

JANUARY 2006 – MAY 2006

GUARDING AMERICA'S HERITAGE . . .



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. We have included in this year's LDF Newsletter New Cases Section highlighting our latest preservation issues. More information on recent LDF developments is available on the Trust's website at:

WWW.NATIONALTRUST.ORG/LAW

THE THRILL OF VICTORY . . .

FEDERAL COURT RULES MASSIVE INTERCHANGE ON HISTORIC MERRITT PARKWAY VIOLATED SECTION 4(F)

On March 31, 2006, U.S. District Judge Mark R. Kravitz in New Haven issued a decision representing a complete victory for the National Trust, the Connecticut Trust for Historic Preservation, the Merritt Parkway Conservancy, and a coalition of other groups, in a case challenging the massive expansion of a double interchange on the Merritt Parkway at Route 7 and Main Avenue in Norwalk, Connecticut. The court ruled that the Federal Highway Administration (FHWA) and the Connecticut DOT (ConnDoT) failed to show that the Norwalk interchange project included "all possible planning to minimize harm" to the historic Merritt Parkway, as required under Section 4(f) of the Department of Transportation Act. The court ordered the transportation agencies to cure the legal "defects" identified by the court. ConnDoT quickly cancelled the construction contract and agreed to reevaluate the interchange design.

The proposed interchange would have destroyed four historic bridges, and nearly a mile of mature landscaping along the Parkway, in order to construct massive new elevated flyway ramps. The interchange design was originally created more than a decade ago to accommodate plans for a major freeway extension to the north. That freeway project was later cancelled, but the interchange was never down-sized to reflect the change.

The court's ruling sets an important precedent reinforcing the Section 4(f) requirement that even projects which cannot avoid historic resources must incorporate "all possible planning to minimize harm."

Designed and built in the 1930s, the Merritt Parkway is recognized as one of the most significant and intact historic parkways in the nation. The Parkway was listed on the National Register in 1991, and has 72 unique historic bridges.



Construction activities had already damaged the historic Main Avenue Bridge before Connecticut DOT agreed to cancel the construction contract and reevaluate the project. [NTHP]

IN THIS ISSUE:

THE THRILL OF VICTORY	1
THE AGONY OF DEFEAT	2
PROTECTING CULTURAL RESOURCES ON PUBLIC LANDS	2
UPHOLDING STATE AND LOCAL PRESERVATION LAWS	4
ENFORCING SECTION 106	5
CONTRIBUTORS, SPONSORS, AND SUPPORTERS	5

THE AGONY OF DEFEAT. . .**NATIONAL TRUST APPEALS NEW MEXICO DISTRICT COURT'S DISMISSAL OF LAWSUIT TO STOP COMMUTER EXPRESSWAY THROUGH PETROGLYPH NATIONAL MONUMENT**

On January 24, 2006, a New Mexico District Court judge handed the Trust a heart-breaking defeat, denying a motion to enjoin the City of Albuquerque from construction of a 1.6-mile extension of Paseo del Norte through the Petroglyph National Monument and Las Imagines Archaeological District. Albuquerque Mayor Martin Chavez has been pushing for years to build the road.

The Trust, the Sierra Club, and three individual plaintiffs had taken up the case after the New Mexico Environmental Law Center dropped its representation of a broader coalition, following an adverse ruling by the same judge in October 2005. The Trust and the remaining co-plaintiffs argued that the City failed to minimize harm to cul-

tural resources, under the New Mexico Prehistoric & Historic Sites Preservation Act (analogous to Section 4(f), which was enforced in the federal Merritt Parkway case), by failing to examine and adopt less harmful alternatives to the massive expressway through the escarpment. Those less harmful alternatives included a tunnel and a single, narrower road cut through the escarpment, rather than two separate roads cutting through the escarpment as planned.

The Trust and its co-plaintiffs appealed the district judge's denial of injunctive relief, but unfortunately, both the lower court and the New Mexico Court of Appeals repeatedly denied the Trust's requests for an injunction pending appeal.

