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CONFLICTS IN STEWARDSHIP: A SURVEY OF HISTORIC PRESERVATION EASEMENT
PRACTICE

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Preservation Practices
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Conflicts in Stewardship: A Survey of Historic Preservation Easement Practice

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Dedication

For my father, Dr. David Sachs, who instilled in me an appreciation for the historic built environment and inspired me to preserve it for future generations.

Acknowledgements

Thank you to Dr. Elaine Stiles for your advice, guidance, and patience as I undertook this research. Thank you also to the many historic preservation professionals who took the time to participate in my study.

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ABSTRACT

Historic Preservation Easements are a unique tool for preserving historic resources, with nonprofits holding easements having unique oversight over the resource. A dispute will arise between the property owner and easement holder if the easement's terms are violated, testing the effectiveness of the easement program. There is a lack of information regarding how the practices of non-profit easement holders inform the effective resolution of disputes and what these organization's experiences have been in addressing violations. This study surveyed easement managers around the United States to better understand how their organizations prepare for and respond to easement violations. It further collected data on the incidence of violations to assess the risks of operating an easement program. The study reveals a more complete picture of the long-term operations of preservation easement programs and makes recommendations for effective practices in key areas of easement stewardship.

I. INTRODUCTION

Historic preservation easements are a unique and vital tool in the effort to steward our nation's historic built environment. A preservation easement is a legal agreement that allows a qualified organization to assume, through purchase or gift, a non-possessory real property interest in a private property that protects the historic resources on that property even after it passes to successive owners. As a private legal transaction, each easement may be tailored to fit the specific features of the protected property and the expectations of the parties to the agreement. It is the private nature of historic preservation easements that makes them particularly valuable because an organization may substantively protect a resource outside the political realm of local ordinances without outright acquisition of the property itself. Once an easement is acquired by the easement holding organization, it has an obligation to enforce its legal rights in the property, often in perpetuity.

An organization's obligation to enforce an easement may pose a significant challenge if the organization lacks funding, qualified staff, and a consistent plan to administer the easement. Where the challenge is not met by an organization, the likely result is a violation of the easement and potentially irreparable damage to the historic resource. An important goal of any easement holding organization, therefore, is to develop a successful strategy to prevent and effectively respond to violations of its easements. Even if an organization has a meticulous strategy for administering its easements, violations of an easement's terms may still occur. The resolution of the ensuing dispute can reveal much about the effectiveness of a historic preservation easement program and provide lessons for other organizations and practitioners.

There is a lack of public information, however, on the actual practices and experiences among easement-holding non-profit¹ organizations and how violations are prepared for and resolved. While there are useful best practices to inform an organization's easement program, there has not yet been a thorough exploration of the actual practices among easement-holding organizations in comparison to the available guidance. Furthermore, information on how violations arise and are resolved is not easily available because disputes are generally privately resolved between the property owner and easement holder. Yet, the relative effectiveness of any strategies used to prepare for and resolve the ensuing dispute may become clear only through a retrospective assessment of the circumstances and practices employed. Finally, examining the experiences of a variety of organizations may assist in developing successful and innovative strategies for preventing and resolving disputes for organizations of all sizes. This study seeks to help fill the information gap surrounding easement disputes by going directly to the source—the practitioners at the forefront of running historic preservation easement programs.

The study will have three main goals to develop a clearer picture of how preservation easement nonprofits handle violations. First, to collect a variety of baseline information on the structure and practices of easement organizations to better understand practical stewardship in comparison to available best practices. Second, to reveal data about the frequency and severity of violations and the methods used to resolve these violations. And third, to gain a more holistic understanding of how various program areas interact through examining the experiences of

¹ Easement holders can be either nonprofit organizations or government agencies. This study chooses to focus on nonprofits to narrow the scope of inquiry and because there are important differences in how nonprofits and agencies are funded, structured, and in their mission that result in some unique challenges for each. The National Trust for Historic Preservation has also recently conducted a survey of State Historic Preservation Offices that operate easement programs. Matthew Ahern, Brooks Becker & Kelli Gibson, "SHPOs and Easements: The Identification and Interpretation of Common Practices and Challenges," National Trust for Historic Preservation, last visited Nov. 14, 2022, <https://forum.savingplaces.org/blogs/special-contributor/2022/02/18/shpos-and-easements>. This study may complement those findings when made fully available.

easement organizations in their efforts to prepare for and resolve violations. The analysis will be framed through four key components of easement stewardship that have profound effect on easement disputes: (1) easement drafting, (2) easement monitoring, (3) property owner relations and preventative measures, and (4) enforcement.²

Following this chapter's discussion of the methods and summary of the findings, chapter II details the development and relevant areas of conservation and preservation easement literature since the conception of easements as a cultural resource protection tool. Chapter III provides a brief history of conservation and preservation easements and discuss the key aspects of easement stewardship practices. Chapter IV discusses the study findings in detail, analyzes similarities and differences in organizational practices, and makes wider observations based on the results. Chapter V supplies case studies of violations and enforcement disputes to give practical examples of how easement disputes are resolved and highlight key lessons therefrom. Chapter VI concludes the study and reiterates key recommendations based on the findings.

A. Methods

To better understand organizational practices in preservation easement stewardship and how organizations seek to address easement violations, this study examines and analyzes the areas of (1) easement drafting; (2) easement monitoring; (3) property owner relations and preventative measures; and (4) enforcement. The analysis of easement drafting examined who participated in easement drafting, whether organizations employed template easement documents, to what extent organizations negotiated with prospective easement donors, and how

² Drafting, monitoring, and enforcement are often acknowledged aspects of running a successful easement program. See, e.g., Elizabeth Watson & Stefan Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources* (Washington, D.C.: National Trust for Historic Preservation, 2007). This study adds property owner relations and preventative measures as a program area to describe the efforts that permeate and link other aspects of an easement stewardship that seek to prevent or proactively address possible violations.

organizations structured their required monetary contributions. The queries around easement monitoring focused on how frequently organizations monitored their easements, what documentation methods were used, who performed the inspections, and how monitoring reports were prepared. Many methods of relationship building and violation prevention were discussed including communications, technical assistance, project review, wider community ties, and social programming. The study of enforcement measured the frequency and severity of violations, who was responsible for violations, the use of written standard operating procedures for resolving violations, who was responsible for violations, and what methods were used to resolve violations. The study relied on definitions of the differing severity of violations provided in the National Trust for Historic Preservation's Model Standard Operating Procedures to establish a shared understanding among participants. Additionally, the study surveyed basic information about preservation easement organizations including staffing, number of easements held, geographic scope, and the types of properties they were willing to accept easements on in historic significance and usage. Finally, the study collected several violation and enforcement case studies based on the real-world experiences of participants to illustrate the life cycle of an easement dispute.

The study employed a concurrent mixed-methods approach with a quantitative phase consisting of an online survey and a qualitative phase of one-on-one interviews, both targeting active preservation professionals working with easements at nonprofit organizations. The survey, provided in Appendix A, was hosted on the Qualtrics survey platform and sought quantitative data in the areas discussed above. The interview questions, provided in Appendix B, broached the topics with greater depth and nuance, particularly regarding the more informal and nuanced practices. The study, however, did not measure the overall magnitude of certain datum such as

the number of each type of violation at an organization, instead opting to use a single data point at each organization to simplify the responses and extrapolate more general findings.

Nonetheless, this study amassed data that will assist easement holding organizations and practitioners better understand and minimize the risks of administering their easement program.

The research sought participants in three ways. The first method was inviting participants to take the survey on several online forums, including the National Trust for Historic Preservation Leadership Forum and the Historic Preservation Professionals Facebook Group. The second method was to send the survey to members of formal (e.g., Preservation Action) and informal (e.g., support groups) preservation groups to disseminate to their networks. The third and final method was sending targeted emails to identified easement-holding organizations. All organizations were nonprofits with a preservation mission that involved administering easements. The study sought to interact with both well-known preservation easement holding organizations and smaller organizations identified through the above methods to provide a fuller picture of nonprofit preservation easement practice. Overall, twenty-nine respondents participated in the initial survey and ten easement professionals were interviewed regarding their organization's historic preservation easement program.

The data from the survey was processed and analyzed using the Qualtrics data tools. The data from the interviews was audio recorded and accompanying notes were taken emphasizing key responses. The survey and interview responses were separated into thematic categories of the study including easement drafting, easement monitoring, preventative strategies, and dispute resolution. Effort was made to group the participants and their organizations into categories based on similarities and differences in their organizational size and practices. Survey data was assessed quantitatively, e.g., how many organizations engaged in litigation to resolve a dispute or

how frequently most organizations monitor their easements. For the interviews, data was assessed qualitatively to identify successful strategies for preventing and resolving disputes and further analyzed by organizational size, characteristics, and policies.

B. Summary of Findings and Statement of Significance

The study findings demonstrate a highly varied spectrum of organizational characteristics practices among preservation easement nonprofits. Participant organizations differed greatly in staffing, programmatic and geographical scope, number of easements held, and overall experience. Many practices varied based on organizational characteristics like staffing and extent of easement holdings. The structure of other approaches may differ according to the philosophical or programmatic decisions of each organization. The findings suggest a need for a flexible set of standards for each organization to evaluate its strategy based on its own circumstances and goals.

There was relative uniformity in other essential program areas of monitoring, funding, and easement drafting. The bulk of organizations strove to consistently monitor each easement property once per year, required donations and other mechanisms to provide ongoing stewardship and enforcement funds, and had reliable attorney involved in the development of their easement documents. While some specifics in approaches differed at each organization, the wider consensus around these issues shows that easement organizations have been responsive to best practices and recommendations in these areas despite overall variability.

Property owner relations and preventative measures were an area of particular significance to the participants of this study. Though the easement holder's relationship with properties owners is recognized as important, there is little guidance on how to approach informal dealings with owners, how the relationship may be cultivated through various other

program areas, and specific strategies for developing and maintaining communications. The importance of frequent, open communications with property owners was singled out by most participants as one of the key aspects of a successful ongoing easement stewardship. Improving the efficiency of project review, providing helpful expertise, and cultivating wider community relations were also identified as important preventative methods. This study suggests that property owner relations and preventative methods should be considered equally important as the more well-explored areas of easement stewardship.

The findings on easements violations suggest that violations are relatively rare and that most violations are likely to be less than moderate in severity. Furthermore, most violations may be resolved informally through negotiation with the property owner without the need for more serious measures. A primary method for many organizations to resolve violations is to give retroactive approval to previously unapproved projects with some modifications in order to resolve violations, where appropriate. Organizations resorting to litigation was rare overall though several participants had participated in lawsuits to enforce their easement terms. These organizations shared important insights, particularly the need to hire experienced trial attorneys to handle the litigation.

A final insight was the need for many organizations to develop written guidelines or standard operating procedures to help guide the decision-making process in easement stewardship. A successful organization should strive to maintain consistency in its practices over time. Furthermore, written policies will help streamline the response to unexpected easement violations. Lastly, these tools can help insulate organizations from program interruption when there are changes in staffing in their easement program.

Overall, this study contributes new insight into the operation of historic preservation easement programs and how these non-profit organizations prepare for and resolve easement violations. Prior to this study, no research had thoroughly explored the actual practices of preservation easement nonprofits in comparison to the available best practices. New data regarding the incidence of easement violations, their severity, and the methods used to resolve them furthers the understanding of the long-term risks and challenges of operating an easement program. Easement practitioners and organizations could benefit from examining what strategies and practices have been successful to improve their own approaches to easement stewardship.

II. LITERATURE REVIEW

Easement literature encompasses conservation easements protecting natural resources and historic preservation easements due to their shared lineage and similarities as a legal tool. The literature covering conservation easements is arguably more comprehensive, and more effectively assesses conflicts stemming from easement administration. This review will examine the available body of scholarship and demonstrate the need for a more focused assessment on issues related to violations in the historic preservation easement field. While not comprehensive, this section will seek to outline the major areas of scholarship pertaining to the legal considerations and practical components of conservation and preservation easement stewardship.

A. Early Literature and Legal Development of Conservation and Preservation Easements

The sociologist William H. Whyte, Jr. penned the earliest literature on conservation and historic preservation easements as understood today, including originating the term "conservation easement" itself.³ Whyte advocated for conservation easements as an innovative solution to combat the growing urban sprawl of housing developments beginning in the 1940s and preserve open space for future generations. Approaching the use of easements from the land use planning perspective, Whyte provided a prospectus for the use of easements in his 1959 report "Securing Open Space for Urban America: Conservation Easements" ranging from issues in the failure of traditional zoning, to the potential public benefits, possible financial investments and incentives, and the need for state legislation.⁴ Whyte's early ideas about easements, however,

³ See, e.g., William H. Whyte, Jr., "Open Space and Retroactive Planning," *Planning* 1958 (Chicago: American Society of Planning Officials, 1958): 68–78; William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, Urban Land Institute, Bulletin No. 36 (1959); William H. Whyte, Jr., "Plan to Save the Vanishing Countryside," *Life*, Aug. 17, 1959. See also Adam W. Rome, "William Whyte, Open Space, and Environmental Activism," *Geographical Review* 88, no. 2 (1988): 259–72.

⁴ See generally Whyte, *Securing Open Space for Urban America*.

required greater legal refinement, and ultimately did not shape the growth of the larger open space conservation movement.⁵

Many works in the 1960s and 1970s focused on legal and practical issues presented by conservation easements. In the conservation easement realm, early legislation in California provided the opportunity for an assessment of the novel legal tool to protect open space. Clyn Smith's "Easements to Preserve Open Space Land," for example, examined the California's Land Conservation Act allowing local governments to acquire easements protecting open space and how legal and financial problems interfering with the early usage of the law might be remedied.⁶ Nonetheless, some writers like James F. Wagenlander in "The Urban Open Space Game" were skeptical that the limitations of conservation easements in enforceability and arguable lack of public benefit could be overcome.⁷ Attempts to synthesize a positive view of conservation easements, despite some legal uncertainty, are exemplified by Russell Brenneman's "Private Approaches to the Preservation of Open Land."⁸ Brenneman was also one of the early writers to stress the importance of private charitable organizations in the conservation easement field.

Writers and practitioners in the growing historic preservation movement were increasingly aware that the new conception of easements could be adapted to protect historic buildings. Some early discussion on the use of historic preservation easements, however, centered on the possibility of local governments protecting historic properties via taking an easement interest by eminent domain, as discussed by Paul Wilson and H. James Winkler in "The Response of State Legislation to Historic Preservation"⁹ and the unsigned Note "The Police

⁵ See Rome, "William Whyte, Open Space, and Environmental Activism," 266–72.

⁶ Clyn Smith, III, "Easements to Preserve Open Space Land," *Ecology Law Quarterly* 1, no. 4 (Fall 1971): 728–48.

⁷ James F. Wagenlander, "The Urban Open Space Game," *The Urban Lawyer* 6, no. 4 (Fall 1974): 956–63.

⁸ See generally Russell L. Brenneman, *Private Approaches to the Preservation of Open Land* (The Conservation and Research Foundation, 1967).

⁹ Paul E. Wilson & H. James Winkler II, "The Response of State Legislation to Historic Preservation," *Law and Contemporary Problems* 36, no. 3 (Summer 1971): 329–47.

Power, Eminent Domain, and the Preservation of Historic Property."¹⁰ Others, like Thomas Reed in "Land Use Controls in Historic Areas" recognized the potential of the private use of preservation easements alongside historic districts and other legal mechanisms to preserve historic buildings.¹¹ The interest in preservation easements was such that the National Park Service commissioned Russell Brenneman to answer the titular question in his work *Should 'Easements' Be Used to Protect National Historic Landmarks?*¹² In addition to assessing the central question posed, Brenneman engaged in a wide-ranging review of many aspects of easement law at the time and, notably, surveyed organizations then holding historic preservation easements, taking away lessons about easement administration that remain true to this day, including highlighting the importance of property owner relations, long-term stewardship strategies, and positing mounting enforcement challenges over time.¹³

In the late 1970s and into the 1980s a unified legal theory of conservation and preservation easements emerged in response to the relatively piecemeal prior state action. Ross Netherton's article "Environmental Conservation and Historic Preservation Through Recorded-Land Use Agreements" comprehensively examined the various issues at common law interfering with the efficacy of conservation and preservation easements to prepare the ground for a uniform state "enabling" law.¹⁴ The Uniform Conservation Easement Act (UCEA), prepared by the National Conference of Commissioners on Uniform State Laws, followed in 1981, enabling "durable restrictions and affirmative obligations to be attached to real property to protect natural

¹⁰ Note, "The Police Power, Eminent Domain, and the Preservation of Historic Property," *Columbia Law Review* 63, no. 4 (April 1963): 708–32.

¹¹ Thomas Reed, "Land Use Controls in Historic Areas," *Notre Dame Law Review* 44, no. 3 (1969): 379–430.

¹² See generally Russell L. Brenneman, *Should "Easements" Be Used to Protect National Historic Landmarks?* (Hartford, Conn.: Copp, Brenneman, Tighe, Koletsky & Berall, 1975).

¹³ Brenneman, 34–47.

¹⁴ Ross D. Netherton, "Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements," *Real Property, Probate and Trust Journal* 14, no. 3 (Fall 1979): 540–80.

and historic resources" in the states that adopted it.¹⁵ In addition to "sweeping away certain common law impediments," the act did not require public agency approval of a conservation easement, as is the case in states like Massachusetts,¹⁶ to enable non-profit organizations to fully engage in the preservation of natural and historic resources through private transactions.¹⁷ As states adopted the UCEA and the general principles it established, the legal foundation for conservation and preservation easements became increasingly settled, paving the way for the growth of the conservation easement movement into the twenty-first century.

B. Branching Legal Issues in Conservation and Preservation Easements

With the most pressing foundational legal issues settled by the passage of state enabling laws, the literature on easements expanded to encompass a larger variety of legal topics. Issues ran the gamut from exploring remaining common law concepts not yet addressed by state enabling laws and ensuring long-term resource protection to reacting to the considerable tax-related controversies of the mid-2000s.

i. Termination, Alteration, and Charitable Trust Principles

Perhaps no area of conservation and preservation easement law has been more hotly debated than the principles that should guide the amendment and termination of easement agreements.¹⁸ Nancy A. McLaughlin has written extensively in this area of conservation easements, often expressing that principles of real property law do not adequately address the unique nature of conservation easements or ensure truly perpetual protection of easement properties. In "Rethinking the Perpetual Nature of Conservation Easements," McLaughlin

¹⁵ National Conference of Commissioners on Uniform State Laws, *Uniform Conservation Easement Act* (1981), *prefatory note*, 1.

¹⁶ MASS. GEN. LAWS ch. 183, § 32 (2022).

¹⁷ National Conference of Commissioners on Uniform State Laws, *UCEA*, *prefatory note*, 2.

¹⁸ See Jeff Pidot, "Conservation Easement Reform: As Maine Goes Should the Nation Follow?," *Law and Contemporary Problems* 74, no. 1 (2011): 16.

argued that conceptualizing a conservation easement as a two-party real property agreement leaves out the implicit beneficiary in the general public.¹⁹ She further posited that this three-party relationship—donor (settlor), easement holder (trustee), the public (beneficiary)—is functionally identical to a charitable trust.²⁰ Following this reasoning, conservation easements should be governed the charitable trust doctrine of *Cy Pres* to constrain an easement holder's ability to amend or terminate an easement contrary to the easement agreement's stated conservation purposes without judicial approval.²¹ McLaughlin applies this same reasoning to the doctrine of merger—whereby an easement would be automatically extinguished if the holder later acquired the property in full—arguing that an easement may not be extinguished due to the public's remaining interest in the protection of the property in "Conservation Easements and the Doctrine of Merger."²²

In response to McLaughlin's argument and a Wyoming Supreme Court case considering the potential charitable trust principles applicable to easement termination, C. Timothy Lindstrom penned "Hicks v. Dowd: The End of Perpetuity."²³ Rather than adopting principles from charitable trust law, Lindstrom argued that the applicable legal rules covering the amendment must originate from real property law doctrines (and federal tax law where applicable) allowing easement amendment and termination—including simple bilateral agreement by the property owner and easement holder.²⁴ Furthermore, he posited that the application of *Cy Pres* would be unwise due to placing undue operational and financial

¹⁹ Nancy A. McLaughlin, "Rethinking the Perpetual Nature of Conservation Easements," *Harvard Environmental Law Review* 29 (2005): 431–441.

²⁰ McLaughlin, "Rethinking Conservation Easements," 431–44.

²¹ See McLaughlin, "Rethinking Conservation Easements," 431–441.

²² Nancy A. McLaughlin, "Conservation Easements and the Doctrine of Merger," *Law and Contemporary Problems* 74, no. 4 (Fall 2011): 284–289.

²³ C. Timothy Lindstrom, "Hicks v. Dowd: The End of Perpetuity," *Wyoming Law Review* 8 (2008): 25–83.

²⁴ Lindstrom, "The End of Perpetuity," 39–59.

constraints on land trusts, even were charitable trust principles to apply to conservation easements.²⁵ Lindstrom's article spawned a lively debate between with McLaughlin in a series of articles covering the various arguments and counterarguments for application of charitable trust principles to conservation easement modification and termination.²⁶ While Lindstrom's position on the permissive nature of easement amendment and termination is likely overstated, the applicability of charitable principles and specific doctrines like *Cy Pres* remains unsettled.²⁷ Nonetheless, the debate spurred more thorough attention to the drafting of easement clauses setting out the scope of permissible amendments and establishing institutional guidelines for easement holders.²⁸

ii. Legal Perpetuity in a Changing World

The concept of legal perpetuity in the field of conservation and preservation easements has also been interrogated in a more practical context. Julia D. Mahoney asked whether legal perpetuity was really forever in "The Illusion of Perpetuity and the Preservation of Privately Owned Lands" and evaluated how conservation decisions should respond to inevitable changes over time.²⁹ In "Conservation Easements at the Climate Change Crossroads," Jessica Owley

²⁵ Lindstrom, "The End of Perpetuity," 56–77.

²⁶ See Nancy A. McLaughlin & W. William Weeks, "In Defense of Conservation Easements: A Response to *The End of Perpetuity*," *Wyoming Law Review* 9, no. 1 (2009): 1–96; C. Timothy Lindstrom, "Conservation Easements, Common Sense and the Charitable Trust Doctrine," *Wyoming Law Review* 9, no. 2 (2009): 397–412; Nancy A. McLaughlin & W. William Weeks, "*Hicks v. Dowd*, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight," *Wyoming Law Review* 10, no. 1 (2010): 73–114.

²⁷ See Jane Ellen Hamilton, "Understanding the Debate about Conservation Easement Amendments," The Land Trust Alliance, accessed July 24, 2022, <https://www.landtrustalliance.org/news/understanding-debate-about-conservation-easement-amendments>. Some states include provisions allowing for the state attorney general to step in and enforce violations of easements on behalf of the public should it be necessary, a mechanism similar to charitable trust law. See Federico Cheever & Nancy A. McLaughlin, "An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law," *Journal of Law Property and Society* 1 (2015): 151–52.

²⁸ See The Land Trust Alliance, *Amending Conservation Easements: Evolving Practices and Legal Principles*, 2nd ed. (Washington, D.C.: The Land Trust Alliance, 2017).

²⁹ Julia D. Mahoney, "The Illusion of Perpetuity and the Preservation of Privately Owned Lands," *Natural Resources Journal* 44, no. 2 (Spring 2004): 573–600.

discussed how the impacts of climate change could impair—if not destroy—many of the cherished landscapes ostensibly protected in perpetuity by conservation easements and how land trusts might adapt their operations to account for this uncertainty.³⁰ Jess R. Phelps examined similar issues in the preservation easement context in "Preserving Perpetuity: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World," offering guidance on how easement holding organizations might prepare for and respond to events that damage or destroy protected historic easement properties.³¹

iii. Enabling Statute Reform

As the conservation easement movement matured and possible defects became clear, a reexamination of the underlying state statutory regimes was warranted. Jeff Pidot examined Maine's 2007 statutory reforms as a model for other states in "Conservation Easement Reform: As Maine Goes Should the Nation Follow?."³² The amendments to Maine's enabling law covered issues ranging from state registration to common standards for monitoring; backup enforcement (should the nonprofit dissolve or fail to uphold its obligations); amendment and termination; and merger and tax foreclosure.³³ In "Conservation Easement Enabling Statutes: Perspectives on Reform," Pidot and McLaughlin explored many of these issues but also cover how state laws should address possible remedies for violations of easement terms and lingering common law equitable defenses that property owners might raise to frustrate enforcement efforts.³⁴ Additionally, McLaughlin undertook a thorough comparison of the various state laws to the

³⁰ Jessica Owley, "Conservation Easements at the Climate Change Crossroads," *Law and Contemporary Problems* 74, no.4 (Fall 2011): 199–228.

