NATIONAL TRUST FOR HISTORIC PRESERVATION®

National Trust Legal Defense Fund

SEPTEMBER 2009 UPDATE

GUARDING AMERICA'S HERITAGE . . .

The National Trust **Legal Defense Fund** works with local preservation advocates across the country, fighting 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 **LDF** is prepared to litigate to protect the Nation's historic resources.

This update, summarizing a few of our current advocacy efforts, represents only a fraction of the controversies we work to resolve each year. More information is available on the Trust's website: www.preservationnation.org/legal.

IN THIS ISSUE:

New Litigation 1

Update on Litigation 3

Other Advocacy................. 6

Update on Public Lands 6

Easements Update............ 9

Contributors & Supporters 12

NEW LITIGATION . . .

NATIONAL TRUST JOINS LOCAL PRESERVATIONISTS IN LAWSUIT TO PROTECT WILDERNESS BATTLEFIELD FROM BIG-BOX SUPERSTORES

On September 23, the National Trust and local preservationists, including Friends of the Wilderness Battlefield, filed a lawsuit to stop a proposed Wal-Mart that would be located on and adjacent to significant Civil War battlefield land. The Orange County Board of Supervisors voted to approve Wal-Mart's special use permit for the construction of 240,000 square feet of commercial development on Wilderness Battlefield and immediately adjacent to the Fredericksburg & Spotsylvania National Military Park. The lawsuit challenges the Board's decision on the basis that: (1) it was arbitrary and capricious; (2) there was an invalid recommendation from the planning commission to the Board; (3) the zoning ordinance relied on for the permit failed to comply with Virginia law because it failed to include historic preservation provisions; and (4) the special use permit unlawfully requires the construction of a commercial road as access for the proposed site.

Wilderness Battlefield is one of the most significant Civil War battle sites in the nation. In May 1864, almost 200,000 soldiers met at the Battle of the Wilderness, marking the first clash between legendary generals Robert E. Lee and Ulysses S. Grant. After two days of intense fighting, nearly 29,000 Americans had been killed, wounded, or captured. In 1992, a congressionally-

Scene at Wilderness Battlefield [NPS]

established advisory commission concluded that the Wilderness and Chancellorsville Battlefields were among the elite class of battlefields that possess the highest level of historical significance and merit the highest priority for preservation.

In spite of the site's significance, and over the objections of Virginia Governor Tim Kaine, several U.S. Representatives and more than 250 notable historians, including David McCullough and James McPherson, the Board approved Wal-Mart's special use permit to construct the superstore. The Virginia Department of Historic Resources and the National Park Service also reaffirmed that the Wal-Mart site is on battlefield land, and raised concern over the site's impact to the battlefield. The proposed superstore would severely degrade the wooded setting of the Wilderness Battlefield, promote commercial sprawl, and drastically increase traffic through the heart of the national park.

The National Trust joined the lawsuit because the proposed site is unsuitable given its importance to our nation's history, and alternative sites are available that would be more suitable. The law firm of Arnold & Porter is representing the plaintiffs *pro bono*.

NEW LAWSUIT CHALLENGES FEDERAL HIGHWAY ADMINISTRATION APPROVAL OF A MASSIVE BRIDGE PROJECT CONNECTING LOUISVILLE AND INDIANA

On September 4, the National Trust and River Fields filed a lawsuit challenging the FHWA's 2003 decision to approve the construction of two new bridges over the Ohio River connecting Louisville, Kentucky and the State of Indiana. The proposal, known as the Louisville Ohio River Bridges Project, includes one new bridge in downtown Louisville and another located eight miles upriver to the east, which would form an outer beltway around the city. The project also includes the reconstruction and expansion of a massive downtown interchange known as "Spaghetti Junction." Throughout the decisionmaking process, the preservation groups expressed concerns that the eastern bridge would generate sprawl in rural Indiana and disinvestment in downtown Louisville.

The lawsuit brings claims under NEPA and Section 4(f) of the Department of Transportation Act, challenging the conclusion that the only reasonable alternative was an eastern bridge *and* a downtown bridge. The Section 4(f) claims focus on FHWA's failure to adequately consider constructive use impacts – proximity impacts such as vibration, noise, and visual effects – associated with the two bridge alternative, and failure to select less harmful alternatives (one bridge-only, or a less harmful alignment for the eastern bridge).

