

PRESERVING PERPETUITY?: EXPLORING THE
CHALLENGES OF PERPETUAL PRESERVATION IN AN EVER-
CHANGING WORLD

BY
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One of the earliest examples of the uses of history is recorded by Aesop in the story of the Fox and the Lion. The Fox, as most of us remember, was invited to dinner by the Lion—a signal honor. Upon arriving at the appointed hour, the Fox observed that the footprints in the dust before the den, made by previous visitors on similar occasions, pointed only inward. The Fox read the history and stood the Lion up.¹

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¹ IPSWICH HISTORICAL COMM’N, SOMETHING TO PRESERVE: A REPORT ON HISTORIC PRESERVATION IN AMERICA’S BEST PRESERVED PURITAN TOWN, IPSWICH, MASSACHUSETTS v (1975). This preservation (admittedly “self-preservation”) parable served as the introduction to an influential pamphlet explaining the town’s efforts to protect its important seventeenth century building stock. In the early 1970’s, Ipswich residents collectively evaluated the potential for an easement program and launched an effort to encourage donations. Overall, sixteen property owners donated easements to the local historic commission—constituting a very successful example of an early localized preservation easement initiative. *Id.* at 25–26. For information on the current status of this unique assemblage of protected seventeenth century buildings, see Historic Ipswich, *Covenanted Houses*, <http://www.historicipswich.org/covenanted-houses/> (last visited Nov. 23, 2013).

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I. INTRODUCTION

At their core, preservation easements are intended to provide permanent, or perpetual, protection to significant historic resources against insensitive alteration or even outright demolition.² Every day, easement-holding organizations partner with property owners to protect additional properties, which can provide sympathetic owners a meaningful degree of assurance that their treasured historic resources will be preserved beyond their lifetimes.³ In recognition of the role this tool can play in protecting important heritage assets, certain types of voluntary easement donations are incentivized through the Tax Code.⁴ This use of tax expenditures to influence individual preservation decisions constitutes an important public investment in preserving our nation's most significant properties, but only will accrue to the donor if the easement meets express, and increasingly proscribed, criteria; namely, that its terms actually provide for perpetual protection.⁵ Perpetuity is an admittedly challenging target, and one that requires close attention from a

² ELIZABETH WATSON & STEFAN NAGEL, *ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 2* (2d ed. 2007). This Article refers to private preservation easements or restrictions and refers to this type of property interest collectively as “easements.” Despite the ongoing academic debate over the appropriate terminology, this term remains the most widely known to the public and is generally used by practitioners. *See, e.g.*, SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 534–35 (2012) (framing the debate over the appropriate terminology within the field); Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 4 UTAH L. REV. 1039, 1042 (2007) (same). A similar debate exists relating to defining significance, but the IRS standard within the tax deduction context focuses on whether a property has been formally listed on the National Register of Historic Places or qualifies as a contributing property to a National Register Historic District, and this is the working definition adopted throughout this Article. *See* I.R.C. § 170(h)(4)(c) (2000) (defining certified historic structures); Thomas A. Coughlin, *Appraisals, Insurance, Preservation Easements, and Estate Planning*, in *CARING FOR YOUR HISTORIC HOUSE* 227, 236–37 (Harriet Whelchel ed., 1998) (detailing the criteria to qualify for tax deductibility).

³ *See* ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 219 (2d ed. 2005) (noting that “[a] well-crafted easement can be even more effective than a preservation ordinance at protecting the built environment. An easement cannot be challenged on constitutional grounds and is not subject to the political pressures that sometimes can undermine even the strongest preservation laws.”); *see also* Jennifer Anne Rikoski, Comment, *Reform but Preserve the Federal Tax Deduction for Charitable Contributions of Historic Façade Easements*, 59 TAX LAW. 563, 565 (2006) (discussing the number of easement-holding organizations nationally).

⁴ Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 5–8 (2012) (explaining the current structure of the conservation easement tax incentives relating to certain enumerated objectives). Others have a differing version of the value of perpetual conservation easements or at least raise valid concerns about the future impact of perpetual easements, and whether allowing the current generation to permanently restrict lands of properties will inevitably lead to unanticipated adverse consequences going forward. *See* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 744–45 (2002) (raising concerns with regard to the rapid expansion of permanent conservation restrictions within the context of land use planning); *but see* Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 605–06 (2004) (exploring whether perpetual easements are as inherently or potentially problematic as argued).

⁵ *See generally* David J. Kohtz, *Improving Tax Incentives for Historic Preservation*, 90 TEX. L. REV. 1041, 1041–45 (2012) (discussing tax incentives, primarily within the rehabilitation tax credit context, and the public investment made in furtherance of this societal objective).

drafting perspective, particularly as the IRS will go beyond the expressed period of duration to ensure that the easement truly provides the requisite level of permanent protection dictated by statute.⁶ Moving beyond drafting concerns, however, if one is to take the concept of perpetuity seriously, the same degree of close attention also needs to be given to the monitoring and enforcement of the easement over that same period.⁷

Despite challenges, many easement-holding organizations have demonstrated the effectiveness of this tool for more than a half-century.⁸ This is not, however, equivalent to perpetuity, and issues will inevitably arise that call into question the continued ability of this tool to provide permanent protection to critical historic resources.⁹ Despite the protection of an easement, a governmental entity may, for example, still seek to seize a historic property through eminent domain to accomplish a particularly prized local objective.¹⁰ Similarly, fires will destroy historic properties, and climate change and coastal flooding can be predicted to affect historic homes despite meaningful efforts to avoid the loss.¹¹ What should

⁶ See generally INTERNAL REVENUE SERV., CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE 15–17 (2012), http://www.irs.gov/pub/irs-utl/conservation_easement.pdf (noting the issues related to determining whether an easement qualifies as having perpetual duration); Ann Taylor Schwing, *Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 220–21, 242 (2013) (noting the challenges of drafting perpetual restrictions and the need for careful planning in this regard to avoid potential longer term issues).

⁷ The challenges with perpetual easements, real or perceived, have led some commentators to call for new forms of property restrictions, including potentially renewable agreements that would require or allow for periodic examination of the negotiated easement to re-examine its continued value and functionality. See Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 165–66 (2011). See also W. William Weeks, *A Tradable Conservation Easement for Vulnerable Conservation Objectives*, 74 LAW & CONTEMP. PROBS. 229, 230–31 (2011) (advocating for tradable conservation easements in light of climate change concerns and increasing uncertainty).

⁸ JANE C. NYLANDER & DIANE L. VIERA, *WINDOWS ON THE PAST: FOUR CENTURIES OF HISTORIC NEW ENGLAND HOMES* 219–227 (2d ed. 2009) (describing Historic New England’s Stewardship Easement Program and its work over the past approximately 50 years). See generally J. MYRICK HOWARD, *BUYING TIME FOR HERITAGE: HOW TO SAVE AN ENDANGERED HISTORIC PROPERTY* 89–94 (2007) [hereinafter *BUYING TIME FOR HERITAGE*] (detailing Preservation North Carolina’s work with preservation easements across that state, protecting over 600 properties in its over 30 years of efforts).

⁹ See generally J. Myrick Howard, *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 313, 330–42 (Robert E. Stipe ed., 2003) [hereinafter *A RICHER HERITAGE*] (discussing the development of preservation easement programs and the troubling resource issues relating to the need to create endowments to sustain the monitoring of restricted properties over long horizons, particularly early issues relating to the failure to fully understand the nature of this commitment, which led to undercapitalization and the use of endowment proceeds for other charitable purposes). See also Sarah Gilman, *Little Orphan Easement? A Look at What Happens When a Land Trust Dissolves*, HIGH COUNTRY NEWS, Dec. 21, 2009, at 5 (discussing the issues surrounding longevity of easement holding organizations); James L. Olmstead, *The Invisible Forest: Conservation Easement Databases and the End of Clandestine Conservation of Natural Lands*, 74 LAW & CONTEMP. PROBS. 51, 61–62 (2011) (providing an overview of this issue within the context of the move to provide greater transparency within the land trust community).

¹⁰ See, e.g., Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 595 (2000) (charting the City of Santa Rosa, California’s, use of its condemnation power in order to run a pipeline across an Audubon Society nature preserve).

¹¹ E.g., Laura J. Nelson, *Inn Fire Takes Away a Piece of History*, BOSTON GLOBE, Aug. 4, 2011, http://www.boston.com/news/local/massachusetts/articles/2011/08/04/historic_groton_

easement-holding organizations do in such situations in light of their perpetual commitment to protect these properties?

The purpose of this Article is to consider this question. Many of the potential issues are unresolved, and are easily enough put off until a real emergency develops. Purely reactive solutions will likely lead to imperfect or non-optimal outcomes both in responding to the emergency and in dealing with the aftermath.¹² It is perhaps an unavoidable reality that protected historic properties will be lost, but planning for a responsible response will respect the resource, the donor's intentions, and will protect any public investment in subsidizing the easement donation, while fulfilling the organization's responsibility as a qualified easement holder.¹³

To this end, this Article is broken into three primary parts. Part II provides an overview of the history of preservation easements with an eye to explaining the motivations that led to the development of this protective mechanism. Part III explores the legal framework that governs an easement-holder's response to a catastrophic event. Finally, Part IV outlines and evaluates an easement-holder's options in assessing and responding to a threat or actual property damage. Ultimately, it will be the ability of easement-holding organizations to respond responsibly to catastrophic events that will validate this critically important preservation tool, or in a meaningful sense, preserve the perpetuity that is its defining hallmark.

II. BACKGROUND

A. Preservation Easements: An Overview

Preservation easements, at their most fundamental level, are simply a legal tool designed to help individual property owners and easement-holders partner to permanently safeguard significant historic resources.¹⁴ To accomplish this objective, an owner donates a limited property interest to a qualified easement holder (most often a nonprofit), which prohibits alterations to protected features

inn_lost_to_fire/ (last visited Nov. 23, 2013) (describing the loss of the historically designated Groton Inn (c.1678) in Groton, Massachusetts to a catastrophic fire).

¹² Similar planning has already occurred in various other arenas within the historic resource community. See Nat'l Trust for Historic Pres., *Disaster Response*, <http://www.preservationnation.org/resources/Technical-assistance/disaster-recovery/> (last visited Nov. 23, 2013) (providing best practices for disaster response within the house museum and homeowner contexts).

¹³ See, e.g., Putney General Store, *Project History*, <http://www.putneygeneralstore.com/history/project-history> (last visited Nov. 23, 2013) (discussing this historic general store's experience with repeated arson events).

¹⁴ Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L. Q.* 673, 704–707 (2007) (describing perpetual easements generally); see also BRENT LEGGS ET AL., NAT'L TRUST FOR HISTORIC PRES., *PRESERVING AFRICAN AMERICAN HISTORIC PLACES* 15 (2012), available at http://www.preservationnation.org/forum/library/public-articles/PB_AfricanAmericanSites.pdf (detailing the use of this legal mechanism to protect the historic Winks Lodge, a 1928 lodge that originally catered to African-American tourists to Arapaho-Roosevelt National Park, near Denver, Colorado).

without the easement holder's express review and approval.¹⁵ "Using the traditional bundle of sticks metaphor for property, we can describe the landowner as losing one of the sticks in her bundle . . . and giving it to someone else" who agrees to hold subsequent owners responsible for complying with the terms of the agreement.¹⁶ To ensure this compliance, an easement holder agrees to periodically monitor the property, generally at least annually, or more frequently if rehabilitation work is occurring on site, and to enforce the terms of the easement against potential future violations—thereby ensuring the continued preservation of the protected resource.¹⁷ The truly unique aspect of preservation easements is that state legislatures have generally granted these property interests exemption from the common law rule against perpetuities, which allows for "permanent" protection for historic resources so encumbered.¹⁸ In some instances, the donation of a perpetual easement can reduce the value of the underlying property being protected, and the federal tax code allows owners to potentially recover some of the loss by claiming a noncash charitable deduction for any diminution in value associated with that donation.¹⁹

¹⁵ SAMUEL N. STOKES ET AL., NAT'L TRUST FOR HISTORIC PRES., *SAVING AMERICA'S COUNTRYSIDE: A GUIDE TO RURAL CONSERVATION* 224–25 (2d ed. 1997) (explaining the easement donation process generally); see also NAT'L PARK SERV., TECHNICAL PRES. SERV., *EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS* 7–8 (2010) available at <http://ohp.parks.ca.gov/pages/1074/files/easements-historic-properties.pdf> (discussing qualified easement-holding organizations).

¹⁶ Jessica O. Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

¹⁷ NORMAN TYLER ET AL., *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* 187 (2000) (noting that easement-holding organizations are "responsible for checking on the condition of the property regularly to ensure it satisfies the provisions of the easement").

¹⁸ Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 385 (2001) (discussing the development of state laws allowing nonprofits to hold perpetual preservation and conservation easements; Massachusetts in 1969 became the first state to afford nonprofits, rather than governmental entities, the ability to secure nonpossessory permanent property interests); see also Robert H. Levin, *A Guided Tour of the Conservation Easement Enabling Statutes*, <http://www.landtrustalliance.org/policy/emerging-issues/conservation-easement-enabling-statutes> (last visited Nov. 23, 2013) (providing an overview of state enabling legislation).

¹⁹ Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. POCKET PART 218, 223 (2008), available at <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/conservation-easement-tax-credits-in-environmental-federalism/> (last visited Nov. 23, 2013) (summarizing the financial aspects of an easement transaction from a landowner's perspective); see also Deborah R. Huso, *This Old Write-Off*, VALUATION, Third Quarter 2012, at 18, 19, available at <http://www.valuationdigital.com/valuation/20123rdQ#pg20> (last visited Nov. 23, 2013) (discussing the difficulties in valuing easement donations within the historic resource context). Despite the publicity and attention given to the tax deduction for easement donations, it is important to note that not all easement donations are incentivized through the tax code—many donors are not driven by any financial incentives whatsoever in taking the initiative to permanently secure protection for their historic resources. *But see*, BUYING TIME FOR HERITAGE, *supra* note 8 at 93–94 (discussing nonincentivized preservation easements).

Within the preservation context, easements are a highly flexible tool that can be tailored to protect the specific attributes of an individual historic property.²⁰ Depending upon the owner's and the easement holder's objectives, an easement can protect the property's exterior, accessory buildings, the landscape or setting, as well as important interior features.²¹ Easements that protect interior details are a unique preservation mechanism as this is the only generally available means of protecting a historic interior from alteration or even total "gut" renovation.²² Restrictions on interior modification can protect significant interior details, such as mantels, paneling, room configuration, light fixtures, plaster, hardware, staircases, flooring, and any other character defining details called out for specific attention in the easement document by the owner and easement holder.²³ A comprehensive easement protecting interior, exterior, and landscape elements is the only meaningful way, outside of museum curatorship, to provide "whole" protection to a historic resource, and allow it to tell the story of its representative time and place.²⁴ In all, this legal tool affords individual property owners the option of partnering with a governmental or nonprofit entity to protect significant historic properties that they own and want to see preserved for posterity.²⁵

"The real work with conservation easements, [however], begins after the signature ink is dry. Even the best written easements are only as good as the holder's resolve and capacity over the long term to monitor, enforce, and defend them."²⁶ The choice of an easement holder, and the responsibility of the organization to its donors and the public generally, is the true key to easements

²⁰ BUYING TIME FOR HERITAGE, *supra* note 8, at 89–90 (explaining that "[e]asements are flexible tools. The easement should protect the historic resources on the property, but it can be custom-designed to meet the personal and financial needs of the landowner.").

²¹ *Id.* at 90 (discussing the process of negotiating an easement and several of the considerations that dictate its structure, including the owner's interest in potentially securing a federal tax deduction).

