project review statutes.

➤ Developers of historic buildings protected by easements will sometimes ask that the easement be extinguished prior to agreeing to purchase and rehabilitate the property. Preservation organizations should reject requests to eliminate an easement, even when it is requested as an incentive to undertake a rehabilitation project that the preservation organization otherwise supports.

➤ Extinguishment is justifiable only in the event that the conservation purpose of the easement no longer exists. Preservation organizations should recognize however, that in many cases, even when a historic structure has been destroyed, the property may still have value as open space

property or as a visual buffer to nearby historic properties, and the easement should not be extinguished under such circumstances.

It should be noted that a preservation organization may not have the legal authority under the easement (and in some cases under state law) to extinguish an easement without court or Attorney General approval. (Tax-benefited easements generally provide that extinguishment may only be granted through judicial action: the applicable Treasury Regulations provide that extinguishment will not be considered to violate the perpetuity requirement *if* done following judicial approval and *if* the easement-holding organization uses all proceeds from its proportionate interest in the property in a manner consistent with the conservation purposes of the original easement. See Treas. Reg. § 1.170A-14(g)(6)(i).

Developers of historic buildings protected by easements will sometimes ask that the easement be extinguished prior to agreeing to purchase and rehabilitate the property. Preservation organizations should reject requests to eliminate an easement, even when it is requested as an incentive to undertake a rehabilitation project that the preservation organization otherwise supports.

Standard 12: Fee Land Stewardship

The organization has a program of responsible stewardship for the land it holds in fee for conservation purposes.

Practices

- A. Funding Land Stewardship. The organization determines the immediate and long-term financial and management implications of each land transaction and secures the dedicated and/or operating funds needed to manage the property, including funds for liability insurance, maintenance, improvements, monitoring, enforcement and other costs. If funds are not secured at or before the completion of the transaction, the organization has a plan to secure these funds and has a policy committing the funds to this purpose. (See 6G.)
- B. Stewardship Principles. The organization establishes general principles to guide the stewardship of its fee-owned properties, including determining what uses are and are not appropriate on its properties, the types of improvements it might make and any land management practices it will follow.
- C. Land Management. The organization inventories the natural and cultural features of each property prior to developing a management plan that identifies its conservation goals for the property and how it plans to achieve them. Permitted activities are compatible with the conservation goals, stewardship principles and public benefit mission of the organization. Permitted activities occur only when the activity poses no significant threat to the important conservation values, reduces threats or restores ecological processes, and/or advances learning and demonstration opportunities.
- D. Monitoring Organization Properties. The organization marks its boundaries and regularly monitors its properties for potential management problems (such as trespass, misuse or overuse, vandalism or safety hazards) and takes action to rectify such problems.
- E. Land Stewardship Administration. The organization performs administrative duties in a timely and responsible manner. This includes establishing policies and procedures, keeping essential records, filing forms, paying insurance, paying any taxes and/or securing appropriate tax exemptions, budgeting, and maintaining files.
- F. Community Outreach. The organization keeps neighbors and community leaders informed about its ownership and management of conservation properties.
- G. Contingency Backup. The organization has a contingency plan for all of its conservation land in the event the organization ceases to exist or can no longer manage the property. To ensure that a contingency holder will accept the land, the organization has complete and accurate files and stewardship funds available for transfer.
- H. Nonpermanent Holdings. When an organization holds fee land with the intention to sell or transfer the land, the organization is open about its plans with the public and manages and maintains the property in a manner that retains the organization's public credibility. (See 8L.)
- I. Condemnation. The organization is aware of the potential for condemnation, understands its rights and obligations under condemnation, and works diligently to prevent a net loss in conservation values.

STANDARD 12: FEE LAND STEWARDSHIP —Considerations for the Historic Preservation Organization.

General Comments: Standard 12 was drafted for land trusts, which primarily hold

fee ownership of land for conservation purposes. These open space, habitat, agricultural or other lands are held in ownership by land trusts primarily for values other than protecting the built environ-

ment. In contrast, preservation organizations primarily hold fee ownership of properties so that they can be interpreted to the public, such as historic house museums and historic sites. These resources present

stewardship responsibilities that may be distinct from the stewardship responsibilities of property held by land trusts. Other associations, such as the Association for State and Local History, the American Association of Museums and the National Trust provide guidance for historic house museums and historic sites that is tailored more closely to the acquisition, maintenance, and operation of historic sites. While other guidance is available, these practices provide useful principles for preservation organizations. For more detailed information on operating and managing historic sites, including technical reports and programs, contact

the American Association for State and Local History (<http://www.aaslh.org>.) and the American Association of Museums (<http://www.aam-us.org>).

