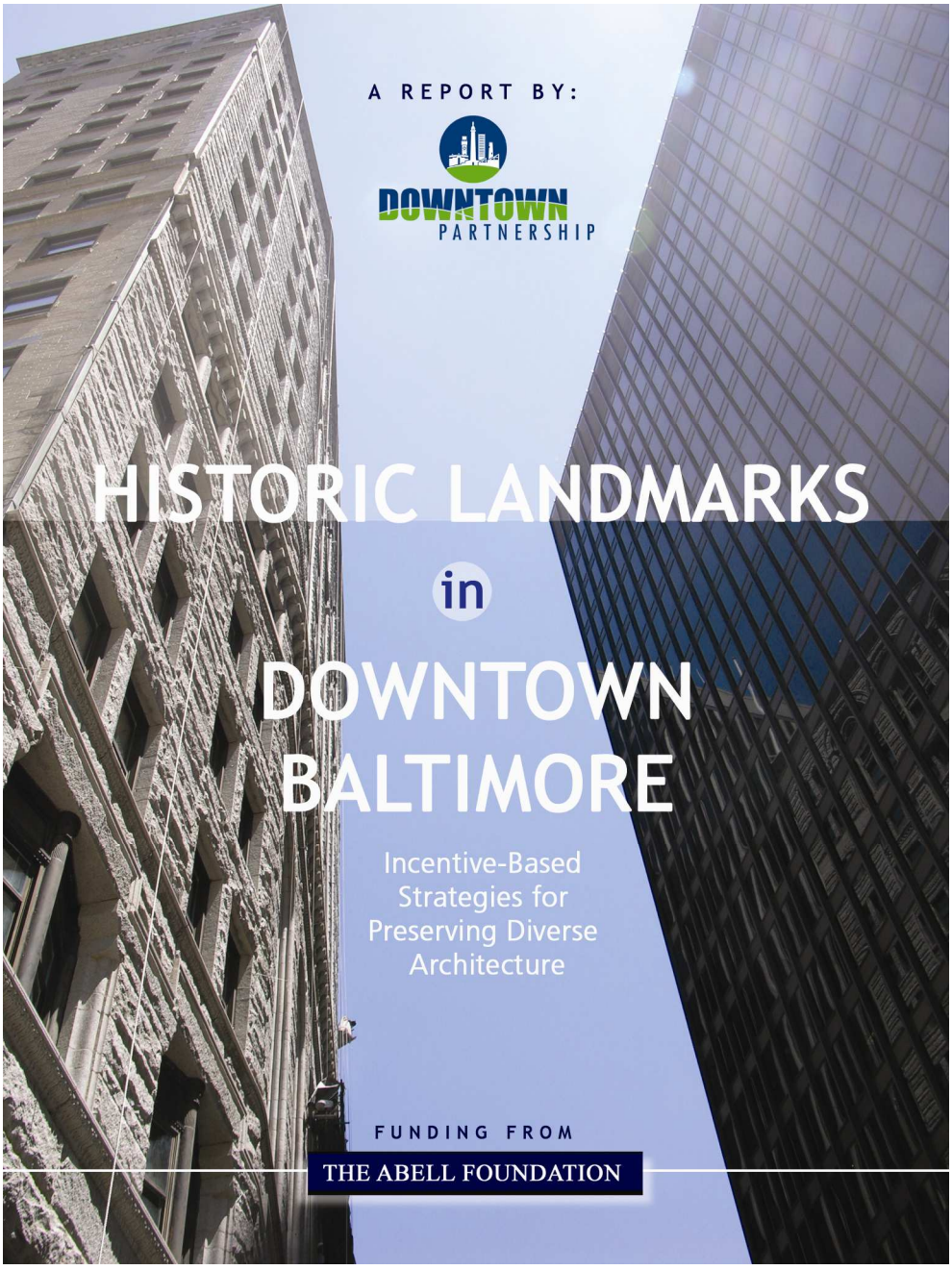
A REPORT BY:
DOWNTOWN
PARTNERSHIP
HISTORIC LANDMARKS
in
DOWNTOWN
BALTIMORE
Incentive-Based
Strategies for
Preserving Diverse
Architecture
FUNDING FROM
THE ABELL FOUNDATION

Historic Landmarks in Downtown Baltimore:

Incentive-Based Strategies for Preserving Diverse Architecture

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A Report From Downtown Partnership of Baltimore

Research by Lipman Frizzell & Mitchell, LLC

Thanks to the Generous Support of

THE ABELL FOUNDATION

July 2007

Cover photo: Fidelity & Deposit Building (left) and One Charles Center, Charles & Lexington streets
Photo by: Michael Evitts

Executive Summary

Introduction

As the high demand for residential and office space in converted older buildings attests, there is market justification for preserving historic properties in Downtown Baltimore, and many more have been saved than demolished in recent years. However, rising land value and overall demand for city property, both commercial and residential, put pressure on owners of historic buildings to develop their property, while the increased costs and complexity of redeveloping an older building could lead a property owner to conclude that it's in their best interest to tear down and start over.

Further heightening the risk to historic buildings is as a preservation strategy that, too often, kicks into gear only after a building has been slated for redevelopment – a stage of the process when it is usually too late to save a building. From the Partnership's perspective, it is hard to argue that a historic building shouldn't be demolished when the proposed new structure is demonstrated to lead to a substantial beneficial economic impact for Downtown – whether it be 500 new jobs, 800 new residents, or $50 million in direct and indirect spending in Downtown.