³¹ Jess R. Phelps, "Preserving Perpetuity: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World," *Environmental Law* 43, no. 4 (Fall 2013): 941–88.

³² Pidot, "Conservation Easement Reform," 1–27.

³³ Pidot, "Conservation Easement Reform," 8–21.

³⁴ Jeff Pidot & Nancy A. McLaughlin, "Conservation Easement Enabling Statutes: Perspectives on Reform," *Utah Law Review* 2013, no. 3 (2013): 811–848.

Uniform Conservation Easement Act in her "Uniform Conservation Easement Act Study Committee Background Report."³⁵

iv. Federal Tax Abuses and Easement Appraisals

More ink been spilt in the area of conservation and preservation easement tax incentives than in any other. The focus on tax issues has been so concerted both due to the federal tax deduction's contribution to the spread of conservation easements and the controversy surrounding the incentive. Interest in the tax benefits of conservation and preservation easement donation began with the IRS's recognition of a tax deduction in the 1960s, but expanded greatly after the federal deduction was permanently enshrined in law in 1980.³⁶ McLaughlin charted the history and dramatic rise in use of conservation easements alongside the availability of tax incentives while assessing the problems in the federal tax program for possible solutions in "Increasing the Tax Incentives for Conservation Easement Donations:— A Responsible Approach."³⁷ In "Conservation Easement & Their Critics," Richard J. Roddewig described the scrutiny by the IRS and Congress to potential conservation and preservation easement tax abuses raised by reporting in the mid-2000s and the fallout that reverberates in the conservation and preservation easement movement today.³⁸ In response to the controversy, numerous authors examined various aspects of the ensuing IRS litigation campaign and proposed alterations to the federal tax incentive program.

³⁵ Nancy McLaughlin, "Uniform Conservation Easement Act Study Committee Background Report," *Utah Law Faculty Scholarship* 119 (2017): 1–55.

³⁶ Nancy A. McLaughlin, "Increasing the Tax Incentives for Conservation Easement Donations:— A Responsible Approach," *Ecology Law Quarterly* 31, no. 1 (2004): 10–17; *See* Tax Treatment Extension Act of 1980, Pub. L. No. 96-541.

³⁷ McLaughlin, "Increasing Tax Incentives," 3–113.

³⁸ Richard J. Roddewig, "Conservation Easements and Their Critics: Is Perpetuity Truly Forever . . . And Should It Be?," *University of Illinois Chicago John Marshall Law Review* 52 (2019): 677–713.

First, some authors like Daniel Halperin challenged the overall public benefit of the tax deduction, as in "Incentives for Conservation Easements: The Charitable Deduction or a Better Way."³⁹ Halperin instead suggested a direct federal expenditure program or at least a yearly cap on available the available tax incentives to cut down on potential abuses.⁴⁰ Second, others suggested potential reforms to address the tax abuse concerns, as did Jennifer Anne Rikoski in "Reform But Preserve the Federal Tax Deduction for Charitable Contributions of Historic Facade Easements," suggesting more stringent standards, enforcement, and the establishment of a specialized government body to review tax issues for certain preservation easements.⁴¹ Thirdly, many reported with great interest as the IRS's litigation unfolded to determine the overall impact on the efficacy of the conservation and preservation tax deduction, as did Jessica Owley in "The Future of the Past: Historic Preservation Easements" and McLaughlin in her working paper "Trying Times: Conservation Easements and Federal Tax Law."⁴² Finally, the cloud over the federal tax deduction was such that Jess R. Phelps suggested historic preservation organizations should consider moving on from claiming the incentive altogether in "Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future."⁴³

³⁹ Daniel Halperin, "Incentives for Conservation Easements: The Charitable Deduction or a Better Way," *Law and Contemporary Problems* 74, no. 4 (Fall 2011): 29–50.

⁴⁰ Halperin, "Incentives for Conservation Easements," 45–50.

⁴¹ Jennifer Anne Rikoski, "Reform But Preserve the Federal Tax Deduction for Charitable Contributions of Historic Facade Easements," *The Tax Lawyer* 59, no. 2 (Winter 2006): 563–588.

⁴² Jessica Owley, "The Future of the Past: Historic Preservation Easements," *Zoning Law & Practice Report* 35, no. 10 (2012): 1–12; Nancy A. McLaughlin, "Trying Times: Conservation Easements and Federal Tax Law" (University of Utah College of Law Research Paper No. 396, Salt Lake City, 2020). There are also a number of useful sources that simply seek to explain the various requirements of the federal tax deduction including a two-part series on perpetuity requirements from McLaughlin and an audit guide from the IRS itself. *See generally* Internal Revenue Service, *Conservation Easement Audit Technique Guide*; Nancy A. McLaughlin, "Internal Revenue Service 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 1: The Standards," *Real Property, Trust & Estate Law Journal* 45 (2010): 473–527; Nancy A. McLaughlin, "Internal Revenue Service 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 2: Comparison to State Law," *Real Property, Trust & Estate Law Journal* 46 (2011): 1–70.

⁴³ Jess R. Phelps, "Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future," *Nebraska Law Review* 91, no.1 (2012): 123–168.

The easement tax controversy centered largely—and justifiably so—on the question of accurate appraisal of easements. The value of the tax deduction is based on the loss in fair market value resulting from the constraints imposed by the easement, sometimes described as lost development rights.⁴⁴ It is incredibly difficult, however, to definitively assess the precise value lost by the transfer of only partial real property interest, leading to controversy over overinflated appraisals and potentially fraudulent or abusive transactions.⁴⁵ McLaughlin assessed appraisal methods, case law in both preservation and conservation easement contexts, and potential reforms in "Conservation Easements and the Valuation Conundrum."⁴⁶ The definitive source on easement appraisal, giving a detailed breakdown of the various overlapping valuation methods, is Richard J. Roddewig and Charles T. Bridgen's *Appraising Conservation and Historic Preservation Easements*.⁴⁷ From the various sources of appraisal guidelines and general considerations, to a discussion of the key methods—the highest and best use analysis, the sales comparison approach, the cost approach, and the income approach—this source goes a long way to remedying a lack of appraisal standards for those who can effectively apply them.⁴⁸

v. Conservation and Preservation Easements in Court

Along with the proliferation of conservation and preservation easements came challenges in court. For the most part, however, these challenges have been limited in number and address a wide variety of legal issues including many issues discussed above. It is therefore difficult to make sweeping assessments about the legal outcomes in conservation and preservation easement

⁴⁴ See Nancy A. McLaughlin, "Conservation Easements and the Valuation Conundrum," *Florida Tax Review* 19, no. 4 (2016): 231–43.

⁴⁵ McLaughlin, "Valuation Conundrum," 227–31.

⁴⁶ McLaughlin, "Valuation Conundrum," 227–306.

⁴⁷ See generally Richard J. Roddewig & Charles T. Bridgen, *Appraising Conservation and Historic Preservation Easements*, 2nd ed. (Appraisal Institute, 2020).

⁴⁸ See generally Roddewig & Bridgen, *Appraising Conservation and Historic Preservation Easements*.

cases, particularly regarding enforcement of easement terms. Nonetheless, some legal scholars have undertaken efforts to evaluate how easement litigation may proceed in court.

Melissa K. Thompson & Jessica E. Jay assessed judicial approaches to interpreting and enforcing easement terms in "An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools."⁴⁹ Thompson & Jay observed the importance of clear and enforceable language in easement documents to avoid a judicial analysis relying on a subjective evaluation of parties' intent, unfavorable common law rules and presumptions, or an economic cost-benefit analysis.⁵⁰ In "Conservation Easement Violated: What Next?," Ann Harris Smith focused on what remedies courts had granted including remediation, injunctions, and criminal or civil penalties.⁵¹ In addition to recommendations for courts analyzing conservation and preservation easement disputes, Harris provides insight into what evidence may prove effective in demonstrating the harm that easement violations may incur without remediation.⁵² The state-specific case survey "Conservation Easements in Court" by Ryan E. Hamilton revealed a striking success rate where the judicial decision or legal settlement favored the easement holder in every single lawsuit examined.⁵³ Though all cases fell under Pennsylvania law, Hamilton's study indicates a judicial stance that favors the plain language of easement agreements under general principles of contract interpretation.⁵⁴

⁴⁹ See generally Melissa K. Thompson & Jessica E. Jay, "An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date," *Denver University Law Review* 78, no. 3 (2001), 373–412.

⁵⁰ Thompson & Jay, "Examination of Court Opinions," 409–412.

⁵¹ Ann Harris Smith, "Conservation Easement Violated: What Next? A Discussion of Remedies," *Fordham Environmental Law Review* 20, no. 3 (Winter 2010): 597–635.

⁵² Smith, "Conservation Easement Violated," 626–635.

⁵³ Ryan E. Hamilton, *Conservation Easements in Court: A Review of Easement Violation and Enforcement Litigation in Pennsylvania* (WeConservePA, 2020), 2.

⁵⁴ Hamilton, *Conservation Easements in Court*, 2.

Studies of available easement enforcement lawsuits reveal some indications of how such disputes will proceed in court. If easement documents are well-drafted and the dispute is limited to enforcing the terms, then easement holders are positioned for a beneficial outcome. Available information on easement lawsuits remains limited, however, and an organization undertakes serious financial and legal risk when undertaking litigation. Furthermore, the need to file a lawsuit can in itself be seen as a failure of an easement holder's stewardship efforts. Stewardship strategies to avoid litigation altogether are therefore just as if not more important than legal strategies.

C. Emerging Conservation and Preservation Easement Stewardship Quandaries

In the 1980s and 1990s, conservation and preservation easement organizations focused on acquiring new easements with particular fervor.⁵⁵ This meant, however, that easement holding organizations found themselves stewarding an increasingly large portfolio of resources, and therefore needed best practices to ensure the perpetual protection of easement properties as legal disputes and stewardship challenges inevitably arose. There were considerable growing pains for these nonprofits as their operations shifted from acquisition to stewardship and they were confronted with a myriad of problem areas including funding, monitoring, property owner relations, and enforcement.

Conservation easement stewardship problems started to come into focus in the 1990s as the easement movement became established enough for concerted study. Federico Cheever was one of the first to express the issues that would likely arise as the conservation easement

⁵⁵ See Rikoski, "Reform Historic Facade Easements," 565 (discussing the number of preservation easement holding organizations and the rate at which preservation easements were donated as of the early 2000's); McLaughlin, "A Responsible Approach," 21–22 (charting the rise in number of land trusts and conservation easements from the 1980s to the early 2000s).

movement began to mature in "Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and A Troubled Future."⁵⁶ Although Cheever recognized the unique benefit of conservation easements as a legal tool, he foresaw that practical stewardship challenges would mount as easement properties were sold to or inherited by property owners who did not share the donor's desire to protect the covered resources.⁵⁷

Ensuring the Promise of Conservation Easements, a study of San Francisco area easement organizations by the Bay Area Open Space Council indicated that stewardship issues were, however, already present.⁵⁸ The most sobering finding was that almost half of conservation easements held by study participants were not monitored whatsoever, and the study also found that 14 percent of easements had already been violated.⁵⁹ Unsurprisingly, many of the study's recommendations for easement holders involved increasing funding, being more consistent and thorough in monitoring efforts, and preparing for violations.⁶⁰

The Land Trust Alliance, the national umbrella organization for land trusts, undertook efforts to provide best practices to enhance stewardship among their constituent land trusts in response to mounting issues, most notably by publishing *The Conservation Easement Handbook*.⁶¹ The first edition was published in 1988 and, fitting to the maturity of the conservation easement movement, focused on front-end issues like marketing easement

⁵⁶ Federico Cheever, "Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and A Troubled Future," *Denver Law Review* 73, no. 4 (January 1996): 1077–1102.

⁵⁷ Cheever, 1087–1102.

⁵⁸ Bay Area Open Space Council, *Ensuring the Promise of Conservation Easements* (1999).

⁵⁹ Bay Area Open Space Council, 13. The monitoring record for private land trusts was better than public agencies, with public agencies failing to monitor 70 percent of their easement properties. Bay Area Open Space Council, 13–14.

⁶⁰ Bay Area Open Space Council, 13.

⁶¹ Elizabeth Byers & Karin Marchetti Ponte, *The Conservation Easement Handbook*, 2nd ed. (Land Trust Alliance & The Trust for Public Land, 2005). Another major ongoing effort by the Land Trust Alliance is the development of standards and practices that touch upon many aspects of operating a land trust but particularly focusing on administrative issues like ethics and organizational management. The Land Trust Alliance, *Land Trust Standards and Practices: Ethical and Technical Guidelines for the Responsible Operation of a Land Trust* (rev. 2017).

programs to landowners and drafting easement documents.⁶² After major ongoing challenges became clear during the ensuing decade, Elizabeth Byers and Karin Marchetti Ponte updated the *Handbook* in 2005 to give greater emphasis to stewardship issues like monitoring and enforcement in addition to refining a holistic set of guidance with the benefit of thirty years of easement management experience.⁶³ The second edition also included a chapter dedicated to historic preservation easements and specific drafting advice, bringing the guidance for conservation and preservation easements closer into sync.⁶⁴

Another major Land Trust Alliance effort has been to periodically sponsor surveys of its constituent organizations to gather data about their experiences stewarding easements.⁶⁵ Of particular note are studies focusing on easement violations and enforcement, as these disputes demonstrate the risks of holding easements and can reveal strategies to minimize those risks. Melissa Danskin's "Conservation Easement Violations: Results from a Study of Land Trusts" surveyed organizations holding over 7,400 conservation easements and found that "less than 7 percent of the easements held by land trusts have experienced violations, and land trusts considered most violations to be minor."⁶⁶ Further, most violations were resolved through negotiations with the property owner, and, of the lawsuits that were filed, the majority were settled out of court.⁶⁷ Nonetheless, some land trusts incurred "substantial costs" enforcing it easement rights.⁶⁸

⁶² Byers & Ponte, 1–2.

⁶³ Byers & Ponte, 2–3.

⁶⁴ See Byers & Ponte, 219–37.

⁶⁵ See "National Land Trust Census," Land Trust Alliance, accessed Nov. 14, 2022, <https://landtrustalliance.org/about/national-land-trust-census>.

⁶⁶ Melissa Danskin, "Conservation Easement Violations: Results from a Survey of Land Trusts," *Exchange* (Winter 2000): 5–9.

⁶⁷ Danskin, 5.

⁶⁸ Danskin, 5.

A later study of disputes involving both property owned by land trusts in fee simple and protected by easements presented a less positive view. Adena Rissman and Van Butsic found that 47 percent of organizations had dealt with a legal challenge or violation in "Land Trust Defense and Enforcement of Conserved Areas."⁶⁹ Organizations nonetheless reported a large share of lawsuits that they engaged in were either won or settled.⁷⁰ A portion of participants, however, noted that they would have engaged in litigation if they had been better funded, showing that financial means remained an obstacle to easement holders seeking to resolve violations.⁷¹ The study also took stock of organizational capacity, but found little to no correlation between factors like staffing and budget and the likelihood of suffering a violation.⁷² Easement holders of every size must therefore give serious thought to how they will resolve disputes when they arise. Overall, the study underscored many monitoring and enforcement challenges and provided quantitative evidence that disputes are "common, varied, and increasing."⁷³

In the historic preservation easement realm, the organizational guidance for easement holders and concerted study of experiences lagged behind that of the conservation easement movement. Granted, many of the legal concepts, program structures, and monitoring and enforcement strategies developed by conservation groups overlap or are transferrable. Aspects of

⁶⁹ Adena R. Rissman & Van Butsic, "Land Trust Defense and Enforcement of Conserved Areas," *Conservation Letters* 4 (2011): 32.

⁷⁰ Rissman & Butsic, 33.

⁷¹ Rissman & Butsic, 32. Those in the conservation easement community recognized the issue of funding and began to propose innovative solutions including a collective insurance fund for land trusts. See Jessica E. Jay, "Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions," *Environmental Lawyer* 6, no. 2 (2000): 441–502. The culmination of these discussions was the creation of TerraFirma, an insurance company offering insurance to land trusts to support legal defense and enforcement efforts. "Welcome to TerraFirma," TerraFirma, accessed Nov. 16, 2022, <https://terrafirma.org/>.

⁷² Rissman & Butsic, "Land Trust Defense and Enforcement," 33, 36.

⁷³ Rissman & Butsic, 35–36.

preservation easement practice are unique, however, as are the specific experiences of organizations that hold easements.

Notable preservation organizations have produced some guidance on the effective operation of an easement program focused on protecting the built environment. These include "Establishing and Operating an Easement Program to Protect Historic Resources" by Elizabeth Watson & Stefan Nagel, attorneys with the National Trust for Historic Preservation, and "Easements to Protect Historic Properties," published by the National Park Service.⁷⁴ Watson & Nagel in particular discuss the major elements of a preservation easement stewardship program including monitoring and enforcement, but a considerable portion nonetheless focuses on tax considerations and the document is brief overall.⁷⁵

A more in-depth discussion of preservation easement stewardship issues is presented in Tyler Smith's master's thesis *Easements Today: Effective Administration of Easement Programs*.⁷⁶ Smith examined the practices of four well-established preservation easement holders, including both non-profit organizations and government agencies.⁷⁷ His analysis focused on each organization's approach to acquisition, monitoring, and enforcement, and highlighted common challenges among them and successful aspects of particular programs.⁷⁸ Though Smith's piece is one of the few that narrows its sight to historic preservation easement organizations, it does not delve deeply into the finer points of easement stewardship nor does it widely examine the full spectrum of preservation easement holding organizations.

⁷⁴ See generally Watson & Nagel, *Establishing and Operating an Easement Program*; Charles Fisher, *Easements to Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits* (2011).

⁷⁵ Watson & Nagel, *Establishing and Operating an Easement Program*, 1–21.

⁷⁶ Tyler Anthony Smith, *Easements Today: Effective Administration of Easement Programs* (Master's Thesis, University of Maryland, 2016).

⁷⁷ Smith, 1–3.

⁷⁸ Smith, 21–46.

The most recent significant development in providing uniform guidance for the administration of preservation easement organizations was the publication of the *Historic Preservation Easement Program Model Standard Operating Procedures* (SOPs) by the National Trust for Historic Preservation.⁷⁹ The model SOPs are an adaptable framework for preservation easement holders covering all major components of administering an easement program. The model SOPs notably provide definitions for levels of violations, with accompanying examples, so that organizations can proactively develop responses based on the circumstances.⁸⁰ The model SOPs are a useful tool but are ultimately a technical document that does not detail the important relationship building and interpersonal components of operating a successful easement program.

The lack of survey comprehensive survey efforts among preservation easement holders is a particular obstacle to better understanding the experiences, challenges, and successful strategies that may be unique to preservation easement organizations. The National Trust for Historic Preservation did undertake a survey of State and Tribal Historic Preservation Offices in the summer of 2021, delving into the challenges particular to those government agencies.⁸¹ Unsurprisingly, funding ongoing monitoring efforts was the major ongoing challenge for the survey participants, leading some agencies to partner with private nonprofits to provide monitoring assistance.⁸² The full findings of the survey and any recommendations, however, are

⁷⁹ National Trust for Historic Preservation, *Historic Preservation Easement Program Model Standard Operating Procedures* (Washington, D.C.: National Trust for Historic Preservation, 2021). The National Trust for Historic Preservation also published a document to assist preservation easement holders to adapt the Land Trust Alliance's *Land Trust Standards and Practices* to the historic preservation context, which can provide important advice on how to run an easement nonprofit but has only limited guidance on practical stewardship questions. National Trust for Historic Preservation, *Best Practices for Preservation Organizations Involved in Easement and Land Stewardship* (2008).

⁸⁰ See National Trust for Historic Preservation, 13–18.

⁸¹ Matthew Ahern, Brooks Becker & Kelli Gibson, "SHPOs and Easements: The Identification and Interpretation of Common Practices and Challenges," National Trust for Historic Preservation, last visited Nov. 14, 2022, <https://forum.savingplaces.org/blogs/special-contributor/2022/02/18/shpos-and-easements>.

⁸² Ahern et al.

not yet publicly available, and the survey did not include the significant number of nonprofit easement organizations.⁸³ Outside of this recent notable example, it may be that the most significant, publicly-available survey effort regarding historic preservation easements was last undertaken by Russell Brenneman in his easement study during the 1970s.⁸⁴

D. Conclusion

Arising from legal uncertainty in the mid-twentieth century, conservation and preservation easements were cemented as a unique tool to protect natural and historic resources by the 1980s. Legal issues surrounding easements became increasingly varied, with great emphasis being given to tax abuses in response to controversy beginning in the mid-2000s. While some aspects legal discussions were removed from practical easement practice, others helped shape fundamental questions like how organizations should approach amending existing easement documents. Scholarship on other important legal issues like the success rate for lawsuits enforcing easement terms demonstrates some reason for optimism among easement holders although the teachings are somewhat limited in application due to factual differences and a relatively small sample size.

As the conservation and preservation easement movement matured around the turn of the twenty-first century, it became clear that practical stewardship challenges had mounted as easement holdings had grown and that they would likely present the major ongoing issue for easement holders. Conservation easement organizations like the Land Trust Alliance worked to provide practical guidance and professional standards to help remedy ongoing administrative issues. This effort was supported with periodical survey efforts, sometimes targeted to serious

⁸³ Ahern et al.

⁸⁴ Brenneman, *Should "Easements" be Used to Protect National Landmarks?*, 42–47.

issues like monitoring and enforcement measures, that gave organizations data on where to focus further research. The combination of guidance and dedicated research efforts have provided conservation easement organizations a solid foundation for refining practices and approaching problems as they arise.

There has not been a comparable endeavor in the preservation easement field, particularly regarding surveying easement holders to amass data about their stewardship experiences and challenges. Preservation organizations like the National Trust for Historic Preservation have largely opted instead to reference and adapt guidance and research originating from the conservation easement movement with some supplementation referencing preservation concerns. To a great degree this is prudent, as conservation and preservation easement programs share most legal and practical challenges and organizational strategies. Nonetheless, it is reasonable to assume that there are some important differences between organizations using easements to protect the built versus the natural environment. There is therefore a need for further research to better understand the experiences and challenges among historic preservation easement organizations.

III. HISTORIC PRESERVATION EASEMENTS: HISTORY AND PRACTICE

Historic preservation easements are a relatively new legal tool but have had a unique development since the mid-twentieth century. In order for easements to be used to protect historic resources in perpetuity, a new conception of common law real property agreements had to be developed and enshrined in state law. The historical trajectory of this development started in the mid-twentieth century and reached maturity by the eve of the twenty-first. Even as the legal foundations of preservation easements were settled, organizations holding these easements had to develop pragmatic strategies for the long-term stewardship of the historic properties under their care. This section will describe the history of the historic preservation and conservation easement movement to give context to the current state of affairs and outline the best practices of easement stewardship as a basis for the more detailed discussion in Chapter IV.

A. History of Historic Preservation Easements

Historic preservation easements, like most concepts in American real property law, are a legal descendent of English common law.⁸⁵ The legal theory of real property posits that ownership of property exists as a "bundle" of rights including, for example, the right to physical possession of the property, to construct improvements, to harvest raw materials, and so on.⁸⁶ The totality of these rights is known as "fee simple absolute" ownership.⁸⁷ A fee simple owner may freely divest themselves ("the grantor") of any of these rights and grant them to another

⁸⁵ See generally Dale A. Whitman et al., *The Law of Property*, 4th ed. (St. Paul, MN: West Academic Publishing, 2019).

⁸⁶ See Whitman et al., 22–23.

⁸⁷ Whitman et al., 22–23.

("the grantee").⁸⁸ Non-possessory property rights or interests granted in this way are known as easements.⁸⁹

Traditionally, common law easements gave the grantee an affirmative right to access and enjoy some aspect of the grantor's property.⁹⁰ The common law disfavored easements that granted negative rights obligating the grantor to refrain from exercising property rights that would otherwise exist.⁹¹ Furthermore, due to the common law's strong public policy against placing enduring limitations real property,⁹² easements that imposed perpetual land use restrictions were commonly struck down by courts.⁹³ For these reasons, preservation easements as they exist today are a relatively recent legal creation born out of an interest in using easements for the long-term protection of natural and historic resources.

