

LITIGATION POLICY

(Revised and Approved by the National Trust Board of Trustees, November 5, 2006)

This policy statement sets forth the considerations that should be evaluated in order to determine whether formal National Trust participation in historic preservation litigation is appropriate, to determine the appropriate level or degree of National Trust involvement, and to set forth the procedures that should be followed in making decisions to participate in litigation.

I. Considerations for Participation in Litigation

- A. The National Trust's participation in litigation will further one or more of the following goals:
 - 1. Securing the validity and effectiveness of federal, state, and/or local laws that protect historic resources, and advocating strong judicial and regulatory interpretations of those laws.
 - 2. Supporting the validity and effectiveness of private legal tools used for preservation, such as conservation easements.
 - 3. Protecting nationally significant historic properties.
 - 4. Challenging government decisions and policies that threaten historic properties, and supporting government decisions and policies that protect and preserve historic properties.
- B. The case should involve at least one of the issues in the field of historic preservation that is identified in the National Trust's Litigation Issue Priorities, attached as Addendum A. The President and the General Counsel may determine on a case-by-case basis that a litigation issue not included in Addendum A is nonetheless sufficiently important to warrant participation by the Trust.
- C. If the controversy involves protecting a specific property or site, the property or site should be listed or be eligible for listing in the National Register, or otherwise designated or determined eligible for designation by a state or local government as a landmark or as part of a historic district. The case should involve a clearly identifiable jeopardy to the historic character of the property or site in question.
- D. Adequate information concerning the controversy should be available on a timely basis.

- E. For site-specific litigation, there should be a local preservation constituency that favors National Trust intervention, and as a general rule there should not be a preservation constituency that opposes Trust intervention. If any local constituency opposes the Trust's involvement in a particular case, Trust staff should reach out in an effort to resolve the disagreement with the constituents. It is recognized, however, that in rare cases the Trust may find it appropriate or necessary to intervene where some members of the local preservation constituency do not favor intervention.
- F. The case should have a reasonable likelihood of success on the merits, in the view of the National Trust's General Counsel.
- G. National Trust participation should be likely to influence favorably the outcome of the dispute or influence a long range aspect of the issues in the case.

II. Degree of National Trust Participation

If it is determined that, on balance, the issues involved in the case would fit within the litigation criteria identified under Part I, the General Counsel will recommend to the President the appropriate level and form of National Trust involvement based on the criteria described below.

A. Amicus Curiae

In most cases, participating as amicus will be the most appropriate and effective role for the National Trust. Generally, amicus participation is appropriate where the existing parties are adequately represented and the case presents discrete legal issues that fit within the Trust's litigation criteria, while other issues in the case may be of less importance to the Trust. Since these cases are likely to go forward regardless of the Trust's involvement, amicus participation will ensure that the Trust's views are considered by the court in the final disposition of the case. A decision whether to participate as amicus will consider the following advantages and disadvantages:

Advantages of amicus role:

- Enables the Trust to strategically target a narrow set of issues in a larger, more complex case.
- Allows additional support for parties who do not have adequate time or space in their own briefs or arguments to do justice to key preservation issues.
- Enables the Trust to avoid being subjected to discovery in a factually complex case.
- Enables the Trust to distance itself from a party that it is supporting, if the Trust has differences with the party's strategy or counsel, or because of the Trust's relationship with the opposing party(s), or because of potential retaliation by an opposing party.
- Lower risk of SLAPP suits from an opposing party.

Disadvantages of amicus role:

- There may be a greater workload, since the preparation of a separate brief (or briefs) is required, rather than having the Trust join in a brief being drafted by another party. This factor may be outweighed, however, if participating as a party requires a more extensive staffing commitment due to discovery, or more extensive briefing than amicus participation would require.
- Burden of finding additional local counsel. Pro bono counsel is often very difficult to find, especially outside the major cities. If the party that the National Trust is supporting has very few options for low cost or pro bono counsel, finding separate local counsel for amicus participation may be even more difficult. (This consideration does not apply to federal appellate cases, where the National Trust may be admitted directly and does not need to secure local counsel.)
- No opportunity for the recovery of attorneys' fees if the case is successful.

