

Prince George's County 2010 Historic Property Grant Program

Preservation Easements: Questions & Answers

The following are answers to common questions about preservation easements associated with the Historic Property Grant Program. For further information please contact The Maryland-National Capital Park and Planning Commission – Historic Preservation Section, County Administration Building, 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772. Call 301.952.3680 or visit www.pgplanning.org/HPGrants.htm

This information has been provided by The Maryland-National Capital Park and Planning Commission (M-NCPPC) as a supplement to and further explanation of the preservation easement associated with the Historic Property Grant Program. M-NCPPC makes no representation or warranty with regard to the correctness of this text as specifically applicable to individual circumstances. Interested parties are advised to review this information and the easement documents with their attorney, financial advisor and/or tax professional.

Q. What is a preservation easement?

A. A preservation easement is a voluntary transfer by the property owner, as donor, of some of the rights inherent in property ownership to a qualified steward of such rights (called the donee). The preservation easement is set forth in a legal agreement between the property owner (the donor) and M-NCPPC (the qualified holder, the donee) to preserve and protect the significant historical, cultural, architectural, or archeological attributes of the property.

The “easement,” as it is legally termed, contains binding and enforceable covenants that run with the land and associated structures. These covenants obligate the owner, and his or her successors, to refrain from actions that are incompatible with the preservation of the historic resource and/or compromise its historic integrity. To understand the easement concept, think of property ownership as investing the owner with a number of generally recognized rights. The landowner may sell or give away all of the rights, or a limited set of them. These rights may include, for example, the right to alter a building, to demolish it, or to construct a new one. In return for the historic property grant, the property owner gives away certain rights while retaining others. The basic premise of the preservation easement agreement stipulates that the owner will be required to seek approval from M-NCPPC on any change to the property designated in the agreement.

Q. Who is required to grant an easement to the M-NCPPC?

A. Any property owner awarded funds through the Prince George's County Historic Property Grant Program must donate an easement to M-NCPPC as a condition of the grant award. If the property belongs to more than one person, all owners must consent to granting an easement. If the property is mortgaged, the owner must obtain an agreement from the lender to subordinate its interests to those of M-NCPPC so that the easement cannot be extinguished in the event of foreclosure.

Q. What are M-NCPPC's responsibilities?

A. M-NCPPC is responsible for monitoring and enforcing the restrictions specified in the easement. Annually, M-NCPPC historic preservation staff will inspect the property (usually with the property owner) to determine that the property remains in the condition prescribed at the time of the easement. This visit also keeps M-NCPPC and the property owner in regular communication and provides an opportunity for M-NCPPC staff to provide technical assistance to owners. If monitoring reveals the easement has been violated, M-NCPPC has the legal obligation to require that the owner correct the violation and restore the property to its original condition.

Holding a preservation easement is a significant responsibility. M-NCPPC, as a federally qualified easement donee, has the professional resources to carry out this responsibility and has made a commitment to assist with the preservation of the property. The technical advice and assistance of M-NCPPC staff will be made available to the property owner. The professional staff can provide information on preservation techniques, consultants, contractors, and other professionals experienced in working with historic buildings and can answer questions on an individual basis. Staff members will meet with the property owner on site to discuss concerns and provide advice on the most appropriate treatment for the property. Unlike many easement holders, M-NCPPC *does not* ask the property owner to make a contribution toward the costs of monitoring the easement in perpetuity.

Q. How long does an easement last?

A. In order for the property owner to be eligible for the federal IRS income tax deduction, the tax laws require that the preservation easement must run with the land and remain in effect *in perpetuity*. The easement, in other words, is a permanent attachment to the deed which passes from owner to owner. A perpetual easement is also a required under Article 28, Subtitle 3, § 5-306(e) of the MGA Statutes.

Q. Why grant a preservation easement?

A. Individuals donate easements for many reasons. One of the most compelling reasons is that historic property owners recognize the importance of their property and want to protect it from alterations, neglect, dismantling, demolition, or from other inappropriate treatment. By granting an easement in perpetuity, the property owner guarantees that his or her property will be protected in the future no matter who owns it. In addition, the granting of an easement may provide significant financial benefits to the donor.

Q. What are the benefits to the general public in the award of historic property grants to individual owners?

A. By preserving historically significant properties through preservation easements, such properties can be used to educate the public about a building's or neighborhood's history, architectural characteristics, culture and heritage. As with the protection and conservation of undeveloped land, a historic preservation easement is designed to ensure the survival of the historic character of Prince George's County.

Q. How does an easement work?

A. An easement is a legal contract that restricts the use of privately-owned property. The easement is recorded with the deed and is filed with the Prince George's County Land Records, and thereafter runs

with the land and affects each succeeding owner. The recordation of the easement allows all future owners and lenders to see the documentation in a title report. This agreement between the property owner and M-NCPPC, into which the parties enter for the mutual benefits of property protection continues private ownership and potentially provides financial advantages or other compensation for the owner.