At risk are Historic districts and major historic estates in Kentucky, and historic neighborhoods and rural properties in Indiana, all of which will be harmed by construction, vibration, noise, visual intrusion, traffic, and sprawl, as the new highway would be built immediately adjacent to them. Much of the harm caused by the selected alternative could be avoided by selecting a one-bridge alternative. Alternatively, there is an alternative alignment for the eastern bridge that would have avoided taking any historic properties.

It is worth noting that in the six years since FHWA issued its final decision for the project, no major progress has been made because of the extraordinary costs and lack of funding. In fact the only reason for filing the lawsuit at this time was the imminent expiration of the six-year statutory deadline for raising any legal challenges. Currently, the price-tag is estimated at $4.1 billion, which eclipses all of the federal transportation funds available to the two states. The recent proposal by Indiana and Kentucky to use toll-funding to finance the eastern bridge would require FHWA to re-open its decision, because the imposition of tolls would dramatically alter the traffic projections for the bridges. Ultimately, the Trust is hopeful that the lawsuit will encourage FHWA to re-open the decision on the project in order to evaluate better transportation solutions.

LDF ASSISTS THE CITY OF SEATTLE IN DEFENSE OF ITS PRESERVATION ORDINANCE AGAINST A VAGUENESS CLAIM

Satterlee House, Seattle [Joe Mabel]

On May 13, the National Trust filed an amicus brief with the Washington State Court of Appeals in support of the City of Seattle in its ongoing defense of the Landmark Preservation Board's decision to deny a property owner's application to build three large houses on the sloping front lawn of a designated, 1906 historic property known as the Satterlee House. The property, a three-story "Seattle Classic Box," sits on the crest of a one-acre lot in West Seattle and faces towards Puget Sound. The Board rejected the application by concluding that the size and scale of three new houses on the front lawn would adversely affect the unique features and characteristics of this landmark property.

Although the City was successful in upholding the Board's decision before a hearing examiner and the trial court, the property owner has pressed forward in an effort to overturn the Board's ruling, and now maintains that, under *Hanna v. City of Chicago* (described below), the preservation board applied unconstitutionally vague standards in the review and denial of their application.

Drawing from our work in *Hanna*, the National Trust's brief emphasized the widespread and important practice of using contextual—rather than prescriptive—standards in reviewing proposed alterations and new construction on historic sites. It also explained why historic preservation does not lend itself to bright-line, formulaic rules, pointing to the 42 court decisions in 24 states and the District of Columbia that, in contrast to *Hanna*, have upheld preservation standards against vagueness challenges.

Oral argument was held on June 10, 2009, but the Court of Appeals has not yet issued its decision.

UPDATE ON LITIGATION . . .

D.C. FEDERAL COURT TRANSFERS TO NEW ORLEANS THE NATIONAL TRUST'S LAWSUIT TO PROTECT NEW ORLEANS' MID-CITY HISTORIC DISTRICT FROM DEMOLITION FOR TWO NEW HOSPITAL COMPLEXES

Charity Hospital, New Orleans. [NTHP]

On July 27, the U.S. District Court for the District of Columbia granted a motion by the Department of Veterans Affairs and FEMA to transfer the National Trust's lawsuit to the U.S. District Court for the Eastern District of Louisiana. The federal defendants objected to the National Trust's choice of venue, arguing that Louisiana federal court is the appropriate venue for the lawsuit because the challenged project is occurring in New Orleans. The Trust defended its choice of venue based on the fact that the agencies' decisions were made in Washington, D.C., and that the Trust had difficulty finding legal representation in New Orleans. Ultimately, the court relied on the high level of local public interest in the project as the basis for transferring the case to New Orleans.

The National Trust filed its lawsuit against the VA and FEMA, challenging the final selection of a 67-acre site in the Mid-City Historic District in New Orleans for construction of two major new medical

centers—one for the VA, and the other for Louisiana State University (LSU), which would be funded in part by a FEMA grant for damage to historic Charity Hospital. The proposed new hospitals would require the acquisition and demolition of at least 25 square blocks within the City of New Orleans, including at least 15 square blocks and up to 165 contributing buildings within the Mid-City Historic District, which is listed in the National Register. The VA and LSU proposal would also displace more than 600 people. Many of the homes and businesses within the proposed footprint of the project, as well as a historic 1879 school, have already been painstakingly rehabilitated by their owners since Hurricane Katrina, and are now threatened with destruction.

