

THE USE OF CONSERVATION EASEMENTS TO PROTECT GARDENS OF
CULTURAL AND HISTORIC SIGNIFICANCE

by

ERIC REISMAN

(Under the Direction of James K. Reap)

ABSTRACT

This thesis examines the use of conservation easements to protect gardens of cultural and historic significance. Among the topics addressed include the origins, history and evolution of garden easements, their essential components, as well as the various tax incentives that are offered in order to encourage easement donation. Next, the thesis examines three specific organizations that hold easements on gardens, as well as specific properties that they have encumbered with easements. Finally, this thesis concludes with a few suggestions targeted towards individuals and organizations interested in garden easements.

INDEX WORDS: Garden easements, conservation easements, easements, garden preservation, Historic Charleston Foundation, The Garden Conservancy, Triangle Land Conservancy, Uniform Conservation Easement Act, landscape preservation, Tax Reform Act of 1976, Public Law 109-280, Property tax incentives, Estate Tax, Gift Tax

THE USE OF CONSERVATION EASEMENTS TO PROTECT GARDENS OF
CULTURAL AND HISTORIC SIGNIFICANCE

by

ERIC REISMAN

B.S. SUNY New Paltz, 2002

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment
of the Requirements for the Degree

MASTER OF HISTORIC PRESERVATION

ATHENS, GEORGIA

2009

© 2009

Eric R. Reisman

All Rights Reserved

THE USE OF CONSERVATION EASEMENTS TO PROTECT GARDENS OF
CULTURAL AND HISTORIC SIGNIFICANCE

by

ERIC REISMAN

Major Professor: James K. Reap

Committee: John C. Waters
David Berle
James R. Cothran

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia

August 2009

DEDICATION

To my brother, Kevin. Keep walkin' tall, kid.

ACKNOWLEDGEMENTS

I could never have begun this thesis, let alone completed it, were it not for the assistance and enthusiasm of so many others! Wherever possible, I'll try to give credit where credit is due.

First and foremost, I would like to thank James R. Cothran, ASLA, for having the foresight to suggest that I turn what began as an ordinary term paper into a thesis centered exclusively on garden easements. For a long time, I had been searching for an original topic to tackle, only to realize that the logical topic to pursue was right in front of me. That, aside, Jim's enthusiasm and optimism for this topic were always much appreciated.

Special thanks as well to my major professor, James Reap. His patience in reading draft after draft over the course of three semesters helped to develop my incoherent pile of rantings into a workable thesis. I could not have done it without his support, both personal and technical.

Many thanks also to April Wood of Historic Charleston Foundation, Bill Noble of The Garden Conservancy, and Katherine Wright of Triangle Land Conservancy. Your enthusiasm for my work, as well as your bountiful supply of patience in answering my infinite questions, will always be remembered. Hopefully one day I can repay you all back in kind.

Finally, thanks to all my friends and family for all of your encouragement. You know who you are, so I won't list names. Although none of you wrote a single line in this thesis, you all contributed in more ways than you will ever know.

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	v
LIST OF TABLES	xi
LIST OF FIGURES	xii
PART I: PROLOGUE	
INTRODUCTION	2
CHAPTER 1: A BRIEF HISTORY OF GARDEN PRESERVATION IN THE UNITED STATES	
STATES	5
Introduction	5
John Bartram’s Botanical Garden, Philadelphia, PA	5
Ann Pamela Cunningham and the Mount Vernon Ladies Association	7
The Role of Landscape Architecture in Promoting Garden Preservation	9
The Rise of the Colonial Revival in America and its Impact on Garden Preservation	12
Colonial Williamsburg and Garden Preservation: Where Illusion Influences Reality	16
The Role of Garden Clubs in Advancing Garden Preservation	18
The First Federal Initiatives	20
Garden Preservation in the Postwar Period	21

Garden Preservation and The National Trust for Historic Preservation	21
Modern Government Initiatives in Garden Preservation	22

PART II: GARDEN EASEMENTS: ORIGINS, EVOLUTION, CONTENTS AND CONTEXT

CHAPTER 2: GARDEN EASEMENTS.....	26
Non-Possessory Interests and Real Property	26
Basic Principles of Easements.....	27
History of Conservation Easements	28
Inherent Limitations of Appurtenant Easements and Easements in Gross	30
Uniform Conservation Easement Act (UCEA)	31
Impact of the Uniform Conservation Easement Act	33
Garden Easements as a Subcategory of Conservation Easements	35
Benefits of Garden Easements	36
History and Subsequent Development of Garden Easements	40
CHAPTER 3: STEPS TO ESTABLISHING A GARDEN EASEMENTS	43
Introduction	43
Finding the Right Holder.....	44
Organizations to Donate to.....	44
How Organizations Acquire a Garden Easement.....	45
Who is Responsible for Drafting the Document?	46
Other Points to Consider Prior to Donating a Garden Easement	46
CHAPTER 4: ESSENTIAL COMPONENTS OF A GARDEN EASEMENT	53
Introduction	53

Project Name	54
Deed Form	54
Statement of Purpose	57
Restrictions and Reserved Rights	57
Administrative Provisions	60
Requirements Under Federal Law	62
Habendum and Signature	64
Acknowledgement and Recording	64
Attachments	64
CHAPTER 5: BASELINE DOCUMENTATION	65
Introduction	65
Existing Conditions	66
History, Social Context, and Significance	67
Integrity	65
Features to Document	69
Specific Contents to Include Within a Baseline Document	70
Completing the Baseline Document	74
CHAPTER 6: GARDEN MANAGEMENT PLAN	75
Long-Term Management and Sustainability	76
Short-Term Maintenance	77
Provisions for Periodically Updating a Management Plan	78
Monitoring	78
Public Access and Long-Term Garden Conservation	79

CHAPTER 7: TAX INCENTIVES FOR GARDEN EASEMENTS	81
Federal Income Tax Benefits	81
Estate Tax	92
Gift Tax	94
Property Taxes.....	96
State Tax Incentives	101
PART III: CASE STUDIES: COMPARISON, ANALYSIS, AND CONCLUSION	
CHAPTER 8: CASE STUDY METHODOLOGY	105
CHAPTER 9: CASE STUDIES: EASEMENT HOLDING ORGANIZATIONS.....	111
Historic Charleston Foundation	111
The Garden Conservancy	127
Triangle Land Conservancy	143
CHAPTER 10: CASE STUDIES: GARDEN EASEMENTS.....	157
Loutrel Briggs garden at the William Gibbes House:	
64 South Battery, Charleston, South Carolina	157
Elizabeth Lawrence House and Garden:	
348 Ridgewood Avenue, Charlotte, North Carolina	178
Margaret Reid Wildflower Garden:	
1439 Dixie Trail Road, Raleigh, North Carolina	206
CHAPTER 11: CONCLUSIONS.....	231
Summary of Garden Easement Case Studies	231
Recommendations for Easement Documents.....	237

The Future for Garden Easements243

REFERENCES246

APPENDICES258

 A THE UNIFORM CONSERVATION EASEMENT ACT259

 B GARDEN EASEMENT QUESTIONAIRES274

 C WAIVER FORM TO ACCOMPANY THE QUESTIONAIRES277

LIST OF TABLES

	Page
Table 1: Classification of Data from Easement Program Director Questionnaire.....	109
Table 2: Classification of Data from Garden Easement Questionnaire.....	110

LIST OF FIGURES

	Page
Figure 1: Upper Kitchen Garden, Bartram’s Garden, Philadelphia, Pennsylvania	7
Figure 2: Common Flower Garden, Bartram’s Garden, Philadelphia, Pennsylvania.....	7
Figure 3: Ann Pamela Cunningham.....	8
Figure 4: Pleasure Garden, Mt. Vernon	9
Figure 5: Kitchen Garden, Mt. Vernon.....	9
Figure 6: Charles W. Eliot	10
Figure 7: Colonial Revival House.....	13
Figure 8: Colonial Revival House.....	13
Figure 9: Boxwood Parterre, Founders Memorial Garden, Athens Georgia	13
Figure 10: Founders Memorial Garden, Athens, Georgia	15
Figure 11: Founders Memorial Garden, Athens, Georgia	15
Figure 12: Arthur Shurcliff	17
Figure 13: Benjamin Waller Garden, Williamsburg, Virginia	18
Figure 14: Topiary Maze by Arthur Shurcliff. Williamsburg, Virginia	18
Figure 15: Ruth Bancroft in her Garden	40
Figure 16: Ruth Bancroft Garden, Walnut Creek, California.....	42
Figure 17: Ruth Bancroft Garden, Walnut Creek, California.....	42
Figure 18: Charleston Garden.....	116
Figure 19: Frank H. Cabot	128

Figure 20: House at Green Gables, Woodside, California.....	134
Figure 21: Roman Water Garden at Green Gables, Woodside, California.....	135
Figure 22: Roman Water Garden at Green Gables, Woodside, California.....	135
Figure 23: The six North Carolina counties served by Triangle Land Conservancy.....	145
Figure 24: Joslin Garden, Raleigh, North Carolina	149
Figure 25: Montrose Gardens, Raleigh, North Carolina.....	150
Figure 26: William Gibbes House, Charleston, South Carolina.....	158
Figure 27: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	173
Figure 28: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	173
Figure 29: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	174
Figure 30: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	174
Figure 31: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	175
Figure 32: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	175
Figure 33: Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	176
Figure 34: Swimming pool, Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	177
Figure 35: Swimming pool, Loutrel Briggs garden at 64 South Battery, Charleston, South Carolina	177
Figure 36: Color plan of Elizabeth Lawrence Garden, Raleigh, North Carolina	182
Figure 37: Hardscape plan of Elizabeth Lawrence Garden, Raleigh, North Carolina.....	182
Figure 38: Main Paths, Elizabeth Lawrence Garden, Charlotte, North Carolina	204
Figure 39: Main Paths, Elizabeth Lawrence Garden, Charlotte, North Carolina	204

Figure 40: Central Reflecting Pool, Elizabeth Lawrence Garden, Charlotte, North Carolina.....	205
Figure 41: Main axial path, Elizabeth Lawrence Garden, Charlotte, North Carolina	205
Figure 42: Elizabeth Lawrence in front of gate leading into her garden, Elizabeth Lawrence Garden, Charlotte, North Carolina	205
Figure 43: Various views, Margaret Reid Wildflower Garden, Raleigh, North Carolina	229
Figure 44: Various views, Margaret Reid Wildflower Garden, Raleigh, North Carolina	229
Figure 45: Various views, Margaret Reid Wildflower Garden, Raleigh, North Carolina	229
Figure 46: Various views, Margaret Reid Wildflower Garden, Raleigh, North Carolina	229
Figure 47: Examples of flora from Margaret Reid Wildflower Garden, Raleigh, North Carolina	230
Figure 48: Examples of flora from Margaret Reid Wildflower Garden, Raleigh, North Carolina	230
Figure 49: Examples of flora from Margaret Reid Wildflower Garden, Raleigh, North Carolina	230
Figure 50: Examples of flora from Margaret Reid Wildflower Garden, Raleigh, North Carolina	230
Figure 51: Examples of flora from Margaret Reid Wildflower Garden, Raleigh, North Carolina	230
Figure 52: Examples of flora from Margaret Reid Wildflower Garden, Raleigh, North Carolina	230

PART I:
PROLOGUE

Give me odorous at sunrise a garden of beautiful flowers where I can walk undisturbed.

~Walt Whitman¹

INTRODUCTION

From the beginning of civilization, one of the simplest activities that mankind has pursued for pleasure has been the development and care of a personal garden. To people, gardens embody many different ideals and values. Some people see gardens as an assemblage of natural beauty, while others regard gardens as a refuge from the world. To passionate gardeners, gardening is not just a mere physical pursuit; instead, it becomes an emotional and psychological journey through nature. Yet regardless of one's philosophical stance towards gardening, the overall objective always remains the same; to create and maintain a personal space devoted to natural beauty. One of the main results of such ardent passion has been the creation of many personal gardens that are truly captivating and unique. Unlike other works of art, a garden, being a living entity, requires constant care to maintain. While this seldom poses a problem during the owner's lifetime, this spurns the question, "how does one guarantee that the garden one has created and loved is permanently protected for posterity?"

This has become a more crucial dilemma in recent years. In years past, when people lived in more rural conditions, personal gardening was a common pursuit. Yet within the last 50 years, a marked change has occurred within American life. Now more than ever, the American population is urban based, resulting in significantly less interaction with nature. The

¹ "Garden Quotes, Gardening Sayings, Quotations for Gardeners," The Quote Garden – Quotes, Sayings, Quotations, Verses, 24 Nov. 2007, 19 Dec. 2007 <<http://www.quote-garden.com/gardens.html>>.

preservation of significant gardens is also jeopardized by the decline in the amount of free time that Americans enjoy. Whereas in years past, people had the time to pursue a labor-intensive hobby such as gardening, this is no longer the case in today's society. These trends present significant problems for the future preservation and maintenance of notable gardens. In short, as interest in gardens declines among younger members of the American population, the future of many noteworthy gardens is uncertain.

The need to protect gardens is further compounded by their fragile and ephemeral nature. With most preservation efforts, the goal is to preserve a structure or landscape as it appears at a certain moment in time. With gardens, this is a difficult task. Unlike buildings, which are designed as permanent structures, gardens are living, breathing, entities that are constantly growing and evolving, making it exceedingly difficult to try to preserve a garden in a specific state. Also, gardens, unlike buildings, have limited functional purposes and exist primarily for aesthetic reasons. This adds yet another obstacle to garden preservation, as for many people, the care required to maintain a garden will not justify the required expenditures of time and money.

Clearly, there is a definitive need for garden owners to try to find appropriate tools and resources to preserve their gardens for posterity. One such tool that is only beginning to gain appropriate recognition is the use of easements. These easements, appropriately referred to as 'garden easements,' provide a legal means for concerned garden owners to ensure that their gardens are maintained and protected for posterity.

The purpose of this thesis is to examine how garden easements can successfully be employed to help preserve gardens of notable cultural or historical significance. This thesis is divided into two distinct parts. Part I explains the origins of garden easements, their usage, along with the legal and historical context that allowed garden easements to develop. In addition, Part

I also outline the essential components that should be included within every garden easement, and explores the various tax incentives that can potentially be realized through garden easement donation. In Part II, the practical utility of garden easements is examined through the use of individual case studies involving three separate easement holding organizations that currently hold garden easements and approach garden preservation from entirely different perspectives. Case studies are also used to examine an actual garden that each of the aforementioned organizations have encumbered with an easement. This thesis concludes by comparing and contrasting the different approaches that the organizations have taken in respect to garden easements, along with a brief analysis of the effectiveness of their respective policies. The conclusions reached through the analysis of the case studies are then used to formulate a set of general guidelines designed to assist any organization that would potentially consider holding garden easements. Finally, some brief commentary is provided in regards to the future use of garden easements in light of some current trends.

CHAPTER 1. A BRIEF HISTORY OF GARDEN PRESERVATION IN THE UNITED STATES

Introduction

The concept of using easements to preserve gardens did not materialize in a vacuum. Their use as a tool for protecting gardens emerged from a broad tradition of garden preservation that exists within the United States. The last two centuries have seen the practice of garden preservation gradually evolve, first from individual to collective private efforts, before becoming an officially sanctioned component of public policy. A few of the more important events and developments that helped facilitate the expansion of garden preservation are explained in detail below.

John Bartram’s Botanical Garden, Philadelphia, PA:

The first efforts to preserve gardens in the United States were private initiatives undertaken by dedicated and influential individuals on behalf of gardens that either exhibited distinguished characteristics or were owned by famous individuals. Arguably, one of the most noteworthy examples of long-term private stewardship that meets the above criteria was the preservation of John Bartram’s Botanical Garden in Philadelphia.²

John Bartram (1699-1777) was America’s first prominent botanist and horticulturalist. Bartram first began scientific gardening in 1728, when he purchased a large tract of land on the site of the present garden.³ Although Bartram received no formal education and training in

²A ‘botanical garden’ is defined as a garden devoted to cultivating plants for scientific and educational purposes. “Gardening Terms Starting With the Letter B,” *Plant and Plant* 24 Nov. 2008, <http://www.planandplant.com/gardening_terms-B.html>.

³Emily Read Cheston, *John Bartram, 1699-1777.; His Garden and His House: William Bartram; 1739-1823* (Philadelphia, PA: John Bartram Association, 1953) 23.

botany, through his passion, tireless research, and encyclopedic knowledge of plants, he achieved worldwide renown as the leading authority on North American plants, bringing him into correspondence with a number of distinguished European botanists.⁴ Throughout his life, Bartram made frequent expeditions up and down the eastern seaboard, exploring a diverse range of North American environments in search of new forms of plant life, which he would then collect and cultivate in his Philadelphia garden.⁵ (Figures 4 & 5) In addition to the garden's scientific value, Bartram's botanical garden also served a commercial purpose; many of the plants that Bartram discovered and cultivated he would later export to interested parties in Europe.⁶

After Bartram's death in 1777, ownership of the garden fell into the hands of two of his sons, John Jr. & William, who continued to operate the garden and nursery in the same fashion as Bartram Sr.⁷ The garden continued to be maintained under the prudent stewardship of Bartram's granddaughter, Ann Carr, and her husband Robert, who assumed control of the garden in 1814.⁸ In 1850 the garden was sold to railroad industrialist Andrew M. Eastwick, ending 122 years of direct stewardship by the Bartram family. Although not a family relation, Eastwick took an active interest in Bartram's work, and throughout his life ensured that the garden continued to be preserved.⁹ In 1891, when the property was again placed up for sale, Thomas Meehan, Eastwick's former gardener and a prominent Philadelphia councilman, convinced the City of Philadelphia to acquire the garden on the grounds of its "historic and botanical significance."¹⁰

⁴Some of the more prominent botanists Bartram corresponded with include: Peter Miller (1691-1771), chief gardener of Chelsea Psychic Garden, London, UK, Peter Collinson (1694-1768) a recreational botanist and importer of seeds from Bartram's garden, and Mark Catesby (1683-1749), distinguished British naturalist, author of *Natural History of Carolina, Florida, and the Bahaman Islands*. Ibid. 6-11.

⁵ Ibid. 10-14.

⁶ Ibid. 10-11.

⁷Rudy J. Favretti, "The Story of Landscape Restoration in the South," Breaking Ground: Examining the Vision and Practice of Historic Landscape Restoration: Proceedings on the Eleventh Conference on Restoring Gardens and Landscapes (Winston – Salem NC: Old Salem, Inc., 1999) 4.

⁸ Cheston: 24.

⁹ Ibid. 24.

¹⁰ Ibid. 24.

Since this time, Bartram's Garden has been owned by the City of Philadelphia, which maintains the site as a part of the City of Philadelphia's Park System, thereby ensuring the permanent preservation of Bartram's lifelong work. However, were it not for the determined heirs of Bartram's garden, who managed to successfully preserve the garden without outside assistance for a period of 163 years, the garden would likely have been lost.



Figure 1 & 2: John Bartram's Garden, Philadelphia, Pennsylvania. From left, Upper Kitchen Garden, where medicinal herbs and vegetables are grown, and Common Flower Garden, where herbaceous plants are grown. Photos courtesy of <http://www.bartramsgarden.org>

Ann Pamela Cunningham and the Mount Vernon Ladies Association

The quest to preserve George Washington's house and grounds was also a private initiative that succeeded without government support. However, whereas Bartram's Garden's continued existence is attributed largely to the efforts of a few dedicated individuals, the successful campaign to preserve Mt. Vernon was a collective private effort, the result of thousands of people who united with the common goal of ensuring the preservation of a national

landmark. Mt. Vernon's preservation signified the first time that a movement to preserve and restore a noteworthy landscape garnered national support.¹¹

The efforts to save Mt. Vernon began in 1853, when Ann Pamela Cunningham (1816-1875) of South Carolina, angered at the deteriorated state of Mt. Vernon, wrote a letter to the *Charleston Mercury* urging support for Mt. Vernon's preservation. Cunningham's appeal met with such universal response that in 1854 she helped found the Mount Vernon Ladies Association of the Union (MVLA) with the purpose of generating public support on behalf of Mt. Vernon's permanent preservation. After early efforts to enlist the support of the State of Virginia failed, the MVLA shifted their attention to raising the money needed to purchase Mt. Vernon from President Washington's heirs, a goal which was met exclusively through private donations.¹² After a long campaign, the MVLA finally purchased Mt. Vernon on April 6,



1858 for \$200,000.¹³

Since obtaining ownership of Mt. Vernon, MVLA has been committed to the long-term preservation of its historic landscape. Under the MVLA's guidance, many landscape restorations have taken place at Mt. Vernon, the overall objective being to restore landscape features to how they appeared during Washington's lifetime. Although Mt. Vernon has received some official public recognition, becoming a National Historic Landmark in 1960, the house and

Figure 3: Ann Pamela Cunningham.

Photo courtesy of www.nwhm.org

¹¹ Favretti, 1; 1999.

¹²The initial effort entailed making donations to respective state governors who would then donate the money to Virginia. "Ann Pamela Cunningham," *National Women's History Museum* 25 Nov. 2008 <http://www.nwhm.org/Education/biography_apcunningham.html>.

¹³ Ibid.

grounds continue to this day to be owned and operated by the MVLA, serving as another fine example of historic stewardship carried out without the use of government monies.



Figures 4 & 5: The Gardens at Mt. Vernon. From left, Pleasure Garden, Kitchen Garden. Photos courtesy of www.mountvernon.org.

The Role of Landscape Architecture in Promoting Garden Preservation

Once the concept of landscape preservation began to gain public acceptance, professionals and scholars slowly began to address the topic in earnest. The first discipline to openly embrace the notion of landscape preservation was that of landscape architecture. As professionals trained in the art of purposely manipulating the natural landscape in order to create a desired aesthetic affect, it was perhaps only natural that landscape architects would be uniquely aware of the need to preserve certain types of landscapes, for example, gardens.

The first landscape architecture program in the nation to openly embrace the concept of landscape preservation was that of Harvard University. Founded in the late nineteenth century, Harvard's landscape architecture program (the first such program in the United States) quickly adopted a holistic approach to the new discipline, in the process helping to define landscape

architecture as “a generalist practice that embraced preservation issues along with other aspects of the new field, such as city planning and resource conservation.”¹⁴

One of Harvard’s first proponents of garden preservation was Charles W. Eliot (1859-1897), a prominent Boston-based landscape architect with the then prestigious firm of Olmsted, Olmsted & Eliot. In addition to designing new and innovative landscapes, Eliot’s eclectic interests included “the preservation of landscapes of scenic, natural and cultural significance.”¹⁵ A prolific writer, many of Eliot’s



Figure 6:
Charles W. Eliot

writings clearly reflect his passion for landscape preservation, in particular garden preservation.¹⁶ One belief that Eliot helped to promote was the use of public funds to acquire noteworthy landscapes. In his report *Vegetation and Scenery in the Metropolitan Reservations*, published in 1897 shortly before his death, he proposes:

investing public money in the purchase of the several metropolitan reservations to secure for the enjoyment of present and future generations such interesting and beautiful scenery as the lands can supply¹⁷

While controversial at the time, Eliot’s firm belief in the public acquisition of land for conservation purposes foreshadowed the future practices of both the NPS and land trusts. In

¹⁴Charles A. Birnbaum and Mary V. Hughes, “Landscape Preservation in Context, 1890-1950,” *Design with Culture: Claiming America’s Landscape Heritage* (Charlottesville, VA: University of Virginia Press, 2005) 2.

¹⁵ Ibid.

¹⁶ Some of Eliot’s more notable works addressing the topic of landscape preservation include “Waverly Oaks” an article written in 1890 championing the preservation of a patch of virgin forest located in the Massachusetts countryside. This was one of the first scholarly articles promoting landscape preservation in the United States. Throughout the 1890’s, Eliot penned numerous articles for the now defunct magazine, *Gardens and Forest*. One of these, “John Bartram’s Garden Today,” chronicled the techniques that were utilized to preserve the John Bartram botanical garden.

¹⁷Charles Eliot, *Charles Eliot, Landscape Architect* (Cambridge, MA: Houghton, Mifflin & Co., 1902) 715.

retrospect, although Eliot's professional career was brief, the influence of his writings extended far beyond his lifetime and helped to define the fundamental values of the landscape preservation movement.

Another early champion of garden preservation was Grace Tabor (1873-1973). One of the first female landscape architects to practice in America, Tabor was also a prolific scholar and writer, her work appearing frequently in periodicals such as *The Gardening Magazine* and *Country Life in America*. In contrast to Eliot, Tabor's main interest was gardens, in particular those of a historic nature. Throughout her life, she wrote numerous books addressing garden design and history.

In 1913, Tabor published *Old Fashioned Gardening: A History and a Reconstruction*, arguably one of the first American works devoted to garden history and preservation. The book is divided into two parts, the first of which describes and identifies several distinct historic garden styles worthy of preservation and restoration.

In the second part of *Old Fashioned Gardening*, Tabor addresses what she considers to be appropriate methods for restoring historic gardens. Tabor believes that a garden should be depicted to reflect its true history, as opposed to only the history that we wish to portray.¹⁸ Another idea expressed by Tabor and since adopted by the preservation movement, is that a garden's appearance should always appropriately reflect its surroundings, Tabor noting that "the primary and only reason that there can be for restoring the old type of garden is either a genuinely old house, or a modern house designed and constructed on the old lines."¹⁹ Many of Tabor's beliefs, which at the time appeared highly innovative, have become established principles of garden preservation.

¹⁸Grace Tabor, *Old Fashioned Gardening: A History and a Reconstruction* (New York: McBride, Nast & Co., 1913) 167.

¹⁹ *Ibid.* 181.

The Rise of the Colonial Revival in America and its Impact on Garden Preservation

While the scholarship carried out by forward seeking landscape architects such as Eliot & Tabor proved instrumental in helping to define the then embryonic concept of garden preservation, their ideas were ultimately successful because they were widely embraced by the public at large. For the most part, this phenomenon can be attributed to the fact that the principles of garden preservation appropriately complemented those of the Colonial Revival Movement, which was a dominant movement in both architecture and landscape design in the early twentieth century.²⁰ The Colonial Revival sparked a renewed interest in the houses and landscapes of colonial America, inspiring many Americans to help preserve historic gardens, in addition to creating new gardens heavily influenced by the originals.

The Colonial Revival movement first began with a renewed interest in America's colonial heritage following the Philadelphia Centennial of 1876.²¹ The newfound interest in America's past was soon reflected in architecture; the esteemed firm of McKim, Mead & White being among the first to incorporate colonial stylistic elements into residential architecture.²² The firm's work in this genre helped to popularize the Colonial Revival style of architecture, which was to become the dominant style of architecture in the first half of the twentieth century.

In general, Colonial Revival houses drew their inspiration from past architectural styles, such as Georgian, Federal, and Dutch Colonial that were popular when the United States was in its infancy. Signature design characteristics of the Colonial Revival include a symmetrical façade, a single-story portico, shuttered windows, restrained use of the classical orders, and a prominent side porch serving as a formal entryway into a garden.²³ (Figures 7 & 8)

²⁰ Birnbaum and Hughes, 4.

²¹William B. Rhoads, *The Colonial Revival*, PhD Thesis Vol. 1 (New York: Garland Publishing, Inc. 1977) 56.

²²These sections contain a detailed account of McKim, Mead & White's work in this genre. *Ibid.* 73-75, 82-88.

²³ Lee McAllester and Virginia McAllester, *A Field Guide to American Houses* (New York: Alfred A. Knopf, Inc., 2005) 320-341. Thorough description of the Colonial Revival style with illustrations.