While the designation of historic districts has been important to Baltimore's preservation approach on a neighborhood level, the landmarking of individual buildings in Downtown stalled decades ago. Many would be surprised about how many iconic structures are not landmarked or protected from demolition in the long term, such as the **Hippodrome Theater**, **10 Light Street** (the Bank of America building), the **Garrett Building** (at Redwood and South Streets), the **Stewart's Building**, and the **Masonic Temple** (now the beautifully-restored Tremont Grand). Over the last 20 years, little has been done to find protections for many of Downtown's most prominent buildings.

Over the last two decades, however, the Downtown Partnership of Baltimore has worked with preservationists, property owners, and development officials to foster a vibrant and diverse Downtown community with a healthy mix of building types and uses. Preservation of historic buildings is, in many cases, key to this endeavor.

The Partnership helped to create Downtown's urban renewal plan, a façade improvement program, and streetscape guidelines. Its Downtown Housing Initiative led to the successful conversion of more than 24 older buildings. In 2007 alone, at least 15 additional older buildings are in the process of being converted to modern uses, including the **Jefferson Building**, the **BGE Headquarters**, **15-19 South Charles Street**, **16 South Calvert**, and the **F&D Building**, to name just a few. And, in 2006, we successfully lobbied for changes

to the zoning code to remove antiquated restrictions on housing density – a move that will make it easier to convert older buildings into apartments and condominiums.

The Partnership understands that historic structures significantly contribute to a special and unique experience in Downtown. Historic structures provide texture and character that one cannot find in a corporate business park off the interstate. To achieve this, we believe that the City needs to: (1) streamline and clarify the process for landmarking and protecting historic structures; (2) better promote the incentives that now exist to encourage more renovation; and (3) find more incentives, based in economic reality, to make it beneficial for property owners to declare their buildings to be historic landmarks and protected from demolition.

The Lipman Frizzell & Mitchell Report

Against this backdrop, and with generous support from The Abell Foundation, Downtown Partnership has engaged local preservation experts on re-energizing the landmarking process, and it hired Lipman Frizzell & Mitchell to recommend effective tools for encouraging the landmarking of historic buildings. In this report, our consultants review two incentive-based approaches that could be utilized to better effect in Downtown Baltimore: **easements** and **transfers of development rights**. The report finds particularly useful the example set by the District of Columbia on transferable development rights.

Knowing that property owners must see economic benefit to voluntarily adopt landmark status, the consultants also look at three Downtown Baltimore properties and evaluate the feasibility and appeal of such incentives with regard to each.

The findings are preliminary in nature, intended to offer guidance on initiatives that might be pursued in greater detail. The Partnership hopes that the ideas compiled in this report will help coalesce Baltimore's preservation advocates and policymakers and spur collective action.

Next Steps

Already, as a result of discussions prompted by this research, a large developer in Downtown has expressed interest in the transfer of a floor area ratio (or FAR) premium in exchange for agreeing to preserve an historic building. Also, proposed legislation is being reviewed to jump-start the implementation of a transfer of development rights program.

But more needs to be done. The following are some possible next steps that The Partnership believes are necessary to create more incentives to preserve historic structures. We will work cooperatively with our partners in the City and preservation community to come to agreement on an action plan for the future.

1. Evaluate the potential of easement and transfer of development rights incentives, including review of Maryland Historical Trust's experience with commercial property easements;
2. Change the law to allow for such incentives, if deemed useful;
3. Streamline and clarify the process for landmarking, while identifying the protection and benefits it provides;
4. Find ways to promote landmark and preservation incentives more effectively and clearly;
5. Immediately landmark historic buildings owned by the government;
6. Meet with individual property owners of critical buildings and determine what incentives would appeal to them to landmark their properties;
7. Evaluate property tax credits or rebates in exchange for landmarking;
8. Investigate direct financial assistance programs, such as the New York Landmark Conservancy's revolving loan fund and evaluate a Baltimore City loan or grant fund to encourage landmarking;
9. Investigate best practices in other cities, including Boston, Charleston, Denver, Jacksonville, and New York City; and
10. Evaluate the potential of multiple property owners of adjacent buildings to landmark in a block or partial block district.

Conclusion

By streamlining the landmarking process and adopting more market-based incentives, Baltimore can better guarantee a future for its most historic buildings. Now is the time to work with property owners on protecting structures deemed worthy of saving, not after a permit for demolition has been filed. At that point, it's already too late. We all won't agree on what buildings are actually historic, but it's best to conduct that debate in a less charged atmosphere than the day before the wrecking ball shows up.

With the right incentives, we'll continue to create a Downtown Baltimore that supports both modern and historic structures. And, if done right, historic preservation will become a powerful economic development tool.

Incentive-Based Strategies for Preserving Diverse Architecture: *Lipman Frizzell & Mitchell Research Report for Downtown Partnership of Baltimore*

I. INTRODUCTION

Lipman Frizzell & Mitchell LLC (LF&M) has been engaged by the Downtown Partnership of Baltimore (DPOB) to do preliminary research into programs which might encourage the preservation of historic landmark buildings in downtown Baltimore.

Understanding of Assignment

DPOB has found that a critical factor in creating a vital downtown environment is a varied real estate stock, including a strong presence of historical structures. Those structures create a "sense of place" and contribute architectural distinction to the downtown streetscape.

DPOB has also found that sometimes an historical building is lost to demolition without benefit of greater public comment/legal controls, since historic guidelines with teeth are typically lacking outside local historic districts.

DPOB is interested in exploring financial (or other) incentives which might encourage property owners to have their downtown buildings designated as landmark properties in order to encourage appropriate review in such circumstances. The incentives might be offered by local or State authorities.

Scope of Work

LF&M has accomplished a preliminary survey of incentive programs in order to better understand what programs are available and effective in attaining DPOB's goals.