This lawsuit is focused on the need for the VA and FEMA to evaluate and potentially adopt other alternatives, including reusing Charity Hospital, and/or consolidating the new facilities on a much smaller parcel, which would avoid or minimize the destruction of historic properties. Now that the case has been transferred to New Orleans, it is anticipated that the City and the State will be joined in the case, based on their failure to comply with federal requirements in allocating HUD Community Development Block Grant funds for acquiring and demolishing historic properties. As the litigation slowly progresses, the Trust continues to be involved in the design review process for the new medical centers. However, one recent disturbing development was the revelation by LSU that it plans to use seven of the 15 square blocks it will demolish for surface parking lots! Such decisions only underscore the needless destructiveness of the project.

The National Trust is represented *pro bono* by the Institute for Public Representation at the Georgetown University Law Center. Trust Advisor James Logan is also serving as local counsel.

ILLINOIS SUPREME COURT DENIES REVIEW OF CHICAGO VAGUENESS CHALLENGE AND REMANDS CASE TO TRIAL COURT

Hanna property, Chicago [NTHP]

We reported in May that the Illinois Appellate Court had sent shock waves through the preservation community by ruling on March 6 in *Hanna v. City of Chicago*, that Chicago's landmark preservation ordinance could potentially be unconstitutional. Specially, the court refused to dismiss a case brought by individual residential property owners in two Chicago historic districts, alleging that the criteria for designating city landmarks and historic districts were unconstitutionally vague and that the city had unlawfully delegated legislative authority to the Commission on Chicago Landmarks. On May 28, the Illinois Supreme Court denied the city's petition for leave to appeal the decision, without explanation, and remanded the case back to the trial court in July. The lower court will now have an opportunity to review and decide the plaintiffs' vagueness claims.

Last spring, with the assistance of *pro bono* counsel provided by Neal & Leroy, LLC, the National Trust, Landmarks Illinois, Preservation Action, the National Alliance of Preservation Commissions, and 16 other amici, filed a statement in support of the city's petition for review before the Illinois Supreme Court. Although unsuccessful, the fact remains that *Hanna* is a rogue decision. Courts have upheld preservation ordinances similar to Chicago's, and rejected vagueness challenges and unlawful delegation of administrative authority challenges, in at least 42 states and the District of Columbia.

The National Trust continues to watch the case closely, and is likely again to seek to participate as *amicus curiae* as the case proceeds following the recent remand.

FEDERAL COURT IN VIRGINIA RULES AGAINST CONSERVATION GROUPS OVER I-81 EXPANSION THROUGH VIRGINIA'S SHENANDOAH VALLEY; PLAINTIFFS REQUEST THAT THE COURT REVISE ITS DECISION

Belle Grove Plantation [Belle Grove, Inc.]

On September 3, 2009, the U.S. District Court for the Western District of Virginia granted summary judgment in favor of the Federal Highway Administration (FHWA) in a lawsuit filed by the Trust, Coalition for Smarter Growth, Shenandoah Valley Network, Scenic Virginia, and Sierra Club, challenging FHWA's decision approving the expansion of I-81 through the Shenandoah Valley in Virginia. The court rejected the plaintiffs' argument that FHWA improperly invoked a 180-day statute of limitations applicable to the Tier 1 Final Environmental Impact Statement (FEIS) in an effort to prospectively foreclose alternatives that will be considered in future Tier 2 decisions for individual segments of the highway.

The lawsuit, filed in June 2007, argued that FHWA approved a Tier 1 FEIS in violation of NEPA and due process. Specifically, a freight rail alternative was not included in the Tier 1 FEIS, even though such an alternative may reduce potentially damaging impacts associated with the I-81 expansion. The lawsuit also included a constitutional due process claim, because the public did not have adequate notice of which alternatives may be foreclosed as a result of the accelerated statute of limitations for challenging the Tier 1 EIS.

