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PRESERVATION EASEMENTS:
CONFIGURING AN HISTORIC PRESERVATION STRATEGY

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To Carrie

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ABSTRACT

The mating of federal tax incentives to historic preservation easements in the Tax Reform Act of 1976 reflected a shifting preservation ethos. As practitioners began to reevaluate long-held assumptions that privileged architecture over community, their focus turned from the preservation of exceptional, individual buildings toward the conservation of entire historic districts as an integrated whole. While preservation easements provide an important legal mechanism for safeguarding America's historic, built environment for future generations, their usage has also been linked with questionable financial schemes and charges of façadism. This thesis explores the interplay between preservation practice and process, between the institutions that govern the profession and the practitioners that seek to codify a particular historicity. It is ironic, then, that by aligning preservation easement policy with such authoritative governmental institutions as the Department of the Interior and the Internal Revenue Service that the easement program now faces an uncertain political future.

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INTRODUCTION

Controversy marks the history of the historic preservation easement program in the United States. Preservation easements are both simple legal devices for protecting one's historic property and, largely because of their attendant tax benefits, mechanisms perhaps too easily exploited. This thesis examines the operations and successes of the preservation easement program, as well as its limitations and failings.

Several basic questions underlie the research: Why did historic preservationists in the 1970s consider tax incentives tied to façade easements to be such a useful preservation strategy? Did the approach prove effective in preservation practice? How have historic preservation easements shaped public interpretation and understanding of architecture? In turn, how does the façadism associated with easements distort our understanding of the past? Do the preservation gains outweigh the potential for financial abuse, or more frankly put, are some property owners and easement holding organizations manipulating the program for financial gain, or is the Internal Revenue Service interpreting the law too narrowly in relation to easements as charitable tax deductions? Finally, should the preservation easement program be structurally or fundamentally altered to ensure its long-term viability as a tool for historic preservation?

In answering those questions as a whole, the author reached a few core conclusions. The mating of historic preservation easements to federal tax incentives reflected a shift in preservation efforts away from the preservation of exceptional, individual buildings toward the preservation of entire historic districts, thereby challenging practitioners to reevaluate long-held assumptions that privileged architecture over community. Moreover,

façade easements became inextricably linked to an impulse to preserve the richness and diversity of historic, urban communities during a period of inner-city blight and continued flight to the suburbs. Criticism of easements today flows from the program's socially conscious roots – in that the easement's role in preservation has largely been supplanted by actively engaged neighborhood organizations and strong preservation zoning ordinances. While historic preservation activity once hinged on the availability of modest government incentives to urban pioneers for such measures as façade easements, tax breaks now fall mainly to the affluent residents of well-established, historic urban neighborhoods. Incentives linked to property valuation are often rightfully criticized as being an unneeded government largesse that has outlived its utility, particularly as an incentive for preservation in historic areas well secured from decay and destruction.

In considering matters beyond the realm of wood, brick, and mortar, the research of this thesis ultimately involves the interplay of human motivations and actions within a larger society – in expectations and limitations, processes and institutions, in what can be done and what perhaps should not have been done in the first place. This interplay involves historic preservationists who sought to preserve, extend, and even ascribe into law their particular vision of historicity by utilizing such authoritative governmental institutions as the Internal Revenue Service and the National Park Service. In that respect, the interpretive approach and findings of this thesis could be said to trend toward the structuralism of Claude Lévi-Strauss, or tread the path emblazoned by Theda Skocpal and her analysis of political institutions and social revolutions. There is also a tack toward Marc Bloch and the *Annales* historians' social science philosophy, particularly in the

manner of primary source consideration. In an eloquent expression of his historical approach, Bloch wrote:

> A civilization, like a person, is no mechanically arranged game of solitaire; the knowledge of fragments, studied by turns, each for its own sake, will never produce the knowledge of the whole; it will not even produce the knowledge of the fragments themselves.[1]

This research adds significantly to the historiography of historic preservation. Understanding preservation easements involves a process consisting of motivated individuals (historians) working to affect public policy through the federal tax structure (working outside of the academy). Thus, the thesis analyzes the rapid professionalization of the historic preservation movement in the 1970s. The research also adds to public history literature as a case study of the move toward professional legitimacy as expressed through the late twentieth century historic preservationist movement.

An important focus of my research was to look broadly at the partnerships and constituencies involved in the preservation easement's inception to gain a better sense of where preservation advocates of the mid- to late twentieth century anticipated the program would grow in the decades to come. In so doing, the investigation drew upon a range of primary sources, from the scholarly and political debate related to the Tax Reform Act of 1976 to the easement program's key requirements as interpreted by the National Park Service. Some of the most important sources were the various qualified charitable organizations to which easements are granted and maintained, ranging from such contrasting organizations as the Trust for Architectural Easements to the National Trust for Historic Preservation. Internal Revenue Service memoranda and tax court cases

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[1] Marc Bloch, *The Historian's Craft*, trans. Peter Putnam (New York: Vintage Books, 1953), 20.

provided a further means of understanding the complex interplay between the various players involved, with the third chapter culled almost entirely from such material.

Secondary sources included professional trade journals focusing on the tax consultant industry, which proved invaluable in understanding how those practicing more on the periphery of the historic preservation industry perceived and responded to the program. Likewise, academic journals provided important context for the historic preservation movement at large, imparting a sense of how the architectural easement strategy has changed not only public perception but also preservation practices. I remain especially interested in the ways in which the focus of preservation efforts shifted away from largely architectural concerns toward one centered more on community and quality of life considerations in urban areas. Therefore, monographs with a bent toward studies of urban revitalization efforts were most helpful. On that note, the *Papers of the NAACP* contain a wealth of primary evidence related to restrictive covenants, which I used a means of highlighting the implications and effects of historic preservation in transitioning urban communities.

Perhaps the most important sources were the easement-related U.S. Tax Court decisions, including such recent cases as *Scheidelman v. Commissioner of Internal Revenue* (2012) and *Schrimsher v. Commissioner of Internal Revenue* (2011). The various arguments set forth by the plaintiffs and respondents in these decisions and in other notable tax court cases are key to understanding the procedural nuances and potential pitfalls involved in claiming a federal tax deduction for an historic preservation easement donation.

The historic preservation easement can be an important means of ensuring that America's historic, built environment is preserved for future generations. Its remarkable strength lies in its uniqueness. Easements can provide permanent protections ranging from only the most essential core of an historic building to everything from the walls to the innermost cubbyhole. The easement's success, however, is achieved through very particular and circumscribed means. And while the permanence of legal obligations is not always the best option for every situation, an easement is truly an indispensable tool to have at the ready when needed.

CHAPTER ONE

A PERPETUAL PARTNERSHIP

Historic preservation easements allow property owners to preserve defining features of their home, land, or other buildings in perpetuity, regardless of future ownership. Prescriptive language incorporated into the property deed provides more lasting protection than the vast majority of preservation programs. Subsequent owners will be constrained in what they are permitted to do, from altering a building's appearance to its outright demolition. Moreover, federal tax incentives have been established to encourage owners of "certified historic structures" to avail themselves of easement protections.[2] And if one's property falls outside federal criteria, certain state and local incentives may be available.

With its modern roots in English common law, the use of easements dates back many hundreds of years and originated in the ancient Roman law concept of *praedial servitudes.*[3] Landowners in pastoral settings, for example, would commonly negotiate grazing and farming rights or access to streams through the use of servitudes. In urban surroundings servitudes might limit the height of a stone wall, so as not to shade a neighboring lot or encumber a view.[4] In this way both the privileges and responsibilities of land ownership could be more favorably distributed.

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[2] A "certified historic structure" is one that is either individually listed on the National Register or located in a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district.

[3] A *praedial servitude* is an easement, that is, a requirement placed on a part of one's property that may be utilized in some way by the owner of another parcel of property.

[4] Ross D. Netherton, "Environmental Conservation and Historic Preservation through Recorded Land-Use Agreements," *Real Property, Probate and Trust Journal* 14, no. 3 (Fall 1979): 543.

Over time, servitudes evolved into the legal mechanism known as easements, with the English judiciary enforcing these narrowly prescribed agreements in the interest of orderly economic enhancement. The utility of easement protections would not be contained to the British Isles alone. Legal scholar Marilyn Meder-Montgomery points out:

> Common-law precedents and perspectives associated with easements crossed the Atlantic with the first settlers of the New World. By the nineteenth century, the rulings of American courts on appurtenant and in-gross easements closely paralleled the judicial decisions emanating from England.[5, 6]

While the history of easements stretches back centuries, its widespread use as a tool for historic preservation and land conservation in America is a much more recent development. The easement's legal mechanisms provide for the continuation of full private ownership of the encumbered property tied to a binding agreement limiting the types of modifications that may or may not be permitted. A hybrid of private sector initiative and governmental intervention, the historic preservation easement exists largely due to the foresight of preservationists of the 1960s and 1970s. They not only appreciated the easement's potential as an effective preservation strategy but worked to secure federal tax incentives to encourage its widespread use. As one such preservation aptly put it, "Most destruction of old buildings is not caused by the fact that people dislike old buildings so much as the fact that our tax laws make it economically beneficial to tear

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[5] Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources* (Denver: Colorado Historical Society, State Museum, Colorado Heritage Center, 1984), 2-3.

[6] *Ballentine's Law Dictionary*, 3rd ed., s.v. "Easement Appurtenant" and "Easement In Gross." An appurtenant easement is an agreement that ensures the right of one property owner to legally use a neighboring property and which permanently transfers with the land to whoever owns it. An in-gross easement concerns the personal right to use someone else's land that does not continue indefinitely but terminates with whoever obtained it.

them down."[7] Ultimately, Congress responded to such concerns by providing a means for owners of historic properties to realize significant tax savings by agreeing to protect their historic property in perpetuity with a preservation easement.[8] Congress incorporated these measures as part of a compliment of historic preservation tax incentives in the Tax Reform Act of 1976.

Yet for all the bicentennial-year achievements in preservation tax policy, the earlier National Historic Preservation Act of 1966 (NHPA) was far more significant in terms of reach and impact. In addition to establishing the National Register of Historic Places, the act promoted the creation of State Historic Preservation Offices (SHPOs) to administer state preservation programs, supported the formation of local historic districts, and authorized a grant program providing funding for preservation activities related to properties listed in the National Register. Through the National Historic Preservation Act the federal government declared as general policy that the nation should foster conditions that contribute to the preservation of prehistoric and historic resources. The new law directed federal agencies to take responsibility for considering historic resources under their purview, and encouraged public and private preservation initiatives and utilization of the nation's historic built environment.[9]

The NHPA also created the Advisory Council on Historic Preservation (ACHP). One of the most important functions of this federal agency is administering the preservation

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[7] Richard E. Reed, *Return to the City: How to Restore Old Buildings and Ourselves in America's Historic Urban Neighborhoods* (Garden City, N.Y.: Doubleday, 1979), 148.

[8] Historic preservation easements are also referred to as architectural or façade easements, protective covenants, and servitudes.

[9] National Historic Preservation Act of 1966, 16 U.S.C. § 470-1(2006).

review process established under Section 106 of the Act.[10] In a summary of its statutory obligations under that section the ACHP noted:

> Section 106 requires each Federal agency to do two things prior to carrying out, approving financial assistance to, or issuing a permit for a project that may affect properties listed or eligible for listing in the National Register of Historic Places. First, the agency must consider the impact of the project on historic properties. Second, the agency must seek the Council's comments on the project. …To administer these requests…the Council has issued regulations to govern agencies' compliance with Section 106. These regulations set forth procedures, known as the 'Section 106 process' that explain how Federal agencies must take into account the effects of their actions on historic properties and how the Council will comment on those actions.[11]

Something else Congress made clear in the National Historic Preservation Act was that none of the federal agencies or programs being created would infringe upon private property rights. Political realism and precedent ensured that the protection of privately owned historic buildings and sites would remain entirely voluntary.[12] That qualification is where the preservation easement tax incentive comes into play. To be sure, enactment of the NHPA was a significant victory for preservationists. Yet one of the major challenges left to resolve was that the federal government had no real teeth when it came to protecting the nation's privately-owned historic properties. This was no easy matter to remedy. After all, how could the federal government ensure the meaningful protection of certain private residences and not others, or hinder legitimate business dealings in the name of aesthetics or historicity?

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[10] Adina W. Kanefield, Charlotte R. Bell, and U.S. Advisory Council on Historic Preservation, *Federal Historic Preservation Case Law, 1966-1996: Thirty Years of the National Historic Preservation Act* (Washington, D.C.: Advisory Council on Historic Preservation, 1996), 6.

[11] Ibid., 8.

[12] Norman Tyler, Ted Ligibel, and Ilene R. Tyler, *Historic Preservation: An Introduction to Its History, Principles, and Practice*, 2nd ed. (New York: W.W. Norton & Co., 2009), 46-47.

Despite concerns and expectations to the contrary, a listing in the National Register of Historic Places is largely an honorific designation. While notable, it affords no protection against private developers. As Thomas F. King, former head of Section 106 review for the ACHP, explains, "If the Mount Vernon Ladies' Association, which owns George Washington's old home, wants to cover its facades with vinyl siding and add a twenty-story tower complete with battlements, it is perfectly free to do so under federal law, provided it doesn't use federal funds or need a federal permit."[13] King further observes that no matter how historic or important a place may be, there are no federal permits to protect the architectural or historic integrity of private property. Congress has passed no legislation on the matter of historic permitting, and there is "no evident constitutional basis for doing it."[14] Voluntary initiatives, then, are absolutely essential to historic preservation, but they may not be the surest long-term strategy in and of themselves.

To better appreciate the importance of local communities in the preservation process, it may help to think of the process in terms of a chain of command. The National Register program functions as a subordinate part of a top-down federal agency, falling under the control of the Secretary of the Interior, who is the head of the Department of the Interior, which oversees the National Park Service, which is the agency responsible for the administration of the National Register of Historic Places. For all that federal bureaucracy, National Register nominations must first be approved by the appropriate State or Tribal Historic Preservation Office. Ultimately, it is up to local communities to

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[13] Thomas F. King, *Cultural Resource Laws & Practice,* Heritage Resources Management Series, 3rd ed. (Lanham, MD: AltaMira Press, 2008), 118.

[14] Ibid.

protect historic districts with zoning ordinances, if they so choose. Yet enforcement can vary greatly from city to city, particularly when development pressures are great. While preservationists recognized the need for a more proactive federal involvement and strengthened local involvement, they also appreciated the inviolability of private property rights. The solution, then, lay not in regulation but in encouragement.

With the passage of the Tax Reform Act of 1976, Congress provided a number of financial incentives to encourage historic preservation efforts. In a report produced by the Pittsburgh History and Landmarks Foundation, the author noted that "this law, for the first time, made the restoration and rehabilitation of historic buildings economically advantageous to developers and, for the first time, made the preservation of historic buildings economically competitive with new construction."[15] Significantly, the Tax Reform Act of 1976 provided important tax incentives for historic preservation easements. In order to take advantage of the tax incentives associated with preservation easements, a number of conditions had to be met. Among these are that an historic building or structure must be designated as a "certified historic structure," which means that it must be either individually listed in the National Register or located in a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district. The easement must also be donated to a "qualified organization," as specified under federal tax code, and the public must be able to visually access the easement protected building.[16] After a determination is made of the value of

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[15] Ronald Yochum, *The Federal Historic Preservation Tax Incentive Program: Information for the Tax Advisor* (Pittsburgh History & Landmarks Foundation, 2004), 9.