We have consulted sources in municipal government and historic preservation at the local, State and national levels. We have interviewed private historic preservation consultants, certain property owners and developers, real estate and legal experts. Having found two particular program models (easements and TDRs) elsewhere, LF&M has outlined their operational characteristics and certain issues concerning implementation in Baltimore. Our findings are preliminary in nature, offering sufficient information for DPOB to make decisions on initiatives which might be pursued in greater detail.

The appendices contain certain documentation of the programs which might assist further inquiries by DPOB.

II. EASEMENT PROGRAM

Outline

Easement programs, especially for conservation and historic preservation purposes, are very common. The IRS, legal and accounting communities have a depth of experience in dealing with them. Federal guidelines recently issued have further clarified the do's and don'ts of historic preservation easement donations.

The program involves the donation of certain property rights in perpetuity to a non-profit group:

- Eligibility - The property must be on the National Register or a contributing structure in a historic district.

- Rights - The property owner donates their right to make any changes to the property which affect its historical aspects. The entire property (not just façade) must be kept in conformance with Secretary of the Interior guidelines forever. All changes to the property must be approved. Maintenance standards must be upheld.

- Donation - Like any charitable donation, the rights donated must be of real value. The non-profit accepting the donation should be set up to receive the easement and monitor it forever. Typically, an up-front fee is charged by the non-profit (based on a percentage of the donation amount) to endow its future monitoring obligations.

- Valuation - The dollar value of the easement must be solidly established through a difficult appraisal process. If the property, for example, is already located in a local historic district with strong design standards, the property owner may realistically have few property rights to donate.

With the 2006 clarification of the IRS guidelines, the market for historic preservation easements has become active again. In addition, the donations have become more attractive with recent changes in tax rules including: permitting deductions up to 50% (previously 30%) of the taxpayer's adjusted gross income; extending the carry-forward period to 15 years (previously 5 years); and waiver of Alternative Minimum Tax (AMT).

Experience

There are numerous non-profit historic preservation advocacy groups nationally (and locally) which run successful easement programs including:

- L'Enfant Trust in the District of Columbia (1,000 easements)
- Landmarks Preservation Council of Illinois in Chicago, IL (400 easements)
- Preservation Alliance for Greater Philadelphia in Philadelphia, PA (200 easements)
- Historic Denver, Inc. in Denver, CO

Locally, the Maryland Historical Trust has easements on 600+/- properties in the State including about 150 in Baltimore City; the City of Baltimore has an easement on Chesapeake Commons (former Baltimore City College); Preservation Maryland and Baltimore Heritage have easement programs that had been awaiting clarification in the IRS guidelines.

Property Owner Motivation

What is the value of a historic preservation easement to a non-residential property owner? The motivation of two classes of property owners is analyzed as follows:

- Commercial Property Owners - Typical profit-motivated property owners are not, in our judgment, willing to give away rights which will restrict their freedom to do what they want with their properties and which may limit the value of their properties in the future. Even if there is, for example, no immediate intent to demolish a building to capture its maximum permitted FAR (Floor Area Ratio) allowance—those potential FAR feet probably add value to the real estate involved. Someday, the market may support development of the property at a significantly higher density than is currently possible.

- Institutional Property Owners - Institutional property owners cannot be directly motivated by income tax benefits which they, as non-profits, cannot receive. It is possible, however, that they can indirectly benefit through sale-leaseback arrangements with private development interests.

Our discussions with public officials and developers indicate that most property owners have decided to donate an easement only as a "gravy" transaction: i.e., only when they're really not giving up any useful/valuable property rights. The tax benefits/value of the easement donation may not be tremendous, but are sufficiently above the transaction costs involved to make a donation worthwhile at the margin.

Most donors are residential owners (or perhaps developers of residential property), not commercial property owners.

Issues

Some of the issues to be considered in regard to implementation of an easement program include:

- Should a local historic district be imposed on some or all of downtown? Though this might be politically difficult to achieve, it would offer the strongest protections to landmark and other contributing structures.

- Alternatively, is there sufficient property owner and political support for designation of downtown as a National Register historic district? Controls are loose enough in a National Register district to boost the value of the rights a property owner might be donating.

- Is there political support for imposing a stronger landmark designation on certain downtown properties, or is a purely voluntary approach required?

- Are the non-profit historic preservation groups in Baltimore and Maryland ready to accept donations of easements, then monitor them effectively in perpetuity?

III. TRANSFER OF DEVELOPMENT RIGHTS PROGRAM

Outline

The District of Columbia government offers the incentive of Transferable Development Rights (TDRs) to preserve historic properties in certain downtown neighborhoods. The District also offers TDRs to reward other types of downtown development which it wishes to encourage including: residential, legitimate theater, anchor stores. Though historic preservation projects generated a substantial number of TDRs in the somewhat distant past (1980's), they are now rarely sources of TDRs.

Conceptually, the TDR program is simple:

1. Objectives - In the midst of downtown redevelopment, the District wanted to preserve historic properties (frequently institutional) intact—not just as "façade-ectomies"—and preserve the scale of their neighborhoods.

2. Downzoning - Historic properties are downzoned to a maximum 6.0 FAR, typically from an existing permitted FAR of 8.5-10.0. They are then allowed to transfer the difference (up to a maximum of 4.0 FAR) between their existing FAR and 6.0 to another site. Churches (typically 1.5-2.0 FAR) were able to take full advantage, transferring/selling all 4.0 FAR. The downtown area had the greatest differential between existing and permitted FARs among District neighborhoods, making this possible.

3. Historic Preservation Covenants - Each deal seems to have been hand-crafted in order to mold the requirements of the historic preservation covenants to the cash generated by the sale of TDRs, understanding the limited financial resources of the institutions involved.