The plaintiffs were so concerned with the court's decision that they filed two motions asking the court to amend or alter its judgment and allow them to renew their motion to amend the complaint on September 18. The motion to amend or alter the judgment argues that the court failed to rule on plaintiffs' claim that FHWA's Tier 1 decision to limit future Tier 2 alternatives violates NEPA and plaintiffs' ability to raise such claims in the future. Plaintiffs argue that this claim was part of their first amended complaint and fully briefed by the parties. If the court determines that the claim was not part of the first amended complaint, then plaintiffs have requested that the court permit them to amend the complaint to specifically articulate this claim. LDF is optimistic that the court will either rule in our favor on these motions, or create a discrete appealable issue with a strong likelihood of success.

The impacts of a major widening of I-81 would be devastating, as the corridor includes 9 to 10 Civil War battlefields, and 1,238 acres of battlefield core area within the Shenandoah Valley Battlefields National Historic District. Most notably, the I-81 expansion would directly destroy up to 436 acres of the Cedar Creek & Belle Grove National Historical Park, representing more than 12 percent of the National Park's acreage. Also at risk are the "String of Pearls" – the historic "Main Street" towns along Route 11 from Winchester to Abingdon, at least 30 of which have historic districts that are formally listed on the National Register. Significant widening of I-81, which closely parallels Route 11, would damage the historic character, and with it the economic vitality, of these communities by inducing a surge of commercial, industrial, and residential development at interchanges and along parallel and connecting roadways.

The Trust is committed to pursuing all legal options if the court denies the current motions before the court.

OTHER ADVOCACY . . .

NATIONAL TRUST CONTINUES TO DEFEND HISTORIC PRESERVATION ORDINANCES AGAINST WEAKENING AMENDMENTS IN SAVANNAH, GEORGIA, DALLAS, TEXAS, AND MONTGOMERY COUNTY, MARYLAND

Working with its preservation partners and Regional Office staff, the National Trust's Legal Department continued its efforts to defeat proposed amendments aimed at weakening historic preservation ordinances. While the amendments are still works in progress, substantial gains were made over the summer.

At the urging of the National Trust and Historic Savannah Foundation, Savannah is now reconsidering proposed amendments to its preservation ordinance that, as originally drafted, would have virtually eliminated the Historic District Board of Review's discretion over height restrictions. Under the current version—released by the City on September 17th, property owners would be able to build to the number of stories set forth in the city's Historic District Height Map. The Board, however, would retain authority to modify the height of individual components of a proposed project to achieve visual compatibility with the city's historic resources.

In Dallas, proposed amendments aimed at expediting the demolition of dilapidated historic buildings—including the Statler Hilton, a National Trust endangered property, and other downtown commercial buildings—have been substantially modified at the urging of the National Trust and Preservation Dallas. On September 10, the Zoning Ordinance Advisory Committee of the City Plan Commission proposed changes to the amendment that would limit the application of the proposed amendments to residential property under 3,000 square feet.

Finally, with the help of Preservation Maryland and Montgomery Preservation, support for amendments to its preservation ordinance that would have made it virtually impossible to designate properties over the objection of a property owner has lost significant traction. On July 23, the National Trust, representatives from other preservation organizations, the Chair of the County's Preservation Commission, county staff, and individual property owners and their representatives met with Councilmember Mike Knapp, the bill's sponsor, to discuss individual concerns and develop workable, non-regulatory solutions. Although the Council is expected to press forward with revisions to the County's 30-year-old ordinance, it is now highly unlikely that owner consent will be included in the changes.

UPDATE ON PUBLIC LANDS . . .

NATIONAL TRUST AND CONSERVATION GROUPS CHALLENGE MANAGEMENT PLAN FOR UPPER MISSOURI RIVER BREAKS NATIONAL MONUMENT IN MONTANA

Citadel Rock [BLM]

In July, the National Trust and several conservation groups filed a lawsuit in federal district court against the Bureau of Land Management over the final resource management plan for Montana's Upper Missouri River Breaks National Monument. The lawsuit contends that BLM violated several laws in preparing and adopting the plan, including the Antiquities Act of 1906 and National Historic Preservation Act.

The lawsuit argues that the management plan fails to prioritize protection of the Monument's "objects," in-

cluding a landscape that "has remained largely unchanged in the nearly 200 years since Meriwether Lewis and William Clark traveled through it on their epic journey." Of particular concern, the plan designates several backcountry airstrips in remote areas of the Monument and allows motor vehicle use to take place on hundreds of miles of user-created routes, even though the vast majority of those routes have never been surveyed for cultural resources. Furthermore, many of the routes designated in the plan never went through the consultation process required by Section 106 of the NHPA, because BLM erroneously determined that designating user-created routes does not trigger the Section 106 process.