Pointers for Preservation Organizations:

➤ *Practice 12A, Funding Land Stewardship*, presents issues distinct for the built environment because buildings will usually require more funding for maintenance than conservation lands. Prior to the acquisition of a historic site that an organization intends to retain, the organization should determine the financial resources necessary for the long-term maintenance and operation of the site. For

example, for a historic house museum, it will be necessary for the preservation organization to develop a proposed budget for the operation of the site, including staffing and long-term maintenance needs, insurance and security, and the amount of income the property can generate. It is important to note that property owners who may be contemplating donating the property will not easily understand that with the staffing cost, expenses of public visitation, and long-term maintenance, it may be much more expensive to maintain and operate a historic house museum than it is to operate a property as a private residence. After develop-



Associations such as the Association for State and Local History, the American Association of Museums, and the National Trust provide guidance for historic house museums and historic sites that is tailored more closely to the acquisition, maintenance, and operation of historic sites.

Lyndhurst in Tarrytown, New York, is one of a number of historic sites open to the public through the National Trust's Historic Sites program. [NTHP]

ing the budget, the organization may then require an endowment sufficient to produce the amount of income needed to close the gap between the income and expenses.

➤ *Practice 12B, Stewardship Principles, Practice 12C, Land Management, and Practice 12D, Monitoring Organization Properties*, generally apply to preservation organizations, although guidance from other organizations more directly targeted to historic house museums and historic sites will provide more detailed information about stewardship responsibilities for historic sites. These practices may be achieved in part through the development and implementation of a stewardship or master plan that guides ongoing operations for the property.

➤ In comparison to land trusts, a key issue for preservation organizations and house museums—especially those owning properties with limited or no endowments—is how to balance the need to raise money to cover expenditures with the organization’s stewardship responsibilities. Every income-producing activity—

whether a house tour or special event—has the potential to damage or adversely affect the integrity of a historic property. Procedures have been developed to mitigate adverse impacts—such as placing protective coverings on heavily traveled areas, limiting access to fragile areas, constructing a new visitor center or reception area that can accommodate large numbers of people, or holding events in dedicated spaces such as a renovated barn or carriage house.

➤ The considerations presented by *Practice 12G, Contingency Backup*, are related to the discussion of transfers or exchanges of land in *Practice 9L, Transfers and Exchanges of Land*, and the potential closing of historic sites that have previously been open to the public. *Practice 12G* encourages organizations to consider and adopt contingency plans for the stewardship properties they hold. This could entail consultation with an appropriate partner, such as a State Historic Preservation Officer, another house museum, or local government officials, who could be potentially interested in the site or have

ideas about possible stewards for the site. The contingent owner should review and approve the contingent ownership. In some instances, organizations have determined that a site is no longer viable as a house museum and that returning the historic resource to private ownership may be the only option available to ensuring that the resource is preserved. Under these circumstances, organizations typically protect the historic character of the property by retaining easements. See also discussion at *Practice 9L, Transfers and Exchanges of Land*.

➤ *Practice 12H, Nonpermanent Holdings*, applies if property is held by the organization temporarily, with the intention of resale. As discussed in *Practice 9K, Selling Land or Easements*, many preservation organizations operate “revolving funds,” in which historic property is acquired by the organization to be resold with restrictions. The properties should be operated and maintained in a manner consistent with the organization’s mission and public responsibilities.

NATIONAL TRUST FOR HISTORIC PRESERVATION®

SUMMARY OF CHANGES RELATING TO PRESERVATION EASEMENTS in the PENSION PROTECTION ACT OF 2006 Pub. L. No. 109-280, 120 Stat. 780 (2006)

Historic preservation organizations that accept—or plan to accept—preservation or conservation easements should be aware that, in August 2006, the U.S. Congress enacted significant legislative changes to address abuses in the area of façade easement donations as part of an omnibus pension reform bill, the Pension Protection Act of 2006. The Pension Protection Act, which included a number of other reforms in the charitable sector as well as several enhancements to charitable giving incentives, became law on August 17, 2006, as Public Law 109-280, and has since been codified within the Internal Revenue Code (see annotated version set out as Appendix B).