4. TDR Receiving Areas - The District set up TDR receiving areas in order to encourage higher density development in those neighborhoods, generally: West End of downtown, K Street Corridor (Golden Triangle), South Capitol Street (now stadium area) and North Capitol Street (railway area etc.) areas.

We are informed that New York City and San Francisco both have TDR programs, which are also supported through muscular local historic preservation regulations.

Experience

According to our sources, the program was adopted in the late 1980's when the District was desperate for development. Additionally, there was sympathy at the time for downtown churches (encouraged by lobbying from their association) since they could not take advantage of federal historic preservation tax credits.

It seems that 12-15 historically-designated properties have actually sold TDRs, pretty much exhausting the eligible historic inventory. There is no listing of those properties available from the District government.

The value of TDRs has fluctuated tremendously over time, rising when the economy was booming and development increasing in the receiving zones then falling when the economy cooled. TDRs have generated cash for Calvary Baptist Church and other churches, the Warner Theater and even a parking lot. For the last, archeological excavations were required as a condition of the deal—before a 3-story building was constructed on the lot.

As a general statement, the District's historic preservation rules are very strict and not susceptible to political review. We are told that development interests have, by and large, given up trying to challenge the rules and are now working with them. Total demolitions are rare, though façade-ectomies (at least preserving the visual quality/scale of the streetscape) are more frequent.

Property Owner Motivation

The District's TDR program seems to have worked well with property owners who 1) wanted to stay in their existing structures and 2) needed cash to improve the structures. The historic property owners' TDRs could only generate sufficient cash, however, if the TDR receiving zones were defined so as to maximize the value-added of each additional square foot of development elsewhere. Even then, demand for development in the receiving zones and the economic cycle were the principal forces driving the value of TDRs. It is arguable whether the TDRs were ever a major factor in fostering development which the District's central planners desired.

Though the principal participants in the District's TDR program seem to have been institutions, private property owners have benefited. The private owners will benefit to the greatest extent (and therefore use the program), it would seem, when they can reap the profit potential of the TDRs by using the TDRs themselves elsewhere—rather than just selling the TDR.

Issues

- Are there sufficient differences between existing and permitted FARs in downtown Baltimore to provide a sufficient scale of TDRs to fuel a TDR program?

- Are there existing institutions which wish to stay in their existing historic structures but need cash to rehabilitate?

- Is the establishment of a downtown historic district or official historic landmark status even necessary as the foundation of a TDR program?

- Does the City Master Plan have a comprehensive vision of the direction (literally) the City wants development to take, encouraging new development with TDRs in designated TDR Receiving Zones?

- Where are the development pressures greatest in the City, such that additional FAR in those receiving zones might have sufficient value to motivate sellers in the sending zones?

- Are there property owners who own eligible properties downtown and who have interest in developing elsewhere in downtown or the larger City?

- Should historic preservation TDRs be one component of a broader TDR program which might, as in the District of Columbia, include TDRs to reward residential or retail development downtown?

IV. F.A.R. EXAMPLES

What is the difference between existing and permitted FAR on a landmark property? That calculation is critical to:

- Total value of an easement donation (assuming that the other rights donated in the easement are relatively less valuable)
- Scale/total value of a TDR transfer

If the difference between existing and permitted FAR is not significant enough, the scale of a potential donation or TDR transfer may not yield sufficient profit to merit a property owner's attention.

(Please note that the following analysis does not constitute an appraisal of the specific properties or development rights mentioned, but is meant for illustrative purposes only.)

Downtown Zoning Generally

Downtown zoning is typically in the categories of B-4-1 and B-4-2 ("Central Business District") or B-5-1 and B-5-2 ("Central Commercial District"). The maximum floor area ratios (FAR) available in the districts are:

- Not to exceed 8.0 in the B-4-1 and B-5-1 districts
- Not to exceed 14.0 in the B-4-2 and B-5-2 districts

(Increases in the FAR are possible in return for certain setback and other amenity considerations.)

Specific Sites

As test cases, LF&M has identified three historic sites which have been developed at a floor area ratio less than current zoning permits. (The property owners have not been involved in these analyses.)

The data used in our calculations is derived from public records and Co-Star commercial multiple list databases. Though the data may not be absolutely accurate, the calculations yield order-of-magnitude results useful in our analysis:

- Mercantile Building (202 E. Redwood Street) - The land records state the parcel land area as 7,200 sq.ft. The zoning is B-4-2. Co-Star states the building's net rentable area as 20,000 sq.ft. The maximum allowable building size for this parcel is 100,800 sq.ft.—a difference of 80,800 sq.ft.

- Vickers Building (219 E. Redwood Street) - The land records state the parcel land area as 4,445 sq.ft. and the enclosed area as 17,600 sq.ft. The zoning is B-4-2. The maximum allowable building size for this parcel is 62,230 sq.ft.—a difference of 44,630 sq.ft.

- Equitable Building (10-12 N. Calvert Street) - The land records state the parcel land area as 26,652 sq.ft. and the building's enclosed area as 193,700 sq.ft. The zoning is B-4-2. The maximum allowable building size for this parcel is 373,128 sq.ft.—a difference of 179,428 sq.ft.

Assuming that the value of a FAR foot for residential purposes is about $10.00 in the downtown area currently, the range of total values in the above properties' FAR development rights might, for purposes of argument, be:

Mercantile Building	$808,000
Vickers Building	$446,300
Equitable Building	$1,794,280

The easement donation value of the foregone FAR might be something close to those numbers in today's market. If condominium or office development were considered the properties' "highest and best use," then the values might be somewhat higher.

The TDR value of the transferred FAR would likely be discounted from those numbers, since an auction price would be set by the market. At a minimum, auction bidders would seek to offer the lowest price at which they could find a seller—allowing themselves the maximum profit opportunity in the new property to which they are transferring the FAR development rights.