Figures 7 & 8: Colonial Revival Homes.
Note symmetry, dentil course, pedimented entryway and side porch.
Pictures by author.

Figure 9: Boxwood Parterre,
Founders Memorial Garden,
Athens Georgia.
Picture by author.



Similarly, Colonial Revival Gardens were basically more modern interpretations of gardens from the colonial era that “evoked the colonial spirit without exactly replicating it.”²⁴ A number of key characteristics identify Colonial Revival Gardens. Gardens were designed to integrate seamlessly with the design of the house; this in part explains the profound emphasis that Colonial Revival architecture places on side or rear porticos. Within the garden proper, space is clearly delineated by a mixture of manmade and natural features such as fences, brick

²⁴Judith B. Tankard, “Ellen Biddle Shipman’s Colonial Revival Garden Style,” *Recreating the Past: Essays on the Colonial Revival*, Richard Guy Wilson, Shaun Eyring, and Kenny Marotta, eds. (Charlottesville, VA: University of Virginia Press, 2006) 67.

walls, or hedges that are carefully placed to create the effect of ‘outdoor rooms,’ the placement of such elements helping to facilitate movement throughout the garden.²⁵ The look and feel of formality is further reinforced through rigid use of geometry, as spaces within Colonial Revival gardens usually exhibit vertical and horizontal axes of symmetry. (Figures 12-14) Finally, Colonial Revival Gardens were often terraced, forming a pronounced correlation between elevation and spatial hierarchy.

²⁵ Ibid.



Figures 10 & 11: Founders Memorial Garden, Athens, Georgia. Note symmetry, terracing and general theme of formality. Pictures by author.



Colonial Williamsburg and Garden Preservation: Where Illusion Influences Reality

Similar to the Colonial Revival Movement, the reconstructed gardens depicted at Colonial Williamsburg helped to generate increased public interest in historic gardens. However, in contrast to the historic buildings depicted at Colonial Williamsburg, which were meticulously reconstructed according to historic documentation, little was known about the landscapes that once existed in Williamsburg, leading to the creation of landscapes that were based on overly stylized European models. In hindsight, it is ironic that American interest in historic gardens was sparked by the gardens of Colonial Williamsburg, which are of dubious historic authenticity.

When critiquing the interpretive efforts carried out at Colonial Williamsburg, it is important to remember the context in which the site was created. The work that was carried out at Colonial Williamsburg was largely the result of two distinct individuals, the Rev. Dr. W.A.R. Goodwin, and John D. Rockefeller Jr. Like many intellectuals passionate about history, both Goodwin and Rockefeller had an idealized view of the past, which was to have an adverse affect on the historical accuracy of the reconstructions carried out under their tutelage, in particular the landscapes.²⁶ As mentioned previously, little was known about the former landscapes at Williamsburg in the 1920's when the town was being redeveloped as a tourist site. The lack of available information would have disastrous consequences for the historical authenticity of the landscapes that were subsequently created, as landscape architects were given the freedom to design idealized and aesthetically pleasing landscapes that were not corroborated by any historic or archaeological evidence.²⁷

²⁶Charles B. Hosmer Jr., "The Colonial Revival in the Public Eye: Williamsburg and Early Garden Restoration," The Colonial Revival in America, Alan Axelrod, ed. (New York: W.W. Norton & Co., 1985) 54.

²⁷ *Ibid.* 52-53.

The individual responsible for the landscapes at Colonial Williamsburg was Arthur A. Shurcliff (1870-1957). (Figure 15) A graduate of both MIT and Harvard who had worked with the Boston Park Commission, Shurcliff was at the time one of the most influential landscape architects in the country.²⁸ Shurcliff, who had no particular expertise concerning colonial gardens, attempted to compensate for the lack of physical evidence and historic documentation at Williamsburg by spending “considerable time documenting surviving Virginia gardens from this period as well as their English precedents.”²⁹ The landscapes that Shurcliff subsequently developed were excessively tidy, ornate, and at odds with the meager documentation that did exist, all of which had “implied [that] colonial gardens had been simple, functional, and even somewhat bare.”³⁰ (Figures 16 & 17) While Shurcliff’s disregard for the scant historic evidence that existed exposed him to considerable criticism from other professionals involved with Colonial Williamsburg, it was to no avail.³¹



Figure 12:
Arthur Shurcliff.
Photo courtesy of
www.history.org

Despite the historic inaccuracy of the gardens that Shurcliff created at Colonial Williamsburg, his designs subsequently proved successful, for they “showed people what they wanted to see, all in pristine condition, rather than the real thing based on hard documentary evidence.”³² Within a short period of time, Colonial Williamsburg became Virginia’s most

²⁸ Ibid. 55.

²⁹ Birnbaum and Hughes, 5.

³⁰ Hosmer, 53.

³¹ Among the most vocal of Shurcliff’s critics was Harold R. Shurtleff, Director of the Office of Research and Record. Of particular note was Shurtleff’s opposition to Shurcliff’s proposal to build a topiary maze in the Governor’s Garden, on the grounds that the maze was “to be based upon neither documentary or three dimensional evidence so far as Williamsburg is concerned.” Like most debates concerning interpretation of the landscape at Williamsburg, Shurtleff and his supporters had to defer to Shurcliff’s plans, and the maze was built. Today, the maze is one of the most popular landscape features at Colonial Williamsburg. Hosmer, 55-62.

³² Favretti, 8; 1999.

popular tourist destination, in the process helping to define the concept of ‘historic tourism’ in America. Shurcliff’s garden designs, while subject to criticism then and now, helped contribute to this trend.



Figure 13 & 14: Gardens at Colonial Williamsburg. From left, Benjamin Waller Garden, and Topiary Maze at rear of Governor’s Palace. Modern scholars generally agree that actual Colonial landscapes would not be as formal and orderly as the Shurcliff designed landscapes pictured here. Photos courtesy of www.history.org.

The Role of Garden Clubs in Advancing Garden Preservation:

The rise in popularity of garden clubs, which began in the early years of the twentieth century, also helped to further the development of a collective garden preservation ethic. Garden clubs gave individuals interested in garden preservation an opportunity to unite and form a collective platform on behalf of their common interests. Like so many other events in garden preservation, the driving force behind the foundation of most garden clubs was usually women. The reasons for this phenomenon are obvious; in a country that once all but excluded women from economic or political opportunities, garden clubs “gave a certain class of women a way to

express their concerns about the environment and their ideas of the beautiful.”³³ Time and time again, women proved to be remarkably adept at using the public forum provided by garden clubs, overseeing numerous activities that helped to advance the agenda of garden preservation.

The very first Garden Club founded in the United States was the Ladies’ Garden Club of Athens, in Athens, GA in 1891.³⁴ This garden club set a valuable precedent for future garden clubs by taking a considerable interest in historic landscape preservation.³⁵ Within a few years, a large number of local and statewide garden clubs would be founded on the model provided by the Ladies’ Garden Club of Athens.³⁶

By far the most successful garden club in terms of garden preservation is the Garden Club of Virginia (GCVA). Founded in 1920, the garden club of Virginia has been instrumental in helping to document and preserve historic gardens and landscapes in Virginia. Beginning in 1929, the GCVA began holding Historic Garden Week, an annual statewide event consisting of tours of Virginia’s historic homes and gardens, the proceeds of which are used to restore historic gardens.³⁷ Since the program’s inception, the GCVA has overseen numerous restorations carried out according to strict criteria.³⁸ Proceeds generated through Historic Garden Week have successfully funded the restoration of over forty prominent gardens to date, in addition to providing valuable publicity on behalf of garden preservation.³⁹

³³Mac Griswold and Eleanor Weller, The Golden Age of American Gardens: Proud Owners, Private Estates: 1890-1940 (New York: Harry N. Abrams, Inc., 1992) 106.

³⁴Ibid. 158.

³⁵Catherine Howett, “Grounding Memory and Identity: Pioneering Garden Club Projects Documenting Historic Landscape Traditions of the American South,” Design with Culture: Claiming America’s Landscape Heritage, Charles A. Birnbaum and Mary V. Hughes, eds. (Charlottesville, VA: University of Virginia Press, 2005) 25.

³⁶By 1938, there were over 2000 garden clubs in the United States.

³⁷Favretti, 10; 1999.

³⁸Gardens restored by the Garden Club of Virginia must be accessible to the public. Restorations must be approved by the garden’s governing body, and they must prove that once completed, that they have the resources to continue maintaining the garden. All restorations must be supervised by a professional landscape architect.

“Restorations,” The Garden Club of Virginia 10 Jan. 2009, 24 Jan. 2009
<http://www.gcvirginia.org/restorations_2_interface/restored.asp> .

³⁹“Historic Garden Week,” The Garden Club of Virginia 10 Dec. 2008
<<http://www.gcvirginia.org/HGW/HGW.html>>.

The First Federal Initiatives:

It was not until the 1930's that the federal government began taking active measures to promote garden preservation. Many of the federal programs that helped foster garden preservation were part of the New Deal, a series of initiatives enacted during the Roosevelt Administration that were designed to rejuvenate the economy and alleviate unemployment.

One of the first measures enacted under the New Deal was the creation of the Civilian Conservation Corps (CCC). The CCC was established in 1933 with the purpose of employing young men from unemployed and impoverished families on conservation related projects. Although most of the projects carried out by the CCC, (which was active until 1942) concerned soil conservation and reforestation, a few of the projects carried out by the CCC involved maintenance and rehabilitation of historic landscapes, many of which were gardens.

The first federally funded effort that specifically contributed to garden preservation was the Historic American Landscape and Garden Project (HALGP), which was founded in May 1935. HALGP was a direct offshoot of the Historic American Building Survey (HABS), a similar program founded in 1933 as an initiative to produce measured drawings of historic properties. Like HABS, HALGP was a make-work program sponsored by the Works Progress Administration (WPA) and administered by the NPS, the purpose of which was to record the historic features of gardens located in Massachusetts.⁴⁰ Architects working with HALGP meticulously recorded a garden's existing flora and architectural features, in addition to noting past features in order to illustrate a garden's chronological development.⁴¹

Like many other programs sponsored by the New Deal, HALGP was terminated in 1940 as World War II loomed on the horizon. In October 2000, the NPS, recognizing that historic landscape preservation was a growing national concern, officially created the Historic American

⁴⁰ Birnbaum and Hughes, 12.

⁴¹ Ibid.

Landscape Survey (HALS), a spiritual successor to the original program.⁴² HALS documentation usually consists of both black and white and color photographs, measured and interpretive drawings, and written history.⁴³ Since the program's inception, HALS professionals have documented numerous historic gardens, such as Middleton Place and Bartram's Garden.⁴⁴

Garden Preservation in the Postwar Period

The immediate postwar period saw a temporary decline in general interest in landscape preservation, a trend which had an adverse impact on garden preservation. Most of the lack of interest can be attributed to the rise of the modernist movement in architecture and landscape design, which completely disavowed the past in its efforts to relentlessly move forward and popularize a new style of design that owed nothing to history. Within a short time, Modernism became the dominant design theme in post-war America, an America that also increasingly looked to the future while ignoring its past.⁴⁵

Of course, all trends are cyclical. By the 1970's, the dominance of modernism in architecture and landscape design began to wane, and professionals within these disciplines once again took a renewed interest in past designs and the lessons that they held in store.⁴⁶

Garden Preservation and The National Trust for Historic Preservation

A "quasi-public organization," the National Trust for Historic Preservation was chartered by Congress in 1949 with the purpose of "linking the preservation efforts of the National Park

⁴²"Historic American Landscape Survey (HALS)," The National Park Service, 11, Dec. 2008
<<http://www.nps.gov/history/hdp/hals/index.htm>>.

⁴³ Ibid.

⁴⁴"Sample Projects," The National Park Service, 12 Dec. 2008
<<http://www.nps.gov/history/hdp/samples/index.htm>>.

⁴⁵ Birnbaum and Hughes, 8.

⁴⁶ Favretti, 14; 1999.

Service and the federal government with activities of the private sector.”⁴⁷ Although the Trust’s primary objective is to promote the preservation of historic buildings, through myriad activities, the Trust has also helped to advance the goals of garden preservation. One of the main ways that the Trust has helped facilitate the protection of historic gardens is through its acquisition of historic properties. Since the Trust first began acquiring historic properties in 1951, they have acquired twenty-nine historic sites, many of which possess “large and important landscapes.”⁴⁸

The National Trust is also responsible for bringing to the public’s attention national preservation issues, a task which it accomplishes through education and advocacy. In 1975, the Trust became one of the first nationwide organizations to openly advocate in favor of landscape preservation when the Western Regional Office of the of the Trust co-hosted a conference with the Trust for Public Land addressing “the need for landscape conservation guidelines and classifications based on natural systems and processes in addition to cultural values.”⁴⁹ The conference had a notable impact on government policy: Within a few years, the National Park Service would address the concerns identified by the National Trust concerning cultural landscapes.

Modern Government Initiatives in Garden Preservation:

In many respects, government sanctioned garden preservation began in 1966 when Congress passed the National Historic Preservation Act (NHPA).⁵⁰ This act, which in its initial

⁴⁷ Tyler, 42.

⁴⁸ Some of the properties acquired by the Trust that contain noteworthy gardens include Cliveden, Philadelphia, PA; Drayton Hall, an excellent example of a Georgian plantation house along the Ashley River in Charleston, SC; Montpelier, James Madison’s former home in Orange, Virginia; Kykuit, the Rockefellers one time home in Tarrytown, NY; Lyndhurst, noted Gothic architect A.J. Davis’s home, also in Tarrytown, NY. Favretti, 12; 1999.

⁴⁹ Keller and Keller, 190.

⁵⁰ The National Historic Preservation Act established a number of provisions that helped redefine the concept of historic preservation in America. The Act established the National Register of Historic Places, the nation’s inventory of historic structures. The act created the Advisory Council on Historic Preservation, an appointed body tasked with advising the President and Congress on historic preservation policy.

form, mainly addressed preservation of the built environment and archaeological resources, also helped to provide some protection and recognition for gardens, mainly through their association with historic structures.⁵¹ Unfortunately, the provisions of the NHPA provided little guidance as to how landscapes such as gardens could be treated as independent resources. Gradually, the NPS acknowledged this shortcoming, and through a series of pamphlets and technical bulletins, officially recognized historic landscapes as cultural resources worth preserving.⁵²

The first NPS publication to address the issue of landscape preservation was published in 1984. Entitled *Cultural Landscapes: Rural Historic Districts in the National Park Systems*, this work provided “a means of systematically categorizing and evaluating landscapes and their component features.”⁵³ Although a notable step forward, this publication focused on the identification and evaluation of rural districts consisting of many component landscapes, as opposed to recognizing the value of individual landscapes such as gardens.

This oversight was remedied in 1986, when the NPS published *National Register Bulletin #18: How to Document, Evaluate, and Nominate Designed Historic Landscapes*. As the title aptly suggests, this bulletin explains the criteria required to nominate landscapes that have been specifically designed and manipulated to the National Register. Among the many landscapes identified are historic gardens.

The act requires any federal or non-federal agency carrying out a project with federal monies to assess the impact of the proposed undertaking on historic resources within the project area, and wherever possible take measures to eliminate or limit the adverse affects. This process is known as Section 106 review.

The Act also calls for the establishment of State Historic Preservation Offices (SHPO's). Among the many duties assigned to the SHPO's include identifying and nominating their state's respective historic resources for inclusion within a state registry, preparing National Register nomination, assisting with Section 106 review, acting and assisting local governments on historic preservation related matters, acting as a liaison between the National Park Service and local governments.

⁵¹ Through association with historic structures, historic gardens were nominated to the National Register, and in certain instances, spared destruction due to Section 106 review.

⁵² Keller and Keller, 189.

⁵³ Ibid. 196.

Further reforms were enacted in the early 1990's. In 1992, the Secretary of Interior's Standards were revised so that they would apply to cultural landscapes.⁵⁴ Consistent with this change, the NPS began to create a database of information on cultural landscapes from information assembled through cultural landscape inventories.⁵⁵ Guidelines for preparing detailed cultural landscape reports were also developed.

Finally, having addressed the proper procedures for identifying, evaluating and nominating cultural landscapes, in 1994, the NPS published *Preservation Brief # 36: Protecting Cultural Landscapes and Guidelines for the Treatment of Cultural Landscapes*. This brief provided detailed guidelines articulating what characteristics of a particular landscape are essential to protect, what can be removed or allowed to disappear, and how landscape change can be appropriately managed.⁵⁶

⁵⁴“Guidelines for the Treatment of Cultural Landscapes,” The National Park Service, 12 Dec. 2008 <http://www.nps.gov/history/hps/hli/landscape_guidelines/index.htm>.

⁵⁵ Keller and Keller, 199.

⁵⁶ *Ibid.* 216.

PART II

GARDEN EASEMENTS:

ORIGINS, EVOLUTION, CONTENTS AND CONTEXT

CHAPTER 2. GARDEN EASEMENTS

Non-Possessory Interests and Real Property

In order to properly appreciate how garden easements have emerged as an important tool for garden preservation, it is necessary to explain a few of the basic concepts underpinning United States private property law. One of the most important principles on which the United States was founded is the right of private individuals to own ‘real property.’⁵⁷ Ownership of real property entitles a landowner to a plethora of ‘rights’ that have often been metaphorically compared to ‘a bundle of sticks,’ each stick corresponding with a particular right associated with the ownership of real property.⁵⁸ Complete possession of all of the rights of real property ownership is referred to as ‘fee simple absolute.’⁵⁹

One of the rights permitted to owners of real property is the ability to detach and convey through either sale or donation certain interests in property, while still retaining overall ownership of the property.⁶⁰ These rights are commonly referred to as ‘non-possessory interests,’ and are defined as the right to use or prohibit use of land owned by another party.⁶¹ Each non-possessory interest is worth a specific monetary value; conveyance of a specific interest will reduce the overall worth of the property by the value of the interest conveyed. Today, United States common law permits many types of non-possessory interests.⁶² One of the

⁵⁷ Real Property is commonly defined as land and any improvements situated on it. Barlow D. Burke and Joseph A. Snoe, Property: Examples & Explanations (Gaithersburg, New York: Aspen Law & Business, 2001), 6.

⁵⁸ Rights are defined as “a legally enforceable claim of one person against another, that the other shall do a given act or not do a given act.” William B. Stoebuck and Dale A. Whitman, The Law of Property 3rd ed. (St. Paul, MN: West Group, 2000) 4.

⁵⁹ *Ibid.* 28-34.

⁶⁰ Interests are commonly defined as “any single right, privilege, power, or immunity.” *Ibid.* 4.

⁶¹ Non-possessory interests in real property allow property owners to maintain ownership of property, but not in fee-simple absolute.

⁶² Mineral rights, air rights, water rights, rights-of way, easements, equitable servitudes, and real covenants are a few of the more common non-possessory interests.

most commonly conveyed non-possessory interests in real property are easements, which are described in detail below.

Basic Principles of Easements

As a legal concept, easements have enjoyed a long history, having first been used in medieval Britain for the purpose of legally granting right-of-ways giving others the ability to use or travel through another person's property. Traditionally, "an easement is defined as a privilege on the part of the person entitled to it to make some use of the land subject to it in derogation of the possessory rights of the owner of the land."⁶³ Stripped of legal jargon, an easement is a legal agreement whereby a property owner grants a deed to a second party conveying the ability to either carry out or restrict certain activities that occur on the property. Easements that permit the holder of the easement to carry out certain activities on a property are commonly referred to as 'affirmative' easements, while easements that allow the easement holder to restrict certain activities that occur on a property are referred to as 'negative' easements.

There are two main types of easements that are legally acknowledged in the United States; appurtenant easements, and easements in gross. Appurtenant easements are easements involving two independent parcels of land that are usually adjacent. In these easements, one parcel of land is held by the dominant estate, while the other parcel is held by the servient estate. The easement is placed on the servient estate's parcel for the benefit of the dominant estate, and the easement is considered to be a part of the property, and its rights and obligations will be valid for all future owners of both the dominant and servient parcels.⁶⁴

⁶³ Russell L. Brenneman, Private Approaches to the Preservation of Open Land (New London, CT: Conservation and Research Foundation, 1967) 22.

⁶⁴ Stephen C. Gregory, "Easements for Dummies," Virginia State Bar Website 27 Jan. 2008 <<http://www.vsb.org/sections/rp/articles/gregory.html>>.

Easements in gross are easements in which there is no dominant estate.⁶⁵ Holders of easements in gross are not required to possess land that is directly adjacent to or is in some way affected by the parcel of land on which the easement is placed. Unlike appurtenant easements, easements in gross are voluntary agreements between two non-dependent parties, and typically possess mutual benefits for both parties involved. In contrast to appurtenant easements, holders of easements in gross can not automatically pass their rights and obligations on to their successors and assigns, as privileges granted under such an easement are granted exclusively to the individual and/or organization in question, and may be extinguished when the aforesaid entities cease to exist.⁶⁶

History of Conservation Easements

The first easements to be utilized for conservation purposes were held by government agencies in order to protect aesthetic values that were determined to be in the public interest.⁶⁷ Although conservation easements held by government agencies helped to further conservation, they did little to demonstrate the need for specific conservation easements. The lands protected by these easements were usually adjacent to publicly owned lands, therefore making the easements appurtenant easements which would exist in perpetuity, with the government being

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ There are several early examples of conservation easements being used to protect aesthetic values. In the late 1880's easements were used to protect the views along parkways around Boston designed by the preeminent landscape architect, Frederick Law Olmsted. Later examples include easements enacted by the federal government in the 1930's to protect the viewsheds along the Natchez Trace Parkway in Mississippi, and the Blue Ridge Parkway in North Carolina and Virginia. Elizabeth Byers and Karin Marchetti Ponte, The Conservation Easement Handbook, 2nd ed. (San Francisco, CA: Land Trust Alliance and The Trust for Public Land, 2005) 10-11.

For a superb essay on how the NPS arrange for the preservation of scenic vistas along the Blue Ridge Parkway, see also: Ian Firth, "The Blue Ridge Parkway: Road to the Modern Preservation Movement" Design With Culture: Claiming America's Landscape Heritage, ed, Charles A. Birnbaum and Mary V. Hughes, (Charlottesville, VA: University of Virginia Press, 2005) 179-202.

For a detailed account of the struggles the U.S. Government faced in acquiring scenic easements along the Blue Ridge Parkway, see also: Harley E. Jolley, The Blue Ridge Parkway (Knoxville, TN: The University of Tennessee Press, 1969) 102-121.

the dominant estate. From a legal perspective, these easements existed primarily for the benefit of the dominant estate, which was the government, which in turn is empowered by the citizens of the United States of America.

Private, non-profit groups committed to historic preservation and land conservation were also quick to realize the potential benefits of easements.⁶⁸ Traditionally, such groups had resorted to protecting resources through fee-simple ownership, a tactic that required considerable revenues. In contrast, easements would allow these organizations the opportunity to obtain a non-possessory interest in a natural or historic resource for a fraction of the cost of fee-simple purchase. This in turn freed up capital that allowed these organizations to protect additional resources. In addition, easements proved far more useful for protecting resources as opposed to other non-possessory interests such as equitable servitudes and real covenants.⁶⁹

⁶⁸Certain New England based land trusts began using conservation easements to preserve open land beginning in the early 1960's. This trend was accelerated after 1964, when the Federal Government began allowing tax deductions for charitable easements. Thomas S. Barrett and Putnam Livermore, The Conservation Easement in California (Covelo, CA: Island Press, 1983) 5-6.

⁶⁹There are many similarities between real covenants and equitable servitudes. Both are non-possessory interests in real property that must be conveyed in writing, usually in the form of a deed. Both interests must 'touch and concern' the burdened estate, and are designed to 'run with the land' with the intention of binding future owners of the servient estate to the terms and conditions of the respective covenant or servitude.

Real covenants differ from equitable servitudes in that they require what is known as 'privity of estate,' which is broadly defined as proof of a continued legal chain between the original promisee (the party that benefits from the creation of the real covenant) and all subsequent owners of the servient estate. In order for a real covenant to be valid, two types of privity must exist; horizontal privity and vertical privity. Horizontal privity is the relationship between the original parties that agreed to the terms of the covenant. Vertical privity is defined as the relationship between the original party that created the covenant and all future owners of the servient estate.

In contrast, the main element that defines an equitable servitude is the requirement that all subsequent owners of the servient estate must be given 'notice' as to the existence of the equitable servitude in order for its terms and conditions to remain valid. " 'Notice' as an element of equitable servitudes can be either actual notice, constructive notice gathered from the deed records, or inquiry notice gathered from viewing the premises and surrounding properties." 497.

The main disadvantage of both real covenants and equitable servitudes is that if the owner of the servient property is in violation of the terms and conditions of a real covenant or equitable servitude, the holder of the aforesaid covenant or servitude can only sue for damages, and not command the owner of the servient estate to comply with the rules, severely limiting their use for conservation purposes. Also, unlike conservation easements, if the conditions that led to the creation of the real covenant or equitable servitude are found to no longer exist, a court may extinguish the easement or covenant on the grounds that further enforcement would unfairly burden the servient estate. This is known as 'the doctrine of changed conditions.' The permutations of this doctrine are clear to see; it is entirely possible that through certain legal interpretation or manipulation, a perfectly valid covenant or servitude may be extinguished. Burke and Snoe, 485-497.

Inherent Limitations of Appurtenant Easements And Easements in Gross

When private interest groups committed to conservation and preservation began to use easements in the late 1960's, the shortcomings of traditional common law easements soon became apparent. Neither appurtenant easements nor easements in gross are ideally suited for private conservation purposes, their basic legal parameters having been established long before the development of the modern concepts of land conservation and historic preservation. Each type of easement presents unique difficulties. The main problem with appurtenant easements is that they require fee-simple ownership of an adjacent parcel of property, thereby making them completely useless for most conservation minded groups. In contrast, the main impediment to employing easements in gross is that any protections afforded by such easements are limited to the lifespan of the individual or organization holding the easement, rendering them unsuitable for the permanent protection of historic and natural resources.

The shortcomings associated with both of these easements only became apparent once they began to be frequently utilized for the purpose of permanently protecting historic or natural resources. In order to solve this problem, individual states began to take the initiative in adopting statutes that specifically addressed easements used to protect buildings or landscapes.⁷⁰ Though ostensibly a step in the right direction, these measures ultimately proved to be ineffective, for the statutes that did exist varied widely in scope from state to state.⁷¹ It was not until the creation of the Uniform Conservation Easement Act in 1981 that easements began to obtain national recognition as a valid legal tool for the protection of historic and natural resources.

⁷⁰Among the first states to enact easement enabling statutes were California (1959) and New York (1960). By 1979, 40 states had enacted separate statutes. Frederico Cheever and Nancy A. McLaughlin, "Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions," Environmental Law Reporter Vol. 34 (2004): 10225.

⁷¹Byers and Ponte, 11.

Uniform Conservation Easement Act (UCEA)

The Uniform Conservation Easement Act (UCEA) was created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1981.⁷² In creating the UCEA, the Commissioners' goal was to create "a model for state legislation that would enable qualified agencies and private conservation organizations to accept less-than-fee interest in land for the purposes of conservation and preservation."⁷³

The Act addresses a number of key issues that had previously impeded the widespread use of easements for conservation purposes. Firstly, the Act eliminates the distinction between easements used to protect historic and natural resources, maintaining that both types of resources are equally worthy of conservation, and that henceforth, easements protecting both types of resources will be classified as 'conservation easements.'⁷⁴ This is of great importance, for prior to the creation of the Act, each state had used different criteria for defining and recognizing conservation easements, some states only recognizing easements which protected historic resources such as buildings or archaeological sites, while others had only recognized easements that protected natural resources such as landscapes.