The first foray into using easements for resource protection occurred in Boston to preserve parkways designed by landscape architect Frederick Law Olmstead.⁹⁴ In the 1930s, the National Park Service (NPS) began purchasing conservation easements to protect natural viewsheds along the Blue Ridge and Natchez Trace Parkways.⁹⁵ The NPS continued acquiring easements surrounding national parks and protecting historic and natural resources sporadically into the mid-twentieth century. Some non-governmental organizations also experimented with using common law easements for a preservation purpose. For example, Historic New England

⁸⁸ Whitman et al., 22–23.

⁸⁹ Whitman et al., 350.

⁹⁰ Whitman et al., 353.

⁹¹ Whitman et al., 353.

⁹² Whitman et al., 23.

⁹³ Federico Cheever & Nancy A. McLaughlin, "An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law," *Journal of Law, Property, and Society* 1, no. 1 (May 2015): 135–36. It is possible to create a common-law easement appurtenant similar in function to a modern conservation or preservation easement, but it requires cumbersome workarounds including the fee simple purchase of a small portion of the covered parcel. Elizabeth Byers & Karin Marchetti Ponte, *The Conservation Easement Handbook*, 2nd ed. (Land Trust Alliance & The Trust for Public Land, 2005), 389.

⁹⁴ Richard R. Powell, *Powell on Real Property*, ed. Michael Allan Wolf (LexisNexis, 2014), 4: 34A–9.

⁹⁵ Powell, 4: 34A–9. California passed a state statute in 1935 focusing on scenic easements similar to those the NPS was acquiring during this period. Powell, 4: 34A–12.

reports that its first historic preservation easement dates back to 1947.⁹⁶ Still, easements protecting natural and historic resources were rare during this period.

Two important factors catalyzed the spreading awareness for conservation easements. First was the passage of the Federal Highway Beautification Act of 1965, providing three percent of state highway funds for scenic improvements.⁹⁷ In response, numerous states passed laws guiding the use of these funds that included the acquisition of scenic easements.⁹⁸ Second, the idea of using easements to protect natural resources began to be raised in academic circles within planning and legal disciplines, beginning with William H. Whyte's coining of the term "conservation easement" in 1959.⁹⁹ Growing discussions about the efficacy of easements and calls to remove the common law impediments to their use soon caught the attention of state legislators.¹⁰⁰

Recognizing the role that easements could play in the protection of natural and historic resources, state legislatures began to pass true conservation easement enabling statutes. Early examples of states passing enabling statutes include California in 1959 and New York in 1960.¹⁰¹ These early statutes vested the ability to hold conservation and preservation easements in governmental entities but later allowed nonprofits to hold easements.¹⁰² Numerous states passed conservation easement enabling statutes in the following decades, driven in part by two important developments. First was the Internal Revenue Service (IRS) determining that conservation easement donations to qualified charitable organizations were federal income tax

⁹⁶ "Preservation Easement Program," Historic New England, accessed June 8, 2022, <https://www.historicnewengland.org/preservation/for-homeowners-communities/preservation-easement-program/>.

⁹⁷ Powell, *Powell on Real Property*, 4: 34A–11 to –12.

⁹⁸ Powell, 4: 34A–12.

⁹⁹ Powell, 4: 34A–12.

¹⁰⁰ Powell, 4: 34A–12 to –13.

¹⁰¹ Powell, 4: 34A–13.

¹⁰² Powell, 4: 34A–13.

deductible, providing an economic incentive for creating easements.¹⁰³ Second was the promulgation of the UCEA by the National Conference of Commissioners on Uniform State Laws, framing the legal norms for states to follow.¹⁰⁴ By the 2005, every state had some form of conservation easement enabling statute, with twenty-three states jurisdictions adopting the UCEA.¹⁰⁵

By many accounts, the availability of a tax incentive for the donation of a conservation easement was a factor in the rapid growth of the conservation easement field. The IRS first informally determined that conservation easement donations qualified as a deductible charitable contribution in 1965, cementing the deduction in the internal revenue code in 1969.¹⁰⁶ The deduction essentially allows the property owner to offset the loss in economic value from the easement's development restrictions. Important adjustments to the revenue code were made in the 1970s, including defining "conservation purposes" and requiring that conservation easements be perpetual, culminating with the addition of Section 170(h) in 1980 that described the various requirements in detail.¹⁰⁷ Between 1980 and 2010, the number of local, state, and regional land trusts grew from 431 to 1,699 and the total covered land area grew from 128,001 acres to more than 8.8 million acres.¹⁰⁸ The federal expenditure under the program has been considerable, granting an estimated \$3.6 billion in tax deduction between only 2003 and 2008, according to one commentator.¹⁰⁹ Over time, there were concerns that the reduction in property values for the

¹⁰³ Powell, 4: 34A-13 to -14.

¹⁰⁴ Powell, 4: 34A-13.

¹⁰⁵ Cheever & McLaughlin, "Introduction to Conservation Easements," 117-18.

¹⁰⁶ Powell, *Powell on Property*, 4: 34A-29.

¹⁰⁷ Powell, 4: 34A-30.

¹⁰⁸ Powell, 4: 34A-33.

¹⁰⁹ Powell, 4: 34A-34 citing Roger Colinvaux, "The Conservation Easement Tax Expenditure: In Search of Conservation Value," *Columbia Journal of Environmental Law* 37, no. 1 (2012): 9-10.

loss of development rights under the easement deduction were being significantly overvalued, reaching a fever pitch in the 2000s.¹¹⁰

Beginning in 2003, *The Washington Post* published a series of articles first taking aim at what appeared to be exorbitant conservation easement appraisals by The Nature Conservancy.¹¹¹ The next year, the *Post* followed with a critique of the practice of placing so-called "facade easements" protecting the exterior of historic buildings, voicing similar concerns over the actual economic impact on property values supposedly being offset by the tax deduction.¹¹² Following the reporting, a series of legislative hearings were held examining abuses in the conservation and historic preservation easement fields, and the IRS opened an aggressive litigation campaign against organizations using and landowners claiming the federal tax deduction.¹¹³ While the IRS litigation has met only limited success in judicial rulings,¹¹⁴ the possibility of being sued by the IRS when attempting to claim the deduction has led to a significant cooling on the use of the tax incentive.

Much of the activity in the conservation and historic preservation community since the mid-2000s has been to engender more scrupulous practices for easement holding organizations and rehabilitate the reputation of easements protecting natural and historic resources as a public good deserving of a viable tax deduction.¹¹⁵ The Land Trust Alliance, the nationwide umbrella organization for land trusts, amended their standards and practices in 2004 and again in 2017 to clarify the legal and ethical guidelines required by its accredited member organizations.¹¹⁶

¹¹⁰ Powell, 4: 34A–32 to –33.

¹¹¹ Powell, 4: 34A–34.

¹¹² Powell, 4: 34A–34 to –35.

¹¹³ Powell, 4: 34A–35 to –42.10.

¹¹⁴ Cheever & McLaughlin, "Introduction to Conservation Easements," 127–133.

¹¹⁵ Richard J. Roddewig, "Conservation Easements & Their Critics," 687–91.

¹¹⁶ See The Land Trust Alliance, *Land Trust Standards and Practices*, 1. The Land Trust Alliance also established an accreditation commission to ensure that its members comply with the standards and practices. Roddewig, "Conservation Easements & Their Critics," 691.

Additionally, greater emphasis has been put on providing a sound basis for the appraisal of conservation and preservation easements, with an important professional text on the subject reaching its second edition.¹¹⁷ Yet the IRS remains committed to combating abusive conservation easement deductions, placing three particular schemes on its annual "dirty dozen" list of tax abuses in 2019.¹¹⁸ Legislation was introduced to Congress in 2021, supported by both the Land Trust Alliance and National Trust for Historic Preservation, intending to eliminate loopholes allowing questionable and abusive practices and restore the efficacy of the easement tax deduction.¹¹⁹ Although the reforms to conservation and preservation standards and practices are a welcome development, it remains uncertain whether the efficacy of the federal tax deduction will be fully restored.

B. Easement Program Overview

Historic preservation easements are a relatively simple concept when discussed in the abstract. The reality of managing an easement program, however, is anything but simple. If an organization wishes for its program to succeed, then it must consider with intention all the major program components necessary. In addition to important preliminary questions, the major program areas targeted in this study are: (1) easement drafting, (2) easement monitoring, (3) property owner relations and preventative measures, and (4) enforcement.

¹¹⁷ See generally Richard J. Roddewig & Charles T. Brigden, *Appraising Conservation and Historic Preservation Easements*.

¹¹⁸ "Abusive tax shelters, trusts, conservation easements make IRS' "Dirty Dozen" list of tax scams to avoid," Internal Revenue Service, accessed June 13, 2022, <https://www.irs.gov/newsroom/abusive-tax-shelters-trusts-conservation-easements-make-irs-2019-dirty-dozen-list-of-tax-scams-to-avoid>.

¹¹⁹ Shaw Sprague, Ross Bradford, & Raina Regan, "Charitable Conservation Easement Program Integrity Act," National Trust for Historic Preservation Leadership Forum, accessed June 13, 2022, <https://forum.savingplaces.org/blogs/special-contributor/2021/04/05/charitable-conservation-easement-integrity-act>; "Tax Shelter Legislation," Land Trust Alliance, accessed June 13, 2022, <https://landtrustalliance.org/tax-shelter-legislation>.

The four categories largely encompass the most crucial aspects of acquiring and stewarding an easement property and are critical to whether a dispute over a violation comes to a beneficial end for the easement holder. Drafting, monitoring, and enforcement practices are frequently described in the available literature on easement stewardship, and guidance is available to assist practitioners in these areas.¹²⁰ Property owner relations and preventative measures is a further category comprising the various strategies and methods that organizations use to reduce the likelihood that violations will occur or go unnoticed. Though not exhaustive of the many challenges of easement program management, these categories provide a lens to assess the practices and successful strategies for easement stewardship.

This section will provide background on the operation and management of a preservation easement program. First, it briefly discusses some basic program structure and practices that preservation easement holders should define. Next, it will describe the essential components and best practices for easement program management in the four inquiry areas to provide a baseline understanding of accepted stewardship standards and a basis for comparison with the more detailed study findings. The comparison between best and actual practices will function as a heuristic to judge the preparedness of preservation organizations for easement violations.

i. Basic Organizational Structure and Practices

There are several fundamental organizational decisions that will shape an easement program and impact some important stewardship challenges. First, the organization must decide what type of historic resources it wishes to protect, including any relationship to formal significance criteria, building types, specific or under-protected architectural styles, and whether to protect interiors or exteriors only, to name a few considerations. Second, the organization

¹²⁰ See e.g., Watson & Nagel, *Establishing and Operating an Easement Program*, 12–21.

must determine how it will staff and financially support its ongoing program efforts and enforcement, usually through some form of additional monetary donation when an easement is executed.¹²¹ Third, the organization should determine the geographical area in which it can feasibly operate, factoring in travel costs for monitoring and any other benefits or challenges in operating at a local, regional, or national scope. In addition to these considerations, an organization should establish a variety of administrative policies that are outside the scope of this study.¹²²

ii. Easement Drafting

Easement drafting, while part of the preliminary steps of acquiring an easement, has profound significance for the effectiveness of the easement. The easement instrument establishes each party's rights and obligations, the components of administering the easement, and lays out the remedies available if a violation of the easement were to occur. How clearly the language is drafted will also determine how and in whose favor a court will interpret the provisions should litigation become necessary. In short, what is included—and not included—in the easement document sets the stage for most every aspect of what comes after it is executed.

Easement documents can differ greatly depending on the organization and the resource to be protected, but there are many necessities and commonalities, nonetheless. Every easement document must comply with the state enabling law and legal technicalities, including the form of the easement and the proper language describing the legal interest and transfer of that interest.¹²³ The document should also thoroughly describe the property, protected features, and purpose of the easement, often referred to as "recitals."¹²⁴ This narrative is often keyed to the baseline

¹²¹ See Byers & Ponte, *Conservation Easement Handbook*, 124–33.

¹²² See National Trust for Historic Preservation, *Best Practices for Preservation Organizations*, 1–46.

¹²³ Byers & Ponte, *Conservation Easement Handbook*, 290–91.

¹²⁴ Byers & Ponte, 291, 93.

documentation attached to the document that exhibits pictures and research supporting the historical significance of the property and the condition at the time of the execution.¹²⁵

The crucial legal language in the document lays out the respective rights and obligations of the parties, namely what is granted to the easement holder and what is reserved to the property owner. For historic preservation easements, these provisions include a requirement of affirmative maintenance, describe absolute prohibitions, and detail permitted changes, often with a requirement of prior written consent of the easement holder.¹²⁶ Other legal terms describe what remedies and defenses are available to each party and how the document should be interpreted.¹²⁷ A final complicating factor in easement drafting is introduced if the property owner is seeking the federal tax incentive, which comes with its own requirements and idiosyncrasies.¹²⁸ Once the easement is signed and executed, the document must be recorded at the local land records office to make it effective and give notice to the public.¹²⁹

Many organizations rely on easement templates to help provide efficiency, structure, and consistency to their ongoing easement drafting efforts.¹³⁰ Model easements provide much of the boilerplate language and programmatic requirements for each easement and are a useful starting point for organizations that are willing to negotiate the specific language with prospective easement donors. If reviewed by a qualified attorney for legal proficiency, a model easement can allow for easement program staff to do most if not all of the negotiations and modification of the

¹²⁵ Byers & Ponte, 100–15; Elizabeth Watson & Stefan Nagel, *Establishing and Operating an Easement Program*, 12–13.

¹²⁶ Watson & Nagel, *Establishing and Operating an Easement Program*, 13–17.

¹²⁷ See Byers & Ponte, *Conservation Easement Handbook*, 430–33, 466, 470.

¹²⁸ See Byers & Ponte, *Conservation Easement Handbook*, 230–35.

¹²⁹ Watson & Nagel, *Establishing and Operating an Easement Program*, 18.

¹³⁰ See, e.g., "Sample Conservation Easement Language," Virginia Department of Conservation and Recreation, accessed June 23, 2022, <https://www.dcr.virginia.gov/land-conservation/document/lcsampease.pdf> (providing language for a variety of protected resource types); "Preservation Easements," National Trust for Historic Preservation, Preservation Leadership Forum, accessed June 23, 2022, <https://forum.savingplaces.org/learn/fundamentals/preservation-law/easements>.

document. If the prospective donor wishes to significantly modify the model, then additional attorney involvement will likely be necessary. While a useful tool, there is no single ideal model easement as they must be adjusted to fit each organization's goals and circumstances and be periodically reviewed for legal sufficiency.¹³¹ Model easements can help set the stage for an easement program's success, but true stewardship requires consistent ongoing monitoring and enforcement efforts.

In addition to negotiating over the substantive terms of the easement, the parties generally agree on a monetary donation or fee to support ongoing monitoring efforts and enforcement measures, should a dispute arise. The need for a healthy endowment was one of the hard-learned lessons of early easement stewardship.¹³² The specific calculation of this fee differs between various organizations but among preservation nonprofits generally falls into three categories: (1) a calculation based on property-specific annual stewardship costs, (2) a percentage of the market value of the property or the appraised value of the easement, (3) a flat rate potentially escalating based the properties market value.¹³³ Another mechanism used by some organizations to support stewardship is requiring a transfer fee from subsequent purchasers of the easement property.¹³⁴ The specific method for bolstering its endowment is a matter of choice for each organization so long as the contribution is sufficient to support stewardship of the property.

iii. Easement Monitoring

Periodic easement monitoring is an essential obligation of easement holders and the primary mechanism to discover and document violations. In addition to assessing the condition

¹³¹ See Byers & Ponte, *Conservation Easement Handbook*, 315.

¹³² See Bay Area Open Space Council, *Ensuring the Promise of Conservation Easements*, 8–9.

¹³³ See Raina Regan, "Funding Easement Stewardship," National Trust for Historic Preservation Leadership Forum, accessed Sept. 8, 2022, <https://forum.savingplaces.org/blogs/raina-regan/2019/12/03/funding-easement-stewardship>.

¹³⁴ Regan, "Funding Easement Stewardship."

of the protected features, periodic monitoring ensures that organizations maintain contact with property owners. A failure to adequately monitor the easement property is likely to lead to violations going undiscovered and may interfere with the ability to subsequently enforce the easement restrictions.

The general consensus is that each easement property should be monitored approximately once per year to ensure that protected features remain in good condition.¹³⁵ The gold standard in monitoring is having a consistent staff member or members monitor easement properties for continuity over a period of years.¹³⁶ Short of dedicated staff, organizations may employ a mix of methods including using volunteers, interns, and/or board members to monitor its easements.¹³⁷ Ensuring thorough documentation of the inspection, whomever performs it, is central to establishing a record of protected features' condition over time, and the documentation provides evidence of a violation if a dispute proceeds to litigation.¹³⁸ Historic preservation easements that protect interior features have the added challenge of working with the property owner to access spaces that may be inside a private residence.¹³⁹ Once the inspection is complete, staff will compare their findings the baseline documentation and generally prepare a report noting any issues with the property's condition.

Monitoring may be one of the most problematic aspects of an easement program if the organization lacks adequate funding. Maintaining enough trained staff to perform a thorough inspection every year is a considerable expense and one that multiplies with the number of

¹³⁵ Byers & Ponte, *The Conservation Easement Handbook*, 145; Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 19.

¹³⁶ Byers & Ponte, *The Conservation Easement Handbook*, 146. The National Trust's publication further recommends that the property be monitored more than once a year if there is a "rehabilitation or construction project" taking place. Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 19.

¹³⁷ Byers & Ponte, 146.

¹³⁸ Byers & Ponte, 146.

¹³⁹ Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 2.

easements that an organization accepts. An organization must therefore balance its desire to protect the maximum number of historic resources with its capacity to do so.

iv. Property Owner Relations and Preventative Measures

Property owner relations and other less formal practices that permeate most every aspect of easement management but are one of the most elusive areas in effective easement stewardship. Nonetheless, it is vital to maintain good relationships with property owners and establish a shared understanding of each party's rights and obligations under the easement agreement. Landowner relations is arguably the "most important piece" of easement administration because the resources are best protected when the parties work in partnership with one another.¹⁴⁰

Periodic monitoring, in addition to the technical and recordkeeping functions, provides a "formal mechanism for maintaining the relationship between the organization and the property owner."¹⁴¹ Asking the property owner to accompany the organization's agent during the inspection may be a particularly effective way to build the relationship and help the owner understand the mechanics of the easement.¹⁴² Once the inspection is completed, the ensuing condition report should be sent to the property owner for their records and to openly communicate the outcome.¹⁴³ Overall, frequent communications may "clear up misunderstandings" that might lead to damage to the property or violations of the easement terms.¹⁴⁴

¹⁴⁰ Byers & Ponte, 134–36.

¹⁴¹ Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 19.

¹⁴² See Byers & Ponte, *Conservation Easement Handbook*, 148–54.

¹⁴³ Byers & Ponte, 150–51.

¹⁴⁴ Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 21.

The perpetual nature of most historic preservation easements means that the property will eventually be acquired by a subsequent owner to the easement donor—one who may or may not share the same historic preservation values.¹⁴⁵ Changes in ownership are a particular challenge to the relationship building component of easement stewardship. The organization must essentially begin at square one by explaining the easement terms and program to the new owner.¹⁴⁶ Indeed, scholars have predicted that changes in ownership, through sale or inheritance, have the potential to degrade the effectiveness of conservation and preservation easements programs over time.¹⁴⁷ Having reliable mechanisms to determine a change of ownership and opening up communications with the new owner as early as possible is therefore a core element of an organization ensuring the perpetual protection of its easement properties.¹⁴⁸

Another important component of interaction between a historic preservation easement holder and property owner is the review of proposed changes to the protected resource. At its core, this process consists of reviewing the property owners plans and permitting or denying the proposed action,¹⁴⁹ but project review is also an opportunity to deepen relationships between the parties. An organization should work with the property owner to find solutions where the submitted plans may negatively impact the character-defining features of the resource. Furthermore, if there is adequate staff time, an organization can function as a general resource for property owner questions about the stewardship of their building, providing guidance on treatment of the property even outside the scope of mandatory review under the easement agreement. It may even be beneficial under the right circumstance to allow a property owner to

¹⁴⁵ Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 19.

¹⁴⁶ Byers & Ponte, *Conservation Easement Handbook*, 152–54.

¹⁴⁷ See, e.g., Cheever, "Public Good and Private Magic," 1092–1102.

¹⁴⁸ Byers & Ponte, *Conservation Easement Handbook*, 152–54; Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 19.

¹⁴⁹ See Watson & Nagel, *Establishing an Easement Program*, 20.

escape from some optional requirements under the easement agreement if the outcome strengthens their trust in the easement holder and furthers the overall purpose of the program.¹⁵⁰

Outside of an organization's relationship with the property owner, staff may cultivate support from preservation-minded citizens, government staff, and other easement owners. Community members may act as an alarm system outside of periodic monitoring if they notice unexpected construction on an easement property. Government bodies may even assist in enforcement measures if they are willing to act in concert with the easement holder where jurisdiction overlaps.

Relationship building and other methods of avoiding disputes are a crucial ingredient of successful easement stewardship program. The occurrence of a violation may ultimately thwart the preservation of an easement property, so any method of prevention is indispensable. Should a violation occur then a fruitful preexisting relationship with the property owner will likely assist in bringing the ensuing dispute to a beneficial end.

v. Enforcement

Enforcement of an easement is, in general, an action taken by the easement holder to remedy a violation of an easement's terms. The facts and circumstances of any given violation, however, may differ wildly, and no universal enforcement strategy exists. An easement holder may in fact need to assess whether an action by the property owner or third party violates the easement and, if so, what type of violation the action would be. Once a violation has been established then the organization must determine the best strategy to resolve the violation under the circumstances.

¹⁵⁰ Byers & Ponte, *Conservation Easement Handbook*, 135 (recounting revamped landowner relations practices by the Vermont Land Trust that strengthened trust between the organization and property owners).

According to the model SOPs, the guiding principles in assessing possible violations are "(1) the purpose of the preservation or conservation easement, and (2) the conservation and preservation values of the property."¹⁵¹ The model SOPs provide four tiers of violations that, although not universal definitions, illustrate the varying level of severity that violations may represent. Violations may be technical, minor, moderate, or major, generally corresponding to the level of damage to protected historic features and whether the action would conform the *Secretary of the Interior's Standards for the Treatment of Historic Properties*, a federal guidance document on how to properly care for historic resources.¹⁵² The examples given in the model SOPs also demonstrate how vastly different potential violations can be, even falling within the same category.¹⁵³

Once the organization has determined that the action amounts to a violation of the easement there are several avenues that it may pursue to resolve the violation, including voluntary reparation, discretionary retroactive approval, mediation, and litigation.¹⁵⁴ The ordering of these strategies generally reflects an increasing investment of time and expense to reach a resolution.¹⁵⁵ Most technical or minor violations will likely be able to resolved with informal negotiation with the property owner, so long as they are open to resolving the issue. Retroactive approval, with some potential modifications, may also be appropriate if an unapproved project would nonetheless fit within the *Secretary of the Interior's Standards*. Proceeding to litigation, due to the time, expense, uncertainty, and damage to the parties' relationship, should be considered a "last resort."¹⁵⁶ An organization should carefully assess the

¹⁵¹ The National Trust for Historic Preservation, *Easement Program Model Standard Operating Procedures*, 14.

¹⁵² National Trust, 14–18.

¹⁵³ See National Trust, 14–18.

¹⁵⁴ Byers & Ponte, *Conservation Easement Handbook*, 162–66.

¹⁵⁵ Byers & Ponte, 162–66.