M-NCPPC has the legal authority and is required to enforce the easement. If a future owner violates the easement (for example, by erecting a building that the easement does not allow), M-NCPPC is given the authority under the easement to require that the violation be corrected and may seek legal remedies to ensure compliance with the easement. By specific provisions set out in the easement:

1. The owner promises to protect the significant historic integrity of the property;
2. M-NCPPC is granted the right to enforce the covenants of the easement and to monitor the property;
3. The owner retains the right and duty to manage and care for the property, pay taxes on it, and live in and use the structures and may sell or lease it or pass it on to heirs.

Easements are flexible tools. They can be designed to protect the historic and environmental features of the property, and can be tailored to meet the personal and financial needs of the owner.

Q. What changes are allowed to my historic property?

A. The preservation easement does not require that the property remain “frozen in time” but that any changes to the exterior of buildings need to be architecturally compatible with the historic and architectural character of the property. (In a few instances, additional restrictions may be required to protect important interior architectural features.) For exterior changes and additions, M-NCPPC will work with the owner to ensure that any alterations remain sympathetic to and compatible with the character of the original structure. Routine maintenance projects do not require M-NCPPC review. However, changing exterior materials (roofing, siding, windows), new additions, demolitions, and alterations to the exterior, do require approval from M-NCPPC. The easement’s restrictions on land may prohibit or limit subdivision and require that the historic or natural landscape of the property be maintained.

There are no restrictions regarding the use of the property (it may, for example, be a single or multi-family residence or a commercial, industrial, or institutional building), as long as the property is in compliance with existing zoning regulations.

Q. Does the preservation easement take precedence over the county preservation ordinance?

A. Yes. As a private contractual agreement between M-NCPPC and the property owner, the preservation easement and its associated terms and conditions can be more restrictive than the regulations established by Subtitle 29, the Prince George’s County Historic Preservation Ordinance or other county ordinances. The easement provisions, however, cannot be in conflict with the ordinance(s).

Q. Are we talking about the entire house and property?

A. Historic preservation easements sometimes are designed to preserve an entire structure – or an outbuilding, or even an ensemble of structures and property. But they also can be tailored to specific

features on your property that are of special value or significance. The specific rights the property owner relinquishes when granting an easement are specified in each easement agreement. The owner and M-NCPPC work together to identify what is necessary to protect the property – what can and cannot be done on the property. The advice of M-NCPPC staff, along with your own goals, plans and needs will come into play in determining the scope of an easement’s restrictions. The terms of the easement are drafted to protect a property’s significant features as fully as possible. This can be a welcome guarantee for those who have invested considerable time, money, and energy in restoring, rehabilitating, or maintaining a historic property.

Q. Will the easement cover interior features as well as the exterior of the property?

A. If the historic property grant is for interior rehabilitation, and the building has significant architectural features or finishes, including plan features, the easement would protect such features.

Q. How is the easement applicable if I use the grant award to purchase a historic property?

A. Grants may be awarded for the acquisition of a historic property. At the time of closing, the easement will be executed and recorded with the deed. The easement will be written to protect the principal structure, outbuilding(s) and property, as applicable. The easement could protect the interior of a structure determined by M-NCPPC to have significant architectural features or finishes.

Q. What is the financial value of the easement and how is it determined?

A. The value of the easement is determined by a qualified, independent appraiser and is generally based on the difference between the value of the property without the easement and the value of the property after the easement is recorded. United States Tax Court cases have generally stated that the easement value must be based on the facts of a particular appraisal situation, and not on a predetermined formula. In recent years, easement valuation has come under increased scrutiny by the IRS. Notices and other communications pertaining to easement valuation are available at the IRS website www.irs.gov. It is important for property owners to review this information with their own legal and/or tax advisors prior to making an easement donation.

Q. What document does a property owner file to obtain the federal tax benefit?

A. The owner must include a completed IRS #8283 tax form with his or her personal income tax filing for the year the easement was donated and first claimed as a deduction. This form reflects the easement appraisal information prepared by an independent, qualified appraiser and is signed by M-NCPPC as the recipient of the donation.

Q. What are my out-of-pocket costs in donating an easement?

A. The historic preservation staff of M-NCPPC will work with property owners to develop the specific terms of the easement and requisite baseline documentation. There are no fees associated with these professional services. However, the property owner should plan on expenses associated with the review of the easement by an attorney of the applicant’s choice, and/or a tax or real estate advisor. The owner must obtain an easement appraisal by a qualified, independent appraiser in order to determine the easement value, or tax deduction to which the owner may be entitled. Lastly, the property owner must provide a title search on the property that is prepared by an attorney or title examiner. This will verify

the legal ownership of the property, provide a legal description and acreage as well as determine whether or not there are any encumbrances of record that will need to be cleared prior to completion of the easement transaction. Bank service charges for mortgage subordination also may be applicable.

Q. What are the legal and real estate implications?

A. The easement is a legal document having a permanent and significant impact on a property. At the time of resale, the preservation easement is a partial interest in the property which the purchaser must be willing to accept. This may or may not limit the number of people who will be interested in buying the property. For those prospective purchasers who have a strong sense of historic preservation and property stewardship, the property may be more appealing knowing that the easement is in place. The property owner should review this with his or her real estate advisor.