²² Will Cook, *The Future of the Past: A New Frontier Called Interior Easements*, PRESERVATION PROGRESS, Spring 2005, at 8 (explaining the importance of interior preservation easements and the efficacy of efforts to use this device in Charleston, South Carolina). Landmark ordinances provide a limited exception as some do provide protection to interior spaces. Interior spaces protected through landmark ordinances tend to be public or quasi-public space and are limited to those areas that are publicly accessible. Local historic districts, by contrast, the most effective regulatory tool—do not protect historic interiors as this tool is focused on the protection of the visual components of the built environment—generally for aesthetic motivations. Robert W. Mallard, *Avoiding the "Disneyland Façade": The Reach of Architectural Controls Exercised by Historic Districts Over Internal Features of Structures*, 8 WIDENER L. SYMP. J. 323, 323 (2002) (discussing these limitations); Albert H. Manwaring, IV, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designation*, 25 NEW ENG. L. REV. 291, 292–93 (1990) (same).

²³ WATSON & NAGEL, *supra* note 2, at 2. Interior easements are less common owing to the complexity of administering such restrictions, and the additional responsibilities this requires of the holder. *Id.* Additionally, many donors may not relish the perceived intrusion associated with an annual interior inspection of their property, which could lead to a market loss beyond what would be normally anticipated with exterior easement donations. *See also* BUYING TIME FOR HERITAGE, *supra* note 8, at 89–90 (noting both the reach and limitations of this generally voluntary preservation tool).

²⁴ Wendy Nicholas, *Collaborating to Save Whole Places*, FORUM J., Fall 2010, at 7 (discussing the role of preservation and conservation organizations in partnering to protect whole places).

²⁵ Richard J. Roddewig, *Preservation Law and Economics*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 427, 485 (Christopher J. Duerksen ed., 1983) [hereinafter *Preservation Law and Economics*].

²⁶ JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 18 (2005).

working as a functional preservation tool.²⁷ Monitoring and enforcement are critical components of any effective easement program, and without periodic site visits to verify the condition of the property, a program loses its vitality and an easement holder could even conceivably waive its interest due to continued inaction.²⁸ Best practices in this field require the easement holder to commit considerable resources to stewarding its easement properties, and to building responsive and responsible relationships of trust with property owners, while retaining sufficient distance to remain a responsible arbitrator willing to enforce the terms of the agreement even when uncomfortable or potentially costly.²⁹ This type of stewardship is critical to ensure that both parties share the same long-term preservation goals for the property, which will allow the easement to operate successfully in actual application.

In sum, preservation easements are a unique legal tool that can provide focused and individualized protection to historic resources, but the effectiveness of this protection hinges upon the ability of the easement holder to monitor and to uphold the terms of this agreement over the course of its permanent commitment to the specific historic resource.³⁰

B. The Move to Permanence – Protection for Historic Properties Through Division of the Fee Estate

Nonpossessory easements allowing for the protection of important resources did not spring forth whole cloth, but rather were the result of a long and evolutionary process focused on arresting the pace of urban change as well as a growing desire to protect rapidly disappearing historic and natural resources.³¹ To more fully understand the modern easement, this section charts the development of this tool over the past century, including investigating its roots in other forms of property restrictions, its break from prior strictures against nonpossessory property interests, its swift rise to prominence as a tool of choice for both the conservation and preservation advocates, and recent controversies relating to the use of this mechanism, as well as future challenges to the concept of perpetual protection.

²⁷ L'Enfant Trust, *You Should Care Who Holds Your Easement*, http://www.lenfant.org/About_YouShouldCare.html (last visited Nov. 23, 2013) (explaining the need to carefully evaluate and vet potential easement holders and the impact of this decision).

²⁸ BYERS & PONTE, *supra* note 3, at 196. Beyond the holder's inaction, there are other potential threats to the long-term protection ostensibly provided by easements. See Jennifer C. McStotts, *In Perpetuity or Forty Years, Whichever is Less: The Effect of Marketable Title Acts on Conservation and Preservation Easements*, 27 J. LAND RESOURCES & ENV'T'L L. 41, 41–42 (2007) (discussing marketable title acts); Jeffrey M. Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 272–73 (2002) (discussing statutory challenges); Clemens Muller-Landau, *Legislating Against Perpetuity: The Limits of the Legislative Branch's Powers to Modify or Terminate Conservation Easements*, 29 J. LAND USE & ENVTL. L. 281–82 (2009) (same).

²⁹ BYERS & PONTE, *supra* note 3, at 143–55 (discussing the importance of monitoring within this context).

³⁰ NAT'L TRUST FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 1–2 (2008) [hereinafter BEST PRACTICES].

³¹ See CHARLES B. HOSMER, JR., PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG 40 (1965) [hereinafter PRESENCE OF THE PAST] (describing the isolated and early preservation efforts that evolved into a national movement).

1. Deed Restrictions/Zoning Controls

In some measure, the movement to allow for nonpossessory easements has early roots in the movement during the late nineteenth and early twentieth century to respond to the excesses of the prevailing, and relatively unrestricted, development framework.³² Often overlooked, a component of this effort was the widespread application of deed restrictions to new residential developments.³³ This effort was designed to give purchasers some comfort that their property's use and value would remain intact for at least their period of ownership, and was aggressively marketed by developers as providing this enumerated benefit.³⁴ In previous decades, it was commonplace and even expected that urban homeowners may need to move periodically to avoid being left behind as a neighborhood's character could fundamentally change several times within even a single lifetime, and more importantly, such a transition might be necessary to protect the value of the owner's underlying equity investment.³⁵ It is perhaps somewhat difficult now to imagine the rapid pace of transition that American cities experienced within the rather finite, proscribed, geographic contexts existing in the era between the industrial revolution and the introduction of the automobile.³⁶ The idea of inevitable economic decline in a neighborhood's lifecycle were hallmarks of the development model of that time and dictated real estate speculation and development activity in urban areas nationwide.³⁷ The introduction of deed restrictions allowed owners, generally or collectively, some ability to enforce or limit undesired activities or uses within a newly constituted subdivision or development.³⁸ Typically, deed restrictions would be used to impose a number of

³² MICHAEL HOLLERAN, BOSTON'S "CHANGEFUL TIMES": ORIGINS OF PRESERVATION & PLANNING IN AMERICA 53 (1998) (exploring the form of deed restrictions that characterized elite suburban subdivision); *but see* RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAWS, AND SOCIAL NORMS 23–28 (2013) (discussing racially restrictive covenants and their interrelationship with the prevailing private planning norms); Elizabeth A. Harris, *At High-Priced Corner, a Building Forlorn*, N.Y. TIMES, Mar. 25, 2013, http://www.nytimes.com/2013/03/26/nyregion/former-village-dispensary-must-untangle-restrictions.html?_r=0 (last visited Nov. 23, 2013) (discussing an early deed restriction and its impacts on a contemporary property).

³³ Valerie Jaffee, Note, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 YALE L.J. 1302, 1307–13 (2006) (providing a history of the use of restrictive covenants in development planning); *see also* HENRY C. BINFORD, THE FIRST SUBURBS: RESIDENTIAL COMMUNITIES ON THE BOSTON PERIPHERY 1815–60 (1985) (noting the role of restrictive covenants in shaping the residential developments surrounding Boston).

³⁴ *See* HELEN C. MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT 72–74 (Richard T. Ely ed., 1928); *see generally* J.C. NICHOLS, *A Developer's View of Deed Restrictions*, 5 J. LAND USE & PUB. UTIL. ECON. 132 (1929) (discussing the use of deed restrictions in marketing residential subdivisions).

³⁵ *See, e.g.*, HOLLERAN, *supra* note 32, at 42–43 (recounting the protagonists from John P. Marquand's novel, *The Late George Apley*, father's decision to move from the Boston's South End to the newly developed Back Bay in light of pending neighborhood transition).

³⁶ *Id.* at 26–29 (exploring the culture of change that served as a dominant feature of nineteenth century development); *see also* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 12–13 (1991) (discussing the pace of change within the context of the rapid industrial development of Chicago, particularly after the American Civil War and through the 1890s).

³⁷ HOLLERAN, *supra* note 32, at 52–54.

³⁸ Efforts to enforce deed restrictions were considerably less effective than the campaign to make this tool widespread as courts repeatedly questioned the desirability and enforceability of this newly

limitations on what an owner buying into the common scheme development could do with her property, including defining the required cost of the new construction and its use among a litany of other possible restrictions depending upon the goals of the organizing developer.³⁹ These restrictions could provide purchasers buying into the development some degree of comfort that the neighborhood's context, for better or worse, would remain relatively consistent over the near to mid-term.⁴⁰

Zoning, a publicly driven process, would serve as a further extension of this desire for greater certainty and permanence in urban and suburban land use patterns.⁴¹ The purpose of zoning was originally simply to separate the use of particular areas to allow residential, commercial, and industrial uses to co-exist in the developed landscape within different spheres and zones.⁴² Zoning provided further definition to and greatly expanded the growing idea and even expectation of predictability and permanence within the urban environment, but still did not protect historic properties—other than having the possibly unanticipated effect of potentially slowing or channeling development activity away from some historic neighborhoods to areas with less intensive zoning limitations.⁴³

In a meaningful sense, however, the modern preservation easement is a continued extension of the compelling late nineteenth/early twentieth century desire for permanence in the face of a rapidly changing world although the end objective varied slightly—the preservation of a neighborhood scale, use, or aesthetic (typically to allow for the continuance of the desired residential use) versus the preservation and appearance of an individual historic property or assemblage of historic buildings and the contextual building fabric.⁴⁴

developed private legal framework. See Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 BERKELEY PLANNING J. 7, 8–9 (1986) (discussing the difficulties of enforcing private land use controls).

³⁹ Jaffee, *supra* note 33, at 1307–13 (exploring the use of restrictive covenants in a 1930s New Haven residential development and the normative community expectations this legal device represented).

⁴⁰ *Id.* at 1341 (noting that despite challenges to the efficacy and implementation of this tool, restrictive covenants had strong signaling power that could lay out community norms and expectations, and lead to the form of development intended by the promoters).

⁴¹ Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New Haven*, 115 YALE L.J. 116, 128–35 (2005) (exploring the motivations for adopting zoning in 1920s New Haven); but see Jerry L. Anderson et al., *Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 690–92 (2008) (exploring representation issues on zoning boards and the potential disconnect between zoning decisions and actual public opinion and objectives).

⁴² Gerald A. Fisher, *The Comprehensive Plan is an Indispensable Compass for Navigating Mixed-Use Zoning Decisions Through the Precepts of Due Process, Takings, and Equal Protection*, 40 URB. LAW. 831, 833–35 (2008) (providing an overview of zoning and its original purposes and objectives).

⁴³ Michael Holleran, *Roots in Boston, Branches in Parks and Planning*, in GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 81, 100–01 (Randall Mason & Max Page eds., 2004) (explaining the formation of the Beacon Hill Civic Association in the 1920s and that this organization's push for zoning in the city of Boston was motivated at least in part by a desire to preserve historic resources by alleviating market pressure through the imposition of height limitations); see also Jaffee, *supra* note 33, at 1332–34 (exploring the interaction between restrictive covenants and zoning).

⁴⁴ See, e.g., PRESENCE OF THE PAST, *supra* note 31, at 41–56 (detailing the preservation of Mount Vernon—perhaps the most prominent example of the purchase and preserve generation of preservation efforts); see also JULIE ANN GUSTANSKI, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT,

2. *Purchase of Historic Properties*

In tandem with the widespread usage of restrictions in development, a second strand of concern relating to the rapid changes in American life began to emerge in the movement to preserve significant historic properties.⁴⁵ From the earliest days of the preservation movement in the mid-nineteenth century, preservationists had sought ways to permanently protect historic properties.⁴⁶ Initially, preservationists seemingly had only a single tool at their disposal—the outright purchase and control of critical heritage assets.⁴⁷ Obviously, if you own an asset, you are able to exert control over its condition and ensure its preservation, subject to having the necessary funds to pay for ongoing maintenance.⁴⁸ The drawback to this model became apparent over time—owning and, more importantly, maintaining a historic property is a costly and involved undertaking, which limits its potential for widespread replication.⁴⁹ Nonetheless, as the vast number of historic house museums demonstrates, the purchase and acquisition of a historic property often proved practicable, as it was exciting and novel.⁵⁰ Paying for routine maintenance

AND FUTURE 9, 9 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (tracing the origins of conservation easements to late nineteenth century Massachusetts and the development and implementation of common law servitudes to protect prominent landscape architect Frederick Law Olmstead's Emerald Necklace surrounding Boston).

⁴⁵ Walter Muir Whitehill, "Promoted to Glory . . ." *The Origins of Preservation in the United States*, in WITH HERITAGE SO RICH 35, 35–44 (1966).

⁴⁶ HOSMER, *supra* note 44, at 29–40 (charting early, largely unsuccessful attempts to protect historic resources prior to the campaign to protect Mount Vernon by the Mount Vernon Ladies' Association).

⁴⁷ James M. Lindgren, "Preserving the Illusion of Being Transported Back into the Past": *Remaking Landscapes through Historic Preservation*, in A LANDSCAPE HISTORY OF NEW ENGLAND 285, 287–89 (Blake Harrison & Richard W. Judd eds., 2011) (exploring this trend in the context of cultural politics and collective memory); *see also* Ernest A. Connally, *The Conservation of Sites and Monuments in the New World*, in PRESERVING AND RESTORING MONUMENTS AND HISTORIC BUILDINGS, 231, 231–32 (1972) (noting the large number of house museums established prior to 1969 and the rationales for using this form of preservation strategy to protect significant historic properties). This progressive historical narrative is perhaps overstated, as the true evolution of preservation efforts is arguably not as linear as normally presented for didactic purposes. *See* Max Page & Randall Mason, *Introduction: Rethinking the Roots of the Historical Preservation Movement*, in GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES, *supra* note 43, at 6–8 (offering a critique of the standard historical narrative of the preservation movement as belying a more complex and variegated patchwork encompassing many more strands and geographic areas than are usually credited within the traditional narrative).

⁴⁸ LEGGS ET AL., *supra* note 14, at 16–18 (discussing the potential of, but also the difficulties associated with, operating a historic site as a house museum, based on a successful example of the Louis Armstrong House Museum, a National Historic Landmark located in Queens, New York).

⁴⁹ DONNA ANN HARRIS, *NEW SOLUTIONS FOR HOUSE MUSEUMS: ENSURING THE LONG-TERM PRESERVATION OF AMERICA'S HISTORIC HOUSES* 4 (2007) ("The initial motivation of preservationists who saved the building was to retain the structure as a part of the historic fabric of the community. In most cases, the initial group who saved the site chose a museum use by instinct or by default with little understanding of the harsh realities of the costs, skills, and experience needed" to run the property as a museum); *see also* TONY P. WRENN & ELIZABETH D. MULLOY, *NAT'L TRUST FOR HISTORIC PRES., AMERICA'S FORGOTTEN ARCHITECTURE* 250 (1976) ("Probably every active preservationist has had a similar daydream, or one in which someone knocks on the door with the check that will miraculously solve all the financial problems of saving a building. The thought of John D. Rockefeller, Jr. repeating his performance as the angel who restored Williamsburg dies hard.").