These changes constitute the first major reforms in the law relating to tax deductions for historic preservation easements in twenty-five years. Many of the changes are logical reforms to address questionable practices by some easement-holding organizations and promoters, as highlighted in recent years by Congress, the IRS, and the news media. In particular, section 1213 of Public Law 109-280 includes new “special rules” for easements on contributing buildings in registered historic districts:

- Disallowing deductions for preservation easements that fail to protect the *entire* exterior of a property;
- Prohibiting deductions for easements that allow changes that are incompatible with a building’s historic character;
- Requiring the donor and donee to certify under perjury that the easement-holding organization is qualified to accept easements, and has the resources and commitment to manage and enforce the easement;
- Requiring the owner to provide the IRS more detailed substantiation to prove the value of the donation; and
- Imposing a new filing fee of \$500 for easement deductions over \$10,000

Section 1219 of the law includes other reforms applicable to all charitable property donations, such as:

- Lowering thresholds for overvaluation penalties for donors, and imposing new overvaluation penalties for appraisers; and
- Imposing new qualification standards for appraisals and appraisers.

This summary was prepared by the Law Department of the National Trust for Historic Preservation, 1785 Massachusetts Avenue, N.W., Washington DC 20036. Additional information on preservation easements is available at www.PreservationNation.org/easements. Please note that this publication is not intended to offer legal, accounting, or tax planning advice; because of the complexity of the subject, if legal advice or other expert assistance is required, the services of a competent professional should be sought.

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At the same time, Public Law 109-280 also includes several provisions that appear less logical or warranted, for example eliminating deductions for non-building structures or land areas in registered historic districts unless individually listed on the National Register, and imposing a new reduction for easements on structures that have also qualified for the rehabilitation tax credit.

All in all, however, the changes included in Public Law 109-280 should help to encourage higher standards of practice for easement-holding organizations, easement promoters, and appraisers. Equally important, by reforming the law providing tax incentives for historic preservation easements—and rejecting an earlier congressional recommendation to substantially reduce or eliminate the deduction—Congress has soundly affirmed the validity of preservation easements and the federal tax incentives that encourage them. Indeed, Public Law 109-280 even includes a provision (section 1206) that actually expanded the availability of the deduction for easements donated in 2006 and 2007, by increasing the amount available for deduction for most taxpayers in any given year (to 50 percent of a taxpayer’s contribution base, versus 30 percent at present), and extending the carry-over period for deductions from five to fifteen years. (This provision was subject to a “sunset” effective December 31, 2007.)

The principal revisions included in Public Law 109-280 are summarized below. For more information, check the National Trust’s web site at www.PreservationNation.org/easements, or contact the National Trust’s Law Department at law@nthp.org.

New “Special Rules” for Charitable Contributions of Easements on Buildings in Registered Historic Districts. Public Law 109-280 includes a number of reforms designed to address congressional concerns about questionable promotions and overvaluation of deductions claimed by some taxpayers for the donation of simple façade easements in historic districts. Specifically, Section 1213 of Public Law 109-280 imposes strict new limitations on the tax deduction available for the donation of historic preservation easements¹ on buildings qualifying as certified historic structures by virtue of having been certified as being of historic significance to a “registered historic district”² under IRC § 170(h)(2)(C)(ii), as amended.³

¹ This summary generally uses the term “easement” to describe conservation restrictions under IRC § 170(h)(2)(C), but the changes also relate to other qualifying conservation “restrictions” on real property under state law, such as, for example, covenants, equitable servitudes, or preservation restrictions.

² The term “registered historic district” as used in the tax code is roughly synonymous with historic districts listed in the National Register of Historic Places, designated by the Secretary of the Interior.