Secondly, the Act acknowledges the fact that in order for conservation easements to work as intended, they cannot be subject to the restraints of appurtenant easements and easements in

⁷² NCCUSL was founded in 1891 "to study and review the law of the states to determine which areas of law should be uniform." It is a non-profit unincorporated organization. Commissioners serving on the NCCUSL represent all 50 states, Washington D.C., and the Commonwealths of Puerto Rico and the Virgin Islands. Each specific jurisdiction determines how its membership is appointed, as well as the number of commissioners and the duration of their terms. In order to serve as a commissioner, a prospective member must be certified to practice law in their respective state or commonwealth.

If uniformity concerning a specific law is determined to be desirable, the Commissioners will propose and create model statutes addressing the issue. Statutes proposed by NCCUSL have no legal standing unless they are subsequently adopted by individual states through legislation.

Since its creation, NCCUSL has created over 250 uniform laws.

"Frequently Asked Questions About the NCCUSL," *The Uniform Law Commission*, 5 Oct. 2008
<<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>>.

⁷³ Byers and Ponte, 11.

⁷⁴ Ninetieth Annual Conference of Commissioners on Uniform State Laws, "Uniform Conservation Easement Act," New Orleans, LA, 1981, §1.

gross, and that this could only be brought about by removing “certain common law impediments which might otherwise undermine the easements’ validity.”⁷⁵ The Act resolved the longstanding problem of perpetuity associated with easements in gross, stating that unless otherwise intended, all conservation easements will be “unlimited in duration.”⁷⁶ The Act also states that conservation easements do not have to be appurtenant, therefore eliminating “the requirement in force in some states that the holder of the easement must hold an interest in real property.”⁷⁷ By eliminating these two major obstacles, the Act helped to give the framers of future conservation easements more latitude to create a legally sound easement document.

Third, the Act permits the creation of conservation easements that impose both negative and affirmative restrictions on the owner of the property encumbered by the easement.⁷⁸ Traditionally, common law easements have only permitted “a limited number of ‘negative easements’” that prevented the owner of an estate from carrying out certain activities on his or her property.⁷⁹ However, the Commissioners understood that in order for a conservation easement to be effective, it would be necessary to restrict certain activities that an estate owner carries out on his or her estate that may be harmful to the resource being protected. Similarly, the Act permits conservation easements to impose affirmative obligations on both the owner of the encumbered property as well as the holder of the easement, which prior to the Act, had been prohibited by U.S. common law.⁸⁰ By allowing reciprocal affirmative obligations, the commissioners again acknowledged the fact that in order to completely ensure that a resource is preserved in accordance with the terms of the easement, the property owner may be required to carry out periodic maintenance. This provision also serves to prevent the destruction of the

⁷⁵ U.C.E.A., Commissioners Prefatory Note, 2.

⁷⁶ U.C.E.A. §2(c).

⁷⁷ U.C.E.A. §4(1) & Comment, 10.

⁷⁸ U.C.E.A. §4(4) & 4(5)

⁷⁹ U.C.E.A: Commissioner’s Comment, 10.

⁸⁰ U.C.E.A. §4(5).

resource through inaction on the part of the property owner, a tactic commonly referred to as ‘demolition by neglect.’ Similarly, the Act allows affirmative actions on the part of the easement holder, admitting that such responsibilities may be necessary for the terms of the easement to be upheld.⁸¹

Finally, since holding a conservation easement is a serious long-term obligation, the Act restricts the types of organizations allowed to hold such easements to two distinct entities; governmental bodies and charitable organizations.⁸² Eligible governmental bodies include agencies at the local, state, and federal level. In contrast, the Act limits ‘Charitable organizations’ to corporations, associations, and trusts with 501(c)(3) status “having an interest in the subject matter.”⁸³ Also of note, the Act permits what is referred to as ‘third-party right of enforcement,’ which basically amounts to the conveyer and holder of an easement designating a third party to enforce the terms and restrictions of the easement in the event that the holder of the easement fails to do so.⁸⁴

Impact of the Uniform Conservation Easement Act

The success of the UCEA in redefining how conservation easements are used cannot be overstated. Prior to the creation of the Act, previous efforts on the part of individual states to address the issue of conservation easements had resulted in varied and inconsistent statutes. With the creation of the Act, any state interested in creating such legislation now “had an easy-to-use template that, after some potential modification to account for the peculiarities of the law

⁸¹ Inspections, monitoring, enforcement, and legal actions are all examples of ‘affirmative’ responsibilities on the part of easement holding organizations.

⁸²U.C.E.A. Section δ 1(2)(i) & 1(2)(ii).

⁸³ Refer to U.C.E.A. Commissioners Prefatory Note, 1.

⁸⁴ U.C.E.A. Section δ 1(3).

of a particular state, could be adopted rather easily.”⁸⁵ This made the task of creating relevant legislation significantly easier.

The success of the Act has been demonstrated by the fact that since the Act’s creation in 1981, twenty-four states have enacted legislation based on the UCEA, while the remaining twenty-six states chose to draft their own laws concerning conservation easements.⁸⁶ Passage of legislation in every state has helped to increase the legitimacy of the use of conservation easements as a suitable tool for protecting natural and historic resources. Thanks to the pioneering role of the UCEA, conservation easements are now one of the most widely used tools of land preservation. As of 2005, conservation easements have successfully protected over 6.5 million acres of land from the perils of development.⁸⁷ Also of note are the thousands of buildings, monuments, and archaeological sites that have been protected through use of conservation easements.

Arguably the greatest benefit brought about by the UCEA is the general acceptance that conservation easements can be used to protect a wide variety of natural and historic resources. This has allowed conservation easements to be successfully used in protecting a diverse range of unorthodox resources, thus allowing a whole subcategory of conservation easements to develop. These easements, which are often referred to as ‘special purpose easements,’ include any highly specialized resource that defies traditional categorization and may require specialized provisions or care.⁸⁸ Garden easements are one prominent example of ‘special purpose easements.’

⁸⁵Christopher Todd Fullerton, The Use of Cultural Easements for the Protection of Historic Properties in Georgia, Masters Thesis (Athens, GA: University of Georgia, 2004) 39.

⁸⁶This book published in 2005, lists 23 states that have adopted UCEA, with 26 states choosing to draft their own legislation. In 2005, Wyoming adopted legislation based on UCEA, becoming the last state to enact a statute formally addressing conservation easements. Byers and Ponte, 12.

⁸⁷ Timothy C. Lindstrom, A Tax Guide to Conservation Easements (Washington D.C.: Island Press, 2008) 4.

⁸⁸Agricultural easements, Scenic Easements, Trail Easements, and Garden easements are all examples of ‘special purpose easements.’ Byers and Ponte, 198.

Garden Easements as a Subcategory of Conservation Easements

Garden easements can be classified as special purpose easements on the basis of their narrowly defined focus of protecting gardens. A ‘garden easement’ is defined as “an easement that protects the historic and natural values of a man-made garden.”⁸⁹ Garden easements incorporate a mixture of values from both preservation and conservation easements. On one hand, the goal of a garden easement is to preserve a garden’s appearance, which is similar to the objectives of a preservation easement. Yet at the same time, one of the main purposes of a garden easement is to protect the flora within a garden, similar to the objectives of a conservation easement.

While theoretically, any garden can be encumbered by an easement, most gardens need to possess significant features deemed worthy of protection in order to merit encumbrance by an easement. Gardens worthy of preservation will likely possess one or more of the following characteristics:

- Significant aesthetic values
- Significant historic value
- Be the work of a famous garden designer or landscape architect
- Significant flora/fauna
- Significant architectural elements
- Association with a famous person or event

⁸⁹ Eric Reisman. Personal definition. 2007.

Benefits of Garden Easements

Garden easements are a valuable yet underused resource for protecting gardens. In addition to all the advantages previously mentioned, there are numerous other reasons why owners of noteworthy gardens should consider placing an easement on their garden.

i. Permanence

Garden easements, (and easements in general) have proven an effective technique for providing permanent protection for a property in accordance with the easement donor's wishes. A garden easement, once recorded, runs with the title to the land, requiring all future owners of the property to comply with the terms and conditions that are specified within the easement. This means that all future owners will be required to care for the garden in accordance with the terms and restrictions as specified in the easement. Therefore, the original easement donor's objective of preserving their garden in perpetuity will be honored.

ii. Compromise Between Private and Public Interests

Another reason that easements have proven to be so successful is that they represent a perfect compromise between ownership of private property and preserving the public interest. Prior to the use of garden easements, people who were truly interested in preserving their gardens would either have to sell or donate their land to individuals or organizations that were committed to preserving the garden for future generations. Obviously, there are many disadvantages to this approach. For one thing, when selling a property, it is often difficult to find an owner with similar interests who will be equally committed to garden preservation. In addition, many organizations that are committed to garden preservation that would be happy to

take possession of the garden lack the financial resources necessary to protect gardens through fee-simple acquisition.

However, by donating an easement on a garden, all of the above concerns can be eliminated. First, the garden owner still retains possession of his or her land, which keeps the property on the public tax roll, while the costs associated with long-term monitoring and enforcement of the easement are placed in the hands of the organization that holds the easement. This compromise represents the best of both worlds, as both the easement holding organization and the property owner achieve their objectives without any of the costs associated with the transaction of private property. Aside from the terms of the easement, the garden owner retains most rights associated with private property ownership: “Generally speaking anything not prohibited remains the owner’s rights.”⁹⁰ In short, “the most effective way to ensure permanent protection while continuing to own land – and eventually sell or bequeath it – is to donate a conservation easement.”⁹¹

iii. Flexibility

Another benefit of garden easements is that they can easily be adapted to different circumstances.⁹² Although easement-holding organizations often have a series of requirements that must be fulfilled by a prospective easement donor, they know that no two gardens, or for that matter, donors, will be identical. Most easement-holding organizations understand that when a person donates a garden easement, they are not just bequeathing an easement, but rather are donating a part of themselves. Therefore, they realize that certain requests may need to be accommodated in order to satisfy the easement donor. Most organizations are very flexible in

⁹⁰ Samuel N. Stokes, Elizabeth A. Watson, and Shelly S. Mastran, Saving America’s Countryside: A Guide to Rural Conservation (Baltimore, MD: John Hopkins University Press, 1997) 225-226.

⁹¹ Richard Brewer, Conservancy: The Land Trust Movement in America (Lebanon, NH: University Press of New England, 2003) 2.

⁹² Byers and Ponte, 10.

tailoring the exact terms and conditions of an easement to suit both the needs of the garden as well as the wishes of the donor. Unlike other forms of protection, with easements, such an accommodation is relatively simple and commonplace. Since garden easements are created by two independent parties on a voluntary basis, considerable leeway is allowed for bargaining in order to ensure that both parties are completely satisfied.

iv. Acceptability

A further advantage of easements is their acceptability in comparison to other effective forms of garden preservation, most notably government regulation. In the United States, regulation of private property for conservation or preservation purposes, while admittedly the most effective means available, is often shunned by property owners. Any meaningful designation or regulation of historic or natural properties is entirely dependent upon the support and goodwill of the general public.⁹³ “Unlike regulations, easements are negotiated with willing sellers or donors and can be tailored to achieve particular conservation goals while accommodating the needs of the individual landowner.”⁹⁴ The fact that easements are entered into on a voluntary, as opposed to a mandatory, basis, along with the fact that the terms and restrictions of the easement only affect the two parties involved, means that such agreements do not arouse animosity in the same fashion as regulations, which when passed, are applied systematically to the public as a whole.⁹⁵ In addition to being acceptable to the general public, use of conservation easements is also endorsed by government, as they allow local governments to continue levying property taxes, while at the same time avoiding the adverse financial costs associated with enforcing regulatory laws.

⁹³ Fullerton, 4.

⁹⁴ Sally K. Fairfax and Darla Guenzler, Conservation Trusts (Lawrence, KS: University Press of Kansas: 2001) 125.

⁹⁵ Byers and Ponte, 7.

v. Public Benefit

Another important benefit that should not be overlooked when donating a garden easement is to ensure that in some way, the general public will benefit from the easement. Consistent with this, it is strongly recommended that garden owners donating an easement include a clause allowing a limited amount of public access to the garden. Requirements for public access will vary among easement holders.⁹⁶ However, many easement-holding organizations do require a certain degree of public access, for the whole reason such organizations exist in the first place is for the public benefit.⁹⁷ Finally, it is important to note that the federal government, as well as many state governments, require that easement donors allow a limited amount of public access in order to claim a tax deduction.⁹⁸

vi. Tax Incentives

Finally, the last compelling reason to donate a garden easement (and for some the most alluring incentive of all) is to take advantage of tax incentives that are available to property owners. The federal government, along with many state and local governments, grants income and property tax incentives to those who have donated an easement to either a government entity or non-profit organization. These tax incentives were created in order to encourage conservation efforts by recognizing the resulting decrease in property value resulting from easement donation. Tax incentives that may be claimed for garden easements fall neatly into five categories, which are described at length later in the narrative.

⁹⁶ Ibid. 21-22.

⁹⁷ Some easement holding organizations may require that the garden be physically accessible to the general public at certain times, while others will be satisfied so long as the garden is visible from a public right-of-way.

⁹⁸ 26 U.S.C.S. § 170(h)(3) (2009).

History and Subsequent Development of Garden Easements

At the present time, there is a paucity of information concerning the history and development of garden easements. It was this lack of available information concerning this topic that ultimately led the author to carry out the research leading to the development of this thesis.⁹⁹

Little information exists explaining how the use of easements to protect gardens developed. Most likely, the first gardens to be protected by easements were those affiliated with historic buildings, where it was recognized that preservation of the grounds would be essential to assuring the integrity of the site. For example, in the early 1980's, the Historic Charleston Foundation, a non-profit primarily devoted to the preservation of Charleston's built environment, began accepting easements that protected noteworthy gardens in addition to the structures.¹⁰⁰

As a specific legal tool, garden easements have only been employed for about twenty years. One of the first recorded easements specifically protecting a garden was donated in 1992, when Ruth Bancroft of Walnut Creek, California donated an easement on her garden to The Garden Conservancy.¹⁰¹ (Figure 1) At the time, Ms. Bancroft's concerns were similar to those faced by many aging garden lovers today; she had spent over forty years developing and caring for her 2.5 acre dry garden, and had made no provisions to



Figure 15:
Ruth Bancroft in her garden. Figure courtesy of The Garden Conservancy

⁹⁹ I initially began research on garden easements in the Fall of 2007 for a final project for HIPR 6400, 'Southern Garden History,' taught by James R. Cothran, ASLA & adjunct faculty at UGA. It was Mr. Cothran who encouraged me to continue my research in this field for the purpose of this thesis.

¹⁰⁰ April Wood, Manager of Easements and Technical Outreach, Telephone Interview, 05 Dec. 2008.

¹⁰¹The Garden Conservancy was founded in 1988 with the purpose of preserving gardens of national importance. "Preservation Project Gardens: The Ruth Bancroft Garden, Walden Creek, CA.," The Garden Conservancy, 26 Dec. 2007, <<http://www.gardenconservancy.org/presGard.pl?ID=11>>.

ensure that the garden was permanently preserved beyond her lifetime.¹⁰² (Figures 2-3) This easement accomplished two objectives; first, it prohibited any development of the property “for any purpose inconsistent with the preservation of the garden.”¹⁰³ Second, it established the precedent that easements can be placed on gardens, a legal assumption that has so far gone unchallenged.

Since this time, garden easements have become more common, although the number of gardens protected by easements is small in comparison to the number of historic properties and open spaces thus encumbered.¹⁰⁴ There are a variety of reasons for this disparity. The most fundamental obstacle is that relatively few people know what an easement is. Other gardeners, who are aware of the existence of easements, are uncertain how to use them to protect their gardens. Finally, there is no doubt that there are many exquisite gardens whose owners underestimate the historic and cultural values that their gardens possess. If only such owners were made aware of the significance of their gardens, it is likely that they would be receptive to the idea of placing an easement on their garden in order to preserve it for posterity.

¹⁰²“About: History,” The Ruth Bancroft Garden, 23 Dec. 2008
<<http://www.ruthbancroftgarden.org/rbgarden/pages/about-history.html>>.

¹⁰³ Byers and Ponte, 205.

¹⁰⁴Other non-profits devoted to land conservation such as The Trust for Public Land, the Triangle Land Conservancy have also accepted easements protecting significant gardens, though their number remains small.



Figure 16: Ruth Bancroft Garden, Walnut Creek, California



Figure 17: Ruth Bancroft Garden, Walnut Creek, California

CHAPTER 3. STEPS TO ESTABLISHING A GARDEN EASEMENT

Introduction

In the past, the unique nature of gardens has hindered the use of easements as a form of permanent protection. Historically, there have been very few organizations devoted to garden preservation that have had the resources to pursue, along with the ability to uphold, such easements. This inevitably meant that any individual or organization serious about encumbering a garden with an easement would have to approach a larger organization with greater resources and a broader mission. This tactic also presents problems, for all too often garden preservation falls *just* outside an organization's primary mission. For example, although many preservation organizations have helped to protect important gardens through the use of easements, this is not their primary mission, and many of these gardens have been protected more for their association with a historic structure than any outstanding merits of the gardens in their own right. Similarly, other garden easements have been assumed by conservation interests such as land trusts, despite the fact that most land trusts are more interested in using conservation easements to protect open land from being developed, instead of manmade landscapes that require a high degree of proactive management.

Donating a garden easement is hardly an easy task. It is a process that entails finding the right holder, a holder who is just as passionate about the conservation values of the garden as the garden owner is. It is a process that involves considerable compromise and negotiation on the part of the easement donor and the grantee in order to ensure that the needs of the garden are met and both parties are satisfied with the end result. Finally, it involves understanding all of the potential risks that may result from donating an easement on a garden.

Finding the Right Holder

Prior to donating an easement, garden owners should carry out some background research on potential easement holders before initiating formal proceedings with easement holding organizations. First, the garden owner needs to find an organization that would be receptive to accepting a grant of easement on a garden. Organizations such as garden clubs and garden trusts are often a good place to start. Other organizations such as land trusts, or even organizations devoted to the preservation of historic buildings, might be interested in accepting a garden easement, provided such an easement is consistent with their overall mission.

When considering a potential organization, garden owners should make sure that the organization is well established and is qualified to hold and enforce an easement. In large part, this can be determined by examining the organization's past successes in administering and enforcing the easements that they presently hold.

At this point, it is important to remember that although garden easements, as a subcategory of conservation easements, are designed to last in perpetuity, the easement can be extinguished if the easement holding organization ceases to exist. In order to ensure that this does not become a problem, the garden owner should make sure that the easement holder intends to designate a third-party that is qualified to assume the responsibilities of the primary holder of the easement so that the easement remains in effect in the event that the original grantee ceases to exist.

Organizations to Donate to

Garden owners can donate an easement to either a governmental agency, or a non-profit organization with 501(c)(3) status that is considered to be a 'charity' by the IRS.¹⁰⁵ It is

¹⁰⁵ The IRS assumes that a 501(c)(3) is a private foundation unless it proves it is a charity. Byers and Ponte, 18; Stokes, Watson, and Mastran, 226.

important to remember that the type of entity that is allowed to hold an easement on a garden is ultimately determined by each state's conservation easement statute. Therefore, it would be in the best interests of the easement donor to make themselves familiar with their respective state's provisions governing conservation easement donation.

In actuality, most easements will be donated to non-profits, as governments, whether at the local, state, or federal level, are generally more interested in using conservation easements to protect large tracts of land such as farmland, forests, and open spaces, instead of small points of interest, such as gardens.¹⁰⁶ In addition, government agencies have often proved reluctant to accept easements on landscapes such as gardens that may require intensive monitoring efforts that would be both time and cost prohibitive.¹⁰⁷ In contrast 501(c)(3)s with related interests, such as garden clubs, historic foundations, and land trusts, are often receptive to taking easements on gardens that are consistent with their agenda and mission.¹⁰⁸

Besides being generally reliable holders of easements, charitable organizations typically possess the financial and human resources required to monitor and enforce the terms and conditions of an easement. These organizations also enjoy a high degree of stability and permanence, ensuring that the easement will be maintained and upheld for a long period of time. Finally, any garden owner seeking to claim a charitable tax deduction for the donation of a garden easement must seek out one of the above entities.

How Organizations Acquire a Garden Easement

Currently, there are two techniques that easement-holding organizations use to acquire garden easements: purchase or donation. Purchase of easements is not a common practice, and

¹⁰⁶ Byers and Ponte, 241.

¹⁰⁷ Barrett and Livermore, 5, 91-92.

¹⁰⁸“Nonprofit organizations will remain preferred recipients of conservation easements, for the simple reason that they embrace preservation as a primary objective and exist in order to carry out that mission.” Fullerton, 122.

is mainly carried out by government agencies as a means of encouraging individuals to establish an easement as part of a widespread public policy agenda.¹⁰⁹

Today, donation is the far more common and preferred method of acquiring a garden easement. This strategy is preferred by the vast majority of non-profits that hold garden easements, as these organizations typically do not possess the financial means to purchase easements, and the success of their easement programs has been dependent upon “charitably motivated easement donations that result from relationships with landowners.”¹¹⁰ Another factor that has contributed to the increased popularity of easement donation is the fact that donation is a prerequisite in order to claim a garden easement as a tax deduction.

Generally speaking, private individuals interested in garden conservation will be the parties that brings up the topic of easement donation. However it is not unheard of for non-profit organizations to ask property owners to consider easement donation, especially if a property contains notable conservation values.¹¹¹

Who is Responsible for Drafting the Document?

Typically, the easement document is created through the joint collaboration of the garden owner, the easement-holding organization, and their respective legal advisors. Creating a document that everyone is satisfied with will usually require several draft revisions. Usually, the costs incurred through creating the easement document are paid for by the owner.

Other Points to Consider Prior to Donating an Easement

As can be seen, there are many inherent advantages associated with donating a garden easement. However, despite all of the advantages, it must be stressed that first and foremost a

¹⁰⁹Byers and Ponte, 245.

¹¹⁰ Ibid. 246-248.

¹¹¹ The Garden Conservancy, which holds easements on a select number of properties, employs this strategy.

garden easement is a legal instrument, and there are many issues that a prospective donor should take into consideration prior to donating one. However, donors should not be deterred from donating an easement by potential difficulties. By taking the time to become familiarized with some of the intricacies of conservation easements beforehand, one can be assured of making the process easier and more satisfying to all concerned parties.

i. Lack of Understanding

One of the main problems concerning conservation easements is a thorough lack of understanding on the part of the garden owner of the many rules and caveats that are included within an easement, which may lead to strained relations with the easement holding organization. The failure to adequately comprehend the terms and conditions of an easement can easily result in a thoroughly disenchanted garden owner, which in turn may unintentionally jeopardize the very conservation values of the garden that the easement is supposed to protect. This can be true of both the original grantor, as well as subsequent owners of the garden.

One of the most important points to remember is that prior to donating an easement, it is the responsibility of the garden owner to make sure that he or she completely understands the terms and conditions of the easement. “If a conservation easement is to endure, it is essential that both parties have a clear understanding of that purpose and that it be articulated in the easement document in a way that will be understood.”¹¹² A garden easement, like other real estate transactions, should never be concluded unless the easement donor fully understands what the easement entails. As to be expected, many problems subsequently arise when donors of garden easements are not fully knowledgeable of all the regulations and stipulations associated within the easement. In order to prevent problems of this nature from occurring, any person

¹¹² Barrett and Livermore, 82.

contemplating donating a garden easement should always obtain legal advice from a lawyer specializing in easements.

Another issue to consider is the importance of making sure future property owners are aware of their obligations concerning the easement. Many subsequent owners will buy properties encumbered by easements without completely understanding that they are responsible for upholding the terms of the easement. In certain instances, unscrupulous property owners will even go so far as to attempt to sell their property without first informing the prospective buyer of the existence of the easement.¹¹³ While it is always the responsibility of the buyer to be aware of the easement, ethically, a seller should always inform any potential buyer of the existence of the easement along with its stipulations.

ii. Financial Considerations

One item that should always be taken into consideration when donating a garden easement is that one's property may potentially depreciate in value after the easement is donated. Although "the property won't bring as high a price as without the easement, this will often be an acceptable trade-off for conservation minded landowners."¹¹⁴ Still, many garden owners, despite having only altruistic motives for donating an easement, fail to give this issue the gravity it deserves. For most garden owners, one's property is their largest liquidable asset; therefore it is absolutely essential that prospective easement donors carefully consider how much their property value would depreciate as a result of being encumbered by an easement. Fortunately, the loss in property value that often accompanies easement donation can often be mitigated by taking advantage of the numerous federal and state tax incentives that exist for charitable donations.

¹¹³James Boyd, Kathryn Caballero, and R. David Simpson, The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions (Washington D.C.: Resources For the Future, April 1999) 21.

¹¹⁴Brewer, 146.

The garden owner also needs to take into account the effect that a mortgage will have on their ability to donate an easement. Any garden owner wishing to donate an easement on a property that they do not completely own in fee simple needs to obtain the permission of their lending institution so that in the event of foreclosure, the lending institution, which would then own the property, will not extinguish the easement. This procedure, which is referred to as “mortgage subordination” is a requirement of most state statutes, in addition to being a requirement of the IRS in order to obtain a tax deduction.¹¹⁵

iii. Public Access

Another problem that potential easement donors should be aware of is the sensitive issue of allowing public access to a garden. Due to the fact that the primary mission of most easement holding organizations in accepting easements is to fulfill a public benefit, most easement holding organizations will require that a garden easement contain a clause stating:

that the property be made accessible to the public on a limited basis, either on a set schedule or by appointment, so that people affiliated with educational organizations, professional gardening associates, or garden societies may study the garden.¹¹⁶

Such a provision will seldom pose a concern for the original donor of the easement, who in all likelihood will be enthused at the prospect of showing others the garden they are so proud of. However, subsequent owners, who naturally had no voice or influence over the terms of the easement, may be reluctant to honor such a clause. Care must be taken on the part of the easement holding organization to gently persuade owners of this mindset about the value of providing limited public access to a garden.

¹¹⁵ Byers and Ponte, 17-18.

¹¹⁶It is important to note that some easement holding organizations may be satisfied provided that a the garden’s features can be viewed from a public right of way. Byers and Ponte, 48.

iv. Monitoring and Enforcement

One of the most crucial issues of all concerns the ability of an easement holding organization to enforce the terms of an easement. “Holding an easement is a substantial, long-term responsibility. The easement holder must be prepared to protect in perpetuity the conservation values of the property.”¹¹⁷ In order to offset the costs associated with monitoring and enforcing an easement, many easement-holding organizations will require a one-time “monitoring fee” to be paid when the easement is donated. The amount of this fee will vary and can be anywhere from a nominal fee to upwards of several thousand dollars. While many garden owners may be reluctant to pay a monitoring fee, it must be emphasized that garden easements may require more frequent monitoring than preservation or open space easements, and therefore the long-term costs of enforcement will likely be many times the amount of the “monitoring fee.”

In order to ensure that the terms of an easement are enforced, garden owners should take pains to only donate to an organization that has the human and financial resources necessary to monitor and uphold the easement. This is particularly crucial, for “failure to monitor over an extended period of time may result in the destruction of the easement.”¹¹⁸ Almost all easements that have been legally challenged have been upheld provided there had been a documented history of monitoring and enforcement.