B. Plaintiff or Intervening Plaintiff

Participation as a plaintiff is appropriate when the National Trust has a special interest in the case. For example, participation as a plaintiff will usually be appropriate when the case involves (i) a challenge to federal regulations or policies; (ii) a major site-specific controversy, such as a highway project in which the Trust has been involved in the administrative process, or (iii) legal issues that have or could have significant national implications. Under these circumstances, participation as a plaintiff, rather than as amicus curiae, may involve less work for the Trust's staff lawyers for the reasons stated above (i.e., no need to prepare separate briefing rather than joining in a brief prepared by another plaintiff. In addition, the potential exists to recover attorneys' fees in the event of a successful outcome. The Trust shall coordinate with other national, state, and local organizations, as appropriate, and efforts should be made to involve partner organizations as co-plaintiffs and as contributors to the anticipated expenses of the case.

The most important factors to assess in deciding whether the National Trust should file suit as a plaintiff include the significance of the case, the history of the Trust's involvement with the issue, the likelihood of success on the merits, the roles of the Trust's state and local partners, and the impact of the case on the Trust's resources. It is also important to evaluate the ways in which participation by the Trust would influence the outcome of the case and its long-term impact.

Prior to involvement as a plaintiff, it is important for the Trust's legal staff to have a sufficient level of control over the litigation. Good working relationships with capable outside counsel, and an opportunity to review and edit any written submissions, are important. The Trust shall also review anticipated litigation expenses and, if possible, obtain written commitments from co-plaintiffs in advance.

Participation as an intervening plaintiff may also be an option, especially where initial developments in a case show that intervention by the Trust would substantially strengthen the case legally or strategically. However, due consideration should be given to the risk of a protracted battle over the intervention itself.

C. Intervention as a defendant.

In some cases, the Trust may be invited to intervene as a defendant. Examples may include:

- a federal agency being sued for a preservation-sensitive management decision; and
- a local government being sued by a developer or property owner challenging the denial of a demolition permit.

In the latter case, the preferred role for the Trust would be participation as amicus rather than as an intervening defendant. These cases would typically involve a coalition of intervenors, which would normally include our state and local preservation partners.

D. Alternative Roles

If the Trust is not able to participate directly in a litigation matter, or decides not to participate, alternative roles should be considered. These include the following:

- Assisting local groups in finding preservation counsel on a pro bono or reduced fee basis;
- Supplying pleadings, briefs, and research from other cases for preservation counsel;
- Consulting with preservation counsel and providing ongoing legal and strategic advice;
- Preparing an affidavit or testifying as an expert witness; and/or
- Preparing or supplying a comment letter for the parties to include in the record or as an exhibit to a brief.

In some cases, it may be advantageous for the Trust to sit out the first round of litigation, but to participate as amicus on appeal, after the facts and the legal issues have been refined and narrowed.

III. Statement of Pro Bono Policy

It is the policy of the National Trust that outside counsel representing the National Trust in historic preservation litigation shall be on a pro bono basis, that is, without charge for legal fees, consistent with the applicable rules of professional responsibility and ethical restraints. The reason for this pro bono policy is that the effectiveness of the Legal Defense Fund would be substantially diminished by diverting resources to the payment of legal fees, since any single case could easily require legal fees equivalent to the entire annual salary of a staff attorney. Through the use of pro bono counsel, the Trust is able to increase exponentially the number of cases in which it is able to participate.

This pro bono policy may be waived only under the following circumstances:

- After due diligence, the Trust's General Counsel is not able to secure pro bono representation;

- Representation is obtained at a rate significantly below market rate (i.e., less than \$100 per hour), and with a cap limiting total fees; and
- The waiver is approved by the President, with the concurrence of the Vice President of Business and Finance.

