

LEGAL DEFENSE FUND



**NATIONAL TRUST**  
for HISTORIC PRESERVATION

**NATIONAL TRUST LEGAL DEFENSE FUND**

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## LDF UPDATE – FEBRUARY 2004

The National Trust **Legal Defense Fund** responds on many fronts to help local communities around the country protect their historic character, their neighborhoods, their unique places, and their quality of life. The LDF team works with preservation advocates all over the country, not only in the courtroom, but also in city council chambers and executive offices at the federal, state, and local levels, to protect the irreplaceable qualities that make our communities special. Our first goal is to avoid the need to go to court at all, by using advocacy to encourage better government decisions that protect historic sites, neighborhoods, and landscapes. When necessary, however, the **Legal Defense Fund** is prepared to litigate to protect the Nation's historic resources.

The following update summarizes a few of the recent developments in our current advocacy efforts. These cases represent only a fraction of the preservation controversies we work to resolve each year. (More information on recent LDF developments is available on the Trust's website at [HTTP://WWW.NTHP.ORG/LAW/LDF.HTML.](http://www.nthp.org/law/ldf.html))



### **710 FREEWAY EXTENSION LOSES ITS FEDERAL APPROVAL; PRESERVATION ADVOCATES CELEBRATE VICTORY**

*City of South Pasadena, et al. v. Rodney Slater, et al.,*  
56 F. Supp. 2d 1095 (C.D. Cal. 1999) (preliminary injunction under federal law);  
*City of South Pasadena, et al. v. California Transportation Comm'n, et al.,*  
No. 98 CS 01329 (Cal. Super. Ct.) (state law claims pending)  
STATUS: *Federal injunction issued; FHWA suspends approval*

The last days of 2003 saw an incredible turn of events in the long-running battle to stop the Route 710 freeway extension through Pasadena, South Pasadena, and El Sereno in southern California. In late December, the Federal Highway Administration (FHWA) suspended its 1998 approval of the freeway, and advised the California DOT ("CalTrans") that a full Supplemental Environmental Impact Statement (EIS) would be required before the project could be considered further. Trust President Richard Moe characterized the FHWA letter as a "stake through the heart" of the project, in light of the seemingly insurmountable costs of going forward. The proposed \$1.4 billion freeway would have demolished almost 1,000 homes and 6,000 trees in a six-mile area, cutting through the heart of four National Register historic districts and skirting along the boundaries of two others. In response to a lawsuit filed in 1998 by the Trust, the City of South Pasadena, and a coalition of other groups, a federal district court in L.A. issued an injunction against the project more than four years ago,



Historic homes in the Route 710 freeway corridor in El Sereno. [Friezer Photography, Los Angeles]

on grounds that included Section 4(f), NEPA (National Environmental Policy Act), and the Clean Air Act. If CalTrans decides to go forward, the new EIS will have to include consideration of a full-bore tunnel alternative, the existence of a recently opened light rail line from Pasadena to downtown L.A., and a number of additional historic properties in the corridor that were not previously evaluated.

### LEADING THE FIGHT TO SAVE SECTION 4(F)

Section 4(f) of the 1966 Department of Transportation Act – one of the bases for the federal injunction in the Route 710 case – requires road-builders to demonstrate that there are “no prudent and feasible alternative[s]” to federally assisted transportation projects that would use historic sites, parks, recreation areas, or wildlife refuges, and to include “all possible planning to minimize harm”



As a result of Section 4(f), this overhead highway in Fort Worth, TX has been torn down, and the historic railroad buildings along Lancaster Ave. are being restored.

to those sites. Congress is currently considering amendments to the transportation bill – due to be completed in late February – that would significantly weaken the Section 4(f) standard that helps to protect so many historic sites from demolition and other adverse impacts. The Trust has taken the national leadership role in opposing amendments that would reduce the protection afforded by Section 4(f). We have also reached out to transportation agencies to seek common ground on solutions that would improve the way they administer Section 4(f) without weakening the fundamental principles of the law. Working closely with the Trust’s Policy and Communications Departments, we have developed a variety of advocacy pieces used by our grass-roots network and by legislative committee staff.