Enforcement is typically not an issue with the property owner who donates an easement, as they were the initiators of the process.¹¹⁹ A notable exception to this rule are garden owners whose primary motive in donating an easement is financial gain. However, “second and third owners of a parcel with a perpetual easement are less likely to have a commitment to the terms of [the] easement and enforcement is more likely to be necessary in the future.”¹²⁰ Again, this is

¹¹⁷ Ibid. 47.

¹¹⁸ Fullerton, 83.

¹¹⁹ Brewer, 167.

¹²⁰ Franklin and Greunzel, 187.

why many easement-holding organizations require a fee or ‘donation’ for future easement enforcement as a condition of accepting an easement.

By creating easement documents that successfully balance conservation restrictions with flexibility, easement holding organizations can help ensure that the number of violations they have to address is minimal. The logic behind this assessment is obvious: An easement that is too restrictive will make it exceedingly difficult for the garden owner to comply with every specific provision, while an easement that is too lax may result in a proliferation of violations merely because the provisions are unclear as to what resources are important, or how they should be cared for.

v. Long-Term Legal Validity

A crucial issue to be cognizant of is the long-term legal validity of easements. “Historically, American law has not favored long-term private restrictions on the exercise of property rights and has devised numerous mechanisms for removing them.”¹²¹ While at the present time, the use of conservation easements is not imperiled, in the future, if legal interpretations and requirements for land use change, conservation easements may undergo more scrutiny. However small, the threat of legal extinguishment means that it is absolutely crucial that easement documents be as comprehensive as possible.

In order to prevent an easement from being terminated, a few key measures should always be adhered to. First, an easement should clearly define the rights and responsibilities of both the garden owner and the easement-holding organization. “A well written easement document will provide not only a lucid description of the important attributes of the resource being protected, but also a robust explanation of a host of legal rights and remedies available to

¹²¹ Byers and Ponte, 394.

the easement holder if the grantor or subsequent owners should violate the terms of the agreement.”¹²² Second, as mentioned previously, an easement should always designate a backup holder to assume the responsibilities of the easement in the event that the original grantee ceases to exist or fails to fulfill its responsibilities.

Finally, the easement should clearly define the conservation values of the garden that are to be protected, as well as proper procedures for ensuring their long-term care. These items can be addressed through the creation of a baseline document and a management plan, which should be included with every easement.

vi. Seeking Proper Professional Counsel

Although it should go without saying, when donating an easement on one’s garden, it is important to make sure that one has access to proper professional guidance. Garden owners seriously considering donating an easement should obtain the services of a lawyer specializing in real estate law. In particular, easements should only be written with the aid of lawyers who are specifically knowledgeable of a state’s easement laws. (Easement holding organizations may be able to recommend legal counsel.) Just as important, if one intends to claim any federal or state tax benefits, it is important to obtain the services of a licensed appraiser in order to precisely assess the value of the charitable contribution. Finally, as charitable deductions can often be complex, it pays to employ the services of an accountant who is particularly knowledgeable about claiming tax deductions for charitable contributions.

¹²² Fullerton, 46.

CHAPTER 4. ESSENTIAL COMPONENTS OF A GARDEN EASEMENT

Introduction

One of the main advantages that garden easements enjoy compared to other forms of garden protection is that they are sufficiently flexible to accommodate the needs of a specific garden or easement donor. However, although all garden easements will contain a degree of variation depending upon the garden being protected, the whims of the donor, as well as the basic requirements of the organization accepting the easement, every garden easement must contain a few key elements in order to ensure that the garden is accurately protected.

Creating a well-written easement document is not an easy task. In many respects it is synonymous to walking a tight rope. The successful easement document needs to carefully balance the rights and responsibilities that are delegated to both the garden owner and the easement-holding organization, while simultaneously ensuring that the easement provides some sort of public benefit. The easement must also “provide not only a lucid description of the important attributes of the resource being protected, but also a robust explanation of a host of legal rights and remedies available to the easement holder if the grantor or subsequent owners should violate the terms of the agreement.”¹²³

The model outlined below attempts to explain the major components that should be included within any garden easement. Although this outline can serve as a valuable frame of reference when drafting an easement, it is important to keep in mind that no single model “can possibly encompass the immense variation in circumstances an easement might be called upon to

¹²³ Fullerton, 46.

address.”¹²⁴ Many garden easements will require additional provisions beyond what is explained in the template below.

Project Name

At the beginning of every easement document, the location and name of the project should be clearly identified. Usually, the project name will be the name of the garden, or if the garden does not have a dedicated name, just the address of the property. This section also identifies the grantor (the property owner and easement donor) and the grantee (easement holding organization) for the first time.

Deed Form

This consists of the following three categories:

- a. Identification of Parties and Date of Conveyance**
- b. Words of Conveyance and Title Covenants**
- c. Legal Description of the Property**

a. Identification of Parties and Date of Conveyance

As the name suggests, this section identifies all of the individual parties concerned with the easement.¹²⁵ This includes the grantor of the easement, who is usually the primary owner of the property, in addition to all other parties with an ownership interest in the property. This section also identifies the grantee, (i.e., the organization holding the easement), as well all other parties affiliated with the grantee, such as third party enforcers or backup holders of the

¹²⁴The nature of the garden, its use, the goals of both the easement donor and the organization accepting the easement and their capacities to effectively uphold the terms of the easement, tax considerations are just some of the variables that will need to be addressed on a case by case basis. Byers and Ponte, 284.

¹²⁵ Ibid. 385.

easement. This section should also confirm the “non-profit corporate status” of the grantee, along with its state of incorporation.¹²⁶ Finally, the date that the easement is being conveyed should also be specified within this section.

b. Words of Conveyance and Title Covenants

i. Words of Conveyance

In this section the actual business of conveying the easement from the grantor to the grantee takes place. All parties affiliated with the grantee, such as co-holders of the easement, third parties with enforcement rights, other individuals, organizations, or entities that will assume the rights and responsibilities of the easement holder in the event that the easement holder should cease to exist, should be identified here.¹²⁷ This section should also clearly state the term of the easement, as well as the relevant state laws (i.e. statutory authority) that validate the easement.¹²⁸

When drafting this section, it is imperative that care is taken “to use language that complies with the conveyancing requirements of the jurisdiction in which the land is located, which in some cases may mean strict adherence to seemingly archaic formulas.”¹²⁹ Words such as ‘give,’ ‘grant,’ and ‘convey,’ are commonly used to describe the transfer of the easement from grantor to grantee.

ii. Title Covenants

Title covenants are covenants that “guarantee that the grantor owns the rights that are being transferred by means of the easement.”¹³⁰ There are two forms of title covenants;

¹²⁶ Ibid. 385.

¹²⁷ Ibid. 291.

¹²⁸ Usually, this would be the enabling legislation or act that recognizes the use of easements for conservation purposes.

¹²⁹ Byers and Ponte, 387.

¹³⁰ Ibid.

‘warranty covenants’ and ‘quitclaim covenants.’ The difference between the two is that with a warranty covenant, the grantor guarantees the grantee that they have full legal authority to transfer an interest in real property (i.e. the easement) to the grantee. In contrast, with a quitclaim covenant, although the grantor is still capable of transferring an interest in real property to the grantee, it is without the assurance that the title to the land is clear.

Although easement-holding organizations can accept an easement with a quitclaim covenant, most organizations will shy away from such properties, preferring the security of a warranty covenant. Consistent with this perspective, prior to closing an easement, most easement holding organizations will have a title report prepared in order to ensure that the title to the property is clear.

c. Legal Description of Property

It is important that the easement accurately describes the boundaries of the property as specified according to state law “so that the easement can be located in the public records and so that the boundary of the eased property can be located in the ground.”¹³¹ The legal description of the land “should conform exactly to the description appearing in the title records, unless a more accurate description is established by survey” specifically for the purpose of the easement.¹³² Common methods used to legally describe property are metes and bounds, subdivision plat and block number, and the Public Land Survey System (i.e., Government Rectangular Survey).¹³³ When describing a property according to legal terms, it is often helpful to consult plat surveys, plat maps and tax maps.

¹³¹ Ibid. 291.

¹³² Ibid. 390.

¹³³ Metes and Bounds is a technique that relies upon units of measurement and boundary markers to define a property’s location. Plat lot and block number identifies a particular parcel within a surveyed subdivision. Public Land Survey System, which was mainly used out west, is a system of land survey where property is divided according to a grid system, consisting of checks (24 miles square) that are divided into four townships (6 miles

Statement of Purpose

The goal of the statement of purpose is to briefly identify “the subject matter of the agreement and describe the intent of the parties in establishing the easement, the characteristics of the property that warrant protection, and often the statutory foundation for the transaction.”¹³⁴ In plain English, the statement of purpose should summarize the conservation values of the property as well as the specific goals of the easement.

The statement of purpose should be a formal operative component of the easement.¹³⁵ Therefore, it is important to place the statement of purpose after the words of conveyance.¹³⁶ If the easement is being claimed as a charitable deduction, the statement of purpose should also be worded in a manner that meets the requirements of the IRS conservation purposes test.

Restrictions and Reserved Rights

Without question, this is the most important section within the easement document. It is here that the restrictions placed on the rights of the grantor of the easement, along with the rights afforded to both the grantor and grantee, are explained in specific detail. Generally, this section assumes the form of a categorized list of permitted and prohibited uses within the garden that are consistent with the main objectives of the easement that were previously outlined within the statement of purpose. This is usually the lengthiest section within an easement, although this is largely dependent upon the nature and intricacy of the resource that is being protected by the easement.

Care must be taken when devising a list of restricted and permitted uses for a garden. The provisions within the easement need to be sufficiently flexible to respond fluidly to change,

square), which in turn are divided into 36 sections (1 mile square). David C. Ling and Wayne R. Archer, Real Estate Principles: A Value Approach (Boston, Ma.: McGraw-Hill Irwin, 2005) 481-486.

¹³⁴ Byers and Ponte, 291-292.

¹³⁵ Ibid. 292.

¹³⁶ Ibid.

yet specific enough to allow for effective management of the resource and to withstand potential legal challenges. As a general rule, a garden easement should contain only enough restrictions “to control activities that could undermine the permanent protection of the conservation values” of the garden.¹³⁷ Activities that do not threaten or harm the integrity of the garden should not be restricted. Some of the common restrictions used to protect gardens of historic and cultural significance are listed as follows:

- **Commercial Development:** Generally, a garden easement will prohibit commercial use of the property.
- **Subdivision:** Exact restrictions pertaining to subdivision will vary depending upon the size of the garden and the size of the property. Minimally, a garden easement should restrict any subdivision that can potentially divide a garden into multiple components. Generally, provisions that prevent subdivision of both the garden and its relevant surroundings should suffice. For many gardens, this will effectively mean the whole property. However, with larger properties, it is acceptable practice “to allow an owner to reserve the right to build on a particular site or to sell off a specified portion of the property for development, where such provisions pose little risk to the resources being protected.”¹³⁸
- **Extinguishments of Development Rights:** The easement should contain provisions restricting future development in and around the garden. This objective can also be accomplished by conveying all future development rights to the grantee.¹³⁹
- **Structures:** All structures located on the property should be listed in the easement. The easement should explicitly identify structures that should remain in their present state, in addition to any structures that the property owner is permitted to alter, remove, modify,

¹³⁷ Ibid. 289.

¹³⁸ Stokes, Watson and Mastran, 226.

¹³⁹ Byers and Ponte, 399.

or destroy. Special reference should be made of all manmade elements within a garden such as benches, fences, pergolas, or gazebos. If these structures are important components of a garden, the easement should contain specific language protecting them. If new structures are allowed to be constructed within the garden, the easement should clearly state the type of structures allowed, along with appropriate materials. If changes or alterations to structures require the review and approval of the grantee, this should be explicitly stated within the easement.¹⁴⁰

- **Vegetation:** Generally, “vegetation” is used to refer to trees, shrubs, flowers, and plants. The amount of regulation concerning these items will vary greatly depending upon the policies of the easement holding organization, as well as the specific needs of the garden. Some organizations will place a large number of restrictions on the treatment of plants, while other organizations will only require that the overall garden plan be maintained. In order to ensure that desired vegetation is maintained, the easement should use language such as “obligation to maintain” in regards to these resources.
- **Fauna (Wildlife):** Some gardens are home to a variety of interesting species. Insects, birds, and other small animals are just a few of the various species that often reside in gardens. If certain species of wildlife are desired in a garden, the easement may contain provisions obligating the garden owner to actively maintain certain plants that encourage the proliferation of such species.
- **Public Access:** A garden easement will often require that the general public derive some benefit from the garden. Public access obligations will vary depending upon the policies of the easement holding organization. Some organizations will require that the

¹⁴⁰In many instances, this is referred to as “notice to holder.” Ibid. 404.

garden owner open the garden to the public at certain times; others will only require that the garden be visible from a public right of way.

Public access obligations within an easement are required if the property owner wishes to claim a tax deduction. The IRS mandates that the general public: “be given the opportunity on a regular basis to view the characteristics and features of the property that are preserved by the easement to the extent consistent with the nature and condition of the property.”¹⁴¹

- **Miscellaneous:** Other restrictions that may be included within a garden easement are prohibitions against dumping on the premises, the installation of signs, and the construction of utility lines.¹⁴²

Administrative Provisions

The administrative provisions explain the rights that are allocated to the grantee to monitor and enforce the terms of the easement. Enforcement provisions should be structured in a manner that allows for the establishment of “a workable and predictable relationship between holder and landowner in the event of a violation, and to assure that holder will have the full panoply of enforcement powers for protecting not only the conservation values of the property but also its rights under the easement.”¹⁴³

Although the affirmative rights of the easement holder will vary, every easement must contain the following two administrative provisions, which are required by IRS regulations as well as the majority of state enabling statutes:¹⁴⁴

¹⁴¹ Ibid. 422.

¹⁴² Stokes, Watson, and Mastran, 226.

¹⁴³ Byers and Ponte, 431.

¹⁴⁴ Ibid. 430.

- **Right to Enter & Inspect the Property:** This provision is essential for monitoring purposes. All garden easements should contain language guaranteeing the holder ‘reasonable entry and access’ to the garden. Though not required, an easement should also include provisions stating the frequency with which inspections will be conducted, as well as procedures for notifying the garden owner of the pending inspection.¹⁴⁵
- **Right to Enforce:** Enforcement provisions explain the steps that the grantee can take in order to enforce the terms of the easement. Often, an easement will contain numerous enforcement clauses that dictate the manner in which the easement holder will respond to violations. These clauses will vary depending upon the severity of the violation, or the past actions or responses of the garden owner.

Some enforcement clauses commonly included in easements are listed as follows.

- **Notification of violations:** This clause describes the manner in which the garden owner is notified of violations. Usually, notification consists of a written notice to the owner describing the nature of the violation as well as the recommended corrective actions.
- **Emergency Enforcement:** This describes corrective actions taken on the part of the easement holder without having given the garden owner prior notification. Typically, this clause will only be invoked if a severe violation has occurred, or if the garden owner has failed to respond or has responded negatively to prior notification concerning a significant violation.
- **Injunctive Relief:** This clause describes the ability of the easement holder to sue the garden owner in order to have the terms of the easement enforced.

¹⁴⁵ Ibid.

- **Recuperation of costs for damage & enforcement:** These clauses allow the easement holder to sue the garden owner for recuperation of enforcement costs or damage costs if injunctive relief proves inadequate.¹⁴⁶

Other administrative provisions that should also be included in an easement that are not related to monitoring and enforcement are listed below.

- **Ownership Costs and Liabilities:** All easements should clearly state that the garden owner is liable for all costs, accidents, insurance or taxes on the property.

Requirements Under Federal Law

Although not technically required, if the easement donor is claiming the garden easement as a charitable deduction, the terms and provisions within the easement need to comply with IRS requirements. These requirements are listed below.

- **Assignment Limitation:** The IRS requires that an easement be assignable to another organization that is qualified to hold the easement in the event that the first holder is unable to fulfill the obligations specified in the easement.¹⁴⁷ This will prevent the easement from being extinguished in the event that the easement holder ceases to exist.
- **Required Notices:** The IRS requires the property owner (grantor) to “notify the holder (grantee) before exercising certain rights reserved in the easement.”¹⁴⁸ While the exact requirements that may trigger such notification will vary, generally actions that would have an adverse affect on the conservation purposes outlined in the easement will require notification of the easement holder.

¹⁴⁶ This clause depends largely on state statutes. In some states, court fees are reciprocal, while in others, the winner is entitled to payment of court costs. Statutes such as these may discourage an easement holding organization from going to court to seek injunctive relief, for fear of incurring excessive court costs. Byers and Ponte, 432-434.

¹⁴⁷ Byers and Ponte, 452.

¹⁴⁸ Ibid. 453.

- **Liens Subordinated:** The IRS requires that all outstanding liens be subordinated in order to ensure that an easement remains in perpetuity. Under most state statutes, if a lien holder forecloses on a mortgage that was in effect prior to the donation of the easement, the easement will be extinguished. By gaining the formal consent of the lien holder to subordinate a mortgage to the restrictions of the easement, if the property is ever foreclosed upon, the restrictions of the easement still remain in effect. Understandably, many lenders may be reluctant to allow subordination of their mortgage to take place. However, in instances where the garden may add to the value of the land, lenders may prove willing.
- **Baseline Documentation:** IRS regulations require that the grantor supply the grantee with baseline documentation prior to the closing of the easement.¹⁴⁹
- **Conservation Purposes – Applicable Law:** This clause states that both the grantor and grantee have met the necessary requirements for the easement to qualify as ‘qualified conservation contribution,’ in accordance with Internal Revenue Code. It is normal practice to make “express reference to compliance,” going so far as to cite which sections of the Tax Code the easement is in compliance with.¹⁵⁰
- **Qualified Donee:** This clause verifies that the holder of the easement is qualified to hold an easement in accordance with IRS requirements.
- **Termination and Proceeds:** This clause states that if in the event that the easement is extinguished either through judicial proceedings or eminent domain, the holder of the easement is entitled to compensation based upon the value of the easement at the time of donation.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid. 451.

Habendum and Signature

The conclusion of the easement will usually contain a clause known as a ‘Habendum clause.’ This clause describes the term *habendum et tenendum*, which is Latin for “to have and to hold.” Though not universally required, most easements will use such language in the provisions transferring the easement from the grantor to the grantee.

After the habendum clause, all parties privy to the easement must sign the easement, confirming that they agree with its provisions and will abide by them.

Acknowledgement and Recording

All garden easements must be notarized prior to being officially recorded. Provisions pertaining to notarization will vary from state to state.¹⁵¹

Attachments:

The following items should also be included as attachments. If these items are also included in the main body of the easement, the easement document must make reference to the fact that they are also an attachment.¹⁵²

- Legal Description of the Property
- Sketch Maps
- Clarifying terms
- Baseline Documentation
- Proof of subordination of mortgage

¹⁵¹ Ibid. 474.

¹⁵² Ibid. 475.

CHAPTER 5. BASELINE DOCUMENTATION

Introduction

In many respects, baseline documentation is the most important element of an easement document. Broadly defined, ‘baseline documentation’ consists of a “record of the property’s condition and conservation values at the time the easement is transferred,” the main purpose of which is to create “an accurate record on which to rely if controversy arises about any future damage to a protected condition.”¹⁵³ Although the exact requirements will vary, baseline documentation typically consists of a variety of text and visual media that explain a garden’s existing conditions, its history and period(s) of significance, and an evaluation of its integrity.

Assembling the necessary information to create a thorough baseline document is not an easy task. Depending upon the size or intricacy of the garden, it may be a very time-consuming and labor-intensive process requiring numerous site visits and thorough archival research. Preparation should begin in the early stages of the easement’s creation, and the finished document should be completed prior to the closing of the easement.¹⁵⁴ In many instances, because the monies involved in creating a baseline document are considerable, the easement holding organization responsible for preparing the baseline document may request that the garden owner donate a fee to help pay for its expense.¹⁵⁵ This fee will vary depending upon the organization or the amount of work that was invested in the creation of the baseline document.

Usually, the organization accepting the garden easement will be responsible for the creation of the baseline document. However, this is not a requirement; the owner of the garden,

¹⁵³ “The Garden Conservancy Conservation Easement Program: Guides for the Garden Owner,” The Garden Conservancy, 21.

¹⁵⁴ Byers and Ponte, 102.

¹⁵⁵ *Ibid.* 101.

or an independent consultant working on behalf of either party can also carry out the task. If the garden owner is claiming a tax deduction for a garden easement, the IRS requires that the property owner assume responsibility for providing baseline documentation.¹⁵⁶ Regardless of who prepares the baseline document, the easement holding organization should maintain a certain degree of involvement, as they will be more familiar with “the process and the conditions that are relevant to compliance with the easement.”¹⁵⁷

Existing conditions

The first issue that a baseline document should address is chronicling the existing conditions of a garden at the time of easement donation.¹⁵⁸ Conditions should be explained in sufficient detail to give future readers of the document a clear understanding of the garden’s physical appearance at the time when the easement was donated. Particular emphasis should be placed on the manmade and natural attributes of the garden that have been deemed most worthy of conservation.¹⁵⁹ Besides serving as a useful frame of reference, the existing conditions assessment will help to facilitate the use of the baseline document as a tool of enforcement in the event of future legal disputes concerning the conservation of the garden.¹⁶⁰

¹⁵⁶IRS requires detailed description of property encumbered by the easement, as well as an acknowledgment statement from the garden owner stating that the baseline document adequately reflects the conservation values of the easement. This is to be conveyed to the easement holder prior to the closing of the easement. Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Existing Conditions is defined as the current physical state of the landscape’s form, order, features and materials. Charles A. Birnbaum, “Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes,” U.S. Department of Interior, National Park Service, 1994, 15 Sept. 2008, <<http://www.nps.gov/history/hps/tps/briefs/brief36.htm>>.

¹⁵⁹ Byers and Ponte, 105.

¹⁶⁰ Ibid. 106.

History, Social Context, and Significance

The baseline document should also explain a garden's historical development, in particular focusing on the qualities that contribute to its significance. When describing a garden's significance, it is advisable to adhere to the terminology and standards outlined in *The Secretary of Interior's Standards for Cultural Landscapes*.¹⁶¹ Currently, the Secretary of Interior recognizes four types of cultural landscapes. Most gardens will likely be classified as 'historic designed landscapes.'¹⁶²

A garden's cultural and historic significance should be analyzed in the context of the four National Register criteria. While gardens may meet any of the four criteria, most gardens will probably be considered significant according to Criterion C.¹⁶³ The baseline document should also note a garden's period of significance and geographic significance.¹⁶⁴

In addition to explaining a garden's physical history, a baseline document should provide insight into the social context that led to the garden's creation. The story of the key people involved in a garden's creation, their aspirations and ideals, are just as important as a garden's

¹⁶¹A 'cultural landscape' is defined as "a geographic area (including both cultural and natural resources and the wildlife or domestic animals therein), associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values.

The Secretary of Interior presently recognizes four general types of cultural landscapes: 'historic sites,' 'historic designed landscapes,' 'historic vernacular landscapes' and 'ethnographic landscapes.' Birnbaum.

¹⁶²"A landscape that was consciously designed or laid out by a landscape architect, master gardener, architect, engineer, or horticulturist according to design principles, or an amateur gardener working in a recognized style or tradition. The landscape may be associated with a significant person, trend, or event in landscape architecture; or illustrate an important development in the theory and practice of landscape architecture. Aesthetic values play a significant role in designed landscapes." Ibid.

¹⁶³Criteria C: A designed historic landscape that embodies the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represents a significant and distinguishable entity whose components may lack individual distinction."

J. Timothy Keller and Genevieve Keller, "How to Evaluate and Nominate Designed Historic Landscapes," *National Register Bulletin # 18* (U.S. Department of the Interior, National Park Service Interagency Resources Division) 6.

¹⁶⁴Period of significance is the time period for when the garden obtained its notable properties. Geographic significance is defined as local, state, or national. Ibid. 5-6.

physical history and development. Only by understanding the people involved in a garden's creation can we truly understand the garden.¹⁶⁵

Integrity

One of the main objectives of baseline documentation is to establish the integrity of a garden at the time of easement donation. It is important to delineate the difference between a garden's existing conditions and its integrity. Whereas existing conditions describes a garden's present appearance, integrity is defined by the Secretary of Interior as "the authenticity of a cultural landscape's historic identity (as) evinced by the survival of physical characteristics that existed during the property's historic or prehistoric period."¹⁶⁶ The NPS recognizes seven categories that can be utilized to analyze a garden's overall integrity.¹⁶⁷

Unlike historic buildings, attempting to evaluate a garden's integrity according to arbitrary criteria can prove somewhat daunting. Gardens, being composed primarily of living flora that are subject to a limited lifespan, are expected to undergo a certain degree of change. A garden retaining integrity may not necessarily possess all of the characteristic features that it possessed during its period of significance. It does, however, need to retain enough essential features so that its historic character is clearly recognizable.¹⁶⁸ The closer that a garden's current appearance approximates to its historic appearance, the greater its integrity will be.¹⁶⁹

¹⁶⁵Katie Fretwell, "Digging for History," Rooted in History: Studies in Garden Conservation (London, UK: The National Trust, 2001) 68-69.

¹⁶⁶Birnbaum.

¹⁶⁷Historic location, design, setting, materials, workmanship, and feeling. Keller and Keller, 6.

¹⁶⁸ Ibid: 6.

¹⁶⁹Birnbaum.

Features to Document

The main focus of the baseline document should consist of a detailed narrative describing the garden's defining attributes, both natural and manmade, that justify its preservation. This should begin with a brief introduction explaining the garden's history and significance, along with a brief summary of its conservation values.

Analysis of a garden's individual features should begin with flora. As flora often blooms at different times, it might be necessary for the author of the baseline document to make multiple site visits to ensure that all flora within a garden is carefully identified. Flora should be identified both by genus and species designation as well as its common household name. Next, flora should be categorized by significance. This can be broken down into three main categories; aesthetic value, historic value, and scientific value.¹⁷⁰ Finally, flora should be evaluated according to its necessity in maintaining a garden's integrity. While certain plants may be crucial to a garden's appearance and meaning, others will be less so.

In addition to individual species of plants, the baseline document should identify all 'component landscapes' within a garden. A component landscape is defined as "a discrete portion of the landscape that can be further subdivided into individual features."¹⁷¹ Some examples of component landscapes within gardens include reflecting pools, boxwood parterres, or flowerbeds devoted to a particular type of plant. Component landscapes should be analyzed both for their individual worth, as well as their contribution to the garden as a whole.¹⁷²

Any species of fauna that makes its home within the garden should also be identified. Birds, insects, reptiles, and small mammals such as rodents, raccoons, and feral cats are often an integral part of a garden's environment. Like flora, analysis of the fauna within a garden may

¹⁷⁰Melissa Simpson, "The Plants." *Rooted in History: Studies in Garden Conservation* (London, UK: The National Trust, 2001) 93.

¹⁷¹Birnbaum.

¹⁷² Keller and Keller, 4.

require multiple site visits, as different species of animals exert their presence during different seasons and times of day.

A thorough analysis of the architectural features within a garden should also be an integral part of the baseline document. Some of the more common manmade elements found within gardens include benches, fences, walls, pergolas, gazebos, and fountains. Their age, authenticity, condition, and defining characteristics should all be described in prolific detail.

Besides providing a thorough description of all of the physical attributes within the garden, the baseline document should also describe the landscapes surrounding a garden: “The surroundings of a cultural landscape, whether an urban neighborhood or rural farming area, may contribute to its significance and its historic character.”¹⁷³ Many gardens, especially those designed by prominent landscape architects, consciously utilize adjacent landscapes to enhance aesthetic effects within the garden. Viewsheds, sightlines and horizons situated outside of a garden’s physical boundaries should always be recorded within the baseline document.