⁵⁰ HARRIS, *supra* note 49, at 9–11.

and ongoing care, however, was far less glamorous and thus the more difficult fundraising task, which led to a serious gap between the number of historic properties in museum use and the necessary funds to care for those resources.⁵¹

In light of this reality, preservation groups, which purchased thousands of historic properties over the course of the nineteenth and twentieth centuries, began to realize that outright ownership was not a sustainable model appropriate for all historic houses, and that other solutions, both private and public, were required to expand preservation efforts beyond a certain strata of “elite” or high-visibility heritage assets.⁵² It is now clear that the ability of museum properties to remain protected in the public or quasi-public ownership of nonprofit institutions is dictated by the general public’s interest in their history—whether through donations or tour fees generated by site visits, which in the best of times was, and often remains, a doubtful and uncertain proposition.⁵³

3. *The Introduction of the Local Historic District/Regulatory Controls*

Recognizing the limitations of the historic house museum model, certain communities experimented with other methods of preserving and protecting historic sites.⁵⁴ Foremost amongst these methods were local historic district ordinances, a form of regulatory control designed to protect assemblages of historic properties as a way of preserving more than just isolated historic relics, but also whole areas of significance derived from an aggregate of associated elements that retain a collective historic and aesthetic context.⁵⁵ The local historic district, permitted under a state’s enabling legislation, focused on preserving historic neighborhoods by implementing design control standards applicable to properties within the regulated district, thus barring insensitive additions or inappropriate new construction without the prior approval of the local historic district commission.⁵⁶

⁵¹ *Id.*

⁵² Jessica Neuwirth et al., *Abbott Lowell Cummings and the Preservation of New England*, PUB. HISTORIAN, Fall 2007, at 57, 65–66 (exploring The Society for the Preservation of New England Antiquities’ (SPNEA) (the precursor to Historic New England) difficult decision to deaccession over 30 historic house museum properties to ensure the organization’s ability to care for its core holdings). The deaccessioned properties, upon being sold to private owners, were protected with preservation easements and now form the nucleus of Historic New England’s Stewardship Easement Program. Other organizations have similar experiences with house museums and in exploring alternative protective methods. See Richard Moe, *Are There Too Many House Museums?*, FORUM J., Fall 2012, at 55, 60–61 (discussing the National Trust for Historic Preservation’s role in guiding the sale of the Robert E. Lee Boyhood Home to preservation-minded private owners subject to a preservation easement); see also Tracie Rozhon, *Homes Sell, and History Goes Private*, N.Y. TIMES, Dec. 31, 2006, at 1 (discussing the sale of many former historic house museums owing to lack of public support or operating capital).

⁵³ Cary Carson, *The End of History Museums: What’s Plan B?*, PUB. HISTORIAN, Fall 2008, at 9, 10–13 (discussing the resource issues many house museums face as a result of declining attendance).

⁵⁴ CHARLES B. HOSMER, JR., PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926–1949, pt. 2, at 238 (1981) [hereinafter PRESERVATION COMES OF AGE] (exploring the southern roots of regulatory preservation).

⁵⁵ Shantia Anderheggen, *Four Decades of Local Historic District Designation: A Case Study of Newport, Rhode Island*, PUB. HISTORIAN, Fall 2010, at 16, 16–21 (noting the tendency of local historic districts to focus on aesthetics rather than broader associated contexts).

⁵⁶ Albert B. Wolfe, *Conservation of Historical Buildings and Areas—Legal Techniques*, A.B.A. SEC. OF REAL PROP. PROB. & TR. L. 18, 20 (1963) (discussing the motivations behind the development of this tool).

This form first came into being in the South with sizeable seaport cities such as Charleston, New Orleans, and Galveston taking the lead.⁵⁷ Ironically, at least some “old-line” preservation organizations, particularly in New England, were initially reluctant or wholly uninterested in using regulatory controls to preserve historic structures—a result of opposition to involving the government in preservation efforts.⁵⁸ The move to the local historic district model, however, “[m]arked a new sophistication in the United States. Many of the areas set aside by these early zoning ordinances never had any great role to play in history, but they were indeed important components of an urban picture.”⁵⁹ In short, preservation continued its gradual evolution away from only protecting individual properties associated with famous personages or historical events, and began to play a more substantial role in the defining the urban context and streetscape.⁶⁰

Notwithstanding growth in the utilization of this tool over the twentieth century to eventually cover historic areas in every state, there were also inherent limitations in the local historic district model that led to a continued need for additional preservation tools to be developed.⁶¹ For one, the legal basis for this form of zoning was predicated upon aesthetics, or the police power, which was continually questioned as an appropriate utilization of this authority.⁶² Despite challenges, historic district legislation would almost uniformly be upheld by the courts, but the lack of a clear mandate would continue to hamper efforts until the *Penn Central* decision finally provided a more firm constitutional foundation in 1978.⁶³ Beyond a generalized reluctance to explore an unproven model, aesthetics as the motivating force normally limited the scope of ordinances to visible elements of properties—generally excluding interior elements and even nonvisible elevations from their protection.⁶⁴ Additionally, there were practical limitations to the effectiveness of this regulatory mechanism, particularly in rural areas.⁶⁵ Local

⁵⁷ PRESERVATION COMES OF AGE, *supra* note 54, at 231–32 (exploring the southern roots of regulatory preservation).

⁵⁸ JAMES M. LINDGREN, PRESERVING HISTORIC NEW ENGLAND: PRESERVATION, PROGRESSIVISM, AND THE REMAKING OF MEMORY 54 (1995) (citing prominent early preservationist William Sumner Appleton’s belief that government “could not be trusted with a subject as sensitive and vital” as historic preservation).

⁵⁹ PRESERVATION COMES OF AGE, *supra* note 54, at 231–32.

⁶⁰ Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 474–76 (1980) (charting the evolution of historic preservation theory and the corresponding design of preservation regulations).

⁶¹ See Valerie Talmage, *Lessons for Land Conservation*, FORUM J., Fall 2010, at 11, 14–15 (imploping preservation organizations to be more involved in the real estate market rather than relying on their traditional regulatory authority).

⁶² JACOB B. MORRISON, HISTORIC PRESERVATION LAW 10–19 (1965) (discussing legal challenges to local zoning focused on aesthetics and summarizing the general trend in favor of allowing such regulatory controls); Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963) (discussing these issues).

⁶³ Symposium, *2011 Fitch Forum: Part Two—Keynote Discussion*, 18 WIDENER L. REV. 141, 142–44 (2012) (discussing the role of *Penn Central* and judicial treatment of preservation ordinances during the preceding period).

⁶⁴ Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 776–78 (2007) (explaining the development of aesthetic regulations).

⁶⁵ See STOKES ET AL., *supra* note 15, at 203–04 (noting the challenges in using historic districts to reach rural historic resources).

historic districts depend on broad-based property owner support to protect designated geographic contexts.⁶⁶ Many areas, and individual properties, remain unprotected, as political support could not be garnered to establish a local historic district.⁶⁷ As a result, non-visible building features and areas outside of urban cores, or isolated from broad-based preservation advocacy and support, largely remained beyond the reach of preservation efforts despite this innovation and its widespread use in the period up to and following the *Penn Central* decision.⁶⁸

4. Limitations to the Common Law/Early Innovations and Experimentation

In light of their growing experience in protecting historic properties and open space, through both fee ownership and the exercise of limited regulatory controls, preservation and conservation organizations recognized the inherent limitations in these tools and began exploring ways they could, through direct intervention in the real estate market, establish control over critical resources.⁶⁹ During the 1930s, the federal government had, as an extension of New Deal era land use planning, purchased right of way or viewshed easements along various federal works projects, as a way both to obtain a societal objective—protecting the aesthetics around a scenic byway—and compensate the owner of the burdened estate for any loss in market value.⁷⁰ In the postwar years, state actors⁷¹ and various other nonprofit organizations began exploring the related concept of acquiring development rights or less-than-fee interests to protect either land or historic resources.⁷² Despite some mechanisms that had allowed groups to acquire non-possessory interests through complicated property transfers,⁷³ the common law

⁶⁶ Mark D. Brookstein, *When History is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1848–49 (2001) (discussing the limitations of local historic district regulation).

⁶⁷ Heuer, *supra* note 64, at 774–76 (discussing the motivations behind the creation of new local historic districts and the need for broad-based public support).

⁶⁸ See Todd Schneider, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. ON POVERTY L. & POL'Y 257, 263–66 (2001) (explaining the occupation with visible historic elements or aestheticism implicit within the local historic district model); see also TYLER ET AL., *supra* note 17, at 59–70 (exploring the local historic district concept and the successful adoption of this tool).

⁶⁹ Russell L. Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROBS. 416, 416–17 (1971).

⁷⁰ Mahoney, *supra* note 4, at 749, 752 (discussing early easement initiatives of “dubious legality”). Other less-than-fee interests were explored during this period of policy innovation, including the purchase of options on what was deemed submarginal lands to provide indirect support for working farmers. See G.B. MacDonald, *Forestry Progress in Iowa*, 29 THE AMES FORESTER 7, 15–17 (1941) (explaining the National Park Service’s acquisition of purchase options on over 40,000 acres of submarginal land in Southeast Iowa in preparation for proposed national parks, which never materialized).

⁷¹ Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 127 (2010) (noting Wisconsin’s efforts to utilize this mechanism to purchase scenic easements).

⁷² *Id.* at 126–27; BYERS & PONTE, *supra* note 3, at 10–11; see also Harold C. Jordahl, Jr., *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343, 343–45 (1963) (summarizing Wisconsin’s easement acquisition experience).

⁷³ See Wolfe, *supra* note 56, at 18–19 (discussing common law right of entry and other covenants used by the Society for the Preservation of New England Antiquities to protect privately-owned properties).

generally disfavored or disallowed nonpossessory easements, based upon a reluctance under the common law to allow negative easements (easements restricting a property owner from utilizing their property in certain ways) as well as easements in gross (easements divorced from any relationship to a neighboring property).⁷⁴ Thus, it would require a transformation in the treatment of non-possessory perpetual property restrictions in order for this tool to be used in any meaningful degree.⁷⁵

5. *The Rise of the Modern Perpetual Easement*

Through the effort of a few pioneering lawyers and legislators, state legislatures during the 1950s through 1970s began experimenting with legislation to allow governmental and nonprofit organizations to acquire the perpetual less-than-fee interests that had been specifically barred at common law in express recognition of the potential societal gain that could accrue from allowing such property interests to exist.⁷⁶ By 1976, the benefits from easement donations were expressly recognized by the IRS, which allowed potential losses in property value associated with certain qualifying donations to be claimed as non-cash charitable contributions and made this tool more popular amongst the potential donor community.⁷⁷ Due to these incentives, the use of easements to protect resources expanded dramatically beginning in the 1980s, particularly by land trusts, which led to the protection of thousands of acres of critical habitat and open space nationwide.⁷⁸

Despite the introduction of this tool and the corresponding tax incentives, relatively few preservation easements were donated when compared to the veritable explosion of land trust activity.⁷⁹ This is not to say that the tool was not effective,

⁷⁴ See Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 3 (1989) (summarizing the common law obstacles to less-than-fee conservation or preservation interests); see also Note, *Affirmative Obligations in Historic-Preservation Agreements*, 51 GEO. WASH. L. REV. 746, 746–52 (1983) (noting the myriad issues surrounding affirmative maintenance and other obligations imposed through easements).

⁷⁵ MARILYN MEDER-MONTGOMERY, PRESERVATION EASEMENTS: A LEGAL MECHANISM FOR PROTECTING CULTURAL RESOURCES 3–4 (1984).

⁷⁶ IPSWICH HISTORICAL COMM'N, *supra* note 1, at 17–24 (discussing the enactment of enabling legislation to allow for the donation of perpetual property restrictions and the Commission's creation of a model agreement to work within the statutory framework); see also RICHARD J. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 9–13 (2011) [hereinafter APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS] (charting the early development of this tool).

⁷⁷ BYERS & PONTE, *supra* note 3, at 12; Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 494–95 (2004) (explaining the IRS's gradual move to recognize charitable deductions for the value of donative easements during the mid-1960s through the 1970s); see also Ross D. Netherton, *Restrictive Agreements for Historic Preservation*, 12 URB. LAW. 54, 55–56 (1980) (charting the development and origins of less-than-fee interests).

⁷⁸ Bray, *supra* note 71, at 129 (noting that after the introduction of tax incentives, “private land trusts began acquiring conservation easements at a breakneck pace”). See generally Parker, *supra* note 77, at 501–07 (exploring the various economic considerations which have led conservation easements to be more attractive than fee ownership).

⁷⁹ RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 38–39 (2003) (charting the growth of land trusts from 1880 through 2000); see also Nat'l Trust for Historic Pres., *Preservation Easements*, <http://www.preservationnation.org/information-center/law-and-policy/legal->

however, as in certain urban contexts preservation organizations actively pursued and secured protection for individual historic properties.⁸⁰ In Charleston, New York, Boston, and in Washington D.C. in particular, easements provided preservationists a mechanism to protect large numbers of properties heretofore beyond reach, including, in some cases, historic interior fabric that had been almost entirely exempt from regulatory protection.⁸¹ Easements also allowed preservation organizations fulfilling specific missions, such as revolving funds focused on adapting “problem” historic properties for new uses, a way to responsibly transfer ownership of rehabilitated properties to new owners with restrictions, using the proceeds to fund additional projects.⁸²

C. Preservation Easements Today

To date, thousands of historic properties have been protected through preservation easements nationally.⁸³ Qualified easement-holding organizations have emerged across the country to help owners protect significant historic properties.⁸⁴ In some areas, states or local communities have taken the lead in accepting preservation easements protecting important privately owned properties.⁸⁵ In others, nonprofit preservation groups have taken on this function.⁸⁶ Although this tool can function outside of an urban environment, most easement activity continues to occur in cities as the density of urban centers can typically

resources/easements/#.UlyBPmQ0j1U (last visited Nov. 23, 2013) (explaining that hundreds of preservation easement holders exist nationally, a number that remains far short of the thousands of local land trusts formed across the United States over the same period); Nancy A. McLaughlin, *Conservation Easements: A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 49–52 (2005) (charting the veritable explosion of land trust activity).

⁸⁰ *Preservation Law and Economics*, *supra* note 25, at 489–90.

⁸¹ BYERS & PONTE, *supra* note 3, at 225; *see also* APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 15–16 (profiling early preservation easement efforts in urban corridors).

⁸² *See generally* BUYING TIME FOR HERITAGE, *supra* note 8, at 65–70 (discussing the role of exterior easements in Preservation North Carolina’s work); Historic Boston Inc., *Preservation Projects: Project Selection Criteria*, <http://www.historicboston.org/info/preservation/criteria/index.html> (last visited Nov. 23, 2013) (detailing a prominent revolving fund’s project selection criteria).

⁸³ *See, e.g.*, Michael Steinitz, Dir., Pres. Planning Div., Mass. Historical Comm’n., Massachusetts: A Case Study—Comments on Trends in Preservation Easements since 2003, Remarks Before the National Preservation Conference 3 (Oct. 20, 2011) (explaining that since 2003, there have been more than 375 easements recorded in Massachusetts alone); *see also* APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 295–98 (estimating there are 2,000 preservation easements in New York City, Washington, D.C. and Chicago alone and listing the largest holders).

⁸⁴ A RICHER HERITAGE, *supra* note 9, at 340.

⁸⁵ *See* State of R.I. Historical Pres. & Heritage Comm’n, *Tax Credits & Loans: Preservation Easements*, <http://www.preservation.ri.gov/credits/easements.php> (last visited Nov. 23, 2013) (explaining Rhode Island’s efforts to protect privately owned properties); *see also* Historic Ipswich, *Covenanted Houses*, <http://www.historicipswich.org/covenanted-houses/> (last visited Nov. 23, 2013) (discussing the local community’s efforts to utilize easements to protect privately-owned properties).