The other plaintiffs in this case are The Wilderness Society, Friends of the Missouri Breaks Monument and Oil and Gas Accountability Project. Earthjustice is representing the plaintiffs *pro bono*.

NATIONAL TRUST JOINS DIVERSE COALITION OF PLAINTIFFS IN LAWSUIT OVER DESIGNATION OF WEST-WIDE ENERGY CORRIDORS

In July, the National Trust joined a diverse coalition of plaintiffs, which includes a Colorado county and several local and national conservation groups, in challenging the Department of Energy (DOE) and BLM's decision to designate over 6,000 miles of energy corridors on public lands in the West. The corridor designations cover approximately 3.2 million acres of land, and allow applicants for transmission lines and pipeline rights of way to obtain expedited review of their proposals from federal agencies.

The National Trust joined the lawsuit because DOE and BLM largely refused to consider alternatives that would have minimized the impact of the designations on cultural resources. In fact, the agencies considered only two alternatives in the Programmatic EIS for the corridor designations—a "no action" alternative and the proposed alternative. As a consequence, the corridor designations allow transmission lines to arise within the viewshed of several important cultural and natural landscapes, including Utah's Grand Staircase-Escalante National Monument.

The National Trust and other plaintiffs are being represented *pro bono* by Earthjustice.

TENTH CIRCUIT RULES IN FAVOR OF PRESERVATION AND AGAINST UNAUTHORIZED MOTOR VEHICLE USE IN UTAH'S GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

Grand Staircase-Escalante National Monument [Conservation System Alliance/Ray Mathis]

In early September, the U.S. Court of Appeals for the Tenth Circuit ruled that closed vehicle routes in Utah's Grand Staircase-Escalante National Monument will remain that way—at least until Kane County can prove that it, and not the federal government, owns them. The dispute underlying the case began in 1999 when the BLM finalized a resource management plan for the Monument. In the plan, BLM closed several vehicle routes in order to protect the Monument's "objects" of historic and scientific interest, including hundreds of prehistoric sites from the Anasazi and Fremont cultures.

Soon after BLM approved the plan, Kane County officials embarked on an aggressive campaign to reopen the routes closed in the plan. As part of this effort, county officials removed over 30 BLM closure signs from Monument routes and passed an ordinance authorizing vehicle use to take place on many of the closed routes. County officials reacted in this way because they believe

that many of the Monument's routes are owned by the county under R.S. 2477, a 19th century statute granting rights of way to anyone willing to construct a "highway" over federal public lands.

In 2005, The Wilderness Society and Southern Utah Wilderness Alliance filed a lawsuit against the county in federal district court, arguing that the county's actions were inconsistent with the Monument's management plan and, therefore, "preempted" by the Supremacy Clause of the U.S. Constitution, which establishes federal law as the "supreme Law of the Land. . . ." The district court agreed, and the county appealed that decision to the Tenth Circuit.

The National Trust became involved in this case last November when we filed an amicus brief with the Tenth Circuit asking it to affirm the district court's decision. Our brief highlighted how a decision upholding the county's action could undermine efforts by federal land managers to develop and implement travel plans not only for the Monument, but for public lands throughout the West. The brief also discussed the likely "chilling" effect a decision in favor of the county would have on federal land managers' willingness to close claimed but unproven R.S. 2477 rights of way, even when vehicle use is damaging or destroying cultural resources.

Recognizing that Kane County had proceeded "unilaterally" and without first proving ownership over the routes in question, the Tenth Circuit affirmed the lower court's decision. If the county wants to exercise management authority over routes in the Monument, then the Tenth Circuit said that it must do more than "simply alleg[e] the existence of R.S. 2477 rights of way; it must prove those rights in a court of law . . . or obtain some other recognition of such rights under federal law."