Property Owner Motivation

From a dollars and cents point of view, the scale of value incorporated in the FAR may not be so great that—in and of itself—it will motivate a property owner to donate an easement or transfer development rights.

If, however, a property owner felt that trying to demolish a historic building and redevelop the site were virtually impossible—due to strong public opposition, etc.—then they might be willing to cash-in the above values as a "gravy" transaction.

Or alternatively, if the property owner could transfer the FAR to another site they were developing—thereby reaping not only the "auction value" of the FAR but also the potential profit value on the FAR at the new location—then they might be willing to use the TDR approach. (This assumes that the developer finds it profitable to develop the new site at an FAR above the downtown area's already permitted 14.0 FAR or above the FAR permitted in some other receiving zone.)

V. CONCLUSIONS

Landmark preservation is typically a messy process. No single approach is likely to meet the needs of all property owners or all properties. We find, therefore, that each of the basic program models should be used in downtown—with a third model perhaps evolving over time as something of a half-way point between the two.

Though the very strong controls inherent in local historic district designation might theoretically save more buildings, the political will necessary to create a local historic district is probably not present. Understanding that the carrot rather than the stick is more likely to be successful (and that every landmark cannot be saved), LF&M finds that:

1. Market forces typically trump all other considerations.

2. Commercial property owners are unlikely to forgo development rights which have any significant market value, now or in the future.

3. Incentives often do not work as intended. They may encourage a certain developer behavior somewhat earlier than the market would permit, but often just add "gravy" to an action which would have happened in any case.

4. Easement donations have the greatest value (and are, therefore, most likely to be used) in situations where a landmark property is on the National Register, has a significant difference between existing and permitted FAR and is unlikely to ever be developed to the maximum FAR because of community opposition.

5. TDR programs have the greatest value if the sending property/zone has a significant difference between existing and permitted FAR and if the market in the receiving zone will support higher densities than currently permitted. If the same entity is on both sides (sending and receiving) of the transaction, the TDR value is maximized.

6. Either program model can be used to deal with non-profit/institutional property owners: the easement model through sale-leaseback arrangements with a private developer, the TDR model more directly.

LF&M still wonders how market forces can best be harnessed to encourage landmark preservation. We have observed in the District of Columbia in particular that a third (compromise?) approach has seemingly evolved over time, offering another way to deal with certain landmark property situations.

We refer to the District's increasing readiness over the years to entertain "façade-ectomy" solutions to development problems. As the value of downtown land has increased over the years and as the impact of historic district zoning seems to have set the frame of reference for development…the redevelopment of sites within the shells of historic structures has been seen more frequently. Such solutions, when done well, have at least the virtues of preserving the historic streetscape's look and scale—while permitting uses on the interior which attain higher value financially and from an economic development perspective.

Appendix A

HISTORIC PRESERVATION EASEMENTS

Excerpts from
National Trust for Historic Preservation
Website

“President Signs Easement Reform Legislation into Law”

(from National Trust for Historic Preservation website)

Many organizations and individuals involved in historic preservation have closely followed the increased public attention recently focused on the subject of preservation and conservation easements, particularly in the news media and in Congress. Those interested in this subject should be aware that significant legislative changes to address abuses in the area of façade easement donations were recently passed by Congress as part of an omnibus pension reform bill, H.R. 4. The bill, which includes a number of reforms in the charitable sector—as well as several enhancements to charitable giving incentives—was passed by the United States House of Representatives on July 28, 2006, and by the United States Senate on August 3, 2006. The bill was signed into law by the President on August 17, 2006, as Public Law 109-280.

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

- Disallowing deductions for preservation easements that fail to protect the entire exterior of a property;

- Prohibiting deductions for easements that allow changes that are incompatible with a building’s historic character;

- Requiring the donor and donee to certify under perjury that the easement-holding organization is qualified to accept easements, and has the resources and commitment to manage and enforce the easement;

- Requiring the owner to provide the IRS more detailed substantiation to prove the value of the donation; and

- Imposing a new filing fee of $500 for easement deductions over $10,000.

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

- Lowering thresholds for overvaluation penalties for donors, and imposing new overvaluation penalties for appraisers; and

- Imposing new qualification standards for appraisals and appraisers.

At the same time, Public Law 109-280 also includes several provisions that appear less logical or warranted, for example eliminating deductions for non-building structures or land areas in registered historic districts, and imposing a new reduction for easements on structures that have also qualified for the rehabilitation tax credit. All in all, however, the changes included in Public Law 109-280 should help to encourage higher standards of practice for easement holding organizations, easement promoters, and appraisers. Equally important, by reforming the law providing tax incentives for historic preservation easements—and rejecting an earlier congressional recommendation to substantially reduce or eliminate the deduction—Congress has soundly affirmed the validity of preservation easements and the federal tax incentives that encourage them.

Finally, Public Law 109-280 includes a provision, section 1206, that expands the availability of the charitable tax deduction for easements donated in 2006 and 2007. The law increases the annual amount deductible for most taxpayers from 30 percent to 50 percent of a taxpayer's contribution base (adjusted gross income less net operating loss carrybacks), and extends the carry-over period for deductions from five to fifteen years. Even more favorable limitations apply for conservation contributions by qualified farmers and ranchers.

- The principal revisions included in Public Law 109-280 are summarized here. For more information, contact the National Trust's Law Department at law@nthp.org or by calling (202) 588-6035.

- Excerpted sections 1213 and 1219 from Public Law 109-280, as described above.

- Excerpted section 1206 of Public Law 109-280 (increasing deduction availability for 2006 and 2007).

- A redlined compilation of the Internal Revenue Code showing these changes.