⁸⁶ *See* Nat’l Trust for Historic Pres., *Preservation Easements*, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/#holds> (last visited Nov. 23, 2013) (explaining who accepts easements).

better support the organizational and administrative capacity to effectively administer an easement program over a sustained period.⁸⁷

Despite their effectiveness, certain preservation easements, particularly so-called façade easements, have proven controversial over the past decade.⁸⁸ The controversy stems from the structure of the tax incentive.⁸⁹ In the early 2000s, donations occurring in several large urban areas were questioned on the merit of the large tax deductions often being claimed.⁹⁰ Much of this criticism was leveled at façade easements donated within local historic districts given the fact that the elevations these easements were designed to protect were already protected by the local regulatory framework.⁹¹ In short, some property owners were claiming large charitable contributions for donations of questionable value owing to the fact that the claimed “loss” arguably was not even a loss, or at least not as much of a loss as claimed because the prohibited alterations were often already barred under local law.⁹² Some of this controversy can perhaps be seen as a function of the notorious difficulty associated with appraising the value of preservation easement donations. The public, however, not unjustifiably, recognized the inequity of allowing owners, often of very valuable urban properties, to obtain a tax advantage for what seemed to be little or no real loss in the owner’s asset value.⁹³

Responding to perceived abuses in this area, congressional hearings were held to investigate façade easement donations.⁹⁴ At the same time, the IRS began to ramp up its scrutiny of easement donations, including aggressively auditing these tax deductions as well as pursuing a considerable number of enforcement actions.⁹⁵ The IRS has not been uniformly successful in these actions, but its focus has had a

⁸⁷ See, e.g., L’Enfant Trust, *Mission*, <http://www.lenfant.org/about-us/mission.html> (last visited Nov. 23, 2013) (Washington, D.C.); Preservation Society of Charleston, *Preservation Easements*, http://www.preservationsociety.org/program_easements.asp (last visited Nov. 23, 2013) (Charleston, South Carolina).

⁸⁸ Rikoski, *supra* note 3, at 563–64 (charting the controversy over this form of easement donation which led to its inclusion on the IRS’s Dirty Dozen list of tax dodges for 2005). Concerns regarding potential abuse were not limited to preservation easements, but also extended into the conservation arena in various fashions. See Roger Colinvaux, *Charity in the Twenty-First Century: Trending Toward Decay*, 11 FLA. TAX. REV. 1, 21–22 (2011) (detailing possible governance issues with The Nature Conservancy, which were the target of a *Washington Post* expose and a subsequent Senate Finance Committee investigation).

⁸⁹ A RICHER HERITAGE, *supra* note 9, at 340 (discussing the bonanza of easement donations).

⁹⁰ Rikoski, *supra* note 3, at 566–67 (exploring the arguments surrounding façade easement donations in areas already protected by local regulations).

⁹¹ Dan McCall, *Are There Added Preservatives in Section 170(h) of the Tax Code?: The Role of Easements in Historic Preservation*, 39 REAL PROP. PROB. & TR. J. 807, 808 (2005).

⁹² See, e.g., Editorial, *A For-Profit Façade*, WASH. POST, Dec. 14, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A62364-2004Dec13.html> (last visited Nov. 23, 2013) (exploring issues and perceived abuses within the façade easement donation context); see also Frank Phillips, *Gomez Took \$281,500 Home Tax Deduction*, BOSTON GLOBE, May 9, 2013, <http://www.bostonglobe.com/metro/2013/05/08/gomez-claimed-controversial-tax-deduction-home/skZgaV3aBoGfIKtR03ZEEJ/story.html> (last visited Nov. 23, 2013) (discussing a façade easement donation by Massachusetts senatorial candidate within a local historic district).

⁹³ Huso, *supra* note 19, at 18–20 (discussing the difficulties of valuing easement donations).

⁹⁴ *To Review the Tax Deduction For Façade Easements: Hearing Before the Subcomm. on Oversight of the H. Comm. On Ways and Means*, 109th Cong. 34 (June 23, 2005).

⁹⁵ Fred A. Bernstein, *Rushing for Tax Breaks on Historic Homes*, N.Y. TIMES, Dec. 14, 2004, at A1 (discussing the IRS’s creation of a special compliance unit to focus on this category of charitable donation).

strong chilling effect on easement donations nationwide.⁹⁶ Donations of preservation easements have not stopped entirely, however, although some donors have elected not to utilize the tax benefits they could otherwise potentially claim owing to the audit risk.⁹⁷ Despite the controversy regarding some tax-incentivized donations, easements play a unique protective role in providing targeted protection to individual historic resources, and are likely to continue to play this role for the foreseeable future given their ability to perform this vital task.⁹⁸

D. The Challenge to Perpetuity?

Beyond the challenges to tax incentivized donations, the preservation easement faces other hazards. For example, the quickening pace of climate change and a seemingly endless barrage of natural disasters present material challenges to the concept of perpetual protection as represented by preservation easements.⁹⁹ Perpetuity is the very hallmark of the preservation easement as it offers property owners and nonprofit organizations a relatively durable mechanism for protecting historic properties.¹⁰⁰ Destructive events, such as fires and floods, that call this device into question, lessen its effectiveness as well as the case for continued public support. The straightforward challenge really goes to the physical fabric—the very historic resources and landscapes these easements protect. As catastrophic events occur, historic fabric is and will continue be lost—challenging both preservationists’ traditional ideas of integrity and the potential outright or total loss of important heritage assets.¹⁰¹ In the face of these challenges, and particularly as regards their obligations to perpetually protect heritage assets, easement holders

⁹⁶ Admittedly, the recent economic downturn also reduced donations, but given the precipitous decline even prior to the recession, and the failure of the numbers to once again rise, it is unlikely that the economic climate was the sole proximate cause of this decline. *See* Huso, *supra* note 19, at 19 (explaining that IRS activity has made “owners of historic properties . . . spooked, too, and with good reason. An IRS official [stated] that there are some 200 cases over disputed tax deductions related to historic preservation and conservation easements . . .”).

⁹⁷ *See* Historic New England, *Preservation Easement Protects Mid-Twentieth Century House Designed by Eliot Noyes*, <http://www.historicnewengland.org/about-us/whats-new/mid-twentieth-century-house-designed-by-eliot-noyes-is-protected-through-preservation-easements> (last visited Nov. 23, 2013) (noting a property owner’s donation of an easement for purely altruistic reasons).

⁹⁸ *See* Martha W. Jordan, *Missed Opportunities and More Questions: The Tax Court’s Most Recent Decisions Regarding Preservation Easements*, 88 TAXES 129, 130–31 (2010) (discussing the value of this legal mechanism); *See also* BUYING TIME FOR HERITAGE, *supra* note 8, at 93–94 (explaining that “not all donations of preservation easements will necessarily result” in tax incentives for property owners for a number of reasons, either because the financial value does not justify the costs of seeking the incentives, or because the owner is donating the easement “purely for reasons of the heart,” and concluding that “preservation easements are an invaluable tool in the preservation arsenal”).

⁹⁹ Owley, *supra* note 7, at 153; *see also* J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363 (2010) (discussing the impacts of climate change on this interrelated area of law).

¹⁰⁰ Tapick, *supra* note 28, at 262.

¹⁰¹ *See generally* SIMON SCHAMA, *LANDSCAPE AND MEMORY*, 571–78 (1995) (discussing the emotional connection between people and landscapes/land uses); *see also* Patrick W. Andrus, Nat’l Park Serv., *How to Apply the National Register Criteria for Evaluation Part VIII 44* (Nat’l Register Bull. No. 15, 1990) (defining integrity as “the ability of a property to convey its significance” and explaining the evaluative process).

will be pressed to respond to these events more comprehensively than they have in the past.¹⁰²

Another potentially less obvious implication directly relates to our collective cultural memory and our sense of place.¹⁰³ Climate shifts may lead to corresponding changes in land use, which will in themselves change the landscape and the sense of place that has historically defined geographic areas for generations.¹⁰⁴ Take as one representative example, the dramatic case of climate change and its recent impacts on the Vermont sugaring industry.¹⁰⁵ One of the iconic components of the Vermont “brand” over the past century has been its maple sugar industry.¹⁰⁶ Already, the syrup season has shrunk because of the warmer winters,¹⁰⁷ and industry participants fear the trend will continue unabated.¹⁰⁷ For Vermont, the cultural, not to mention economic, loss of the sugaring harvest is staggering, but many areas are similarly defined by their traditional land uses.¹⁰⁸ In the face of changing land use, protected historic resources will not be immune, as they are inseparable from place, and there is a growing need for proactive solutions from the easement community to respond to these threats to historic resources and the places they represent.¹⁰⁹ At least some consideration to these impacts should also potentially be considered in developing an organizational response to a disaster, which may require thinking about mitigation differently than it has been thought of in the past.

III. LEGAL FRAMEWORK

A. Overview

Typically, despite the mutual intention of both the easement holder and the property owner to perpetually preserve a historic resource, there are still circumstances that may result in the failure of this protection, as an easement unfortunately does not magically shield historic properties from damage.¹¹⁰ Preparing for such an event is critical for the effective maintenance and monitoring of an easement program’s portfolio, but the nature of this response will be a

¹⁰² Hugh C. Miller, *Why Care About Your Historic Home?*, in *CARING FOR YOUR HISTORIC HOUSE*, *supra* note 2, at 12–14 (discussing the issues relating to natural disasters).

¹⁰³ See generally NED KAUFMAN, *PLACE, RACE, AND STORY: ESSAYS ON THE PAST AND FUTURE OF HISTORIC PRESERVATION* 24–37 (2009) (framing preservation on the lens of larger “storyscapes” and human interaction with place); see also Scott C. Roper, “*Wrought in the Spirit of Our Ancestors*”: *Ethnicity, Scale, and Reinvention of a New England Town*, in *A LANDSCAPE HISTORY OF NEW ENGLAND*, *supra* note 47, at 303–17 (discussing this in the context of the reinvention of Peterborough, New Hampshire).

¹⁰⁴ See, e.g., JAN ALBERS, *HANDS ON THE LAND: A HISTORY OF THE VERMONT LANDSCAPE* 136–195 (2000) (charting the development of the classical agrarian Vermont ideal).

¹⁰⁵ See John Elder, *Afterword: “Back in a Time Made Simple by the Loss of Detail”*, in *A LANDSCAPE HISTORY OF NEW ENGLAND*, *supra* note 47, at 388–401.

¹⁰⁶ ALBERS, *supra* note 104, at 211 (noting the marketing power of the contemporary Vermont “brand.”).

¹⁰⁷ Pam Belluck, *Warm Winters Upset Rhythms of Maple Sugar*, *N.Y. TIMES*, Mar. 3, 2007, at A10.

¹⁰⁸ ELDER, *supra* note 105, at 390–92, 400.

¹⁰⁹ *Id.*

¹¹⁰ Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 *U. RICH. L. REV.* 1031, 1072–76 (2006).

function of the various legal requirements that invariably dictate an easement holder's responsibilities. To provide a working context, this section will review the federal requirements relating to perpetual easements, the complex issues associated with the potential amendment and termination of perpetual easements, and the specific template provisions included in most easements as all three components collectively frame an easement holder's obligations in responding to threats to a protected property.

B. General Requirements under Federal Law

Federal law provides the baseline for responding to damage both directly, by influencing the terms of the easement, but also indirectly by dictating the process that must be followed to modify or even terminate the easement when necessary or appropriate.¹¹¹ Beyond the general abstractions of meeting the intended preservation objectives of the parties, for many property owners, the potential to obtain a possible tax advantage is a strong motivating factor behind this charitable gift.¹¹² Generally, the owner of a historic property, subject to the property meeting certain threshold requirements, is potentially eligible to claim a charitable deduction for any loss in property value resulting from the easement donation.¹¹³ If the threshold requirements are met for the property, most commonly through listing on the National Register of Historic Places, either individually or as a contributing property to a National Register Historic District, the terms of the easement will need to be carefully tailored to meet IRS requirements, which are justifiably stringent to avoid the potential for abuse.¹¹⁴

One of the IRS's primary concerns relates to ensuring that the easement, in fact, results in perpetual protection.¹¹⁵ This attention to perpetuity extends to possible casualty events—including what happens to the proceeds of an eminent domain action or an insurance recovery, both key components of any disaster response when applicable.¹¹⁶ Recently, the IRS has focused on several provisions that could hypothetically lead to the premature termination of donated easements and, therefore, on that basis, has denied donors' claimed tax benefits.¹¹⁷ To take a representative example of one recent line of inquiry, the IRS has closely examined easements to verify the superiority of these interests to any liens or mortgages that

¹¹¹ BEST PRACTICES, *supra* note 30, at 34–37 (noting the legal requirements in this area).

¹¹² BRONIN & BYRNE, *supra* note 2, at 557–58; A RICHER HERITAGE, *supra* note 9, at 340; *but see* Josh Engle, *Notational Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENV'T'L L. REV. 47 (2011) (diving deeper into the motivations which have led to the enormous volume of conservation easement donations over the past several decades).

¹¹³ 26 C.F.R. § 1.170A-14(a) (2009).

¹¹⁴ NAT'L PARK SERV., *supra* note 15, at 6 (describing the designation process and the requirements for meeting the threshold certified historic structure status).

¹¹⁵ Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 ZONING L. & PRAC. REPORT 1, 6–7 (2012) [hereinafter *The Future of the Past*] (explaining that “[t]he IRS has been looking closely at the provisions of conservation easements to see how easy they are to change or terminate and to assess what would happen if they are extinguished or diminished.”).

¹¹⁶ IRS, *supra* note 6, at 11–15.

¹¹⁷ Letter from Steven T. Miller, Comm'r Tax Exempt and Gov't Entities Div., IRS, to Paul W. Edmondson, V.P. & Gen. Counsel, Nat'l Trust for Historic Pres. (Mar. 13, 2008) (on file with author) (discussing IRS enforcement initiatives generally).

might also exist in the chain of title.¹¹⁸ In a foreclosure event or the bankruptcy of the fee owner, the easement's interest would be subject to being stripped off through the applicable proceedings, effectively nullifying the protection of the easement.¹¹⁹ To protect a property subject to a mortgage, and still be able to claim a charitable deduction, the owner and the easement holder will need to prevail upon the lending institution to subordinate its interest, which can be a difficult proposition given the perceived impact on the lender's financial interest.¹²⁰ The IRS is diligent in ensuring that this step is accomplished—even focusing its review on the language of subordination agreements to evaluate whether the agreed-upon subordinations actually accomplish their intended function.¹²¹ In response to this heightened review, easement-holding organizations have been forced to scrutinize their projects and verify that the terms of the negotiated agreements conform to IRS requirements.¹²² It is not surprising that, as the terms included in the easement provide the basic lens or framework for any easement response, these obligations continue to evolve to comport with IRS guidance.¹²³

C. Amendment of Perpetual Easements

Apart from the IRS requirements in the perpetuity context, there are other possible layers of requirements affecting the amendment of easements specifically, which is to be expected given: 1) the perpetual nature of these agreements; 2) the potential for amendment to improperly dilute the protection afforded by the restrictions; and 3) the use of taxpayer funds to achieve this measure of lasting control.¹²⁴ This section, while not exhaustively recapitulating the intensive scholarly debate over what process should be followed in amending perpetual easements, will provide an overview of the current landscape in this area as these requirements heavily influence both the form and substance of an organization's potential response to catastrophic events.¹²⁵

¹¹⁸ *The Future of the Past*, *supra* note 115, at 6–7 (noting the perpetuity challenges associated with security instruments).

¹¹⁹ *Id.*

¹²⁰ Wendy C. Gerzog, *Mortgages and Conservation Easements—Not a Good Mix*, 132 TAX NOTES 437, 437–39 (2011).

¹²¹ *The Future of the Past*, *supra* note 115, at 6–7.

¹²² BEST PRACTICES, *supra* note 30, at 1–2.

¹²³ IRS, IRS ADVISORY COUNCIL PUBLIC REPORT 8–12 (2009), available at http://www.irs.gov/pub/irs-utl/irsac_2009_full_report.pdf (discussing the impact of IRS enforcement actions on easement design).

¹²⁴ See LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES, 10–11 (2007) (discussing the inapplicability of a “one-size-fits-all” approach to easement amendment based upon the complexities of these protective agreements).

¹²⁵ While this section covers a few of the more interesting issues and principal arguments being advanced, there are other legal precepts potentially in play. For a comprehensive list of legal considerations within the Massachusetts context, see Jonathan Bockian, *Amending Massachusetts Conservation and Preservation Restrictions* 24 (2013) (unpublished manuscript) (on file with author).