[16] Internal Revenue Code, 26 U.S.C. 170(h).

the easement donation, the owner may claim a charitable contribution deduction on their federal tax return for the property's post easement reduction in value.[17]

The key to the easement donation strategy's strength is that not only does an easement run with the property it effectively becomes part of the property. No matter how strong local preservation ordinances may appear to be, they can often stand or fall with the whims of politics. In other words, any ordinance that can be created can be eliminated, as explained by one easement holding organization:

> Ordinances change, but easements are forever. … The protection offered by a historic preservation easement also goes beyond limiting changes to the exterior of the property, which is where local ordinances normally focus. Easements prohibit demolition by neglect and require that the structural integrity of the entire building be maintained. Easements remain independent of local politics or local budget pressures.[18]

To those involved in crafting the 1976 legislation, preservation easements must have offered a compelling solution to a vexing problem. So long as a critical mass of homeowners participated in the program, entire historic districts could be protected, thereby avoiding the significant expense and unwieldy burden of direct federal ownership of historic properties. Moreover, such protected buildings would remain on the tax role.[19] In a sense, the owner of an easement-encumbered property enters into a committed, long-term relationship with the charitable preservation organization to which they have donated their easement rights, with both bound by law to protect their investment. Precisely what those protections consist of, however, is a key part of the easement's

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[17] National Park Service, *Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits* (Washington, D.C.: U.S. Department of the Interior, National Park Service, Technical Preservation Services, 2010), 2-11.

[18] Trust for Architectural Easements, *Preserving Our Architectural Heritage* (Washington, D.C.: Trust for Architectural Easements, 2008), 3.

[19] Yochum, 10.

appeal. As there is a great deal of flexibility in the drafting of easement provisions, property owners and preservation organizations are able to precisely negotiate an agreement that serves to permanently protect a cultural resource, and the physical context for interpreting its story for generations to come.[20]

An appreciation of historic architecture or neighborhoods is, of course, not uniformly shared. Many would question the wisdom of expending so much energy and capital to preserve an old building. What poet and historian George Zabriskie wrote nearly fifty years ago remains true today:

> There are still millions of Americans who believe as a matter of principle that anything new is better by the sole virtue of novelty. Their attitude is attended by the equally naïve belief that the passage of time brings progress, which is a continuous amelioration of the human condition: therefore, all change is for the better. Such people are not easily persuaded that any existing structure is better than a new parking lot, although they may be persuaded that a new structure is better than an old parking lot.[21]

After all, some would ask, why should anyone care about a cramped old house with plaster walls and sagging eaves? Surely it would be more efficient, more affordable, and simply more intelligent to tear down the old and build anew at the end of a cul-de-sac in a neighborhood with a good school system and room for a four-car garage. Why all the fuss?

There are innumerable responses to such questions, some helpful and some rather less so. In the mid-1960s, however, one could turn for guidance to perhaps the most influential study yet produced on the state of American historic preservation, the U.S.

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[20] Meder-Montgomery, 5.

[21] George Zabriskie et al., *With Heritage So Rich: A Report* (New York: Random House, 1966), 62.

Conference of Mayors Special Committee on Historic Preservation Report. [22] Released in 1965 and published the following year as *With Heritage So Rich*, the report set the stage for implementation of the National Historic Preservation Act of 1966 by envisioning a robust national preservation movement that would value not only national landmarks but also architectural design and the preservation of entire historic districts.[23] From the first chapter of the published report comes an eloquent response from Pulitzer Prize winning biographer Sidney Hyman to those who would question the wisdom of preservation:

> A nation can be a victim of amnesia. It can lose the memories of what it was, and thereby lose the sense of what it is or wants to be. It can say it is being 'progressive' when it rips up the tissues which visibly bind one strand of history to the next. It can say it is only getting rid of 'junk' in order to make room for the modern. What it often does instead, once it has lost the graphic source of its memories, is to break the perpetual partnership that makes for orderly growth in the life of society.[24]

Regardless of the cause, whether the result of apathy, lack of resources, or desire for commercial gain, the destruction of our nation's cultural resources is irrevocable. Structures and artifacts do not simply will themselves into existence; they are the product and measure of human endeavor – in all its striving, in all its beauty, and in all its loss. The home and the lives lived within it are, in a sense, humanity's shadows made manifest in wood, stone, silk, or linen. And when our tactile connection to the past is lost, it is gone forever – along with stories left untold and lessons left unlearned. Even so, not everyone is convinced by what can be perceived as mere emotional or aesthetic appeals, particularly as the costs of rehabilitation rise or an historic building is preventing some

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[22] Gail Winson, *Historic Preservation Law: An Annotated Survey of Sources and Literature* (Littleton, CO: F.B. Rothman & Co., 1999), 3.
[23] Ibid.
[24] Sidney Hyman et al., *With Heritage So Rich: A Report* (New York: Random House, 1966), 1.

profitable new development from proceeding. Such concerns are valid, and unless one has access to an endless font of money, economic considerations will shape the arc of most preservation projects.

Fortunately, there are plenty of solid economic arguments to be made for the value of historic preservation, along with legal precedent upholding aesthetic regulation. In a unanimous Supreme Court decision in *Berman v. Parker* (1954), the Court upheld the taking of private property for the purpose of beautification and redevelopment, thereby establishing the principle that aesthetics alone could justify government regulation. Justice William O. Douglas, in writing the majority opinion for the Court, opined that, "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[25] Justice Douglas also had strong words on the subject of housing in that decision:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[26]

Despite the challenges, preservationists have made significant progress in expanding the appreciation of those "places and objects of value in our individual communities and in the nation as a whole," for which the Conference of U.S. Mayors so persuasively advocated in 1965.[27] Beyond mere admiration, preservationists have continually sought new and better ways to realize their goals. By demonstrating the positive link between

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[25] Berman v. Parker, 348 U.S. 26 (1954).
[26] Ibid.
[27] Hyman, xvi.

historic preservation and economic development, for example, they persuaded lawmakers at every level of government to support important preservation objectives through a range of policies and laws.

Yet before delving into their legislative achievements, it should prove useful to look back at their legislative antecedents. First, a definition – what exactly is "preservation law?" Land use attorney Christopher J. Duerksen defines it as:

> a collage, cutting across and drawing from several other established areas of law: land use and zoning, real property, taxation, local government, constitutional, and administrative. In many ways preservation law, particularly at the local level, is closest to land use and zoning; the rules are very similar."[28]

Preservation law, then, is wide and encompassing but also tight in application. Duerksen further states that preservation law "has its own distinctive provisions – pertinent state and federal administrative procedures, an indigenous regulatory scheme, and special tax laws."[29] These idiosyncrasies are particularly apparent when it comes to working with preservation easements. A 2011 article on easements in *Practical Tax Strategies* provides some sense of the intricacies involved, with the authors cautioning that "The donor of a façade easement should be aware of the detailed requirements related to a qualified appraisal and qualified appraiser set forth in Section 170(f)(11) and Regs. 1.170A-13(c)(3) and (5)."[30]

Ann Pamela Cunningham was certainly not weighing the merits of architectural easements, tax incentives, and property evaluation when she founded the Mount Vernon

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[28] Christopher J. Duerksen, David Bonderman, Stephen N. Dennis, and National Trust for Historic Preservation in the United States, *A Handbook on Historic Preservation Law* (Washington, D.C.: Conservation Foundation: National Center for Preservation Law, 1983), xxi.

[29] Ibid.

[30] Craig J. Langstraat and Akela Young, "Where Is the Ease in Valuing a Façade Easement?" *Practical Tax Strategies* 87, no. 1 (2011): 23.

Ladies' Association in 1853, but her actions signaled the start of the modern historic preservation movement in America.[31] While the saving of George Washington's home marked an auspicious beginning, the movement developed in a fitful and circuitous manner over the next half century. Ardent believers of various stripes filled the ranks, from members of social organizations with benevolent motives to those with powerful financial interests bent on exploiting cultural treasures at the behest of museum curators. The passage of the American Antiquities Act of 1906, however, ushered in a series of important twentieth century preservation-related legislative protections and led to the consistent standards in place today. Significantly, the Antiquities Act gave the president the authority to designate "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal lands as national monuments.[32] It also provided for criminal penalties for the unauthorized use of such lands by artifact hunters and other collectors.

Even more consequential was the creation of the National Park Service (NPS) in 1916. As a new federal bureau within the Department of the Interior, the NPS gained control of the "thirty-five national parks and monuments then managed by the Department and those yet to be established."[33] An Executive Order signed by President Franklin Roosevelt in 1933 transferred fifty-six national monuments and military sites from the Forest Service and the War Department to the National Park Service, further broadening the Park Service's responsibilities. These new laws and directives not only

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[31] Barbara J. Howe, "Women in Historic Preservation: The Legacy of Ann Pamela Cunningham," *The Public Historian* 12, no. 1 (Winter 1990): 33.

[32] American Antiquities Act of 1906, 16 USC §§ 431-433.

[33] Harpers Ferry Center, *The National Parks: Index 2009-2011* (Washington, DC: Superintendent of Documents, U.S. Government Printing Office, 2009), 6. http://www.nps.gov/history/history /online_books/nps/index2009_11.pdf.

contributed significantly to the development of today's national system of parks but also the increasing professionalization of historic preservation practice.

President Roosevelt meted out further change with his authorization of the Historic American Buildings Survey (HABS) in 1934. HABS put scores of architects and historians back to work during the Great Depression and remains an invaluable resource to historic preservationists. Another consequential piece of New Deal legislation was the Historic Sites Act, which created the National Historic Landmarks program in 1935. With this Act the preservation of “historic sites, buildings, and objects of national significance” was declared as national policy for the first time.[34] The end of World War II saw renewed interest in preservation efforts, as the chartering of the nonprofit National Trust for Historic Preservation (NTHP) by Congress in 1949 demonstrated.[35] With President Truman’s signature America gained, as the NTHP described itself, a “national organization to provide support and encouragement for grassroots preservation efforts.”[36]

Yet with all of these new protections something more was needed, something more organic and egalitarian. From his perspective in the 1970s, former NTHP president James Biddle observed:

> From the 1860s until the 1950s, the focus of historic preservation was necessarily placed on saving a relative handful of historic homes and sites. Comparatively few individuals accomplished stunning victories against tremendous odds to preserve Mount Vernon, Monticello, Jamestown Island,

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[34] Historic Sites Act of 1935, 16 U.S.C. §§ 461-467.

[35] 16 U.S.C. §§ 468-468d (2012). A fuller citation for this formerly, federally funded organization is: Act of October 26, 1949, Pub. L. No. 81-408, 63 Stat. 927, as amended by Act of July 28, 1953, Pub. L. No. 83-160, 67 Stat. 228; Act of June 29, 1960, Pub. L. No. 86-533, 74 Stat. 248.

[36] National Trust for Historic Preservation, *A Brief History of the National Trust* (Washington, DC: National Trust for Historic Preservation, 2012). http://www.preservationnation.org/who-we-are/history.html.

> Andrew Jackson's 'Hermitage,' and other landmarks of our heritage. They succeeded many times over."[37]

Indeed they did, but theirs was a focus on historic landmarks, an important-names-and-places style of preservation. Yet the degree of affluence or notoriety of a building's former owner would not remain the central determinant of historic worth forever. First, however, something dramatic needed to happen.

The preservation movement might have rolled along incrementally for years, building steady support in dribs and drabs, were not for a signature, mobilizing event in American preservation – the destruction of the grand, Beaux-Arts style Pennsylvania Station in New York City in 1963-64. A *New York Times* editorial captured the sentiment of many when it decried the train station's demolition:

> Monumental problems as big as the city itself stood in the way of preservation; but it is the shame of New York, of its financial and cultural communities, its politicians, philanthropists and planners, and of the public as well, that no serious effort was made. A rich and powerful city, noted for its resources of brains, imagination and money, could not rise to the occasion. The final indictment is of the values of our society. … And we will probably be judged not by the monuments we build but by those we have destroyed.[38]

Here was a monument to the people, or at least to the tumult of the passenger class, with its "soaring steel skeletal structure modeled after the stone vaults of the Baths of Caracalla."[39] The difference between the original Penn Station and its modernist, subterranean replacement was the subject of Yale architectural historian Vincent J. Scully's lament, "One entered the city like a god; one scuttles in now like a rat." Mr. Scully was not alone in his assessment.

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[37] James Biddle, "Historic Preservation: The Citizen's Quiet Revolution," *Connecticut Law Review* 8, no. 2 (1976): 202.

[38] Editorial, "Farewell to Penn Station," *New York Times*, Oct 30, 1963.

[39] Jane Jacobs, foreword to *James Marston Fitch: Selected Writings 1933-1997*, by James Marston Fitch and Martica Sawin, (New York: W.W. Norton & Co., 2006), 21.

Fortunately, the loss of Penn Station was not wholly in vain. Public outcry led to the formation of the New York City Landmarks Preservation Commission in 1965, one of a number of preservation groups to spring up in the 1960s. As was earlier noted, passage of the National Historic Preservation Act of 1966 appreciably altered the landscape of historic preservation practice. The nation would doubtless be a very different looking place today were it not for the hard work of an engaged citizenry who pushed for preservation legislation with substantive protections. Things turned out very differently the next time another iconic New York City train station was threatened. As architect Steven W. Semes explains:

> The 1978 Supreme Court decision upholding the City of New York's preservation law in the Grand Central Terminal case not only preserved that beloved landmark, but placed the regulation of historic properties on sound legal footing nationwide. Gradually, preservation became part of the American cultural mind-set and challenged the long-standing and deep-seated predisposition in favor of novelty and change."[40]

More than the continued existence of Grand Central Terminal was at stake in this case. Had the U.S. Supreme Court struck down New York City's Landmark Preservation Law as unconstitutional, municipalities across the nation would have been effectively prevented from protecting historic landmarks and neighborhoods. Instead, the Court's decision inspired government leaders in cities and towns across the nation to adopt their own preservation ordinances.[41]

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[40] Steven W. Semes and Institute of Classical Architecture and Classical America, *The Future of the Past: A Conservation Ethic for Architecture, Urbanism, and Historic Preservation* (New York: W.W. Norton & Co., 2009), 132.

[41] Julia H. Miller and National Trust for Historic Preservation in the United States, *A Layperson's Guide to Historic Preservation Law: A Survey of Federal, State, and Local Laws Governing Historic Resource Protection* (Washington, D.C.: National Trust for Historic Preservation, 2008) 20.

