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Knowledge
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Historic Preservation Easements

What is a Historic Preservation Easement?¹

A historic preservation easement is an interest in real estate that provides restrictions on the use of a significant historic, archaeological, or cultural resource.² Typically, people associate easements with access roads or utility rights-of-way. For instance, a utility company may have a gas line running underground through your property, in which case they would likely have an easement which grants them access to the line and establishes certain limits on your activities above the gas line. Easements are also used for conservation purposes. A conservation easement limits the use of a property in order to protect the conservation values of the land. A preservation easement, which is typically a voluntary agreement between the property owner and the protecting organization, grants certain rights associated with the use and enjoyment of a property to the protecting organization. However, most remaining private property rights, not restricted by the easement, remain with the property owner and may be exercised to the fullest extent not inconsistent with the preservation easement. Once recorded, an easement “runs with the land,” which means that it continues even when the property is sold or inherited. Historic preservation easements may be applied to historic buildings, structures, or landscapes, battlefields, traditional cultural places, or archaeological sites – even a historic structure’s façade or interior may qualify. So, a historic preservation easement is a voluntary agreement between a property owner and a protecting organization which limits the use of the property in order to protect the property’s historic values.³

“An easement is the right to use the land of another for a specified purpose.”
Schadewald v. Brule, 225 Mich. App 26, 35; 570 NW2d 788 (1997)

“Thirty seven million acres is all the Michigan we will ever have.”

Former Governor
William G. Milliken

Michigan State University
Extension Land Use Team

<http://ntweb11a.ais.msu.edu/luaoe/index.asp>

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¹ Includes easements referenced in Sec. 266 of 1967 P.A. 281 (the Income Tax Act, M.C.L. 206.1 *et seq.*), in Sec. 435 of 2007 P.A. 36 (the Michigan Business Tax Act, M.C.L. 208.1101 *et seq.*), both amended by 2008 P.A. 447, and changes to the Federal Pension Protection Act of 2006.

² For a detailed definition, see Sec. 2140 of the Natural Resources and Environmental Protection Act (P.A. 451 of 1994, being M.C.L. 324.101 *et seq.*).

³ Occasionally, easement execution is required as a condition of receiving a Federal, state, or other grant.

Why Use Easements for Historic Preservation?

Easements can be useful tools for preserving historic resources. One reason historic preservation easements are so useful is because they allow a property owner to retain control over and exercise

Definition of Historic Structure

The IRS definition of a certified historic structure includes:

- any building, structure, or land area that is listed in the National Register of Historic Places, or
- any building that is located in a registered historic district and certified by the U.S. Department of the Interior as being historically significant to the district.

The IRS defines historically important land areas as:

- independently significant areas, including any related historic resources that meet National Register Criteria for Evaluation, or
- land areas within registered historic districts, including buildings, that contribute to the significance of the historic district, or
- land areas adjacent to a property individually listed in the National Register of Historic Places where physical or environmental features of the land contribute to the historic or cultural integrity of the historic property.

most or all remaining private property rights of a resource while often receiving substantial tax benefits for granting the easement. Second, historic preservation easements are flexible and can be tailored to the resource and the interests of both the property owner and the protecting organization. Also, easements may be drafted to last for a term of years, or even in perpetuity, so the historic resource can be preserved regardless of the number of times the property changes ownership.⁴ Finally, for the protecting organization, protection through an easement is often cheaper than outright purchase of the property. The use of easements can generate

⁴ Easements typically terminate when the purpose of the easement fails. Thus, if a building with a historic preservation easement is destroyed by fire or tornado, the easement is terminated.

both private and public benefits while preserving historic, archaeological, and cultural resources that are unique and valuable to a community.

What Defines a Historic Resource's Eligibility for a Preservation Easement?

Historic preservation easements (and conservation easements) are created under state law. In Michigan, the legal framework for creating a historic preservation easement is established under of the Natural Resources and Environmental Protection Act.⁵ Structures or sites that are listed as national historic landmarks,⁶ listed on the national register of historic places,⁷ listed on the state register of historic sites,⁸ or recognized under a locally established historic district⁹ are eligible for protection through the use of historic preservation easements and the resulting tax benefits.¹⁰

If tax benefits are of interest to the property owner, prior to donating an easement, the owner must obtain certification of the property's historic significance. To apply for certification, the owner must obtain a *Historic Preservation Certification Application* available through the State Historic

⁵ 1994 P.A. 451 as amended, M.C.L. 324.101 *et seq.* Historic preservation easement regulations are found at M.C.L. 324.2140 through 324.2144.

⁶ As defined under the Historic Sites, Buildings, and Antiquities Act of 1935 (16 U.S.C. 461 to 467).

⁷ Pursuant to the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 to 470t).

⁸ Pursuant to 1955 P.A. 10 (the Michigan Historical Markers Act, M.C.L. 399.151 to 399.152).