1. Overview

Over the life of an easement, there are situations where amendment, if possible, might be desirable to address unanticipated circumstances.¹²⁶ For example, if a historic resource has been severely damaged, it may be helpful to update the terms of an easement to more accurately reflect the features now protected, or to otherwise correct ambiguity, drafting errors, or even to substitute updated template language as it continues to evolve over time.¹²⁷ One thing is clear, however: given the continuing debate regarding the appropriateness of amending perpetual easements, amendment should only be sought when absolutely critical for the continued function of the restriction.¹²⁸ From a cautionary perspective, amendment entails considerable potential risk to the easement holder as it may call into question the perpetual nature of the tool with the donor community and even threaten the organization's tax-exempt status in extreme cases if improperly utilized.¹²⁹ Other risks, such as the possible involvement from neighbors if third party standing exists, should also be considered before seeking to take this action¹³⁰—ideally according to a well-designed and considered amendment policy implemented by the easement-holding organization to methodically lay out the circumstances when amendment will be deemed an appropriate recourse. If amendment is ultimately deemed necessary, federal and state requirements will play a defining role in establishing the parameters for that action.

2. Federal Treatment of Amendment of Perpetual Easements

Overall, the Code and corresponding Treasury Regulations require easements to be of perpetual duration in order to receive the benefit of the charitable deduction and expressly limit the circumstances in which tax incentivized easements can be terminated or extinguished.¹³¹ The Regulations, however, do not expressly mention amendment or dictate a process under which the terms of these agreements can be modified, which has led to a recent and relatively rigorous debate on this specific point.¹³² Some commentators argue that as the Regulations are unclear or silent as to the permissibility of amendment, this has been left as a matter of state law to

¹²⁶ BYERS & PONTE, *supra* note 3, at 187 (providing a summary of possible reasons for amending easements).

¹²⁷ *Id.* at 186 (discussing the land trust movement's history with amendments and noting that approximately 4% of all easements recorded had been amended as of 1999).

¹²⁸ See LAND TRUST ALLIANCE, *supra* note 124, at 53–56 (providing a risk spectrum for land trusts considering amendment).

¹²⁹ *Id.* at 15–16 (discussing the Land Trust Alliance's conservative approach in evaluating proposed amendments); see also Schwing, *supra* note 6, at 228, 235–36 (discussing concerns regarding donor intentions and failing to protect specific parcels versus more generalized or abstract conservation principles).

¹³⁰ See McLaughlin, *supra* note 110, at 1,035 (profiling the complexity of an ultimately aborted attempt by the National Trust for Historic Preservation to amend a preservation easement); see also Jessica E. Jay, *Third Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 791–95 (2005) (describing third party standing and the potential for neighbors to enforce restrictions against both the owner and easement holder).

¹³¹ Treas. Reg. § 1.170A-14(g)(6) (2009).

¹³² Jessica E. Jay, *When Perpetual is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL L. REV. 1, 6–7 (2012).

dictate both the availability and the applicable process for proposed modifications.¹³³ Others argue that this omission was intentional, and that amendment of perpetual easements is not permitted unless a judicial proceeding establishes that changed circumstances have completely frustrated the initial purposes of the agreement.¹³⁴ This distinction is material as it has profound implications as to the ability of the parties to even amend the easement.

Although this area is arguably unsettled, there are several threshold issues where federal law has direct and undisputed application, including the requirement that easement holders both enforce and maintain their commitment to properties under their protection.¹³⁵ Failure to honor this commitment, including by allowing inappropriate or unmerited amendments, could result in sanctions, or even revocation of the organization's charitable exemption.¹³⁶ The IRS is clearly "interested to know if holders and taxpayers are modifying or terminating their easements, largely because of the substantial public investment in donated perpetual easements through tax subsidy."¹³⁷ The primary vehicle for monitoring this activity is through the mandatory reporting requirements it requires of nonprofit organizations, which require the disclosure of information regarding monitoring activities and expenses through the annual filing of the form 990.¹³⁸ Recently, this form was updated to specifically require information regarding the "[n]umber of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year."¹³⁹

In sum, within the federal realm, regardless of one's view of the threshold debate as to the appropriateness of amending perpetual easements under the Regulations, there are numerous issues facing easement holders seeking to take this step.¹⁴⁰ Agreeing to inappropriate amendments could lead to severe consequences, and attention must be given to the process the organization follows in seeking to amend any tax incentivized easements under its stewardship.¹⁴¹

3. Express State Oversight over Amendment of Perpetual Easements

In light of the actual or perceived lack of clarity from the IRS, at least some of the responsibility for the oversight of amendments of perpetual easements devolves to the states.¹⁴² Given the public investment often involved, some states, through

¹³³ *Id.* at 13; *see also* Schwing, *supra* note 6, at 227.

¹³⁴ Schwing, *supra* note 6, at 240, 244; *see also* Bockian, *supra* note 125, at 19 n.120 (discussing the interplay between the tax court's decision in *Strasburg v. Commissioner*, 79 T.C.M. (RIA) 2000-094 (2000), which appears to tacitly allow for amendment, and the IRS's recent internal guidance policies that limit amendment to proscribed circumstances such as the correction of typographical errors).

¹³⁵ Jay, *supra* note 132, at 13; *see also* Schwing, *supra* note 6, at 219 (stating that a conservation easements must satisfy all applicable federal laws in order to potentially qualify for the federal tax deduction).

¹³⁶ Jay, *supra* note 132, at 13–14.

¹³⁷ *Id.*

¹³⁸ I.R.S. Form 990 Schedule D, available at www.irs.gov/file_source/pub/irs-pdf/f990sd.pdf.

¹³⁹ Jay, *supra* note 132, at 13 (citing I.R.S. Form 990 Schedule D, pt. II, 1.3).

¹⁴⁰ LAND TRUST ALLIANCE, *supra* note 128, at 55–56.

¹⁴¹ *Id.* at 64.

¹⁴² Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROBS. 1, 16 (2011) (discussing Maine's oversight of easement modifications); *see also* Jay, *supra* note 132, at 74 (arguing that state oversight should be explicit).

legislation, have moved to limit the ability of easement holders to modify easements and established oversight procedures for easement holders in their jurisdiction.¹⁴³ The nature of the amendment process is subject to the vagaries of each state's designated process.¹⁴⁴ Typically, this oversight will involve either the review of the court or various public agencies (or both) before an amendment will be allowed with the purpose of evaluating whether the public interest is being served or advanced through that action.¹⁴⁵ Some states, including Louisiana, Maine, Massachusetts, and New Jersey, have expressly limited amendments, normally drawing upon the common law doctrine of changed circumstances applicable to servitudes for a normative standard of review.¹⁴⁶ For example, Maine's statute requires court approval for amendments that would "materially detract from the conservation values intended for protection" and if any financial benefit results from the modification, that the increase be utilized to advance conservation objectives, rather than to reward the property owner.¹⁴⁷

This process is not necessarily clear even where a state law mandates direct oversight.¹⁴⁸ For example, in Massachusetts, governmental approval is required for a "release, in whole or part" of an easement.¹⁴⁹ In instances where the easement expressly allows for amendment by the parties, it is unclear whether approval of the Massachusetts Historical Commission would be required as long as the amendment falls short of being a "release in part" and the purposes of the underlying easement are not impacted.¹⁵⁰ Given the difficulty of drawing such lines, where an express state review process is in place, prudence would seem to dictate early discussions with the governing agency or official to ascertain their view on the applicability of the oversight process, and to gauge their reaction to the proposed modification.

4. *The Debate over the Charitable Trust Doctrine*

Despite prominent exceptions, the overwhelming majority of states do not currently require governmental approval for amendment, and the common view is that "amendment could take place in most jurisdictions without the interference of any public actors."¹⁵¹ In light of this, many practitioners have historically assumed that "a land trust had the authority, as the owner of the interest, to amend an easement" subject to several legal and ethical constraints including upholding the public's trust and confidence in easements as a productive endeavor worthy of

¹⁴³ Jay, *supra* note 132, at 43–44.

¹⁴⁴ See generally PAUL DOSCHER ET AL., AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS (discussing New Hampshire's process and requirements for modifying or extinguishing perpetual easements).

¹⁴⁵ BRONIN & BYRNE, *supra* note 2, at 548–49.

¹⁴⁶ *Id.*; see also RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10(1) (2000).

¹⁴⁷ ME. REV. STAT. tit. 33, §§ 477-A & 478(3) (2012). Given that approximately 10% of Maine's land mass, more than 750,000 acres and the most of any state, is currently restricted by conservation easements, the state's interest in monitoring changes to perpetual conservation restrictions is particularly compelling. Cf. BRONIN & BYRNE, *supra* note 2, at 549 (discussing Maine's amendment process).

¹⁴⁸ BRONIN & BYRNE, *supra* note 2, at 548–49.

¹⁴⁹ MASS. GEN. LAWS ch. 184, § 32 (2008).

¹⁵⁰ Bockian, *supra* note 125, at 6.

¹⁵¹ BRONIN & BYRNE, *supra* note 2, at 549; but see Jay, *supra* note 132, at 77–78 (providing charts of state laws governing amendment and termination of perpetual conservation easements).

continued financial support and backing.¹⁵² Beyond the few state laws expressly mandating oversight of amendments, there are other principles that may limit this seemingly broad authority.¹⁵³ In fact, there is a raging academic debate regarding the applicability of one state law principle in particular: the charitable trust doctrine.¹⁵⁴

i. The Argument for the Charitable Trust Doctrine

In the view of many commentators, a formal legal proceeding should be required whenever a proposal to amend an easement is advanced due to the application of the charitable trust doctrine.¹⁵⁵ Under the common law, the charitable trust doctrine applies to certain charitable gifts made with an express intention that the gift be utilized for a specified purpose.¹⁵⁶ For example, take a property owner who leaves her home to a nonprofit organization, but conditions this gift upon its continued use as a house museum.¹⁵⁷ If the nonprofit accepts this gift, it takes the property subject to this condition, and should the nonprofit then need or desire to stop using the property for this use, for instance, it cannot sustain the museum's operations, it will need the involvement of the state's attorney general and the applicable court to carry out this modification to the conditions of the gift to allow for its sale.¹⁵⁸ In short, under the common law, "charitable trusts may not be amended to deviate from their charitable purposes without the approval of a court."¹⁵⁹ The impact of this doctrine would be to apply the common law cy pres

¹⁵² Darby Bradley, *Amending Perpetual Conservation Easements: Confronting the Dilemmas of Change: A Practitioner's View 5* (Dec. 2007) (unpublished manuscript) (on file with author) (taking the position that parties should have the freedom to amend easements subject to limitations on private inurement and impermissible private benefit, general charitable laws, and upholding the public's expectations and interests).

¹⁵³ Schwing, *supra* note 6, at 219.

¹⁵⁴ Compare generally C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009) [hereinafter Lindstrom 1]; C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008) [hereinafter Lindstrom 2], with Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010); Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009) [hereinafter McLaughlin & Weeks 1]; compare also Jessica E. Jay, *Understanding When Perpetual is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, 37 HARV. ENV'T L. REV. 247 (2013); Jay, *supra* note 132, at 1, with Schwing, *supra* note 6, at 217.

¹⁵⁵ See, e.g., Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 428 (2005) [hereinafter *Rethinking the Perpetual Nature*].

¹⁵⁶ Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 701–02 (2005).

¹⁵⁷ For a discussion of restricted gifts, see John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 698–99 (2007). For an example of an unrestricted gift, see McLaughlin & Weeks 1, *supra* note 154, at 73 n.1.

¹⁵⁸ See Coughlin, *supra* note 2, at 235–36 (discussing the Society for the Preservation of New England Antiquities' decision to accept the gift of Casey Farm (c. 1750) in Saunderstown, Rhode Island subject to the condition that the land remains in cultivation or active farm use).

¹⁵⁹ BRONIN & BYRNE, *supra* note 2, at 551.

doctrine to limit the ability of parties to amend easements to situations where a “court finds that the means of achieving the charitable purpose become ‘impossible or impracticable’ as a result of changed conditions and such amendments would conform with the original intent of the trust.”¹⁶⁰

As applied to the easement context, the general argument is that easement donations made by individual donors are intended as restricted gifts to protect specific defined resources, and should be treated as such under state charitable trust principles.¹⁶¹ Land trusts and preservation organizations certainly promote the perpetual nature of the restrictions for specific parcels, rather than for conservation purposes more generally.¹⁶² Advocates point out that charitable trust principles have been utilized for years in other contexts to balance, as best as possible, the donor’s desire to exercise dead hand control over a charitable gift, and society’s interest in promoting the rational use of the underlying resource.¹⁶³ Extending this same degree of oversight to perpetual conservation easements, particularly given the public investment normally involved, is in the view of many, the most effective way to ensure that this investment continues to provide the intended public benefit.¹⁶⁴

To date, only one court has actually applied the charitable trust doctrine to the amendment of a perpetual easement, but it remains an open question whether this principle will have greater applicability going forward.¹⁶⁵ At least one state, New Hampshire, has already issued guidance expressing its view that this doctrine applies to amendments and laying out parameters for review of proposed easement modifications by the state’s attorney general, and others may follow as they begin to confront this issue.¹⁶⁶

ii. The Argument Against Application

Others argue that a charitable trust is not created by an easement donation, and this is perhaps the most accepted approach—at least in practice to date.¹⁶⁷ In most cases, “if the parties agree, an amendment could take place in most jurisdictions without the interference of any public actors. Indeed, many believe that one of the most attractive features of conservation and preservation restrictions is their ability

¹⁶⁰ *Id.*

¹⁶¹ McLaughlin & Weeks 1, *supra* note 154, at 76–77.

¹⁶² See Schwing, *supra* note 6, at 237.

¹⁶³ McLaughlin, *supra* note 155, at 429.

¹⁶⁴ *See, e.g., id.*

¹⁶⁵ *Hicks v. Dowd*, 157 P.3d 914, 919 (Wyo. 2007) (applying charitable trust doctrine to easement held by a local governmental agency which extinguished an easement to allow for mineral development of the site); *but see* *Long Green Valley Assoc. v. Bellevalle Farms, Inc.*, 68 A.3d 843, 845 (Md. 2013) (rejecting charitable trust argument with regard to an agricultural preservation easement purchased with state funds). Even if this principle does not have express application, it could have the effect of spurring states to consider enacting legislation to allow the state an oversight role and a basis to draw upon for crafting a process for reviewing and evaluating amendments. Jay, *supra* note 132, at 43–44 (discussing additional states considering prospective legislation).

¹⁶⁶ NEW HAMPSHIRE OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CHARITABLE TRUSTS ET AL., AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS 2–4 (2011).

¹⁶⁷ BRONIN & BYRNE, *supra* note 2, at 549.

to be created or modified without governmental interference.”¹⁶⁸ This view has been summarized as

government entities and land trusts have right to modify and terminate the perpetual conservation easements they hold ‘on their own’ and as they ‘see fit,’ subject to only the agreement of the owner of the encumbered land and the general constraints imposed by federal tax law on the operations of charitable organizations.¹⁶⁹

Advocates of this approach point to the relative dearth of known improper amendments as evidence that there is no need for more governmental involvement or oversight of the amendment process.¹⁷⁰ Concerns about the ability of state attorneys general to assert oversight and the costs associated with monitoring and enforcing these restrictions might open “up private easement administration to intervention by political officials in the form of the states’ attorneys general [and] . . . be counterproductive. . .” in that some officials may be more development-minded than the easement holder.¹⁷¹ Others worry about the impact this degree of oversight may have on the critical trust relationship between donor and the easement holder, which could have a chilling effect as well as create uncertainty where none used to exist.¹⁷² As easements often involve multiple policy objectives or preservation goals, evaluating the relative benefits of these competing considerations may be better addressed by the easement holder as they directly relate to the holder’s area of expertise.¹⁷³

Overall, amendment is one of the thorniest issues that an easement holder will need to navigate when developing their response to a disaster event. In light of this fact, easement holders should develop amendment guidelines to expressly proscribe the bounds of the organization’s willingness to utilize this step, and utilize caution before seeking to modify a perpetual easement.¹⁷⁴

D. Extinguishment

The issue of when an easement can be extinguished is in some ways more straightforward: “if changes surrounding the property that were unexpected at the time of the easement donation make it impossible or impractical to achieve the easement’s conservation purposes, the easement can be terminated.”¹⁷⁵ In contrast to amendment, the Regulations specifically provide for this eventuality—allowing

¹⁶⁸ *Id.*

¹⁶⁹ McLaughlin & Weeks 1, *supra* note 154, at 4 (summarizing Lindstrom 2, *supra* note 154). *See also* Andrew C. Dana, Conservation Easement Amendments: A View from the Field 3–4 (Apr. 10, 2006) (unpublished draft prepared for the Environmental and Natural Resources Law Seminar, Stanford Law School) (on file with author) (discussing changing views of amendments within the field and the formerly nearly universal view of when this degree of intervention would be appropriate).