In its decision, the Supreme Court held that the Landmark Preservation Law had not "taken" private property without just compensation in violation of the Fifth and Fourteenth Amendments, nor arbitrarily deprived the Penn Central Transportation Company of their property without due process of law in violation of the Fourteenth Amendment. In writing for the majority in this landmark decision, Chief Justice William J. Brennan opined that:

> Structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.[42]

Not to paint too rosy a picture, Justice William Rehnquist questioned the basic fairness of imposing significant financial burdens on private businesses, arguing in his written dissent whether "the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties."[43]

Anything worth fighting for will find its contours shaped and shaped again by beliefs and experience. Historic preservation proves no exception. One new approach that had inspired many preservationists in the 1960s stressed the "sense of place that older structures lend to a community."[44] This conceptualization marked the third major philosophical shift in preservation thought since the founding of the Mount Vernon Ladies' Association and the nineteenth century approach their organization typified – the

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[42] *Penn Central Transportation Co. v. City of New York*, 438 U.S 104 (1978).
[43] Ibid.
[44] Carol M. Rose, "Preservation and Community: New Directions in the Law of Historic Preservation," *Stanford Law Review* 33, no. 3 (1981): 480.

first being a strong predilection for preserving those places associated with celebrated persons and events. The second conceptual shift, which occurred around the turn of the twentieth century, prized great architecture and artistic considerations as being the most deserving of preservation efforts. [45] In a way, the cannibalization of Pennsylvania Station for its "air rights"[46] signaled the start of something new by signaling the end of something old. The old Penn Station was doubtless an architectural treasure, but it just as surely provided particularity – that sense of place so essential to discerning the soul of a city and the citizens who people it.

The 1960s were a time of upheaval. Little that existed at the beginning of the decade would not be reevaluated and re-imagined by its end, including historic preservation philosophy and practice. A particularly influential book, Jane Jacobs's *The Death and Life of Great American Cities*,[47] first published in 1961, inspired preservationists to think more holistically about the urban environment. Jacobs was fervently opposed to urban renewal projects and the damage it inflicted on a city's livability. She championed a pedestrian-centered urban environment, one that valued social interactions and the human scale of mixed-use buildings.[48]

If Jacobs's credo sounds familiar it is doubtless a tribute to her lasting influence on urban planning and the notion of livable cities. Jane Jacobs recognized the qualities of good urban design at a time when it had largely fallen from favor. Surprising as it may

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[45] Ibid., 479.

[46] L.B. Diehl, *The Late, Great Pennsylvania Station* (New York: American Heritage Press, 1985), 144.

[47] Jane Jacobs, *The Death and Life of Great American Cities* (New York: Random House, 1961).

[48] Peter Dreier, "Jane Jacobs' Radical Legacy," *Shelterforce Online* no. 146 (Summer 2006). http://www.capitoltrust.org/newsissues/.

seem today, her ethos contrasted sharply with the prevailing wisdom of the modernist urban planners of the day and raised the hackles of more than a few detractors. Indeed, in a *Yale Law Journal* review of her book from 1962 she is dismissively referred to as "angry" and a "screeching critic."[49] Yet so many preservationists have since heeded her call for action that her ideas, which had once been described as radical, have become commonplace.

Maintaining the integrity of neighborhoods has seldom been a simple matter, neither has improving them. There is certainly far more to historic preservation practice than the physical rehabilitation of structures aided by preservation tax credits and capped with well-crafted zoning regulations. Even committed preservationists can find themselves at odds with each other over methods and objectives. Rehabilitating a block of historic homes in a city's urban core is not the same as developing a new subdivision on a once-bucolic pasture. Serious issues of community identity come into play when neighborhoods are "revitalized." The question to consider, and consider very seriously, is…revitalized for whom?

In an article published in *Law and Contemporary Problems* in 1971, Michael deHaven Newsom posed the question, "Why should black people be so concerned with historic preservation?"[50] If one were to put a face on gentrification in all its complexity it would have to be the Georgetown district of Washington, D.C. It is today one of the most expensive enclaves in the country, its cobblestone streets lined with meticulously restored Federal-style homes populated largely by an elite and predominantly white class of

[49] Arthur T. Row, "Review: The Death and Life of Great American Cities," *The Yale Law Journal* 71, no. 8 (1962): 1597.

[50] Michael deHaven Newsom, "Blacks and Historic Preservation," *Law and Contemporary Problems* 36, no. 3 (1971): 423.

Washington power players. Newsom reminds readers that in 1930 blacks accounted for forty percent of the Georgetown population, but by 1950 they had been driven away from their homes by "historic preservationists in league with real estate developers." Newsom, though writing some forty years ago, put forth an argument that has yet to be satisfactorily resolved – the crux of which is his objection to what he called the Georgetown-syndrome:

> It is not clear that it properly qualifies as 'historic preservation' at all. The true history of Georgetown—until the preservationists' interest in it—was an integrated history. The black elements in that history have now been destroyed, resulting in a perversion and distortion of history.[51]

Forty years later, scholars continue to debate. Andrew Hurley argues for the importance of providing a meaningful, grass-roots interpretation of revitalized urban communities. Without it, Hurley argues, historic buildings "lose their capacity to anchor people in the flow of time and to expose relationships between the past and present. Only when associated with stories and imbued with meaning do yesterday's material remains acquire the capacity to articulate shared values and visions."[52]

At the heart of these concerns are old buildings (enough of them to amass a sense of place) and the community of people who call those old buildings home. Without the structures that "visibly bind one strand of history to the next," as Sidney Hyman phrased it, does history resonate at all? [53] The preservation of the built environment is on the one hand the task of mortar and wood and paint and nails; that is the simple part. With the other part lay nuance and complexity in the form of historic interpretation, community

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[51] Ibid., 424.

[52] Andrew Hurley, *Beyond Preservation: Using Public History to Revitalize Inner Cities* (Philadelphia: Temple University Press, 2010), ix-x.

[53] Sidney Hyman et al., 1.

cohesion, and a set of laws. One invests, renovates, and stakes a claim in a community. Historic zoning ensures some measure of physical continuity, but not all historic neighborhoods are so protected. What safeguards do exist can sometimes be overcome.

One of the many reasons historic preservationists lobbied Congress to include tax incentives for façade easement donations in the Tax Reform Act of 1976 was to encourage a house-by-house adoption of easement protections within entire historic neighborhoods. As with any endeavor, this approach had its limits. For example, preservation easements can significantly reduce the value of an easement-encumbered property. Lower property assessments can reduce property tax revenues for municipalities tasked with providing essential services. Historic preservation easements can also prove problematic should one decide to sell, can be somewhat complicated to obtain, and must be donated to a charitable preservation organization or public agency tasked with enforcing the legally binding terms of the easement.

Conversely, preservation easements have been utilized in such numbers as to have been an effective tool in helping to restore historic urban neighborhoods, such as the well-established Georgetown historic district in Washington D.C., the transitioning neighborhood of Capitol Hill in Denver, or any number of other historic districts in which architecturally or historically significant homes have been so protected. Beyond aesthetics, one of the more quantifiable upshots of historic preservation is its monetary impact – in that as neighborhoods become increasingly desirable, economic opportunities for nearby business and nearby residences generally increase as well.

Yet despite their proven value, tax incentives for easement donations have been the subject of some criticism since their inception, primarily in regards to the value of the

charitable contribution deduction. Indeed, the Internal Revenue Service (IRS) itself has not always been on board with appraisal evaluations. As recently as 2011 members of Congress accused the IRS of "engaging in policies and practices that undermine the existing law related to the charitable tax deduction for the donation of preservation easements on certified historic structures."[54] Interestingly, the IRS first recognized a charitable contribution tax deduction for the value of an easement donation as early as 1964. In 1976 Congress authorized easement donation deductions from income, estate, or gift tax liability, changes that were made permanent in 1980, and in 1986 the IRS promulgated its first set of easement regulations.[55] This decades-long history belies a recent record of oft-contentious debate involving suspected overvaluations by appraisers, unscrupulous preservation groups, and questions of duplication of historic protections, such as whether a house in a strictly regulated historic district truly incurs a reduction in value after an easement is imposed.

That easement donations can benefit the larger good is a concept that is not always enthusiastically embraced in this country. This holds true to a lesser extent for the landed cousin of the preservation easement, the conservation easement. The notion of donating an interest or right in one's property, one that adds up to something less than full ownership yet carries with it permanently enforceable obligations in the name of the public good, is a concept some Americans have found troubling. Put another way, easement agreements bump up against a couple of very un-American notions: "public

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[54] 3rd District Congressman Michael R. Turner, Ohio, to Commissioner Douglas H. Shulman, Internal Revenue Service, April 8, 2011.

[55] Elizabeth Watson and Stefan Nagel, updated by R. Bradford, T. Mayes, and J. Miller, *Establishing and Operating an Easement Program* (Washington, D.C.: National Trust for Historic Preservation, 2007), 2.

ownership of significant property on one extreme and government land-use regulation on the other."[56] Charles C. Goetsch, writing in the *Connecticut Law Review* in 1976, had this to say:

> When first invented, the conservation easement was an ingenious device with little to recommend it except a laudable purpose and a dubious claim of descendancy from the common law of easements, restrictive covenants, and equitable servitudes. Adoption of the device, and others like it, by the federal government and well over half the states has removed this taint of illegitimacy.[57]

The "taint of illegitimacy," as Goetsch phrased it, has not disappeared altogether. For example, critics have questioned the appropriateness of directing federal tax incentives to affluent homeowners who elect to preserve the façades of their historic townhouses through easements, particularly when so many of those properties are already subject to stringent historic zoning regulations.[58] Appropriate or not, Congress has repeatedly shown its preference for supporting historic preservation efforts in recent decades by passing legislation that encourages and facilitates the preservation of historically significant properties. Indeed, a key recommendation of the U.S. Conference of Mayors Special Committee on Historic Preservation Report from 1965 centered on tax policy, with the Committee finding that the IRS should clarify by regulation or rule the status of:

> historic preservation as a public, exempt charitable activity, deductibility of gifts of historic easements or restrictive covenants to governmental units or exempt organizations engaged in preservation, and permissibility of revenue-producing adaptive or incidental uses.[59]

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[56] Land Trust Exchange and National Trust for Historic Preservation in the United States, *Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements* (Washington, D.C.: Land Trust Alliance: National Trust for Historic Preservation, 1989), 2-3.

[57] Charles C. Goetsch, "Conservation Restrictions: A Survey," *Connecticut Law Review* 8, no. 2 (1976): 409.

[58] Joe Stephens, "For Owners of Upscale Homes, Loophole Pays: Pledging to Retain the Façade Affords a Charitable Contribution," *The Washington Post*, December 12, 2004.

[59] United States Conference of Mayors, Special Committee on Historic Preservation, *With Heritage So Rich: A Report* (New York: Random House, 1966), 209.

The preference for providing tax incentives for easement donations was clearly articulated within that influential report, which culminated in the passage of the National Historic Preservation Act in 1966. While the deductions were not fully integrated into the tax code until the enactment of the Tax Reform Act of 1976[60] and Tax Treatment Act of 1980,[61] Congress's intent was clear, as was explained in a report prepared by staff of the Joint Committee on Taxation in 1976:

> Congress believes that the rehabilitation and preservation of historic structures and neighborhoods is an important national goal. Congress believes that the achievement of this goal is largely dependent upon whether private funds can be enlisted in the preservation movement. Tax considerations have an important bearing on whether private interests are willing to maintain and rehabilitate historic structures rather than allow them to deteriorate or replace them with new buildings.[62]

In claiming historic preservation as a national goal Congress made clear that private investment would be essential to achieving that goal. While attracting private capital to historic preservation projects may often prove difficult, investors are frequently swayed by the addition of financial enticements. Tax incentives, for instance, can push investors toward the rehabilitation and adaptive reuse of historic structures in situations where they might otherwise choose to scrape and build anew. Historic preservation easements are yet another example of how a public enticement can impact private expenditure. Easements also fill a void where local historic zoning ordinances may not be present or stringent enough to withstand political challenges or development pressures. Significantly, preservation easements provide charitable organizations or public agencies with a means to protect historic structures against the ravages of neglect, demolition, or incompatible

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[60] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1919 (1976).

[61] Tax Treatment Act of 1980, Pub. L. No. 96-541, 94 Stat. 3204 (1980).

[62] Staff of Joint Committee on Taxation, 94th Congress, *General Explanation of the Tax Reform Act of 1976* (Washington, D.C.: U.S. Government Printing Office, 1976), 643.

alteration without incurring the substantial costs associated with purchasing a property outright. Tax incentives also sweeten the pot for homeowners considering encumbering their property with permanent easement restrictions.

CHAPTER TWO

TECHNICAL CHALLENGES

In a letter to Douglas H. Shulman, Commissioner of the Internal Revenue Service (IRS), dated April 8, 2011, U.S. Congressmen Michael R. Turner and Russ Carnahan, co-chairs of the Congressional Historic Preservation Caucus, expressed their "serious concern" that the IRS was "engaging in policies and practices that undermine existing law related to the charitable tax deduction for the donation of preservation easements on certified historic structures." After noting that Congress had approved a charitable deduction for preservation easement donations in 1976, added strengthened provisions in 2006, and "enhanced the availability of this tax incentive" in 2010, Turner and Carnahan asserted that not only did the IRS seem "out of step with Congressional action with respect to protecting historically significant buildings," but that they also "intensively audited all charitable donations of this kind and [were] undervaluing donor contributions." Moreover, they claimed, taxpayers were reporting that the IRS was utilizing a "variety of hyper-technical challenges to easement donations to invalidate the deduction altogether," thereby avoiding the issue of easement valuations that had been in place for decades. The congressmen raised a number of other related concerns. Chief among them was that the IRS was not abiding by the 2009 IRS Advisory Council (IRSAC) Report,[1] which provided six recommendations for resolving the matters in

[1] The Internal Revenue Service Advisory Council is a 30-member group (the number varies) comprised of IRS officials and members of the public. Representing a broad range of interests and expertise, they are tasked with developing suggestions on how to improve IRS operations through policies, programs, and procedures.

dispute. Significantly, the congressmen called on the IRS to institute an immediate moratorium of enforcement actions related to the program.[2]

IRS Deputy Commissioner for Services and Enforcement Steven T. Miller, in a written response dated May 20, 2011, assured Congressman Turner that the IRS recognized the importance of conservation easements in preserving both land and historic property. He clarified the Service's position by noting that:

> In administering the tax law provisions related to easements, our goal is to maintain a balanced program that facilitates the delivery of these important economic incentives while ensuring that we only allow the benefits to taxpayers legitimately entitled to them. [3]

Miller went on to state that the IRSAC recommendations referenced in the congressmen's letter were not accepted by the IRS for "legal, policy, and practical reasons that we would be happy to discuss further." He ended his letter with an affirmation that the IRS would continue to administer Section 170(h) "in a fair and impartial manner so that taxpayers who meet the statutory requirements can deduct their conservation contributions."[4]

The IRS exchange with Congress reflected a shifting political landscape for easements. Since 2008, taxpayers from New York City to Chicago, New Orleans to Boston, and Ohio to Alabama had been before the U.S. Tax Court contesting the IRS's disallowance of their charitable contributions for easement donations. A Washington, D.C., easement-holding organization described the recent upsurge in actions by observing that "the IRS initially claimed that easements had no value, and later added technical challenges, claiming, for example, that the donor's appraisals were not 'qualified' or that

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[2] 3rd District Congressman Michael R. Turner, Ohio, to Commissioner Douglas H. Shulman, Internal Revenue Service, April 8, 2011.