Q. Are easements a well-proven idea?

A. Preservation easements have been used for decades to protect significant properties. Historic preservation easements further the county's efforts to preserve historically significant properties by creating a system of oversight, regulation and enforcement that can supplement local government preservation statutes. Nonprofit preservation organizations and the State of Maryland have active historic preservation easement programs. Federal tax legislation was passed by Congress in 1980 to encourage owners of qualifying historic properties to ensure that these structures are preserved and maintained in an architecturally and historically appropriate manner. The Federal Historic Preservation Tax Incentive Program (Public Law 96-541) encourages owners to make a donation of a preservation easement in exchange for federal IRS income tax deductions. A preservation easement is viewed by the IRS as a non-cash charitable deduction.

Q. What are the benefits of granting an easement?

A. There are many benefits associated with granting an easement. The first is the peace of mind knowing that the property will be protected from development or alteration in perpetuity, regardless of who owns it. The second benefit is financial. Because the owner is giving up certain rights to the property, the owner is potentially eligible for certain local, state and federal tax incentives. A qualified easement may provide the following potential tax incentives:

1. The value of an easement can be a charitable contribution to the individual's personal financial situation. Preservation easements are regulated by the IRS Code, Section 170(h). If the provisions of the easement meet the requirements of the code, the donation value is deductible from federal income taxes in the same manner as other non-cash charitable contributions. A taxpayer may deduct as a charitable donation, i.e., the difference in value between the property before an easement is granted (unrestricted value) and after it is donated (restricted value). Under the Alternative Minimum Tax provisions of the Tax Reform Act of 1986, there is a strong possibility that a deduction could be limited to an owner's "basis" (acquisition cost) in the property rather than the fair market value of the easement. Only a careful review with personal tax advisors will reveal whether or not this will be a problem for individual property owners. It is the property owner's duty to ensure that the donation is made in accordance with the Internal Revenue Code in order to receive this deduction;

2. The value of the easement may also reduce the assessed value of the property for property tax purposes. Tax assessments are made by local assessors based on the fair market value of the property. Logically, a restrictive easement that reduces the property's market value should be reflected in a lower assessment, but this decision falls within the discretion of the local assessor;
3. The easement may reduce the value of the owner's estate for estate tax purposes.

Q. Do typical non-cash charitable contributions rules apply to the donation of a preservation easement?

A. Yes. The donation of a preservation easement is treated (for tax purposes) as any non-cash charitable contribution. Under Section 170(h) of the tax code, the grantor of a qualified easement is entitled to a charitable contribution deduction in the amount of the appraised value of the easement. The deduction has generally been limited to 30% of a taxpayer's contribution base for the year in which the donation is made (adjusted gross income less any net operating loss carry-backs), with any excess allowed to be carried over for up to 5 additional years. Public Law 109-280 recently extended these allowances for donations made to 50% of a taxpayer's contribution base for the year of the donation, with a 15-year carryover. (Different deduction limitations apply to taxpayers who use a cost basis for determining the value of their property, most commonly for those who donate an easement within a year after purchasing a property. Easement grantors should check with their tax advisors for specific information.)

Q. Must an easement require some type of public access?

A. Yes. Property owners who grant a preservation easement to M-NCPPC may be required to open their property to the public on a limited basis. The easement grants public access to the property for a period not to exceed two (2) days per year. M-NCPPC, at its sole discretion, may (or may not) choose to exercise this right. Furthermore, in order to claim the Federal income tax deduction, the property must be accessible to the public on a limited basis. The degree of access is tailored according to the historic resource under protection. For example, a sensitive archeological site or one with religious significance protected by an easement may be accessible to the public for as little as a few hours per year. Other means of providing access may include ensuring visual access from a public roadway for a historic building subject to an exterior easement, or allowing the public to tour the inside of a historic house subject to an interior easement two days per year. Often, the easement-holding organization can assist the owner in finding a balance between protecting the owner's privacy and providing a public benefit. The degree and nature of access may vary, depending upon a range of factors including the historical significance of the property; the features that are subject of the easement; the remoteness or accessibility of the site; the possibility of physical hazards to the public when visiting the site; the extent to which visitation would pose an "unreasonable intrusion" on privacy; the degree to which visitation would impair preservation objectives; and the availability of alternative means to view the property apart from physical access.

Q. What are the basic tax code requirements for an easement?

A. The federal and state governments provide tax incentives for easements given only for certain qualified purposes. To qualify as a charitable contribution, and thus to receive federal and state income tax reductions, the easement must be perpetual, must be made to a qualified donee, and must meet one or more of the conservation purposes set out in the federal tax code:

- Preservation of historically important land or buildings (generally, the property must be listed on or eligible for listing on the National Register of Historic Places);
- Preservation of land for outdoor recreation or education;
- Protection of relatively natural habitats for fish, wildlife, or plants;
- Preservation of open space pursuant to a clearly delineated governmental policy.

Note: *The complexities of the federal tax code and the applicable IRS regulations are not easily encapsulated in a short summary, so prospective easement grantors are strongly advised to seek the advice and assistance of an attorney with experience in such matters.*