¹⁵⁶ Byers & Ponte, 165–66.

legal merits of the case and whether litigation is in the best interest of the goals of the organization.¹⁵⁷ In some cases, "[c]ollecting monetary damages might give other owners pause before destroying protected features, but . . . will not bring back the irreplaceable."¹⁵⁸ In this complicated area, an organization may be best served by operating from the first principal of protecting the resource rather than taking to the strictest possible enforcement measures.

vi. Conclusion

The effective stewardship of easements is complicated but useful guidance describes the key areas and best practices that organizations should maintain for their program to be successful. The available guidance is largely in agreement on many aspects of stewardship discussed above. It is not clear, however, the extent to which various preservation easement holding nonprofits adhere to these guidelines. The results of the study, which follow, use these best practices as a baseline for comparison to those of various organizations, to frame the data surrounding violations and enforcement, and to reveal more detailed strategies used by preservation easement holders.

¹⁵⁷ Watson & Nagel, *Establishing and Operating an Easement Program*, 21.

¹⁵⁸ Watson & Nagel, 21.

IV. ANALYSIS OF EASEMENT ORGANIZATION PRACTICES AND EXPERIENCES

A. Introduction

Despite the importance of easements as a private historic preservation tool, little is known about the various practices and experiences among preservation easement non-profit organizations. This section presents the findings of the study and analyzes how organizational practices compare to best practices, the significance of the findings related to easement violations, and takes a broader look at how various aspects of easement stewardship inform the preparedness for and resolution of easement disputes. First, this section will report the basic organizational structure and practices of the organizations involved in the study to present context and findings not directly related to the prevention of violations and enforcement of easement terms. Next, the findings and analysis will be presented in the four key inquiry areas of easement drafting, easement monitoring, property owner relations and preventative measures, and easement violations and enforcement.

B. Basic Organizational Structure and Practices

This study collected information on organizational structure and practices of participants to give context to the more specific findings in the key program areas. The survey and interview participants represented organizations that run the spectrum of easement program size and scope. Participation in the study was nationwide, with participants from most major regions of the United States, though largely centered in eastern and midwestern states. Overall, twenty-nine respondents participated in the survey¹⁵⁹ and there were ten participants in the follow-up interviews. The organizations represented in the interviews were five local, two statewide, one

¹⁵⁹ Though there were twenty-nine survey respondents, not every participant answered every question, making the results somewhat variable in number.

regional, and two national nonprofits. Most easement programs were nested within traditional preservation non-profit advocacy groups, but three organizations were almost exclusively easement focused and one organization also operated a Main Street program. The numbers of easements held by surveyed organizations ranged from only a single active easement to over 1,100. The staff size of the organizations ran from two full time employees to approximately 200. Despite the auspicious size of a few of the surveyed nonprofits, the maximum number of staff dedicating the majority of their time to easement stewardship matters was only five, with the majority having only a single staff member managing their program. Interviews conducted were a representative sample ranging from the largest to the smallest of these organizations.

Other baseline information probed in the interview portion of the study were the acquisition criteria and types of resources that the organizations would consider accepting easement donations on. Almost all interview participants indicated that their organization limits easement acquisitions to properties that are listed or determined eligible for the National Register of Historic Places. This is particularly true for organizations that routinely accept easements in connection with tax incentives, which require listing or local historic district recognition as a prerequisite for the programs.¹⁶⁰ Participants from two of the largest organizations involved in the study noted that they are willing to undertake their own significance analysis where a formal designation has not yet taken place, a practice that is likely only possible by having several dedicated staff with the necessary expertise for independent research. Nonetheless, it was indicated that the need for an informal analysis is rare and tends to occur only for endangered resources or those that represent a historical narrative not often represented within traditional historic accounts. While some organizations tended to steward certain types of resources, i.e.

¹⁶⁰ See Watson & Nagel, *Establishing and Operating an Easement Program*, 5–6 (describing

single-family homes or mixed-use commercial buildings, none had a policy to exclude any other resource types. Finally, most organizations reported that they held easements protecting interior features though this tended to be a small share compared to the number of easements covering only exterior elevations.

While there were many commonalities among the experiences and practices of the organizations, there was also a surprising amount of divergence that will be further explored in the sections below. In some ways, the diversity in organizations make it difficult to making sweeping observations or recommendations. Nonetheless, the spectrum of organizational practices reveals different approaches that may be useful for organizations seeking to evaluate or develop their own stewardship programs.

C. Easement Drafting

i. Staff and Attorney Drafting Involvement

Easement drafting is the first step to ensuring a successful and enduring historic preservation easement. Well-drafted easements support future prevention and resolution of easement violations by providing for remedies available to the easement holding organization and penalties for non-compliance, in addition to describing in detail the protected features and relationship between the parties. Although the substantive provisions of the deed are most important to how the relationship and obligations between the parties are structured, skilled drafting has been the subject of other works and is outside the scope of this study.¹⁶¹ This inquiry instead sought to discern basic practices in who is involved in the work of drafting the easement and how various organizations engage in negotiation with prospective easement donors. The results showed that, using attorney involvement and an easement template as the metric, most

¹⁶¹ See, e.g., Byers & Ponte, *Conservation Easement Handbook*, 284–476.

organizations carefully attend to defining the relationship and obligations enshrined in the easement document. A more surprising finding was a potential lack of staff involvement in the drafting process.

Easement templates are an important tool for most historic preservation easement holding organizations, giving a baseline for the provisions needed to comply with state law and ensure legal and programmatic quality and consistency. Due to the availability of sample templates and their importance in the literature, the percentage of respondents using an easement template was expected to be high. The survey results largely confirmed this suspicion. Over 80 percent of survey respondents noted that their organization employed an easement template. Of the five respondent who did not use a template, three had a policy for their easements to either be prepared or reviewed by legal counsel, meaning most of these organizations likely vet their easements to the necessary degree.¹⁶² The few organizations not using a template tended to be on the smaller side, possibly indicating that some smaller organizations may not feel the need to prepare a template or can afford to employ an attorney alongside every donation due to the infrequency of their need.

A similarly large share of respondents—slightly less than 80 percent—reported that they had an attorney either prepare or review their easement documents prior to execution. The remaining 20 percent do not have routine attorney participation although one respondent reported that they would engage an attorney if the easement departed from their template sufficiently. In terms of overall drafting involvement for preservation easement nonprofits, 50 percent use attorneys for drafting, 64 percent use staff in the preparation of the easement document, 68

¹⁶² It is not entirely clear whether the remaining two respondents truly draft and execute their easements without any legal review on a template or their draft easement agreement. It is possible that these participants misunderstood the question, for instance that they use a "model" easement rather than a "template."

percent use attorneys to review draft easements, and 60 percent use some combination of the above (Figure 1). The large share of organizations that involve attorneys in their easement drafting despite the potential expense is notable and indicates that most organizations put an emphasis on producing quality easement documents. On the other hand, the percentage of organizations noting staff involvement in drafting appears lower than expected, as staff would be more likely to understand the practical preservation components to the document than would attorneys and a significant portion of organizations use easement templates.

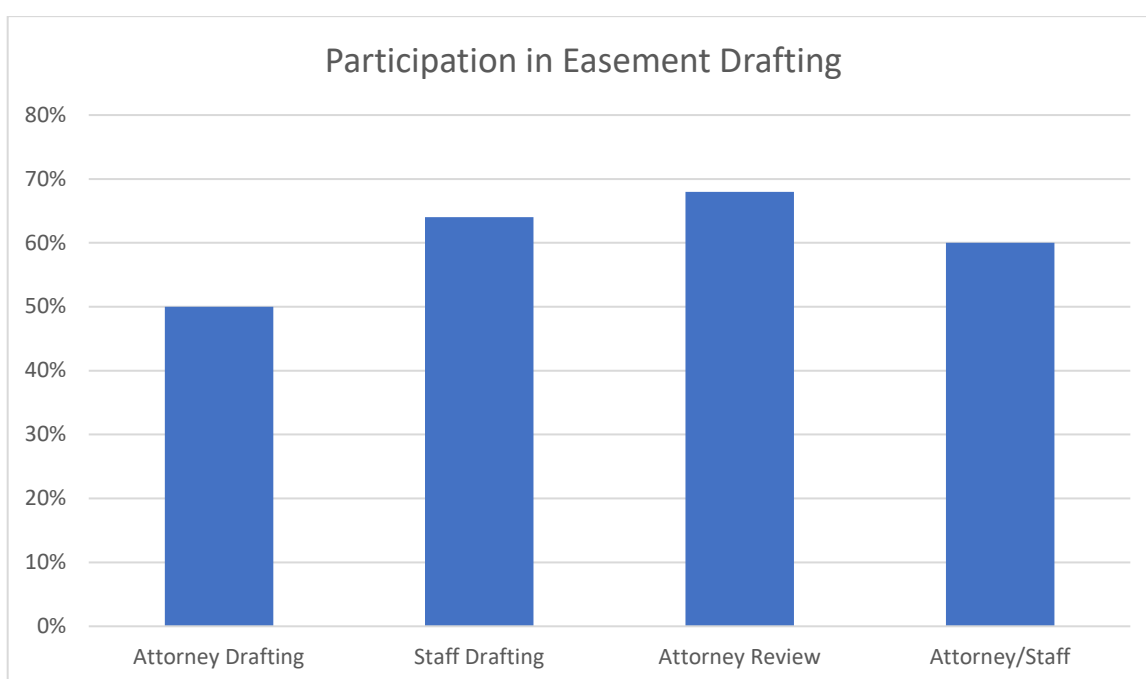


Figure 1

ii. Property Owner Negotiation

The next area of inquiry is that of negotiation between the non-profit organizations and property owners. The ability to shape the various rights and obligations of the parties based on each of their needs is often viewed as one of the great strengths of easements a preservation tool. In the law, it is axiomatic that each property is unique. This is also the case with each historic resource and its significant historic, architectural, artistic, and possibly natural features. The

various organizations' philosophies on negotiating their easement agreements were probed in the interview portion of the study.

Overall, most organizations reported that they are willing to negotiate with the property owner on many terms of the easement though some provisions are sacrosanct due to their importance in meeting the basic stewardship and enforcement standards of their easement programs. Unsurprisingly, these unalterable provisions include those required by the IRS if the property owner is seeking the federal tax deduction. Most participants said, however, that it was rare that a prospective easement donor would pull out of negotiations once reaching that stage because of factors like previous investment in application fees for the easement program or simply in time and effort. Provisions that organizations considered changeable were more likely to involve issues of timing such as a property owner's duty to notify the organization after a casualty event or natural disaster within a certain period. Interviewees indicated that these negotiations often occurred between staff and the property owner or their counsel, but that the organization would direct requests for substantial drafting changes to their own counsel or an easement committee.

A single interviewee indicated that their organization does not negotiate the substantive terms of their easement template whatsoever. Rather, that the only difference in each easement document is the address and legal description of the property. This particular organization held the most easements out of any participant. This organization did not view it as advisable to allow variability in each easement when operating at that scale. Its approach instead fostered predictability in their terms and costs related to negotiations. Additionally, the staff was confident that the document was sufficiently stringent, the enforcement mechanisms having previously been upheld in court. Programmatic factors, namely the similarity of protected

resources—primarily row houses—and relative efficiency in the monitoring involved, may make this approach possible for this organization where it would not be for others. Nonetheless, this organization's approach raises fundamental philosophical questions about preservation easements and the role that negotiation should play in a program's administration.

A successful non-negotiation approach may call into question the principle that conforming the easement document to the property is one of the core benefits of an easement as a preservation tool. The accepted benefits of drafting unique easements include the ability to conform to the unique characteristics of the property in question. This would often at least include a precise description of the historical features protected by the easement to foster the document's enforceability. On the other hand, a practice of non-negotiation may benefit predictability in an organization's stewardship and enforcement measures and save on unnecessary costs. Indeed, the interview responses indicate that most provisions are likely non-negotiable in any event and that few potential donors withdraw due to an inability to alter lesser terms. Furthermore, an organization taking this approach likely has the ability to operate at greater scale and protect a larger number of resources, even if accepting less specificity in easement terms. This study is not equipped to assess the relative merits of traditional negotiation-based and non-negotiation approaches. The philosophical and practical differences in these approaches, however, are ripe for debate.

iii. Stewardship Fund Donations

In addition to the easement document itself, a key aspect of negotiation is the requirement of an additional donation to a stewardship fund. The need for additional funds to steward an easement was one of the hard learned lessons of the early conservation and preservation easement movement, and it was suspected that most organizations would require a monetary

donation.¹⁶³ Once again, the survey results largely supported this premise, with 80 percent of respondents noting that their organization required a donation on acceptance of the easement. Likewise, only a single interview participant indicated that a donation to their organization's endowment was requested but optional. This interviewee, however, indicated that the property owner would generally acquiesce to their request. Nonetheless, even if donations are the norm, organizations not strictly requiring a considerable donation are taking a substantial risk that they will not have enough funds to monitor the easement in perpetuity, let alone enforce the easement terms where a violation occurs.

Although the requirement of a monetary gift was widespread, the precise calculation for the donation varied greatly. There was no area of greater divergence among the organizations whose representatives took part in the interviews. Among the basic methods were donations based on a share of the appraised value of the easement or the entirety of the property, flat fees, calculations based on expected staff time and travel expenses, or some combination of the above.¹⁶⁴ One organization placed a provision in the easement deed requiring a yearly monitoring fee adjusted for inflation. Such a requirement was unique among the surveyed organizations but reflected an anxiety expressed by many interview participants concerning the time value of their stewardship funds from one-time donations. Although there are certainly benefits of a yearly fee structure, it is easy to imagine the difficulty in reliably collecting yearly fees for larger programs. Indeed, the easement portfolio of this particular organization was small—under twenty total.

¹⁶³ See Bay Area Open Space Council, *Ensuring the Promise of Conservation Easements*, 13.

¹⁶⁴ See Raina Regan, "Funding Easement Stewardship," National Trust for Historic Preservation Leadership Forum, accessed Sept. 8, 2022, <https://forum.savingplaces.org/blogs/raina-regan/2019/12/03/funding-easement-stewardship>.

The structure of calculations largely fall in two categories despite the overall variance: those who base at least part of the donation on an appraisal value of the easement and those who primarily focus on the expected and actual cost of drafting and stewarding the easement. The former group is, generally, more focused on accepting easement donations in connection with the federal tax deduction. This comports with the requirements of the incentive, as a qualified appraisal is necessary under the Internal Revenue Code.¹⁶⁵ The latter group largely indicated they were less focused on utilizing the tax deduction, which is not to say that they had not in the past or continued to do so on occasion. Furthermore, programs using an expected cost calculation tended to be well-staffed, often having them engage in a thorough monitoring strategy, and were likely well-funded.¹⁶⁶ For one organization this difference was explicit, as they would base the donation on an easement appraisal if the property owner was seeking the deduction but base the donation on a combination of the overall property value and additional staff time if not.

These two programmatic categories may also express a different philosophical and ethical approach. For most supporters of historic preservation, preserving sites of historic and cultural significance is a necessary public good precisely because they are irreplaceable and therefore invaluable. An easement appraisal, in some sense, places a monetary value on the historic features of a property, making historic fabric theoretically fungible. Furthermore, a nonprofit basing its required contribution on the appraised value can create an incentive—real or perceived—for easements to be overvalued so that an organization might require a larger donation.¹⁶⁷ This cautionary principle is not without real world precedent as the suspicion that

¹⁶⁵ 26 U.S.C. § 170(h)(a)(11) (2022).

¹⁶⁶ Although the study did not include any questions about overall organizational budget, these organizations tended to have more overall staff, had more diverse operations, and therefore likely had a greater variety and magnitude of funding streams.

¹⁶⁷ National Trust for Historic Preservation, *Best Practices for Preservation Organizations Involved in Easement and Land Stewardship* (2008), 35.

easement contributions were being overvalued to the benefit of property owners and easement holders led to the IRS scrutiny of the federal tax deduction.¹⁶⁸ The actual and expected cost approach sidesteps this association altogether, instead centering the calculation on the price to effectively steward the easement. Nonetheless, what the appraisal value approach arguably lacks in ethical purity it trades off for in relative simplicity. Furthermore, it can be seen to recapture a portion of the considerable public investment represented by the federal tax deduction for enduring preservation use.¹⁶⁹

D. Easement Monitoring

Easement monitoring is the primary mechanism for discovering violations ranging from deferred maintenance to unapproved major projects. Core elements of a nonprofit's monitoring strategy will include setting the periodic cycle for inspections, determining documentation methods, deciding who will engage in the inspection, and reporting the findings to the property owner. Many organizations also view their inspection obligation as a means to help build a relationship with the property owner, settle misunderstandings about the easement, and collect consistent documentation that may be used, if necessary, to show evidence of a violation. Certain monitoring practices, such as the period of inspections and documentation methods, were fairly consistent among the organizations, but those engaging in the inspection and the level of detail in reports varied.

¹⁶⁸ National Trust, *Best Practices for Preservation Organizations*, 39. See also Rikoski, "Reform Historic Facade Easements," 564–67 (recounting the controversy over preservation easement appraisals).

¹⁶⁹ It should also be noted that the organizations using the percentage of easement appraisal method must maintain an arms-length relationship with the appraiser and are not involved in the actual calculation—merely using the final valuation as a basis for their required stewardship donation. National Trust for Historic Preservation, *Best Practices for Preservation Organizations*, 35.

i. Monitoring Schedule

Texts on easement practices are consistent in recommending that each easement property be monitored at least once per year.¹⁷⁰ The majority of organizations surveyed and interviewed followed an annual monitoring schedule, with over 85 percent of survey respondents reporting that their organizations did so. Seventy percent of the organizations represented in the interviews also monitored their easement properties yearly. Several interviewees noted that they sometimes conduct more frequent cursory inspections via incidental drive-bys. Importantly, most participants would perform periodic check-ins when a construction project was ongoing.

Among organizations that did not monitor on a yearly basis, one did so every three years, one did so every five years, and two monitored "as needed," a survey answer offered to indicate nonprofits without a standing policy for periodic inspections. The interview participants in this same category strove to monitor all their properties annually but found it too logistically difficult. One organization opted for a twelve-to-eighteen-month window for inspections, another monitored most properties annually except for those in outlying locations, and the last sought an informal, bi-annual inspection schedule as the best strategy after a previous lack of consistent monitoring at this organization. Common factors among organizations with longer than annual monitoring schedules were a relatively large number of easements (more than 150), a reliance on a small number of staff to monitor the properties, and, for two of the organizations, a multi-state geographic scope.

The relative uniformity in the frequency of the various organization's monitoring is notable and shows that organizations take strong cues from the literature on the subject. There is no requirement for an annual monitoring schedule other than as a heuristic balancing operational

¹⁷⁰ See, e.g., Byers & Ponte, *Conservation Easement Handbook*, 145; Watson & Nagel, *Establishing and Operating an Easement Program*, 19.

resources with the likelihood of new developments or violations within a given period.¹⁷¹ Nor is there any known literature tending to demonstrate that a longer than yearly monitoring schedule necessarily increases the number of easement violations. Indeed, there may be certain scenarios where a less frequent schedule would be logical, such as where a property is in the care of a dedicated stewardship organization. Yet the potential risks of missing serious violations during a longer period or allowing a new owner to remain unaware of the easement are such that most organizations have ultimately opted for consistent annual monitoring.

ii.. Documentation Methods

Though the particular methods of documentation were not originally a part of this inquiry, several innovative tools were discussed among the interview participants. Unsurprisingly, most organizations documented their easement properties in a way that would be familiar to any historic preservation practitioner—a physical inspection utilizing some combination of photographs of the conditions of historic features, written descriptions of the condition, and possibly a gradation of the current severity of the condition.

One organization, however, has relatively recently opted for a significant reliance on various internet tools including Google Street View, photographs on real estate websites, and neighborhood blogs, among other methods, for its monitoring program. The interviewee from this organization reported that this monitoring method was highly successful and saved considerable time and expense normally required to perform its annual monitoring.¹⁷² This

¹⁷¹ The *Conservation Easement Handbook* does not give a specific reason for this monitoring schedule, merely stating that easement holders "should monitor properties at least once a year." Byers & Ponte, *Conservation Easement Handbook*, 145. The IRS does not even explicitly require yearly monitoring to claim the federal tax deduction though their audit guide suggests that this would partially satisfy their inquiry into whether an organization has the requisite "commitment and resources." Internal Revenue Service, *Conservation Easement Audit Technique Guide*, 28–29.

¹⁷² Google Street View is updated annually in large metropolitan areas, a schedule that could work well for easement monitoring, but there is also the possibility that photographs will not be updated if the previous versions remain accurate. See William Antonelli, "It can take years for Google to update certain features – here's how they get the

method, however, was only possible due to the concentration of easements held by the organization in major metropolitan areas and because most easements were limited to the building's primary facade. The ability for other organizations to rely on internet-based monitoring tools may be limited to those whose programs have similar characteristics. Another organization noted that they use a combination of drone photography and GIS technology to monitor a large estate under an easement, a strategy likely more familiar in the land trust community.¹⁷³ Finally, while not documentation-related per se, several interviewees mentioned that they used property marketing websites like Zillow to alert them when an easement property is sold so that they can approach the new property owner. While an overreliance on more novel internet-based and technological documentation methods may not be advisable, these new tools have the potential to supplement what can be a costly and arduous process when done in a purely traditional manner.

iii. Monitoring and Staffing

For an organization's monitoring program to be most effective, it should have consistent and knowledgeable staff. A preservation easement holding nonprofit generally has three main options in its inspection staff: full-time staff, professional contractors, and student interns.¹⁷⁴ The interviews and literature revealed advantages in having staff perform the monitoring due to their preservation expertise and program knowledge. A staff member will likely know inspection standards and practices, the protected features and past condition of the property, and the organization's relationship with the owner. In addition, a staff member's ability to speak

data to update Street View, traffic, and more," Business Insider, accessed Oct. 11, 2021, <https://www.businessinsider.com/guides/tech/how-often-does-google-maps-update>.

¹⁷³ See Byers & Ponte, *The Conservation Easement Handbook*, 147–48.

¹⁷⁴ Though the *Conservation Easement Handbook* mentions some land trusts use volunteers to monitor their easements, that would not be advisable for a preservation easement because volunteers are unlikely to have sufficient historic preservation expertise to reliably identify and diagnose property conditions without considerable training. Cf. Byers & Ponte, *The Conservation Easement Handbook*, 146–47.

authoritatively will enable them to maximize potential interactions with the property owner by explaining the nature of the easement and the organization's approach to enforcing its terms. Property owner interactions may be key in preventing future violations based on misunderstandings or unfamiliarity with the organization. With the small number of easement staff at most organizations, however, having staff monitor all easement properties annually is not always possible. In such a case, the organization may supplement or entirely replace their monitoring staff with interns or contractors. While interns and contractors may have sufficient preservation expertise and can do the job of monitoring admirably, they nonetheless lack the added benefits of full-time staff.

Ultimately, most organizations reported that their staff did, in fact, perform the easement monitoring. Seven out of ten organizations participating through interviews relied almost exclusively on staff to monitor their easement properties, two used contractors with limited staff support, and the final organization used a single intern in a year-long position. Though the majority of organizations used staff monitors, two were not able to fully meet the recommended annual monitoring practices. It was simply deemed impracticable for the one or two dedicated staff at these organizations to inspect hundreds of properties each year and still attend to their other programmatic duties. The two organizations that opted for using contractors to perform inspections were unable to meet an annual monitoring schedule using staff due to limited budget and the large number of easements held in comparison to most others. The organization using an intern monitor did so because it had a relatively small easement program and did not yet have even a full-time director. Nonetheless, a large share of these organizations have the ability for staff to monitor their easements.

The ability for a preservation-focused easement organization to staff its monitoring program is likely the greatest logistical challenge in the field. It may also be a uniquely difficult one because the monitor must have considerable expertise either as a historic architect or preservation professional in order to effectively identify and diagnose property conditions. There is, unfortunately, no such thing as a clear ratio of how many staff members to easements is necessary to effectively monitor an organization's properties. The needed staffing depends on various factors outside the sheer number of easements including the size and protected details of easement properties and the detail of the monitoring and documentation required by the organization. What is clear is that an organization should carefully consider the rate at which it accepts new easements lest it go beyond the ability for its staff to effectively inspect them, particularly for large properties or easements protecting interior features. Indeed, the organizations that now rely on contractors for monitoring steward the most easements of any study participants. If an organization fails to maintain the necessary number of staff to effectively monitor its easements, then it is less likely to discover violations and may ultimately fall behind on its obligation to protect the historic resource.

iv. Monitoring Reports

The final aspect of monitoring is the preparation of a monitoring report both to communicate the findings to the property owner and document the property condition over time for its own recordkeeping, which can serve as the basis of proving a violation should a dispute arise. Though the basic practice of reporting to the property owner was almost universal, the interviews indicated that the level of detail included in the report varied, and most organizations prepared relatively brief form-based reports.