[3] IRS Deputy Commissioner for Services and Enforcement Steven T. Miller, to 3rd District Congressman Michael R. Turner, Ohio, May 20, 2011.

[4] Ibid.

certain easement terms were not compliant under the regulations."[5] While several cases have yet to be resolved, the summer of 2012 saw the U.S. Court of Appeals rule in favor of easement donors in *Scheidelman v. Commissioner of Internal Revenue* and *Kaufman v. Shulman, Commissioner of Internal Revenue*.[6/7]

In light of these developments, an obvious question arises: How did such a seemingly straightforward tool for historic preservation become so controversial in application? With so much focus on federal tax incentives and the criteria for obtaining them being dependent upon National Register listing as a "certified historic structure," it is important to remember that preservation easements are state instruments and should not be considered as part of a monolithic, national preservation strategy. While federal tax benefits are available to qualified easement donors, each state must authorize the creation of preservation and conservation easements through enactment of enabling legislation. In other words, the federal system is organized in such a way that the legal framework governing much of the activity of the typical historic property owner or preservation organization is derived from the actions of state legislatures and city councils and not the federal government.

Before delving into such issues as the 2009 IRSAC Report or what Commissioner Miller had in mind when he vowed to administer Section 170(h) in a "fair and impartial manner," there is yet one overriding factor affecting preservation activity regardless of

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[5] Capitol Historic Trust, *Capitol Historic Trust - Tax Court Cases*, (Washington, D.C., 2009). http://www.capitoltrust.org/newsissues/.

[6] *Scheidelman v. Commissioner of Internal Revenue*, 682 F.3d 189, 2012 U.S. App. LEXIS 12272, (2d Cir. 2012).

[7] *Kaufman v. Commissioner of Internal Revenue*, 687 F.3d 21, 2012 U.S. App. LEXIS 14858, (1st Cir. 2012).

jurisdiction, and that is money – or in the case of governments, the power to tax…or not to tax. Accordingly, taxation can also be used to influence behavior. For the property owner deciding whether to take the financial plunge into an historic preservation project, economic incentives can greatly affect the decision-making process.

For example, historic rehabilitation tax credits, which were first enacted at the federal level with the Tax Reform Act of 1976 and expanded in 1981, have been a very effective enticement for developers interested in the rehabilitation of income-producing historic structures. Administered jointly by the National Park Service and the State Historic Preservation Offices, the Historic Preservation Tax Incentives Program has "generated billions of dollars in historic preservation activity since its inception in 1976," according to the IRS.[8] In summarizing the program's success the Service notes that "The completed projects have brought renewed life to deteriorated business and residential districts, created new jobs and new housing units, increased local and state revenues, and helped ensure the long-term preservation of irreplaceable cultural resources."[9]

In addition to federal tax incentives are the many forms of state-level tax relief. A report by the National Trust for Historic Preservation cites six basic categories of state tax incentives for owners of historic buildings: "exemption, credit or abatement for rehabilitation, special assessment for property tax, income tax deductions, sales tax relief, and tax levies."[10] Not all states go about implementing the various tax incentives in quite the same way. Neither are they equally effective. Perhaps some insight can be gained by

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[8] Internal Revenue Service, *Rehabilitation Tax Credit: Market Segment Specialization Program*, (Washington, D.C., 2002).

[9] Ibid.

[10] Margaret Davis and National Trust for Historic Preservation in the United States, *State Tax Incentives for Historic Preservation*, (Washington, D.C.: National Trust for Historic Preservation, 1985), 2.

narrowing the focus to state or regional differences in the way preservation easements are applied. It may be that the underlying cause of the IRS's increased scrutiny of preservation easements lay in the difficulty of reconciling a fifty-state easement approach to federal tax code. As recent court decisions involving the valuation of easement donations indicate, the line between interpretation and deception can be slack or taut, depending on who is holding the ends.

One measure aimed at resolving the complexity of multiple state laws is the Uniform Conservation Easement Act, recommended by the Uniform Law Commission (ULC). In 1892 state governments established the ULC as a means to improve the consistency of state laws by drafting uniform legislation. The ULC has drafted some three hundred uniform acts, including the Uniform Conservation Easement Act (UCEA), which was introduced in 1981 and amended in 2007.[11] A ULC summary of the Act notes that the great interest in conservation and preservation easements has its roots in common law, and:

> that interest is exhibited in legislation, judicial action, and agency activities from state to state. The acquisition of interests in land conforms, also, to the typical American resistance to imposed land use controls, zoning restrictions and the exercise of eminent domain. Acquisition of interests depends upon voluntary acts of landowners, who may give or sell interests in land for specific benefits to their own self-interest. These benefits include the receipt of a fair prize and/or tax advantages, depending on the jurisdiction.[12]

The drafters of the UCEA were particularly concerned with crafting a uniform act that would "remove outmoded common law defenses that could impede the use of

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[11] National Conference of Commissioners on Uniform State Laws, *About the ULC*, (Chicago, 2013). http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC.

[12] National Conference of Commissioners on Uniform State Laws, *Conservation Easement Act Summary*, (Chicago, 2013). http://www.uniformlaws.org/ActSummary.aspx?title=Conservation%20Easement%20Act.

easements for conservation or preservation ends."[13] Without such legal provisions easement agreements would remain perpetually vulnerable to challenges and a level of uncertainty that would not well serve the interests of historic preservationists or property owners. Approved by the American Bar Association, the Act has been codified in twenty-one states, the District of Columbia, and the U.S. Virgin Islands.[14]

It is interesting to note that out of the twenty principal cases involving tax deductions for historic preservation easement donations heard before the U.S. Tax Court, District Court, or Court of Appeals since 2008, very few came from states that have adopted the Uniform Conservation Easement Act. With the exception of one case in Alabama and three from the District of Columbia, most have come from states that have not adopted the UCEA: twelve in New York and one case each in Illinois, Louisiana, Massachusetts, and Maryland. Whether it is because of a greater stock of historic buildings, inconsistent state statutes or local historic zoning regulations, questionable easement donation valuations, or something altogether different only serves to amplify the point that some property owners have faced more challenges than others in obtaining a charitable contribution deduction from the IRS for their preservation easement donation.

Arbitrariness was not the intent of Congress when they established a legal framework for the preservation of historic property through federal tax incentives. Yet as the IRS began to audit and undervalue charitable donations of easements in the early 2000s they signaled to preservation-minded taxpayers that they had better be prepared to

[13] Uniform Conservation Easement Act, *Commissioners' Prefatory Comments*, National Conference of Commissioners on Uniform State Laws, (Chicago, 2007).

[14] National Conference of Commissioners on Uniform State Laws, *Conservation Easement Act Summary*, (Chicago, 2013). http://www.uniformlaws.org/ActSummary.aspx?title=Conservation%20 Easement%20Act.

defend their tax-deductable contributions every step of the way. With the threat of indiscriminate tax disallowances and arbitrary enforcement actions laid on the table, historic preservations began to reevaluate their options, with predictable results. Senator John Kerry expressed his concerns over the IRS's disallowances of tax deductions for easements in a letter to IRS Commissioner Douglas Shulman dated October 28, 2010. After noting that the Pension Protection Act of 2006 included a provision that tightened the standards for preservation easements while leaving the deduction intact, Kerry wrote that "determining the fair market value of a preservation easement is a challenge, but this deduction is a helpful tool for preserving historic structures across the country. The current situation has resulted in a chilling effect on historic easements."[15]

The aggressive scrutiny of easement donations by the IRS occurred in the wake of a series of articles published in the *Washington Post* in late 2004 that revealed what appeared to be an unwarranted tax bonanza for affluent homeowners and unscrupulous preservation groups. In one article entitled, "For Owners of Upscale Homes, Loophole Pays: Pledging to Retain the Facade Affords a Charitable Deduction," Joe Stephens wrote:

> In almost every instance, easement donors in Washington write off about 11 percent of the value of their homes. That means owners of a $1.5 million mansion claim federal tax breaks of $165,000 or more. Such tax deductions are increasingly common although the District already bars unapproved and historically inaccurate changes in the facades of homes in the city's many historic districts. As a result, easement donors largely are agreeing not to change something that they cannot change anyway.[16]

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[15] Senator John Kerry, Massachusetts, to Commissioner Douglas H. Shulman, Internal Revenue Service, October 28, 2010.

[16] Joe Stephens, "For Owners of Upscale Homes, Loophole Pays: Pledging to Retain the Facade Affords a Charitable Contribution," *The Washington Post*, December 12, 2004.

Stephens referenced a number of prominent Washingtonians who had made easement donations, including politicians, writers, and filmmakers who, he asserted, were courted by "for-profit 'facilitators' – businesses that market the program and process the paperwork for homeowners, making the procedure quick and painless."[17] John D. Echeverria, director of the Georgetown Environmental Law and Policy Institute, spoke a bit more candidly in the article, stating, "It really is money from the taxpayer for nothing. …People are absolutely delighted – and astounded – that the federal government would send them $50,000 and more for doing nothing.'"[18]

In response to the week-long series of *Washington Post* articles, Senate Finance Committee Chairman Charles E. Grassley and fellow committee member Max Baucus announced their intent to introduce legislation that would fine "property owners, promoters and appraisers involved in donating facade easements that lead to undue tax deductions."[19] Richard Moe, then president of the National Trust for Historic Preservation, voiced his support for reforming the preservation easement program, contending in a *Washington Post* interview that "Aggressive easement-promoting organizations have given the program a bad image. ...We want to correct the abuse. I strongly support increased fines and penalties."[20] With public pressure mounting, easement contributions must have seemed ripe for increased scrutiny. Indeed, in a 2005 congressional hearing to review the tax deduction for façade easements, IRS Deputy Commissioner Steven T. Miller testified that:

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[17] Ibid.

[18] Ibid.

[19] Joe Stephens, "Senators Vow to End Tax Break on Easements: Wealthy Homeowners Have Taken Advantage," *The Washington Post*, December 18, 2004.

[20] Ibid.

> While we are still early in our enforcement work, let me say that we are concerned that some homeowners are being misled by charities, promoters, and appraisers into believing that a donation of a façade easement entitles them to a deduction in excess of what we believe is appropriate. I want to make it clear to the Subcommittee and to those in the easement community that those individuals who take improper façade deductions will hear from us.[21]

In that same hearing, Steven McClain, Senior Vice President of National Architectural Trust, in response to the question of whether an easement granted on property covered by local ordinances and commissions should qualify as a charitable deduction donation, testified that "the value of conservation easements granted on such properties was thoroughly considered six times by U.S. Tax Court. In each case, the court ruled that easements generate a loss of value through a reduction in the property owners' bundle of rights that constitutes property ownership in this country."[22]

The tax deduction matters discussed in that 2005 congressional hearing have continued to be litigated by the IRS, though the IRS has often come up short. For example, on June 15, 2012, the U.S. Court of Appeals, 2nd Circuit, vacated the Tax Court decision in *Scheidelman v. Commissioner of Internal Revenue* disallowing easement donation deductions.[23] On July 19, 2012, the U.S. Court of Appeals, 1st Circuit, overturned a similar opinion in *Kaufman v. Shulman, Commissioner of Internal Revenue*,

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[21] *To Review the Tax Deduction for Façade Easements: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means*, 109th Cong. (June 23, 2005) (statement of Steven T. Miller, Commissioner of Tax-Exempt and Government Entities Division, Internal Revenue Service).

[22] Ibid. (statement of Steven McClain, Director of National Architectural Trust and President of Springfield Management Services).

[23] Scheidelman v. Commissioner of Internal Revenue, 682 F.3d 189, 2012 U.S. App. LEXIS 12272, (2d Cir. 2012).

after the Tax Court had disallowed an easement donation deduction for failing to guarantee a perpetual gift.[24]

The courts have largely rejected the IRS's contention that easement donors were playing loose with their valuations have largely been rejected by the courts. Indeed, the courts have consistently ruled that the reduction in the fair market value of an easement-encumbered property does have a significant and quantifiable value. It is important to have a logical and systematic process in place when it comes to incentivizing historic preservation. Potential easement donors may begin to ask themselves whether a handful of shaky tax credits are worth the stress and financial expense of a potential tax audit and protracted court case.

What is an easement worth, in societal terms? Perhaps there is something in the very nature of an easement that would help explain why they tend to elicit such strong responses. The *Restatement of Property* defines the mechanism quite simply:

> An easement is an interest in land in the possession of another which
> (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
> (b) entitles him to protection as against third persons from interference in such use or enjoyment;
> (c) is not subject to the will of the possessor of the land;
> (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and
> (e) is capable of creation by conveyance.[25]

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[24] *Kaufman v. Commissioner of Internal Revenue*, 687 F.3d 21, 2012 U.S. App. LEXIS 14858, (1st Cir. 2012).

[25] Restatement of Property, §450.

It is a decades' old definition, but a concise one that speaks to the substance of the preservation easement's appeal — permanent protections that can be initiated by private property owners. It may seem a bit intangible, couched in terms of "enjoyment of the land" and such, but raises the question – how much is "enjoyment" worth, and can it be assessed for tax purposes?

While state methods vary, conservation and historic preservation easements are created in essentially the same manner, albeit in a tightly prescribed process that bears further explication. Property owners agree to maintain particular characteristics of their property by conveying or donating certain rights to "a qualified organization whose mission includes environmental protection, land conservation, open space preservation, or historic preservation."[26] The "qualified organization" must not only be committed to administering the easement over a long period of time, it must also have the financial resources to do so effectively, which includes the enforcement of the negotiated restrictions agreed upon in the property deed. Once implemented, owners' rights to use their property are constrained, with uses incompatible with the property's historical, environmental, or architectural significance, for example, prohibited.[27]

Steeped in hundreds of years of property law, deed restrictions are a flexible and effective means of stipulating specific property uses. The more problematic aspect of preservation easements lay not in their legal construction so much as their use as a tax incentivized tool for historic preservation. In exchange for placing permanent restrictions on their property, owners may become eligible for certain tax benefits to help offset the

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[26] National Park Service, *Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits* (Washington, DC: National Park Services - Technical Preservation, 2010), 3.

[27] Land Trust Exchange and National Trust for Historic Preservation in the United States, 2.

reduction in market value typically associated with easement donations. These incentives can be significant, providing a meaningful motivation to undertake such property encumbrances. The difficulty arises when preservation policy and tax policy collide in a realm of shifting interpretations. Yet in fairness to a process often shaped by divergent ideologies, how *does* one assess the worth of “enjoyment”?

