

Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits



What is a Historic Preservation Easement?

A historic preservation easement is a voluntary legal agreement, typically in the form of a deed, which permanently protects a significant historic property. Since it is a perpetual easement, an owner is assured that the property's historic character will be preserved. In addition, an owner who donates an historic preservation easement may be eligible for one or more forms of tax benefits.

Under the terms of a typical preservation easement, a property owner places restrictions on the development of, or changes to, the property and transfers these restrictions to a qualified organization whose mission includes environmental protection, land conservation, open space preservation, or historic preservation. The organization must have the resources to manage and enforce the restrictions provided for in the easement and have a commitment to do so. Once recorded, the easement restrictions become part of the property's chain of title and "run with the land" in perpetuity, thus binding not only the owner who grants the easement but all future owners as well. Preservation easements in some states may also be called preservation "restrictions," "covenants," or "equitable servitudes."

Benefits of Donating An Easement

An easement is a particularly useful and flexible historic preservation tool. It allows a property owner to retain private ownership of the property while insuring that the historic character of the property will be preserved. Within certain statutory and regulatory constraints, easements can be tailored to meet the needs of the property owner, the individual resource, and the mission of the protecting organization.

If certain criteria are met, the owner may be eligible for a Federal income tax deduction for the value of the easement, and Federal estate taxes also may be reduced. In addition, many State tax codes provide state tax benefits for conservation easement contributions where a reduction in the value of a property occurs. There may also be local tax benefits where property tax assessment is based on a property's highest and best use. Since the rules are complex, property owners interested in the potential tax benefits of an easement



A comprehensive conservation and preservation easement protects the Cambus-Kenneth Farm in Danville, KY. © National Trust for Historic Preservation.

donation should consult with their accountant or tax attorney.

Easement Restrictions

A conservation easement gives the organization to which it is conveyed the legal authority and responsibility to enforce its terms. This includes the right to inspect the property to ensure that the owner is complying with the terms of the easement. Historic preservation easements typically prohibit an owner from demolishing the historic building(s) and from making changes that are inconsistent with the historic character of the property. Proposed alterations to the property may require prior approval from the easement holding organization. Restrictions on subdividing and developing the property are common as well. To be tax deductible, a preservation easement generally cannot be amended. If the restrictions apply only to the exterior of a building, future alterations to the interior do not require approval by the easement-holding organization, as long as the alterations do not affect the building's exterior appearance or structural integrity.

Potential Tax Benefits

When an owner donates an easement in accordance with Federal and State rules to a qualified charitable or governmental organization, the easement may provide tax benefits. The value attributed to the easement may be claimed as a charitable contribution deduction from Federal income tax. The value of the easement is generally the difference between the appraised fair market

value of the property prior to conveying an easement and the appraised fair market value of the property after the easement.

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

Recent Federal Tax Law Changes

A property owner seeking a Federal tax deduction for a qualified conservation contribution (including a donation of an historic preservation easement) needs to be aware that there are several detailed requirements to meet, and that there are a number of recent changes to the tax laws. Several of these changes govern properties located in registered historic districts. For example, to be deductible, the deed of easement on a building in a registered historic district must now preserve the entire exterior of the building (including the front, sides, rear and height of the building), and the easement must prohibit any change to the exterior of the building inconsistent with its historic character.

The requirement that the easement cover the entire building exterior does not apply to an easement on a property that qualifies for the deduction on the basis that it is individually listed in the National Register of Historic Places. As in the past, easements on properties individually listed in the National Register of Historic Places can cover part(s) of a building, such as the front façade, a front façade along with an important interior space, or the entire exterior. Most easement-holding organizations, however, require that the entire exterior of a building be covered by the easement's protections.

While a number of the recent Federal tax law changes are designed to address overvaluations by taxpayers and appraisers, several recent changes to the Federal tax code temporarily expanded the availability of the tax deduction in certain respects. These temporary changes, however, expired on January 1, 2010. Currently, the amount of a charitable income tax deduction for a conservation easement contribution that can be used by an individual in any one year is back to 30 per cent of the donor's contribution base (generally adjusted gross income) from the temporary increase of 50 per cent. In addition, the period over which individuals can carry forward unused deductions for conservation easement contributions returns to five years from the temporary increase of fifteen years. Any changes after January 1, 2010 can be viewed on the National Park Service web site.

Qualified Properties

According to the Internal Revenue Code, an income tax deduction may be available for a preservation easement protecting a certified historic structure or a historically important land area.

A property is considered a certified historic structure if it is a building, structure, or land area individually listed in the National Register of Historic Places, or if it is a building located in a registered historic district and is certified by the National Park Service as contributing to the



The modern-style residence of noted residential architect Henry B. Hoover in Lincoln, MA remains in the family while being permanently protected by an easement that includes certain interior rooms. Courtesy of Historic New England.