Most monitoring reports were one to two pages, and some were closer to checklists, where the condition of protected features was noted alongside a number of accompanying photographs. More detail would be given, with potential follow-ups, if a feature needed repair or a violation was noted. Several participants noted a practice of memorializing any important verbal exchanges in the report and others also requested a confirmation from the property owner that they had received the report. Two organizations had more intensive reporting practices, with the monitoring report being closer to a limited-scope historic structures report. This level of reporting would often include detailed recommendations about the work necessary to remedy any features in poor condition. Naturally, preparing reports at these organizations required a greater level of staff time and expertise than most preservation easement organizations would likely be able to furnish. One organization had a less formal reporting practice, only preparing a monitoring report if an issue was noted during the inspection.

The interview responses regarding monitoring reports once again reveal an array of practices among easement organizations. The detail in the reports ranged greatly based, at least partially, on the level of staff time and expertise the organization could muster. The level of detail strictly necessary for an easement holder to fulfill its stewardship responsibilities likely falls somewhere in the middle of this spectrum, providing a property owner with the key information about the condition of the property compared to the terms of the easement agreement.

A more consistent and detailed report, however, may offer potential benefits for preventing and resolving violations. Firstly, a detailed report can serve to clear up questions and misunderstandings about the scope of the easement that may prevent accidental violations and be an important mechanism for relationship building. Secondly, a detailed report will serve as legal

notice of its contents, making it difficult for a property owner to later deny knowledge of the report. Thirdly, the consistency of the reporting as a routine business practice could indicate that the property owner did in fact receive a report on a particular occasion.¹⁷⁵ Practices including memorializing verbal conversations in the report and proving actual receipt, either through a confirmation from the property owner or sending the report via certified mail, would also serve to bolster a monitoring report's important evidentiary functions should a violation arise. An organization should consider these potential benefits when structuring its reporting practices.

E. Property Owner Relations and Preventative Measures

Though all preservation easements involve legal rights that can be enforced against the property owner, the preservation of the historic property is best served if the property owner and easement holding organization work in partnership. When good relations are built, in conjunction with other strategies, some violations can be prevented altogether where the property owner is familiar with their obligations and are motivated to protect the resource. Even if the owner inadvertently or negligently violates the easement, they may be more willing to work with the organization to find positive solutions if they have a pre-existing relationship with the organization or staff. If property owner relations break down, every part of an organization's operations regarding that property becomes more difficult. Maintaining a positive relationship with each property owner and avoiding violations is a task easier said than done, however. A further challenge is added when an easement property changes hands, and the organization must build the relationship again from nothing.

¹⁷⁵ See FED. R. EVID. 406.

The easement literature agrees on the importance of relationship building, but relatively little has been written about particular strategies used by different organizations.¹⁷⁶ Organizations involved in the interview portion echoed the importance of relationship building—many viewed maintaining good relations as the most important aspect of a successful preservation easement program. Collecting information about particular strategies central to preservation easement organizations' property owner relations may be the most significant contribution of this study. The most effective strategies reported by study participants were consistent communication, serving as a preservation resource to property owners, improving the efficiency of proposed project review, and, outside of specific property owners, cultivating relationships in the wider community. Incidental practices included attempting to involve easement property owners in other programming and social events. Finally, organizations used several related mechanisms to discover property transfers and begin building relationships with new owners.

i. Communication

Both survey and interview participants considered communication with property owners to be by far the most important part of cultivating a strong relationship. In an open-ended survey question, the vast majority of respondents listed some form of communication as the primary method of maintaining fruitful relations. Further, when interview participants were asked what advice they would offer other organizations in any of the areas covered, strong communication was singled out almost unanimously due to the many potential benefits.

¹⁷⁶ The *Conservation Easement Handbook*, for example, asserts that property owner relations are "[t]he most important piece of a stewardship program." The *Handbook*, however, dedicates only a few pages to the subject. Byers & Ponte, *Conservation Easement Handbook*, 134–38.

Open and consistent communication can foster familiarity and even trust. These are important ingredients for preventing an adversarial relationship and encouraging property owners to reach out on their own with any questions or concerns. Fostering a dialogue can help prevent potential violations based on misunderstandings of easement terms. At the very least, frequent communication will serve to make the property owner aware of the easement and the holding organization, if they are not already.

The primary mechanism for most easement holders to communicate with property owners surrounded periodic monitoring efforts, as inspections are the single guaranteed point of interaction in any easement program. An organization's communications should, at minimum, include the monitoring reports discussed above. In addition to the substantive content, a monitoring report underscores that an organization is monitoring the property and willing to enforce the easement's terms. If the property owner is responsive, then the report may open up a dialogue about the findings. Several interview participants also noted that they strongly encouraged, though did not require, the property owner or their representative to be physically present during the property inspection. A property owner accompanying the monitor during the inspection allows for the owner to become familiar with protected features, ask any questions about the easement and compliance with its terms, and associate an actual person with the easement holding organization.¹⁷⁷ If a knowledgeable staff member is performing the inspection, they can make specific recommendations to the property owner about maintenance or repair efforts, providing a useful service that one interview participant compared to a free yearly house inspection. Although working to ensure property owner participation increases the logistical challenge inherent in an organization's monitoring program, this may be the most impactful

¹⁷⁷ See Byers & Ponte, *Conservation Easement Handbook*, 146 (discussing the benefit of having staff meet with property owners during inspection visits).

strategy for an organization to build a strong relationship and take full advantage of the already necessary periodic monitoring.

Several organizations reported sending written communications to property owners outside of their monitoring reports. Annual mailings sent to easement property owners are possibly the most beneficial additional communication strategy used by several large easement holders. An example of this type of mailing was a simple postcard with some basic information about the requirements of the easement and the organization's contact information. Additional mailings will add costs and staff time but may be well worth the effort, particularly if an organization has a large number of easements that makes a more personal communication style impracticable. One organization sending annual letters reported a marked increase in property owner inquiries and communications after each mailing, indicating that they have some effect. If letters are returned to the sender, it will often indicate that a property has changed hands and the organization should make additional efforts to contact the owner and jumpstart relations. More frequent checks in ownership via mailings are crucial where an organization operates in an area with significant development pressures or stewards property types, like residential, that are more frequently transferred.

A final communication method was used by nonprofits who operated other programs in addition to holding easements. These organizations included property owners in other periodic communications such as newsletters and invitations to events. Program communications help the property owner become familiar with the broader work of these organizations and send a message that the organization does exist simply to police property owners. This type of communication, however, was seen more as incidental because the organization would prepare

this type of communication regardless of its easement program. Nonetheless, these communications added little to no cost for the organization.

The consensus among study participants that they would recommend strong communication with property owners to other organizations as the core ingredient of a successful easement program is in itself significant. It suggests that, despite the importance of other ever-present issues like consistent monitoring and adequate staffing, less formal practices surrounding property owner relations are the most fertile area for improvement. Of course, it may be that problems relating to core easement program functions were thought to be well-known and did not merit repeated mention. Further, it would take a study of much greater scope and complexity to determine what precise effect increased communications has on preventing future violations. Yet, increased communications via regular in-person discussion with property owners and additional mailings are also something within the reach of most organizations, without the need for additional staff or significant costs. These practices may not be necessary for every organization, particularly those that steward only a small number of easements, but as an easement program increases in size and complexity strong, consistent communication becomes imperative.

ii. Preservation Expertise and Resources

A universal practice among interviewed organizations, and one that was frequently mentioned in the survey, was providing preservation expertise and resources to property owners. Every easement organization has some level of substantive preservation expertise, and a willingness to share that knowledge with property owners seeking information about proper methods for maintaining and repairing a historic structure is a valuable service. For preservation-minded property owners, the availability of reliable advice can have significant added value and

incentivize a fruitful relationship with the easement holder. Importantly, interview participants reported that they were willing to share expertise even where the inquiry involved features or projects that would not necessarily fall under the purview of the easement. An organization that is willing to assist property owners whenever possible demonstrates the easement forms a partnership, not simply legal relationship. And, if a property owner seeks advice, then the organization can help ensure that any even minor projects comply with preservation standards and possible violations are avoided.

Study participants also noted that they routinely offered preservation resources and connected property owners with other professionals, including preservation contractors, where the advice or substantive work went beyond staff's expertise. Preservation organizations often naturally develop relationships with local professionals and determine who performs reliable historic rehabilitation work. Passing on this information to property owners can be invaluable in the often-challenging effort of locating knowledgeable craftspeople. For properties that are eligible, organizations can also assist in connecting owners with available grants and other aid. Since offering expertise and resources appears to be a widespread strategy for preservation easement nonprofits, it is likely an approach that most organizations are aware of, but it is nonetheless a key method for building property owner relations.

iii. Project Review

Review of proposed alterations to the easement property is another necessary component of a preservation easement program, as alterations are permissible so long as they are compliant with preservation practices, usually the *Secretary of the Interior's Standards for Rehabilitation*.¹⁷⁸ This process generally involves the property owner contacting the easement

¹⁷⁸ See The Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR 68 (1995).

holder with a description of the proposed work that the nonprofit staff then reviews and provides feedback on by a certain deadline. If the proposal complies with the applicable standards, then the project may be implemented as proposed, but more often adjustments will need to be made before it can go forward, if at all. Several interview participants considered making the project review process as efficient as possible to be an important component of maintaining favorable relations with property owners.

A key preliminary question is what level of detail the organization will require prior to considering a proposal. A high degree of detail, including architectural drawings and chosen materials, will allow the staff or reviewing committee to make a definitive judgement on the project, with specific suggestions to improve it. Indeed, all interviewees and many survey respondents stressed that they are solution-minded when reviewing proposals and will work with the owner to meet their needs within preservation norms. On rare occasions, however, a project may not be permissible in any form, such as a major addition viewable from the street, and the property owner will have wasted potentially considerable time and resources, likely harming their view of the easement holder. This problem may be remedied by providing property owners with resources and guidance on how the organization will apply the review standards but requires staff time and programmatic consideration to prepare. Some easement organizations with the means to do so even offer resources with in-depth descriptions of projects that they are willing to approve for recurring project types like window repair.

An organization may also opt to require less detail in its project proposals and allow property owners to approach staff earlier in the process, as did one organization. This has the benefit of allowing for a fruitful dialogue between the organization and property owner, where the easement holder is truly a partner in the process. Because of the considerable staff time

required for repeated discussions with property owners, this level of involvement may only be possible for organizations with a small number of easements. Most interview participants indicated that they required a more complete proposal prior to their involvement.

Outside of the easement organization's internal practices, interview participants noted that they sought to work with related government bodies to increase the efficiency of the review. Review processes often overlap where an easement property is located within a local historic district subject to regulatory design review.¹⁷⁹ Several participants noted that strong relations with district review boards and supporting staff can help ensure that projects pass both processes in identical form. Of course, the easement holder must reserve the right to disagree with a local commission's determination where it does not meet preservation standards as interpreted by organization staff. Requiring the property owner to bring proposals to the easement holder first will prevent disagreements on preservation standards and increase the likelihood that the property owner's proposal passes the commission on its first submission. Likewise, early submission can reduce issues outside of local historic districts where building permits or zoning approvals are required, reducing property owner frustration over stoppages and the need for repeated approvals. Consultation with staff, particularly if they have knowledge of how to navigate these government processes, may itself be a valuable service to property owners.

Though issues surrounding project review are inevitable where property owners are unaware of easement holder policy or projects are not feasible under preservation standards, there are nonetheless steps that easement holders can take to prevent instances where property owners may be left frustrated. Working to find preservation-minded solutions in an efficient

¹⁷⁹ See, e.g., "Rules of the New York City Landmarks Preservation Commission," City of New York, accessed Nov. 19, 2022, https://www1.nyc.gov/assets/lpc/downloads/pdf/Rules/Rules%20of%20the%20NYC%20Landmarks%20Preservation%20Commission_01.22.2019.pdf.

manner and assisting the property owner navigate overlapping approval processes are effective strategies to attain a positive outlook from property owners, in addition to simply being beneficial programmatic practices.

iv. Community Relations and Outreach

An easement holder's relationship with the wider community and other government and interest groups can also be important to monitoring easement properties and potentially preventing violations. An engaged community that is aware of and supports the easement organization's work is essentially an alarm system, with concerned parties notifying the organization if they observe unapproved construction projects at an easement property. Concerned parties can be preservation-minded individuals or interest groups, neighbors, or even other easement property owners. One interview participant noted that their most major violation to date was reported by other easement property owners who were concerned about the project. While an organization may sometimes already be aware of and have approved these projects, it will be well worth cultivating community connections if it further protects easement properties.

Easement holding organizations with a general preservation advocacy component may naturally spread the awareness necessary to rely on community support through their other programs. One organization hosted their annual conference at a rehabilitated easement property, for example. Organizations that focus solely on easements, however, may need to think creatively to publicize their program and its benefits, potentially through partnership with a local preservation advocacy nonprofit or other community groups. A common strategy for publicizing an easement program is to list all of the organization's easement property on its website. While a simple approach that may be done with relatively little cost, publicizing easement properties may

have diminishing returns for organizations with a large portfolio and may cause friction where property owners are concerned for their privacy.

An interesting strategy fitting loosely within this category was one organization's mandatory plaque program. While placing plaques or signage on historic buildings is fairly common, this organization turned them into a passive enforcement tool. By making it mandatory for the property owner to place the plaque prominently on their building the effect was twofold. First, the plaques help publicize the program and which structures are specifically protected, making it more likely that the community would report any potential problems. Second, ensuring that the plaque is placed on the building promotes actual and legal notice of the easement to new property owners or realtors looking to market the property. It is much more difficult to assert, as a property owner, that you are not aware of the easement when there is a plaque by the front door. While this strategy may be most useful in urban areas where the plaques are viewable to pedestrians, it is a creative method of turning an honorific symbol into an enforcement tool.

Relationships with local government boards and staff were also discussed as methods for collateral monitoring. Several interview participants noted that they shared a list of easement property locations with local government staff, boards, commissions, and/or building officials, so that they would be aware of the easement holder's interest in decisions regarding those properties. While these connections are not always reliable, organizations may be notified of projects on easement properties put forth for permits or other approvals. One interview participant explained that they had an informal practice to reach out whenever a new government employee with relevant duties was hired in their geographic area to familiarize them with the easement organization's program. Staff should also frequently check publicly available

permitting information to flag proposals that are not made to the easement holder first, as did one organization with a database of city building permits.

The final important local relationships reported in the study were with realtors. Several interviewees noted a practice to include provision for a transfer fee in the easement deed to increase the likelihood that the organization will be notified on the sale of an easement property. In the process of preparing to close the transaction and establishing the rights of parties various in property, a careful realtor will reach out to the easement organization about the transfer fee and easement interest.¹⁸⁰ The organization staff can then advise the realtor to refer the potential buyer to them in order to explain their respective rights and obligations in the easement, hopefully prior to the final closing. If the realtor's practice and the organization's easements coincide sufficiently, then the organization can cultivate a relationship such that staff will be notified as early as possible in the sale process to ensure the buyer understands the commitment of purchasing a property subject to an easement. Though it will likely be challenging to cultivate relationships with realtors, doing so will allow the easement organization to make contact at or before the critical stage of property transfer and begin cultivating a relationship with the new property owner.

To some extent, community ties may come to an organization through its normal operations interacting with community members and other preservation professionals. It may be difficult to ensure community support programmatically, however, because these relationships are largely dependent on the personalities at the easement holding organization and, for local government staff and boards, the politics of the locality. For regional or national easement

¹⁸⁰ They realtor may also seek a certificate of estoppel clarifying the rights of the easement holder in the property with the satisfaction of the transfer fee. See *Black's Law Dictionary*, "Estoppel Certificate," 10th ed. (St. Paul, MN: Thomson Reuters, 2014): 669.

nonprofits, developing strong community relations may be even more challenging if not impracticable. Nonetheless, if an easement holder can cultivate these relationships, then community members can be an important monitoring mechanism and base of support should a violation occur.

v. Social Programming and Memberships

Social programming and membership were the last area of property owner relations probed in the study. Providing social events to easement property owners was a strategy that was either untried or viewed as an ineffective strategy by those organizations that had attempted this method. Only a single organization had made a concerted effort to incorporate annual social events as a method of improving relationships with easement property owners, and, according to the interview participant, the results were lackluster. Unfortunately, a small number of easement property owners attended the events, and the attendees at subsequent events tended to be consistent, meaning that the organization was not successful in reaching a significant number of property owners even after repeated attempts. Other respondents noted that property owners would be invited to general events done through their organization's other programs, which do not require additional planning or funding from the organization. Still, several participants expressed interest in utilizing easement owner focused social events in the future.

Several participants with wider programmatic scope than just easements reported that they provide complementary memberships for easement property owners on the donation of the easement or when a new owner acquires the property, either for the length of their ownership of the property or for a fixed term. Free memberships can incentivize property owners to get involved and familiarize themselves with the beneficial work of the preservation organization. Additionally, memberships are a tangible benefit that organizations can offer property owners

without significant costs. Despite these potential benefits, complementary memberships were viewed as merely incidental to the effort of cultivating property owner relations.

Social programming and memberships are potential strategies for easement holders to add value for and deepen ties with property owners. Based on feedback from study participants, however, these methods are ancillary and are available primarily to organizations with other ongoing programs. While associated with little extra costs, significant property owner relations efforts may be better focused on core strategies discussed elsewhere.

F. Easement Violations and Enforcement

The violation of easement terms and the enforcement actions taken by the holding organization represent the ultimate test of an easement program. The respective rights and obligations expressed in the easement document mean little if the organization does not take the necessary steps to discover violations and effectively address them, seeking a positive preservation outcome. While no organization wishes for violations to occur and it may come up with effective strategies to prevent violations, some of which are discussed above, violations will inevitably occur due to either misunderstanding or deliberate action. When a violation occurs, the organization must determine what strategy to adopt to resolve it—a decision guided by a complex combination of factors.

Easement enforcement among preservation nonprofits is also opaque due to the sensitive private legal negotiations between the easement holder and the property owner. While there have been a few highly publicized legal cases involving preservation or conservation easements, the legal issues are not always focused on the enforceability of the easement terms against the

violator.¹⁸¹ Furthermore, it is suspected that most violations will be minor and able to be resolved privately, not meriting the expense of formal litigation. Even where enforcement negotiations move beyond informal discussions to the filing of a lawsuit, it is likely that the case will be settled before trial, leaving no clear public disposition of the merits of the case.¹⁸² Yet, as challenging as violations can be to effectively address, they can also reveal a great deal about where an organization's practices require improvement—information that may be equally valuable to other organizations.

The survey probed at the frequency and severity of violations, who was responsible for violations, whether organizations had existing procedures for addressing violations, and the methods used to resolve violations. The interviews further explored these questions, examined the organization's decision-making process around easement enforcement, and discussed examples of violations the organizations had dealt with in the past.

The study revealed several key findings. First, it confirmed that violations are relatively rare and, of those violations that occur, most are minor or technical in nature. Second, participants noted that most violations were able to be resolved informally without the need for litigation. Thirdly, the study found that a significant portion of preservation easement organizations operate without standard procedures prescribing an approach to enforcement

¹⁸¹ See, e.g., *United States v. Blackman*, No. 042404, slip op. at 4–5 (Va. June 9, 2005) (determining whether a preservation easement, i.e. a negative easement in gross, was valid in the state of Virginia prior to the passage of the state enabling act); *Hoffman Properties II, LP v. Commissioner*, No. 19-1831, slip op. at 3–8 (6th Cir. Apr. 14, 2020) (finding that a preservation easement deed allowing for a property owner to make alterations contrary to the Secretary of Interior's Standards if the easement holder did not respond within 45 days failed to meet the perpetuity requirement for the federal tax deduction); *Hicks v. Dowd*, 2007 WY 74, No. 06-2, slip op. at 6 (examining standing to enforce a conservation easement under charitable trust doctrine).

¹⁸² See Thomas Eisenberg & Charlotte Lanvers, "What is the Settlement Rate and Why Should we Care?," *Journal of Empirical Legal Studies* 6, no. 1 (2009): 111–46 (discussing estimates of settlement in civil cases ranging from 66% to over 90%); see e.g., Nancy A. McLaughlin, "Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," *University of Chicago Law Review* 40, no. 4 (2006): 1055–62 (chronicling a lawsuit by an easement property owner against the National Trust for Historic Preservation that was settled before trial).

measures. Finally, the participants provided insight into their general experiences dealing with violations and the difficult process of resolving them. These findings and more are discussed in turn.

i. Frequency and Severity of Violations

The overall risk of an organization's easement terms being violated, and the magnitude of those violations are uncertain and distressing metrics for ongoing stewardship. Violations take up staff time better spent stewarding easement properties and can take potentially astronomical amounts of funds to resolve.¹⁸³ The survey asked participants to reveal how many times the terms of one of their organization's easements had been violated and the severity of violations they had experienced. The results showed that most organizations had experienced relatively few violations and that a significant majority of organization's had experienced minor or technical violations compared to those that were more severe.

Of the participants in the survey, 8 percent reported that none of their easements had been violated, 44 percent that they had experienced one to two violations, and 20 percent responded to each of the final two options, three to five violations or five or more. The remaining 8 percent of respondents said there were no violations that they were aware of but lacked the confidence to report that none of their easements had been violated (Figure 2). These results indicate that violations are relatively rare—with a majority of respondents experiencing two or fewer violations over the history of their organization's easement program. To the extent that these findings are indicative of the wider preservation easement community, there is some reason for optimism about the general risk of violations that these organizations face. Nonetheless, a

¹⁸³ Byers & Ponte, *Conservation Easement Handbook*, 159 (discussing results of a 1999 Land Trust Alliance survey where costs of resolving violations by either litigation or threat of litigation ranged from \$5,000 to \$100,000, with many other instances costing even more).

reasonable assumption is that the likelihood of violations only increases with the number of easements held and the passage of time due to properties changing hands.¹⁸⁴ Additionally, some organizations may define a violation differently than others, meaning there could be some variance in the specific numbers.

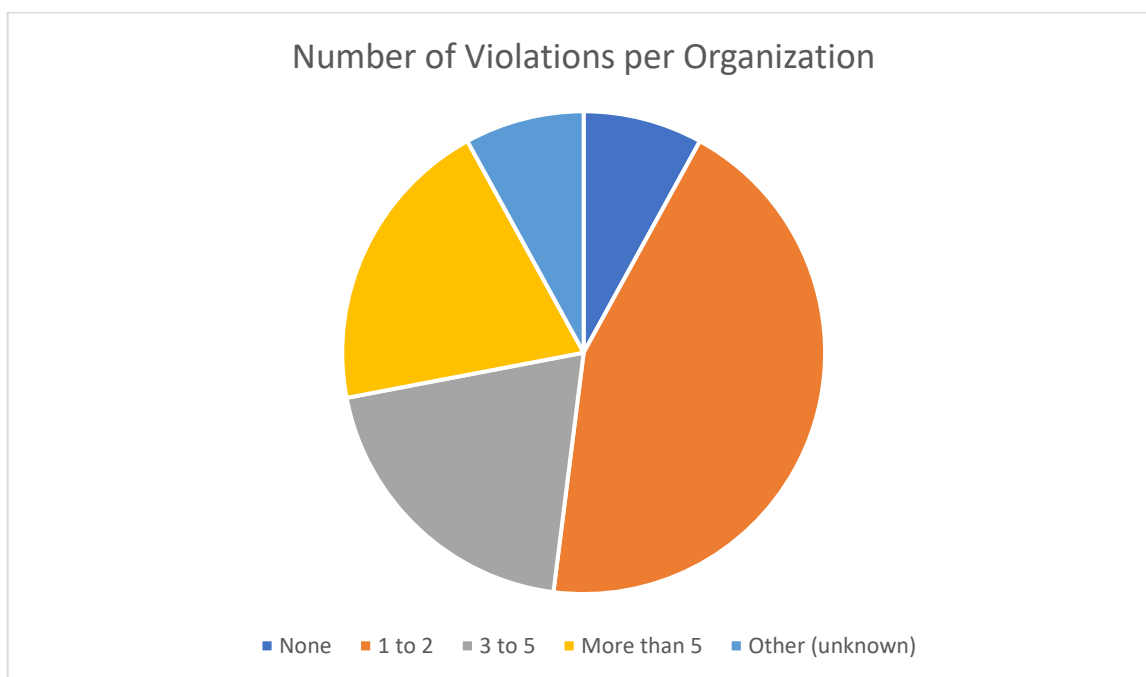


Figure 2

To probe the severity of violations, the survey set out to establish uniform definitions of various levels of violation including technical, minor, moderate, and major violations. These definitions were based off the National Trust for Historic Preservation's Model SOPs, and generally correspond to the harm a violation does to the easement property's protected historic features.¹⁸⁵ A technical violation does not result in physical damage to the protected features

¹⁸⁴ Cheever, "Public Good and Private Magic," 1092–1100 (exploring the mounting complications as an easement program matures and generations of owners pass through its easement properties).