In a summary of the IRS Advisory Council (IRSAC) 2009 Report, whose recommendations on easement valuations the IRS rejected, IRSAC staff explained that:

> determining the fair market value of a preservation easement has challenged appraisers and the IRS alike, since preservation easements are generally not bought and sold in a market that values them directly. The tax regulators therefore endorse the indirect, ‘before and after’ valuation method, which calls for determining the fair market value of the underlying property before and after an easement encumbrance, and attributing the difference to the easement.[28]

Those comments only hint at the breadth of IRS skepticism of easement valuations that began around 2004, with the release of Notice 2004-41, an IRS bulletin warning easement donors and donee organizations that they “may be improperly claiming charitable contribution deductions under Section 170 of the Internal Revenue Code.”[29] Indeed, the 2009 IRASC report also pointed out that the IRS had placed preservation easements on the IRS’s ‘Dirty Dozen’ list of tax scams in 2005 and 2006, and on the 2005 listing of tax shelters.[30]

The IRS acted on suspicions of wrongdoing by routinely rejecting taxpayers’ easement contributions, often asserting that the easement had no value whatsoever,

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[28] Internal Revenue Service Advisory Council, *Issue: IRS Challenges to Deductions for Historic Preservation Easement Donations,* (Washington, D.C., 2009).

[29] Internal Revenue Service, *Internal Revenue Bulletin - July 12, 2004 - Notice 2004-41*, (Washington, DC, 2004).

[30] Internal Revenue Service Advisory Council, *Issue: IRS Challenges to Deductions for Historic Preservation Easement Donations*, (Washington, D.C., 2009).

despite the fact that courts, as the authors of one tax journal observed, "have generally rejected a zero-valuation argument, often expressing doubt that a perpetual restriction may ever have a value of zero."[31] In a 2008 letter to Paul Edmonson of the National Trust for Historic Preservation, IRS Commissioner Steven T. Miller refuted such claims and stated that the IRS "does not believe that all conservation easements, including façade easements, are intrinsically of little or no value. […] A key issue in many of these cases is whether the taxpayer's appraisal satisfies these requirements." [32] Miller then reiterates the IRS's goal of faithfully carrying out Congressional intent. The agency wishes:

> to do nothing to discourage or deter the donation of legitimate façade easements. At the same time, it is clear that Code provisions such as Section 170(h) attract some who are intent on misuse and abuse, as well as others who have good intentions but who fail to take the steps required to support the claimed deduction. Our enforcement program in the area of façade easements is designed to address these situations.[33]

Section 170(h) is a provision of the Internal Revenue Code dealing with conservation and preservation easements. The statute, enacted under the Tax Reform Act of 1976 and made permanent in the Tax Treatment Extension Act of 1980, provides a financial incentive for the donation of an easement in the form of a charitable deduction credit. This is made possible by treating a preservation easement donation as a "qualified conservation contribution."[34]

The intent of the law is to encourage the preservation of the visible façades of buildings of architectural, cultural, or historical significance. While some would criticize

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[31] Scott D. McClure, Steven E. Hollingworth, and Nicole D. Brown, "Courts to IRS: Ease Up on Conservation Easement Valuations," *Tax Analysts*, August 10, 2009: 551-555.

[32] IRS Commissioner for Tax Exempt and Government Entities Division Steven T. Miller, to Paul W. Edmonson, Vice President and General Counsel National Trust for Historic Preservation, March 13, 2008.

[33] Ibid.

[34] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1919 (1976).

the government's involving itself in such aesthetic activities as encouraging the preservation of old building exteriors through tax subsidies, tax scholar Jennifer Anne Rikoski explains that a façade:

> can be considered a 'public good,' as it is non-excludable (one person cannot exclude another from enjoying it), non-rival (one person's consumption of it does not diminish the benefit available to others), and it invites members of the general public to enjoy its benefits freely.[35]

Seen in this light, an historic façade is little different than the art and artifacts displayed by museums and treasured by patrons. An historic façade, then, is simply another type of cultural property.[36] And, as Rikoski observes, "The federal tax system encourages donations of such property to museums and other charitable organizations, both to make it available to the public and to preserve it for future generations."[37] Seeing that the federal government has provided tax incentives for donations of art since 1917,[38] historic façade donors should be subjected to no more scrutiny than any other art donor.

What is most troubling about the ongoing actions by the IRS regarding easement donations is that the agency is effectually supplanting the will of Congress, and consequently the American people, by imposing their own narrowly prescribed vision of what they have determined to be appropriate tax policy. While the IRS has every right, indeed a duty to go after tax cheats, the agency appears to have crossed a sort of ideological threshold when it comes to the tax-incentivized, historic preservation easement program. Attorney Matthew Eisenstein, who represented the National Trust for

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[35] Jennifer Anne Rikoski, "Reform but Preserve the Federal Tax Deduction for Charitable Contributions of Historic Façade Easements," *The Tax Lawyer* 59, no. 2 (2006): 572.

[36] Ibid.

[37] Ibid.

[38] Susan E. Wagner, "The Implications of Changing the Current Law on Charitable Deductions: Maintaining Incentives for Donating Art to Museums," *Ohio State Law Journal* 47, (1986): 773.

Historic Preservation, The L'Enfant Trust, and the Foundation for the Preservation of Historic Georgetown as *amici curiae* in the easement-related tax case, *Simmons v. Commissioner*, minces no words in his assessment of IRS actions against historic easement donors:

> Purportedly reacting to abusive transactions, the IRS has conducted many audits of individual taxpayers and rejected tax deductions on the grounds that easement donations are entirely valueless, or else not 'exclusively for conservation purposes' as required by the Internal Revenue Code. The IRS has extracted favorable settlements, and litigated vigorously when donors have been unwilling to compromise on the IRS's terms.
>
> By attacking preservation easement programs at the taxpayer level – instead of revoking the tax-exempt status of easement holding organizations engaged in abusive practices – the IRS has deterred many owners of historic properties from donating easements, even to legitimate tax-exempt organizations. […] Donations of preservation easements in fact have dwindled and, in some communities, have virtually ended.[39]

Eisenstein's appraisal portrays an agency bent on undermining a long-established and highly effective historic preservation tool. If the IRS's intent has been to intimidate, they have succeeded. Taking a congressionally authorized charitable deduction for the donation of a preservation easement should not be grounds for an IRS audit. Yet according to Eisenstein and many other preservation professionals, that seems to be the general perception amongst potential donors – the chilling effect made manifest.

As earlier mentioned, in those instances when historic easement donors have contested IRS disallowances of their charitable deduction in U.S. Tax Court or on appeal, courts have often ruled in the donors' favor. It is important to note, however, that the IRS has also properly rejected a number of claims. Perpetual easement valuation and

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[39] Matthew A. Eisenstein, "The Significance of Simmons V. Commissioner: D.C. Court Ruling Supports Preservation Easements," *Forum Bulletin* (Washington, D.C.: National Trust for Historic Preservation (September 22, 2011).

administration is not a precise art, nor is there a one-size-fits-all donation schema to cope with every eventuality an easement holding organization may encounter.

Whether a few unscrupulous actors have exploited the program's ambiguities in their financial favor is an issue for the courts to decide. In order to provide some insight into particular points of concern by the many players involved, the next chapter will examine a number of recent tax cases, the majority of which reflect the period of vigorous IRS enforcement efforts leading up to the 2006 changes in federal legislation affecting preservation easements. Congress included some fairly substantial changes in the Pension Protection Act of 2006, which closed loopholes, imposed penalties on negligent appraisers, and required the preservation of the entire exterior of a structure and not simply the façade. It made further changes to Section 170(h) requirements. Even though a number of earlier concerns were addressed in the new legislation, the IRS has continued to aggressively challenge easement donors with audits and in tax court proceedings.

CHAPTER THREE

A CASE FOR CLARITY

The following review of preservation easement related cases that follow consider the procedural nuances and potential pitfalls involved in claiming a federal tax deduction for a façade easement donation. I selected the three cases not because they were precedent setting or extraordinary, but because they were recent and typical. While some would condemn the Internal Revenue Service for wielding its arcane and overtly technical rules as a cudgel against generally well-intentioned taxpayers, others would find merit in their pursuit of purported tax cheats and loophole exploiters who abuse the federal tax structure to enrich their bank accounts. Whatever one's perspective, the following tax court cases reveal a tax system in which there appears to be no concise or predictable path to an audit-free charitable contribution deduction. The old adage, "there's always something," certainly applies to such taxpayers as are burdened with the weight of proving their tax deduction to the IRS. Indeed, more than a few potential historic easement donors have become skittish, believing it better to avoid the donation process altogether than to risk consorting with the IRS.[1]

Evans v. Commissioner of Internal Revenue (2010)

This Tax Court case involved the determination of the fair market value of a pair of preservation easement donations, and serves to illustrate an important point – that the

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[1] Eisenstein.

burden of proof is on the taxpayer when it comes to claiming tax deductions, or as the court so eloquently phrased it, "Deductions are a matter of legislative grace."[2]

Billy L. and Renetta J. Evans claimed a $154,350 charitable deduction on their 2004 Federal income tax return for the donation of two façade easements to Capitol Historic Trust, Inc. The easements were placed on two, single-family rowhouses in the Capitol Hill Historic District in Washington, D.C. The IRS disallowed the Evans's deduction in 2008 and assessed an $11,779 accuracy-related penalty. The Tax Court, then, had two matters to decide: whether the Evans's easement donation should be disallowed and, if so, whether they were liable for the accuracy-related penalty.

Figure 1. Capitol Hill Historic District in Washington, D.C. (Photo courtesy of D.C. Department of Housing and Community Development.)

[2] *Evans v. Commissioner*, T.C. Memo. 2010-207.

The IRS is normally assumed to be correct in their determination of value unless or until the taxpayer proves otherwise. If evidence supports the taxpayer's claim, then the burden of proof shifts to the IRS. Also, and this aspect comes to bear in the Evans's case, if the IRS introduces matters not raised in the initial notice of deficiency, then the IRS will bear the burden of proof.

The Evanses and the IRS both called expert witnesses to testify, which for the Evanses (petitioners) proved to be the undoing of their tax court case. Internal Revenue Code contains very specific substantiation requirements regarding appraisals of easements. The petitioners' expert witnesses prepared façade easement appraisal reports on the encumbered properties in 2008, nearly four years after the date of the easement donation, and raised enough red flags during cross-examination that the judge held that their appraisal reports lacked "any probative weight." Although the appraisers, Sandy L. Lassere and Calvin Mark Lassere, were certified as appraisers in the District of Columbia, with Mr. Lassere additionally holding appraiser licenses in six states, Mrs. Lassere's testimony not only contained a number of inaccuracies but also implied that she prepared the appraisals without having personally inspected the properties. The court stated:

> In the light of her admitted lack of familiarity with the requirements for a qualified appraisal report, her use of terms without an understanding of their exact meaning, and the various conceptual, methodological, and calculation errors that she acknowledged, we decline to give Mrs. Lassere's appraisal reports any probative weight, and we find that her conclusions regarding the fair market values of the facade easement lack credibility.[3]

[3] *Evans*, 13.

The Evanses also provided the original appraisal reports used to determine the fair market value of their easements. Licensed appraisers Douglas K. Wood and John R. Keegan prepared the reports, and they signed and dated them on January 6 and 7, 2005. As the court pointed out, this date indicated that the appraisals were completed before the Evanses filed their 2004 income tax return and that they had relied upon them in claiming a charitable contribution for the value of their easement donation. Wood and Keegan, however, were not called to testify on the Evans's behalf. Because the burden of proof rests with the taxpayer to prove the legitimacy of their claimed deductions through a preponderance of evidence, the court found that the "petitioners' failure to call either of the two signatories of these reports to testify at trial precludes us from considering these reports as evidence of the fair market values of the facade easements."[4]

Determining the fair market value of a preservation easement donation is not a simple matter. As easements are almost always gifted, there is no preservation easement market to use as a ready point of comparison. Therefore, the "before and after" method has become the accepted means of establishing the value of an easement donation for purposes of taking a qualified conservation contribution deduction under Section 170(h) of the Internal Revenue Code.[5] The "before and after" method simply subtracts the fair market value of an easement-encumbered property from the fair market value of the property at the time the easement was donated. The process may sound simple enough, but a range of factors, such as whether a building is commercial or residential, is part of an urban historic district or not, or is located in a rural setting, affect the assessment.

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[4] Ibid., 21.
[5] *Hilborn v. Commissioner*, 85 T.C. 677 (1985).

Various stipulations in the negotiated easement itself can also affect an evaluation, including provisions related to maintenance obligations, viewshed, additions, or any number of other such particulars.

The IRS appeared to green-light another means of arriving at easement valuations with the publication of one of its tax briefs, in which it was stated that a 10 to 15 percent reduction in fair market value was "the proper valuation" for a preservation easement. The declaration came after a string of IRS losses in Tax Court cases over easement valuation, which the historic preservation community had noted. As the authors of a 2009 report by the Internal Revenue Service Advisory Council (IRSAC) explained, "This document and the court cases had the collective effect of establishing an informal safe harbor for easement valuation of 10-15 percent, upon which the easement donating public apparently relied." The IRS addressed the matter in a 2007 memorandum, in which they asserted that no safe harbor had been intended.[6]

The "safe harbor" controversy appeared in the *Evans* case. The IRS argued that neither of the Evans's appraisals satisfactorily explained how the valuation was determined. The IRS was concerned the appraisers arrived at the number by merely applying an 11 percent discount to the before-donation value. Therefore, the IRS concluded, the taxpayers had not demonstrated "'a recognized methodology or specific basis for the calculated after-donation value.'"[7] However, in the case of accuracy-related penalties the burden of proof shifts from the taxpayer to the IRS.[8] The IRS also had failed

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[6] Internal Revenue Service Advisory Council, *Issue: IRS Challenges to Deductions for Historic Preservation Easement Donations*, (Washington, D.C., 2009), 10.

[7] *Evans*, 28-29.

[8] *Higbee v. Commissioner*, 116 T.C. 438, 446 (2001).

to call Wood and Keegan to testify, meaning the court could decide if the Wood and Keegan appraisal met the IRS regulatory requirements of a qualified appraisal.

The court rejected the IRS's claim that the taxpayers had not acted in "good faith." Mr. Evans testified that he had chosen Messrs. Wood and Keegan only after carefully reviewing a list of appraisers he had received from Capitol Historic Trust, Inc. After winnowing down his choices, he checked their qualifications, researched their backgrounds, and engaged in personal conversations with each one before making his decision. The appraisal reports produced by Wood and Keegan showed a thorough knowledge of pertinent regulations and appropriate methods for determining fair market value, which ultimately led the Tax Court to rule that the Evanses were not liable for the $11,779 accuracy-related penalty.