### ENCOURAGING PUBLIC INVOLVEMENT IN COMMENTING ON SECTION 106 REGULATIONS

The Trust has also taken a leadership role in encouraging public comment on a controversial proposal by the Advisory Council on Historic Preservation (ACHP) to weaken the Section 106 regulations by permanently eliminating the ACHP’s authority – which dates back twenty years – to make binding determinations about whether a project will adversely affect historic properties. The LDF took the lead in developing the Trust’s comments, filed just before Thanksgiving, as well as getting the word out to preservation groups around the country about the importance of commenting on the proposed regulations. As a result of the Trust’s efforts, more than 155 comments were submitted to the ACHP.

The proposed amendments would eliminate the ACHP’s authority under Section 106 when the ACHP disagrees with another federal agency’s finding that an undertaking will not harm historic properties. The Trust has been concerned that this element of the proposed amendments provides insufficient incentives for federal agencies to resolve disagreements about historic properties and effects, rather than simply ending consultation. The result would significantly weaken the effectiveness of the Section 106 process.

The proposed amendments could also generate a significant increase in litigation under Section 106, because judicial review would be the only recourse to challenge arbitrary and capricious agency

findings that historic properties would not be harmed. This would place an enormous burden on the National Trust and other private historic preservation groups, who would be required to resort much more often to the costly and wasteful remedy of litigation in order to enforce compliance with Section 106. Other Trust recommendations included:

- developing procedural safeguards to discourage agencies from choosing to proceed without resolving disagreements about historic properties or effects
- clarifying the difference between “no historic properties affected” and “no adverse effect”
- providing additional guidance and safeguards for the Office of Surface Mining and Environmental Protection Agency in their oversight of delegated permitting programs
- clarifying the definition of undertaking

### TRUST FILES AMICUS MOTION IN SUPPORT OF INJUNCTION REQUEST IN NEW ORLEANS WAL-MART APPEAL

*Coliseum Square Ass’n v. Martinez, et al.*,  
No. 02-2207 (E.D. La. April 11, 2003),  
Appeal pending, No. 03-30875 (5<sup>th</sup> Cir.)

In the first week of 2004, the Trust filed an *amicus* motion in support of a request for an injunction pending appeal by the coalition of New Orleans preservation groups challenging the construction of a Wal-Mart in the historic Lower Garden District. The Wal-Mart is a component of a major HOPE VI project, funded by the U.S. Department of Housing and Urban Development (HUD), which is intended to replace the 1500-unit St. Thomas public housing development with a mixed-income and mixed-use redevelopment.

The Trust participated actively in the administrative process for the project, including Section 106 consultation, and the Trust also testified at local public hearings. The Section 106 process revealed significant adverse effects in the areas of traffic, drainage, vibration damage to historic properties, economic harm to businesses in the historic districts, incompatible design of the Wal-Mart store, and destruction of 1500 historic public housing units.

The federal lawsuit, among other things, challenges HUD’s failure to comply with the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS). The Trust also anticipates filing an *amicus* brief on the merits in connection with the appeal, together with the American Planning Association.



Opposition to the Wal-Mart has been strong from local businesses on Magazine Street in New Orleans’ Lower Garden District.

### PRESERVATION-SENSITIVE DEVELOPER SELECTED FOR FORMER ARMY ANNEX AT FOREST GLEN, MD

*National Trust for Historic Preservation v. Blanck*,  
938 F. Supp. 908 (D.D.C. 1996),  
*aff’d mem.*, 203 F.3d 53 (D.C. Cir. 1999)  
*reported in full*, 1999 U.S. App. LEXIS 29703 (D.C. Cir. Oct. 22, 1999)  
STATUS: *Case Lost; but historic district preserved*

In May 1994, the Trust and a local preservation group sued the Army, based on its decades of “demolition by neglect” of two dozen historic buildings in the Forest Glen Annex to the Walter Reed



Forest Glen Annex to the Walter Reed Army Medical Center in Silver Spring, MD, in disrepair, but a new developer has been selected to rehabilitate and redevelop the district.

Army Medical Center in Silver Spring, MD. Although the court did find that the Army repeatedly violated Sections 106 and 110 of the NHPA from 1984-1992, the court concluded that Section 110 does not impose any requirements on federal agencies beyond the requirements of Section 106.

Despite losing the lawsuit, however, Forest Glen has become a classic example of preservationists “losing the battle but winning the war.” First of all, the demolition by neglect at Forest Glen became notorious within the Army as an embarrassment the agency is determined to avoid ever repeating.