FEDERAL COURT PRESERVES PRESIDENTIAL AUTHORITY TO MANAGE NATIONAL MONUMENTS

Preservationists breathed a sigh of relief in June when a federal district court in Arizona issued a revised order upholding the president's broad authority to establish and manage national monuments. In its original order, the court had adopted a far more narrow view of the scope of presidential authority concerning national monuments. Even though presidents had been including management directives in national monument proclamations for over a century, the court ruled that the Antiquities Act of 1906 only authorized presidents to establish—not manage—national monuments, and refused to allow judicial enforcement of management directives included within a presidential proclamation. The ruling cast a cloud over the management of national monuments throughout the West, many of which are governed under the terms of presidential proclamations.

Sonoran Desert Landscape [Peter Bungart, Circa Cultural Consulting]

The case began when a conservation group—the Western Watersheds Project (WWP)—filed a lawsuit claiming that the BLM had taken too long to prepare a management plan and grazing suitability analysis for Arizona's Sonoran Desert National Monument, as required by the proclamation establishing the monument. In February, the court dismissed the case after finding that WWP lacked the standing to enforce compliance with those requirements, since the president had no authority to include them in the proclamation in the first place. After WWP petitioned the court for a rehearing, the National Trust filed an amicus brief with the court supporting the petition. A coalition of law profes-

sors led by former Solicitor of the Interior Department, John Leshy, filed a similar brief.

The court granted the plaintiff's petition and reheard the case in May. One month later, the court issued its revised order and recognized that the president does in fact possess the authority to govern national monuments.

EASEMENTS UPDATE . . .

DELAWARE SUPREME COURT RULES IN FAVOR OF PRESERVATION DELAWARE IN EASEMENT AND USE VARIANCE CASE

This past winter the National Trust provided amicus support to Preservation Delaware, Inc. (PDI) in an easement and use variance case. In an effort to find adaptive reuses for its historic property known as Gibraltar, PDI solicited proposals to redevelop the property; however, a use variance was needed in order to make the site economically viable. A small number of neighborhood residents appealed the zoning board's approval of the use variance based on the argument that the property's use limitations resulted from the placement of a preservation easement on the property, which constituted a self-imposed hardship.

Gibralter [Preservation Delaware, Inc.]

The Trust's amicus brief argued that preservation easements should never be considered self-imposed hardships since they focus on protecting historic resources for the public, and not the private property owner's, benefit. In addition, we argued that even if easements were deemed to be self-imposed hardships, they should only constitute one factor for consideration in a zoning board's decision making process and should not create an absolute bar from seeking a use variance.

In March, a three-justice panel of the Delaware Supreme Court held oral arguments on the case, and in an uncommon step for the Court, oral arguments were reheard at an en banc hearing in June. The Delaware Supreme Court issued its en banc opinion in July, finding in PDI's favor and reversing the lower court's decision. The Delaware Supreme Court reaffirmed its earlier holding that there is no per se bar against issuing a use variance for a self-imposed hardship. This decision will allow PDI to move forward with its plans to work with a developer to rehabilitate and redevelop the property.

OAK PARK, ILLINOIS, EASEMENT VALUATION CASE DECIDED ON TECHNICAL GROUNDS AGAINST EASEMENT DONORS

As reported in our October 2008 LDF Update, in recent years the Internal Revenue Service has taken an extremely aggressive audit approach for taxpayers donating historic preservation easements—in many cases arguing that the value of such easements is zero. In many if not most of these cases, the IRS has also taken the position that donors had no right to deductions for easement donations on technical grounds. These audits and adverse determinations now number well into the hundreds, both with respect to residential and commercial properties, and a number of these cases are starting to be appealed to the U.S. Tax Court or other federal courts.

In September 2008, the National Trust took the unusual step of seeking to intervene as *amicus curiae* on the side of individual donors involved in one of these cases. In *Bruzewicz v.*

United States, No. 07-C-4074 (N.D. Ill.), not only did the IRS take the position that a preservation easement on a historic residential property in Oak Pak, Illinois, was valueless, the agency also argued that the donors had no right to a deduction for the easement in the first place purely for technical reasons. The agency's rationale was that the donors' failure to comply with any single one of a variety of substantiation requirements—for example, that their appraiser had not included a statement describing her qualifications in the appraisal—should be a complete bar to their receiving a charitable deduction for the donation. In *Bruzewicz*, the National Trust sought to file a brief arguing that the donors should not be summarily deprived of the opportunity to prove the underlying value of the easement donation, simply because of minor substantiation oversights. Ultimately, on March 25, 2009, the court ruled against the donors, upholding the "strict compliance" position advocated by the IRS. 604 F.Supp.2d 1197 (N.D. Ill. 2009). The donors decided not to appeal.