¹⁷⁰ Lindstrom 1, *supra* note 154, at 401–02, 409 (noting “[i]n the over one hundred years of land trust history, with nearly 1,700 private land trusts now in business . . . there is only one recorded case of an improper conservation easement termination.”).

¹⁷¹ *Id.* at 409.

¹⁷² *Id.* at 410.

¹⁷³ *See* Dana, *supra* note 169, at 5 (recommending targeted cross-disciplinary , expert review of potential amendments to a conservation easement).

¹⁷⁴ BEST PRACTICES, *supra* note 30, at 42 (discussing amendment policies generally).

¹⁷⁵ Jay, *supra* note 132, at 9.

termination if the protection of the restricted property no longer furthers the targeted conservation values as long as the value of the public investment is preserved.¹⁷⁶ In such an occurrence, the interest in the property represented by the percentage of the property's value that was claimed as a charitable deduction will accrue to the preservation organization for use in its charitable mission—thus preserving the value of the tax expenditure utilized to secure this property interest.¹⁷⁷

This is not to say that termination of an easement should be taken lightly as the act is only “justifiable in the event that the conservation purpose of the easement no longer exists.”¹⁷⁸ This determination can quickly get complicated as “even when a historic structure has been destroyed, the property may still have value as open space property or as a visual buffer to nearby historic properties and the easement should not be extinguished.”¹⁷⁹ If the conservation values have been completely destroyed, extinguishment can result from a judicial proceeding as expressly provided for by the Regulations.¹⁸⁰ In such a proceeding, it is a matter of judicial decision whether the facts presented by the easement holder and encumbered property owner rise to the level to merit termination.¹⁸¹ Again, these cases are not always clear, but “[a] court is likely to [to extinguish] if, for example, the structure being protected by the restriction has been destroyed” and there are no other conservation values being furthered; for example, if an ocean-side cottage and site are lost to erosion, no additional conservation values are likely to be furthered, in contrast to a rural or farm property, which may also be providing open space or habitat.¹⁸² Extinguishment of perpetual easements is exceedingly rare, and is the last step or outcome an easement holder should consider in responding to a catastrophic event.¹⁸³

E. Specific Easement Provisions

The other principal driver of any disaster response is the terms of the easement itself, which provide the process and define the obligations of the property owner with regard to the impacted property. In relationship to potential catastrophic events, preservation easements typically include provisions addressing defining a destructive event, mandating how the property is to be insured, and addressing amendment and termination of the property interest as well as how any proceeds received in conjunction with eventual extinguishment are to be distributed.¹⁸⁴ These provisions are briefly summarized in turn.

¹⁷⁶ Treas. Reg. § 1.170A-14(c)(2) (2011).

¹⁷⁷ See Shea B. Airey, *Conservation Easements in Private Practice*, 44 REAL PROP. TR. & EST. L. J. 745, 760–61 (2010).

¹⁷⁸ BEST PRACTICES, *supra* note 30, at 43.

¹⁷⁹ *Id.*

¹⁸⁰ Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, PROB. & PROP. July/Aug. 2009, at 52, 55; Treas. Reg. § 1.170A-14(g)(6)(i) (2011).

¹⁸¹ BYERS & PONTE, *supra* note 3, at 229.

¹⁸² BRONIN & BYRNE, *supra* note 2, at 555.

¹⁸³ BYERS & PONTE, *supra* note 3, at 190 (noting that preservation easements should remain perpetual in almost all cases).

¹⁸⁴ BUYING TIME FOR HERITAGE, *supra* note 8, at 178–79 (showing sample easement provisions).

1. Easement Donations Generally

To briefly recap, the lion's share of preservation easements are voluntary grants of property interests to easement-holding organizations that limit future owners' ability to insensitively alter or demolish historic resources.¹⁸⁵ Easements are of necessity a flexible tool as they are tailored to protect the defining features of a specific resource and to meet both of the parties' expectations and goals.¹⁸⁶ These often, but do not necessarily align, and the donor's motivations, as well as the easement holder's requirements, will shape the structure of the protection and dictate how much of the property is preserved; in short, the scope or extent of protection ultimately afforded by the easement.¹⁸⁷ Within the preservation context, easements also place an affirmative maintenance obligation on owners of encumbered properties, requiring the owner to keep the property in a good state of repair and dictating an approval process for any proposed work at the site.¹⁸⁸

2. Defining the Casualty Event

Most preservation easements place a duty upon the owner of the encumbered property to notify the easement holder of any damage to the protected resource.¹⁸⁹ Typically, an owner will need to provide notice to the easement holder within a specified period of time so that the easement holder can review, approve, and then monitor any repair work.¹⁹⁰ The easement may also require that a rehabilitation plan be prepared as part of the approval which will detail how and when repairs will be made to bring the property back into compliance, and demonstrating that the repair work will be performed using similar materials, workmanship, and feature similar design as the historic elements being repaired or replaced.¹⁹¹

In the course of this review, and after determining the extent of the damage and the feasibility of restoring the resource, the easement holder may need to determine whether a full restoration or rehabilitation is appropriate or can be required under the terms of the easement.¹⁹² Not surprisingly,¹⁹³ a decision to require restoration when significant property damage has occurred has the strong

¹⁸⁵ Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261, 261 (2011).

¹⁸⁶ WATSON & NAGEL, *supra* note 2, at 2–3.

¹⁸⁷ BUYING TIME FOR HERITAGE, *supra* note 8, at 93–94.

¹⁸⁸ APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 584–88 (providing the National Trust for Historic Preservation's template provision for work approvals).

¹⁸⁹ BYERS & PONTE, *supra* note 3, at 228–29 (explaining a standard easement provision requiring notice to the easement holder before the owner commences repair or rehabilitation efforts).

¹⁹⁰ WATSON & NAGEL, *supra* note 2, at 14–16; *see also* APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 586–88 (providing language from an easement held by the National Trust for Historic Preservation requiring notification regarding any damage to an encumbered property within fourteen days).

¹⁹¹ BYERS & PONTE, *supra* note 3, at 224–28; *see also* APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 586–88 (providing template language from the National Trust for Historic Preservation addressing rehabilitation).

¹⁹² WATSON & NAGEL, *supra* note 2, at 16–17 (noting that “[a] holder’s decision on whether restoration is required tends to be influenced by the availability of insurance proceeds to pay for the work.”).

¹⁹³ 36 C.F.R. § 68.3(c) (1999) (defining the Secretary of Interior’s standard for restoration).

potential to be a critical conflict point.¹⁹⁴ In some instances, the easement may set as a reasonableness bound the amount of insurance proceeds (for example, not requiring restoration or rehabilitation should the costs exceed the insurance recovery).¹⁹⁵

3. Insurance Requirements

To cover a casualty event, easements generally require a certain level of property insurance, which is intended to provide sufficient protection to allow the owner to remedy most damage to the historic building.¹⁹⁶ Insurance requirements vary among easement-holding organizations, but typically will require an owner to carry insurance for full replacement cost to ensure, to the extent possible, that the necessary funds will be in place to allow the owner to carry out a sensitive rehabilitation.¹⁹⁷ Depending upon the location of the resource, additional coverage, such as flood insurance if located in a federally designated flood zone, may also be required.¹⁹⁸ Insuring historic properties is perhaps necessarily an inexact science, but the key from an easement holder's perspective is to ensure, to the extent possible, that the property owner will have the funds to complete any needed repairs.¹⁹⁹

Some insurance carriers specifically focus on historic properties and the issues these properties face when damaged, and these specialty providers may be utilized by owners of historic properties to meet their easement obligations.²⁰⁰ These policies, while requiring an additional premium beyond standard homeowner's policy do provide for the use of historic materials and fabric in costing out a claim, unlike most policies that require the use of modern construction materials.²⁰¹ For example, as noted by one specialty carrier, "[m]ost insurance carriers want to give you Pergo and drywall instead of hardwood and plaster . . ." as opposed to authentic methods and materials.²⁰² "That can mean no restoration specialists, no

¹⁹⁴ WATSON & NAGEL, *supra* note 2, at 17.

¹⁹⁵ APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 586–88 (providing National Trust for Historic Preservation template language defining total loss as exceeding insurance recovery).

¹⁹⁶ Genny Dill, *Getting the Right Insurance for Your Historic Building*, FORUM NEWS, Mar./Apr. 2009, at 1–2; *see also* BYERS & PONTE, *supra* note 3, at 228–29 (exploring the issues relating to insurance requirements). Depending on the easement holder, the easement may require the property owner to periodically provide proof of insurance to ensure that the proper coverage is in place. *See also* APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 590–91 (providing insurance requirements from an easement held by the National Trust for Historic Preservation).

¹⁹⁷ BYERS & PONTE, *supra* note 3, at 228–29.

¹⁹⁸ Adam Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. C. L. REV. 3, 7–11 (2005) (noting that homeowners policies typically exclude flood coverage).

¹⁹⁹ BYERS & PONTE, *supra* note 3, at 229.

²⁰⁰ Nat'l Trust Ins. Services, *Welcome to Our Website*, <http://nationaltrust-insurance.org> (last visited Nov. 23, 2013) (describing the National Trust for Historic Preservation's for-profit subsidiary focused on insuring historic properties and nonprofit historic property owners).

²⁰¹ Catherine Siskos, *Old House Insurance Policies with the Right Stuff*, OLD HOUSE J., May/June 2007, http://www.oldhousejournal.com/old-house_insurance/magazine/1356 (last visited Nov. 23, 2013) (discussing the cost of specialized insurance coverage for historic properties and pegging the additional expense as 20% to 40%).

²⁰² Siskos, *supra* note 201, at 20.

artisan craftspeople, and no materials that aren't found at the local big-box hardware stores."²⁰³ Specialty policies also can be designed to cover repairs that exceed the insured value of the property if required to complete a full rehabilitation or restoration using appropriate materials, workmanship, and design.²⁰⁴

Given the tumult of the last few years, insurance coverage requirements are becoming increasingly hard to navigate for owners as well as easement holders.²⁰⁵ For example, flood insurance or hurricane insurance for historic properties in coastal zones is now exceedingly difficult and expensive to procure, and may eventually become impossible for owners to obtain if the federal government vacates the field as some have advocated.²⁰⁶ If a significant gap develops between the costs of repairs and the availability of appropriate insurance coverage, the functionality of this legal mechanism may be affected, and easement holders have to remain vigilant to this evolving situation.

4. Amendment

As discussed, easements often provide an amendment process.²⁰⁷ This process will normally require the joint assent of both grantor and grantee to modify the terms of the agreement.²⁰⁸ Most easements limit mutual amendment to situations where the underlying conservation values are not impacted. For example, changes are limited to correcting a typographical error or to updating template language.²⁰⁹ If an amendment is mutually agreeable to both parties and does not impact the protected conservation values, the easement can, at least conceptually, be amended, although other legal requirements will likely limit the flexibility of the parties.²¹⁰

5. Condemnation

Condemnation is another issue typically addressed in easement templates as local, state, or federal entities can still use eminent domain to acquire protected

²⁰³ Dill, *supra* note 196, at 1.

²⁰⁴ Siskos, *supra* note 201, at 20 (discussing The Chubb Group of Insurance's approval of repairs in excess of three times of the value of a historic New York home). This type of coverage provides a guarantee to rebuild or repair the damaged home using original materials (or the best possible alternative or reproduction should original materials not be available) even if the repairs exceed the insured value of the historic property. *Id.*

²⁰⁵ Nat'l Conference of State Historic Pres. Officers, *Best Practices: Insurance and Historic Properties*, <http://www.ncshpo.org/current/bestpractices/insurance.htm> (last visited Nov. 23, 2013) (discussing the issues relating to insuring historic properties).

²⁰⁶ See, e.g., Judith Kildow & Jason Scorse, Editorial, *End Federal Flood Insurance*, N.Y. TIMES, Nov. 29, 2012, at A31 (exploring the federal role in this process).

²⁰⁷ Nancy A. McLaughlin, *Extinguishing and Amending Tax Deductible Conservation Easements: Protecting the Federal Investment after Carpenter, Simmons, and Kaufman*, 13 FLA. T. REV. 217, 242–45 (2012); see also APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 596 (providing template language from an easement held by the National Trust for Historic Preservation addressing amendment).

²⁰⁸ Bockian, *supra* note 125, at 3.

²⁰⁹ *Id.* at 19 n.120.

²¹⁰ Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 LAW & CONTEMP. PROBS. 279, 281–82 (2011).

parcels for public purposes.²¹¹ Actual condemnation of protected historic structures anecdotally appears to be rare, but given their perpetual duration, easements require language to address even this remote possibility.²¹² Easements address this by providing that the parties will join in any condemnation proceeding to oppose the taking, and, in the event that their opposition fails, will act to recover the full value of the property.²¹³ Given the equities in play in such a circumstance, the intervention of the easement holder can potentially play a meaningful role in redirecting or at least mitigating the impacts on the historic property.²¹⁴ If the opposition fails, the value represented by the easement holder's restriction will be dedicated to the organization's charitable purposes.²¹⁵

6. Extinguishment/Allocation of Percentage Interests

Easements also address the potential extinguishment of the easement in the event that this extreme action becomes necessary based upon changed circumstances or unanticipated events.²¹⁶ Within the preservation easement context, these are normally related to catastrophic property damage.²¹⁷ Extinguishment provisions address the reality that situations do, albeit infrequently, arise where the purposes that led to the easement donation are no longer advanced by the restrictions.²¹⁸ The extinguishment provisions included in most preservation easements provide for the easement holder to have control over the extinguishment process and seek to limit the range of circumstances in which an easement can be terminated.²¹⁹

If an easement is to be extinguished, the easement will also provide a procedure allocating any proceeds obtained through either an insurance settlement or condemnation action between the donor and donee.²²⁰ Normally, the division of proceeds will be allocated based upon the ratio claimed as a federal tax deduction.²²¹ This ratio focuses on the fair market value of the property before and

²¹¹ Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 42 U.C. DAVIS L. REV. 1897, 1949–60 (2008) [hereinafter *Condemning Conservation Easements*] (explaining this principle and providing examples of hypothetical compensatory events).

²¹² *Id.*

²¹³ See BEST PRACTICES, *supra* note 30, at 43; see also APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 594 (providing template language from an easement held by the National Trust for Historic Preservation governing condemnation).

²¹⁴ Ross Bradford, *Help! The Highway is Coming! Highway Expansion and Historic Sites*, PRES. LEADERSHIP FORUM BLOG (May 24, 2013), <http://blog.preservationleadershipforum.org/201305/24/help-the-highway-is-coming/#.UI8oNIBJN8B> (detailing, within the section 106 process, the role preservation groups can play in shaping the outcomes of these public decisions).

²¹⁵ *Condemning Conservation Easements*, *supra* note 211, at 1939, 1942.

²¹⁶ Airey, *supra* note 177, at 766.

²¹⁷ See BEST PRACTICES, *supra* note 30, at 43; see also APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 594–95 (providing sample extinguishment language from an easement held by the National Trust for Historic Preservation).

²¹⁸ Schwing, *supra* note 6, at 244–45 (discussing allocation of proceeds provisions).