¹⁸⁵ See National Trust for Historic Preservation, *Model Standard Operating Procedures*, 14–18. The survey provided the following definitions: Technical violation. A technical violation has no impact upon the preservation easement's purpose or protected architectural features, e.g., failure to give notice of the easement on subsequent sale or lease. Minor violations. A minor violation has negligible impact upon the preservation easement's purpose or the protected architectural features, e.g., unapproved alterations of protected architectural features that are consistent with the Secretary of Interior's Standards. Moderate violation. A moderate violation has moderate impact upon the preservation easement's purpose or protected architectural features, e.g., unapproved alterations of protected

such as a property owner failing to provide notice on sale of the property.¹⁸⁶ A key difference between a minor and moderate violation is that, in a minor violation, the alteration comports with the *Secretary of Interior's Standards* whereas it does not with a moderate violation.¹⁸⁷ An example could be a property owner replacing a historic window with in-kind materials and appropriate design versus non-historic materials. A major violation has severe impact on the resources protected features such as demolition or construction of an unapproved addition to the principal structure.¹⁸⁸

The survey asked only if the respondent's organization had experienced each type of violation rather than attempting to amass specific numbers of each type. While the data does not reveal the typical severity of violations at a specific organization, the results do indicate in the aggregate which type of violations are most common. Fifty percent of organizations had experienced technical violations, 76 percent minor violations, 50 percent moderate violations, and only 23 percent major violations (Figure 3). The survey shows that most organizations can expect technical and minor violations more than any other. Still, a significant share of respondents indicated that their organization had experienced moderate or major violations, underscoring the need for each easement holder to develop strategies for how to respond to these more serious violations.

architectural features that are inconsistent with the secretary of Interior's Standards. Major violation. A major violation has significant impact upon the easement's purpose or protected architectural features, e.g., demolition, partial demolition, or unapproved additions on the principal structure. *See* Appendix A.

¹⁸⁶ National Trust for Historic Preservation, *Model Standard Operating Procedures*, 14–15.

¹⁸⁷ National Trust for Historic Preservation, *Model Standard Operating Procedures*, 14–15.

¹⁸⁸ National Trust for Historic Preservation, *Model Standard Operating Procedures*, 16.

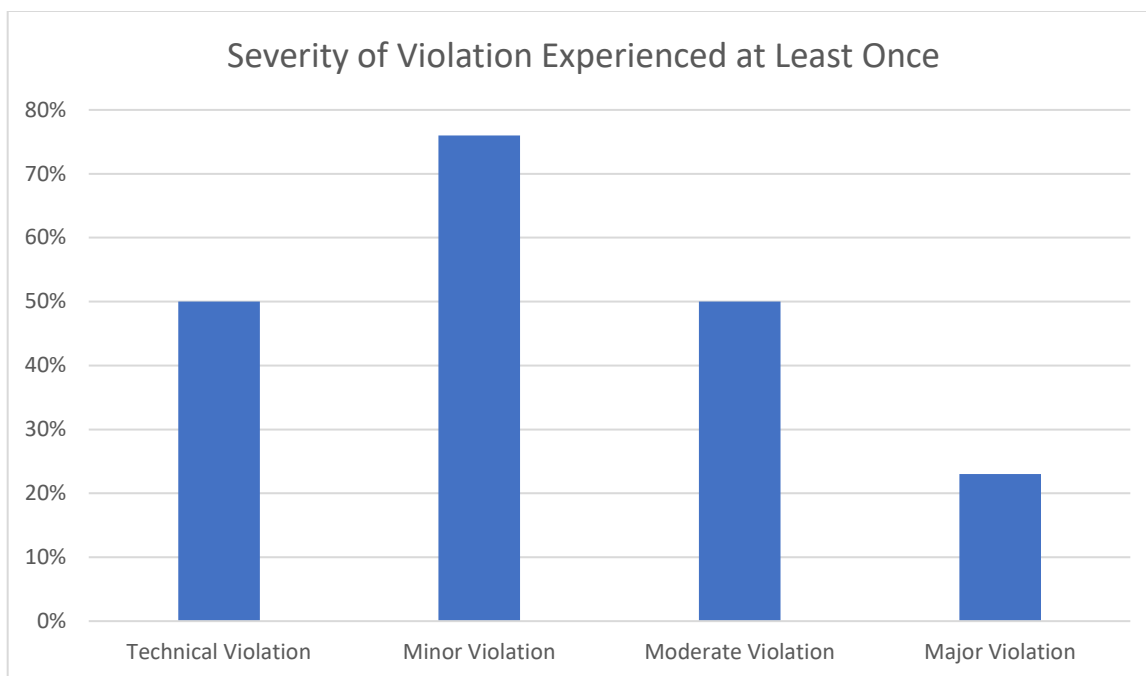


Figure 3

The interviews further outlined the severity of violations that an organization should expect. The participants confirmed survey findings, overwhelmingly reporting that most violations were likely to be relatively minor or technical in nature. These violations tended to be issues that most preservation professionals are familiar with such as deferred maintenance, window replacements with non-historic materials, and minor but reversible unapproved alterations. One organization indicated an often-frustrating technical violation to deal with was property owners failing to obtain or maintain insurance on the structure covering the easement organization's interest as required in the agreement. A potentially disastrous problem if a fire, flood, or other casualty event damages or destroys the structure, leaving the organization with a total loss of its interest in the property. While many minor or technical violations may not ultimately damage the property, they should nonetheless be dealt with seriously if an organization wishes to fulfill its obligation to steward the property.

Though more rare, moderate and major violations do occur and represent a significant challenge for the easement holder. It is important that an organization be prepared for these potential disputes because the staff will have less experience resolving these more intermittent violations, and they are likely to be inherently more complicated. If an organization can respond decisively, the likelihood of a positive outcome is increased, cutting down on the expenditure of staff time to develop a strategy.

ii. Who was Responsible for Violations?

The party responsible for a violation, either the original donor, a subsequent owner, or third party, is also a significant factor in an easement organization assessing the risk to its easement interests. Past easement studies reflected a greater likelihood of subsequent owners to violate the terms of an easement.¹⁸⁹ In the conservation easement community, the interest in how to resolve third-party violations is of particular concern because third parties are most the second highest class of violators.¹⁹⁰ The study results largely reflected the prevalence of subsequent-owner violations and indicated that third-party violations are not as widespread in the preservation field.

The survey showed that 80 percent of organizations had experienced a violation by a subsequent owner, 60 percent by the original donor, and only 16 percent by a third party. These percentages do not reflect an overall number of violations if the organization has experienced multiple violations from the same group. Nonetheless, they do indicate the overall likelihood that an organization might suffer a violation from a particular group. Namely, that subsequent owners are the most likely to violate an easement, as indicated by previous research,¹⁹¹ with original

¹⁸⁹ Danskin, *Conservation Easement Violations*, 5–6.

¹⁹⁰ See Jessica E. Jay, "Enforcing Perpetual Conservation Easements Against Third-Party Violators," *UCLA Journal of Environmental Law & Policy* 32, no. 1 (2014): 83–101.

¹⁹¹ Jay, "Enforcing Against Third-Party Violators," 82.

owners following with a still significant likelihood of violation. Though not empirical, interview participants overwhelmingly reported that, in their experience, subsequent owners were the most frequent violators, signifying that the raw number of subsequent-owner violations is likely larger. One participant, however, cautioned that organizations should be cognizant that original owners do indeed violate easements. Two such incidents were shared, both resulting from misunderstandings of what the easement required.

The lack of third-party violations with preservation easements in comparison to conservation easements can be inferred from the differing nature of the protected resources—large spans of natural landscapes versus primarily historic buildings. Preservation easement properties are more consistently occupied and watched over whereas many parts of conservation properties may only be visited during the annual monitoring visit. To put it simply, it is unlikely that a preservation property will be invaded and damaged by trespassers on motorized recreational vehicles, for example.¹⁹² Nonetheless, the findings on third-party violations of preservation easements confirms these inferences. The results indicate that third-party violations are not of serious or special concern in the preservation context outside of easements that may protect natural or landscape features in addition to the structures.

iii. Methods of Resolving Violations

Once an easement violation has been discovered or established, the easement holder's staff must determine the appropriate method to attempt to reach a beneficial resolution. The *Conservation Easement Handbook* lists several possible methods to resolve easement violations: voluntary reparation by the landowner, discretionary approvals, mediation, and litigation.¹⁹³

¹⁹² Cf. Byers & Ponte, *Conservation Easement Handbook*, 161.

¹⁹³ Another possibility to resolve a dispute may be to amend the easement document where a violation stems from ambiguous or extraneous conditions in the deed. Such alterations should not diminish enforceability of the easement generally nor the protection of important features and may be particularly tricky where the easement was donated in

These options largely encompass the available strategies ranging from the least onerous in terms of staff time and financial resources to the most onerous. It should be stressed, however, that there is no one-size-fits-all method for resolving violations—just as each property is unique so is every violation, and the approach taken by the organization should differ depending on the circumstances.

The survey probed whether participant organizations had utilized these different methods, and the interviews allowed for further elaboration how successful respondents viewed the various outcomes. Overall, the results demonstrate that most violations can be resolved relatively informally through a voluntary reparation or informal negotiation with the property owner to adjust or approve the action resulting in the violation.

The methods that organizations reported using in the survey were thus: 11 percent of violations were resolved after mediation, 15 percent after litigation, 27 percent after legal settlement, 57 percent after informal negotiation, and 65 percent were remediated voluntarily by the owner (Figure 4).¹⁹⁴ Clearly, the percentage of organizations that resolved violations either with simple consent of the property owner or after an informal negotiation process far outweighed the use of other methods. Conversely, the number of organizations that had resorted to formal legal process was small, with mediation used by a similar share of organizations. It should be noted, however, that the survey did not inquire whether the resolution was considered beneficial to from the organization's perspective.

exchange for the federal tax deduction due to limitations on granting property owners economic benefit. *See* Byers & Ponte, *Conservation Easement Handbook*, 164. Because situations requiring amendments are rare and different than a usual violation, this category was not independently probed in the study. Nonetheless, several participants mentioned needing to amend their easements, particularly older easements from the early days of their programs due to poor drafting or that the documents simply no longer reflected contemporary easement law or practice.

¹⁹⁴ It should be noted that the survey did not offer uniform definitions for what was encompassed in each of these resolution methods, and some respondents may have selected answers based on differing understandings. For instance, distinctions between what was a voluntary reparation versus one that required negotiation may be understood to overlap.

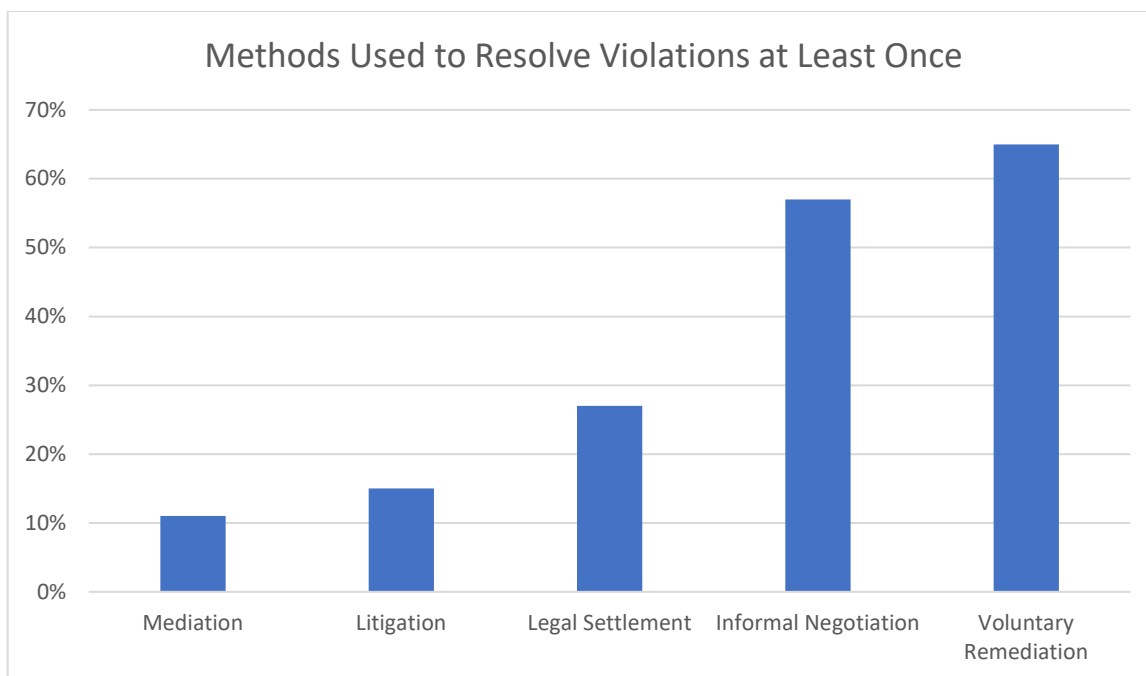


Figure 4

The interviews underscored that negotiating with the landowner to resolve violations was the favored and most utilized strategy for resolving easement violations. Working with the property owner to resolve violations is the least expensive method for handling disputes and can help preserve the all-important relationship that the organization has cultivated in its interactions with the owner. Furthermore, negotiation is the most obvious strategy to resolve the more frequent minor violations, particularly where an unapproved alteration may be reversible or ratified after the fact. Indeed, the process of opening negotiations with the property owner generally begins any effort to settle a violation dispute even if one of the parties later files a lawsuit.

Resolving easement violations through negotiation, however, is not necessarily a simple or straightforward process. When a violation is discovered by the easement holder, staff will contact the property owner to notify them that there has been a violation with supporting

documentation and requesting some action to resolve the violation.¹⁹⁵ Both the tenor of the communication and the proposed solution will likely differ based on the severity of the violation, and negotiation should not be ruled out even for major violations. Though the exact approach may differ among organizations, the communication should also provide a discrete timeline for further action whether that be determining if retroactive approval is appropriate, reversing the action, or creating a more detailed rehabilitation plan, if necessary. Multiple participants stressed the importance of sticking to a timeline when negotiating, noting instances where a property owners drew out discussions over several years before a lawsuit nonetheless had to be filed when negotiations stalled. An organization can also develop successive escalating deadlines to pressure a property owner into action where they appear intransigent. Although organization staff should work in a positive, solution-minded manner, its staff must weigh how decisively they should act depending on the circumstances.

The ability for an organization to bring a negotiation to a successful conclusion is another area where a positive preestablished relationship with the property owner can have profound effect. Good relations will not prevent every violation but may still start the negotiation process on a cooperative basis. If the parties can maintain this tenor, then they may nonetheless emerge from what can otherwise be a contentious process with their relationship intact. Several interview participants noted that relationships can sometimes even improve through the negotiation process if the property owner considers the expertise offered by staff as beneficial. Even where a strong relationship is not present, if staff approaches the dispute with an open, cooperative mindset and are willing to propose and accept creative solutions, then a successful, human-centric resolution is more likely. Such an outcome may not be possible, however, and the organization must

¹⁹⁵ Byers & Ponte, *Conservation Easement Handbook*, 162–64.

balance a desire to work in a positive manner with the necessity of enforcing its legal rights in the easement.

Retroactive approval of unconsented alterations was also considered to be a central method for resolving violations among the majority of interview participants, again being particularly useful in the case of technical or minor violations. Among most preservation easement organizations, retroactive approvals appear routine and represent a positive outcome, often being handled by staff if the alterations are minor. Retroactive approvals may still be possible even for more serious violations if the project can be modified to fit the applicable standards, but these more complicated decisions may be referred to an easement committee, if the organization has one. The discretion to ratify projects if they fit or can be altered to fit preservation standards allows for a flexibility in responding to the unique situations arising from easement stewardship and may allow for maintenance of the relationship with the violating property owner.

One organization had a differing approach and heavily disfavored the use of retroactive approvals. This approach reflects a different philosophical stance on whether routine approval of actions that may violate the easement abrogates some responsibility to enforce the organization's legal rights. This approach is attractive because it takes a stern and literal interpretation of the rights and obligations in the easement document. Even the interview participant agreed, however, that there would be situations where a retroactive approval is appropriate. An approach that is too strict threatens to lose the flexibility that may be necessary to adapt to the nature of the historic resource and violation at issue. Here again there is a balance that organizations should strive for, accepting some alternatives that staff may not have recommended if approached prior to the project but being stricter in enforcing the organization's legal rights where required.

Litigation of easement violations is rare and, according to the study participants, considered a last resort for easement holding organizations. Litigation can be immensely expensive¹⁹⁶ and the outcome is often uncertain.¹⁹⁷ Due to efforts to find other methods to resolve violations, litigation over preservation easements was thought to be rare, and the results of the survey largely bore out this assumption with only 27 percent of organizations reporting a resolution through legal settlement and 15 percent through litigation itself.¹⁹⁸ Interview participants echoed these findings and likewise noted that litigation to resolve violations was quite rare. Nonetheless, some organizations participated in litigation, and the study participants shared some details and learnings from these violations.

The major open question surrounding resorting to litigation as an enforcement method is where it is necessary. The simplest answer is that a lawsuit should be filed where all other available options have failed, but exactly where that line lies is not always clear. Participants described situations where a lawsuit was only filed after years of non-communication and demolition by neglect, where negotiations broke down partway through, and where the property owner instituted the suit to dispute a rejection of a project proposal. Staff may get some sense of whether litigation will be necessary based on the tenor of the negotiations, certainly where the property owner refuses to communicate at all.

Where negotiations do not appear fruitful, there are some steps an organization may use to put legal pressure on an intransigent property owner before filing a complaint. A widely used strategy is to hire legal counsel either to draft or co-sign a letter to the property owner to

¹⁹⁶ Byers & Ponte, *Conservation Easement Handbook*, 159.

¹⁹⁷ See Thompson & Jay, "Examination of Court Opinions," 409–412 (examining various judicial approaches to conservation and preservation easement litigation); Harris, "Conservation Easement Violated," 626–635 (same).

¹⁹⁸ Again, it should be clear that this figure does not reflect the number of incidents of litigation by an organization only that it was a method used on at least one occasion. It is likely that individual uses of other less formal methods happen far more than the filing of lawsuits.

demonstrate the organization's ability and willingness to hire lawyers to settle the matter. A final step used by at least one organization was to have lawyers fully draft the legal complaint but first send the complaint to the property owner rather than immediately filing it to allow them one final period consider negotiation. If these preludes fail to bring the property owner back to the negotiating table, then the filing of a lawsuit will likely be the necessary next step. Of course, if the property owner chooses to sue the easement holder for declaratory judgment, then they will have little choice but to defend the easement or the decision at issue.

It is paramount to select the right legal counsel to handle the case when engaging in litigation. Interview participants from organizations with experience litigating violations stressed the importance of hiring outside counsel with experience litigating real property issues and, if possible, knowledge of conservation or preservation easements.¹⁹⁹ This is important advice because many organizations have attorneys on their easement committee or board of directors who may be willing to provide free legal services to the organizations. Using pro bono services may be useful, even recommended, when approaching routine issues such as easement drafting, tax issues, writing letters to property owners, or giving general legal advice. The ability to handle the full spectrum of litigation issues, from filings and motions, to discovery, and finally taking the matter to trial, however, will likely be beyond the transactional skills that attorneys working with more routine easement matters can confidently muster. Even one organization that has its own in-house legal counsel nonetheless has a practice to hire specialists when litigating easement issues. Despite the allure of using free legal services for litigation in whole or part, hiring experts is worth the expense.

¹⁹⁹ See Byers & Ponte, *Conservation Easement Handbook*, 165–66.

An important consideration when deciding to file a lawsuit is also the precedential effect that the suit may have both in the legal and organizational sense. Legal precedent is, of course, based on the outcome of the case, if it proceeds to some sort of judicial decision from a pre-trial motion, trial motion, or full judicial opinion. Precedent can be either good or bad for an organization depending on the legal basis and reasoning of the opinion. A decision against the easement holder can hold the terms unenforceable and, if the organization uses an easement template, may bring into question the enforceability of every single easement an organization holds. It is unsurprising, therefore, that a private legal settlement may be preferable even apart from the expense of proceeding through litigation. Conversely, if a decision holds that an easement's terms are strictly enforceable, it may provide the ability for the organization to negotiate from a position of strength. One interview participant noted that it was invaluable to attach a court filing detailing their organization's triumph in a previous lawsuit when negotiations with property owners become contentious, demonstrating both their willingness to litigate and ability to win.

An organization also needs to balance a decision to file a lawsuit with what message it sends in bringing or not bringing a lawsuit against a violator, and whether litigation is the worth the time and expense. It is not only important legally and philosophically for an organization to enforce its rights in its easements, but public perception is also a factor to recognize, whether that be from supporters, the general public, or other easement property owners. The most serious of these may come from other easement property owners because they may become disgruntled, for instance, if they see another owner violate the terms of an easement without repercussion where others have voluntarily complied. Public perception may also be affected by who the property owner is, as one participant voiced some concern over whether a property owner was, for

example, a real estate developer versus the owner of a single-family home due to perceptions of unequal power dynamics. Finally, if a resource is severely damaged or lost altogether, it may be worth little to bring costly litigation with only the hope of gaining monetary damages.²⁰⁰

The interviews also probed the perceived success rate of organizations that had engaged in litigation to resolve disputes. Though anecdotal, most organizations that had engaged in litigation to resolve violations reported reaching a beneficial outcome from their perspective, either through legal settlement or judicial determination.²⁰¹ Only one participant reported a lawsuit that was settled more in favor of the property owner, but it was also a dispute where the owner had a legitimate public safety concern about retaining the historic feature at issue. Though an encouraging finding, it is important to consider that each circumstance is unique and these organizations also picked their battles carefully, resorting to litigation only where necessary.

A final interesting result from the survey was the low number of organizations that had utilized mediation as a method to resolve a violation—only 11 percent—which is less than even litigation. Though mediation can be an additional cost and will not stop ongoing harms as will a court granted injunction, it can provide a final stopgap prior to either party resolving to litigation. A neutral mediator may help clarify the positions and points of contention for either party or clarify a workable rehabilitation plan. One organization reported that the most serious violation it had experienced to date was able to be resolved only when both parties were able to meet in person and discuss the basis of the organization's opposition to the project at issue and possible

²⁰⁰ Watson & Nagel, *Establishing and Operating an Easement Program to Protect Historic Resources*, 21.

²⁰¹ See, e.g., Hamilton, *Conservation Easements in Court*, 2.

alternatives. Preservation easement holders should consider the potential benefits of mediation as have those in the land trust community.²⁰²

Although this study did not result in a comprehensive picture of the how preservation easement holders resolve violations, it does provide some additional clarity to the methods used and the decision-making process involved. Informal negotiation will likely be a possible solution to most violations, particularly if the organization can leverage an established an existing relationship. Where litigation appears necessary, there are some final steps that may be taken to resolve the issue and also some key considerations in what legal representation to hire or whether to file a lawsuit at all. These findings provide some new information to the otherwise opaque area of easement violations.

iv. Standard Operating Procedures and Decision Making

As made clear in the preceding sections, defining violations and deciding on an approach to resolve a violation in any given circumstance is by no means a simple process but requires a conscious balancing act. The unique aspects of the protected property, the relevant easement terms, and the circumstances of the violation will alter the desirable approach. One important tool to help guide an organization's decision making are established SOPs, as in the National Trust for Historic Preservation's Model.²⁰³ These procedures can provide a useful prism through which to examine a violation and settle on concrete action based on previously established criteria and strategies. Furthermore, written standards insulate organizations from the loss of institutional knowledge due to staffing turnover. The study demonstrated, however, that many

²⁰² See Byers & Ponte, *Conservation Easement Handbook*, 164–65; see also Jessica E. Jay, "Land Trust Risk Management," 459–99. One interview participant noted that their organization reserved the right to engage in mediation in its easements but that it had been some time since it had done so.