⁹ Created pursuant to 1970 P.A.169 (the Local Historic Districts Act, M.C.L. 399.201 to 399.215).

¹⁰ These qualifications pertain to historic property owners interested in receiving tax benefits for donating an easement. However, easements can be established on any real property through a deed restriction that limits the use of that property, provided some organization or person is responsible for monitoring the provisions of the easement.

Preservation Office (SHPO) of the Michigan Department of History, Arts and Libraries.¹¹ The SHPO forwards the application to the National Park Service, which in turn, issues certification on behalf of the U.S. Department of the Interior. Certification by the National Park Service is required before the owner can claim a deduction on a Federal income tax return for donation of an easement. However, the availability of a tax deduction requires that the historic resource be accessible to the public. This provision is relatively flexible. For instance, public access for a historic building whose façade is protected by a historic preservation easement may be established by the presence of a public road that allows viewing of the facade, or, for an interior easement, public access may be established by opening the historic building for the public to tour one day per month. It is up to the easement donor and the protecting organization to find balance between the owner's privacy and the public's benefit.¹²

What are the Tax Benefits associated with Historic Preservation Easements?¹³

Historic preservation easements may either be

¹¹ The National Park Service's *Historic Preservation Certification Application*, as used by the Michigan SHPO, is available at: www.nps.gov/history/hps/tps/tax/hpcappl.htm#download.

¹² A model historic preservation easement is available by request from the National Trust for Historic Preservation by emailing law@nthp.org.

¹³ Nothing in this Article is intended as legal, accounting or tax advice. All historic preservation easements are unique and require the assistance of qualified professionals. To the extent that this Article may address federal tax issues, federal regulations issued by the U.S. Treasury require that the reader be informed that this written communication is not intended and cannot be used to (i) avoid any potential tax penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promote, market, or recommend to another party any transaction or matter addressed in this communication.

sold or donated by property owners. If a property owner donates an easement to a charitable or government organization the owner may be eligible for 1) tax deductions because of the donation, 2) tax credits for investments made to rehabilitate the property, if necessary, and 3) property tax abatements or moratoriums associated with the diminution in property value resulting from development restrictions.

Income Tax Deduction

In general, to qualify for a Federal income tax deduction through the donation of an easement, the IRS requires that the easement must be:

1. donated in perpetuity;
2. donated to a qualified organization; and
3. given exclusively for conservation purposes.

Source:

www.nps.gov/history/hps/tps/tax/download/easements.pdf

The donation of an easement allows the property owner to claim a charitable deduction for Federal income tax purposes.¹⁴ Under the Internal Revenue Service's (IRS) Qualified Conservation Contribution, the property owner can claim income tax deductions equivalent to the value of the rights given away.¹⁵ This entitles the owner to a deduction equal to the decrease in fair market value of the property caused by the restrictions placed on the property as a result of the easement. In any given year however, a donor can only claim a value for the easement that is up to 30 percent of the donor's adjusted gross income, with any excess value allowed to be carried over to the next tax year for up to five years. As required by the IRS, a qualified appraiser will need to determine the

¹⁴ A charitable deduction is allowed for any building, structure, or land listed on the National Register or any building in a registered historic district. A charitable deduction is not allowed for structures or lands located in a registered historic district.

¹⁵ See Internal Revenue Code of 1986, as amended, Section 170(h) (26 U.S.C. § 170(h)), and Department of the Treasury Regulation Section 1.170A-14, which provide for income and estate tax deductions for charitable contributions of partial interests (e.g. façade easements) in historic property.

donation amount that can be claimed if the value of the easement is greater than \$5,000. The amount of the donation is the difference between the property's fair market value without the easement and its value with the easement restrictions in place. For properties subject to a mortgage, the lender must agree to subordinate its rights to the property to the protecting organization in order for the donor to claim a charitable deduction.¹⁶ For buildings in registered historic districts, the deduction may only be claimed if the easement preserves the entire exterior of the building (including the front, sides, rear, and height of the building). A \$500 filing fee is also required if the value of the deduction for an easement granted on a building in a registered historic district exceeds \$10,000. Like conservation easements, when historic preservation easements permanently reduce the value of a property, Federal estate taxes for property heirs will also be reduced.