Completed in 1816, Tudor Place in Georgetown, DC, a National Historic Landmark, is protected by an easement covering the building and grounds granted to the U.S. Department of Interior by a direct family descendant of the original owner, the late Armistead Peter 3rd. Photo: Charles Fisher, NPS.

historic significance of that district. A registered historic district includes any district listed in the National Register of Historic Places. A State or local historic district may also qualify as a registered historic district, provided the district and the enabling statute are certified by the National Park Service.

In the case of a building in a registered historic district, to apply for a certification of significance (a determination by the National Park Service as to whether a building is a certified historic structure), a prospective easement donor contacts the State Historic Preservation Office (SHPO) to request a Historic Preservation Certification Application or downloads the application from the National Park Service website www.nps.gov/history/hps/tps. The property owner then completes Part 1 of the application and returns it to the SHPO. The SHPO then forwards the application, along with a recommendation, to the National Park Service, which makes the certification decision. The property must be certified by the National Park Service either by the time of the transfer of the easement or the due date (including extensions) for filing the Federal income tax return for the taxable year of the easement transfer.

Properties individually listed in the National Register of Historic Places are already recognized as certified historic structures, so a property owner does not need to request a certification from the National Park Service. Unlike the deduction for preservation of properties located in an historic district, charitable contribution deductions for preservation easements on properties individually listed in the National Register are not restricted to protection of buildings but may also be al-

lowed for easements on historic structures or land areas without buildings. Examples of qualifying structures may include bridges, dams, or roller coasters.

A historically important land area must be listed in the National Register of Historic Places. Historically important land areas include either independently significant areas, including any related historic resources, that meet the National Register of Historic Places Criteria for Evaluation, or land areas adjacent to a property individually listed in the National Register of Historic Places, where physical or environmental features of the land contribute to the historic or cultural integrity of the historic property. Common examples of historically important land areas include traditional cultural places, archeological sites, battlefields, and historic cultural and designed landscapes.

Public Benefit

In order to claim the Federal income tax deduction for a historic preservation easement, at least some visual public access to the property must be available. The degree of access is tailored to the historic resource under protection. For example, the amount of access required for a sensitive archeological site individually listed in the National Register may be as little as a few hours a year. Other means of providing access may include ensuring visual access from a public roadway for a historic building and grounds subject to an easement, or allowing the public to tour the inside of a historic house on a reasonable number of days a year if the easement is imposed on portions or all of the interior. Often the easement-holding organization can assist the owner in finding a balance between protecting the property and the owner's privacy, and providing a public benefit.

Qualified Organizations

The recipient of an easement donation must be a qualified organization. Qualified organizations may include governmental units, charities that receive a substantial part of their support from governmental units or from public contributions, publicly supported charities, or charities that meet the requirements of §509(a)(3) and are controlled by qualified organizations. For an easement on a historic property in a registered historic district, the donor and donee must enter into a written agreement certifying that the donee is a qualified

organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and that the organization has the resources to manage and enforce the restriction and a commitment to do so.

An easement-holding organization may require the easement donor to make an additional donation of funds to help the organization administer the easement. Those funds are often held in an endowment that generates an annual income to pay for easement administration costs such as staff time for annual inspections or needed legal services.

Inconsistent Use

To qualify for a deduction, the donor may not retain uses of the property that would permit destruction of significant conservation interests. Retained uses must be specifically circumscribed in the deed of easement.

Valuation/Qualified Appraisal

Easement valuations have come under closer scrutiny by Congress and the IRS in recent years, and the Federal tax code imposes new qualification standards for both appraisals and appraisers. For example, the appraisal must be prepared in accordance with generally accepted appraisal standards.



The 1787 Phelps Inn located in North Colebrook, CT is one of several buildings on a 33-acre property protected by a preservation and conservation agreement granted to Historic New England by the late John A. and Nancy Phelps Blum. Courtesy of Historic New England.

The amount of a contribution deduction for a perpetual preservation or conservation easement generally is the fair market value of the easement at the time of the contribution. The most commonly-used method of determining this value is usually referred to as the “before” and “after” method: Generally the fair market value of an easement is equal to the difference between the fair market value of the property before the granting of the easement and the fair market value of the property after the granting of the easement. The appraisal therefore must value the property both before and after the easement is granted.

Treasury Regulations governing valuation of conservation easements (§ 1.170A-14(h)(3)(ii)) provide that, if the before and after valuation method is used, the market value of the property before the contribution must take into account not only the property’s current use but also an objective assessment of the likelihood that the property would be developed absent the restrictions, as well as any effect from local zoning, local historic preservation regulations, and similar restrictions that affect the property’s highest and best use. In other words, the valuation of an easement must be determined through a qualified appraisal that considers the specific terms of the easement and the specific nature of restrictions imposed by existing local land use or similar laws. Note that there are no generally recognized percentages by which an easement reduces the value of a property. In fact, there are instances in which the grant of an easement may have no material effect on the value of the property, particularly if the easement is no more restrictive than local ordinances already in effect.