³ IRC § 170(h)(2)(C)(ii), as amended, refers to buildings qualifying as certified historic structures because they have been certified by the Secretary of the Interior to be of historic significance to a registered historic district. The new “special rules” only apply to historic buildings qualifying under this provision, and do not appear to be applicable to properties that separately qualify as certified historic structures under IRC § 170(h)(2)(C)(i) (i.e., by virtue of having been listed in the National Register of Historic Places). However, donors and preservation organizations would be well advised to follow the common-sense guidance reflected in the special rules in any case, such as ensuring that the entire building is protected, and that incompatible changes are prohibited.

The law includes six ways that tax benefits for such donations would be limited:

- First, the law **permits a deduction for the contribution of an easement on a building in a registered historic district only if the easement includes a restriction to preserve the “entire exterior” of the building, including the front, sides, rear, and “height” of the building.** This provision eliminates charitable deductions, for example, for easements that only protect the front façade of a historic building in a registered historic district.⁴ *This change is effective for easement donations made after July 25, 2006. [IRC § 170(h)(4)(B)(i)(I).]*
- Second, the law requires that, in order to qualify for the deduction, **an easement protecting a historic building in a registered historic district must prohibit any change to the exterior of the building that would be inconsistent with its historical character.** This requirement would eliminate deductions for easements that purport to preserve a historic structure as provided by section 170(h) of the Internal Revenue Code, but do not include restrictions sufficient to prevent the owner from damaging or destroying a building’s historic character. *This provision is also effective for donations made after July 25, 2006. [IRC § 170(h)(4)(B)(i)(II).]*
- Third, the law **requires the donor and the recipient easement-holding organization to enter into a written agreement certifying, under penalty of perjury, that the easement-holding organization is a “qualified organization” entitled to receive such donations under the tax code, and that the organization has the resources and commitment to manage and enforce the easement’s restrictions.** *This provision is effective for donations made after July 25, 2006. [IRC § 170(h)(4)(B)(ii).]*
- Fourth, the law imposes new substantiation requirements for taxpayers claiming charitable conservation contributions of easements on buildings located in registered historic districts. Specifically, **the taxpayer must include with his or her return a “qualified appraisal,” photographs of the entire exterior of the building, and a description of “all restrictions on the development of the building.”** Presumably the description of restrictions would include those imposed by the easement as well as those imposed under local zoning, planning, or historic preservation laws, since many of the concerns raised about the donation of simple façade easements in historic districts relate to the redundancy between easement restrictions and those restrictions already imposed by such laws. *This provision applies to returns filed for contributions made in the taxable year beginning after the date of enactment of the law*

⁴ The requirement to preserve the “height” of a historic building is not defined in the statute. The Joint Committee on Taxation, in its explanation of H.R. 4, appears to interpret this language as requiring that the easement “must preserve . . . the space above the building.” JCT Report JCX-38-06 at 296 (August 3, 2006). It is worth noting, however, that the guidelines implementing the Secretary of the Interior’s Standards for Rehabilitation—often used as criteria for preservation easements—recognize that rooftop additions may be appropriate for historic properties in some circumstances (i.e., when they are: required for a new use; set back from the wall plane; designed to be as inconspicuous as possible when viewed from the street; and do not radically change the historic appearance of the building). Whether such additions would comply with the requirement to preserve the “height” of a historic building may require further guidance from the IRS.

(August 17, 2006). (The law also includes revisions to what constitutes a “qualified appraisal” and a “qualified appraiser”—see the discussion below.) [IRC § 170(h)(4)(B)(iii).]

- Fifth, the law provides that **a taxpayer would not be able to claim a deduction for an easement or other qualified conservation restriction on a building in a registered historic district in excess of \$10,000 unless the taxpayer includes with his or her tax return a new \$500 filing fee, to be used by the IRS to enforce the requirements of the tax code relating to qualified conservation contributions.** In other words, taxpayers granting easements on buildings in registered historic districts may claim a deduction in excess of \$10,000 only if the claim is accompanied by the new \$500 filing fee. Fees paid by taxpayers claiming such deductions will provide a dedicated source of funding to assist the IRS in reviewing such claims to ensure their validity. *This provision is to be applied to contributions made 180 days after the bill’s enactment into law (February 13, 2007).* [IRC § 170(f)(13).]
- Sixth, the law includes a new provision that **reduces the deduction for easement donations involving properties for which the taxpayer has benefited from the Rehabilitation Tax Credit within the previous five years.** The percentage-based reduction is to be equivalent to the proportion of tax credits allowed to the taxpayer over the previous five years compared to the fair market value of the building at the time of the easement contribution. *This provision is effective for easements donated after the date of enactment of the law (August 17, 2006).* [IRC § 47(14).]