In many cases, the Trust is able to partner with other national, state, and/or local groups who retain outside counsel at either market or below-market rates, and the outside counsel agrees to represent the Trust as well. In those cases, the Trust may agree to assume responsibility for all of the out-of-pocket expenses incurred by outside counsel, rather than sharing the expenses among the groups, since the Trust would not be contributing to the cost of fees for legal services.

This pro bono policy is applicable only to litigation in which the Trust enters on a voluntary basis. Defense of litigation brought against the National Trust by another party shall not be limited to pro bono counsel or inside counsel, although pro bono counsel may be sought as available and appropriate to the circumstances.

IV. Alternative Dispute Resolution

The staff should explore, at the earliest possible stage, the possibility of using advocacy techniques that lead to dispute resolution as an alternative to litigation, if appropriate and if time permits. The LDF has participated actively in a number of successful ADR initiatives, both in the context of consultation under Section 106 of the National Historic Preservation Act, and in other contexts. These include a wide range of issues, such as the Washington, DC Convention Center; Tenth Street Bridge in Great Falls, Montana; Paris Pike in Kentucky; Spring-Sandusky Interchange Project in Columbus, OH; San Diego Padres Stadium; and others. The participation by LDF staff has often been central to the success of the process, and staff is encouraged to continue to look for strategic opportunities to use its expertise in this way.

V. Procedures for Making Litigation Decisions

Any decision to participate formally in litigation, either as amicus or as a party, will be made by the President, based on a litigation memorandum prepared by the General Counsel. The memorandum will address the ways in which the criteria of this Litigation Policy are satisfied by the Trust's participation in the case. In addition, the memorandum will:

- (1) summarize the factual background and legal issues in the case;
- (2) identify the parties;
- (3) assess the likelihood of success on the merits;
- (4) provide a history of National Trust involvement in the controversy;
- (5) analyze the various local interests involved, including, where appropriate, the views of statewide and local preservation groups, the SHPO, the Advisory Council, local governments, Trust Advisors, and Trustees;

- (6) identify political interests; and
- (7) assess the impact on staff and financial resources, including the availability of pro bono counsel where necessary.

Recognizing that litigation opportunities often require quick decisions, emergency situations may arise where time does not permit the completion of a formal litigation memorandum in advance. In those instances, the President may personally authorize the National Trust's participation in litigation that satisfies the criteria in this policy, based on a discussion with the General Counsel and/or a draft litigation memorandum, provided that the memorandum will be completed and formally approved by the President promptly after the litigation activity commences.

The Public Advocacy Committee of the Board of Trustees will be regularly informed about the Legal Defense Fund's litigation activities.

VI. Amendments and Revisions

This policy may be amended from time to time by the Board of Trustees.

Addendum A (Litigation Issue Priorities) may be revised from time to time by the President in consultation with the Vice President & General Counsel as they may deem necessary or appropriate. The Public Advocacy Committee of the Board of Trustees will be notified of any such revisions.

ADDENDUM A

LDF LITIGATION ISSUE PRIORITIES

I. Federal Laws

The National Trust's Legal Defense Fund will continue vigorously to enforce and defend the following federal laws that serve to protect historic resources:

A. National Historic Preservation Act

1. Secure broad legal interpretations of Section 106 jurisdiction, and oppose overly narrow and incorrect interpretations of a "Federal Undertaking"
2. Promote effective and strong enforcement Memoranda of Agreement (MOA's), including enforcement by non-signatories
3. Challenge actions reflective of an agency-wide non-compliance problem, such as the adoption of regulations or policies that undermine Section 106.
4. Challenge actions that foreclose the Advisory Council's opportunity to comment on an undertaking.
5. Secure strong judicial interpretation of agency responsibilities with respect to National Historic Landmarks under Section 110(f).
6. Challenge actions involving anticipatory demolition to defeat Section 106 consultation.
7. Secure strong judicial interpretation of agency stewardship responsibilities with respect to historic properties under their control, under Section 110.