Historic Preservation Easements Generally
(from National Trust for Historic Preservation website)

Preservation easements have become an important component of state and federal policy to encourage public participation in the preservation of America's historic resources. Indeed, their use is specifically encouraged by an important economic incentive: property owners who donate qualified preservation easements to qualified easement-holding organizations may be eligible for a charitable contribution deduction from their federal income taxes for the value of the historic preservation easement – provided that the contribution meets the standards of the Internal Revenue Service (IRS).

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

A preservation easement is considered a "partial interest" in real property – the property owner continues to own the property but transfers the specific set of rights represented by the easement to the easement-holding organization. Typically, a preservation easement protects against changes to a property that would be inconsistent with the preservation of the property, such as demolition of historic buildings, inappropriate alterations, or subdivision of land. The easement may also protect against deterioration by imposing affirmative maintenance obligations. The restrictions of the easement are generally incorporated into a recordable preservation easement deed that is part of the property's title (in legal terms, it "runs with the land") – and this title interest is binding both on the present owner and future owners.

Conservation and preservation easements are created under state law – most states have specific enabling laws that authorize the creation of conservation and preservation easements as discrete interests in real property. The terms (and the requirements) of an easement may vary depending on the laws of a particular state – and, as such, it is important that property owners considering donating an

easement, and that organizations considering accepting an easement, work with a lawyer familiar with the laws of the state in which the property in question is located. In some states, for example, state and local approval must be obtained before an easement will be deemed valid under state law.

Even though preservation easements are created under state law, easement donors seeking federal tax incentives will need to meet the requirements of the IRS regulations. Easements that do not comply with these additional requirements may be fully effective as easements, but may not qualify for the federal tax deduction. The IRS requirements are summarized below, but, again, donors are strongly advised to work with a lawyer familiar with the requirements of federal law.

The duration of preservation easements may differ. Some easements are for a term of years, with the interests of the preservation organization expiring at the end of the term. A common example is an easement that is imposed as a condition for a grant of financial assistance from a state or governmental authority or a nonprofit organization. Most easements, however, are written to last permanently. Easements that qualify for the federal tax deduction must be perpetual.

Typically, preservation easements address five basic issues: (1) What physical features of the property are covered by the easement; (2) What activities by a property owner that could damage or destroy significant historic or architectural features are absolutely prohibited; (3) What activities are allowed, subject to the approval of the easement-holding organization; (4) What activities are permitted by the owner as a matter of right; and (5) what type of affirmative maintenance obligations are required to be undertaken by the owner. The easement will also address other “boilerplate” issues, such as insurance, public access, amendment, and casualty damage.

There are many kinds of historic properties – and easements are as varied as the properties they protect. Most preservation easements protect, at the very least, the exterior character-defining features of a historic property, but many go beyond this to include interior features, the historic setting of a property, and/or specific landscape features. Most easements restrict the owner’s use of development rights such as subdivision or air rights. Some allow the owner to exercise those rights, but only as approved by the easement-holding organization. Some prohibit additions or construction of secondary structures; others permit them if approved as compatible with the historic character of a building.

The criteria used by preservation organizations in deciding upon the appropriateness of changes proposed by property owners may vary, but many organizations rely on the Secretary of the Interior’s Standards for Rehabilitation or the Secretary of the Interior’s Standards for the Treatment of Historic

Properties. Some organizations follow the criteria established by a local historic preservation commission for review of changes to historic properties in a designated historic district under local law.

An easement is a relatively flexible tool. It can be crafted to meet the specific characteristics of the property, the interests of the easement-holding organization, and the property owner's interest in having a property that will continue to have a viable productive use.

The obligations of an easement run in two directions: the owner of the property has the obligation to comply with the terms of the easement, and the easement-holding organization has the obligation to monitor and enforce the easement. From the standpoint of the easement-holding organization, the substantive benefits of preservation easements can greatly advance its preservation mission. On the other hand, easements may require a significant commitment of staff time and resources into the indefinite future, and they should not be undertaken lightly.
The qualifications for an easement-holding organization are generally defined under state law. In addition, easements designed to qualify for the federal tax deduction must meet qualifications established by the federal tax code and regulations.

Generally conservation and preservation easements are held either by governmental entities (such as state historic preservation offices or local historic preservation commissions) or by nonprofit organizations that are committed to the conservation and/or preservation purposes of the easement. To qualify for federal tax benefits, easement-holding organizations must have the preservation of historic places as a part of their mission and must have the commitment and resources to enforce and monitor the easement. In fact, many easement-holding organizations have set aside easement endowments or stewardship funds that provide a designated source of funding to cover the obligations of the easement-holding organization. Easement-holding organizations should have either established funds or ongoing operational support to meet their stewardship obligations.

There are hundreds of easement-holding organizations and governmental entities across the country that accept and administer preservation easements. A few, like the National Trust for Historic Preservation, are national organizations; and some, like Historic New England, are regional. Most easement-holding organizations, however, operate at the state or local level.

Yes, our model easement deed is available on request by emailing us at law@nthp.org. Our model easement represents a relatively detailed easement, and one that includes a number of provisions necessary to meet applicable IRS requirements to qualify for a donation deduction. However, it is very important to understand that every easement must be individually crafted to meet individual

state law requirements, to address the character-defining features of a specific historic property, and to address the respective interests of the donor and the easement-holding organization. As noted earlier, the advice and assistance of a qualified attorney should be sought.

The National Trust's model easement is only one example of a preservation easement deed – there are many other models. Most preservation organizations that hold easements have sample easement documents, and most are happy to share sample easement documents with prospective donors.
Potential donors, attorneys, and preservation organizations should also be aware the Congress recently passed legislation, which the President signed into law on August 17, 2006, that changes certain provisions of the law relating to federal tax benefits for donations of easements on historic properties. Please see this summary for additional information.