The donor of a historic preservation easement may also be eligible for a Federal income tax credit under the Federal Historic Preservation Tax Credit Program if undergoing a rehabilitation project.¹⁷ Provided the rehabilitation is of a certified historic structure, the taxpayer may be eligible to receive a rehabilitation credit equal to 20 percent of the qualified rehabilitation expenditures. The project must be certified and in accord with the U.S. Secretary of the Interior's *Standards for Rehabilitation* and may include the rehabilitation of historic structures for commercial, industrial, agricultural, or rental residential purposes, provided the property is not used exclusively as the

owner's residence.¹⁸ The building must also be depreciable, meaning it is used for trade or business purposes and held for the production of income. The owner of a historic building undergoing a certified rehabilitation must adjust the depreciable value of the building to reflect the diminution in value associated with the conveyance of an easement, which in turn may change the amount of credit the owner is allowed. For historic property owners eligible for both the charitable deduction and the rehabilitation credit, the amount of the deduction allowed shall be reduced by an amount equal to the ratio of the sum of credits allowed, to the fair market value of the contribution (see sidebar). A property owner who may be eligible for both rehabilitation tax credits and charitable contribution deductions from an easement donation should seek certification of the rehabilitation project from the Department of the Interior before donating the easement.

Combining a Charitable Deduction and a Rehabilitation Credit:

Say the fair market value of a property =	\$1,000,000
Also, assume the aggregate amount of credits claimed by the taxpayer over five years =	\$100,000
The income tax deduction would be reduced by the ratio \$100,000/\$1,000,000, which =	0.1
Assuming the easement value is \$200,000, the deduction is reduced by \$200,000 x 0.10 which =	\$20,000
Such that the donor can only claim a deduction =	\$180,000

¹⁶ Lenders will determine if the fair market value of the property, less the easement value, is equal to the outstanding balance of the mortgage, and may also require a margin of safety. Also, some mortgages may prohibit property owners from diminishing the value of the property by granting an easement.

¹⁷ A tax credit lowers the tax amount owed whereas a tax deduction lowers the amount subject to taxation.

¹⁸ The U.S. Secretary of the Interior's *Standards for Rehabilitation* are available at: www.nps.gov/history/HPS/TPS/standards_guidelines.htm

In Michigan, a property owner may also be eligible for a state income tax credit of up to 25 percent under the Michigan Historic Preservation Tax Credit Program.¹⁹ Historic property owners must first apply for the 20 percent Federal tax credit. If approved, owners of properties located in historic districts or other designated areas are eligible for an additional 5 percent state tax credit. For commercial properties, owners are eligible for an additional 5 percent credit and can apply to the Michigan Department of History, Arts and Libraries for as much as another 15 percent, making the combined Federal-state tax credit potentially as much as 40 percent.²⁰ The credit is allowed in the year in which the rehabilitation of the property is completed and may be carried forward for up to 10 years if the credit exceeds the taxpayer's yearly tax liability.²¹ A tax attorney or accountant should be consulted when combining the two programs as timing of claims and conveyances are important for maximizing tax benefits.

Also, because the value of a property with an easement is based on its restricted use rather than its fully developable use, a historic preservation easement may also reduce local property taxes. While assessors will consider the existence of an easement when determining the taxable value of a property, in Michigan they are not required by law to reduce the assessed value of the property unless they are certain the easement actually reduces the fair market value of the property. As a result,

¹⁹ The tax credit can be claimed under Sec. 266 of the Income Tax Act, P.A. 281 of 1967, as amended (M.C.L. 206.1 *et seq.*), and Sec. 435 of the Michigan Business Tax Act, P.A. 36 of 2007, as amended (M.C.L. 208.1101 *et seq.*). The state tax credit could also be claimed under Sec. 39c of the Michigan Single Business Tax Act, P.A. 228 of 1975, as amended (M.C.L. 208.39c), repealed December 31, 2007.

²⁰ For more details on the state tax credit visit the Tax Incentives webpage of the Michigan Department of History, Arts, and Libraries at: www.michigan.gov/hpcredit.

²¹ The historic property must remain in possession of the owner for five years after the initial claim to avoid recapture of a percentage of the credit by the state.

property tax reduction cannot be guaranteed. The reason is that appraisals, such as before and after appraisals, consider limits on future use imposed by an easement, whereas tax assessments, by law, are based on present market value. As a result, a property owner may be able to claim a modest income tax deduction from the donation of a historic preservation easement, but not enjoy any property tax relief if the easement does not lower the property's value in terms of present use. For further details regarding income, estate, and property tax benefits of historic preservation easements consult a tax attorney.

What are the Responsibilities of the Protecting (Grantee) Organization?

The protecting organization, or grantee organization, must be recognized by the IRS as a qualified organization in order for the donor to be eligible for tax benefits. Protecting organizations must certify through a written agreement with the donor that they are qualified to accept, and have the commitment and resources to manage and enforce, easements. Generally, government and charitable (501(c)(3)) organizations, such as land trusts or historic preservation organizations, are considered qualified by the IRS.²²

²² State law identifies several types of organizations as eligible to receive historic preservation easements, including governmental entities, charitable or educational organizations, corporations, trusts, and other legal entities whose purposes include the preservation or restriction of historic sites and structures (see M.C.L. 324.2142).