²¹⁹ See *id.* at 242–43.

²²⁰ Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part I: The Standards*, 45 REAL PROP. TR. & EST. L. J. 473, 509–10 (2010) [hereinafter *National Perpetuity Standards*].

²²¹ See *id.*

after the easement donation.²²² Consider, for example, a hypothetical property appraised at \$1,000,000, where the property owner donates an easement valued at \$100,000, or the appraised loss in property's value associated with the donation. The ratio that will apply to any future casualty event will then be one to ten, so 10% of any future recovery—based upon the appraised value at the time of the event—will accrue to the easement holder.²²³ The ultimate calculation may be more complicated because the holder will not be entitled to a pro rata share of any improvements made to the property in the intervening period, and the parties will need to obtain an additional appraisal to justify any adjustment.²²⁴ The easement holder's percentage of the recovery will ultimately be utilized to advance the organization's charitable purposes as required by the applicable Regulations.²²⁵

In all, while this section provides a basic overview of many standard provisions included in preservation easements, the terms of each easement should be closely analyzed because even within the portfolio of a single preservation easement holder, there can be wide variation in the language from easement to easement—a reflection of the fact that these are negotiated agreements designed to fit the circumstances of a specific property, the parties' goals, and the associated context.²²⁶

IV. RESPONDING TO THE CASUALTY EVENT

Inevitably, an easement-holding organization will have to respond to a casualty event where substantial damage, if not total loss, of a protected resource has occurred or may be threatened.²²⁷ The organization's response will be critical in honoring the intent of the donor, respecting the owner's vulnerable position, and complying with all applicable requirements under both state and federal law. Preparing for this inevitability then is absolutely critical. Although each individual response is by necessity fact specific and depends on the nature of the damage, the historic resource, and the easement protecting the property, the following considerations should be weighed in forming a comprehensive organizational response.

A. Before a Disaster: The Importance of Relationship Building

Before any threat to a historic property develops, easement holders can benefit substantially from building connections and relationships with the various actors that will play a role in responding to the event. To this end, the owner may want to even identify which properties within its portfolio are at the most risk as a way of prioritizing its proactive planning. Once this threshold review has been completed,

²²² Coughlin, *supra* note 2, at 237.

²²³ *Id.*

²²⁴ APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 594–595 (providing the National Trust for Historic Preservation's template provision for allocating value).

²²⁵ *National Perpetuity Standards*, *supra* note 221, at 509.

²²⁶ See BUYING TIME FOR HERITAGE, *supra* note 8, at 65–66; see also Erin Michelle Tobin, Are Easements an Effective Preservation Incentive? 1–3 (1999) (unpublished M.S. thesis, University of Pennsylvania) (on file with University of Pennsylvania Library) (noting wide variations between easement holders).

²²⁷ WATSON & NAGEL, *supra* note 2, at 16–17.

the following actions may prove beneficial. First, the actual property owner relationship is critically important.²²⁸ The property owner will be responsible for directing a large part of the repair process so establishing an open line of communication is of immense value. Additional relationships are, however, nearly as important. Having a relationship or familiarity with the local building inspector is something that should be pursued as the building inspector will have wide discretion in addressing the future of the resource and in complying with building code requirements once repairs commence.²²⁹ Alerting the local building inspector to the easement's existence will hopefully avoid an overly rash decision to condemn, and may help the property attain favorable treatment as allowed under the state's building code once repairs commence.²³⁰ Local building inspectors have a meaningful degree of discretion and this should be recognized in the organization's outreach efforts.²³¹ Last, identifying sensitive preservation contractors will help to provide a reservoir of specialists who can be both recommended to property owners and utilized as consultants if required to supplement the organization's expertise.²³² Identifying specialists in advance will save valuable time in the event of an emergency as will having a dedicated staff person assigned to the given property to supervise the response. In sum, building these relationships and an understanding of the situation on the ground will provide a head start to any disaster response and will help avoid being caught unaware with an extremely limited response window.²³³

B. The Initial Response: Surveying the Situation

Once notified of actual damage, the first step will be to get the organization's staff and/or consultant expertise on site to independently assess the damage and determine the condition of the protected resource.²³⁴ Depending on how the easement was drafted and the nature of the harm, the damage may not have impacted protected features and be outside the scope of the easement holder's authority.²³⁵ Effectively accomplishing this mission may require staff to be

²²⁸ *Id.* at 19 (explaining that “[o]ngoing contact with the property owner and periodic inspections of the property are critical components of an effective easement enforcement program.”).

²²⁹ See Sarah C. Galvan, *Rehabilitating Rehab Through State Building Codes*, 116 YALE L.J. 1744, 1750 (2006) (discussing the intersection between code requirements governing rehabilitation and historic preservation considerations).

²³⁰ See UNIVERSITY OF VERMONT GRADUATE PROGRAM IN HISTORIC PRESERVATION, FIRE & BUILDING SAFETY CODE COMPLIANCE FOR HISTORIC BUILDINGS: A FIELD GUIDE ii (2d ed. 2006), available at <http://www.uvm.edu/histpres/307/LifeSafetyFieldGuide.pdf> (discussing flexibility within the building code to accommodate historic preservation concerns); see also BYERS & PONTE, *supra* note 3, at 227 (discussing requests for alterations for accessibility and code compliance generally).

²³¹ See City of Hingham, *Inspection Procedure*, <http://www.hingham-ma.gov/building/inspections.html> (last visited Nov. 23, 2013) (explaining the building inspector's role).

²³² See SWANKE HAYDEN CONNELL ARCHITECTS, HISTORIC PRESERVATION: PROJECT PLANNING & ESTIMATING 11–12, 105 (2000) (discussing the identification and selection of appropriate specialists).

²³³ Milford W. Donaldson, *The First Ten Days: Emergency Response and Protection Strategies for the Preservation of Historic Structures*, in DISASTER MANAGEMENT PROGRAMS FOR HISTORIC SITES 25 (Dirk H.R. Spenneman & David W. Look eds., 1998) (providing a sense of the urgency of this window in noting that most decision are made within ten days of a destructive event).

²³⁴ BYERS & PONTE, *supra* note 3, at 228–29.

²³⁵ WATSON & NAGEL, *supra* note 2, at 2.

proactively checking in with property owners following events that damage properties within the impacted region. In the event of relatively minor damage, a prompt response is needed to ensure that even modest emergency repairs do not exceed what is required to repair the loss and that these repairs are made in a manner consistent with preservation standards. Emergency repairs, are perhaps the most difficult to manage as an owner will be anxious to fix any damage quickly and resume their accustomed use of the protected property. Depending on the severity of the damage, however, the owner may not realize that the easement holder's review or involvement is required, or may in some instances, feign ignorance.²³⁶ Having the easement holder's staff or consultants involved promptly will allow the easement holder to determine what actions will be necessary to effect an immediate or more far reaching response and will assist in accommodating, to the extent possible, the owner's interest in finding an expedient solution to address the damage to their property in the short term.

C. Evaluating the Damage: Developing a Response Strategy

If there is substantial damage to the property, the easement holder's next step will be to determine whether the property can be repaired or restored, and whether such treatment is desirable or can be required given the terms of the easement.²³⁷ It must be kept in mind that easement provisions vary as far as defining a total loss.²³⁸ A common easement provision focuses on the percentage of loss of historic fabric to determine whether or not to require restoration of the impacted property or individual features.²³⁹ For example, under some easement templates, if more than 70% of the protected features are lost, restoration will not be required.²⁴⁰ This is because established preservation principles do not consider reconstructed or replica properties "historic."²⁴¹ In preservation terms, a historic property's significance is embodied in its location, integrity, design, setting, materials, workmanship, feeling and association, and replica structures cannot replace these lost qualities.²⁴²

A total loss is not typically at issue as that determination can be readily made; in a fire or hurricane scenario, there may be so little fabric remaining that the assessment is abundantly apparent, and reconstruction of the built structures would not be required.²⁴³ The point of controversy will hinge on determining whether the critical loss threshold has been met in a partial loss event.²⁴⁴ Typically, when a

²³⁶ *Id.* at 16–17.

²³⁷ *Id.*

²³⁸ See APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 590 (providing casualty language from an easement held by the National Trust for Historic Preservation).

²³⁹ *Id.*

²⁴⁰ *Id.* (showing template agreement allowing agreement to extinguish easement when extensive damage has occurred).

²⁴¹ See WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 8–9 (2006) (discussing the theoretical issues associated with reconstruction through the lens of the preservation decisions made at the site of the former Benjamin Franklin residence in Philadelphia).

²⁴² See 36 C.F.R. § 60.4 (1999).

²⁴³ WATSON & NAGEL, *supra* note 2, at 16–17.

²⁴⁴ BYERS & PONTE, *supra* note 3, at 228–29.

catastrophic event does occur, and repairs are imminent, the property owner will retain their own contractor who may or may not have experience with historic properties who may advocate against repair.²⁴⁵ From an easement holder's standpoint, it is critical to independently assess the damage, either with professional staff or specialized consultants who can determine how much historic fabric has been lost and whether rehabilitation is feasible.²⁴⁶ Once the damage is formally assessed, the organization can begin to form its formal response.

D. Developing a Legal Response: What is the Future of the Protected Resource after a Casualty Event?

Beyond making the determination that protected features have been impacted, the nature of the easement holder's response will be dictated by how severe the damage is to the protected resource.

1. Minor Damage

If the threshold for declaring a total loss is not met, the easement holder's role will be multi-faceted and involved for an extended period while the property is being rehabilitated.²⁴⁷ From a legal perspective, however, this is not necessarily a complicated proposition, as the enforcement tools provided for in the easement will allow the holder to assert meaningful control over this process.²⁴⁸ In less than a total loss event, however, the preservation considerations are particularly complex and require careful attention to preservation philosophy, as well as practicality, and should be guided by professionals within the field with the specialized knowledge to minimize harm to the protected resource.²⁴⁹ Depending on the scope of the damage, additional steps may be desirable, including creating a rehabilitation plan or schedule to guide the work, the preparation of new baseline documentation, and potentially even amendment of the underlying easement.

i. Creating a Rehabilitation Plan/Schedule for Work

If the damage involves more than a routine repair, the easement holder will want to work with the property owner to develop a formal rehabilitation plan with an agreed upon timeframe for completion to bring the property back in compliance

²⁴⁵ See generally John Poole, Letter to Editor, *Architectural Historian Laments House Demolition*, MILFORD MIRROR, July 17, 2013, <http://www.milfordmirror.com/7812/architectural-historian-laments-house-demolition/> (last visited on Nov. 23, 2013) (discussing dueling engineering assessments in the context of the lamentable approval of the demolition of the c.1790 Sanford-Bristol House, in Milford, Connecticut, a rare surviving example of Dutch architectural influence in the region).

²⁴⁶ See WATSON & NAGEL, *supra* note 2, at 16–17 (discussing dynamics between easement holder and property owner in determining whether a building subject to a less than total loss event should be restored).

²⁴⁷ *Id.* at 14–17 (discussing the need to utilize the review process when rehabilitation work is necessary and explaining that “[r]esponding to request for approvals can be very time consuming).

²⁴⁸ MEDER-MONTGOMERY, *supra* note 75, at 17–19.

²⁴⁹ WATSON & NAGEL, *supra* note 2, at 20 (discussing the review of on-site rehabilitation work and the potential need or benefits for developing a “property management plan” or rehabilitation plan to manage the work on site).

with the terms of the easement, while respecting the surviving historic fabric and allowing for the property's continued productive use.²⁵⁰ From a preservation standpoint, a rehabilitation plan serves multiple purposes or objectives. One, it places the owner on notice and establishes a timeline for bringing the property back into compliance with the terms of the underlying easement.²⁵¹ Further, the plan provides guidance on the needed repairs and can help educate the property owner about how work should be completed to minimize damage to sensitive fabric while also prioritizing attention to most critical repairs. The rehabilitation plan can also provide for expedited approval of repairs and call out specific treatment methods to be used on site. Ideally, the easement holder's oversight of a rehabilitation will be substantial, including ongoing communication with both owner and contractor, and frequent site visits to both monitor and document the repairs. Overall, it is the rehabilitation plan that can provide the working framework to guide the resource through this exceedingly sensitive period.²⁵²

ii. Preparing New Baseline Documentation

If the loss is substantial, creating new supplemental baseline documentation of the rehabilitation work as well as the post-repair condition of the property might prove beneficial for both the owner and the easement holder to clearly establish the condition of the resource.²⁵³ Baseline documentation is initially prepared when an easement is executed as it provides both parties with a record of the property's condition at that point in time.²⁵⁴ Within the preservation arena, baseline documentation usually includes floor plans of the built structures, a site plan, and comprehensive documentary photography.²⁵⁵ This documentation ideally is prepared to Historic American Building Survey (HABS) documentary standards as it is both an historic and legal record of the property's existing conditions.²⁵⁶ Obviously, when a resource has been damaged, the protected features documented in the baseline are not immune from impact. Depending on the scope of the damage, enough change may have occurred to merit re-documenting to establish a record of the new conditions on the property. Preparing an updated baseline will allow the easement holder to know which features survived undamaged—and counter a property owner's claim down the line that certain features were lost during the catastrophic event rather than through subsequent neglect or alteration.²⁵⁷ Updating the baseline will also allow the organization to

²⁵⁰ See *id.* at 16–17 (discussing the restoration process of protected buildings and the respective contractual duties of property owners and easement holders).

²⁵¹ Coughlin, *supra* note 2, at 236–37; BUYING TIME FOR HERITAGE, *supra* note 8, at 163–171 (providing sample rehabilitation agreement).

²⁵² WATSON & NAGEL, *supra* note 2, at 16–17, 20 (discussing property management plans to guide large scale work to a propertied property).

²⁵³ See BEST PRACTICES, *supra* note 30, at 40.

²⁵⁴ Coughlin, *supra* note 2, at 234 (discussing baseline documentation).

²⁵⁵ APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 601–10 (providing sample baseline documentation from an easement held by the National Trust for Historic Preservation).

²⁵⁶ WATSON & NAGEL, *supra* note 2, at 12–13.

²⁵⁷ See BEST PRACTICES, *supra* note 30, at 26, 40–42.

comprehensively illustrate the property's evolution over time, as damage and repairs are realistically a component of the history of all properties.

iii. Possible Amendment of the Easement

Related to the preparation of updated baseline documentation, it might also be desirable to amend and update the easement to tailor the agreement to the property's new conditions.²⁵⁸ As discussed in section III.C, amendment of a perpetual easement is not something to enter into lightly as there are potentially state and federal law implications that can take time and considerable expense to properly navigate, even presuming amendment is an appropriate and permissible action.²⁵⁹ From a risk perspective, the easement holder should first evaluate whether there are parties, including the former donor or neighbors, who should be consulted regarding the proposed amendment, to preempt litigation or unnecessary rancor and expense for all identifiable parties with an interest (legal or otherwise) in the protected property.²⁶⁰ Amendment is a relatively rare step and a decision that must be made on a case-by-case basis in accordance with the easement holder's policy for amendment.

If an easement holder proceeds with amending the easement despite the attendant risks, it may be prudent to update the easement to more precisely define the protected features and to incorporate the organization's current template language as this may have changed since the easement was negotiated.²⁶¹ Depending on the owner's mindset, it may be possible to expand the protection of the easement to encompass additional historic features during this discussion. Close attention to federal and state law, as well as an assessment of the possible impact of the amendment on the easement's conservation values, will be required to ensure the appropriateness of such a step.

In sum, the key in a partial loss event is to protect and retain as much surviving material as possible while documenting the changes to the property and articulating and implementing a process that can be followed to return a property to a useful function.²⁶² Not surprisingly, this can be considerably more art than science, but given advanced planning and consideration of how to respond when the inevitable property damage does occur, easement-holding organizations can negotiate a critical moment in the life of the protected resource sensitively and in a straightforward manner.