Change in the Definition of “Certified Historic Structure” Remove the Reference to Structures and Land Areas in Registered Historic Districts.

Public Law 109-280 also includes a provision (Section 1213(b)) entitled “Disallowance of Deduction for Structures and Land in Registered Historic Districts,” which **amends the definition of a Certified Historic Structure under Section 170(h) of the Internal Revenue Code to eliminate the reference to non-building structures or land areas in Registered Historic Districts.** [IRC § 170(h)(4)(C).]

Previous law authorized tax deductions for the charitable contribution of conservation easements given for two specific historic preservation purposes: first, for the preservation of a “historically important land area,” and second for the preservation of a “certified historic structure.” IRC § 170(h)(4)(A)(iv). The latter term currently includes buildings, structures, and land areas that are (1) listed in the National Register of Historic Places or (2) located in a registered historic district and certified to be of historic significance to the district. The change made by section 1213(b) of Public Law 109-280 does not amend the definition of “historically important land area” but amends the term “certified historic structure” to strike the words “structure” and “land area” in the description of eligible historic resources located in a registered historic district—narrowing the definition of certified historic structures in registered historic districts to encompass only “buildings.” *This provision is effective for qualified conservation contributions made after the date of enactment of Public Law 109-280 into law (August 17, 2006).*

The intent suggested by the title of this subsection appears to be to disallow any deduction for easements that preserve non-building structures or land areas in registered historic districts, at least under the definition set out in IRC § 170(h)(4)(C)(ii) [previously IRC § 170(h)(4)(B)(ii)]. At the same time, this change leaves intact the definitions that allow deductions for easements that preserve non-building structures or land areas that are individually listed on the National Register of Historic Places under IRC § 170(h)(4)(C)(i), or those that otherwise qualify under the separate deduction criteria for easements to preserve “historically important land areas,” under IRC § 170(h)(4)(A)(iv).

Donors and easement-holding organizations should be aware that, depending on how this language is interpreted, it may affect the deductibility of easements that protect land areas or ancillary structures that help preserve the historic context of historic buildings in registered historic districts. The revision may also reduce the availability of easement donations as a tool for preserving privately-owned land areas that encompass battlefields, archaeological sites, and rural historic landscapes, since many of these resources may not be individually listed in the National Register, but otherwise contribute to the historic significance of National Register historic districts. (Many of these properties include non-building structures, such as fortifications, monuments, stone fences, ruins, and other similar resources of historic value). These areas, however, may separately qualify as “historically important land areas” under IRC § 170(h)(4)(A)(iv).

Changes Relating to Valuation Penalties for Taxpayers and Appraisers. Section 1219 of Public Law 109-280 includes several different provisions that would discourage overstatements of valuations by both taxpayers and appraisers.

Immediately following media reports in December 2004 raising serious questions about the overvaluation of façade easement donations on historic buildings in highly-restricted locally-regulated historic districts, Chairman Chuck Grassley of the Senate Finance Committee and Senator Max Baucus, ranking member of the Committee, issued a joint statement describing their intention to introduce new legislation that would increase and create additional fines and penalties on promoters, taxpayers, and appraisers who participate, aid or assist in the donation of façade easements found to be “significantly overvalued.”

Consistent with that statement, Public Law 109-280 lowers the threshold percentages for overvaluation penalties, making it easier to impose such penalties on taxpayers. The law also imposes new overvaluation penalties on appraisers.