Since the issuance of a revenue ruling in 1964, taxpayers have been able to take charitable contribution deductions for federal income, estate, and gift tax purposes on the value of a conservation easement (including a preservation easement) donated to a qualified charity or public agency. This tax benefit was formalized by Congress in 1976, in recognition of the important public benefits conferred through donated easements. In subsequent years, new provisions have been incorporated into the tax code which set forth specific eligibility requirements.

Copies of the federal tax code governing the deduction of easement donations (26 U.S.C. § 170(h) and the applicable IRS regulations (26 C.F.R. § 1.170A–14) are available in PDF form: the tax code provisions (including recent revisions passed by Congress and signed into law by the President); and the IRS regulations.

Under Section 170(h) of the tax code, a donor of a qualified conservation easement is entitled to a charitable contribution deduction in the amount of the appraised value of the donated easement. The deduction has generally been limited to 30 percent of a taxpayer's contribution base for the year in which the donation is made (adjusted gross income less any net operating loss carrybacks), with any excess allowed to be carried over for up to five additional years. The President recently signed Public Law 109-280, extending these allowances for donations made in tax years beginning in 2006 and 2007 to 50 percent 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. Different deduction limitations may also apply in the case of farmers or ranchers. Donors should check with their tax advisors for specific information.)

APPENDIX B

DISTRICT OF COLUMBIA
TRANSFERABLE DEVELOPMENT RIGHTS

District of Columbia Municipal Regulations
Zoning Regulations Title 11

CHAPTER 17 DOWNTOWN DEVELOPMENT OVERLAY DISTRICT
Section 1709

1709 TRANSFERABLE DEVELOPMENT RIGHTS

1709.1 This section shall authorize the transfer of development rights from a project within the DD Overlay District to a receiving lot or lots located elsewhere in the DD Overlay District or in the Downtown East, New Downtown, or other receiving zones or sites pursuant to this section.

1709.2 Transferable development rights shall be generated either by historic preservation as provided in § 1707, bonus uses pursuant to the sub area provisions of §§ 1703 through 1705, or the residential development provisions of § 1706.3. Transferable development rights shall also be generated pursuant to the downtown historic properties residential rehabilitation incentive provisions of[2] § 755.

1709.3 No transfer of development rights from historic properties pursuant to §§ 755 and 1707, nor of bonus density derived from bonus uses, shall be effective under this section unless an instrument, approved by the Corporation Counsel to be legally sufficient to effect such a transfer and approved in content by the Zoning Administrator and the Director of the D.C. Office of Planning, has been entered into among all of the parties concerned, including the District of Columbia.

1709.4 In the case of transferable development rights derived from historic preservation pursuant to § 1707, the instrument shall effect the requirements of § 1707.5 as well as the applicable requirements of this section.

1709.5 In the case of bonus density derived from bonus uses, the following provisions shall apply:

(a) The property owner shall obtain a building permit indicating in appropriate plans the floor area designed and reserved for the designated bonus uses:

(b) The instrument of transfer shall indicate the size of the applicable bonus uses in square feet of floor area and the location of bonus uses by reference to the plans required by paragraph (a);

(c) The indicated floor area shall be occupied by the designated bonus uses, or held as vacant;

(d) The instrument of transfer may be executed to transfer development rights to receiving lots after the building permit has been issued; provided, that no certificate of occupancy for the transferred floor area shall be issued for the receiving lot until the conditions specified in paragraphs (e) or (f) of this subsection, as applicable, have been met;

(e) If the project on the sending lot generates transferable development rights from bonus uses of less than fifteen thousand square feet (15,000 ft.²) of gross floor area, any transferred development rights shall vest in the receiving lot without regard for the status of the development on the sending lot, after the certificate of occupancy for the bonus uses on the sending lot has been issued;

(f) If the project on the sending lot generates transferable development rights from bonus uses of fifteen thousand square feet (15,000 ft.²) or more of gross floor area, any transferred development rights shall vest in the receiving lot without regard for the status of development on the sending lot, after applicant provides evidence of a lease agreement with a complying user/occupant of the bonus gross floor area; provided:

(1) The applicant shall provide the Zoning Administrator and the Director of the D.C. Office of Planning with evidence of the lease agreement with the operator of the bonus use; and

(2) The Zoning Administrator, with the concurrence of the Director of the Office of Planning, will certify in writing that the requirements of this paragraph have been satisfied; and

(g) Following the execution and recordation of an instrument transferring development rights to a receiving lot, any modification of provisions of the instrument that relates to the type, size, or discontinuance of a bonus use in the sending lot shall require the approval of the Zoning Commission, after public hearing and with the concurrence of the Office of Planning; provided, that the Commission shall find that the proposed modification is fully justified and consistent with the purposes of this chapter.

1709.6 The instrument of transfer shall increase the development rights under the Zoning Regulations otherwise available to the receiving lot, to the extent of the rights transferred.

1709.7 If more than one transfer of development rights is made from a sending lot, the second transfer and all subsequent transfers shall he numbered "two" and sequentially, and the instrument of transfer shall include the names of the transferors and transferees involved in all previous transfers, including the amount of gross floor area transferred and the dates of recordation of each transfer.

1709.8 Transferable development rights may be re-transferred from the original receiving lot to another eligible receiving lot; provided, that there is compliance with the procedures specified in § 1709.7 and other applicable provisions.

1709.9 Nothing in this chapter shall prohibit the purchase of transferable development rights by an entity or individual who intends to resell the transferable development rights at a future date for use on a receiving lot, so long as there is compliance with this section and chapter.

1709.10 A certified copy of the instrument of transfer shall be filed with the Zoning Administrator prior to approval by the Department of Consumer and Regulatory Affairs of any building permit application affected by the transfer.