²⁰³ National Trust for Historic Preservation, *Model Standard Operating Procedures*, 13–18.

organizations currently do not have such SOPs, showing that this may be a fertile ground for future development.

The survey results showed that 57 percent of participant organizations had existing standard operating procedures while approximately 43 percent did not. This figure conflicts somewhat with the interview participants where only two of the ten organizations maintained written operating procedures for handling violations, including several larger, well-established organizations. One organization did have a tiered system to identify the severity violations and respond to them though the participant did not consider this approach rising to formal SOPs. Furthermore, even if less than half of organizations do not have existing written procedure there is still significant room for development among preservation easement holders because these procedures are likely a net positive in an often-complicated easement stewardship program. Developing standard operating procedures is not necessarily simple, however. It requires a thorough examination of an organization's program, context, and financial means, even when working off of the National Trust's available model.

One interview participant discussed a strategy their organization had developed to send a series of four letters of escalating legal tenor, each with discreet timelines, once a violation had been identified. If the property owner fails to satisfy the requests contained in each letter by the deadline, the organization will proceed to the next level of warning. The organization's board then votes on whether to retain legal counsel, and the last letter will have a fully drafted legal complaint attached to make clear that litigation will ensue if the property owner does not provide concrete steps to resolve the violation. This process spans four to five months total, which, in the opinion of the interviewee, is ample time for the property owner either to work with the easement holder or hire a specialist to develop a rehabilitation plan, if necessary. This strategy

has the benefit of being straightforward and consistent, establishing a clear timeline and taking some of the onus off of staff to make the difficult decision about how to proceed. What this strategy potentially lacks, however, is the flexibility that other organizations tended to value in responding to violations.

Most organizations, even those with well-established programs, tended to take a case-by-case approach to resolve violations. One larger organization exemplified the most robust form of this approach because, despite its relative informality, it was based on considerable experience and expertise over the half-century history of the organization's easement program. Once a violation has been identified, staff will make an assessment about the severity and potential damage to the protected features of the resource before formulating a plan of action. Due to the infrequency of more serious violations, most may be either retroactively approved or reversed with the consent of the property owner. More severe violations will go to the organization's easement committee who will formulate a response, likely beginning with an enforcement letter and escalating from there. The interviewee was confident that due to the substantial experience of the committee and staff that effective strategies could be developed based on the precedent of past disputes. It should be noted, however, that most easement holders are unlikely to match this organization in either experience or staffing.

Most easement holders' approaches to developing a strategy to resolve a violation will be case by case, but likely more by necessity than intention. Violations appear to be rare, particularly major violations, to the point where many organizations have likely not found it necessary to develop SOPs, opting instead to react as violations arise. The rarity of serious disputes makes a lack of existing procedures understandable for smaller organizations. If a serious violation does arise, however, an organization without SOPs may be caught unprepared

and waste valuable time and funding settling on a response. Such a situation surely will not ultimately serve to resolve violation in a beneficial manner.

It should also be noted that SOPs do not necessarily have to establish strict procedures but may still incorporate a large degree of flexibility depending on the needs, capabilities, types of protected resources, and geography of the organization. The National Trusts Model SOPs, for instance, stresses that "each organization's standard operating procedures must be specifically tailored to address the characteristics of an individual organization."²⁰⁴ The model further allows for expansive and detailed definitions of each type of violation and does not limit the remedies or strategies available from those previously discussed.²⁰⁵ In short, there is little that an organization has to lose in adopting SOPs, and the process of considering the contours of the procedures may be beneficial in itself to reveal a philosophical and pragmatic consensus on how to approach various aspects of easement stewardship.

Finally, SOPs may be an incredibly useful tool to ensure programmatic consistency over time and insulate an organization against the loss of institutional knowledge. Several interview participants expressed varying levels of frustration with previous easement managers and the lack of reliable documentation and guidance. Due to the complexity of easement stewardship, the benefit of experience in how to handle various aspects of an easement program cannot be overstated. Yet, it also appears that most organizations have only a single staff member managing the easement program, meaning considerable institutional knowledge stands to be lost if an easement manager vacates the position. Aside from the substantive usefulness of SOPs, easement holders and experienced managers should strongly consider developing written guidelines to strengthen an easement program for the future.

²⁰⁴ National Trust for Historic Preservation, *Model Standard Operating Procedures*, 1.

²⁰⁵ National Trust for Historic Preservation, *Model Standard Operating Procedures*, 13–18.

V. CASE STUDIES IN EASEMENT ENFORCEMENT

The study collected several case studies from the interviews to demonstrate how organizations had resolved violations. This section will present several of these in anonymized forms so as not to reasonably reveal the organization or the identities of any third parties. The case studies are organized around the methods used to resolve the disputes including informal negotiation, mediation, legal settlement, and litigation. The interviews did not result in discussions of litigation detailed enough to provide a case study so the examples here are based on independent analysis of cases discussed in other works. The case studies discussing lawsuits will not be anonymized as the names and circumstances involved are a matter of public record.

The purpose of providing these case studies is to provide examples of how easement disputes arise and are resolved based on real-world examples. The case studies will also demonstrate how the program components discussed above interacted in these scenarios. The case study may demonstrate, for example, how the violation was discovered, its severity, what the relationship with the property owner was, and the method used to resolve the violation. The case studies will be examined to determine the effectiveness of the organization's response, what improvements might be suggested, and any overall lessons from the dispute.

A. Informal Negotiation: Restoring an Interior Feature

The dispute here centered on an easement that protected interior features, specifically a portion of stenciled painting ceiling that the property owner painted over. The easement holder's²⁰⁶ staff discovered the violation after performing their annual monitoring. Although initially the staff did not note any issues during their visit, on reviewing the photo documentation

²⁰⁶ The easement holder in this case study is a statewide organization holding less than 20 easements total.

of the protected features they discovered that part of the decorative painting on the ceiling of one of the rooms had been repainted. Much of the ceiling remained unchanged, however, the organization considered the unapproved repainting to be a violation under the terms of the easement. The staff arranged a phone call with the property owner and told them about the concerns over the unapproved paint alteration. When the property owner was told that he had violated the easement, he was open to solutions that the organization staff suggested to resolve the matter.

After some discussion, the property owner agreed to hire a decorative painter to restore the portion of the feature that had been obscured. Though the property owner was dismayed at the prospect of hiring a specialist to undo the work that they had just paid for, they understood the need to remedy the violation. Thanks to examples on site and in the easement holder's documentation of the property's protected features, the painter was able to reliably replicate the unique dimensions and characteristics of the painted panels. When the work was completed the easement holder's staff did an early annual inspection to determine whether the issues had been resolved. Ultimately, the work was satisfactory, and the organization could consider the violation resolved.

This organization's dispute over the repainted ceiling is representative of the violations that easement holders are most likely to confront. Though blatant and possibly as serious as a moderate violation under the definitions in the model SOPs,²⁰⁷ the violation here was reversible if the property owner was receptive to the easement holder's solutions. The property owner was understandably distressed by the additional cost, but they relented in response to the staff's

²⁰⁷ The model SOPs provide that moderate violations include "[a]lterations to protected architectural features that . . . are not in accordance with the *Secretary of the Interior's Standards for the Treatment of Historic Properties*." National Trust for Historic Preservation, *Model Standard Operating Procedures*, 15.

explanation of the importance of the feature and that their action violated the easement. The staff speaking with the owner directly, rather than sending an impersonal notice, was likely a factor in being able to bring the potential dispute to a beneficial end.

This violation also likely resulted from a somewhat understandable lack of knowledge of the easement's terms by the property owner. Decorative interior features are generally not the type protected under most preservation easements. Even one knowledgeable of an easement's contents might forget or misunderstand that they may be violating a legal agreement by undertaking what appeared to be a relatively minor paint job. A possible mechanism to mitigate this possibility is to ensure that the property owner accompanies staff during monitoring visits so that the owner better understands each feature protected by the easement. If the property owner had previously observed staff documenting the decorative feature, there is a greater likelihood that they would have inquired about potential changes prior to acting. Nonetheless, these types of unknowing violations are difficult to prevent altogether.

The final issue highlighted by this case study is the importance of meticulous recordkeeping and attention to detail while performing easement monitoring. Indeed, the violation here was relatively small and as a result overlooked during the in-person visit. It was only when staff compared to photographs from the inspection to those in the original easement documentation that the violation was discovered. If a less detailed staff person had performed the monitoring, it is possible that the violation would have gone unnoticed.

B. Mediation: The Obscuring Fence

The violation here occurred where a residential property owner began erecting a large fence surround their property that obscured the view of the structure in contravention of the

easement's public benefit guarantee.²⁰⁸ In this case, the violation was actually reported by several community members who were aware of the easement, including other easement property owners. Unfortunately, the project was well underway when the violation came to the easement holder's²⁰⁹ attention. Although the organization's staff contacted the owner promptly to discuss the violation, the property owner refused to consider alternatives to their project as designed. Over time, the easement holder escalated its approach to several formal letters drafted by its attorney detailing the violation, but the property remained unwilling to resolve the violation and hired their own legal representation to respond. At this point, litigation seemed almost certain, and the easement holder went so far as to hire a trial attorney. On the recommendation of the trial attorney, however, the parties first met for a conference to discuss the matter.

According to the interview participant from this organization, holding an in-person conference was a seismic shift for resolving the violation. Though the meeting and negotiation was contentious, the parties were able to detail their respective positions and come to a positive resolution that previously seemed improbable. From the easement holder's perspective, the property owner had violated the easement simply by undertaking the project without the organization's consent, but they were still willing to negotiate to alter the project so as to better allow for public view of the property. After some discussion, the property owner became receptive to proposals from the easement holder's staff on how to alter the fence and ultimately

²⁰⁸ Many states' easement enabling statutes, as well as the federal tax incentive, are premised on a benefit to the public. In some cases, easements may allow for limited public access, even to private homes, but a less intrusive interpretation may only guarantee that the historic building is viewable from the public right of way. *See* Internal Revenue Service, *Conservation Easement Audit Technique Guide*, 37–38 ("The terms of the easement must be such that the general public is given the opportunity on a regular basis to view the characteristics and features of the property."); *see, e.g.*, R.I. GEN. LAWS § 34-39-1 ("This chapter is . . . intended to provide the people of Rhode Island with the continued diversity of history and landscape that is unique to this state without great expenditures of public funds.").

²⁰⁹ The easement holder in this case study is a local organization operating in several neighboring counties and holds around 50 easements.

agreed to a change. The property owner reportedly conceded on the next monitoring visit that the project as completed had a superior design, and they are now one of the most communicative easement property owners for the organization, frequently discussing potential projects with staff.

Although the conference was not mediation per se in that there was no truly neutral arbiter, this case study demonstrates the potential that mediation or mediation-like strategies can have for organizations dealing with easement violations. Simply bringing the property owner and organization staff around a table to discuss the issues and lay out alternatives succeeded where phone calls and even sternly worded legal warning letters had previously failed. This strategy allowed the easement holder to avoid what appeared at the time the almost certainty of having to litigate to resolve the dispute and salvage its relationship with the property owner. Where the situation merits it, easement holding organizations may be well served to attempt mediation before filing a lawsuit.

An important factor for the organization staff in pursuing enforcement in this case was the need not only to resolve the violation itself but to send a clear message to other easement property owners that the organization would step up its enforcement measures where necessary. This organization in particular had one of the most cordial approaches to property owner relations, including being open to informal communications about project proposals. Nonetheless, in this case other easement property had noticed the project and contacted the organization to express concern, and, for some, frustration at having similar projects disapproved by the organization in the past. Easement staff decided that stricter measures would be required due to the flagrancy of the violation and poor design of the project despite a usual willingness to

work with the property owners to alter or retroactively approve alterations. This case highlights some of the decision making that contributes to whether and how to pursue easement violations.

A final observation on this case is the utility of having an engaged community surrounding an organization's easement program. The violation was able to be discovered before the project was fully completed due to not only community members but also other easement property owners notifying the easement holder of the project. This is a situation where the relationship between property owners and easement program staff paid clearly paid dividends that, while not resolving the dispute, allowed the easement holder to begin enforcement measures earlier than it otherwise would have.

C. Legal Settlement: The Secondary Entrance

This dispute involved a commercial property in the metropolitan core of an urban area encumbered by an easement protecting the exterior elevations facing two primary commercial streets. Without notifying or proposing the project to the easement holder,²¹⁰ the property owner undertook a series of alterations including cutting into the exterior masonry to create a secondary entrance. The violation was discovered by one of the organization staff by chance when passing along the street where they saw that a portion of the building was obscured by scaffolding, indicating a major construction project. When the organization staff initially contacted the property owner, they claimed to be unaware of the easement's existence despite the building being adorned with the easement holder's plaque. The property owner further professed that the Covid-19 pandemic had caused their commercial tenant to vacate the space and that they had decided to split the space into two smaller commercial units, necessitating a separate secondary

²¹⁰ The easement holder in this case study operates in a major metropolitan area and holds approximately 250 easements.

entrance. Regardless of the owner's reasoning, the easement holder set about trying to resolve the violation.

The ensuing communications between the parties proved to be contentious, with the property owner refusing to even produce full plans for the project for some time. The easement holder was nonetheless adamant that the easement had been violated both procedurally due to the property owner failing to have the project approved and substantively by the owner damaging the building's exterior. The organization proposed the possibility of restoring the exterior and then going through the normal approval process. The property owner, however, was unwilling to consider this possibility, and the organization conceded that it was likely impossible to restore the exterior to its previous condition due to the extensive damage. Furthermore, the property owner, through their legal representation, made arguments that potential litigation would be fruitless because (1) the project would have been approved under the terms of the easement regardless and (2) a judge would likely be sympathetic to what the owner considered a business necessity. Faced with the potential expense and uncertainty of filing a lawsuit against a well-funded commercial developer, the easement holder's board of directors ultimately opted to accept a settlement where the property owner admitted to violating the easement and paid a settlement into the easement holder's legal defense fund.

The easement holder likely had a solid legal case based on general easement principles despite ultimately accepting the settlement.²¹¹ Indeed, the legal arguments offered by the property owner are somewhat lackluster. The argument that the project would have been approved by the organization is at odds with both the flexibility inherent in preservation standards and the level of discretion that easement staff has in approving, denying, or

²¹¹ The principles discussed here could differ if specific language in the easement agreement provided otherwise.

recommending modification to a proposed project.²¹² Furthermore, the opportunity for the easement holder to exercise its review authority was foreclosed by the property owner's failure to obtain approval, which is itself a violation of the easement terms. The property owner's economic necessity argument too has flaws. Easement documents generally do not include provisions similar to the economic hardship escape valve included in local landmark laws that would allow an easement property owner to evade enforcement based on economic circumstances.²¹³ The requirement of an economic hardship carveout originates from the limitations on governments "taking" private property originating from the Fifth Amendment of the United States Constitution—a concern not found in a private agreement like a preservation easement.²¹⁴

The property owner's arguments are not totally without merit, however, due to the uncertainty in outcome from a judicial determination. A judge presiding over a potential bench trial in the case is unlikely to be an expert in preservation principles, potentially leading to a dubious interpretation of the applicable standards.²¹⁵ Furthermore, a judge may not be familiar with the niche legal concept of a preservation easement, otherwise injecting their own biases about economic waste, interpreting the easement document outside of its terms based on a

²¹² See Byers & Ponte, *Conservation Easement Handbook*, 332–333 (providing model language for a provision governing approvals including that "approval may be withheld or conditioned in the sole discretion of Holder"); Sharon C. Park, "Respecting Significance and Keeping Integrity: Approaches to Rehabilitation," *APT Bulletin: The Journal of Preservation Technology* 37, no. 4 (2006): 15 ("There is a certain amount of flexibility inherent in the Secretary's Standards."). Several interview participants, for instance, noted that they sometimes disagreed with approvals made by local historic district commissions based on differing interpretations of preservation standards. An easement holder could nonetheless abuse its discretion where its interpretation of preservation standards was clearly misapplied.

²¹³ See Byers & Ponte, *Conservation Easement Handbook*, 469–70 (detailing provisions that nullify causes of action to terminate an easement based on economic hardship or changed circumstances); J. Peter Byrne, "Regulatory Takings Challenges to Historic Preservation Laws After *Penn Central*," *Fordham Environmental Law Review* 15, no. 2 (2004): 320–330.

²¹⁴ See Kayley B. Sullivan, "Off the Mark: Mitigating the Conflict Between Local Landmark Ordinances and Individual Property Rights," *Hofstra Law Review* 46, no. 2 (2018): 1151.

²¹⁵ See Smith, *Easements Today*, 29–30.

sometimes dubious assessment of the parties' intent, or perpetuating common law policy promoting the free economic use of private property against easement restrictions.²¹⁶ These types of boons for a property owner seeking to evade enforcement are by no means guaranteed, likely contributing to the property owner in this cases ultimately seeking a settlement. Easement holders should be aware of the respective merits of the arguments on each side of a potential dispute, and, above all, seek legal advice from knowledgeable attorneys in the jurisdiction.

While this case arguably came to a disappointing end from a preservation perspective, with the historic fabric of the building being damaged and the project being completed largely unabated, it cannot be said that the organization erred in accepting the settlement. How property owners violate easement, and whether the easement holder becomes aware of the violation in time to intervene is uncertain at best. In this case it was likely too late to circumvent the permanent damage to the building or to restore its previous condition. Despite the severity and potential willfulness of the violation, the organization was presented with a difficult decision: should it pursue litigation against a property owner with the resources to zealously respond and without much chance of a beneficial preservation outcome? The organization's leadership made the pragmatic decision to accept an admittance of wrongdoing and a monetary settlement to support other enforcement efforts.

Outside of the potential legal arguments of this case, another lesson is the importance of having access to public information about construction permits. In the jurisdiction at issue, there is no requirement for construction permits to be shared publicly by the city, unlike other local matters like zoning variances. This is not always the case, however, as another organization in

²¹⁶ Melissa K. Thompson & Jessica E. Jay, "Examination of Court Opinions," 383–85, 399–412 ("[Easement-holding organizations] should be aware that courts are considering common law doctrines and economic factors in their examination of conservation documents. While courts are examining the intent of the parties, they also reject evidence of the parties' intent and devise their own interpretations of documents.").

the study used access to city permits as a tool to monitor for unapproved projects on its easement properties. Though there is no certainty that such a measure would have brought this dispute to a different outcome, local easement organizations would be well served to advocate for policies contributing to greater transparency in permitting. It is more likely that an easement holder may seek a prompt halt to a project through a preliminary injunction if even a serious violation is caught earlier, potentially undercutting arguments that the project has advanced too far to reverse.

D. Litigation: Interpreting Maintenance

Maryland Historical Trust v. Holly was a case involving an enforcement effort by the holder of a preservation easement, the Maryland Historical Trust (MHT),²¹⁷ against a property owner who failed to obtain approval for the replacement of forty-five wood-sashed windows on his historic home, known as "Bellefields."²¹⁸ The historic divided-light wood windows were replaced with single-light vinyl windows with applied mullions.²¹⁹ Arguing that the property owner's action violated the easement, MHT filed suit. The court, however, found against MHT and held that the replacement of the windows qualified as permissible "maintenance or repair" under the easement that did not rise to a "material alteration" in appearance.²²⁰

Due to a failure of the easement document to clearly define important terms, the court largely relied on plain definitions of key terms and its own estimation of the potential change in character resulting from the window placement. The governing provision of the easement

²¹⁷ The Maryland Historical Trust is the State Historic Preservation Office for the state of Maryland and holds over 650 easements. "Maryland Historical Trust Easement Program," Maryland Historical Trust, accessed Nov. 17, 2022, <https://mht.maryland.gov/easement.shtml>.

²¹⁸ Md. Hist. Trust v. Holly, No. CAE14-05985, slip op. at 1 (Md. Cir. Ct. Oct. 21, 2015) (on file with author); See also Tyler Smith, "Easements Today," 28–30 (discussing *Holly*).

²¹⁹ Md. Hist. Trust v. Holly, slip op. at 3.

²²⁰ *Holly*, slip op. at 2–3.

provided that no alterations of the protected features could occur without the "express permission" of MHT, except in the case of "maintenance, reconstruction, repair, repainting or refurbishing, repair . . . damage . . . which has resulted from casualty loss, deterioration or wear and tear . . . provided that [act] is performed in a manner that will not materially alter the appearance [of the residence]. . ." ²²¹ The court determined that the significant deterioration of the wood sills fit within this exception. Further, making a comparison to fixing a car, that replacement of wood windows with vinyl could nonetheless be considered "repair." Finally, comparing photographs presented in evidence and relying on a statement that "from ten feet away you can't tell the difference," the court noted that it was "hard pressed to note a material alteration in appearance." ²²²

The court was able to reference inconsistent monitoring and approval practices by the easement holder in support of its decision. First, the easement holder conceded that a past unapproved replacement of roof shingles would be considered a repair. In a letter from 1988 suggesting that the windows then required re-finishing or replacement the easement holder also referred to those options as "maintenance." Second, the court noted that the property owner had replaced the attic windows with vinyl in 1985 and that staff inspecting the property had failed to note a material alteration during any of the ensuing inspections of the property or attic space. Though the court stopped short of finding that the easement holder was estopped from differing enforcement measures due to these past actions, they clearly factored in the ultimate decision.

A second, more general provision governing the upkeep of the property was also considered in the decision. This provision required that the property owner preserve the "historic, aesthetic and cultural character and appearance" of the property "to the extent reasonably

²²¹ *Holly*, slip op. at 1.

²²² *Holly*, slip op. at 3.

financially feasible."²²³ Although the easement holder argued that the property owner could have repaired rather than replaced the windows, the court reasoned that the easement holder had failed to offer a financially feasible alternative whereas the property owner had testified that repairs would be "ungodly expensive" and in-kind replacement would have cost an additional \$80,000.²²⁴ Again, the court found that the property owner had complied with the easement terms.²²⁵

Holly clearly showcases the risk of a preservation easement holder seeking enforcement of easement terms in court, but also contains important lessons for easement organizations. First, and most importantly, easements must be drafted with utmost care because litigation will inevitably involve a technical parsing of the language included. Second, the practices of easement staff should support and be consistent with easement terms over time. Thirdly, judges are unlikely understand applicable preservation standards and may substitute their own assessments in a judicial determination.

The easement terms considered by the court in Holly are problematic and not defined with the necessary specificity to support enforcement measures. First, the operative provision excepts the requirement for express permission for projects resulting from "deterioration and wear and tear," likely the majority of projects an easement property owner will undertake. Though it is not unusual to except some types of routine maintenance projects from approval in easements, these exceptions should be carefully structured to allow only projects with low likelihood of harming the historic features of an easement property.²²⁶ Second, the easement does not clearly define what qualifies as "maintenance" or "repair," opening the door for

²²³ *Holly*, slip op. at 2.

²²⁴ *Holly*, slip op. at 3.

²²⁵ *Holly*, slip op. at 4.

²²⁶ See Byers & Ponte, *Conservation Easement Handbook*, 224.

interpretations within the outer limits of a layman's definition of these terms. For instance, the easement could specify that replacement of components with in-kind materials is "repair" or "maintenance" but that other alterations are not. Third, what qualifies as a material alteration under the easement is based purely on "appearance," leaving out important aspects of materiality and design. Finally, it may be unwise to qualify the general maintenance provision based on what is "reasonably financially feasible." Though an easement holder should certainly consider costs in reviewing project proposals, placing vague economic factors in the easement document allows for a fact finder to determine what, in its estimation, is financially feasible rather than balancing cost with preservation outcomes. The combination of these vague provisions rendered the court's interpretation of the easement defensible despite the significant effect on protected historic features.

The vintage of MHT's easement helps explain some of the drafting issues in easement deed. This easement was created in 1977, which was during the earliest period of preservation easement activity and does not reflect contemporary drafting standards. MHT could not have relied on the Secretary of the Interior's Standards, for example, because the standards were first created later that same year.²²⁷ Nonetheless, easement organizations, particularly those with older easements, should be aware of how courts may interpret vague or poorly drafting easement terms.²²⁸

The second lesson should be for an easement holder to maintain consistent practices and interpretations, or else risk providing ammunition for property owners to dispute enforcement

²²⁷ "A History of the Secretary of the Interior's Standards," National Park Service, accessed October 20, 2022, <https://www.nps.gov/tps/standards/history-of-standards.htm>.