The City has already begun construction of the Paseo del Norte expressway, including the blasting of a 165-foot wide and 100-foot deep trench through the West Mesa Escarpment. The Monument and Las Imagines Archaeological District include more than 17,000 petroglyphs. The area is listed both on the National Register of Historic Places and the New Mexico Register of Cultural Properties, and also has religious and cultural importance for many local Indian tribes. Listed as one of the National Trust's inaugural 11 Most Endangered Historic Places in 1988, the West Mesa Escarpment and Petroglyph National Monument continues to be irreversibly degraded by sprawl and traffic.



View of the cut through the West Mesa escarpment. [Rocky Archuleta]

PROTECTING CULTURAL RESOURCES ON PUBLIC LANDS. . .**TRUST JOINS AMICUS BRIEF SUPPORTING RIGHT TO INTERVENE IN LITIGATION OVER MANAGEMENT OF ROADS ON PUBLIC LANDS**

On May 1, 2006, the National Trust joined a dozen environmental groups in an *amicus* brief being submitted to the en banc U.S. Court of Appeals for the Tenth Circuit in Denver. The case involves efforts by three conservation groups (the Wilderness Society, Southern Utah Wilderness Alliance, and Grand Canyon Trust) to protect Salt Creek Canyon in Canyonlands National Park. The three groups sought to intervene in a quiet title action filed by San Juan County, which claims it owns the right-of-way through the Canyon under Revised Statute 2477 (RS2477), an 1866 law that grants local governments rights-of-way over federal public lands in limited circumstances.

The Canyon has a jeep track, which runs through the Salt Creek Archaeological District, the area of highest concentration of archaeological sites in the entire National Park. In fact, the jeep track cuts directly through six archaeological sites within the districts that are individually eligible for the National Register. The Park Service closed the canyon to vehicles about five years ago, but is getting ongoing pressure from San Juan County to allow vehicles on the road.

The federal district court had denied the motion of the three conservation groups to intervene in the quiet title action, but a three-judge panel of the Tenth Circuit court of appeals re-

versed, and allowed the intervention. More recently, however, the Tenth Circuit granted en banc review in the case. A panel of up to 13 judges will rehear the intervention motion, and could decide to exclude the conservation groups.

Although the Trust itself has not intervened in a quiet title action before, we have intervened from time to time on the side of the federal government in public lands cases, including most recently our intervention in the Grand Staircase-Escalante National Monument case described below. The *amicus* brief is being prepared pro bono by Wilmer Cutler Pickering Hale & Dorr in Washington, DC.

The jeep track [in Salt Creek Canyon] cuts directly through six archaeological sites within the district that are individually eligible for the National Register.

NATIONAL TRUST ARGUES AS AMICUS BEFORE NEW MEXICO FEDERAL COURT IN LAWSUIT TO PROTECT OTERO MESA FROM OIL AND GAS LEASING

On January 24, 2006, the U.S. District Court for the District of New Mexico held a hearing on the State of New Mexico's lawsuit challenging a January 2005 decision by BLM to allow oil and gas leasing throughout a seven-million acre area known as the Otero Mesa in southern New Mexico. The lawsuit claims that BLM failed to comply with Section 106 of the National Historic Preservation Act (NHPA) and other federal laws, prior to approving the leasing plan. The state offered the Trust a portion of the state's allotted time to argue the NHPA claims before the

District Court. As amicus, the Trust's staff attorneys were seeking to persuade the Judge of the BLM's NHPA failures and to inform the court of the potential far-reaching effects of the court's decision in this case.

Otero Mesa is part of the Chihuahuan Desert Ecosystem, which extends into west Texas and northern Mexico, and is one of the three most biologically diverse desert eco-regions in the world. Otero Mesa also has tremendous historic and cultural significance, with more than 50,000 archaeological and his-

torical sites, including traditional cultural properties significant to Native American tribes and historic trails dating from 1539. The National Trust, Ysleta del Sur Pueblo, and the Association on American Indian Affairs joined together in an *amicus* brief supporting the State of New Mexico, emphasizing the importance of protecting cultural resources and compliance with Section 106. The court has scheduled a supplemental evidentiary hearing on May 17, 2006 regarding alleged sightings of the endangered aplomado falcon within the lease area.