2. Total Loss of the Protected Historic Resource

A total loss presents additional legal challenges as not only the long-term future of the built structures are at stake, but also the associated context and setting. In a total loss scenario, the easement holder will need to consider whether

²⁵⁸ *Id.* at 42–43.

²⁵⁹ BYERS & PONTE, *supra* note 3, at 183–87 (discussing amendments and the attendant legal issues presented by alteration of a negotiated perpetual agreement).

²⁶⁰ BRONIN & BYRNE, *supra* note 2, at 554–55 (exploring the potentially involving the heirs in preempting litigation).

²⁶¹ BYERS & PONTE, *supra* note 3, at 183–87 (discussing amendment generally).

²⁶² WATSON & NAGEL, *supra* note 2, at 16–17.

extinguishment is appropriate, and consider how to best mitigate the impact of losing the heritage asset.

i. Extinguishment of the Easement

The most critical issue relates to whether the situation merits extinguishment.²⁶³ As discussed at length in Part III.D, the release of an easement is governed by state law, and the state may articulate a formal process that must be followed before an easement holder releases part or all of the control it holds over an easement property.²⁶⁴ For example, in Massachusetts, a public hearing must be convened before termination can occur, and other states have established varying requirements to address this issue.²⁶⁵

In making a determination that extinguishment is necessary, an easement holder will need to evaluate what conservation values are protected through the easement.²⁶⁶ Many easements contain multiple conservation purposes within their recitals, and may be designed to advance both the preservation of a significant heritage site and its setting, or conservation values present in the surrounding landscape.²⁶⁷ In the event that an easement was designed to protect multiple conservation values, the easement holder will need to evaluate how to appropriately amend the easement without impacting the surviving conservation values.²⁶⁸ This is perhaps best illustrated by using the example of a historic farm easement that both protects the built structure and the significant scenic and conservation values present at the site. Even if the protected structures burn down, the scenic qualities and conservation attributes of the site may continue to merit protection.

In such an instance, an easement holder will need to determine whether amendment or termination of the easement is most appropriate while keeping in mind what future uses should or might occur at the site. Allowing for new construction on the premises likely should be permitted, potentially with provisions for the organization to exercise design review over the location, scale and massing of the new construction and to ensure that the new construction does not interfere with the other important site specific attributes.²⁶⁹ Amendment or extinguishment may be required to allow the new owner to re-build, which implicates the applicable legal process.²⁷⁰ Overall, amendment or extinguishment in response to a total loss event is a challenging endeavor from both a legal and preservation perspective that requires serious conversations with the property owner, but also serious philosophical consideration to the best approach for securing the future of the resource.²⁷¹

²⁶³ BYERS & PONTE, *supra* note 3, at 228–29.

²⁶⁴ *See supra* Part III.D.

²⁶⁵ MASS. GEN. LAWS ch. 184, § 32 (2003).

²⁶⁶ *See* NAT'L TRUST FOR HISTORIC PRES., *supra* note 30, at 42–43.

²⁶⁷ BYERS & PONTE, *supra* note 3, at 228–29.

²⁶⁸ *Id.*

²⁶⁹ BEST PRACTICES, *supra* note 30, at 42–43.

²⁷⁰ BYERS & PONTE, *supra* note 3, at 228–29.

²⁷¹ WATSON & NAGEL, *supra* note 2, at 16–17; BEST PRACTICES, *supra* note 30, at 42–43.

ii. Moving the Historic Resource

Depending upon the damage or threat, moving a historic resource may be presented as a possible option to mitigate the outright loss of the resource in, for example, the context of a condemnation proceeding.²⁷² From a preservation philosophy standpoint, the recent trend towards moving historic houses as a catchall preservation solution is problematic.²⁷³ Moving a historic house leads to considerable loss of historic fabric as foundations and many other character-defining features are removed.²⁷⁴ Moving a historic house also has the effect of functionally separating a historic resource from its historic context and setting.²⁷⁵ For example, moving a house from the Connecticut River Valley to Eastern Massachusetts ignores the historical distinctions between the framing methods and materials utilized in the vernacular architecture of those disparate regions.²⁷⁶ Even moving a historic property within the same region removes much of the historical value associated with the resource.²⁷⁷ For these reasons, the National Register of Historic Places generally does not allow the listing of relocated resources, with limited exceptions in place to address outliers worthy of continuing recognition.²⁷⁸

Despite valid reasons against moving a historic resource, there are situations where this tool should remain in the disaster response plan as a last resort for preserving a historic resource.²⁷⁹ If a community has condemned a historic property through its power of eminent domain, moving the resource out of the path of the intended project may be one of the few possible forms of mitigation.²⁸⁰ Similarly, if coastal flooding has endangered a historic property, moving may be appropriate.²⁸¹ The challenge with moving historic properties, however, is that it has come to be

²⁷² Brad Vogel, *There's Still Time to Move Historic Houses: A Letter to the Editor*, TIMES-PICAYUNE, Dec. 17, 2010, http://blog.nola.com/opinions_impact/print.html?entry=2010/12/theres_still_time_to_move_hist.html (last visited Nov. 23, 2013) (lamenting Louisiana State University's use of eminent domain without consideration of moving historic resources).

²⁷³ See JOHN O. CURTIS, *MOVING HISTORIC BUILDINGS*, v (1979) (explaining the impact of moving a historic structure on its integrity and sense of place).

²⁷⁴ Historic New England, *Preservation Hot Topics*, <http://www.historicnewengland.org/preservation/regional-resources/preservation-hot-topics#moving-historic-homes> (last visited Nov. 23, 2013).

²⁷⁵ *Id.*

²⁷⁶ See PETER PARVALOS, *MOVING A HOUSE WITH PRESERVATION IN MIND* 15 (2006) (discussing the recent trend of purchasing New Hampshire and Vermont barns for removal to disparate areas across the country).

²⁷⁷ See *id.* at 126 (noting the discovery of a midden, or dump, during the move of the Benson Hall in British Columbia—a representative example of the type of historic context lost in removing a structure from its original location).

²⁷⁸ 36 C.F.R. § 60.4 (2006) (excluding moved buildings, but also providing limited exceptions for moved buildings deriving independent significance from their architectural value); see also Andrus, *supra* note 101, at 29–31 (discussing limited situations where moved buildings remained eligible for listing on the National Register of Historic Places).

²⁷⁹ See PARVALOS, *supra* note 276, at 133–37 (discussing the move of the c.1719/c.1769 King of Prussia Inn in Pennsylvania to accommodate the expansion of a roadway).

²⁸⁰ See Joseph Cornish, *Preserving a Landmark*, HISTORIC NEW ENGLAND, Fall 2005, at 17, 17–20 (detailing the effort to relocate the c. 1811 Alexander House in Springfield, Massachusetts in response to the General Services Administration's (GSA's) plans to site a new federal courthouse in the vicinity).

²⁸¹ See PARVALOS, *supra* note 276, at xii–xiii (profiling the move of Highland Light, a historic lighthouse located near Truro on Cape Cod, due to coastal erosion).

seen as a panacea in the popular imagination; something that allows both a project proponent and the preservation community to achieve their individual goals, a veritable win-win.²⁸² This is a largely inaccurate portrayal given the extent of loss that will generally ensue.²⁸³ In short, moving a historic resource is often proposed as a way of lessening the adverse impacts of a project and enabling it to proceed without incurring any “loss.” However, there remain enough situations where moving a historic resource is the only option, and when relocation, coupled with comprehensive documentation, may be desirable as a sort of fallback option.²⁸⁴ Relocating a protected property will require some flexibility from the easement holder, both to extinguish the easement to provide for the property’s relocation, and to protect the property at its new location, if merited after the relocation.²⁸⁵

iii. Salvage

In some instances, the salvage of significant surviving architectural features may also be part of a disaster response strategy.²⁸⁶ Some easement templates specifically grant an easement holder the ability to salvage important architectural features in the event the property is not going to be restored.²⁸⁷ These historic elements can potentially be reincorporated into other rehabilitation projects or utilized as part of an organization’s collections or educational programming (such as in an exhibit of architectural fragments).²⁸⁸ In such instances, salvage may give continuing viability to otherwise abandoned materials. If the easement-holding organization lacks the capacity or interest to possess and care for a collection of architectural elements, it can at least work to ensure that the important features are further documented, and perhaps, even repurposed as salvaged materials rather than being relegated to a landfill.²⁸⁹

²⁸² See Dan Adams, *Historic Belmont House Saved from Demolition*, BOSTON GLOBE, Feb. 19, 2012, at B13 (noting the move of the historic c. 1796 Thomas Clark House in Belmont, Mass.).

²⁸³ See Historic New England, *supra* note 274.

²⁸⁴ See PARVALOS, *supra* note 276, at 15–19.

²⁸⁵ See BYERS & PONTE, *supra* note 3, at 183–87.

²⁸⁶ See *From the Field: Volunteers Salvage History from Flood-Damaged Buildings in Iowa*, <http://www.preservationnation.org/forum/library/public-articles/volunteers-salvage-history.html#.Ulbj0xAdSok> (last visited Nov. 23, 2013) (discussing the role salvage played in mitigating loss following severe flooding in Eastern Iowa); see generally Sheri E. Repovich, *Architectural Salvage: Its Use and Validity within the Preservation Field* (May 2009) (unpublished M.S. thesis, Ball State University) (on file with Ball State University Library) (exploring this philosophical issue and its limited use within the preservation context).

²⁸⁷ NAT’L TRUST FOR HISTORIC PRES., *Model Historic Preservation and Conservation Easement*, July 2013 (on file with author).

²⁸⁸ See Repovich, *supra* note 286, at 28.

²⁸⁹ Some preservation organizations currently maintain salvage warehouses and seek to make these materials available to historic homeowners as part of their mission. See, e.g., GALVESTON HISTORICAL FOUND., *Architectural Salvage Warehouse*, http://www.galvestonhistory.org/Salvage_Warehouse.asp (last visited Nov. 23, 2013) (discussing Historic Galveston’s operation of an architectural salvage program); see also Melanie A. Markowicz, *Making the Connections: Historic Preservation in Detroit’s Rightsizing*, FORUM J., Summer 2013, at 14, 20 (discussing the environmental benefits to salvage in the context of controlled demolition).

iv. Use of the Charitable Proceeds: An Easement Holder's Legal and Ethical Obligations

If the easement is extinguished, and the easement holder receives funds related to its proportionate share of the property's value, it must determine how these proceeds should be utilized.²⁹⁰ The IRS requires that these proceeds be utilized to advance the organization's charitable purposes or those specific purposes that the tax benefit was intended to preserve.²⁹¹ This requirement could be met in a number of responsible ways—including adding the funds to the organization's endowment for monitoring its other easement properties. This option is not without merit as monitoring is critical to the validity of an easement program and many organizations lack the resources to properly monitor and enforce their existing easement portfolios.²⁹²

There may be other options that may be more in keeping with the original donor's intent. Easement holders often require endowments or contributions to accompany easement donations.²⁹³ These contributions provide the operating support to keep the program viable, but occasionally prevent an easement from being secured even where there is a willing donor because of the donor's inability or reluctance to make a corresponding financial contribution.²⁹⁴ It is one thing to have a donor willing to voluntarily restrict their property, but a monetary contribution on top of this is often financially daunting. Conceivably, funds received through the allocation of extinguishment proceeds could be utilized to allow properties to come in without the required contribution.²⁹⁵ An easement "scholarship" program or similar initiative would potentially allow the organization to expand its reach to properties that might not otherwise be protected. For example, for more modest scale properties, including many important vernacular building forms, it is unlikely to expect a property owner living in such a home will have the means to both donate an easement and make a significant monetary contribution.²⁹⁶

Another possible alternative would be to examine the property that was actually lost and make an attempt to protect, as best as the organization is able, a significant historic property that resembles the lost resource—geographically, architecturally, or contextually through purchase of a new preservation easement. For example, if a Queen Anne farmhouse is lost to a tragic house fire, the easement

²⁹⁰ 26 C.F.R. § 1.170A-14(g)(6)(i)–(ii) (2013).

²⁹¹ APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 34–35.

²⁹² See A RICHER HERITAGE, *supra* note 9, at 342 (explaining the chronic under-endowment plaguing many easement holders); See BEST PRACTICES, *supra* note 30, at 40 (noting the importance of monitoring).

²⁹³ LAND TRUST ALLIANCE, CONSERVATION EASEMENT STEWARDSHIP ENDOWMENTS 1 (2008), available at <http://www.landtrustalliance.org/conservation/documents/CE-stewardship-endowment.pdf>.

²⁹⁴ See BUYING TIME FOR HERITAGE, *supra* note 8, at 91.

²⁹⁵ See *Rethinking the Perpetual Nature*, *supra* note 155, at 519 (discussing endowment contributions and the need for such funds to ensure the easement holders' continued ability to monitor and enforce their restrictions).

²⁹⁶ Given the financial considerations, the donor may not benefit financially from the charitable gift as this gift, in conjunction with the non cash charitable donation, may exceed what their income level can support. See APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS, *supra* note 76, at 34–35 (explaining annual charitable deduction limits).

holder could explore whether an easement acquisition of a nearby property of similar date and integrity could be accomplished by utilizing their portion of the insurance proceeds. Having a proactive plan in place may help assuage owner's concerns regarding what will happen to the endowment proceeds or the casualty proceeds in the event of a total loss of their specific resource. Securing a similar property with a similar context seems a logical extension of the preservation motivations behind the initial charitable gift and might be appealing in that regard.

Overall, there are any number of potential ways to meet these requirements, but the ultimate use should be a conscious decision, taking into consideration the significance of the lost property, the organization's mission, the original donor's intentions, and the amount of money that may redound to the easement holder as a result of the casualty event. Thinking creatively about how to best use the allocated funds to advance the conservation values protected through the now-extinguished easement will allow the organization to advance its mission while honoring the donative intent as required under the applicable Treasury Regulations.

v. Preserving the Story: Oral Histories and Archival Materials

Last, the easement-holding organization may also want to consider if it can document the story of the place it once protected. This could be done by conducting oral histories campaigns with owners and recording, which can be a valuable source of information.²⁹⁷ Oral histories could be provided to local historical societies and or made accessible via the organization's website offering a measure of mitigation for the loss of a historic resource in the community. Another potential option would be the collection of archival materials, documents, and even surviving objects associated with the property provided the easement-holding organization has the capacity to take this on, or can find an appropriate repository locally or regionally. The general point is, in addressing a loss, the easement holder has the opportunity to think beyond the historic resource to frame a creative response that captures a broader context and also preserves a portion of our collective cultural memory.

V. CONCLUSION

At the end of the day, a failure to plan is a conscious decision. Eventually, even the best endowed, supported, and administered preservation easement programs will need to confront the issue of how to address an easement property that has been damaged or destroyed, either through an accident, condemnation, or through other unanticipated or unavoidable threats. Having at least thought through how to respond will allow easement-holding organizations to approach these eventualities thoughtfully and to tailor appropriate, and at times even creative, responses within the parameters of the easement agreement. In short, working proactively will allow organizations to avoid being caught off guard and to craft optimal preservation outcomes.

²⁹⁷ See generally DONALD A. RITCHIE, *DOING ORAL HISTORY* 11–15 (2d ed. 2003) (providing overview of importance of oral history initiatives in the field of public history).

Having a plan in place will also provide a framework proscribing the use of any proceeds owed to the easement-holding organization and direct these resources into promoting the conservation values behind the initial charitable donation. Such a course of action will further validate easement programs and enhance the value of preservation easements as a tool worthy of continued governmental support in times of austerity. Preserving perpetuity is—and will continue to be—difficult, but a commitment to respond responsibly to future catastrophic events will allow easement holders to maintain and uphold the public's trust in this critically important voluntary preservation tool.²⁹⁸

²⁹⁸ Schwing, *supra* note 6, at 245–46 (discussing the commitment easement holders make to donors and the importance of continued public support).