²²⁸ Two interview participants mentioned their organization had recently made efforts to amend older easements and excise ambiguous terms in addition to those that no longer reflect modern practices. If possible, other organizations should pursue similar efforts.

measures. In Holly, the court was able to point to past failures of MHT to dispute projects done without prior authorization as a basis to establish that replacement of components was per se repair. Further, staff performing inspections failed to note any material alteration when the historic wood windows in the attic were replaced with vinyl despite multiple inspections over three decades. It is understandable that a court would look upon later enforcement efforts over a similar alteration with suspicion. Organizational SOPs may provide a potential solution here, as they could specify what the staff should consider maintenance, repair, material alterations, or other key terms, even over many years and after successive staff in an easement program.

Despite these deficiencies in the easement drafting and the consistency of the easement holder's practices over time, it is clear that the court was unfamiliar with preservation principles and relied on its own interpretations in making the ultimate determination. In particular, the court admitted that the determination of whether the building's appearance was materially altered was a subjective one but refused to parse the expert testimony provided at trial. Instead, the court made its decision "[w]ithout delving further into the battle of experts."²²⁹ Rather, the court ultimately relied on its own comparison of the before and after photographs entered into evidence to determine that MHT had failed to meet its burden. Easement organizations should be wary of the potential for courts to inject their own biases and insulate against the possibility by referring to preservation standards and otherwise clearly defining the language included in the easement document.

²²⁹ *Holly*, slip. op. at 4.

E. Litigation: Blocking an Addition

Bagley v. Foundation for the Preservation of Historic Georgetown was brought by an easement holder²³⁰ ("the Foundation") seeking enforcement of an easement following the property owner's ("Bagley") attempted construction of an addition to the rear of their home.²³¹ The terms of the easement prohibited the property owner "from building any structure on his property, encroaching on any presently open space, or obstructing a view of the building facade from the street."²³² Nonetheless, Bagley commenced building a rear addition less than a year after the execution of the easement agreement without notifying the easement holder.²³³ When the Foundation discovered the violation, it opened up negotiations with the property owner but demanded that the property owner must first remove the existing new construction before alternative design proposals could be considered.²³⁴ Bagley refused to demolish the addition, and, after over a year of unsuccessful negotiations, the Foundation filed suit.²³⁵

The Foundation argued that the property owner had breached the easement agreement and violated the D.C. ordinance requiring a building permit prior to construction, and the property owner countersued on several grounds, requesting significant damages.²³⁶ The trial court matter ended with the judge granting a summary judgment motion in favor of the Foundation, ordering Bagley to demolish the addition.²³⁷ The court also awarded the Foundation

²³⁰ The Foundation for the Preservation of Historic Georgetown is a non-profit easement holder founded in 1965 and operating primarily in the Georgetown neighborhood of Washington, D.C. with approximately 100 easements in its portfolio. "Organization," Foundation for the Preservation of Historic Georgetown, accessed Nov. 17, 2022, <https://preserve-georgetown.squarespace.com/organization>.

²³¹ *Bagley v. Found. for Pres. of Hist. Georgetown*, 647 A.2d 1110, 1111 (App. D.C. 1994); *see also* Thompson & Jay, "Examination of Court Opinions," 399–402 (discussing *Bagley*).

²³² *Bagley*, 647 A.2d at 1111.

²³³ *Bagley*, 647 A.2d at 1111.

²³⁴ *Bagley*, 647 A.2d at 1111–12.

²³⁵ *Bagley*, 647 A.2d at 1112.

²³⁶ *Bagley*, 647 A.2d at 1112. Bagley's counterclaims included arguments of selective enforcement and violations of his due process rights with a requested \$1 million in damages, all with little to no merit. *Bagley*, 647 A.2d at 1112–15.

²³⁷ *Bagley*, 647 A.2d at 1112.

legal fees based on a provision of the easement agreement.²³⁸ Bagley then filed an appeal, resulting in the decision at issue.

On appeal, the court found that the easement agreement was clear and unambiguous in prohibiting the property owner's action and upheld the lower court's finding. Bagley argued that the agreement applied only to the front facade of the building and that the Foundation had acted unreasonably in demanding that he demolish the addition before considering alternatives.²³⁹ The court reasoned that the agreement by its terms alone prohibited both unapproved projects and the construction of an improvement on the property.²⁴⁰ Looking to the availability of harsher available remedies under the easement for the Foundation itself to enter onto the property and remove non-conforming structures, the court found that the foundation complied with a provision ensuring the Foundation would "exercise reasonable judgment."²⁴¹ Lastly, the decision upheld the trial court's grant of legal fees to the foundation.²⁴²

Bagley demonstrates the other end of the spectrum from the previously discussed case, showing the strong litigation position that an easement holder may have when enforcing a favorable and clearly drafted easement agreement. Rather than leaving any carveouts from prior approval requirements, the document here was clear in requiring all projects to first be submitted to the easement holder. The lack of exemptions from approval requirements may pay off in enforcement actions despite the obligation to review a larger number of proposals. Furthermore, the easement expressly prohibited any encroachment into open space or construction of additional structures. Finally, the guarantee of the property owner paying the easement holders

²³⁸ *Bagley*, 647 A.2d at 1112–13.

²³⁹ *Bagley*, 647 A.2d at 1113.

²⁴⁰ *Bagley*, 647 A.2d at 1113.

²⁴¹ *Bagley*, 647 A.2d at 1113.

²⁴² *Bagley*, 647 A.2d at 1114–15.

legal fees if a court found in its favor, as is common in easement drafting, allowed the Foundation to aggressively litigate when it became clear that negotiations would be fruitless. The Foundation's dauntless litigation of the matter was also despite Bagley's efforts to intimidate through arguing borderline frivolous claims and requesting inflated monetary damages.²⁴³ Such tactics are possible in easement enforcement efforts against property owners with means. In Bagley, however, simplicity and clarity proved dispositive over potentially more complicated or flexible drafting options.

²⁴³ See Thompson & Jay, "Examination of Court Opinions," 402.

VI. RECOMMENDATIONS

The findings of the study revealed many challenges of easement stewardship as well as successful strategies among easement-holding nonprofit organizations. Based on the study findings and a review of the relevant literature, the following recommendations were formulated. Aspects of these recommendations may be familiar to those familiar with easement stewardship but are well worth repeating.

- **Consider the rate at which to accept easements**

The total number of easements held complicates most every aspect of easement stewardship, and an organization should therefore carefully consider the rate at which it can accept easements without limiting the quality of its stewardship program. Endangered or unique historic resources that appear ripe for protection by an easement will likely be presented to an organization. Yet, an organization must be willing to reject easements on properties that do not fit within its goals or require excessive resources to steward.

There are a number of stewardship challenges that grow with an organization's easement portfolio. Most organizations have only a single staff member managing their easement properties, and there are limits to the number of easements an individual can effectively steward. The larger an easement portfolio an organization holds, the less likely it will be that it can maintain a consistent annual monitoring schedule. Inspections may also have to be performed by contractors or non-professionals, and the organization will forfeit the advantages in having consistent staff documenting features and interacting with property owners. Communicating with property owners and monitoring changes in ownership is a perennial and growing challenge as an organization acquires more easements. An inability to quickly review and respond to alteration proposals will lead to property owner dissatisfaction. Ultimately, more easements

mean a higher likelihood of violations occurring and going undiscovered, resulting in the loss of important historic features and resources.

The decision to accept a new easement is not isolated, but results in a perpetual and ever-increasing stewardship responsibility. Organizations can reduce many of these concerns by streamlining their practices or simply hiring more staff. For many organizations, however, these solutions may be challenging to implement due to limited time and resources. Each organization must balance the challenge of stewarding its easements with protecting the many deserving historic resources.

- **Develop easement agreements with clear language and detailed documentation**

The easement agreement is the foundation of the relationship between the easement holder and property owner. Clear language allows the parties to understand their rights and responsibilities and attend to them without confusion. Detailed documentation supports the ongoing stewardship and maintenance of the resource. A shared understanding of the resource and responsibilities between the parties is valuable in itself because violations may be avoided altogether.

If a violation does occur, clear language sets the stage for a beneficial resolution of the dispute. The agreement lays out the enforcement rights of the easement holder and can allow it to approach enforcement efforts from a strong negotiating position no matter the enforcement method. Enforcement letters can refer to specific language in the easement to justify an organization's demands where informal discussions fail. As illustrated by the judicial decisions in *Bagley* and *Holly*, clear language can mean the difference between success and failure in a dispute that proceeds to litigation.

Part of ensuring quality easement documents is having the necessary mix of preservation and legal expertise. If an organization uses an easement template, it should have a qualified attorney review the template frequently to update the language based on any developments in the jurisdiction and get specific advice where a property owner wishes to significantly depart from the model language. Staff can help ensure that language comports with preservation principles to provide standards that a court may assess rather than inserting its own interpretation of important terms. Finally, thorough baseline documentation prepared by staff is essential to identify and illustrate protected features for comparison where an unapproved alteration is made.

- **Ensure endowments are structured to support ongoing stewardship**

The amount of divergence in the calculation of easement endowments suggests that easement organizations do not agree on a single optimal way to support their endowment. There are benefits and drawbacks with each of the prevailing methods including flat fees, percentages of fair market value, and expected cost calculations. Flat fees, though simple to administer, may not accurately reflect the true costs of stewardship and an organization must be careful in setting the contribution. Fair market value, whether based on easement appraisals or total property value, will likely cover stewardship costs but can present the appearance of self-interest in the transaction. Expected costs calculations adhere closely to stewardship costs but are more complicated to administer. Additionally, there may be supplemental methods to support an organization's endowment such as transfer fees and recurring fees. Organizations should carefully consider which method of calculating contributions fits its goals and circumstances so long as it provides the essential support for ongoing monitoring and enforcement efforts.

- **Maintain consistent monitoring schedules, documentation practices, and prioritize staff inspections**

Monitoring may be the most challenging ongoing obligation of preservation easement organizations due to staff, time, and funding constraints. Monitoring obligations must be routinely met in comparison to more sporadic challenges in easement stewardship. To the extent possible, however, organizations should strive to maintain annual monitoring, consistent and detailed monitoring, and utilize staff to perform inspections.

There was a broad consensus among study participants for an annual monitoring schedule, comporting with available best practices. This alone is a compelling reason for organizations to adhere to annual monitoring to the extent feasible. Organizations may be tempted to deviate from an annual schedule where staff capacity or resources are limited. Performing inspections on a longer than annual schedule is an option, but an organization should have a compelling reason to do so. Whatever the monitoring schedule selected, the organization should be as consistent as possible to ensure the property owner is aware that the easement holder follows a set inspection policy.

Consistency and detail in documentation practices during inspections is crucial. Not all violations will be readily apparent and only a careful review of past documentation may make it clear that a violation has occurred. Although the detail required in documentation reports may differ between organizations, all should ensure that reports contain the detail necessary to prove a violation in court if need be, particularly if the violation is based on a pattern of behavior such as deferred maintenance. An organization should also be consistent in whether it interprets certain actions documented during inspections as violations, as *Holly* demonstrates. If an

easement holder allows certain repairs without at least providing notice that it is retroactively approving a violation, it may forfeit the right to subsequently assert a differing interpretation.

Organizations should not discount the many benefits of having consistent staff perform the inspections. Consistency is most likely where a staff member becomes intimately familiar with a property, its protected features, and any changes over time. Staff are the most knowledgeable of the overall program and can speak on behalf of the easement holder. Expert staff can provide recommendations for the effective maintenance or repair of historic features, providing a material benefit to the property owner. Interaction with a staff member gives the property owner a face or name to associate with the easement holder, making the relationship more than a legal one. While volunteers or contractors may be well-qualified and perform an admirable job, they are unlikely to have the level of experience and expertise as full-time staff.

- **Take steps to ensure property owner participation during inspections**

Property owners or their representative participating in routine inspections may be the most cost-efficient method to prevent future violations. Monitoring is the single guaranteed interaction between the easement holder and property owner. It is therefore in easement holders' interest to maximize the value of monitoring to overall easement stewardship.

A property owner who is present for inspections is more likely to be engaged and understand the process. They can observe what specific features are documented so they can better understand what projects require approval by the easement holder. As the inspection proceeds, the property owner can ask clarifying questions about their responsibilities under the easement to reduce unknowing violations. Any important questions or conversations can be memorialized in the monitoring report or follow-up communications to better document the parties' relationship. Overall, monitoring should be viewed not only as an essential obligation to

protect the resources but also a key opportunity to grow and cement the property owner's relationship with the staff and organization.

It is not always be possible to ensure property owners and failure to achieve participation should not interfere with adherence to the monitoring schedule. Any steps to ensure property owner participation, however, will likely be worth the effort.

- **Center property-owner relations for successful easement stewardship**

Property owner relations is a pillar of successful easement stewardship alongside drafting, monitoring, and enforcement. The cultivation of a strong relationship can fulfill the promise of a preservation easement—a private partnership for the protection of the historic resource. While building a constructive relationship is easier said than done, there are many aspects of an easement program that can contribute to this effort.

Consistent communication is the essential ingredient of property owner relations and can foster a healthy dialogue between the parties. Property owner communications naturally include scheduling monitoring visits and reporting findings after the inspection is complete. It is beneficial to send additional communications on a schedule to remind property owners of the organization and the essentials of the easement. Organizations can utilize certified mail to ensure that the intended recipient receives the letter and can also encourage property owners to reach out to staff in return. Communications can also assist organizations in discovering when easement properties are sold so that staff can reach out and establish contact with the new owners. More frequent mailings may be particularly important the larger an organization's easement portfolio or if it protects resources in areas of heavy development pressure and frequent ownership turnover.

As explored in the above recommendations, monitoring can be an important opportunity to build relations, particularly if the property owner participates in the inspection.

Misunderstandings of easement terms may be a leading cause of violations even among property owners who support the easement's preservation goals. Settling misunderstandings, discussing the parties' respective responsibilities, and making routine contact via monitoring are an essential aspect of building good relations.

An organization should make project review processes as efficient and useful to the property owner as possible to engender positive relations. Being open to questions about potential projects and providing useful resources is a common and feasible method to build rapport with property owners. When a project is proposed, staff should be solution-minded and ensure that both the property owner's needs and preservation standards are met, if possible. The organization can also assist the property owner navigate any additional approval processes once a proposal is accepted, providing a valuable benefit to property owners. An easement holder can reduce the friction inherent in the project review process and even show the property owner that the organization has useful expertise to both protect the resource and make it relevant to modern life.

Even where a violation occurs, organizations should strive to work towards efficient solutions and maintain good terms with the property owner. Most violations can be resolved informally after some negotiation with the property owner to modify or retroactively approve the action taken. Though an easement gives the holder legal rights, they should not be used as a bludgeon unless the property owner demonstrates that they are unwilling to work with staff to resolve the dispute. Instead, staff should work to find a positive, human-centric solution. If

handled carefully, there is a possibility that resolving a violation can even improve the relationship between the parties.

Building property owner relations can be an elusive challenge. There are, however, methods to enrich many aspects of easement stewardship to better cultivate positive relationships with property owners. Furthermore, property owner relations is possibly the area of easement stewardship most ripe for experimentation for developing successful new strategies. Finally, developing a strong relationship with a property owner can be a cost-effective method for preventing and effectively resolving violations.

- **Cultivate community and government relations**

Cultivating community and government relations is a method of preventing violations that should not be overlooked. Community and government connections can assist the easement holder in discovering violations and resolving them effectively.

Support from the local preservation community or even other easement holders can lead to violations being discovered between monitoring visits. The earlier violations are discovered the more likely it will be that the easement holder can effectively intervene. Organizations with a broader preservation mission may naturally accrue support, but other methods such as partnerships with other organizations or publicizing easement properties may be successful. If possible, local realtors should be made aware of the organization's easement program so that they can refer potential buyers to staff to educate them on the significance of buying a property subject to an easement. Transfer fees are a common method to increase the realtor awareness of existing easements.

Various government bodies oversee important government processes that will likely affect easement properties. Easement holders should familiarize government staff or board

members that work on permitting or approving construction projects to ensure that the easement holder is made aware of relevant proposals coming before them. Where jurisdiction overlaps with a local historic district, an easement holder and the commission can present a unified front to resolve a mutual violation under their regulatory purview. Performing frequent checks on publicly available information from these government bodies is also a useful practice, and greater public access should be lobbied for where it is not currently available.

- **Develop a system to categorize the severity of violations and guide decision making for enforcement**

Easement violations are inevitable. An easement violation is the ultimate test of an easement program, and resolving a violation only becomes more difficult where the easement holder is unprepared. Organizations should therefore be proactive in developing strategies for categorizing and effectively responding to violations.

It is paramount that an organization act promptly to resolve a violation when it is discovered because solutions effectively protect the resource may become impossible as time passes. If the organization does not have clear guidelines of what it considers a violation, then it may waste valuable time making that determination. The same is true of how an organization should respond, and what method of resolving the violation should be selected.

A system that clearly defines violations and includes levels of severity that correspond to resolution strategies will help minimize these challenges. The National Trust's Model SOPs provide an example of such a system and may be adapted to the needs and circumstances of each organization.

Certain resolution strategies may be more appropriate for violations of certain severity than others. Technical and minor violations are more readily resolved through relatively informal

negotiation methods or a notification of violation and retroactive approval. For moderate violations, it may be more effective to begin with formal enforcement letters providing a discrete timeline to the property owner to meet set milestones towards the remediation of the unapproved action. Major violations may require a more formal mediation process or, in cases of emergency, the immediate filing of a lawsuit to seek work stoppage before additional damage is done to the protected resource. These guidelines can also clarify important tenets of approaching litigation such as hiring outside counsel to manage the legal process.

The process need not be rigid, nor is an overly rigid approach desirable. Every easement property, relationship, and violation is unique and requires the professional judgment of staff to effectively address. Where the violation is particularly complicated or challenging the additional insight of an advisory board or committee will be beneficial. Rather, it is important that an organization respond as decisively as possible to put the violation on track to a positive resolution and prevent the property owner from unnecessarily drawing out the dispute.

Finally, the system should include a process for the periodic review of any disputes that have arisen. Gaps in the effectiveness of the system or the general easement stewardship program may appear only in hindsight. The system should be adjusted based on the discussions that occur during this review.

VII. CONCLUSION

This study provides new perspective on the challenges of preservation easement stewardship. It addresses three challenges in understanding how preservation easement nonprofits operate and address easement violations. First, it compares the stewardship practices of a representative sample of organizations to the available best practices. Second, it provides new data about the frequency and severity of easement violations and the methods used to resolve them. Third, it connects various aspects of easement stewardship to how organizations prepare for and resolve violations by examining the real-world experiences of preservation easement organizations.

Preservation easement organizations are a diverse group in their overall easement holdings, geographic contexts, and organizational practices despite many shared challenges. The diversity in how organizations fund and operate various aspects of their easement programs contrasts notable consensus in ensuring attorney involvement in easement drafting, requiring endowment contributions, and adhering to annual property monitoring. These practices comport with available best practices that prepare organizations for eventual violations. Each organization may balance benefits and burdens to shape its practices in other program areas based on its resources and philosophies of easement management.

Easement violations and enforcement is an opaque area, particularly considering its importance for the long-term success of preservation easement stewardship. The study revealed that most organizations had dealt with only a few violations, suggesting that they are relatively rare. Furthermore, violations that do occur are more likely to be minor in nature and may be resolved informally between the easement holder and property owner. While the results are a cause for optimism overall, a significant share of organizations nonetheless had dealt with

moderate or major violations. Several participants were also party to enforcement lawsuits. Considering that a single major violation can be a significant drain on an organization's resources, easement holders should make efforts to effectively prevent and prepare for violations.

There are many ways that preservation easement organizations prepare for violations and seek to address them. The importance of quality easement drafting, consistent and detailed monitoring, and effective enforcement measures are underscored by this study. Property owner relations and other strategies to prevent violations and increase the likelihood that disputes come to a beneficial resolution should permeate an organization's stewardship program. Additionally, most organizations may benefit from developing written guidelines to help streamline their decision-making process when a violation is discovered. The development of established enforcement policies becomes imperative as an easement program increases in size and complexity.

This study provides a solid foundation for future research into the practices and experiences of preservation easement organizations. Future research should measure the overall incidences of violations, how severe each violation was, or what method was used to resolve each violation. A larger sample size of easement organizations would also more fully reveal the variance in stewardship practices and metrics around violations. Finally, a more targeted look at easement litigation is merited. Garnering further details of how enforcement lawsuits proceed and are resolved would assist organizations in understanding the risks and relative strength of their litigation position before filing a complaint.

The findings and recommendations discussed in this study could prove useful to preservation professionals and organizations that manage easements. Easement management can be a challenging and isolating experience separate from more mainstream regulatory tools for the

preservation of historic resources. The more information and support from other easement programs that easement managers and organizations can access, the more effectively they can shape their own approaches to easement stewardship. While conflicts in easement stewardship are inevitable, there are steps that organizations can take to minimize the likelihood that violations will occur and bring the ensuing disputes to a positive end when they do. The promise of historic preservation easements as unique preservation tool will only increase as the effectiveness of stewardship practices and strategies improve.

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APPENDIX A: SURVEY QUESTIONS

- 1) How many easements does your organization hold?
- 2) Does your organization have an easement template?
- 3) Does your organization retain legal counsel to prepare or review your easement instruments prior to execution?
- 4) Does your organization require a donation to administer the easement?
- 5) On what basis does your organization monitor each one of its easement properties?
— 5 years — 3 years — 1 year — less than 1 year — other
- 6) How many times has one of your organization's easements been violated?
— never — 1–2 times — 3–5 times — more than 5 times
- 7) How would you categorize the violation(s) that have occurred?
— Technical (legal) violation — Minor (negligible) violation — Moderate violation — Major violation
- 8) Who was responsible for the violation(s)
— Original owner — Subsequent owner — Third party — Natural event
- 9) Does your organization have existing procedures for handling violations?
- 10) How were the violation(s) resolved?
— Voluntarily — Informal negotiation — Threat of litigation — Litigation — Unresolved
- 11) How does your organization seek to maintain a healthy relationship with easement property owners and avoid disputes and/or violations of the terms of the easement?
- 12) Would you be willing to discuss your organization's experiences in administering easements with me?

APPENDIX B: INTERVIEW QUESTIONS

- (1) Can you please describe the history of your organization's easement program?
- (2) What does your easement program look like in terms of overall number of easements held, types of properties covered, and geographical spread?
- (3) How large is your organization in staff? How many staff dedicate the majority of their time to easement issues?
- (4) Can you tell me about your organization's easement acquisition process? What types of properties does your organization consider holding easements over? What are your typical negotiation processes? How do you typically draft your easement documents?
- (5) Does your organization require a donation or endowment to hold an easement in order to support monitoring and enforcement efforts?
- (6) How does your organization monitor its easements? Do you conduct periodic inspections, engage community or volunteer involvement for monitoring, or use other methods?
- (7) What is your organization's process for reviewing proposed alterations and who engages in the review?
- (8) What methods does your organization use to maintain good relations with the property owner and prevent future disputes? Do you, for example, provide updates or reports on property inspections, send periodic communications, sponsor social events, or use other methods?
- (9) If your organization uses particular methods to maintain good relations with property owners, how do you see these efforts supporting avoidance of potential violations? Does your organization have established guidelines for how to assess and respond to potential violations of easement terms?
- (10) Has your organization experienced violations of the terms of its easements in the past? If you have had violations in the past, how frequently have they occurred and how would you characterize their severity?
- (11) Who was most often responsible for the easement violations, e.g., donating property owners, subsequent property owners, or third parties?
- (12) How has your organization sought to resolve violations of its easements, e.g., a voluntary cessation/remediation by the violator, mediation, threat of litigation, or litigation?
- (13) If your organization has ever had to resort to litigation, how did your organization mount that litigation, e.g., in-house counsel, outside counsel, or pro bono counsel? How did that dispute(s) resolve?

(14) How does your organization fund its enforcement measures?

(15) What would you have done differently in reflecting on those cases? Any advice for other organizations?