1709.11 The instrument shall be recorded in the Office of the Recorder of Deeds, serving as a notice both to the receiving lot and to the sending lot by virtue of this agreement for transfer of required gross floor area or bonus floor area.

1709.12 The notice of restrictions and transfer shall run with the title and deed to each affected lot.

1709.13 A building that has been constructed or that is under construction as of January 18, 1991, shall not be eligible to earn bonus density or transferable development rights, nor to utilize the combined lot development provisions.

1709.14 The instrument of transfer shall be processed in the government as follows:

(a) The applicant shall submit the instrument of transfer to the Zoning Administrator, with a copy provided to the Director of the Office of Planning;

(b) The Zoning Administrator and the Office of Planning shall review the instrument to determine whether its contents are complete and accurate as to the applicable provisions of the DD Overlay District;

(c) If the Zoning Administrator and the Director of the Office of Planning find that the instrument is complete and accurate in content, the Zoning Administrator shall transmit the instrument to the Office of the Corporation Counsel, together with a written statement that the content complies with the provisions of the DD Overlay District;

(d) The Corporation Counsel shall determine whether the instrument is legally sufficient to effect the transfer of development rights;

(e) If the Corporation Counsel finds the instrument to be legally sufficient, the Corporation Counsel shall forward it to the Mayor after notifying the Zoning Administrator of the finding;

(f) After signature by the Mayor or by the Secretary of the District of Columbia for the Mayor, the covenant or instrument of transfer shall be returned to the Zoning Administrator;

(g) The applicant, upon notification by the Zoning Administrator that the instrument has been signed by the Mayor, shall take the covenant to the Recorder of Deeds, who shall record the covenant with the applicable sending and receiving lots, and provide the applicant with two (2) certified copies of the covenant and of title certificates for all affected properties; and

(h) The applicant shall provide one (1) certified copy to the Zoning Administrator and one (1) to the Office of Planning.

1709.15 The Downtown East receiving zone consists of the C-3-C and HWC-3-C zoned portions of Squares numbered 565, 567, 569 through 574, 625, 626, 627, and 628 through 631.

1709.16 The New Downtown receiving zone consists of the C-3-C zoned portions of Squares numbered 72 through 73, 74, 76, 78, 85, 86, 99, 100, and 116 through 118.

1709.17 The North Capitol receiving zone consists of Squares 668 through 677, 709 through 713, and 715, each zoned C-3-C.

1709.18 The Capitol South receiving zone consists of those portions of Squares 695 through 697, N697, 698, 699, N699, 737 through 742, and N743, each zoned C-3-C.

1709.19 The Southwest receiving zone consists of Squares 268, 270, 299, 300, 327, 386, 387, 463 through 466, 493 through 495, and 536 through 538, and Lot 61 in Square 435, each zoned C-3-C.

1709.20 If the height of a receiving building exceeds the height that the provisions of this title allow as a matter of right for a building located on an abutting lot, including a lot that is separated from the receiving lot by an alley, no part of the receiving building shall project above a plane at a forty-five degree (45º) angle from a line that is as follows:

(a) Directly above the zone district boundary line between such abutting lot and the receiving lot; and

(b) Above such boundary line by the distance of the matter-of-right height that this title allows for such abutting lot.

1709.21 In the New Downtown, North Capitol, Capitol South, and Southwest receiving zones, the maximum permitted building height shall be that permitted by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Officia1 Code § 6-601.01 to 6-601.09 (formerly codified at D.C. Code §§ 5-401 to 5-409 (1994 Repl. & 1999 Supp.))), and the maximum permitted FAR shall be 10.0 for buildings permitted a height of one hundred thirty feet (130 ft.) and 9.0 for buildings permitted a lesser height.

1709.15 In the New Downtown receiving zone, the height of a receiving building may not be measured from a point that fronts on New Hampshire Avenue.

1709.23 In the Downtown East receiving zone, the maximum permitted FAR for any permitted uses shall be 9.0 and the maximum permitted building height shall be one hundred ten feet (110 ft.)

1709.24 In addition to the matter-of-right transfers authorized by this section, a lot that is approved and developed as a Planned Unit Development pursuant to chapter 24 of this title may serve as a receiving lot for transferable development rights; provided:

(a) The Planned Unit Development shall be located in a receiving zone or in a DDIC-2-C, DDIC-3-C, or DDIC-4 Overlay District;

(b) The maximum permitted building height shall be that permitted by the Act to Regulate the Height of Buildings in the District of Columbia, D.C. Official Code § 6-601 .O1 to 6-601.09 (2001)(formerly codified at D.C. Code § 5-401 to 5-409 (1994 Repl.)); and the maximum permitted FAR shall be 10.5 for buildings permitted a height of one hundred thirty feet (130 ft.) and 9.5 for buildings permitted a lesser height; and

(c) Development rights may not be transferred to a lot that is within the site of a Planned Unit Development approved prior to October 1, 1989, nor to a historic landmark or a lot in a historic district.

SOURCE: Final Rulemaking published at 38 DCR 612, 635 (January 18, 1991); as amended
and renumbered by: Final Rulemaking published at 39 DCR 8312, 8318 (November 13, 1992);
and Final Rulemaking published at 46 DCR 1016, 1018 (February 5, 1999); as amended by Final Rulemaking published at 47 DCR 5871, 5874 (July 21, 2MX)): Final Rulemaking published at 47 DCR 6230. 6232 (August 4, 2000); and Final Rulemaking published at 47 DCR 9741-43
(December 8, 2000). incorporating by reference the text of Proposed Rulemaking published at 47 DCR 8335, 8483-86 (October 20, 20M)).