Specific Contents to Include Within a Baseline Document

Having explained the manner in which a baseline document addresses a garden’s cultural significance and physical features, a brief description of the supporting materials that should be incorporated within the baseline document is appropriate. A thorough baseline document will utilize a wide variety of visual and verbal media to appropriately illustrate the conservation values of the garden that is being protected by the easement. A few of the more essential elements are described in detail below.

¹⁷³Birnbaum.

a. Measured Drawings and Site Plan Maps

A baseline document should always include measured drawings depicting the garden as it exists at the time of easement donation. These drawings will help to provide a visual reference point that can be useful in identifying future unwanted changes. In addition to a main drawing, measured drawings of the individual architectural features within a garden should also be created.

Measured drawings should always be supplemented by a site plan map. The site plan should depict the garden in the context of the boundaries of the property that it is situated upon.¹⁷⁴ It should also identify the name and location of all of the architectural and natural features within the garden. The location and trajectory of any significant viewsheds or sightlines within the garden should also be identified.

b. Historic Garden Plans and Maps

If historic maps or plans exist, they should be incorporated within the baseline document. Besides identifying how a garden once appeared, old plans and maps serve as a valuable reference for identifying extant elements within a garden. Unfortunately, unless a garden was created by either a prominent landscape architect, or was part of a ‘palatial structure,’ it is very unlikely that older plans will exist; these gardens were often in the care of professional gardeners who “transferred their knowledge through oral apprenticeship traditions rather than on paper.”¹⁷⁵

c. Paintings, Drawings, and Lithographs

As with historic plans and maps, the following media may be useful to the owners of prominent historic gardens. Prior to the widespread adoption of photography in the second half

¹⁷⁴ Property boundaries can be obtained through use of plat maps.

¹⁷⁵ Norman Tyler, Historic Preservation: An Introduction to Its History, Principles, and Practice (New York, NY: W.W. Norton & Co., 2000) 213.

of the nineteenth century, many famous gardens enjoyed the distinction of having been depicted in a painting or sketch, either for the owner's enjoyment, or to provide a visual reference of the garden's appearance. These compositions may provide some insight into how a historic garden once appeared. It is important to stress that this form of media should be approached with caution: "Any artists' works may contain considerable license taken by the artist in his interpretation."¹⁷⁶

d. Photographs

Photographs are by far the most important visual media that should be included within a baseline document. Numerous photos should be taken from a variety of different angles, and it is important to record on a map the location where a photograph was taken, the direction, the subject that the photo is depicting, and its significance. If the garden is large enough and funding permits, it might be worthwhile to invest in aerial photography; aerial photos often "reveal important landscape relationships not always evident on the ground."¹⁷⁷

The compiler of a baseline document should whenever possible attempt to locate historic photographs or daguerreotypes. Older photographs will provide visual clues as to how a garden appeared in the past, thereby giving the modern researcher a means of visual comparison. As garden owners are immensely proud of their gardens, they may be able to assist in locating historic photographs of their garden. Even photographs that are ostensibly not of the garden, for example, photos of a family or a house, may depict the garden in the background and therefore prove helpful.

¹⁷⁶Rudy J. Favretti, Landscapes and Gardens for Historic Buildings (Nashville, TN: American Association for State and Local History, 1991) 74.

¹⁷⁷Genevieve P. Keller, "The Inventory and Analysis of Historic Landscapes," Historic Preservation Forum May/June 1993: 33.

e. Written Records

Various types of written records may prove valuable in understanding a garden's history and development. For example, personal letters and travel accounts may include a thorough description of a garden as it once appeared. The value of personal correspondence through letters cannot be overstated. Prior to the invention of the internet or even the telephone, most people carried on long distance communication with others through letters, which have a tendency to compensate for the lack of a visual reference by utilizing prose rich in descriptive imagery. The same basic premise is also true of historic travel accounts; past travelers hoping to preserve memories of their journeys for the benefit of themselves and others had no realistic alternative other than to make liberal use of the written word.

The diaries or journals of individuals who played a crucial role in a garden's design, construction, or maintenance (if they exist) may contain useful information. With larger and more prominent gardens, it was not uncommon for gardeners to keep detailed inventories of plant lists; these may prove important for establishing what plants were historically present within a garden. Another source that might prove useful are historic account books, which may indicate the purchase of plant materials or architectural and sculptural elements.

Finally, it is important not to underestimate the value of local newspapers, especially those that were published in rural areas. Prior to the globalization of the world brought about by modern technology, people tended to be more interested in local events that took place within a very limited geographic range. Consequently, many rural newspapers used to devote significant coverage to the mundane day-to-day events in the lives of ordinary individuals. It is not inconceivable to expect that newspaper articles devoted to the creation or care of personal gardens may exist.

f. Legal records

Legal records found at the county courthouse may yield useful information. Probate records and wills might be worth investigating, as they may contain a description of a garden's attributes. Deeds that describe a property in metes and bounds may also give a brief description of a garden.

g. Oral History

Investigation of the unwritten history of a garden may provide some additional information that cannot be gleaned from other sources. People privy to the history and development of a garden will often be knowledgeable of obscure facts that one would never find in written accounts or publications. Present and past garden owners, landscape architects, and neighbors may prove to be reliable sources for obscure information.

Completing the Baseline Document

In general, a baseline inventory should be concluded once it contains enough information to accurately document the conservation values of the garden that is being protected by the easement.¹⁷⁸ All information that has been assembled should be thoroughly checked for accuracy. Once completed, a baseline document should be periodically updated to reflect a garden's current condition.

¹⁷⁸ Byers and Ponte, 103.

CHAPTER 6. GARDEN MANAGEMENT PLAN

A comprehensive management-plan should be developed upon completion of the baseline document. As the name suggests, a management plan is a detailed plan that explains the proper procedures for the maintenance, preservation, modification, or restoration of a garden's manmade and natural features. An appropriately designed management plan should provide recommendations for both the immediate and long-term treatment of the defining attributes of a garden that have been identified in the baseline document.

While a management plan should always be an integral part of any conservation easement, they are particularly crucial for gardens. Unlike other open space easements where natural resources are allowed to grow unabated, a garden needs to be actively managed in order to ensure that its important characteristics are preserved.¹⁷⁹ Any systematic effort to protect a garden's features would be futile without specific policies explaining how each resource within a garden should be treated.

As with baseline documentation, development of a management plan is a serious endeavor, and should only be undertaken by professionals familiar with garden management, for example, licensed landscape architects or professional gardeners. The easement holding organization should be able to provide some assistance with the plan, or at the very least be able to recommend qualified professionals.

The garden management plan should be created after the completion of the baseline document, as it is necessary to identify the conservation values of the garden before beginning to

¹⁷⁹Ibid. 217.

choose appropriate treatments. Ideally, the management plan should be completed prior to the closing of the easement.

Long-Term Management and Sustainability

The most important objective of a garden management plan is to devise appropriate treatments to ensure the long-term conservation of the garden's defining attributes. In large part, this is contingent upon the amount of change that will be permitted by the easement. With most gardens, the goal of the easement will be to preserve the garden as it appears at the time when the easement was donated. For these gardens, the long-term goal of the management plan would include numerous treatments to ensure that the garden's appearance remains static. On the contrary, for other gardens change may be desirable. For example, some easements may permit a garden to slowly evolve from its appearance as described in the existing conditions report. Inversely, for gardens of a particular historic vintage, or gardens associated with a famous person or event, it might be desirable to restore the garden's appearance to how it once appeared in the past, therefore requiring the use of treatments that will facilitate these changes.

Once the long-term goals of the management plan have been decided upon, the long-term treatment of a garden's component features can be addressed. Most of the emphasis should be placed on suggested treatments for the flora, which due to its inherent nature will require the most proactive management to conserve. Efforts to preserve flora in a purely static state are often complicated and expensive, and considerable thought should be expended in devising appropriate treatments. For gardens where a certain degree of change is permitted (i.e. most personal gardens) the management plan should graciously defer to the dynamic qualities of the garden by proposing treatments that flexibly respond to a garden's ever-changing nature.

The management plan should also address long-term treatments concerning the manmade elements within a garden. For a garden of noteworthy historic significance, it might be necessary to repair or restore certain features using comparable materials, appropriately sanctioned methods, or compatible replacements. With newer gardens or gardens possessing only a minimal number of manmade elements, treatments addressing these features may be more relaxed, perhaps permitting contemporary alternatives or materials to be used in the repair, restoration, or replacement of the garden's architectural features.

Finally, any long-term garden management plan created today should only permit treatments that are environmentally friendly and promote long-term sustainability. Garden easements exist with the purpose of protecting the conservation values of noteworthy gardens, therefore helping to improve the natural environment. Any efforts to conserve a garden using methods that are environmentally unfriendly would be contrary to the easement's objectives.

Short-Term Maintenance

While long-term conservation of a garden's defining attributes should be the overall focus of a management plan, rules and procedures governing short-term maintenance should also be created. With gardens, mundane and routine maintenance activities often play a crucial role in ensuring that a garden's integrity is preserved for the long-term.¹⁸⁰ Consequently, every garden management plan should provide appropriate guidelines addressing maintenance and upkeep of a garden.

Short-term maintenance activities should appropriately complement the long-term goals of the management plan. For example, if the long-term conservation goal of a garden with a boxwood parterre is to maintain its current appearance, frequent pruning will be required.

¹⁸⁰Bill Malecki, "Conservation in Action," Rooted in History: Studies in Garden Conservation, (London, UK: The National Trust, 2001) 45.

Therefore, the long-term goal has been achieved through short-term maintenance. Short-term maintenance is also necessary in gardens where change is permitted, and one of the tasks that should be carried out on a regular basis should be documenting any changes that have occurred since the implementation of the management plan.¹⁸¹

Short-term maintenance should be divided into daily, weekly, monthly, and seasonal tasks. Frequent maintenance will prolong the lifespan of a garden's manmade and natural elements, helping to save money on behalf of the garden owner, and reducing enforcement costs on behalf of the easement holding organization.

Provisions for Periodically Updating a Management Plan

Although long-term goals are considered when the management plan is created, new and unforeseen circumstances can arise which may require a thorough reassessment of the management plan's strategic goals. Garden management plans should be periodically updated in order to respond to changed conditions, objectives, and values, thereby allowing "future generations to decide for themselves how they conserve gardens whilst also ensuring that the 'spirit of place' passes on successfully from one generation to the next."¹⁸²

Monitoring

The only way to ensure that the short and long-term goals of a management plan are being achieved is for the organization holding the easement to carry out periodic inspections of the encumbered garden. Long-term monitoring of a garden protected by an easement often presents certain difficulties. Unlike easements protecting open spaces or historic buildings,

¹⁸¹Birnbaum.

¹⁸² Ibid. 205.

gardens, due to their rapidly changing nature, may require more frequent monitoring to ensure that their integrity is preserved.

The interval and intensity of inspections is dependent upon a variety of different factors such as garden size, intricacy of design, historic significance, the amount of change that is permitted, and even seasonal changes. The provisions governing inspection of a garden should be custom tailored to suit the needs of each particular garden. For example, a formal garden with carefully trimmed plantings may need to be monitored on a frequent basis, while a garden with a more random design may require only annual or biannual monitoring. As plants often bloom and die at different times, it might be prudent to schedule inspections to coincide with the changing of the seasons.

While the fact that gardens will likely require more intense monitoring may at first appear to be cost prohibitive, this is not necessarily the case. For example, a garden that requires frequent inspections can perhaps have a tiered hierarchy of inspections, with some inspections amounting to little more than brief walkarounds, while others conducted at extended intervals will be much more detailed.

During more detailed inspections, photographs should always be taken depicting the components within a garden that are protected by the easement. These photographs will help compare a garden's current condition with its condition as recorded in the baseline document. At minimum, photographs should at least be compiled annually, although it might be advisable to take seasonal photographs of gardens whose appearance changes markedly with the seasons.

Public Access and Long Term Garden Conservation

Most garden easements stipulate that there should be some public benefit through preservation of the garden; in most instances, this means that the garden should be made visible

to the public. While sometimes public access requirements can be met if the garden can clearly be observed from a public right-of-way, in certain circumstances, it can only be achieved by opening the garden to the general public. While on one level, this helps to preserve the garden by increasing public awareness of its existence and importance, increased human traffic, even for brief periods of time, can be detrimental to a garden's features, in particular its natural elements.

Prior to finalizing the easement, the impact of increased human traffic should be thoroughly assessed. If this is determined to have long-term negative consequences, the management plan should address ways in which human traffic can be manipulated to minimize its harmful effect. As with everything else related to garden conservation, this too may require constant reassessment, for very often the solution to one problem simply creates another problem to contend with.

CHAPTER 7. TAX INCENTIVES FOR GARDEN EASEMENTS

Federal Income Tax Benefits

In many respects, the tax incentives provided by the federal government have become one of the most powerful tools available in facilitating easement donation. For over forty years, the Internal Revenue Service has sanctioned the use of tax incentives in order to help encourage the donation of charitable conservation easements. This has proven to be a successful strategy; since the first tax incentives were created, the number of easements annually claimed as charitable contributions has risen sharply, especially in the past few years.¹⁸³ On the other hand, the unexpected success of the use of incentives has also led to some unforeseen and adverse consequences. While some of these issues have been addressed through changes and modifications to the Internal Revenue Code governing easement donation, other conflicts have yet to be addressed, and may potentially have adverse repercussions for future easement donors.

From the federal government's perspective, there are a couple of reasons why allowing tax deductions for charitable contributions makes sense. First, by creating incentives for people to conserve, the federal government contributes to the conservation of significant landscapes without having to resort to regulations, which may prove unpopular, or fee simple purchase, which can be exorbitantly expensive. Second, the use of tax incentives allows both the federal government and the easement donor to mutually benefit. The government receives the satisfaction of ensuring that through the judicious use of tax incentives, it is helping to further national conservation policy; meanwhile, the easement donor is also happy because their prized

¹⁸³ Nancy A. McLaughlin, "Increasing Tax Incentives for Conservation Easement Donations," Ecology Law Quarterly Vol. 31, No. 1 (2004): 21, 25.

garden is protected, they still own their land, and they are now eligible for a number of lucrative tax deductions.

a. History

The use of tax incentives to encourage easement donation began over forty years ago with a couple of obscure decrees issued by the Internal Revenue Service. In 1964, the IRS issued a ruling stating that easement donors who had donated a conservation easement to protect scenic land adjacent to a federal highway were entitled to a tax deduction “equal to the fair-market value of the easement.”¹⁸⁴ As this ruling was of limited utility to most easement donors, in 1965, the IRS issued a news release declaring that all landowners who had donated a conservation easement to a government agency were entitled to a tax deduction.¹⁸⁵

It was not until 1976, when Congress passed the Tax Reform Act of 1976, that deductions for charitable contributions such as easements would become a permanent component of the United States Tax Code. This Act established “explicit statutory authority for charitable income, gift, and estate tax deductions for conservation easement donations.”¹⁸⁶ The Act also defined for the first time the type of conservation values that an easement must protect in order for it to be considered a valid charitable deduction, in addition to identifying the types of organizations and agencies that are qualified to accept conservation easements. The effect that this legislation had in helping to further the use of conservation easements cannot be overstated: The Tax Reform Act of 1976 established the legal validity of using financial incentives to encourage the donation of conservation easements, a practice which has withstood legal challenges and continues to the present day.¹⁸⁷

¹⁸⁴ Ibid. 10-11.

¹⁸⁵ Ibid. 12. IRS News Release #784, Nov. 15, 1965.

¹⁸⁶ Ibid. 13.

¹⁸⁷ Ibid.

Although the Tax Reform Act of 1976 helped to validate the use of tax incentives, the original rules governing the requirements for charitable deductions within the Internal Revenue Code were vague, open-ended, and frequently exploited. Almost immediately, Congress began taking measures to eliminate such oversights. In 1977, the Tax Reduction and Simplification Act was passed, adding the proviso that all conservation easements must be donated in perpetuity, another precedent that has remained unaltered to the present day.¹⁸⁸

The rules governing conservation easement donation were further clarified in 1980, when Congress passed the Tax Treatment Extension Act, which added Section 170(h) to the United States Internal Revenue Code.¹⁸⁹ This Section, entitled *Qualified Conservation Contributions*, contains a detailed set of rules governing tax deductions for conservation easements. The Act also established a number of definitive criteria, referred to as ‘conservation purposes’ that all easements being claimed as charitable deductions must meet.¹⁹⁰ These criteria are still in effect today.

Although the main purpose of Section 170(h) was to clarify the rules governing conservation easement donation, there were still many provisions that were subject to interpretation: Throughout the 1980’s, a number of high profile legal battles took place concerning the appropriate valuation of easements.¹⁹¹ In an effort to clarify Section 170(h), in 1986, the United States Treasury published a set of regulations, referred to as ‘The Regulations,’ the purpose of which is to provide guidance and interpretation of Section 170(h).¹⁹²

Gradually, Section 170 was amended to close the few remaining loopholes. The regulations governing charitable easement donation remained relatively static until 2006, when

¹⁸⁸ Ibid.

¹⁸⁹ Ibid. 14.

¹⁹⁰ 26 U.S.C.S § 170(h)(4)(i-iv) (2008).

¹⁹¹ See *Hilborn vs. Commissioner*: 85 T.C. No. 40: 677 (1985), *Losch vs. Commissioner*: 55 TCM 909 (1988), and *Nicoladis vs. Commissioner*: 55 TCM: 624 (1988).

¹⁹² McLaughlin, 15.

Congress passed the Pension Protection Act (Public Law 109-280), the details and impact of which are described in depth below.

b. Current Tax Incentives

The tax savings that result from donating a garden easement are dependent on many different factors, such as the donor's annual income, their applicable tax bracket, the amount being claimed in relation to total income taxes paid, as well as the effect of other deductions that are being claimed within the same tax return.¹⁹³ Also, easements donated by garden owners who have owned the garden for more than one year will be "taken into account only after all other contributions have been deducted."¹⁹⁴ Another point to consider is the changing nature of federal income tax policy, which may impact the percentage of the charitable easement deduction that the donor is allowed to claim.

For many years, the IRS allowed easement donors who have donated a 'qualified conservation contribution' to deduct 30% from their contribution base for the taxable year that the easement was donated.¹⁹⁵ As most easement donors are unable to recuperate the full value of their charitable deduction within a single tax return, the IRS allowed donors to 'carry forward' the unused portion of the deduction for either an additional five years, or until the appraised value of the deduction has been completely claimed.¹⁹⁶ While this provision certainly helps, many easement donors who are 'land rich, cash poor,' were unable to realize any significant tax savings under the older provisions.¹⁹⁷

¹⁹³ Lindstrom, 145.

¹⁹⁴ 26 U.S.C.S. § 170(b)(1)(C)(i) (2008).

¹⁹⁵ 'Contribution base' is adjusted gross income. Ibid.

¹⁹⁶ 26 U.S.C.S. § 170(b)(1)(C)(ii) (2008); Lindstrom, 107.

¹⁹⁷ 'Land rich, cash poor,' is a common euphemism describing individuals with relatively low incomes whose wealth consists mainly of real estate. Farmers, ranchers, and inheritors of real estate commonly fit this description. The hypothetical situations illustrated below demonstrate how the 30%/5 year rule unfairly disadvantaged 'land rich, cash poor' easement donors.

In order to address this discrepancy, in 2006, Congress passed The Pension Protection Act (Public Law 109-280), a multi-faceted bill containing numerous provisions, among which were modifications to the IRS Code governing charitable contributions. Under the new regulations, donors donating a conservation easement can now deduct 50% from their contribution base, and any remaining value of the easement can now be carried over for up to 15 additional years.¹⁹⁸ These provisions apply only to easement donors who donated an easement in 2006 or later.

Although the 50%/15 year policy is considerably more amicable to lower-income taxpayers, it remains uncertain how long deductions will remain at this level. Although the law that created this provision was originally slated to expire at the end of 2007, in June 2007, Congress Passed the Food, Conservation, and Energy Act of 2008, which effectively extended the above provisions until December 31, 2009.¹⁹⁹

In order to fully maximize tax savings, the easement donor should also be aware of other external expenses associated with easement donation that can also be claimed as deductions. Accounting, appraisal, legal, recording, and monitoring fees are all generally accepted as valid deductions.²⁰⁰

For example, if Mr. Black, who has a contribution base of \$25,000/year, donates an easement appraised at \$200,000, he can deduct \$7,500 a year for up to 6 years. This means that he will only be able to recuperate \$45,000 of the original \$200,000 deduction.

On the other hand, if Mr. White, who has a contribution base of \$100,000/year, donates an easement appraised at \$200,000, he can deduct \$30,000 a year for up to 6 years. Therefore, he can recuperate \$180,000 of the \$200,000 easement through tax deductions.

¹⁹⁸Using the same hypothetical situation described above, under the new regulations, if Mr. Black, who has a contribution base of \$25,000/year, donates an easement appraised at \$200,000, he can deduct \$12,500 a year for up to 16 years. This means that he will only be able to recuperate the value of his easement within the 16 years allotted. Likewise, if Mr. White, who has a contribution base of \$100,000/year, donates an easement appraised at \$200,000, he can deduct \$50,000 a year for up to 16 years. Therefore, he can recuperate the full value of the easement in four years. 26 U.S.C.S. § 170(b)(1)(E)(i-ii.) (2008).

¹⁹⁹ Lindstrom, 146.

²⁰⁰ Ibid. 145.

c. Current Criteria

At the time of this writing, the criteria governing charitable easement donation are contained within Section 170 of the Internal Revenue Code. Despite having undergone numerous revisions since its inception, Section 170 still contains no criteria specifically dealing with gardens. However, Section 170 makes numerous references to criteria for land donated for conservation purposes, much of which can also be applied to gardens.

In order for a garden easement to qualify for a tax deduction, it must meet one of the four following criteria which are referred to as “conservation purposes:”²⁰¹

1. *The preservation of land areas for outdoor recreation by, or the education of, the general public,*
2. *The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,*
3. *The preservation of open space (including farm land and forest land) where such preservation is -*
 - i. *for the scenic enjoyment by the general public, or*
 - ii. *pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or*
4. *The preservation of an historically important land area or certified historic structure*

As can be imagined, almost all gardens of noteworthy cultural or historic significance should be eligible for consideration under at least one of the four categories listed above. In fact, many gardens will comfortably meet all of the above criteria.

In addition to proving definitively that one’s garden will qualify under the ‘conservation purposes’ described above, all garden easements claimed as charitable deductions must also

²⁰¹26 U.S.C.S. § 170(h)(4)(A)(i-iv.) (2008).

qualify as a “qualified conservation contribution.” This means that a garden easement must meet the following three criteria, which are explained in depth below:²⁰²

1. *A qualified real property interest*
2. [easement must be donated] *to a qualified organization*
3. *exclusively for conservation purposes*

First, a garden easement must represent a “real property interest.” Stripped of legal jargon, this means that the IRS will only consider a tax deduction if proof is presented that an interest in real property, (such as an easement) is being conveyed from one party to another, along with confirmation that the individual conveying the interest (i.e. the garden owner) has the right to do so (fee-simple ownership). The IRS requirements for ‘real property interests’ are as follows:²⁰³

1. *the entire interest of the donor other than a qualified mineral interest,*
2. *a remainder interest, and*
3. *a restriction (granted in perpetuity) on the use which may be made of the real property*

As can be seen, a garden easement will qualify as a ‘real property interest’ under the third provision, for at the heart of every garden easement are restrictions that are granted in perpetuity.

Secondly, Section 170 clearly states that a garden easement must be donated to a “qualified organization.”²⁰⁴ These are defined as follows:²⁰⁵

²⁰²26 U.S.C.S. § 170(h)(1)(A-C) (2008).

²⁰³ Ibid.

²⁰⁴26 U.S.C.S. § 170(h)(3) (2008).

²⁰⁵26 U.S.C. S. § 170(h)(4)(B)(ii)(I-II) (2008).

1. *A qualified organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and*
2. *Has the resources to manage and enforce the restriction and a commitment to do so*

Although the IRS lists a number of different types of organizations that are considered to be ‘qualified organizations,’ most garden easements will be donated to either government agencies or public charities or private foundations with 501(c)(3) status.²⁰⁶

The provisions concerning ‘qualified organizations,’ which were only added in recent years, are largely in response to numerous instances of easement donors claiming tax deductions who had knowingly donated easements to organizations unqualified (or uninterested) in upholding the terms of the easements. The rationale behind the ‘qualified organization’ requirement “is that if an easement is held by the right type of organization, that organization will be an adequate and effective watchdog against any violations of the restrictions imposed by the easement.”²⁰⁷ By requiring both the donor and easement holder to verify under threat of perjury that the easement holding organization is qualified to accept the easement and has the financial resources necessary to enforce the terms of the easement, the IRS has demonstrated its determination to ensure that only ‘qualified organizations’ are accepting easements.

Third, the easement must be donated exclusively for conservation purposes, a concept referred to as ‘donative intent.’ While there is nothing in the IRS Code or Regulations that specifically explain the definition of ‘donative intent,’ “the IRS has made it clear that donative intent is a precondition to receiving a charitable deduction for the grant of easement.”²⁰⁸ In other words, the easement document should clearly stipulate that the garden owner’s primary motive in donating the easement is to protect the conservation values of the garden in perpetuity.

²⁰⁶ Lindstrom, 29; 26 U.S.C.S. § 170(b)(A)(v-vii) (2008).

²⁰⁷ Lindstrom, 29.

²⁰⁸ Ibid. 116.

The easement must also provide a valuable public benefit, usually in the form of public access.²⁰⁹ A common misconception among potential easement donors is that simply donating a conservation easement will automatically entitle a donor to a tax deduction.²¹⁰ This assumption is incorrect. “The Code and Regulations focuses first on whether a conservation easement confers a significant public benefit.”²¹¹ Obviously, in order for the public to derive any benefit from an easement-encumbered garden, they have to be able to access it in some meaningful way. At the very least, this means that the public must have ‘visual’ access to the garden.²¹² Many easement holding organizations will require more significant obligations on the part of the garden owner, often going so far as to stipulate within the easement that the garden be open to the general public at certain times.

Finally, the IRS also requires a detailed description of the property encumbered by the easement.²¹³ Documentation usually includes a detailed written description of the garden’s history and existing conditions, which is further augmented by a variety of visual media such as photographs, maps, drawings, etc. that further illustrate the past and present condition of the garden. Generally, a well-executed baseline document will suffice to meet these requirements.

d. Appraisal

Prior to claiming a charitable deduction for a donated conservation easement, the value of the easement must be appraised by a ‘qualified appraiser’ who has experience with conservation easements. In order to find a suitable appraiser, it is worth inquiring with easement holding organizations; they should be able to offer some assistance.

²⁰⁹ 26 USCS § 170(h)(4)(iii) (2008).

²¹⁰ Lindstrom, 53.

²¹¹ Ibid.

²¹² Ibid. 55.

²¹³ 26 C.F.R. § 1.170A-14(g)(5)(i)(A-D) (2008).