In the case of a preservation easement donation for which a deduction of more than \$5,000 is claimed, a donor generally must obtain a qualified appraisal prepared by a qualified appraiser. The appraisal must be attached to the donor’s tax return for any claimed deduction over \$500,000. To deduct the value of an easement on a building in a registered historic district, an appraisal must be attached to the tax return regardless of the amount of the claimed deduction. The Internal Revenue Service (IRS) may accept the value determination in the appraisal or make its own determination. Donors and appraisers should be aware that there are strict penalties for overvaluations of property that lead to substantial or gross valuation misstatements.

In the case of a claimed deduction of \$250 or more, the donor must obtain a contemporaneous written acknowledgement as required by section 170(f)(8) of the

Internal Revenue Code. This means that the donor needs to obtain from the easement holding organization a document stating the amount of any cash it received and a description of any property it received (such as the preservation easement). The organization must also state whether it provided any goods or services in return for the property and, if so, a description of the goods or services. The donor must obtain this contemporaneous written acknowledgement on or before the earlier of the date the donor files the tax return claiming the charitable contribution or the due date (including extensions) for the tax return.

For easement donations that involve buildings within historic districts where a deduction in excess of \$10,000 is being claimed, the donor must submit a \$500 filing fee with IRS Form 8283-V. In addition, in all cases in which a deduction of more than \$500 is claimed, a properly completed IRS Form 8283 (Noncash Charitable Contributions) must accompany the donor's tax return. For contributions for which a deduction of more than \$5,000 is claimed, the Form 8283 generally must be signed by the appraiser who prepared the qualified appraisal and by the qualified organization that accepted the easement donation.

In addition to the above requirements, the donor of a preservation easement on a building in a registered historic district must include with his or her tax return photographs of the entire exterior of the building and a description of all restrictions on the development of the building.



One of a number of historic commercial properties in a historic district renovated by the Ron Kaufman Co., the 1855 Gibb-Sanborn Warehouse, a rare city survivor of the Gold Rush era, is protected by an easement held by San Francisco Architectural Heritage. Photo: ©SF Architectural Heritage.

Qualified Appraisers

To be a qualified appraiser, the appraiser has to have verifiable education and experience in valuing historic properties, must not be prohibited from practicing before the IRS, and must meet several other requirements established by the IRS. In addition, certain appraiser declarations are required.

Combining an Easement with Federal Historic Rehabilitation Tax Credits

A property owner conveying an easement on an historic building that has or will be rehabilitated may also be eligible for a 20% tax credit under the Federal Historic Rehabilitation Tax Incentives Program. This credit is available for properties rehabilitated for income-producing properties, but it is not available for properties used exclusively as the owner's private residence. The rehabilitation must be substantial as defined by IRS and applies only to a project that the National Park Service designates as a certified rehabilitation.

In cases where the donor may qualify for both a Federal income tax deduction and a rehabilitation tax credit, there are two important considerations: First, an easement placed on a building that is the source of a rehabilitation tax credit may be considered a partial disposition of the building, which could affect the available tax credits. Second, where rehabilitation tax credits have been claimed within 5 years preceding the easement donation, the Internal Revenue Code requires some reduction in the amount of the easement contribution deduction. An accountant or tax attorney should be consulted in such cases.

Further Information

For further information about historic preservation easements and how to obtain certified historic structure status for a building in a historic district, visit the National Park Service website at <http://www.nps.gov/history/hps/tps/tax/easement.htm> or contact our office at NPS_HPS-info@nps.gov.

This leaflet incorporates changes to Federal tax law as a result of the Pension Protection Act of 2006 and the Food, Conservation, and Energy Act of 2008 (Public

The preservation easement given to the Preservation Alliance for Greater Philadelphia on the Manufacturer's Club protects a National Register listed property not subject to local historic commission review. Courtesy of the Preservation Alliance.



Law 110-234). For updates on any subsequent Federal tax law changes, please refer to the website cited on the previous page.

Acknowledgments

This brochure was prepared by Charles Fisher, National Park Service. The following individuals are gratefully acknowledged for their review and other assistance in the preparation of this publication: Paul W. Edmondson, Vice President & General Counsel, National Trust for Historic Preservation, Washington, DC, and Stefan Nagel, Esq., of Counsel, Law Office of Stephen J. Small, Esq., P.C., Newton, MA. Thanks also go to the Washington Office of the Internal Revenue Service; Michael Auer and Kaaren Staveteig of the National Park Service; and Joseph Cornish, Historic New England, for their assistance.

This publication was prepared pursuant to the National Historic Preservation Act, which directs the Secretary of the Interior to develop and make available to government agencies and individuals information concerning professional methods and techniques for the preservation of historic properties.

Comments or questions regarding this publication are welcomed and should be addressed to Technical Preservation Services, Heritage Preservation Services, 1201 Eye Street NW, Washington, DC 20005 or email at NPS_HPS-info@nps.gov.