More recently, the property has been declared excess by the Army, and Montgomery County, MD has just selected a new developer, who is expected to develop 225 residential units in the 32-acre district, while rehabilitating the historic properties. The redevelopment will be subject to review by Montgomery County’s historic preservation commission. The expectation is that the property will be redeveloped in a way that will respect its historic integrity and allow the public to appreciate the many unique historic properties at Forest Glen. Originally, the property was conceived as a luxury hotel, but was converted to a girls’ school, the National Park Seminary, in 1894. The campus contained a variety of eclectic architectural designs, including a Japanese pagoda, a Swiss chalet, a Dutch windmill, and an English castle. During World War II, the property was acquired by the Army for use as an annex to the Walter Reed Army Medical Center.

## TRUST INTERVENES IN LAWSUIT TO SAVE STREATOR SCHOOL IN ILLINOIS

*Landmarks Preservation Council of Illinois, et al. v. Crossland, et al.,*

No. 03 MR 167 (Ill. Cir. Ct. Oct. 15, 2003)

STATUS: *Case Lost*

The Trust recently intervened in a case with the Landmarks Preservation Council of Illinois (LPCI) in an effort to protect the historic Streator School, which dates back to 1923. The school district’s plans for expansion of the school included the demolition of the oldest parts of the building. The school district had entered into a Memorandum of Agreement (MOA) with the Illinois Historic Preservation Agency (IHPA) and the Illinois Capital Development Board (ICDB), because the state funding of the partial demolition required compliance with the Illinois State Agency Resources Preservation Act.

However, the Act requires the IHPA to determine whether or not there is a “prudent and feasible” alternative to demolition, and if the IHPA and the applicants disagree with that finding, the Act requires applicants to conduct a public meeting and submit the undertaking to a Historic Preservation Mediation Committee. The IHPA concluded that there was a “viable” preservation alternative for the Streator School that would avoid any “adverse effect” under the Act. Nonetheless, the IHPA signed the MOA, which allows for demolition of historically significant parts of the Streator High School, without making any finding as to whether or not there is a “prudent and feasible” alter-



Streator High School, dating back to 1923, in Streator, IL. [LPCI]

native to demolition, thus failing to comply with the procedural or substantive requirements of the Act. Although the Illinois Circuit Court ruled against the preservation groups, a decision was made not to appeal the case because of strong local political pressure deemed likely to affect the outcome of the appeal. Rachlis, Durham, Duff & Adler represented the Trust and LPCI.

## TRUST SEEKS U.S. SUPREME COURT REVIEW OF FEDERAL APPEALS COURT DECISION DECLINING TO PROTECT HISTORIC PROPERTIES AND OTHER SITES FROM COAL MINE SUBSIDENCE

*Citizens Coal Council, et al. v. Norton,*  
193 F. Supp. 2d 159 (D.D.C. 2002),  
*rev'd*, 330 F.3d 478 (D.C. Cir. 2003),  
*petition for cert. filed*, No. 03-834 (filed Nov. 2003)

STATUS: *Case lost on appeal; petition for certiorari filed with U.S. Supreme Court*

In November 2003, the Trust and a coalition of co-plaintiffs filed to seek review by the U.S. Supreme Court of a decision by the U.S. Court of Appeals for the D.C. Circuit, which upheld a regulation issued by the Secretary of the Interior eliminating protection for historic properties and other sensitive sites when damage is threatened from subsidence caused by underground coal mining, as opposed to surface strip mining. Subsidence results when the entire landscape above a coal seam drops several feet once the coal is removed. Subsidence can cause irreparable harm to historic properties, which are especially vulnerable to vibration damage.

The Surface Coal Mining and Reclamation Act (SMCRA) prohibits surface mining, as well as the "surface impacts" of underground mining, within National Register-listed historic properties, National Parks, National Forests, and other sensitive sites. In 1999, however, the Office of Surface Mining (OSM) issued a set of regulations interpreting the statute in a way that would remove the prohibition on surface impacts of underground mining in these sensitive areas. The Trust and a coalition of environmental and mining groups challenged the OSM regulations as inconsistent with the requirements of SMCRA. Although the district court agreed and struck down the regulations, the federal appeals court reversed.



The Thomas Kent, Jr. Farm, in Greene County, PA, a National Register property directly impacted by surface subsidence from underground coal mining. [Laurine & Murray Williams]

The petition for certiorari was prepared by the Public Citizen Litigation Group, with the assistance of Citizens Coal Council, Earthjustice, Kentucky Resources Council, and National Wildlife Federation.



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