When appraising the value of an easement encumbering a garden, a competent appraiser should take a conservative and prudent approach. In recent years, the IRS, in its efforts to stop abuses, has been quick to inflict significant penalties for overvalued easements appraised by incompetent assessors.²¹⁴ In order to deter inflation of easement value, the IRS now requires that all contributions valued at over \$5000 be carried out by a ‘qualified appraiser.’²¹⁵ The IRS considers a ‘qualified appraiser’ to be an individual who has earned an appraisal designation from a recognized professional appraisal organization, and who has the necessary experience and professional credentials.²¹⁶ In addition, the appraiser must prove that he or she regularly performs appraisals, meets certain educational standards, and must not have been disbarred within the last three years. If an easement is determined to be overvalued, the appraiser will be subject to heavy fines.²¹⁷ Finally, for all gifts in excess of \$500,000, a copy of the appraisal must be submitted along with the donor’s tax return.²¹⁸

The IRS recognizes two different methodologies that an appraiser can use to appraise a garden easement: The ‘comparable sales method,’ and the ‘before and after method.’²¹⁹ The comparable sales method “determines the value of an easement by using recent sales of easements containing similar provisions over land comparable to the subject easement parcel.”²²⁰ Although this is the methodology that is most preferred by the IRS, the comparable sales method is of limited utility to most easement donors.²²¹ In addition to the lack of comparable gardens, due to the fact that the comparable sales method takes into consideration the value of an easement based upon its market price, it is really only useful in situations where there is a viable

²¹⁴ Lindstrom, 163.

²¹⁵ 26 U.S.C.S. § 170(f)(11)(E)(i-ii) (2008).

²¹⁶ 26 C.F.R. § 1.170A-13(c)(3) (2008).

²¹⁷ IRC 6695A.

²¹⁸ See IRS Form 8283 “Noncash Charitable Contributions.”

²¹⁹ 26 C.F.R. § 1.170A-14(h)(3)(i) (2008).

²²⁰ Lindstrom, 148.

²²¹ 26 C.F.R. § 1.170A-14(h)(3)(i) (2008).

market for garden easements. As most garden easements will be donated rather than purchased, there is essentially no viable market upon which to draw comparable sales data.

As the comparable sales method can seldom be applied with any reasonable accuracy, most appraisers typically rely on the 'before and after' method to determine easement valuation.²²² Using this method, the value of the garden easement is determined to be the difference between the property's value before and after it is encumbered by an easement, the before value typically equating to the property's highest and best use.

While it is relatively simple for an appraiser to assess the 'before value' of an easement, valuing the property after it has been encumbered by an easement is a much more daunting task.²²³ One tactic that the appraiser could use would be to analyze similarly encumbered properties with similar characteristics that have been sold, and then apply the comparable sales method to estimate the value of the easement. However, finding a similarly encumbered property will probably prove just as difficult as finding a market for conservation easements.

In many instances, the appraiser will be compelled to assess the value of the easement based upon the analysis of the value of the development rights that have been extinguished. Again, this is also based upon a variety of factors, such as the current use of the property, its highest and best use, the probability of whether or not the property will ever realize its highest and best use, as well as zoning regulations and their effect on a property's ultimate development potential. As to be expected, the greater the potential there is for immediate development, the greater the value of the easement will be.²²⁴ In addition to all of the above, the appraiser also needs to take into consideration the amount of burdens the easement imposes upon the donor. If a garden easement places strict maintenance and public access requirements on the part of a donor, it can be argued that the easement increases the burden of ownership, and with it, the

²²² McLaughlin, 70.

²²³ Lindstrom, 151.

²²⁴ Ibid. 149.

value of the easement as well. It is important to stress that since all of the above considerations are largely the product of speculative appraising, it is easy to understand why the IRS prefers that the comparative sales method is used for easement valuation.

Estate Tax

Another incentive that the financially astute easement donor should consider taking full advantage of is the Estate Tax. The Estate Tax is a tax levied by the federal government on large “nonexempt transfers of wealth” upon the death of the taxpayer.²²⁵ The estate tax is calculated based upon the value of the deceased’s gross estate after all relevant deductions have been made.²²⁶ It is levied prior to the legal transfer of ownership, and is paid by the executors of the estate. In this respect, the Estate Tax is markedly different from the Inheritance Tax, which are taxes paid by the recipients of inherited wealth.

For many people, preparing for the orderly transfer of one’s assets after death is a difficult task to approach. However, with proper planning and a keen awareness of current and future provisions, the garden easement donor may successfully be able to utilize the Estate Tax to his or her advantage, therefore assuring that more of one’s estate remains in private hands, and less goes to the government.

In the past decade, the Estate Tax has undergone drastic changes. Until 2001, the Estate Tax was levied at a rate of 55% on all taxable estates exceeding \$675,000. In 2001, President Bush signed into law the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), which significantly altered many facets of the federal tax structure, including the Estate Tax. Since the passage of this act, the monetary cap of the Estate Tax has been substantially raised, while the corresponding tax rates for non-exempted wealth have been reduced. Currently, in tax

²²⁵ Ibid. 174.

²²⁶ Ibid. 176.

year 2009, up to \$3.5 million in assets may be exempted from taxation, while the tax rate for estates exceeding this amount is levied at 45 percent.²²⁷ In 2010, the Estate Tax will be completely repealed.²²⁸ In short, the years 2009-2010 happen to be fortuitous times for the transfer of large estates.

The benefits of the present Estate Tax for garden easement donors are plain to see. Many large gardens occupy enough acreage that they may potentially raise their owners net worth to a level high enough for the Estate Tax to take effect. Under the current provisions, which have gradually raised the amount exempted from \$675,000 to \$3.5 million, larger and more valuable land parcels (including gardens) can now be transferred to one's beneficiaries with a significantly reduced risk of being subject to the Estate Tax. This makes it much easier to facilitate family transfers of large tracts of land.

In particular, the current provisions of the Estate Tax benefit households whose net worth consists primarily of real estate as opposed to more liquid financial assets. Known as 'land rich, cash poor,' this group tends to consist of people who either bought property for primary use that has subsequently appreciated in value, or people who own large tracts of land that have been family owned for multiple generations.²²⁹ Prior to the passage of EGTRRA, these same people were often unfairly targeted by the Estate Tax. Due to the fact that the wealth being taxed consisted solely of the value of the land, the only way many individuals could pay the Estate Tax was through the sale of their property.

The provisions of the Estate Tax can benefit a garden owner in two distinct ways. First, an easement, by its very nature of limiting a property's development rights, will lower the value of an encumbered parcel of land. Depending upon the value of the parcel, the potential exists to

²²⁷ Ibid. 171.

²²⁸ Ibid.

²²⁹ Ibid. 173.

either significantly reduce or eliminate the Estate Tax completely.²³⁰ In addition to the favorable provisions of EGTRRA, Section 2031(c) of the U.S. Tax Code states that any land subject to the Estate Tax that is beholden to a ‘qualified conservation easement’ is allowed a 40% exemption from its post-easement value, the maximum allowable exclusion being \$500,000.²³¹ In order to receive the 40% or \$500,000 exemption, the easement must be a ‘qualified conservation contribution.’ The exemption is only valid for the encumbered land, and not for any improvements that may happen to be situated upon it.²³² In addition, the easement in question must reduce the value of the land by at least 30%.²³³

While the provisions of EGTRRA clearly benefit the bequeathals of large estates, its pending expiration makes it hard to formulate precise long-term plans. In 2011, EGTRRA is scheduled to expire, unless it is extended by an act of Congress, which at the time of this writing appears highly unlikely due to the precarious state of the United States economy. If EGTRRA is allowed to expire, the Estate Tax would revert back to a \$1million exemption and a 55% tax rate, thereby dramatically increasing the number of estates that will be eligible for taxation.²³⁴

Gift Taxes

In addition to the Estate Tax, garden easement donors may be able to take advantage of the exemptions that can be realized through the use of the Gift Tax. The Gift Tax is a tax levied

²³⁰For example, if Mr. White owned a property with a large garden valued at \$2,100,000, and he donated an easement on his garden to a charitable non-profit valued at \$900,000, his estate would then be worth \$1,200,000, and would not be subject to the Estate Tax. Ibid. 169

²³¹To illustrate this point, if Mr. White, who donated an easement on a 1-acre garden valued post-easement at \$800,000 dies, then 40% of the value of his garden \$320,000 would be exempt from taxation.

On the other hand, if Mr. Black, who donated a conservation easement on his 5.7-acre garden designed by a prominent landscape architect, the value of which was worth \$2,300,000, died, \$500,000 would be exempt from taxation. Lindstrom, 191; Section 2031(c)(1-3).

²³² Lindstrom, 203.

²³³If the easement reduces the value of the land by less than 30 percent, the exemption can still be claimed; for each percentage point below 30%, the available exclusion is reduced by a corresponding two percentage points. Therefore, if an easement only reduces the value of land by 25%, the only a 30% deduction can be claimed. 26 U.S.C.S. § 2031(c)(2) (2008).

²³⁴ Lindstrom, 171; Bick and Haney, 32.

by the IRS on gifts donated during a donor's lifetime that exceed annual monetary limits.²³⁵ The main reason that the Gift Tax exists is "to tax all transfers of wealth made by an individual, except for charitable contributions and transfers to a spouse."²³⁶ In essence, the main difference between the Gift Tax and the Estate Tax is that the former concerns gifts received during the lifetime of the donor, the latter gifts received after the donor's death. However, like the Estate Tax, through careful financial management there are numerous ways in which a taxpayer can avoid paying gift taxes. While donating a garden easement does not automatically exempt or discount a taxpayer from the Gift Tax, it provides yet another avenue that the garden owner may wish to pursue in order to avoid forfeiting a portion of their wealth to the federal government.

According to the IRS, a gift is defined as something with monetary value that has been given to another party without money being received in return.²³⁷ Therefore, a gift can assume many forms, such as money, cars, land, gardens, etc. Under the current IRS Code, taxpayers can exempt up to \$1 million in gifts donated during a person's lifetime, after which gifts will be subject to a 45% tax.²³⁸ In addition, the IRS allows taxpayers an additional annual exemption for gifts worth up to \$12,000.²³⁹ In 2010, the lifetime exemption will be reduced to only \$500,000, but the gift tax rate will also be reduced to 35 percent.²⁴⁰ The IRS places no limits on the number of recipients that donors may give gifts to in a given year: Provided gifts given in a single year total no more than \$12,000, they are tax-exempt.²⁴¹ In addition, the annual Gift Tax exemption can effectively be doubled through a process known as 'gift-splitting.' With this

²³⁵ Lindstrom, 174, 179.

²³⁶ Ibid. 174.

²³⁷ "Frequently Asked Questions on Gift Taxes," Internal Revenue Service: Department of the Treasury 27 Oct. 2008, 9 Feb. 2009 < <http://www.irs.gov/businesses/small/article/0,,id=108139,00.html>>.

²³⁸The \$1 million cap on exemptions from the Gift Tax is part of unified credit that also includes the Estate Tax. Any exemptions sought for the Gift Tax will reduce the Estate Tax exemption by a corresponding amount. Lindstrom, 174, 179.

²³⁹ Ibid. 174, 183.

²⁴⁰ Ibid. 183.

²⁴¹For example, if Mr. White wishes to give each of his three grandchildren a gift of a share in his easement encumbered garden worth \$10,000, although he has given gifts totaling \$30,000, since each individual gift is worth less than \$12,000, he is not subject to the Gift Tax. Ibid. 184.

technique, a married couple filing a joint return can make annual gifts of up to \$24,000 without incurring the Gift Tax.²⁴² For gifts in excess of \$12,000/\$24,000, IRS Form 709, entitled ‘*Gift Tax Return*’ needs to be filed along with one’s annual tax return, and the excess amount will then be deducted from the taxpayer’s \$1,000,000 tax exempt limit.²⁴³

It’s not hard to extrapolate how the present IRS regulations could be useful for those considering giving a gift of their easement-encumbered garden. Theoretically, provided one’s garden is worth less than \$1 million, one could gradually gift it away over the course of many years to an interested party without having to pay the Gift Tax. This can be accomplished either through gifts of small parcels of land, or through annual gifts of an undivided percentage interest in land.²⁴⁴ For the vast majority of garden easements that will probably be valued at somewhat less than six figures, tax-exempt transfer of ownership can occur within a very short period of time.

Property Taxes

One of main principles of the United States Constitution is that powers that are not reserved by the federal government are thereby delegated to the states. One such power that has been delegated to the states is the taxation of private property to raise funds for public services.²⁴⁵ For the vast majority of local governments, property taxes “represent the largest single source of revenue.”²⁴⁶ Property taxes are used to fund constituencies’ essential public

²⁴² If Mr. and Mrs. White decide to give their three grandchildren shares of the above garden worth \$20,000 each, these gifts will also be tax exempt.

²⁴³ Using the same example, if Mr. White has a change of heart, and decides to give his three grandchildren shares of the garden worth \$20,000 each, totaling \$60,000, \$24,000 will be subject to the Gift Tax unless Mr. White chooses to claim this from the \$1 million in exemptions he is allowed. If Mr. White elects to claim the gifts as an exemption, his lifetime exemption would be reduced by \$24,000 to \$976,000. “Tax Rules for Gifts,” [Fairmark.com](http://www.fairmark.com/begin/gifts.htm) 3 March 2009 <<http://www.fairmark.com/begin/gifts.htm>>.

²⁴⁴ Lindstrom, 184-185.

²⁴⁵ Ling and Archer, 130.

²⁴⁶ Ibid. 147.

services.²⁴⁷ Police and fire departments, sanitation services, schools, and public parks are but a few examples of services commonly funded by property taxes.²⁴⁸

Usually, property taxes are typically assessed at the county level of government.²⁴⁹ A county's tax rate, which is usually stated in mills, is determined by a municipality's local governing body based upon the monetary needs of the aforesaid municipality.²⁵⁰ Once the tax rate has been determined, the tax assessor, who is usually an elected official, will assess the value of all taxable real estate within the municipality, and apply the applicable tax rate.²⁵¹ Typically, a county's tax assessor will determine the value of a particular parcel and any improvements such as buildings by appraising it based upon its 'highest and best use.'²⁵² Once a property's value has been determined, it is then multiplied by the property tax rate to determine the annual tax assessment.²⁵³

When a garden owner donates an easement, their garden is permanently protected by limiting the future development rights of the property. Limitation of development rights closely correlates with a reduction in a property's 'highest and best use,' thereby diminishing a property's market value.²⁵⁴ As a property encumbered by a garden easement will likely be worth less than an unencumbered property, it is usually within the easement donor's rights to request a property tax reappraisal that appropriately reflects the eased property's reduced economic potential.

State laws concerning the reassessment of properties encumbered by easements vary. Generally, states that have adopted easement-enabling statutes based upon the Uniform

²⁴⁷ Ibid. 148.

²⁴⁸ Ibid.

²⁴⁹ Ibid. 150.

²⁵⁰ Ibid. Millage rate is the tax dollars per \$1000 of real estate value.

²⁵¹ Ibid. 149.

²⁵² Ibid. 150.

²⁵³ Ibid. 149.

²⁵⁴ Bick and Haney, 37.

Conservation Easement Act contain provisions stating that property owners who have donated a conservation easement are entitled to a property tax reassessment.²⁵⁵ Unfortunately, the positive intentions of these provisions are often mitigated by vague language that is subject to the interpretation of the local tax assessor.²⁵⁶ Simply being ‘entitled’ to a reappraisal does not automatically guarantee that the tax assessor will agree to lower the appraised value of the eased property.

However, a number of individual state statutes contain more specific provisions addressing the reappraisal of properties encumbered by conservation easements.²⁵⁷ The approach that these states take in regard to conservation easements varies. Indiana, Missouri, North Carolina, Oregon, and Wisconsin all require that tax assessors take into consideration the easement’s affect on property value when appraising the property.²⁵⁸ Massachusetts and Illinois go a step further by formally stipulating the rate that encumbered properties must be taxed at.²⁵⁹ In contrast, Vermont has addressed the issue by creating an entirely new property tax category specifically for properties encumbered by conservation easements.²⁶⁰ Finally, it is worth

²⁵⁵ Fullerton, 99; Columbia Leighelen Mecham, Land Trust Activity Within the Context of Property Tax Assessment in Georgia, USA Thesis (Athens, GA: University of Georgia, 2003) 111.

²⁵⁶ Fullerton, 116.

²⁵⁷ Colorado, Illinois, Indiana, Maryland, Massachusetts, Missouri, North Carolina, Oregon, Vermont, Washington, and Wisconsin all contain specific provisions addressing the valuation of easement-encumbered property for property taxes. Mecham, 112.

²⁵⁸ Indiana law requires that easement properties be taxed on a basis that reflects the easement.

Brian Ohm, Matthew B. Cobb, Julie Ann Gustanski, and Larry E. Meuwissen, “Conservation Easements in the Seventh and Eighth Federal Circuits,” Protecting the Land: Conservation Easements Past, Present, and Future, Julie Ann Gustanski and Roderick H. Squires, eds. (Washington D.C.: Island Press, 2000) 292, 299, 311.

T. Heyward Carter Jr., W. Leighton Lord III, and Chalmers W. Poston, “Conservation Easements in the Fourth Federal Circuit,” Protecting the Land: Conservation Easements Past, Present, and Future. Julie Ann Gustanski and Roderick H. Squires, eds. (Washington D.C.: Island Press, 2000) 194.

William T. Hutton, “Conservation Easements in the Ninth Federal Circuit,” Protecting the Land: Conservation Easements Past, Present, and Future, Julie Ann Gustanski and Roderick Squires, eds. (Washington D.C.: Island Press, 2000) 380.

²⁵⁹ Illinois requires that conservation easements be valued at either 8.33% or 25% of fair market value depending upon a county’s population. Massachusetts requires properties encumbered by conservation easements to have their tax rate reduced by 90%. Mecham, 111-112.

²⁶⁰ Easement encumbered properties in Vermont are taxed under a ‘conservation land’ category.

Karin Marchetti and Jerry Cosgrove, “Conservation Easements in the First and Second Federal Circuits,” Protecting the Land: Conservation Easements Past, Present, and Future, Julie Ann Gustanski and Roderick Squires, eds. (Washington D.C.: Island Press, 2000) 97-98.

mentioning that in some states that have failed to provide more specific statutes, the courts have ruled in favor of reappraisal for easement encumbered properties.²⁶¹

Yet despite the fact that some states mandate a reassessment, “reassessments often do not occur, and easement grantors do not realize property tax reductions on a consistent basis.”²⁶² This disheartening trend has been confirmed by a number of studies.²⁶³

There are a number of reasons for this trend. For one thing, many local tax assessors are unfamiliar with their respective state’s laws concerning easement valuation. This is particularly true in states that have vague criteria concerning property tax reappraisal. In these states, the tax assessor is delegated the onerous task of interpreting their state’s laws governing conservation easement valuation while simultaneously ensuring the uniformly equitable treatment of their tax base.²⁶⁴ This being the case, some assessors may determine that a reduced assessment for one taxpayer is not fair to other taxpayers.

Even in municipalities where tax assessors are fully knowledgeable of conservation easements, their attitudes may be ambivalent.²⁶⁵ Some tax assessors are supportive of the

²⁶¹In *Village of Ridgewood vs. The Bolger Foundation* 517 A.2d 135 (1986), the New Jersey Supreme Court ruled “a taxpayers may reduce the value of property upon which a conservation easement was granted in perpetuity to a qualified conservation foundation for real estate tax assessment purpose.”

Melanie Pallone, “Conservation Easements in the Third Federal Circuit,” Protecting the Land: Conservation Easements Past, Present, and Future, Julie Ann Gustanski and Roderick Squires, eds. (Washington D.C.: Island Press, 2000) 135-136.

In Michigan, the State of Michigan Tax Tribunal has ruled that eased lands are to be taxed at their eased value. John F. Rohe, “Conservation Easements in the Sixth Federal Circuit,” Protecting the Land: Conservation Easements Past, Present, and Future, Julie Ann Gustanski and Roderick Squires, eds. (Washington D.C.: Island Press, 2000) 265.

²⁶² Mecham, 112.

²⁶³ In a 2001, Ezra Meyer of the Gathering Waters Conservancy in Wisconsin analyzed 109 eased properties in the state of Wisconsin. Of these, only 54% were reassessed, and the average appraised value of the eased land was on average only reduced by 2.3%. Many of the respondents felt that their tax assessors were cavalier towards the treatment of conservation easements, and only 28% of respondents felt that the assessor seriously considered the impact of the easement in their reappraisal. Ezra Meyer, The Impacts of Conservation Easements on Property Taxes in Wisconsin (Madison, WI: The Gathering Waters Conservancy, 2001).

In Vermont, “local assessors have been known to evade the purpose of this [Vermont’s Conservation Easement] program either by finding little reduction in property value or by shifting any loss of value estimated on the restricted portion of the landowner’s property to the owner’s unrestricted land.” Marchetti and Cosgrove, 98.

In Oregon, landowners have had difficulty getting their properties reappraised in accordance with Oregon’s conservation easement statute. Hutton, 380.

²⁶⁴ Mecham, 132.

²⁶⁵ Ibid. 7.

objectives of conservation easements and will be amicable to a reassessment. Other tax assessors feel that a conservation easement effectively “leaves the landowner with no practical use of a property,” and therefore they are certainly entitled to a favorable reassessment.²⁶⁶

Another point to consider is the fact that since local governments are so reliant upon property taxes to fund local services, assessors may be reluctant to grant a property owner a reassessment on account of a conservation easement. There are a number of reasons for this. Many assessors feel that reducing the assessment on one property unfairly shifts the burden of taxation to other unencumbered properties within the tax base.²⁶⁷ This is not an unreasonable position; any shortfall in revenue, however small, will certainly need to be made up elsewhere.

In addition, some tax assessors may claim that the conservation values protected by the easement are not sufficient enough to warrant a reappraisal. The public benefit of an easement, its claim that it will last in perpetuity, and the ability of the organization holding the easement to monitor and enforce its provisions are all qualities frequently called into question by appraisers.²⁶⁸

While a revised appraisal will typically result in a lower property value and a correspondingly lower property tax, this outcome is by no means certain. “Unless the state mandates it, there is no guarantee that the assessor will reduce the assessment of an easement-burdened property.”²⁶⁹ In certain situations where the unencumbered portion of a property has dramatically increased in value, a reassessment may actually result in a property tax increase. Also, with gardens, there is the possibility that the tax assessor may already regard the garden as ‘unimproved land,’ meaning that there will not be any tax advantages to reappraisal.²⁷⁰

²⁶⁶ Ibid. 78.

²⁶⁷ Ibid. 109-110.

²⁶⁸ Ibid. 168.

²⁶⁹ Ibid. 159.

²⁷⁰ Fullerton, 124.

However, despite these obstacles, there are a number of things that the garden owner can do in order to try to ensure that they receive a favorable reappraisal. Initiating an open dialogue with one's local tax assessors' office prior to donating an easement is a wise idea, and may help to educate the tax assessor about the purpose of the easement, along with relevant state laws. Notifying the tax assessor of one's intentions beforehand will also go a long way towards determining the prospects of a reappraisal, and can help save the garden owner a lot of time and aggravation.²⁷¹

Even if reappraisal fails to result in a favorable outcome, the garden owner still has other options to pursue. Another tactic that can be considered by the easement donor prior to easement donation is negotiating with the easement holding organization to pay the property taxes on the part of the property encumbered by the easement. While hardly a standard practice, "nothing prohibits assigning a portion of the property tax burden to the grantee."²⁷² Another option to consider if an assessor is reluctant to grant a reappraisal is to try to have the easement-encumbered property assessed under a differential taxation program, if the garden should happen to qualify.²⁷³ At the present time, most states have some form of differential taxation to assess property taxes of properties with conservation values.²⁷⁴

State Tax Incentives:

In response to the success that federal tax incentives have enjoyed in encouraging easement donation, a number of individual states have developed their own tax incentive programs in order to "further encourage the donation of easements within their borders."²⁷⁵ Although their exact provisions differ, most state tax incentives are designed to supplement the

²⁷¹ Bick and Haney, 36.

²⁷² Ibid. 38.

²⁷³ Mecham, 116.

²⁷⁴ As of 2000, 48 of 50 states used differential taxation to assess property taxes. Ibid. 102.

²⁷⁵ Cheever, and McLaughlin, 10226.

existing federal tax incentives, and therefore easements must meet similar criteria in order to qualify for such incentives.²⁷⁶ In fact, many states actually have more stringent requirements than those required by the federal government.²⁷⁷

Unlike the federal tax incentives, which are strictly deductions, most state incentives take the form of an income tax credit.²⁷⁸ At this point, it is important to delineate the difference between a tax deduction and a tax credit: Whereas a deduction reduces the amount of income that is subject to taxation, a credit is a dollar for dollar write off that reduces the amount of taxes owed. Therefore, tax credits have the potential to be a more lucrative incentive for easement donors.²⁷⁹

While the exact limits vary, the value of a tax credit is usually calculated to be either a percentage of the fair market value of the easement, or is capped at a predetermined value.²⁸⁰ Like the federal incentives, all states allow recipients to ‘carry over’ the tax credit into succeeding returns in order to realize the full value of their donation.²⁸¹ In addition, some states allow tax credit recipients to sell their tax credits to other parties, a concept known as ‘transferability.’²⁸²

For tax purposes, the Internal Revenue Service treats state tax credits differently depending upon whether they are in the hands of the original recipient or a subsequent investor.²⁸³ If the state tax credits received by the easement donor are being used to offset state liability (usually in the form of state taxes), the donor does not have to pay federal taxes on state

²⁷⁶ “State Conservation Tax Credits: Impact and Analysis,” (Boulder CO.: Conservation Resource Center, 2007) 9.

²⁷⁷ *Ibid.* 9.

²⁷⁸ California, Colorado, Connecticut, Delaware, Georgia, Maryland, Mississippi, North Carolina, New Mexico, New York, South Carolina, and Virginia all offer state tax credits.

²⁷⁹ Lindstrom, 142.

²⁸⁰ “State Conservation Tax Credits: Impact and Analysis,” 19.

²⁸¹ *Ibid.* 32-34.

²⁸² Colorado, Virginia, and South Carolina all allow for transferability. On the open market, tax credits will typically command \$0.75-\$0.80 for every dollar of credit. Lindstrom, 98; “State Conservation Tax Credits: Impact and Analysis,” 23, 32-34.

²⁸³ Lindstrom, 142.

tax credits received.²⁸⁴ However, if the recipient decides to sell their state tax credits to another taxpayer, the IRS considers this to be a 'sales proceed,' and therefore the tax credits are subject to taxation.²⁸⁵

²⁸⁴ Ibid.

²⁸⁵ Ibid. 143.

PART III

CASE STUDIES:

COMPARISON, ANALYSIS, AND CONCLUSION

CHAPTER 8. CASE STUDY METHODOLOGY

Having explained the history, development, and essential components of garden easements in the second part of this thesis, the next section seeks to analyze the different approaches that easement holding organizations have taken in respect to garden easements, as well as the effect that garden easements have had when applied to real world applications. Analysis was carried out through the in depth study of three specific easement-holding organizations with a prior history of accepting garden easements, in addition to the analysis of a specific garden protected by an easement held by each of the three organizations.

The three easement-holding organizations that were chosen for analysis in this study are: Historic Charleston Foundation, The Garden Conservancy, and the Triangle Land Conservancy. These three organizations share a number of common attributes. They are all private non-profit organizations staffed by a small and dedicated cadre of personnel. All three have established easement programs that are part of a multi-faceted approach towards preserving historic landscapes such as gardens. Finally, all three organizations protect at least one garden located in the southeast region of the United States.

However, the main reason that these three organizations were chosen was not for their commonalities, but rather the fact that all three of the organizations approach garden preservation from an entirely different perspective. Historic Charleston Foundation's primary objective is preservation of Charleston's built environment, with historic landscapes such as gardens being regarded as an important accompaniment to the City's unique built environment. In contrast, Triangle Land Conservancy's primary mission is the preservation of large undeveloped

landscapes such as farmland or forest. Of the three organizations, only The Garden Conservancy is exclusively concerned with garden preservation.