Section 1219 makes the following changes to prior law:

- First, Section 1219(a)(1) **amends the tax code to lower the threshold for accuracy-related taxpayer penalties for “substantial” and “gross” valuation misstatements relating to charitable deduction property, including easement interests.** The threshold for determining whether a taxpayer has made a “substantial valuation misstatement” is to be set at 150 percent of the amount determined to be the correct amount of the value of the property subject to the deduction (reduced from 200 percent). The new law lowers the threshold for a “gross valuation misstatement” for charitable deduction property to 200 percent of the

amount determined to be the correct value of the property (reduced from 400 percent). The law (Section 1219(a)(2)) also eliminates an existing “reasonable cause” exception in the case of underpayments that reflect “gross valuation misstatements” of charitable deduction property, based on the revised thresholds. *These changes generally apply to returns filed after the date of enactment of the bill into law (August 17, 2006), except that these penalty changes are retroactive to returns filed after July 25, 2006, in the case of a contribution of an easement or other conservation restriction on the exterior of a building located in a registered historic district.*

- Second, Section 1219(b) adds a new provision to the tax code **to impose penalties on appraisers who knew or who “reasonably should have known” that an appraisal would be used in connection with a tax return if the claimed value of the property results in a substantial or gross valuation misstatement.** This provision would not be limited to charitable deduction property, but the lowered valuation misstatement thresholds for charitable deduction property would presumably apply. The amount of the penalty would be the lesser of (1) 10 percent of the amount of the underpayment attributable to the misstatement or \$1,000 (whichever is greater), or (2) 125 percent of the gross income received by the appraiser. The law includes a limited exception if the Secretary of the Treasury determines that the value established in the appraisal was “more likely than not” the real value. *These prospective appraiser penalties are generally applicable with respect to returns filed after the date of enactment of the bill into law (August 17, 2006), except that, again, they are retroactive to returns filed after July 25, 2006, in the case of a contribution of an easement or other conservation restriction on the exterior of a building located in a registered historic district.*
- Finally, Section 1219(d) amends current law to provide that appraisers may be barred from practice before the Department of the Treasury or the IRS after notice and a hearing even without having been assessed a penalty for aiding and abetting the understatement of a tax liability. *This provision is effective for returns filed after the date of enactment (August 17, 2006).*

Changes Relating to Appraisal and Appraiser Qualifications. Section 1219 of Public Law 109-280 would also strengthen qualification requirements for appraisals, as well as for appraisers who value property given for a charitable deduction:

- Section 1219(c) of Public Law 109-280 revises the statutory definition of “qualified appraisal,” and also adds new “qualified appraiser” requirements for substantiating the value of charitable donations. The term “qualified appraisal” would continue to be defined in the tax code by reference to guidance or regulations issued by the Treasury Department, but with the addition of a new statutory requirement that **a “qualified appraisal” must be prepared by a “qualified appraiser in accordance with generally accepted appraisal standards.”** Following the enactment of Public Law 109-280, one key issue for determining whether a taxpayer has substantiated a deduction with a “qualified

appraisal” will be whether the appraiser who prepared it is deemed to be a “qualified appraiser.”

- The term “qualified appraiser” is defined under the new law as an individual who (1) has earned an appraisal designation from a recognized professional appraiser organization (or has otherwise met minimum education and experience requirements established by the Secretary of the Treasury), (2) regularly performs appraisals for compensation, and (3) meets any other requirements that the Secretary of the Treasury may establish. In addition, the law requires that an individual would not be considered to be a “qualified appraiser” with respect to a specific appraisal unless he or she “demonstrates verifiable education and experience in valuing the type of property” in question and has not been barred from practice before the IRS or the Treasury Department during the previous three years. *These requirements apply to appraisals prepared for any tax return filed after the date of enactment into law (August 17, 2006).*

Changes Relating to Annual Deduction Limitations and Carryover Period for Qualified Conservation Contributions. Finally, Public Law 109-280 includes a number of other provisions relating to charitable deductions, ranging from expanding tax deductions for contributions of book inventory, to reforms for charitable contributions of taxidermy property. One of these additional provisions, unrelated to the reform provisions of Sections 1213 and 1219 of Public Law 109-280, made several important changes to current limitations imposed with respect to the availability of the deduction of all types of qualified conservation contributions (including conservation and preservation easements) under Section 170(h) of the Internal Revenue Code. However, these changes were limited to taxable years 2006 and 2007.