Conversely, the court ruled against the Evanses in the more essential question of the case – whether they were entitled to the qualified conservation contribution for the donation of their façade easements. It was not that the court doubted that there had been a reduction in property value on the encumbered townhouses, but rather, how much? The Tax Court held that the Evanses failed to provide "sufficient credible evidence with respect to the fair market values of the façade easements to meet their burden of sustaining their claimed charitable contribution deduction."[9]

It is interesting that the bifurcated results in this case were so clearly aligned with the party bearing the burden of proof. When the Evanses had the burden they lost. When the IRS had the burden it lost. One might be tempted to dwell on the series of dualities in this case: two easements, two donors, two questions, two burdens, and two outcomes. Yet in

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[9] *Evans*, 15.

the final analysis there is a singularly important conclusion in the case: an historic preservation easement deduction was denied. The lesson for potential easement donors in *Evans* is that even with an accurate fair market value appraisal, taxpayers can lose. Whatever the Evans's rationale for not calling Wood and Keegan to testify for the accuracy of their appraisal matters less than what *Evans* has to say about the aggressiveness of the IRS in disallowing their charitable deduction. If, as the court found, the Evans's initial appraisal met the IRS's regulatory requirements for a qualified appraisal, thereby satisfying the conditions for taking a charitable contribution deduction for the donation of a preservation easement, then what does that say about IRS priorities?

The IRSAC had earlier touched upon the issue, noting that after preservation easements were placed on the IRS's "Dirty Dozen" list of tax scams in 2005 and 2006, the Commissioner of the Tax Exempt/Government Entities Division announced an ambitious new plan to subject more than one-third of all easement donors to pre-audit review.[10] A full 700 easement donating taxpayers out of 2,000 would be targeted.[11] The IRS enforcement strategy can be matched up point by point with the disallowance rationale employed in the *Evans* case. The IRSAC described it as follows:

> Practitioners observed that the audit outcome almost always resulted in a zero deduction. The grounds asserted to support this position were several: an easement has zero value where local preservation laws are already in place; use of the 10-15 percent informal safe harbor for easement valuation is not appropriate; the appraisal failed the technical substantiation requirements and therefore the appraisal was not a 'qualified appraisal' under the regulations.[12]

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[10] Internal Revenue Service, *IRS Announces the 2005 Dirty Dozen*, IR-2005-19, (Washington, D.C., 2005).

[11] Internal Revenue Service Advisory Council, *Issue: IRS Challenges to Deductions for Historic Preservation Easement Donations*, (Washington, D.C., 2009), 10.

[12] Ibid.

That sort of aggressive enforcement by the IRS would give any potential easement donor room for pause, particularly if the donor knows that, as the IRSAC phrased it, "he or she is thereby 'buying an audit.'"[13] The IRSAC did recommend a six-point solution to the problem in their 2009 report (see *Appendix*). One of the key points was that the IRS, being aware of the inherent difficulty of easement valuation, should consider establishing a safe harbor method of valuation. The predictability of a set percentage reduction in fair market value would be of great benefit to both sides.

Schrimsher v. Commissioner of Internal Revenue (2011)

When Michael R. Turner and Russ Carnahan, co-chairs of the Congressional Historic Preservation Caucus, expressed their concerns over taxpayer claims that the Internal Revenue Service was utilizing a "variety of hyper-technical challenges to easement donations to invalidate the deduction altogether," they might have had *Schrimsher v. Commissioner* in mind.[14] *Schrimsher* provides a clear example to preservation easement donors and donee organizations of the importance of meticulous adherence to IRS documentation requirements. While scrupulous recordkeeping is always sound practice, it is especially important when claiming a charitable deduction over $5,000 on IRS Form 8283, as the judge's decision in *Schrimsher* shows. [15]

In December of 2004, Randall A. and Kelly C. Schrimsher donated a façade easement to the Alabama Historical Commission (the commission) on the "Times Building," a twelve-story office building in Huntsville, Alabama. Considered

[13] Ibid., 12.

[14] 3rd District Congressman Michael R. Turner, Ohio, to Commissioner Douglas H. Shulman, Internal Revenue Service, April 8, 2011.

[15] *Schrimsher v. Commissioner of Internal Revenue*, T.C. Memo. 2011-71.

Huntsville's first skyscraper when it was completed in 1928, the art deco style tower housed the offices of the *Huntsville Daily Times* until 1956.[16] On December 30, 2004, Mr. Schrimsher executed a document granting a façade easement on the building to the commission

Figure 2. "Times Building" in Huntsville, Alabama. (Photo courtesy of Huntsville Planning Commission.)

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[16] "Times Building," Emporis, accessed July 15, 2013, http://www.emporis.com/building/times-building-huntsville-al-usa.

The Schrimshers listed the appraised fair market value of their easement donation as $705,000 on IRS Form 8283.[17] To conform to Internal Revenue Code Section 170 regulations, they deducted $193,180 as a charitable contribution on their 2004 Federal income tax return and carryover deductions of $206,699 in 2005, and $120,724 in 2006.[18] The IRS later disallowed the deductions, contending the Schrimshers had not only failed to properly substantiate the charitable deduction but had also failed to establish the $705,000 value of the preservation easement. As a result, the IRS determined the following deficiencies and penalties:[19]

Year	Deficiency	Penalty §662(h)
2004	$54,091	$21,636
2005	60,686	24,274
2006	42,253	16,901

As was earlier discussed, the IRS has been so aggressive in its pursuit of fraudulent and inflated appraisals of preservation easements in recent years that the number of donors willing to participate in the federal easement program has dropped dramatically.[20] Indeed, the *Schrimsher* case could be seen as yet another example of bureaucratic overreach, with arcane paperwork requirements needlessly complicating a perfectly legitimate tax deduction. Then again, whatever the merits of the IRS's enforcement

[17] IRS Form 8283, Noncash Charitable Contributions.

[18] Taxpayers may generally deduct up to fifty percent of their adjusted gross income for charitable contributions, such as a conservation easement donation. Gifts valued in excess of fifty percent of the taxpayer's adjusted gross income may be carried forward over the next five years in order to attain the full value of the donation.

[19] *Schrimsher*, 2.

[20] Jess R. Phelps, "Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future," *Nebraska Law Review* 91, no. 1 (2012): 127.

action, documentation of a $705,000 tax deduction ought to require a high level of accuracy and diligence. Taxpayers would expect no less.

To return to the specifics of the case, the IRS disallowed the Schrimsher's charitable contribution of the façade easement for failure to meet two specific requirements. One was that "they failed to obtain a contemporaneous written acknowledgement of the façade easement from the commission as required by section 170(f)(8)."[21] The second was that they failed to include a qualified appraisal report of the fair market value of the façade easement with their income tax return. As was seen in *Evans*, the lack of a qualified appraisal would seem the more serious issue. However, the IRS led with the first matter – that of providing a contemporaneous written acknowledgment of the easement donation.

Although the physical form of acknowledgement is not delineated, Internal Revenue Code does specify that the contemporaneous written acknowledgement must include:

> (i) The amount of cash and a description (but not value) of any property other than cash contributed.
>
> (ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).
>
> (iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii)….[22,23]

The trouble with the Schrimshers' written agreement with the commission, according to the IRS, was that it failed to state whether the commission provided any goods or services

[21] *Schrimsher*, 5.
[22] Internal Revenue Code §170(f)(8)(B).
[23] *Schrimsher*, 6.

in facilitating the easement donation.[24] The only mention of consideration in the agreement states:

> for and in consideration of the sum of TEN DOLLARS, plus other good and valuable consideration, …the Grantor does hereby irrevocably GRANT, BARGAIN, SELL, AND CONVEY unto the Grantee …a preservation and conservation easement to have and hold in perpetuity…[25]

While the language concerning the payment of ten dollars and other consideration is merely boilerplate, as both parties agreed, the court held that it still "does not indicate that the commission received no goods or services."[26] In fact, the language quite literally states the opposite. The Schrimshers argued that the "merger clause" included in the agreement should be considered instead as proof that there were no goods or services considered for the easement donation. The Tax Court disagreed, noting that nowhere in the agreement was there language that would satisfy the requirements of Internal Revenue Code Section 170(f)(8)(B)(ii). Therefore, the court upheld the disallowance of the Schrimshers' charitable deduction for "failure to obtain a contemporaneous written acknowledgement of the façade easement."[27] Because of this decision, the court ruled that it was unnecessary to address the IRS's second contention that the Schrimshers had also failed to substantiate the preservation easement's $705,000 fair market value.

Without knowing more of the particulars in the case it is difficult to draw conclusions as to whether *Schrimsher* was yet another in a series of overly aggressive IRS enforcement actions or something altogether warranted. Less ambiguous is the fact that because the Schrimshers were unable to substantiate the validity of either their donor

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[24] Internal Revenue Code §170(f)(8)(B)(ii).
[25] *Schrimsher*, 3.
[26] Ibid., 9.
[27] Ibid., 11.

agreement or easement valuation in Tax Court, they were denied a significant charitable contributions deduction. It is notable that the case involved the donation of a preservation easement to the Alabama Historical Commission, which facilitated the agreement to protect in perpetuity the façade of a National Register listed, historic high-rise office building from 1928. The authors of a seminal book on easement valuation, *Appraising Easements*, did not mince words when it came to the responsibilities of easement holding organizations:

> Organizations accepting gifts of conservation easements are part of a system of non-profit organizations and government agencies all over the United States that are finding conservation easements an increasingly important tool for protecting vital natural and historic resources. Inattention by any one donee threatens the easement programs of all donees. Opposition to easements in Congress or at the Internal Revenue Service could lead to eliminating or seriously restricting the tax deductions that are so critical for donors. Although there is no uniformity of opinion about the proper role for the donee in the appraisal process, every donee has an interest in assuring the integrity of the appraisal process affecting charitable gifts.[28]

The donee organization must be beyond reproach, not only ethically but administratively. Impressions of incompetence, or worse, can bring pressure on Congress to do away with a uniquely powerful tool for historic preservation. *Schrimsher v. Commissioner* shows how careless errors by a donee organization can have significant consequences. That the IRS disallowed the Schrimshers' charitable contribution deduction may well dissuade others considering making a preservation easement donation to the Alabama Historical Commission. The outcome in *Schrimsher* could also provide skeptical taxpayers with yet another example of how affluent taxpayers, right or wrong, are out to game the system by taking advantage of egregious tax incentives.

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[28] Land Trust Exchange and National Trust for Historic Preservation in the United States, *Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements*, (Washington, D.C.: Land Trust Alliance, National Trust for Historic Preservation, 1989), 48.

Scheidelman v. Commissioner of Internal Revenue (2012)

In *Scheidelman* one confronts a host of issues common to many easement related tax cases, such as qualified appraisals, tax penalties, and the fair market value of a conservation easement donation.[29] What is striking about this case is its circuitous route to eventual denial. After all of the testimony and deliberations concerning appraisal methods and documentation requirements, the outcome ultimately hinged on whether Huda Scheidelman's historic preservation easement donation was worth anything at all, considering the neighborhood's ironclad zoning restrictions. Criticism of easement valuation is nothing new, but in this instance the Tax Court's decision rested on some fairly convincing evidence that the façade easement did not reduce the value of the property in question. Therein lies a potentially devastating gap in the preservation easement's armor, with the armor being that an easement-encumbered property always loses at least some amount of potential resale value.

In the wake of *Scheidelman* the question for future IRS enforcement might become one of – if not here, why there? In other words, if Huda Scheidelman's easement donation did not reduce her property's valuation, then why should Smith's or Jones's or anybody else's easement donation be worth so much? The question is most apt for properties located within established historic districts with strong preservation ordinances, such as Washington, D.C., Boston, or New York City, which is also where the majority of the nation's preservation easement-encumbered properties are located.

The case begins with a house – a four story townhouse on Vanderbilt Avenue in Brooklyn, New York. The property is also located within the Fort Greene Historic

[29] *Scheidelman v. Commissioner of Internal Revenue*, T.C. Memo. 2010-151.

District, which the National Park Service recognized as a "registered historic district." The City of New York also recognized the neighborhood as an historic district, as administered by the city's Landmarks Preservation Commission. In what would prove to be a very important determinant in this case, the Tax Court pointed out, "In New York City it is unlawful to alter, reconstruct, or demolish a building in a historic district without the prior consent of the Landmarks Preservation Commission."[30]

Figure 3. 374 Vanderbilt Avenue, Brooklyn, New York. (Photo courtesy of Corcoran Group Real Estate.)

Huda Scheidelman, a registered nurse, purchased the townhouse for $255,000 on September 24, 1997. In an appraisal report of the property prepared some seven years later the townhouse was described as including "a wealth of turn of the century details

[30] *Scheidelman*, 3.

that generate strong demand for such homes in the area. These include wood mouldings, paneling and wainscoting, volume ceilings, exposed brick walls, stained glass windows, original wood planking, and fireplaces."[31]

The rising value of the historic homes in the Boerum Hill neighborhood of Brooklyn attracted the attention of one of the nation's largest preservation easement holding organizations, the National Architectural Trust (NAT), which would later rename itself the Trust for Architectural Easements. Ms. Scheidelman received a postcard from NAT in the fall of 2002, announcing an upcoming informational meeting on historic preservation easements and the potential tax benefits of façade easement donations. After consulting with her longtime accountant, John Somoza, Ms. Scheidelman decided to initiate the façade easement donation process through NAT. She completed an application for her Vanderbilt Avenue property on March 24, 2003, and included a required $1,000 fully refundable deposit. The easement donation's acceptance by NAT was contingent upon the granting of all necessary approvals from mortgage lenders and a National Park Service determination of the property as a "certified historic structure." If approved, Ms. Scheidelman would then be required to make a cash donation equal to 10 percent of the easement valuation to NAT in order to help defray the organization's operating expenses in managing the easement donation.[32]

On April 22, 2004, Ms. Scheidelman received a letter from NAT, informing her that all necessary approvals had been received and that the next step involved her obtaining an appraisal of her property. Included in the letter from NAT was a list of appraisers

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[31] *Scheidelman*, 7.
[32] Ibid., 3-5.

"qualified to do easement appraisals." From that list Ms. Scheidelman selected Michael Drazner who, upon completing an appraisal report of the property, concluded that

> the presence of the façade conservation easement would alter the market value of the subject property. In the subject's market area, the appraiser cannot precisely estimate the extent to which this 'loss in value' will result from the façade easement due to the lack of market data. In this situation it is the appraiser's conclusion that the value of the façade conservation easement … on the subject property would be estimated at $115,000, which is approximately 11.33% of the fee simple value of $1,015,000.[33]

Mr. Drazner further reported that he had relied primarily on easement valuation case law and historical precedents in making his determination, noting that the IRS had typically recognized that the loss of property value associated with easement donations ranged from 10 to 15 percent of the pre-easement value.

Having obtained Mr. Drazner's appraisal report, NAT finalized the façade easement donation on the Vanderbilt Avenue townhouse, including a cash payment from Ms. Scheidelman in the amount of $9,275. In a confirmation receipt NAT stated that they had "received no goods and services in return for your gifts," and provided to Ms. Scheidelman IRS Form 8283 attesting to that fact. Recall that in *Schrimsher v. Commissioner of Internal Revenue* the Tax Court judged such confirmation to be deficient and disallowed a $705,000 charitable contribution deduction for the donation of a façade easement on a 1928 office tower to the Alabama Historical Commission.[34]

While history would not repeat itself in exactly the same way in the Brooklyn neighborhood of Boerum Hill, the IRS did seem to be operating from the same set of assumptions – one in which it scrutinized historic easement donations to the very bone.