The three individual gardens that were analyzed for this thesis are the Elizabeth Lawrence Garden in Charlotte, North Carolina, which is protected by an easement held by The Garden Conservancy, the Loutrel Briggs designed garden at the William Gibbes House in Charleston, South Carolina, which is protected by an easement held by Historic Charleston Foundation, and the Margaret Reid Wildflower Garden in Raleigh, North Carolina which is protected by an easement held by Triangle Land Conservancy. Each of the encumbered gardens were chosen at the behest of representatives from the respective organizations. In order to limit the number of variables affecting the outcome of this study, I specifically requested that the representatives confine their choices to gardens located within the southeast region of the United States, a request that all were able to honor.²⁸⁷ All three of the gardens analyzed in this thesis experience similar climatic stresses and share many of the same species of flora.²⁸⁸

Data for this study was compiled largely through the use of questionnaires, which were administered to the individuals responsible for managing the easement programs at their respective organizations.²⁸⁹ The questionnaires were administered either through phone interviews or e-mail correspondence, depending upon the preference of the respondent. Any additional questions or data that required clarification following the initial interview was usually obtained through the use of e-mail communications.

²⁸⁷ For Historic Charleston Foundation and the Triangle Land Conservancy, this was not an issue, as all of their easements they hold are on properties located in the southeast. In contrast, The Garden Conservancy only holds one garden easement in this region, which they acquired only recently. In this regard, the decision to analyze the Elizabeth Lawrence House and Garden was reached by default.

²⁸⁸ All three gardens are located in the 'humid subtropical' climatic region, the boundaries of which roughly extend over the southeast quarter of the United States. Also, all three gardens are located in USDA Plant Hardiness Zone 8. "2006 arborday.org Hardiness Zone Map," *Arbor Day Foundation*, 25 March 2009, <<http://www.arborday.org/media/zones.cfm>>.

²⁸⁹ See Appendix B.

In total, this questionnaire was administered to four individuals. At Historic Charleston Foundation, the individual that I interviewed was April Wood, HCF's Manager of Easements and Technical Outreach. Although Ms. Wood has an extensive repertoire of experience involving preservation, since she had only assumed her duties at HCF in the Spring of 2007, she was unable to answer some of my questions concerning the historic context of HCF's easement program. This information was obtained from Jonathan H. Poston, former Director of Preservation Programs and Museum and Preservation Initiatives at HCF. Mr. Poston was responsible for developing HCF's easement program in the early 1980's, and continued to oversee the program until 2007 when he left to assume a faculty position in the Department of Planning and Landscape Architecture at Clemson University.

At The Garden Conservancy, the person I interviewed was Bill Noble, Director of Preservation Projects. As Director of Preservation Projects, Mr. Noble has been responsible for the development of the policies underlying The Garden Conservancy's easement program which are still evolving at this point in time.

At Triangle Land Conservancy, the person I interviewed was Katherine Wright, TLC's Easement Steward since 2007. As Easement Steward, Ms. Wright is responsible for monitoring eased properties, maintaining productive relationships with the owners of these properties, and promoting and representing the easement program to prospective donors.

Two questionnaires were formulated for this study. The first, entitled "Easement Program Director Questionnaire," consisted of twenty-two questions relating the easement program and the organization in general. The second questionnaire, entitled "Individual Garden Easement Questionnaire," consists of eleven generalized questions designed to elicit information about the encumbered garden that was being analyzed.

After the information that was obtained from the questionnaires was transcribed and processed, the responses were divided into particular categories for the purpose of producing a written summary. This was not always easy, for some responses could have been included in multiple categories, while others were so vague that they seemingly defied categorization. The results of the categorization process can be seen on the following tables.

Table 1: Classification of Data from Easement Program Director Questionnaire

Category	Corresponding Questions
Introduction	<i>Author's commentary.</i>
Mission and History	<i>Information obtained from website and supporting materials.</i>
Overview of Easement Program	<ol style="list-style-type: none"> 1. What factors led to the founding of the easement program? 2. How long has your organization been accepting easements on gardens? 3. What does your organization do to promote the easement program?
How Easements are Acquired	Where does the impetus for easement donation originate; with your organization, or with the easement donor?
Number of Easements Held	<i>Same as category title.</i>
Requirements of Gardens Protected by Easements	What are some of the requirements for gardens to be protected by an easement?
Qualities of Gardens Protected by Easements	What are some of the components within a garden that are protected by the easement?
Public Access Requirements	How are the public access requirements met?
Materials Required for Baseline Documentation	<ol style="list-style-type: none"> 1. What materials are required for baseline documentation? 2. Who is responsible for compiling information for baseline documentation?
Management Plans: Use and Duration	Are gardens encumbered by an easement subject to a management plan?
Interval and Procedures for Inspections	<ol style="list-style-type: none"> 1. How often are inspections carried out? 2. What specific items are assessed during inspections?
How Provisions are Enforced and Violations Addressed	<ol style="list-style-type: none"> 1. How are the easements enforced? 2. What types of violations typically occur (if they do)?
Addressing Proposed Changes	<ol style="list-style-type: none"> 1. What type of changes to the gardens would require approval? 2. How does one go about getting changes approved?
Legal Challenges to Garden Easements	Have there been any legal challenges to easements held on gardens?
Fees Associated with Easement Donation	What are the typical fees associated with easement donation?
Claiming a Garden Easement as a Charitable Donation	<ol style="list-style-type: none"> 1. Do a good portion of easement donors claim their easement as a charitable contribution? 2. If yes, how is the garden appraised? Who is qualified to conduct the appraisal? 3. Does your organization assist in this process?
Future Mission and Direction of Easement Program	How does your organization view its future role in regards to garden easements?

Table 2: Classification of Data from Garden Easement Questionnaire

Category	Corresponding Questions
Introduction	<i>Authors own commentary.</i>
Property Description and History	<ol style="list-style-type: none"> 1. Briefly, what are the main features of the garden? 2. How is the garden significant?
Development of the Easement	<ol style="list-style-type: none"> 1. How did your organization become involved with this garden? 2. What factors convinced your organization that an easement was a viable option?
Easement Provisions	<ol style="list-style-type: none"> 1. What specific features in the garden does the easement protect? 2. Are there any provisions within the easement that are exclusive to this easement alone? 3. Was a management plan prepared for the garden? 4. If yes, what specific issues does the management plan address?
Subsequent History	<ol style="list-style-type: none"> 1. How have inspections been carried out? 2. Since the garden was encumbered by the easement, have there been any issues with violations? 3. Have there been any legal challenges concerning the existence of the easement?

CHAPTER 9. CASE STUDIES: EASEMENT HOLDING ORGANIZATIONS

Case Study #1: Historic Charleston Foundation

1. Introduction

The first case study examines Historic Charleston Foundation's (HCF) easement program. Although primarily an organization devoted to the preservation of Charleston's built environment, Historic Charleston Foundation has also maintained an active role in preserving Charleston's natural environment, in particular the compact and intricate gardens that are a quintessential feature of many historic Charleston homes. One method that Historic Charleston Foundation has successfully utilized to help ensure that these gardens are preserved is easements, which have selectively been used by HCF in order to protect a small number of Charleston gardens.

2. Mission and History

In order to understand Historic Charleston Foundation, one first must understand Charleston. Founded in 1670, Charleston quickly became the most populous and prosperous city in the southern British Colonies, developing into a prominent port from which locally grown crops such as rice, indigo, and cotton were exported.²⁹⁰ Following the Civil War, Charleston's economy, like many other cities in the South, was completely decimated by the collapse of the plantation-based economy that Charleston was dependent upon.²⁹¹ The city subsequently entered a long period of decline characterized by economic impoverishment and the search for a new identity. Although it did not appear so at the time, the unfortunate circumstances that

²⁹⁰Barbara S. Williams, "Charleston," World Book Encyclopedia. (Chicago: World Book, Inc., 1998) 383-384.

²⁹¹ Ibid.

Charleston faced in the latter nineteenth century would prove to be a blessing. Unlike other leading cities that continually refashioned their appearance in the latest architectural styles, the citizens of impoverished Charleston could ill afford new construction, and for the most part, made do with their existing building stock. As a result, Charleston entered the twentieth century with a large quantity of intact structures from the eighteenth and nineteenth centuries.

Gradually, Charlestonians began to recognize that the key to Charleston's future hinged on preserving its past. Charleston began to take measures to help market and preserve its historic architecture. These efforts quickly paid dividends; by the late 1920's, tourism had become Charleston's largest single industry.²⁹² In 1931, in response to past demolition and undesirable new structures, Charleston designated 23 blocks of Charleston an 'Old and Historic district,' wherein changes would have to be reviewed and approved by an appointed body known as The Board of Architectural Review.²⁹³ Charleston's ordinance, which was the first municipal historic preservation ordinance enacted in the United States, would later serve as a model for other municipalities to follow.²⁹⁴

Despite the existence of the ordinance and a strong preservation ethic, many Charlestonians felt that Charleston still lacked sufficient institutions in order to permanently safeguard the City's architectural heritage. Many felt that the solution could be found through the establishment of a strong preservation advocacy organization that could engage in a wide variety of activities in order to further historic preservation in Charleston.²⁹⁵ In order to address

²⁹²Walter J. Frasier Jr., Charleston! Charleston!: The History of a Southern City (Columbia, SC: University of South Carolina Press, 1989) 374.

²⁹³ Ibid.

²⁹⁴Susan Sully, Charleston: Style: Past and Present (New York, NY: Rizzoli International Publications, Inc., 1999) 23.

²⁹⁵ In response to this dilemma, in the late 1930's, Robert N. S. Whitelaw, Director of the Carolina Art Association, formed the Charleston Civic Services Committee, which was tasked with finding a 'non-political solution' to this problem. The committee sought out the advice of the notable landscape architect, Frederick Law Olmsted Jr. (1870-1957). After visiting Charleston in January 1940, Olmsted prepared a report focusing on city planning and the protection of Charleston's values. Olmsted realized that the greatest impediment to preserving historic buildings was their high cost of maintenance, and duly recommended in his report that Charlestonians establish a 'permanent agency' to provide financial and technical assistance for those in need of it.

these concerns, in April 1947, Historic Charleston Foundation was founded “to preserve and protect the integrity of Charleston’s architectural, historical and cultural heritage.”²⁹⁶ Since this time, HCF has worked diligently to protect Charleston’s historic resources through a variety of advocacy, educational, and financial programs.²⁹⁷

Since its inception, Historic Charleston Foundation has played a pivotal role in many Charleston preservation initiatives. Some of HCF’s more notable achievements include the establishment of the first preservation revolving fund in 1957, the restoration of dozens of buildings in the Ansonborough Historic District, and the acquisition of both the Aiken-Rhett and Nathaniel-Russell Houses, which are today interpreted by HCF as house museums.²⁹⁸

Historic Charleston Foundation is incorporated as an educational non-profit with 501(c)(3) status. Operating income is generated from numerous sources such as gifts from

Efforts to form such an institution were stymied until the conclusion of World War II. After the war, the Charleston Civic Services Committee resumed its efforts, enlisting Kenneth Chorley (1893-1974) President of Colonial Williamsburg, to help gain widespread support for their efforts.

Leigh Handal, ed., The Challenge of Charleston: 2003 Annual Report (Charleston, SC: Historic Charleston Foundation, 2003) 4-6.

²⁹⁶ “Who We Are,” Historic Charleston Foundation, 22 Dec. 2008

<<http://www.historiccharleston.org/about/who.html>>. Also see Robert R. Weyeneth, Historic Preservation for a Living City: Historic Charleston Foundation: 1947-1997 (Columbia, SC: University of South Carolina Press, 2000) 22-34.

²⁹⁷ Among Historic Charleston Foundation’s many pursuits are participation in community planning, educational programs, technical assistance, heritage tours, acquisition & resale of historic properties, rehabilitation of historic neighborhoods, and historic documentation of Charleston’s built environment.

Leigh Handal, ed., Historic Charleston Foundation: 2007 Annual Report (Charleston, SC: Historic Charleston Foundation, 2008) 3.

²⁹⁸ In 1959, Historic Charleston Foundation began using monies from the revolving fund to purchase and restore properties in Ansonborough. By 1976, over 60 structures in Ansonborough had been rehabilitated due to the revolving fund.

J.J. Nuss, “Ansonborough and H.A.N.A. Information,” The Historic Ansonborough Neighborhood Association, July 2007, 29 Dec. 2008 <<http://www.ansonborough.org/history.html>>.

The Aiken-Rhett House is a c. 1817 home once owned by former South Carolina Gov. William Aiken. HCF purchased the house from The Charleston Museum in 1995.

“The Aiken-Rhett House: History of the Aiken-Rhett House,” Historic Charleston Foundation, 29 Dec. 2008 <<http://www.historiccharleston.org/experience/arh/history.html>>.

The Nathaniel-Russell House, an 1808 Federal style house located on The Battery, was purchased by Historic Charleston Foundation in 1955, debuting as a house museum the following year.

“Nathaniel Russell House,” Historic Charleston Foundation, 14 Jan. 2009

<<http://www.historiccharleston.org/experience/nrh/>>.

personal and business contributors, corporate sponsorships, special events such as The Charleston International Antiques Show and The Annual Festival of Houses and Gardens, proceeds generated through sale of licensed merchandise, and ownership and operation of three gift shops and two house museums.²⁹⁹ HCF is governed by a 35-member Board of Trustees, while everyday operations are administered by an executive director, who currently oversees a staff of 32.

3. Overview of Historic Charleston Foundation Easement Program

Historic Charleston Foundation's easement program was founded in 1982 by Jonathan Poston, former Director of Preservation at HCF.³⁰⁰ Prior to Mr. Poston joining HCF, the organization had already accepted a large number of covenants protecting historic facades in Charleston.³⁰¹ However, HCF wanted to gravitate away from using covenants in favor of conservation easements, which were regarded as a more reliable legal means of protecting property in perpetuity, and Mr. Poston was tasked with developing guidelines for their future employment.³⁰² As the use of easements for conservation purposes was at this time still in its

²⁹⁹The Festival of Houses and Gardens, which has been held annually since 1947, allows participants the opportunity to view 8-10 private gardens and homes that are not normally open to the public.

"Festival of Houses and Gardens," Historic Charleston Foundation, 29 Dec. 2008
<http://www.historiccharleston.org/news_events/festival.html>.

Historic Charleston Foundation sells a variety of licensed products, many of which are reproductions, through its network of three stores in the Charleston area, and through its online site.

"Historic Charleston Foundation: Online Store Collection," Historic Charleston Foundation, 27 Dec. 2008
<http://www.historiccharleston.org/mm5/merchant.mvc?Screen=SFNT&Store_Code=hcf>.

³⁰⁰Although HCF's easement program was formally established in 1982, the first easement donated to HCF was accepted in 1979 "by a citizen who had learned about easements and wanted to protect a property in the vicinity of the controversial hotel and convention center then under discussion in Charleston." Weyeneth, 236; April Wood, telephone interview with author, 05 Dec. 2008.

³⁰¹Covenants were first used by HCF in the late 1950's when HCF was heavily involved in the rehabilitation of the Ansonborough Neighborhood. HCF would buy homes for rehabilitation with monies from its revolving fund, and then sell the rehabilitated properties to interested buyers with restrictive covenants. The covenants ran with the land, and were to last for 75 years. Today, HCF holds over 115 valid covenants, and continues to place restrictive covenants on properties purchased with monies from the revolving fund.

Weyeneth, 56, 63, 214-215; April Wood, "RE: Some questions to start a Monday with," email to the author, 30 Jan. 2008; Jonathon Poston, telephone interview with author, 23 Jan. 2009.

³⁰²For more information concerning the difference between restrictive covenants and easements, see Chap. 2, Pg. 6, Note #14.

infancy, prior to developing any definitive guidelines, Mr. Poston sought out legal counsel from the National Trust for Historic Preservation, and carefully examined the easement programs of Historic Savannah Foundation and the Society for the Preservation of New England Antiquities.³⁰³

Currently, Historic Charleston Foundation accepts three types of conservation easements; exterior, interior, and open space.³⁰⁴ Consistent with HCF's main objective of preserving Charleston's built environment, the vast majority of easements held by HCF exclusively protect exterior façades. Easements protecting historic interiors or open spaces are usually only accepted if a façade easement is also being donated.³⁰⁵

Historic Charleston Foundation first began to utilize open space easements in the mid-1980's. Open space easements have been employed by HCF in order to protect a wide variety of historic landscapes such as woods, farmland, plantations and gardens.³⁰⁶ Generally, the gardens protected by open space easements held by HCF are the small private residential gardens for which Charleston is renowned.³⁰⁷ (Figure 18)

³⁰³Jonathan Poston, telephone interview, 23 Jan. 2009.

³⁰⁴April Wood, telephone interview, 5 Dec. 2008.

³⁰⁵April Wood, "RE: Some questions to start a Monday with," 30 Jan. 2009.

³⁰⁶April Wood, telephone interview with author, 5 Dec. 2008; and "RE: Some questions to start a Monday with," 30 Jan. 2009.

³⁰⁷There are a number of reasons why Charleston's intimate and luxurious private gardens are worth preserving through the use of easements. For decades, these gardens have proven to be a major tourist attraction, as garden lovers throughout the world have traveled to Charleston specifically to see its gardens. It is the combination of intricate manmade and natural features on a personal scale that has contributed to the charm and popularity of Charleston's private residential gardens.

Charleston's private gardens are the product of a unique tradition of gardening that is almost as old as the City itself. It is a tradition that developed from the unique combination of wealthy citizenry, a mild climate, and urban space limitations. Many Charleston gardens are as old as the structures they accompany, and are an integral part of the City's urban landscape.

Though generally inspired by the formal designs characteristic of English and French gardens, Charleston's gardens represent a unique adaptation that reflects both the intimate urban environment of Charleston, as well as its temperate climate. Typical characteristics of Charleston gardens include the following features:

- Thorough integration of house and garden
- Maximum use of limited space:
- Enclosure through use of brick and stucco walls and picket fences
- Wrought iron gates providing privacy to owners and visibility to the public
- Creative use of ornamental plants



Figure 18: A Charleston Garden. Note the formality of the garden plantings, as well as its clear delineation of boundaries through the use of manmade elements.

The idea of using open space easements to protect gardens originated with Mr. Poston, and it was under his tutelage that the majority of garden easements presently held by Historic Charleston Foundation were acquired.³⁰⁸ When developing HCF's easement program, Mr.

-
- Paths created from bricks, tiles, or cobbles
 - Prolific lawn ornamentation such as sculptures, sundials, spheres, vases, urns, birdbaths, terra-cotta pots, finials, columns, tiles, joggling boards
 - structures such as gazebos, pergolas, pavilions, arbors
 - An Outdoor door that leads from the street to the piazza, a porch that runs lengthwise and perpendicular to the street and serves as a transition element between the house & garden
 - Paving materials consisting of brick, flagstone, gravel, cobblestones, grass, crushed shells, Welch slate, Belgian blocks, cobblestones, and Bermuda limestone
 - Pools and fountains
 - Seats & benches

For more information concerning the characteristics of Charleston gardens, see: James R. Cothran, [The Gardens of Historic Charleston](#) (Columbia, SC: University of South Carolina Press, 1995) 46-7; 98-111.

³⁰⁸Although the idea of holding easements specifically protecting gardens originated with Mr. Poston, the first deed restriction actually protecting a garden was a covenant acquired by Historic Charleston Foundation in 1979 on 94 Rutledge Ave. Although the main purpose of the covenant was to protect the house, a c. 1850's Italianate structure, with an elaborate garden, a covenant was also inserted in this particular deed stating that "the conformity of the

Poston saw the need for HCF to take decisive action on behalf of Charleston's historic gardens, as "a lot of gardens that should not have been messed with had already been destroyed."³⁰⁹ Although HCF's original intention was to accept open space easements on gardens wherever possible, HCF soon realized that they had to exercise restraint in promoting garden easements, as a lot of potential easement donors were "less than enthusiastic," about the idea, and HCF was legitimately concerned about "scaring people off."³¹⁰

Easements held by Historic Charleston Foundation constitute a permanent legal agreement that is designed to last in perpetuity. Like other conservation easement holding organizations, Historic Charleston Foundation makes every effort to accommodate the needs and desires of easement donors, as "each homeowner has different things that they think are important."³¹¹ As a result of this policy, each easement drafted by HCF will contain slight variations based upon the "different needs of the property."³¹² As a general rule of thumb, most easements drafted by Historic Charleston Foundation will contain the following four prohibitions:³¹³

- No alterations affecting the architectural character of the structures on the site
- No change in the use or density of the property
- No construction of new buildings and disturbance of archaeological features
- The property cannot be subdivided without the approval of HCF

garden can not be changed." The covenant did not contain any specific provisions concerning garden plans or plantings. April Wood, telephone interview with author, 5 Dec. 2008; Jonathan Poston, telephone interview with author, 23 Jan. 2009.

³⁰⁹Jonathan Poston, telephone interview with author, 23 Jan. 2008.

³¹⁰Ibid.

³¹¹April Wood, telephone interview with author, 5 Dec. 2008.

³¹²Ibid.

³¹³"Preservation provisions," Historic Charleston Foundation, 16 Jan. 2009, <http://www.historiccharleston.org/preservation/how_cov_provisions.html>.

4. How Historic Charleston Foundation Acquires easements on gardens

Most of the garden easements that are held by Historic Charleston Foundation were acquired at the behest of property owners donating an exterior easement whose property also possessed gardens of exceptional historic significance. Generally, these were donors who had taken a keen interest in preserving their gardens (or specific landscape features within them), and willingly “donated [easements] because they knew [their] gardens were significant, and they didn’t want to see them destroyed”³¹⁴

5. Number of Easements Held

At the present time, Historic Charleston Foundation holds easements or covenants on 357 properties, the vast majority of which exclusively protect the exterior facades of historic structures.³¹⁵ Of these, sixty-four contain open space restrictions.³¹⁶ Unfortunately, the exact number of open space easements that specifically protect gardens is unknown, for the language used within many of these easements often fails to make specific reference to the qualities of the natural resource that is being protected.³¹⁷

This dilemma is clearly illustrated by the easements held by HCF that protect gardens designed by Loutrel Briggs.³¹⁸ HCF currently holds easements on eight properties containing

³¹⁴ April Wood, telephone interview with author, 5 Dec. 2008.

³¹⁵ April Wood, “RE: Some questions to start a Monday with,” 30 Jan. 2009.

³¹⁶ April Wood, “RE: Garden easements again,” 8 Jan. 2009.

³¹⁷ Many of HCF’s earlier open space easements were short documents that failed to delineate specific features within the garden requiring protection. Later easements are often more specific. April Wood, “RE: Some questions to start a Monday with,” 30 Jan. 2009.

³¹⁸ Loutrel Briggs (1893-1977) was a prominent landscape architect who practiced in Charleston for over 40 years. A native New Yorker, Briggs graduated with a degree in Landscape Architecture from Cornell University in 1917. He subsequently opened a design office in New York City where he built a loyal following. In 1929, Briggs received his first commission when he was asked by Mrs. Washington Roebling (widow of Washington Augustus Roebling, civil engineer who supervised construction of the Brooklyn Bridge) to design a garden for the c. 1772 Gibbes House, which Mrs. Roebling was then in the process of restoring. A short time later he established an office in Charleston, and remained active in Charleston gardening circles for the rest of his life. Briggs’ gardens are characterized by a high-degree of formality and reference to past garden styles, both of which are indicative of the Colonial Revival that was the dominant force in landscape design during his peak years.. Many

Loutrel Briggs gardens, five of which definitively contain open space provisions designed to protect these gardens.³¹⁹ However, none of the five open space easements protecting Loutrel Briggs gardens specifically makes reference to the fact that the gardens were designed by Briggs, or attempts to protect any of the characteristic features of the gardens he designed.³²⁰

The number of easements held by Historic Charleston Foundation has progressively grown since the program's inception. In the past decade, HCF has acquired on average an additional ten easements per year.³²¹

6. Requirements for Gardens to be Encumbered by an Easement

Historic Charleston Foundation will usually only contemplate accepting an easement on a garden if an exterior easement encumbering a historic structure is also being donated.³²² In order for a garden to be taken into consideration, it must be historic, contribute to the overall site as a whole, and maintain a good portion of its integrity.³²³ In addition, the site must either be listed individually or be eligible for inclusion in The National Register of Historic Places, or be located within a National Register Historic District.³²⁴ As the vast majority of properties that Historic Charleston Foundation holds easements on are located in one of Charleston's numerous historic districts, these criteria seldom present a problem.

of his gardens are subdivided into a series of 'rooms, and feature a water-based focal point such as a pond or fountain. Common flora utilized by Briggs include azaleas, camellias, and other plants traditionally grown in Charleston gardens.

James R. Cothran, "Preserving Charleston's Landscape Legacy," Historic Preservation, Spring 2005: 2-3.

³¹⁹ April Wood "RE: Some questions to start a Monday with," 30 Jan. 2009.

³²⁰ Inversely, it is also possible that HCF holds additional easements on Loutrel Briggs gardens that are not documented as such. Ibid.

³²¹ Estimated number of easements acquired annually based upon the numbers reported in Historic Charleston Foundation's annual reports from 2001-2007.

³²² James R. Cothran, "RE: Follow-up calls on easement research," e-mail to author, 22 March 2008.

³²³ Ms. Wood defined integrity as "not being modified in any meaningful way." April Wood, telephone interview with author, 5 Dec. 2008.

³²⁴ "Qualified Properties," Historic Charleston Foundation, 17 Jan. 2009
<http://www.historiccharleston.org/preservation/how_cov_qualified.html>.

7. Qualities of Gardens Protected by Easements

Due to the fact that protecting gardens is not the primary mission of Historic Charleston Foundation, the organization to date has not specified exact criteria concerning the features that are to be protected within encumbered gardens. This is particularly true of HCF's earlier open space easements, many of which were brief documents which failed to describe and delineate the component features within a garden.³²⁵ Although HCF's later open space easements are considerably more detailed, they are still not oriented towards the specific needs of gardens.³²⁶ This is an issue that HCF hopes to address in the future.³²⁷

Consistent with this philosophy, the overall goal of HCF's existing open space easements that pertain to gardens has been to protect the open space from being developed, not to protect a specific garden design.³²⁸ Therefore, most of the protection afforded to gardens by HCF's easements is provided by prohibiting future construction or removal of existing architectural features. In many instances, garden easements held by HCF also "prohibit trees of a certain dimension from being cut down without prior approval."³²⁹

In many respects the vague language used by Historic Charleston Foundation in many of its older open space easements has been both a benefit and a liability. While in certain instances, the easement's vague language may fail to protect certain values within a garden, in others, it may allow HCF to protect features within the garden that were not initially appreciated for their historic significance.

Although clauses within open space easements will vary depending upon the needs of the garden, many of the easements held by HCF that protect Charleston's small urban gardens are

³²⁵ April Wood, "RE: finalized reports," 23 Feb. 2008.