Under current law, a donor of a qualified conservation contribution is entitled to a charitable contribution deduction in the amount of the appraised value of the donated property interest, but in most cases such deductions are generally limited (in the aggregate, including other charitable deductions) to 30 percent of a taxpayer’s contribution base for the year in which the donation is made. (The “contribution base” is a taxpayer’s adjusted gross income without regard to any net operating loss carryback). Any excess deduction over this limitation may be carried forward under the same terms for up to five additional years. (Different deduction limitations apply to taxpayers who use a cost basis for determining the value of their property, most commonly for those who donate an easement within a year after purchasing a property.)

For taxable years 2006 and 2007, Section 1206 of Public Law 109-280 increased the amount of the deduction limitation for individual taxpayers from 30 percent to 50 percent of the taxpayer’s contribution base in the year the donation is made, and extended the carryover period to 15 years. For qualified farmers and ranchers, the aggregated contribution limitation was extended to 100 percent of the taxpayer’s contribution base in the year of the donation, with a 15 year carry forward period. This change provided a significant additional enhancement to the charitable conservation deduction, particularly for those property owners—farmers and ranchers especially—who have limited annual incomes, but high-value property with significant conservation

or preservation values. *These changes, however, were stated to be effective only for the two tax years noted above: the law included a “sunset” provision stating that these new benefits are inapplicable to contributions made in taxable years beginning after December 31, 2007.*

* * * * *

NATIONAL TRUST FOR HISTORIC PRESERVATION®

QUALIFIED CONSERVATION CONTRIBUTIONS

Internal Revenue Code of 1986, as amended

Section 170(h) (26 U.S.C. § 170(h))

Showing **insertions** and ~~deletions~~ from the Pension Protection Act of 2006,

Pub. L. No. 109-280, 120 Stat. 780 (2006)

170(h) Qualified Conservation Contribution

(1) **In general.** For purposes of subsection (f) (3) (B) (iii), the term “qualified conservation contribution” means a contribution—

- (A) of a qualified real property interest,
- (B) to a qualified organization, and
- (C) exclusively for conservation purposes.

(2) **Qualified real property interest.** For purposes of this subsection, the term “qualified real property interest” means any of the following interests in real property:

- (A) the entire interest of the donor other than a qualified mineral interest,
- (B) a remainder interest, and
- (C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) **Qualified organization.** For purposes of paragraph (1), the term “qualified organization” means an organization which—

- (A) is described in clause (v) or (vi) of subsection (b) (1) (A), or
- (B) is described in section 501 (c) (3) and:
 - (i) meets the requirements of section 509(a) (2), or
 - (ii) meets the requirements of section 509(a) (3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined.

(A) **In general.** For purposes of this subsection, the term “conservation purpose” means—

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland and forest land) where such preservation is—
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,
 and will yield a significant public benefit, or
- (iv) the preservation of a historically important land area or a certified historic structure.

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(B) Special Rules with Respect to Buildings in Registered Historic Districts. In the case of any contribution of a qualified real property interest with is a restriction with respect to the exterior of a building described in subparagraph (C)(ii), such contribution shall not be considered to be exclusively for conservation purposes unless—

(i) such interest—

(I) includes a restriction which preserves the entire exterior of the building (including the front, sides, rear, and height of the building), and

(II) prohibits any change in the exterior of the building which is inconsistent with the historical character of such exterior.

(ii) the donor and donee enter into a written agreement certifying, under penalty of perjury, that the donee—

(I) is a qualified organization (as defined in paragraph (3)) with a purpose of environmental protection, open space preservation, or historic preservation, and

(II) has the resources to manage and enforce the restriction and a commitment to do so, and

(iii) in the case of any contribution made in a taxable year beginning after the date of the enactment of this subparagraph, the taxpayer includes with the taxpayer's return for the taxable year of the contribution—

(I) a qualified appraisal (within the meaning of subsection (f)(11)(E))¹ of the qualified property interest.

(II) photographs of all the entire exterior of the building; and

(III) a description of all restrictions on the development of the building.

~~(B)~~**(C) Certified historic structure.** For purposes of subparagraph (A) (iv), the term “certified historic structure” means ~~any building, structure, or land area which:~~

(i) any building, structure, or land area which is listed in the National Register, or

(ii) any building which is located in a registered historic district (as defined in section 47(c)(3)(B))² and is certified by the Secretary of the Interior to the Secretary [of the Treasury] as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.

(Cont'd)

¹ See revised IRC § 170(f)(11)(E) below.