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[33] *Scheidelman*, 9.
[34] Ibid., 11.

To put it another way, if a federal tax audit failed to persuade a taxpayer of the wrongheadedness of their deduction, an aggressive IRS agent could always play their hand in tax court. After all, the burden of proof is on the taxpayer to prove their entitlement to a deduction. Unknown to Ms. Scheidelman, IRS skepticism of the preservation easement program had been percolating long before she had ever received the postcard from NAT about the benefits of easement donation and made plans to attend their informational meeting.

Nevertheless, two years after that first meeting the City of New York recorded a conservation deed of easement on her century-old townhouse. As a result, Ms. Scheidelman took a charitable contribution deduction for the value of her easement donation on her 2004 Federal income tax return, which, because of certain stipulations in the tax code, she carried over to 2005 and 2006. After a 2008 audit by the IRS, likely triggered by the preservation easement deduction, the IRS determined the following deficiencies and penalties:[35]

Year	Deficiency	Penalty §662(a)
2004	$16,873	$3,375
2005	17,537	3,507
2006	1,015	203

The questions for the Tax Court to decide, then, were whether Ms. Scheidelman was entitled to take a charitable contribution deduction for her preservation easement donation, whether the mandatory cash payment she made to NAT was deductable as a charitable contribution, and whether she was liable for the Internal Revenue Code Section

[35] *Scheidelman*, 2.

662(a) penalties. Of these three matters, the obvious issue to resolve first was whether Mr. Drazner's report was a "qualified appraisal" under IRC code. The IRS argued that the appraisal could not be regarded as qualified because it "did not describe the property contributed; did not include the terms of the deed of easement; did not include a statement that it was prepared for income tax purposes; and did not provide the method and specific basis for valuing the easement."[36] Of these points the court focused specifically on the IRS's last contention, the utilization of flawed valuation methodology, in its finding of the appraisal as not qualified.

The court referenced *Hilborn v. Commissioner* and *Simmons v. Commissioner* in recognizing that, although comparable sales of easement-encumbered properties are generally unavailable, the "before and after" approach has been identified as a legitimate means of determining fair market value. In such cases, however, there is a methodology employed and available that satisfactorily explains both how the appraisal determination was made and what it was based upon. The Tax Court criticized the Drazner appraisal report for its failure to "outline and analyze qualitative factors for the Vanderbilt property. …Drazner's report applied mechanically a percentage with no demonstrated support as to its derivation, other than acceptance of similar percentages in prior controversies."[37]

Ms. Scheidelman's attorneys argued that in *Simmons v. Commissioner* the court observed that "appraisals also include discussions of IRS practice and cases of this Court concerning façade easements." The Tax Court countered by noting that in *Simmons* the

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[36] *Scheidelman*, 16.
[37] Ibid., 19-20.

appraisals relied on statistics, which were taken into account, and identified a method and basis of valuation. The trouble with Drazner's report was that it "used only estimates based on prior cases and displayed no independent or reliable methodology" in obtaining the valuation of the Scheidelman property. As such, the court agreed with the IRS in disallowing Ms. Scheidelman's charitable contribution deduction for failure to obtain a qualified appraisal under Section 170(f)(11).[38]

Nor did the Tax Court accept that Scheidelman's mandatory cash payment of $9,275 made to NAT was deductable. The IRS asserted that the payment was not a "contribution or gift" as set forth in Section 170(a) but was, rather, a *quid pro quo*, because NAT had facilitated Ms. Scheidelman's claim of a tax deduction for the donated easement, which NAT accepted in exchange for a cash payment based upon the valuation of the preservation easement. The court observed that payments made to qualified organizations are only deductible under Section 170 so long as no "substantial benefit" is expected in return, unless the payment "clearly exceeds the benefit received and the excess is given with the intent to make a gift."[39,40] The Tax Court held that Ms. Scheidelman did not provide the necessary evidence to prove she was entitled to a deduction for the money paid to NAT as a charitable contribution. As to the accuracy-related penalty assessed by the IRS, the court ruled that Ms. Scheidelman had acted in good faith in hiring both a competent tax professional and a qualified appraiser and was therefore not liable for the Section 662(a) penalties.

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[38] *Scheidelman*, 23-24.
[39] Ibid., 27-28.
[40] *United States v. American Bar Endowment*, 477 U.S. 105 (1986).

Huda Scheidelman appealed the Tax Court decision to the U.S. Court of Appeals for the Second Circuit. In a written opinion issued June 12, 2012, Chief Judge Dennis Jacobs rejected the Tax Court's ruling that the appraisal was not qualified, holding instead that Mr. Drazner did in fact explain his appraisal method; regardless of whether the IRS believed the process to be "sloppy or inaccurate, or haphazardly applied – it remains a method, and Drazner described it."[41] The Court also overturned the disallowance of Ms. Scheidelman's deduction of the cash contribution made to the National Architectural Trust (NAT or Trust), ruling that "the Trust's agreement to accept the gift of the easement was not a transfer of anything of value to the taxpayer and thus did not constitute a *quid pro quo* for the gift of the cash."[42] Upon vacating the decision, the Appeals Court remanded the case to Tax Court for a determination of the fair market value of the preservation easement.

The Tax Court issued its opinion on January 16, 2013, noting that it was not the value of Huda Scheidelman's property before the easement donation that was in dispute; it was the property's value after the easement was granted that was at issue. As such, the Tax Court heard evidence from experts testifying on behalf of both sides in the case, beginning with Michael Ehrmann, a qualified appraiser who had prepared an additional appraisal report of the Scheidelman property on her behalf, working closely with NAT. Judge Mary Ann Cohen's assessment of Mr. Ehrmann's appraisal was rather less than glowing: "Ehrmann's testimony had all the earmarks of overzealous advocacy in support

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[41] *Scheidelman v. Commissioner*, 682 F.3d 189, U.S. Appeals, 2nd Circuit, (2012), 15.
[42] Ibid., 2-3.

of NAT's marketing program and, indirectly, petitioner's tax reporting. His conclusion that the easement should be valued at $150,000 is unpersuasive and not credible."[43]

The IRS's first expert was Timothy Barnes who, after analyzing the terms of the preservation easement, zoning ordinances, and regulations of the New York City Landmarks Preservation Commission (LPC), testified that:

> in highly desirable, sophisticated home markets like historic brownstone Brooklyn, the imposition of an easement, such as the one granted on June 23, 2004, is not a deterrent to the free trade of such properties at fully competitive prices and does not materially affect the value of the subject property.[44]

In Mr. Barnes's opinion, then, the Scheidelman easement essentially had no value, because in the Fort Greene Historic District a façade easement simply did not affect buyer interest, the home's time on the market, or even financing. Further, the IRS presented expert testimony from Stephen D. Dinklage, an engineer employed by the IRS, who maintained that, because the easement only affected the façade of the townhouse, and that the structure was already subject to restrictions by the LPC, the preservation easement "would not have a material effect on the market value of the whole property."[45] Ms. Scheidelman's attorneys argued that the LPC did not enforce its restrictions as effectively as NAT. The IRS countered, "That speculation is based on testimony of a representative of NAT, is not supported by anything but anecdotes, and is contrary to evidence specifically related to the Vanderbilt property."[46]

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[43] *Scheidelman v. Commissioner of Internal Revenue*, T.C. Memo. 2013-18, (2013), 16.
[44] Ibid., 17.
[45] Ibid., 19.
[46] Ibid.

Ultimately, the Tax Court ruled that Ms. Scheidelman's easement donation "had no value for charitable contribution purposes."[47] An interesting conclusion made by the Court concerns the prediction of what Huda Scheidelman would not have done, rather than what she actually did. Judge Cohen observed:

> We do not believe that petitioner would have granted the easement if she had anticipated a substantial drop in the market value of her property as a result. It is even less likely that she would have agreed to a restriction that reduced the value of her property by the relatively large amount claimed, \$115,000, or the even larger amount proposed by Ehrmann, \$150,000.[48]

Judge Cohen's remarks arguably reflect a dismissive attitude toward the very tenets of conservation easement policy. The notion that one would only choose to preserve the architectural integrity of one's home so long as it does not cost very much to do so contradicts and, coming from a tax court judge, undermines long-accepted tax policy encouraging such investments. Huda Scheidelman was, however, permitted to take a charitable donation deduction for her mandatory payment of \$9,275 to the National Architectural Trust, thanks to the U.S. Court of Appeals decision. The deduction is probably little consolation for a preservation-minded taxpayer who sought permanent protections for her century-old townhome under the auspices of a nearly forty-year-old federal historic preservation program.

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[47] *Scheidelman* (2013), 21.
[48] Ibid.

CHAPTER FOUR

THE END OF PERPETUITY

Considering all the hoops so many easement donors have been compelled to jump through, one might wonder what the point of the tax-subsidized preservation easement program was in the first place. While its inclusion in the Tax Reform Act of 1976 came partly in response to the devastation wrought by the urban renewal policies of postwar America, the easement strategy was not a tool for social reform but one designed to preserve historic buildings and notable architecture. It remains as such to this day. Consequently, it should come as no surprise that the preservation easement was properly termed a façade easement for most of its history. And though an emphasis on buildings is as appropriate for historic preservationists as a familiarity of medicine is for physicians, the bricks-and-mortar focus likely fostered an impression that preservationists cared more for maintaining the appearance or façade of a community than they did for its actual inhabitants. To be fair, only since passage of the Pension Protection Act of 2006 has the entire exterior of a building been required to be protected as a condition for receiving a tax deduction for an easement donation, rather than merely the façade.[1] Preservationists, however, are not the same as developers: preservationists are driven to preserve; developers are driven to turn a profit. There is overlap, to be sure, but it would be inaccurate to paint the two with the same broad brush.

Yet the belief that rehabilitation of historic housing or adaptive reuse of old commercial buildings spells the inevitable upheaval of a community and its longtime

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[1] Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780.

residents is not completely unfounded. Whether deserved or not, the displacement narrative has been a potent source of misunderstanding and mistrust among preservationists and community activists. Displacement is an unfortunate corollary of urbanity, and it is nothing new. And while innovative ideas to minimize some of the adverse impact of urban redevelopment are being tried, it would be naïve to think that it is a problem with equitable solutions only waiting to be discovered.[2] Neither is it an all or nothing proposition – not every restored historic building portends the wholesale transformation of a community.

More than half a century ago, when heavy equipment operators began to level block after block of America's historic urban fabric, preservation-minded citizens mobilized to protect what historic structures they could while working to thwart as much future destruction as was possible. In time, their efforts evolved from a grassroots movement into the mature field of historic preservation, whereby adherents employ a number of strategies to safeguard America's historic built environment, from advocacy to zoning, easements to endowments. Yet there was more to the preservation movement coalescing in the 1960s than the number of old buildings being destroyed or saved, there was the recognition that a vibrant part of the social fabric of America's cities was at risk of disappearing – house by house, neighborhood by neighborhood.

There can be no getting around the fact that urban renewal predominantly affected racial and ethnic minorities. The uprooting of low-income communities for resettlement within a concentration of high-density, urban housing projects ultimately contributed to a

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[2] Brett Theodos, Susan J. Popkin, Elizabeth Guernsey, and Liza Getsinger, *Inclusive Public Housing: Services for the Hard to House* (Washington, D.C.: The Urban Institute, 2010), 1-5.

worsening of poverty and urban blight, fewer and fewer affordable housing options, and an increasing crime rate – exactly the opposite of what social engineers had set out to achieve.[3] While public housing projects may have been a well-intentioned attempt to provide solutions for the daunting problems of grinding poverty, blatant discrimination in the private housing market was fueling the ghettoization of racial and ethnic minorities through a process of exclusion. One scholar of housing policy describes the urban redevelopment process in this way:

> The designation was influenced by subjective judgment and political maneuvering. Some stable neighborhoods without advanced physical deterioration were destroyed. In any event, residents–predominantly low-income minorities–were displaced. The process could be brutal. Owners were provided meager assistance and renters received nothing more than an order to vacate. Replacement housing was seldom built, forcing relocatees to compete for limited supplies of affordable housing. In a ripple effect, other neighborhoods became overcrowded and physically deteriorated. A program designed to help restore cities contributed to their decline.[4]

Federal policy was appreciably altered with the passage of the Fair Housing Act in 1968, which prohibited discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, and national origin, yet decades of damage had already been done.[5]

Interestingly, the legal mechanisms behind the historic preservation easement are essentially the same as those that were used in crafting the racially restrictive covenants that were so prevalent before the U.S. Supreme Court overturned them in *Shelley v.*

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[3] Kevin Fox Gotham, "A City Without Slums: Urban Renewal, Public Housing, and Downtown Revitalization in Kansas City, Missouri," *American Journal of Economics and Sociology* 60, no. 1 (2001): 307.

[4] C. Theodore Koebel, *Urban Redevelopment, Displacement and the Future of the American City*, (Community Affairs Office, Federal Reserve Bank of Richmond, 1996), 9.

[5] Fair Housing Act, 42 U.S.C. 3601-3619.

Kraemer (1948).[6] With perpetual control over particular aspects of a home's usage, including who would and would not be permitted to purchase it, written into the deeds of every house within an established neighborhood, easement restrictions provided an ideal way for segregationists to maintain a lilywhite neighborhood for as long as they kept prevailing in legal challenges. Historic preservationists today can likewise utilize the flexibility of easement restrictions to dictate permanent stipulations for the property they own, although for much less contemptible means. In her influential book on the social history of housing in America, Gwendolyn Wright observed, "During the 1920s, the restrictive covenant prevent[ed] the sale of property to such groups as Asians, Mexicans, blacks, and Jews. …In many cities, realtors openly promoted the covenant as a way to ensure that each neighborhood contained only one ethnic group.[7] For proponents of restrictive covenants it was all about controlling who could live next door…forever. One California homeowners' association boasted that the "types of restrictions and high-class scheme of layout which we have provided tends to guide and automatically regulate the class of citizens who are settling here."[8]

Racially restrictive covenants were one of the more overt means of controlling a neighborhood's racial composition. A more gnawing form of inequality came from home mortgage lending discrimination, which was part of a more surreptitious effort to segregate housing in America along racial lines. The practice of redlining in urban neighborhoods was both devastating in effect and generational in impact. Through an in-depth analysis of the various federal players involved in assigning mortgage risk

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[6] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[7] Gwendolyn Wright, *Building the Dream: A Social History of Housing in America*, (New York: Pantheon Books, 1981), 212.