NATIONAL TRUST FILES *AMICUS* BRIEF IN NEW ORLEANS PRESERVATION EASEMENT VALUATION CASE

The Maison Blanche building in New Orleans , now the site of a Ritz-Carlton hotel, is the subject of easement valuation litigation. [Infrogmation, Wikimedia GFDL]

In June 2009, the National Trust once again sought to participate in an easement valuation case on the side of an easement donor, this time in a case involving a commercial property. The case, *Whitehouse Hotel Limited Partnership v. Commissioner of Internal Revenue*, No. 09-60085 (5th Cir., filed Jan. 27, 2009) involves a preservation easement given to the Preservation Resource Center of New Orleans on the historic Maison Blanche building on Canal Street in 1997. The property was adjacent to another non-landmark property (the Kress Building), and the two parcels were purchased and combined by Whitehouse and used as the basis to obtain an extremely valuable Ritz-Carlton Hotel franchise concession, running with the land. The property was valued on an arms-length basis at the time by mortgage financiers at $35 million in its "as is" undeveloped state. The easement appraiser hired by Whitehouse estimated the value of the easement at just over $7 million.

Under audit, the IRS took the position that the easement was worth just over $1 million, and it assessed back taxes, interest, and significant overvaluation penalties. Whitehouse sought review in the U.S. Tax Court in 2003. At trial, the IRS's expert took the position that the pre-easement value of the property was approximately $10 million, and that the easement donation was worth nothing at all. The donor's expert took the position that the pre-easement value of the property was approximately $41 million, and that the easement was worth approximately $10 million. In a decision rendered on October 30, 2008, the Tax Court ruled that the value of the property was about $12 million, and the easement was valued at about $1.8 million. The court also upheld substantial penalties against the taxpayer. In early 2009, the taxpayer appealed to the U.S. Court of Appeals for the Fifth Circuit.

While it is not unusual for valuation cases in the Tax Court to involve battles of expert witnesses with very different views, the National Trust's real concern in this case (and the reason for seeking to participate as *amicus curiae*) was the particular valuation methodology used by the Tax Court itself. With very little analysis, the court rejected out of hand the use of the "income" approach to valuation, which is generally considered by appraisers to be one of the most accurate method of valuing income-producing properties. The Tax Court also took an

extremely narrow view of the property to be considered in the valuation, refusing to consider impacts on adjoining properties (an analysis that is expressly required by the applicable Treasury Regulations). The Tax Court also took an extremely narrow view of the pre-easement value of the property, essentially ignoring the extremely valuable Ritz-Carlton franchise rights attached to the property. The Tax Court's overly restrictive approach to valuation, if used in other cases, could seriously reduce the availability of tax benefits for easement donations on commercial historic properties.

The National Trust's petition to participate as *amicus curiae* in the *Whitehouse* case was granted by the Court of Appeals on July 1, 2009. Oral argument in the case is set for later this fall.

NATIONAL TRUST DONATES FOUR CONSERVATION EASEMENTS AT MONTPELIER TO STATE OF VIRGINIA AND PIEDMONT ENVIRONMENTAL COUNCIL

The Gilmore Cabin, home of a former slave at Montpelier, is permanently protected through one of the new easements granted by the National Trust. [Montpelier Foundation]

The National Trust Law Department, working with the Historic Sites Department and The Montpelier Foundation, finalized the transfer in August of four conservation and preservation easements on specified tracts at Montpelier totaling over 700 acres. The easements will protect four distinct portions of Montpelier. Two of the easements, on the East Woods and Chicken Mountain, are primarily conservation easements and were deeded to the Virginia Outdoors Foundation (VOF) and the Piedmont Environmental Council (PEC). The East Woods, a 200 acre forested tract, is adjacent to the "Landmark Forest," a nationally recognized old-growth Piedmont forest that is already protected by an easement held by the Nature Conservancy. Chicken Mountain is a prominent, 245-acre forested tract, visible from the Montpelier visitor's center. Preservation of these tracts help to conserve the water quality in local streams, as well as the forested backdrop to Montpelier and the surrounding countryside. The other two easements, on the Gilmore Farm and the Civil War Encampment site, are primarily historic preservation easements and were deeded to PEC and the Virginia Department of Historic Resources (VDHR). The historic Gilmore Farm, a 19-acre parcel, is the site of the restored home of George Gilmore, a former slave at Montpelier and his wife Polly and their family. The large Civil War Encampment site, immediately adjacent to the Gilmore Farm, was occupied during the winter of 1863-1864 by troops from Gen. Lee's Army of Northern Virginia, before they fought at the Battle of the Wilderness.