B. Department of Transportation Act -- Section 4(f)

1. Urge strong application of the "feasible and prudent" alternative standard
2. Secure strong judicial protection against projects having indirect impacts or involving constructive use of historic sites.
3. Secure strong protection for Historic Bridges through Section 4(f) and the Surface Transportation and Uniform Relocation Assistance Act (STURAA))
4. Challenge administrative regulations or policies that weaken Section 4(f)
5. Challenge segmentation as a means of defeating federal jurisdiction under Section 4(f)

- C. National Environmental Policy Act (NEPA) and related environmental laws which protect historic resources.
- D. Federal Land Policy & Management Act (FLPMA).

II. State Historic Protection Laws

Many states have adopted laws that are modeled after Section 106 of the NHPA (requiring state agencies to consult with the SHPO and “take into account” effects on historic properties), or Section 4(f) of the Department of Transportation Act (requiring a showing of “no feasible and prudent alternatives” prior to allowing harm to historic properties). For example, Connecticut, Florida, Kansas, Minnesota, New Jersey, and New Mexico all have laws with a 4(f)-type standard, though judicial interpretations vary. In addition, states such as California and New York have strong state NEPA laws (CEQA and SEQRA, respectively), which are often effectively used to protect historic properties. The LDF will seek to take advantage of opportunities to become involved in enforcing and interpreting these state laws.

III. Local Ordinances

- A. Challenge local administrative actions that have the effect of undermining or circumventing the integrity of local ordinances nationwide (e.g., revoking landmark designation, misapplication of exemption standards such as hardship or special merit; and significant procedural violations).
- B. Uphold local government actions implementing preservation ordinances, in response to challenges by property owners or developers.

IV. State and Local Legal Tools to Address Sprawl

A number of states and local governments have laws requiring that local permit decisions be consistent with comprehensive plans. The LDF plans to seek opportunities to enforce such planning laws in communities seeking to fight the adverse effects of sprawl.

V. Constitutional Issues:

- A. Defend against constitutional challenges to federal regulations, and to state and local environmental and land use regulation, including takings challenges and first amendment challenges.
- B. Challenge funding discrimination against religious properties. The LDF has taken a leadership role in advocating equal treatment for religious and non-religious historic properties, both by opposing religious exemptions from neutral land-use laws, and by defending local governments that regulate to protect historic religious properties from demolition. Some federal and state agencies discriminate against religious properties in operating financial assistance programs, claiming that the establishment clause prohibits public funds from being used by a religious institution under any circumstances,

even if the funds would be used for a non-religious purpose and a similarly situated non-religious institution would be eligible for funds. The LDF will continue to challenge these policies as a high priority for our advocacy program.

VI. Private Legal Tools for Preservation

Support the validity and effectiveness of private legal tools used for preservation, such as conservation easements. Ensure the appropriate valuation and enforcement of preservation easements.

VII. Protection of Specific Types of Historic Resources

- Archaeological Sites
- Sites of significance to Native Americans
- Bridges
- Lighthouses
- Railroad-related properties
- Religious Properties
- Shipwrecks

VIII. Procedural Issues

The LDF will oppose the use of procedural and other non-merits issues from imposing threshold obstacles or undermining the enforcement of preservation laws, including but not limited to the following: restrictive application of standing requirements for plaintiffs; prohibitive or unjustified security bonds; restrictive intervention standards; overly burdensome standards for entitlement to equitable remedies (including injunctive relief); narrow interpretation of attorney's fees statutes; and timeliness issues - ripeness, mootness, exhaustion of administrative remedies.

IX. SLAPP Suits

The LDF will oppose the threat of SLAPP suits (Strategic Lawsuits Against Public Participation) that seek to punish or deter individuals and organizations from using legal tools to protect historic resources. SLAPP suits may be couched in the form of claims such as defamation, antitrust, and tortious interference with business relations.