[8] Ibid.

assessments to banks and lenders from the early 1930s to around 1950, scholars have highlighted a process whereby overt racial discrimination played a significant role in mortgage lending decisions. That same process established practices that exacerbated urban blight by marking out entire neighborhoods as unworthy of capital investment. The procedure through which lending opportunities were systematically denied on the basis of race or ethnicity was complex, and involved a number of governmental agencies working in concert to ensure that neighborhoods would remain as homogenous in composition as possible. Once the system was firmly in place, it became nearly impossible for non-white Americans to obtain loans to purchase homes in particular areas or to make physical improvements to their existing homes.[9]

The *Papers of the NAACP: Part 5 - The Campaign Against Residential Segregation, Legal File 1914-1955* reveals the sobering scope of such discriminatory practices as racially restrictive covenants, redlining, and inequitable FHA and VA loan policies and procedures that directly and deliberately contributed to the displacement of so many in the African American community.[10] For instance, in a letter dated September 5, 1947, from NAACP Secretary-Treasurer James B. Carey to U.S. Attorney General Tom C. Clark, the subject of racial segregation is addressed head-on. Mr. Carey wrote:

> In the past, many of Washington's Negroes and whites have lived close together in many parts of the city and where mixed neighborhoods still exist, incidents of racial friction are rare. In late years, Negroes have increasingly been forced into a few overcrowded slums. City planners and well-to-do private citizens are

[9] Louis Lee Woods II, "The Federal Home Loan Bank Board, Redlining, and the National Proliferation of Racial Lending Discrimination, 1921–1950," *Journal of Urban History* 38, (April 9, 2012): 1036-1059.

[10] Randolph Boehm, August Meier, Mark Fox, and National Association for the Advancement of Colored People, *Papers of the NAACP*, *Part 5 - The Campaign Against Residential Segregation, 1914-1955*, Black Studies Research Sources, (Frederick, Maryland: University Publications of America, 1982), microform, Series MFM 1389, Part 5, Reel 22.

> displacing old Negro neighborhoods while white real estate dealers and property owners erect formal barriers to keep Negros out of so-called white areas. Housing conditions are poor for Washington residents in general, but largely because of the pressure just described, they are much worse for Negroes.[11]

Mr. Carey's comments would have needed only minor emendations to have been restated at any point in the years and decades that followed. While many gains have been made since 1947, with laws intended to prevent overt racial discrimination in housing on the books, the condition of poverty remains a constant that has yet to be outlawed.

In an argument made some thirty years ago, Richard Ernie Reed, a proponent of the then new back-to-the-city movement, asserted that:

> An ironic indication of the growing success of urban preservation is the accusation by some that the preservationist is a major cause of displacement of the poor. The assumption seems to be that if preservation would cease on old, often abandoned structures, then the problems of the poor would cease.[12]

Reed makes the case that the healthiest economy is the mixed economy, and exactly the same can be said for communities. Diversity leads to dynamism, which is what is needed for urban areas to flourish. Yet when a neighborhood becomes ever more desirable, when everyone covets the same piece of property, then the poor are displaced in the face of rents they can no longer afford or property taxes too steep for many long-term residents to pay. Reed's prescient analysis led him to conclude that unless preservationists cared as much for people as architecture, which he believed they did, …"then hope for the poor

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[11] James B. Carey, NAACP Secretary-Treasurer to U.S. Attorney General Tom C. Clark, September 5, 1947, *Papers of the NAACP*, *Part 5 - The Campaign Against Residential Segregation, 1914-1955*, Black Studies Research Sources, (Frederick, Maryland: University Publications of America, 1982), microform, Series MFM 1389, Part 5, Reel 22, Frame 985.

[12] Reed, 165.

would be very bleak indeed. Then the sad pronouncement that the suburbs will be the next slums while inner cities become bastions of the rich could be true."[13]

Reed's seemingly remote fears have been realized. According to the authors of a recently published Brookings Institution study, the percentage of America's poor now living in the suburbs has risen an astonishing 64 percent from 2000 to 2011, with the suburban poor's population increasing at a rate more than double that of the urban poor's population. Improbably, by 2011 more than three million more poor people lived in the suburbs of America's largest cities than in the cities themselves.[14] Yet more than rising property values have fueled this migration to the suburban fringes. Where once America's cities offered plentiful opportunities for anyone willing to punch a time clock, a rapid disappearance of employment opportunities mark the last forty years. Whether from outsourcing, technology, or the shift to a service-oriented economy, the transformation of work has decimated large swaths of America's cities. Many residents of the former industrialized cities of the Rust Belt have found no better solution than to walk away, and while gentrification has had a notable impact on communities in Brooklyn or in Washington, D.C., the plight of the poor and the physical concentrations of poverty is a phenomenon that operates at a far deeper level. Sociologist William Julius Wilson believes its roots are bound up in the lack of work associated with deindustrialization. In his article titled, "When Work Disappears," Wilson observes that:

> The consequences of high neighborhood joblessness are more devastating than those of high neighborhood poverty. A neighborhood in which people are poor but employed is different from a neighborhood in which people are poor and jobless. Many of today's problems in the inner-city ghetto neighborhoods –

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[13] Reed, 165.

[14] Elizabeth Kneebone and Alan Berube, *Confronting Suburban Poverty in America*, (Washington, D.C.: Brookings Institution Press, 2013), 35.

> crime, family dissolution, welfare, low levels of social organization, and so on – are fundamentally a consequence of the disappearance of work.[15]

In light of such profound economic and societal upheaval, the notion that historic preservationists armed with zoning regulations, restoration projects, and façade easements have been systematically displacing the poor for the sake of aesthetics sounds rather less than convincing. America's divestment in labor and the audacious transference of wealth up the socioeconomic ladder is the real culprit. That does not mean gentrification plays no part in the displacement of urban communities; it does, but considering the depth of the problems of the poor, historic preservationists are more of a red herring than blameworthy.

To return to the question of why the historic preservation easement program was enacted some forty years ago, the answer is simple: to provide meaningful tax incentives to owners of certified historic structures who elect to permanently protect their property utilizing easement restrictions. The actual processes involved – the homeowner's relinquishment of parts of their property rights to a qualifying charitable organization, the hiring of expert tax and legal counsel, obtaining a qualified easement appraisal, and so on – is where it gets tricky. Historic preservation easements can be a challenge to apply and difficult to assess. Perhaps the easement program is a bit of a relic of the era of big government. Few federal programs can boast of such an intricate involvement of so many levels of regulatory agencies: the Department of the Interior, Internal Revenue Service, National Park Service, the states, territories, and tribal governments who must statutorily

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[15] William Julius Wilson, "When Work Disappears," *Political Science Quarterly* 111, no. 4 (1996): 567.

authorize the creation of easements, the state and tribal historic preservation offices, local governments from county to city, township to historic district, each with their own array of zoning restrictions and enforcement powers. Then there are the various 501(c)3 charitable organizations to which homeowners must contractually bind their property in perpetuity, along with the involvement of such private practitioners as may be needed to navigate the process from the initial inkling of inspiration to the implementation of permanent protections that will run with the property forever. There is, however, a simpler way: one could forgo the federal tax deduction and significantly cut the chain of involvement.

For more than thirty years the call for a smaller government providing fewer services has been a mantra for a great many of America's politicians. Recognizing that message might not appeal to the largest number of voters, politicians provided some nuance by asserting that reallocations in federal spending would translate into greater local control. As the federal government's role was diminished, the private sector would step in to fill the void as needed. The downward shift would, in theory, lead to increasing opportunities for small businesses and non-profit groups and improved accountability overall.

One of the ways that political impetus has been played out, in historic preservation terms, can be seen in the 1980 amendments to the National Historic Preservation Act of 1966. The amendments were crafted and implemented with an eye toward decentralizing federal statutory and regulatory authority. Consequently, the National Park Service began relinquishing some of their control by shifting a range of responsibilities onto lower-tiered agencies. State and local historic preservation groups may have found themselves

carrying a bit more clout, but with increased autonomy came new obligations – an example of which is the creation of nationally designated Heritage Areas.[16]

Congress has designated forty-nine National Heritage Areas (NHAs) since 1984. The Park Service describes the NHAs as "places where natural, cultural, and historic resources combine to form a cohesive, nationally important landscape [and] tell nationally important stories that celebrate our nation's diverse heritage."[17] Ranging from the Tennessee Civil War National Heritage Area to North Dakota's Northern Plains National Heritage Area, what differentiates NHAs from national park units is their status as public-private partnerships and their character as "a grassroots, community-driven approach to heritage conservation and economic development."[18] In a similar way, so can be described the historic preservation easement program. It too falls under the umbrella of the National Park Service. It is likewise a public-private pairing dedicated to conservation, but with its primary focus shifted to architecturally significant historic buildings, as adjudged by the National Register of Historic Places. Perhaps the drafters of the Tax Reform Act of 1976 intuited the future direction of historic preservation better than they have been given credit for. Perhaps they realized that it was through easement protections that property owners' individuated efforts could contribute in a meaningful way to the wider preservation movement – and perhaps stake a claim on posterity.

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[16] Norman Tyler, Ted Ligibel, and Ilene R. Tyler, *Historic Preservation: An Introduction to Its History, Principles, and Practice*, 2nd ed. (New York: W.W. Norton & Co., 2009), 333.

[17] National Park Service, *Heritage Areas 101: Place-Based, Community-Driven Conservation & Economic Development*, (Washington, D.C.: U.S. Department of the Interior, National Park Service, National Heritage Area Program Office, 2012).

[18] Ibid.

Yet today, with the historic preservation easement program still reeling from its association with "easement mills," one can readily envision the tax-incentivized portion of the program being dismantled in the near future. Indeed, a congressional committee held hearings on June 23, 2005, on exactly that topic.[19] The threat is not an idle one. The staff of the U.S. House Joint Committee on Taxation prepared a report in January 2005 that advocated for a comprehensive restructuring of the preservation easement program. In a summary of their proposal, the staff explained that their plan:

> eliminates the charitable contribution deduction with respect to facade and conservation easements relating to personal residence properties, substantially reduces the deduction for all other qualified conservation contributions, and imposes new standards on appraisals and appraisers regarding the valuation of such contributions.[20]

It was only after significant changes were made to the conservation easement program in the Pension Protection Act of 2006 that it survived. While traditional easement provisions are an indispensable legal tool for property owners and developers, their continued availability for historic preservation purposes is not a given.

There would, of course, be repercussions should Congress remove the tax incentive from the preservation easement program. For one, its usage would become limited primarily to those whose wealth would cushion and absorb the financial hit an easement encumbrance typically brings to a property's resale value. This is no small matter, as historic preservation's strengths are best realized as a democratic endeavor. Were preservation to become solely the province of the well-to-do, the field could very well

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[19] U.S. Congress, House, Committee on Ways and Means, Subcommittee on Oversight, *To Review the Tax Deduction for Facade Easements: Hearing before the Subcommittee on Oversight of the Committee on Ways and Means*, 109th Cong., 1st sess., June 23, 2005.

[20] U.S. Congress, House, *Options to Improve Tax Compliance and Reform Tax Expenditures*, Report by the Staff of the Joint Committee on Taxation, January 27, 2005, 281.

shift in focus over time – moving away from greater inclusivity and drawing closer toward a uniformity of class. Homogeneity tends to seek its own level. Those with fewer resources would be no more noble or dignified in their endeavors, but only operate at the other end of the monetary spectrum. Indeed, it would not be going too far out on a limb to suggest that those of modest means would preserve modest buildings, while the affluent would skew toward the preservation of grander structures, or at least the more expensive ones. A 2004 *Washington Post* article reported that there were approximately, "900 residential façade easements in Washington covering a total of 1,400 homes and condo units."[21, 22] The 2004 article also noted that the average assessed value of the residences protected by preservation easements in the District of Columbia was more than one million dollars, with most of the homes located in such affluent neighborhoods as Capitol Hill, Dupont Circle and Georgetown.[23]

Even with the housing market crash in 2008, the average home price in the nation's capital has significantly increased in the nearly ten years since that study was completed. Extending the range a bit, between June 2000 and June 2013 home prices in Washington, D.C., increased by some 88%, while an average of twenty major U.S. cities over that same time period yields a gain of 49%.[24] The extent to which Washington's abundant historic architecture played into that increase has not been determined. But the sense of place that animates the city, especially in its most renowned neighborhoods, is perhaps

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[21] Joe Stephens, "For Owners of Upscale Homes, Loophole Pays: Pledging to Retain the Façade Affords a Charitable Contribution," *The Washington Post*, December 12, 2004.

[22] Nationally, the number of preservation easements is estimated at 28,000. Lindsey Wallace, National Trust for Historic Preservation, email message to author, September 3, 2013.

[23] Stephens.

[24] Shan Carter and Kevin Quealy, "Housing's Rise and Fall in 20 Cities," *The New York Times*, website updated August 27, 2013. http://www.nytimes.com/interactive/2011/05/31/business/economy/case-shiller-index.html?smid=pl-share.

not so coincidentally linked to the fact that those same neighborhoods are also home to the great majority of the city's historic preservation easements.

On their own, neither a worker's cottage nor financier's townhouse is representative of the full range of historic architecture. Taken together, they paint a far more accurate picture. Historic preservation must remain a truthful and democratic undertaking if it is to stay compelling and relevant. Otherwise, its credibility will erode until practitioners become little more than doddering echoes of the history hobbyists and nostalgic romanticists of the field's antiquarian past. The tax incentivized preservation easement program will not last so long as it continues to be seen, however incorrectly, as a specialty tax loophole for a handful of easement holding organizations to exploit. Those who would abuse the system for personal gain should be held accountable, with further reforms considered to curtail any future abuses.

The historic preservation easement, when legitimately utilized, is a critically important means of safeguarding our nation's historic, built environment for future generations. While it is not always the best option for every situation, it is an invaluable tool to have at the ready in particular circumstances. Its loss would be felt perhaps most keenly by those with the fewest legally binding protections available for their historic property. Whether consumed by the misinformed or the misled, the gnawing of good public policy comes at a heavy price. After all, there are only so many slices a cake can yield before it is gone.

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APPENDIX

Appendix

Internal Revenue Service Advisory Council 2009 Public Report – Recommendations

1. Permit a taxpayer to revise the taxpayer's appraisal if an IRS audit determines there is a technical deficiency in the "qualified appraisal" requirements of IRS regulations. For this purpose, adopt the "substantial compliance" standard of *Bond v. Commissioner,* 100 T.C. 32 (1993).

2. Publish an announcement reaffirming IRS's recognition that historic preservation easements may have a non-zero market value in areas which have local preservation laws, with such value to be determined by a "qualified appraisal" per IRS regulation.

3. Adopt a safe-harbor audit policy that "qualified appraisals" (original or revised) will be accepted (absent clear and convincing evidence to the contrary) when the appraised value of the donated easement is equal to or less than 10 percent of the value of the underlying property.

4. Contract with outside appraisers (rather than using appraisers who are IRS employees) as the general rule, rather than the exception, in preservation easement audits where IRS believes an easement valuation is incorrect and therefore conducts its own appraisal.

5. Process taxpayer requests for audit reconsideration (on audits already concluded) using established IRS audit reconsideration procedures, where such requests are based on recommendations 1-3 above.

6. Consistent with the requirements of FACA, initiate an appropriate process for creating an expert easement advisory board to review appraisals and make nonbinding findings where the taxpayer and revenue agent do not agree on the value of a donated easement.