The collaboration between the four conservation and preservation organizations to transfer the easements demonstrates the importance of cooperation between preservationists and conservationists. It is hoped that these easements will also encourage the protection of other nearby parcels, further enhancing the context of Montpelier and preserving the Madison-Barbour Historic District. Funded by private donations and a $700,000 grant from the Virginia Land Conservation Foundation, PEC provided $2M to the National Trust in exchange for the easements. The funds will be placed in the National Trust's Montpelier endowment.

CONTRIBUTORS, SPONSORS, AND SUPPORTERS . . .

The work of the National Trust's Law Department would not be possible without the enormously generous contributions of lawyers and law firms and others who have donated substantial *pro bono* or sponsorship assistance to the National Trust within the past year, including the following:

Andrews Kurth LLP, Austin, TX
Arent Fox LLP, Washington, DC
Arnold & Porter, LLP, Washington, DC & New York, NY
John P. Bagley, P.S., Seattle, WA
The Bogaard Foundation, Pasadena, CA
David Bonderman, Esq., Fort Worth, TX
Brandt-Hawley Law Group, Glen Ellen, CA
Buchanan Ingersoll & Rooney P.C., Wilmington, DE
Buist-Moore Smyth McGee, PA, Charleston, SC
Clarion Associates, Inc., Chicago, IL
David A. Doheny, Esq., Coral Gables, FL
James Dougherty, Esq., Washington, DC
Earthjustice, Denver, CO & Washington, DC
Andrea C. Ferster, Esq., Washington, DC
Ronald Lee Fleming, Cambridge, MA
Louise & Perry Flicker Foundation, South Pasadena, CA
Carter B.S. Furr, Esq., Norfolk, VA
Georgetown University Law Center, Institute for Public Representation, Washington, DC
Phillip S. Griffin II, Esq., Winchester, VA
Walter Handelman, Esq., White Plains, NY
William Hassler, Esq. & Mary Gay Sprague, Esq., Washington, DC
Hunton & Williams, LLP, Washington, DC & Norfolk, VA
Jerold S. Kayden, Esq., Cambridge, MA
James R. Logan, IV, Esq., New Orleans, LA
Manning Curtis Bradshaw & Bednar LLC, Salt Lake City, UT
Joseph H. McGee, Esq., Charleston, SC
McGuireWoods, LLC, McLean, VA
Neal & Leroy, LLC, Chicago, IL
Nixon Peabody, LLP, Washington, DC
Pepper Hamilton, LLP, Philadelphia, PA & Washington, DC
Pratt-Thomas, Epting & Walker, PA, Charleston, SC
Rachlis, Durham, Duff & Adler, Chicago, IL
Neil & Anna Rasmussen Foundation, Concord, MA
Reynolds, Motl & Sherwood, Helena, MT
Robinson & Cole, LLP, Stamford, CT
Antonio Rossmann, Esq., San Francisco, CA
Shackelford, Thomas & Gregg PLC, Orange, VA
Smith & Duggan, LLP, Boston, MA
Southern Environmental Law Center, Charlottesville, VA
Peter and Alice Stoudt, Free Union, VA
Thompson, Rosenthal & Watts, LLP, Naperville, IL
Philip N. Walker, Esq., Canton, CT
Western Environmental Law Center, Taos, NM & Eugene, OR
Wilmer, Cutler, Pickering, Hale & Dorr, LLP, Washington, DC

NATIONAL TRUST FOR HISTORIC PRESERVATION®

National Trust
Legal Defense Fund
1785 Massachusetts Avenue, NW
Washington, D.C. 20036
Tel. 202-588-6035 • Fax. 202-588-6272
LAW@NTHP.ORG • WWW.PRESERVATIONNATION.ORG