The Otero Mesa in southern New Mexico has important natural, historic, and cultural resources, including more than 50,000 archaeological and historical sites. [Stephen Capra, New Mexico Wilderness Alliance.]

FEDERAL COURT APPROVES NATIONAL TRUST INTERVENTION IN DEFENSE OF GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT RESOURCE MANAGEMENT PLAN

In early January, the U.S. District Court for the District of Utah granted the motion of the National Trust, the Wilderness Society, Sierra Club, and Southern Utah Wilderness Alliance to intervene as defendants in a lawsuit filed by Kane and Garfield Counties in Utah. On November 14, 2005, the counties had filed a lawsuit challenging the BLM Resource Management Plan (RMP) for Grand Staircase-Escalante National Monument, which was approved in 1999. The RMP was the first plan to be completed for any of President Clinton's 14 National Monu-

ments designated for management by BLM. The lawsuit was filed by the counties just before the six-year statute of limitations expired. The suit alleges that certain roads within the Monument are considered county roads, and that BLM did not have the authority to restrict vehicle use on those roads. The counties have opposed the Monument's vehicle restrictions and have removed BLM road signs, and have even posted illegal signs that *encourage* vehicle use of closed routes. BLM's restrictions were intended to protect natural and cultural resources within the Monument.

President Clinton created the 1.7-million-acre Monument in 1996 in significant part to protect areas of natural and cultural significance. Over 4,000 cultural sites have been recorded within the Monument, even though only 3 percent of the Monument has been surveyed. The Trust and others sought to intervene as defendants in order to defend BLM's road restrictions. A hearing date has not yet been set.

The Grand Staircase-Escalante RMP was the first Plan to be completed for any of President Clinton's 14 National Monuments designated for management by BLM.

UPHOLDING STATE AND LOCAL PRESERVATION LAWS . . .**CITY OF TAMPA APPEALS TRIAL COURT RULING OVERTURNING THE CITY'S PERMIT DENIAL FOR A 24-STORY CONDO BUILDING IN HYDE PARK HISTORIC DISTRICT**

The trial court's interpretation of the relationship between the city's zoning and preservation laws is contrary to the city's own laws as well as those in Florida and around the country.

The City of Tampa has filed a writ of certiorari with the Florida District Court of Appeal, seeking review of a trial court ruling that Tampa's Architectural Review Commission may enforce its preservation regulations only to the extent that they do not conflict with the city's zoning laws. The National Trust filed an *amicus* brief in support of the City's appeal, together with the Florida Trust for Historic Preservation, Tampa Preservation, Inc., and two local historic

Neighborhood Associations. In the *amicus* brief, the preservation groups argued that the trial court's interpretation of the relationship between the city's zoning and preservation laws is contrary to the city's own laws as well as those in the State of Florida and around the country. The appeals court granted the motion to file the *amicus* brief on April 20, 2005.

Consistent with established criteria and guidelines for new construction in historic districts,

the City of Tampa denied a developer's application to build a 24-story condominium building in the Hyde Park Historic District, which is comprised of three-story commercial buildings and single-family homes. In response, the applicant filed a lawsuit challenging the city's permit denial on constitutional and statutory grounds. A hearing date on the appeal has not yet been scheduled.

VIRGINIA SUPREME COURT GRANTS REVIEW IN NORFOLK CASE TO DETERMINE WHO HAS STANDING TO CHALLENGE DEMOLITION OF HISTORIC PROPERTIES

On April 21, 2006, the Virginia Supreme Court granted review in a case filed by preservationists in Norfolk, challenging the City's approval of a demolition permit for the 1903 Guild House in the North Ghent Historic District. The National Trust and APVA Preservation Virginia filed an *amicus* brief urging the

Supreme Court to hear the case, because the trial court ruled that the plaintiffs lacked standing to bring the case, even though they were owners of other historic properties within the historic district. Among other things, the lawsuit challenges the validity of a provision in the Norfolk preservation ordi-

nance that attempts to preclude any party other than the applicant from appealing decisions of the Planning Commission such as the decision to allow demolition in this case. Briefs will be filed with the Virginia Supreme Court on May 31, with an argument expected in August or September 2006.