² See IRC 47(c)(3)(B) below.

(5) **Exclusively for conservation purposes.** For purposes of this subsection—

(A) **Conservation purpose must be protected.** A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

(B) **No surface mining permitted.—**

(i) **In general.** Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

(ii) **Special rule.** With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

(6) **Qualified mineral interest.** For purposes of this subsection, the term “qualified mineral interest” means—

(A) subsurface oil, gas, or other minerals, and

(B) the right to access to such minerals.

[Note on the effective dates of Public Law 109-280 revisions:

Most of these changes are to be applicable to easement donations made after July 25, 2006, except that the changes to the definition of a “certified historic structure” are to be applicable to easements donated after the date of enactment of Public Law 109-280 into law, August 17, 2006.]

CROSS-REFERENCED AND RELATED SECTIONS:

Definition of Registered Historic District under IRC 47(c)(3)(B):

(B) **Registered historic district.** The term “registered historic district” means—

(i) any district listed in the National Register, and

(ii) any district—

(I) which is designated under a statute of the appropriate State or local government, if such statute is certified by the Secretary of the Interior to the Secretary [of the Treasury] as containing criteria which will substantially achieve the purpose of preserving and rehabilitating buildings of historic significance to the district, and

(II) which is certified by the Secretary of the Interior to the Secretary [of the Treasury] as meeting substantially all of the requirements for the listing of districts in the National Register.

(Cont’d)

Definition of Qualified Appraisal and Appraiser under IRC § 170(f)(11)(E) (revised by H.R. 4):

(E) Qualified Appraisal and Appraiser.—For purposes of this paragraph—

(i) Qualified Appraisal.—The term “qualified appraisal” means, with respect to any property, an appraisal of such property which—

(I) is treated for purposes of this paragraph as a qualified appraisal under regulations or other guidance prescribed by the Secretary, and

(II) is conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance prescribed under subclause (I).

(ii) Qualified Appraiser.—Except as provided in clause (iii), the term “qualified appraiser” means an individual who—

(I) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary.

(II) regularly performs appraisals for which the individual receives compensation, and

(III) meets such other requirements as may be prescribed by the Secretary in regulations or other guidance.

(iii) Specific Appraisals.—An individual shall not be treated as a qualified appraiser with respect to any specific appraisal unless—

(I) the individual demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and

(II) the individual has not been prohibited from practicing before the Internal Revenue Service by the Secretary under section 330(c) of title 31, United States Code, at any time during the 3-year period ending on the date of the appraisal.

[Note: Applicable to appraisals filed after July 25, 2006 for buildings located in registered historic districts.]

Filing Fee for Easements on Buildings in Registered Historic District under IRC § 170(f)(13) (added by H.R. 4):

(13) Contributions of Certain Interests in Buildings Located in Registered Historic Districts.—

(A) In General.—No deduction shall be allowed with respect to any contribution described in subparagraph (B) unless the taxpayer includes with the return for the taxable year of the contribution a \$500 filing fee.

(B) Contribution Described.—A contribution is described in this subparagraph if such contribution is a qualified conservation contribution (as defined in subsection (h)) which is a restriction with respect to the exterior of a building described in subsection [170](h)(4)(C)(ii) and for which a deduction is claimed in excess of \$10,000.

(C) Dedication of Fee.—Any fee collected under this paragraph shall be used for the enforcement of the provisions of subsection (h).

[Note: Applicable to contributions made 180 days after enactment of Public Law 109-280 into law, or February 13, 2007.]

(Cont'd)

Reduced Deduction for Easements on Buildings for which Taxpayer has received Rehabilitation Tax Credits under IRC § 47 (added by H.R. 4):

_(14) Reduction for Amounts Attributable to Rehabilitation Credit.—In the case of any qualified conservation contribution (as defined in subsection (h)), the amount of the deduction allowed under this section shall be reduced by an amount which bears the same ratio to the fair market value of the contribution as—

____ (A) the sum of the credits allowed to the taxpayer under section 47 for the 5 preceding taxable years with respect to any building which is a part of such contribution, bears to

____ (B) the fair market value of the building on the date of the contribution.

[Note: Applicable to easements donated after enactment of Public Law 109-280 into law, August 17, 2006.]

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