Factors to Consider

A Property owner considering whether to donate an easement should consider the following questions:

- Has the property been designated as historically significant through National Register listing?
- Is the property in a Registered Historic District?
- Are there state or local tax benefits to donating an easement?
- What are the financial implications of donating an easement?
- How much public access would be required to claim a Federal income tax deduction?
- Is the easement-holding organization staffed by historic preservation professionals?
- Does the easement-holding organization charge the donor a fee to cover administrative costs incurred by accepting the easement?
- Does the easement holding organization have the time and resources to monitor the terms of the easement?
- How specific will the easement need to be in order to protect the property?

The protecting organization is responsible for administering the details established in the historic preservation easement. This includes the legal authority to enforce any restrictions on the use or alterations of the property. For instance, the historic preservation easement may prohibit the owner from making façade alterations or performing new construction without approval by the protecting organization, or may require the owner to make improvements or maintain the property in a specific manner, such as in conformity with Federal Rehabilitation Standards. The protecting organization is also required to monitor the property at least once a year and maintain written records of each visit. In some cases, the protecting organization may require the easement donor to make an additional financial contribution in the form of a stewardship fee to help administer the easement and cover certain expenses or legal fees. Visit <http://www.irs.gov/localcontacts/> or call 1-800-829-1040 for information on how to contact your

local IRS Taxpayer Assistance office regarding the status of a protecting organization.

How do Historic Preservation Easements fit with Local Ordinances?

Local municipalities can tailor plans and ordinances to foster the use and compatibility of historic preservation easements. A historic building may be eligible for a historic preservation easement if it's located within a registered historic district. In Michigan, local governments can adopt a historic preservation ordinance that establishes one or more historic districts within its jurisdiction, as permitted by the Local Historic Districts Act.²³ A local historic preservation ordinance controls all exterior work on properties located within the district. It would include remodeling properties and demolition deemed inconsistent with the character of a local historic neighborhood or commercial district. Establishing a local historic district not only potentially increases the number of historic resources eligible for historic preservation easements, it also enables a municipality to be eligible for financial aid and technical assistance through the U.S. Department of the Interior's Certified Local Government Program, provided the particular local government qualifies and has become a certified local government. As a certified local government, a municipality can benefit from the federal-state-local preservation partnership through improved capacity for identifying specific preservation projects and applying for federal grants to carry out the projects.

Historic preservation easements also work well with local planning and zoning tools such as transfer of development rights (TDR).²⁴ For

²³ 1970 P.A.169, as amended (M.C.L. 399.201 to 399.215).

²⁴ While there is no express statutory authority for TDR in Michigan, Section 503(3) of the Michigan Zoning Enabling Act (2006 P.A. 110, M.C.L. 125.3101 to 125.3702) authorizes approval of a planned unit development (PUD) with open

instance, a historic property in a central business district may have significantly fewer stories than is currently permitted in the district. These so called “air rights” to develop the building to the maximum allowable height could be sold on the open market to a property owner or developer in the same zone or a completely different zone. The rights to develop the historic property to the maximum allowable height are effectively transferred to the other property (the receiving property), allowing the structure on that property to be developed to a height taller than is typically allowed in the zoning ordinance. Such policies may improve the attractiveness of historic preservation easements; with the additional income from the sale of the air rights, the property owner may be more likely to donate the remaining development rights through a historic preservation easement.

Where can I find Additional Information about Historic Preservation Easements?

National:

National Park Service

Heritage Preservation Services
1849 C Street, NW (2255)
Washington, D.C. 20240
Phone: 202-513-7270
e-mail: nps_hps-info@nps.gov
Internet: www.nps.gov/history/hps/

Internal Revenue Service

Rehabilitation Tax Credit Compliance Unit
P.O. Box 12040
Philadelphia, PA 19105
Internet:
www.irs.gov/businesses/small/industries/article/0,,id=97599,00.html
Related NPS website:
www.nps.gov/history/hps/tps/tax/index.htm

National Trust for Historic Preservation

1785 Massachusetts Avenue, NW
Washington, D.C. 20036-2117
Phone: 202-588-6000 or 800-944-6847
Fax: 202-588-6038
Internet: www.preservationnation.org

State of Michigan:

Michigan State Historic Preservation Office

Michigan Historical Center
Department of History, Arts & Libraries
702 W. Kalamazoo Street
P.O. Box 30740
Lansing, MI 48909-8240
Phone: 517-373-1630
Fax: 517-335-0348
email: preservation@michigan.gov
Internet: www.michigan.gov/shpo

Michigan Historic Preservation Network

107 E. Grand River Avenue
Lansing, MI. 48906
Phone: 517-371-8080
Fax: 517-371-9090
email: info@mhpn.org
Internet: www.mhpn.org

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space that is not contiguous with the rest of the PUD,
essentially allowing for TDR-type transactions.