APPEAL GOES FORWARD TO PROTECT DUPAGE THEATRE FROM DEMOLITION IN LOMBARD, ILLINOIS

Briefing before the Illinois Appellate Court was completed on April 25, 2006 in a case challenging a decision by the Village of Lombard, Illinois (a Chicago suburb) to demolish the 1928 DuPage Theatre, one of only two National Register properties in Lombard. The Appellate Court had issued an injunction on November 30, 2005—just one day before the Village of Lombard was set to approve a demolition contract for the building. The

appeal seeks to overturn a Circuit Court ruling that would have allowed the demolition.

The lawsuit was originally filed in September 2005 to save the theatre. The Landmarks Preservation Council of Illinois (LPCI) and the National Trust intervened in the case, because of the Trust's unusual status in Illinois, where the state supreme court held in 1988 that the National Trust has standing to en-

force local preservation laws by virtue of our congressional charter. The Circuit Court upheld the standing of the National Trust and LPCI to intervene, but ruled that the original plaintiffs—the Lombard Historical Commission and Friends of the DuPage Theatre—lacked standing to bring the case. A hearing date for the appeal has not yet been scheduled.



The 1903 Guild House in Norfolk is the subject of a challenge in state court over the standing of local residents to challenge a demolition permit under local law. [Norfolk Preservation Alliance]

The Appellate Court had issued an injunction on November 30, 2005—just one day before the Village of Lombard was set to approve a demolition contract for the building.

ENFORCING SECTION 106 . . .**TRUST PARTICIPATES IN ORAL ARGUMENT AS AMICUS IN NEW ORLEANS WAL-MART CASE**

On February 9, 2006, the U.S. Court of Appeals for the Fifth Circuit held oral argument in the long-pending New Orleans Wal-Mart case, challenging the construction of a Wal-Mart in the historic Lower Garden District. The Trust participated in the argument, after filing an *amicus* brief on December 7, 2004. The Wal-Mart is a component of a major HOPE VI project, funded by the US Department of Housing and Urban Development (HUD), to replace the 1500-unit St. Thomas public housing project with a mixed-income and mixed use development. The lawsuit challenges HUD's failure to comply with the National Environmental Policy Act (NEPA) by failing to prepare an EIS for the

project, and failure to comply with Section 106 of the National Historic Preservation Act through improper delegation to the Housing Authority of New Orleans, which negotiated an initial Memorandum of Agreement that was never executed by HUD.

Though the Wal-Mart was completed and opened while the appeal was pending, the store was thoroughly looted after Hurricane Katrina in 2005, and has not reopened, though it did serve as a temporary shelter and operations base for the New Orleans police. Meanwhile, the housing component of the redevelopment project has become

more urgent in the wake of the hurricane.

The three-judge panel hearing the appeal was concerned that the case had become moot as a result of the hurricane. The parties filed supplemental briefs arguing that the case was not moot because the project is far from complete. For example, nearly 800 housing units remain to be built as part of the development. All but 100 of those will be built in the Lower Garden District, which is on relatively high ground within the City and thus less vulnerable to future flooding. The parties are still awaiting a decision from the court.

The lawsuit challenges HUD's failure to comply with the National Environmental Policy Act (NEPA) by failing to prepare an EIS for the project, and failure to comply with Section 106 of the National Historic Preservation Act through improper delegation to the Housing Authority of New Orleans.

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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 this year, including the following:

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- is the only national organization that regularly goes to court to protect America's heritage;
- defends, enforces, and monitors federal, state and local preservation laws to ensure their effectiveness in protecting historic resources;
- advises both private and government lawyers, as well as citizen activists around the country, on using the tools of legal advocacy to protect our heritage;
- educates lawyers, law students, and others interested in learning more about preservation law, creating a vital network of preservation advocates.



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