³²⁶ April Wood, "RE: Some questions to start a Monday with," 30 Jan. 2008.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ April Wood, telephone interview with author, 5 Dec. 2008.

similar in nature. Below is a sample clause from an open space easement protecting a garden designed by Loutrel Briggs:

*As to the gardens or grounds of the Property, no construction above-ground or below-ground, cutting or removal of trees greater than eight inches in diameter or demolition of existing exterior improvements and structures of the Property shall be permitted without prior, express, written consent of the grantee, including without limitation, activities or construction relating to swimming pools, garden pools, whirlpool baths, fountains, walkways, driveways, brickwork or walls. Notwithstanding the above, Grantee's consent shall not be required for the routine maintenance, trimming, pruning and mowing of the trees, shrubs and lawn. The gardens and grounds shall at all times be kept in a neat and trash-free condition.*³³⁰

8. Public Access Requirements

Generally, the majority of the open space easements held by Historic Charleston Foundation do not contain any specific provisions requiring garden owners to open their gardens to the general public.³³¹ In large part, this is because HCF's primary objective in holding easements is simply to provide a public benefit by "protecting the property from future development."³³² This being said, a few of HCF's easements concerning gardens contain

³³⁰ Deed of Conservation Easement with Right of First Refusal from NationsBank Trust as Personal Representative for the Estate of Barbara H. Williams and Historic Charleston Foundation, 3 Aug. 1992 (filed 17 Sept. 1992), Charleston County, South Carolina, Deed Book E218, Pg. 834. Charleston County Registers Office, Charleston, SC. Article VIII. Pg. 5.

³³¹ Typically, this is addressed through a clause stating the following: "Although this easement will benefit the public in ways recited above, nothing herein shall be construed to convey a right to the public for access or use of the property by the public, and the Grantor, their heirs, successors or assigns, shall retain exclusive right to access and use, subject only to the provisions herein recited." April Wood, "RE: Some questions to start a Monday with," 30 Jan. 2009.

³³² Ibid.

provisions requiring the garden owner to allow public access several times a year, or to allow HCF the opportunity to bring interested parties to view the garden.³³³

9. Materials Required for Baseline Documentation

Although past easements encumbering gardens contained no or minimal documentation addressing the garden's physical features, today, baseline documentation is a required component of all garden easements accepted by Historic Charleston Foundation. HCF requests that the following items are to be included within the baseline document:³³⁴

- B/W & color photographs depicting the garden and its features
- Floorplans and drawings of the gardens. (If these do not already exist, they should be created.) Floorplans and drawings should thoroughly indicate the location of specific plants and features within the garden.
- A thorough inventory of a garden's significant manmade and natural features
- Supplemental written history of the garden. (if available)

With the exception of modern photographs, all of the above materials should be provided by the garden owner prior to the closing of the easement.³³⁵

10. Management Plans: Use and Duration

Generally, Historic Charleston Foundation does not require management plans for gardens encumbered by easements.³³⁶ As the "easement document explains what is being

³³³ Ibid. Owners who decline to permit public access can alternatively submit annual photographs depicting the interior of their gardens instead.

³³⁴ April Wood, telephone interview with author, 5 Dec. 2008.

³³⁵ Ibid.

³³⁶ Ibid.

preserved,” HCF believes that this is sufficient information to ensure that the garden owner manages the garden effectively.³³⁷

11. Interval and Procedures for Inspections

Historic Charleston Foundation conducts annual inspections of gardens encumbered by easements.³³⁸ Inspections consist of a brief examination of the garden’s significant features.³³⁹

12. How Provisions are Enforced and Violations Addressed

To date, Historic Charleston Foundation has had the fortune of not having had to address any major violations concerning its garden easements.³⁴⁰

Every easement held by HCF clearly stipulates the legal ramifications that will result if the Grantor or his or her successor is found to be in violation of the terms of the easement. If any significant violation were ever to occur, HCF would initially respond by raising the issue amicably with the owner. If the garden owner fails to correct the violation within thirty days of initial notification, HCF has the right to legally remedy the violation through either of the two following methods:³⁴¹

- Instituting legal proceedings by ex parte, or temporary or permanent injunction to require the restoration of the premises to their prior condition, while being reimbursed for all court costs and attorneys fees

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Under normal circumstances, the easement inspector would consult the baseline document in order to compare the garden’s existing condition to the time when the easement was conveyed. Unfortunately, the existing garden easements held by HCF do not contain garden drawing or plans as part of the baseline document, making analysis of past and present conditions difficult. April Wood, “RE: Some questions to start a Monday with,” 30 Jan. 2009.

³⁴⁰ April Wood, telephone interview, 5 Dec. 2008.

³⁴¹ Deed of Conservation Easement with Right of First Refusal. NationsBank Trust as Personal Representative for the Estate of Barbara H. Williams to Historic Charleston Foundation. Article X.(b), 6.

- The right to enter the premises after ten days advance notification in order to remedy the violation. The Grantor is subsequently responsible for the costs incurred by HCF

13. Addressing Proposed Changes

Any changes or alterations that a garden owner wishes to carry out to a garden encumbered by an easement requires the explicit approval of Historic Charleston Foundation. To request permission, garden owners are required to prepare and submit a form entitled ‘*Request for Alteration/Repair to Property*’ to HCF’s easement manager for review.³⁴² This is a simple and convenient one-page form where the owner briefly describes the desired repairs or alterations that they are seeking to carry out.

Generally, the amount of time required for approval will vary depending upon the intricacy of the project.³⁴³ Depending upon circumstances, requests for minor changes may be approved immediately.³⁴⁴ However, more complex projects will often take longer, as the easement manager will often need to visit the site in order “to get a better understanding of the proposed project.”³⁴⁵ Should any controversy arise over whether or not the proposed changes are appropriate, the baseline document will be consulted.³⁴⁶

14. Legal Challenges to Garden Easements

To date, there have been no legal challenges concerning any of the easements that Historic Charleston Foundation holds on gardens.³⁴⁷

³⁴²“Covenants and Easements,” Historic Charleston Foundation, 29 Dec. 2008 <http://www.historiccharleston.org/preservation/how_covenants.html>.

³⁴³April Wood, “RE: Some questions to start a Monday with,” 30 Dec. 2009.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶April Wood, telephone interview with author, 5 Dec. 2008.

³⁴⁷ Ibid.

15. Fees Associated with Easement Donation

At the time of this writing, Historic Charleston Foundation requires an initial donation of \$4,000.³⁴⁸ Of these proceeds, \$1,000 is retained by HCF in order to finance future inspections and enforcement, while the remaining \$3,000 is used to subsidize the legal fees accrued in creating the easement document.³⁴⁹

16. Claiming a garden easement as a Charitable Deduction

While gardens are sometimes claimed as charitable donations, due to the techniques and procedures utilized during the appraisal process, it is difficult to measure the exact impact that a garden encumbered by an easement will have on a property's value. It is important to remember that Historic Charleston Foundation will not accept easements exclusively on gardens, so any appraisal carried out of at the behest of a property owner seeking to claim a tax deduction will also take into consideration the impact of the façade easement as well. Although the easement may only be encumbering certain components of the property, the easement still has an effect on the property as a whole. Therefore, "when an appraiser comes to appraise the property, he may take the garden into account," but only its relation to the property as a whole.³⁵⁰ Therefore, it is difficult to isolate the effect that the garden easement will have on the value of the property by itself.

Compounding this problem, it must also be emphasized that when the property is appraised, the appraiser is strictly looking at the garden easement from the perspective of how it limits the property's development towards its highest and best use, and therefore the garden's value is completely dependent upon the extent to which it limits the future development potential of the property. Qualities of the garden that may have value to others such as age, design, and

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

rarity are of no concern to the appraiser. If the future development potential of the property is found to be severely restricted by the easement, the easement's value will be high. If however, development potential is not compromised to a great degree, (for example a garden covering a small area that can not realistically be developed into anything else) the value of the easement will be minimal.

17. Future Direction of the Easement Program

Although it has been some time since Historic Charleston Foundation has accepted an easement on a garden, the future looks bright, as the easement program may once again place a renewed emphasis on gardens. Ms. April Wood, Historic Charleston Foundation's present Manager of Easement and Technical Outreach, repeatedly stressed that "HCF has not focused enough on gardens, it has been overlooked, but we're open to [more] exploring and more research documentation to help owners understand the importance of Charleston's gardens."³⁵¹ In the future, Ms. Wood maintains that HCF "is definitely interested in getting more people to donate garden easements."³⁵²

However, there are a number of obstacles towards implementing this change, most notably common attitudes towards private property rights and more stringent IRS regulations concerning easement donation. Although Ms. Wood would like to see Historic Charleston Foundation protect more gardens through easements, she recognizes the difficulty of this task in a climate where "it's hard enough to get people to donate an easement on an historic home, let along their yard."³⁵³ This is exacerbated by what Ms. Wood feels is a general lack of understanding on the part of the public concerning the importance of ensuring that Charleston's

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

famous gardens are preserved.³⁵⁴ In addition, the more stringent regulations passed by Congress in 2006 concerning easement valuation (Public Law 109-280), make it much more difficult for garden easement donors to claim charitable easements on landscape features such as gardens.

Case Study # 2: The Garden Conservancy

1. Introduction

The second organization that this thesis explores in depth is The Garden Conservancy. Unlike the other two organizations presented here, The Garden Conservancy is specifically interested in the preservation of notable gardens, and since its inception has been the nation's leading advocate on behalf of garden preservation in the United States.

2. Mission and History

The Garden Conservancy was founded in 1989 by Frank H. Cabot, a self-trained gardener/horticulturalist who had long been active in gardening circles.³⁵⁵ Mr. Cabot was inspired to found The Garden Conservancy (and later the easement program) after having visited the Ruth Bancroft garden, a prominent dry garden in Walnut Creek, CA that Ms. Bancroft began creating in 1971.³⁵⁶ Both Mr. Cabot and Ms. Bancroft shared a mutual concern over the fact that there were no interested parties to care for the garden beyond her lifetime, for at this time, there were no national organizations exclusively devoted to gardens. Mr. Cabot, acting on his wife's suggestion, founded The Garden Conservancy as the first national organization exclusively devoted to garden preservation.³⁵⁷

³⁵⁴ Ibid.

³⁵⁵ Frank H. Cabot (1925-) has created two gardens of notable significance, Stonecrop, in Cold Spring, NY, and Le Quartes Ventes in La Malbaie, Quebec.

³⁵⁶ William Noble, telephone interview with author, 17 Dec. 2008.

³⁵⁷ Deitz, Paula. "Keeping the Best Gardens a Joy Forever" *New York Times*. September 28, 1989.

Since its inception, it has been the mission of The Garden Conservancy to help preserve “gardens of exceptional importance” for public education and enjoyment.³⁵⁸ In order to carry out its stated mission, The Garden Conservancy utilizes a variety of strategies, such as advocacy, education, information, fundraising, management, and legal means. One strategy that is successfully employed by The Garden Conservancy is the use of easements, which will be explored in detail below.

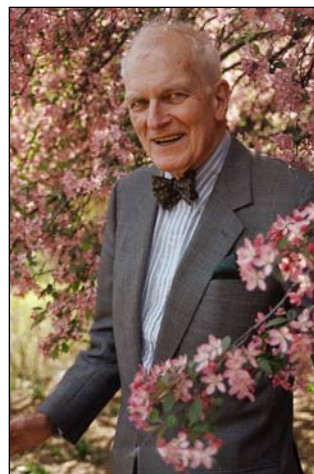


Figure: 19
Frank H. Cabot.
Photo courtesy of
<http://planetplant.net>

3. Overview of The Garden Conservancy’s Easement Program

The Garden Conservancy’s easement program effectively began in 1992 when The Garden Conservancy accepted a conservation easement on the Ruth Bancroft Garden in Walnut Creek, CA.³⁵⁹ The easement program was adopted at the behest of Frank Cabot, The Garden Conservancy’s founder.³⁶⁰ Prior to founding The Garden Conservancy, Mr. Cabot had prolific experience with various facets of land conservation, and had seen firsthand how effective conservation easements had been when used for other purposes.

At the time when the easement was granted, Ruth Bancroft still owned the garden. However, The Garden Conservancy had already determined that the most effective means of ensuring the long-term preservation of Ms. Bancroft’s garden would be to own and operate it as

³⁵⁸ “A Message from the President - Looking Back and Forward,” *The Garden Conservancy*, 5 Nov. 2008 <<http://www.gardenconservancy.org/index.pl?Title=About%20Us>>.

³⁵⁹ William Noble, telephone interview with author, 17 Dec. 2008.

³⁶⁰ *Ibid.*

a public garden.³⁶¹ This meant that The Garden Conservancy would have to either create or seek out a qualified organization to effectively take over the garden, hardly a simple task. For the interim, Mr. Cabot recommended that an easement be placed on the Ruth Bancroft Garden as an initial transitory step in its long-term preservation.³⁶² Perhaps unknowingly, this became the first easement protecting a garden held by an organization *specifically* dedicated to garden preservation.

Initially, The Garden Conservancy had no formal program or policies governing the use of garden easements. The easement program as it exists today only began to be formally developed once The Garden Conservancy began to acquire additional garden easements and realized that specific guidelines addressing the criteria for their use were needed.

At the present time, there are two distinct branches of The Garden Conservancy's easement program. These approaches reflect the future ownership goals of gardens that are protected by easements. They are listed as follows:

- a. **Preservation Projects:** Gardens that will eventually be publicly owned
- b. **Private Gardens:** Gardens that will remain in private ownership

These two categories were developed because The Garden Conservancy recognized that the manner in which easements are administered on public gardens would be fundamentally different than on private gardens. While on some level, the presence of a garden easement would appear to make public ownership redundant, The Garden Conservancy believes that with certain gardens, long-term conservation requirements are ultimately best achieved through public ownership.³⁶³ With these gardens, the easement is used as “part of a strategy for a future public

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ That is, in addition to the garden easement.

garden.”³⁶⁴ While The Garden Conservancy may propose public ownership in certain instances, the final decision as to whether or not a garden will one day become public property always rests with the wishes of the owner.³⁶⁵

Like all easements, easements held by The Garden Conservancy constitute a voluntary legal agreement that is designed to last in perpetuity. Every easement created by The Garden Conservancy is custom tailored to the needs of a particular garden.³⁶⁶ This being said, The Garden Conservancy recognizes that the defining features within gardens are often subjected to constant changes; therefore, easements are designed with enough flexibility to respond to new or unforeseen circumstances.³⁶⁷

4. How The Garden Conservancy Acquires Easements

Easements are recommended when they can appropriately fulfill the conservation objectives set forth by both The Garden Conservancy and the owner of the garden.³⁶⁸ Usually, it is The Garden Conservancy that puts forth the suggestion of easement donation to garden owners.

The Garden Conservancy’s easement program is promoted through “normal communication channels,” such as The Garden Conservancy’s website, e-mails, newsletters, and public events.³⁶⁹ The Garden Conservancy also tries to “foster awareness in the legal community,” so that attorneys are aware of the fact that their clients may be able to use

³⁶⁴ William Noble, telephone interview with author, 17 Dec. 2008.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ A grant of conservation easement is not a requirement for a garden to be a ‘project’ of the Garden Conservancy.

Ibid.

³⁶⁹ Ibid.

easements to protect their gardens in perpetuity.³⁷⁰ In 2005, The Garden Conservancy enacted a program specifically targeted towards the owners of significant gardens, informing them of the numerous tools and resources available from The Garden Conservancy that can help them to preserve their gardens.

If a garden owner is potentially interested in encumbering their garden with an easement, a representative from The Garden Conservancy will then tour the property to review its conservation values and discuss the easement program with the garden owner.³⁷¹ If the garden owner wishes to proceed, the Conservancy will then evaluate the feasibility of the project, and prepare a “preliminary easement conservation plan” that identifies that conservation values that will be protected in the finalized easement document.³⁷² Once both parties have reviewed the final easement document, The Garden Conservancy seeks approval from its board to authorize the acquisition.³⁷³ If the board approves, the easement is closed upon.

5. Number of Easements Held

The Garden Conservancy presently holds seven easements protecting gardens. Of these, four are gardens that will one day become public gardens, while the remaining three are gardens that will permanently remain in private ownership. Of the seven gardens, four are located in California around the San Francisco Bay Area, where the Garden Conservancy’s West Coast Office is located.³⁷⁴ The remaining three gardens are located in the states of New York, North Carolina, and Washington respectively.

³⁷⁰In the San Francisco Bay Area (the location of the majority of gardens The Garden Conservancy holds easements on) Attorney Bill Hutton is the lawyer most responsible for communicating to others the value of The Garden Conservancy’s Easement program. Ibid.

³⁷¹ “The Garden Conservancy Conservation Easement Program: Guides for the Owner,” 8.

³⁷² Ibid. 8.

³⁷³ Ibid. 10.

³⁷⁴ Close proximity to The Garden Conservancy’s headquarters allows the Conservancy to administer easements with greater ease.

6. Requirements for Gardens to be Encumbered by an Easement

The Garden Conservancy has specific requirements that all gardens must meet in order for The Conservancy to consider accepting an easement on a garden. Foremost, a garden has to be of “national significance,” which is defined as a garden that either has been already placed on the National Register of Historic Places or is eligible for inclusion on the National Register.³⁷⁵ When analyzing significance, The Garden Conservancy considers several factors such as cultural, horticultural, design, historic, and social significance.³⁷⁶

In determining whether to accept an easement on a garden, The Garden Conservancy also examines the feasibility of an easement. Some of the criteria The Garden Conservancy uses to examine feasibility include the following:³⁷⁷

- Is the garden capable of outlasting its originator?
- Is the garden physically capable of being preserved through an easement?
- Will an easement be flexible enough to allow a garden to change in response to future circumstances?
- Is the Garden Conservancy’s mission of garden preservation and public access served by the easement?
- Is the Garden Conservancy capable of monitoring and enforcing the easement?

7. Qualities of Gardens Protected by Easements

Gardens easements held by The Garden Conservancy protect a wide variety of historic and cultural values. Generally speaking, easements are designed to protect a garden’s “essential elements” such as structural features, architectural features, trees, important plants, et. al.³⁷⁸ In

³⁷⁵ William Noble, telephone interview with author, 17 Dec. 2008.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ William Noble, “The Garden Conservancy: Conservation Easement Program,” PowerPoint Presentation, 16 Dec. 2008.

addition to protecting a garden's defining attributes, garden easements held by The Garden Conservancy also prohibit certain activities. Dumping, new construction, subdivision of land, commercial or industrial use, alterations of "height, footprint or exterior of buildings" (if protected), and non-conformance with the management plan (if it exists) are all prominent examples of activities that are typically prohibited by an easement.³⁷⁹

In certain instances where appropriate, The Garden Conservancy may consider drafting an easement that protects more than just a garden. For example, the easement on the Elizabeth Lawrence Garden in Charlotte, NC, which was donated by Ms. Mary Lindeman 'Lindie' Wilson in early 2008, protects not only the garden, but also the exterior of the adjacent house and some aspects of the interior as well.³⁸⁰ This was done because both the house and the garden represent the "legacy of one of the most important garden writers this country has produced."³⁸¹ The Garden Conservancy felt that it was important to preserve "the relationship between the garden and the home; the room where she [Elizabeth Lawrence] wrote."³⁸² In essence, it was felt that the garden could not effectively be preserved without also preserving the other spaces that were equally important to Ms. Lawrence.

However, in many instances, an easement protecting only a garden will make such measures unnecessary. For example, when the easement on Green Gables in Woodside, California was donated to the Garden Conservancy in 2004, the Fleishacker family who owned

³⁷⁹ Ibid.

³⁸⁰ Elizabeth Lawrence (1904-1985) was a noted Southern gardener and author of numerous books on Southern Gardening. Her garden, which she began creating at her Charlotte home in 1949, represents a lifetime of work and achievement. See Chap 10 for additional information.

In 1986, the garden was acquired by Mary Lindeman Wilson (1932-), who continued to preserve and care for the garden in the same manner that Ms. Lawrence had done for decades. Seeking to preserve the garden for posterity, Ms. Wilson approached The Garden Conservancy for assistance in 2002. The Garden Conservancy, after determining that there was sufficient public interest in the garden to warrant its continued preservation, helped to create The Friends of Elizabeth Lawrence in 2004. In 2008, Elizabeth Lawrence donated the house and garden to The Wing Haven Garden & Bird Sanctuary in Charlotte, NC. "History of the Garden," The House and Garden of Elizabeth Lawrence 18 Dec. 2008 <www.elizabethlawrence.org/history.html>; and "The House and Garden of Elizabeth Lawrence," The House and Garden of Elizabeth Lawrence, 18 Dec. 2008 <www.elizabethlawrence.org>.

³⁸¹ William Noble, telephone interview with author, 17 Dec. 2008.

³⁸² Ibid.

the property attempted to find another organization qualified to accept a façade easement on the house, which had been designed by the famous architect Charles Sumner Greene of the firm Greene & Greene.³⁸³ (Figure: 20) In the end, the family did not proceed with their plan for a façade easement because after donating an easement on the garden to The Garden Conservancy, they soon realized that a façade easement was “no longer necessary for the overall objective” of preserving both the house and the garden in perpetuity.³⁸⁴



Figure 20:
House at Green Gables,
Woodside, California,
c. 1915
Charles Sumner Greene,
architect.

³⁸³ Ibid.

Charles Sumner Greene (1868-1957) along with his brother Henry Matthew Greene (1870-1954) formed the architectural firm of Greene & Greene, which was established in Pasadena, CA in 1894. In the space of twenty years, the brothers created a prolific body of work, much of which displays elements of the Arts and Crafts Movement (which was popular at the time) as well as the brothers’ interests in Japanese architecture.

The brothers are particularly well known for the residential structures that they were commissioned to design on behalf of their wealthy California clientele. Most of these structures were designed as large-scale bungalows, which today are appropriately known as ‘Ultimate Bungalows.’

The house and gardens at Green Gables were commissioned by Mortimer Fleishhacker, a prominent San Francisco banker & philanthropist in 1911. Construction on the Arts & Crafts influenced house began in 1913, and was completed in 1915.

The gardens, which were also designed by Greene, took longer to complete. Greene designed the grounds of Green Gables to simulate the grounds of an English country estate. The defining feature of the gardens was no doubt the Roman Pool, a 60x300ft. pool surrounded by roman arches inspired by aqueducts. Construction on the Roman Pool began in 1927 and was completed in 1929.

Today, the Fleishhacker family continues to maintain ownership of Green Gables, and the property will remain in private ownership for the foreseeable future.

“Green Gables,” San Francisco Bay Area Arts and Crafts Movement, 12 Sept. 2005, 3 Jan. 2008
<<http://www.geocities.com/SiliconValley/Orchard/8642/greengables.htm>>.

“A Guide to the Greene and Greene Collection, 1775-2000, Greene and Greene Archives: University of Southern California School of Architecture,” University of Southern California School of Architecture, 2 Jan. 2009
<<http://www.usc.edu/dept/architecture/greeneandgreene/findingaid/>> .

³⁸⁴The easement prevents subdivision or further development of the 75-acre property. William Noble, telephone interview with author, 17 Dec. 2008.

Figures 21 & 22:
 Roman Water
 Garden, Green
 Gables Estate,
 Woodside,
 California, 1929.
 Charles Sumner
 Greene, architect.



8. Public Access Requirements

The Garden Conservancy requires that easement donors make their gardens “accessible to the public on a limited basis.”³⁸⁵ This is mainly an issue concerning gardens that will remain privately owned, for gardens that are publicly owned are designed to be open to the general public. The Garden Conservancy’s requirements for public access mainly consist of opening a garden on an annual basis if a visit is requested by a party with a legitimate reason to study the

³⁸⁵ “The Garden Conservancy Conservation Easement Program: Guides for the Owner,” 5.

garden, e.g. professional gardening associations, garden clubs, academic institutions, et al.³⁸⁶ Public access can be arranged either by a set schedule or by appointment, and owners of encumbered gardens can often meet this requirement by participating in The Garden Conservancy's Open Days Program.³⁸⁷ On rare occasions, The Garden Conservancy may request permission to bring additional interested groups to view the garden.³⁸⁸ Of course, The Garden Conservancy encourages easement donors to go beyond the minimal requirements imposed by the easement and make their gardens accessible to the public on a more frequent basis.

9. Materials Required for Baseline Documentation

The Garden Conservancy places particular emphasis on amassing sufficient materials in order to create a thorough baseline document. Baseline documentation is prepared at the expense of the easement donor prior to the closing of the easement by either staff of The Garden Conservancy or independent consultants working for the Conservancy.³⁸⁹ Once the baseline document has been completed, it will then be reviewed and certified by both The Garden Conservancy and the easement donor.³⁹⁰ After completion, baseline documents can be updated to reflect changes if necessary.³⁹¹

³⁸⁶ Ibid.

³⁸⁷The Garden Conservancy founded the Open Days Program in 1995 with the purpose of giving garden connoisseurs the opportunity to partake in self-guided tours some of the country's finest private gardens. Gardens are selected for inclusion in the Open Days Program by regional representatives of The Garden Conservancy, who politely request that the garden owners make their gardens open to the public for scheduled open days. Proceeds generated from admission charges are used to support the various projects carried out by The Garden Conservancy.

³⁸⁸William Noble, telephone interview with author, 17 Dec. 2008.

³⁸⁹The baseline document is usually created after an initial, first draft of the easement document has been prepared. "Conservation Easement Baseline Documentation Preparation," The Garden Conservancy, 1.

³⁹⁰ Ibid. 4.

³⁹¹ Ibid. 5.

All baseline documents prepared by The Garden Conservancy must meet the following criteria:³⁹²

- IRS requirements (where applicable)
- Be specific and measurable
- Include no more detail than necessary
- Be objective and easy to duplicate

In addition to the requirements stated above, The Garden Conservancy requires an extensive list of items to be included in the baseline document. The principle items are listed below:³⁹³

- **Acknowledgment statement:** The IRS requires that both the landowner and The Garden Conservancy sign a statement referencing the baseline and acknowledging that it is an accurate representation of the property's condition at the time of the grant of easement.
- **Background information:** Ownership and property information, history of the easement acquisition, and the significance and history of the property.
- **Property description:** Natural and manmade features, description of current and historic uses.
- **Easement summary:** Purpose of the easement, conservation values, and restrictions imposed by the easement.
- **Legal information:** The easement, title report, legal descriptions, and other legal encumbrances on the property if applicable.
- **Conservation values:** Detailed descriptions of the ecological, agricultural, scenic, and historic features of the property.

³⁹² Ibid. 1-2.

³⁹³ Ibid. 2-3.

- **Maps or plans:** A regional map, property map specifying the property’s boundaries and topography, aerial photographs, and site plans depicting important natural and manmade features as well as the footprint of buildings.
- **Photographs:** Photos should document the condition of the property at the time when the easement is donated. Photos should depict the protected attributes and areas where potential encroachment may occur.

10. Management Plans: Use and Duration

Another important element of many easements held by The Garden Conservancy is the development of a comprehensive management plan. A management plan is not a requirement for every easement held by The Garden Conservancy. Instead, management plans are generally created for intricate gardens that have character defining elements that will require specific treatments. Creating a separate management plan for such gardens prevents the easement document from becoming too lengthy and restrictive.³⁹⁴

Generally, The Garden Conservancy’s management plans tend to be extremely specific, providing detailed “guidelines for stewardship” intended to benefit both the garden owner and the Conservancy.³⁹⁵ As with baseline documentation, The Garden Conservancy periodically updates management plans to reflect a garden’s changing needs and conditions. Management plans are usually updated every 5-6 years.³⁹⁶

11. Interval and Procedures for Inspections

The interval for which The Garden Conservancy carries out inspections of gardens encumbered by easements varies depending upon whether a garden is a preservation project (i.e., a garden that is or

³⁹⁴ “The Garden Conservancy: Conservation Easement Program: Guides for the Owner,” 5.

³⁹⁵ Ibid.

³⁹⁶ William Noble, telephone interview with author, 17 Dec. 2008.

one day will be publicly owned) or if a garden is to remain in private hands.³⁹⁷ Gardens that are preservation projects are not subjected to annual inspections. In large part, this is due to the fact that The Garden Conservancy is extensively involved in the ‘day-to-day’ management of these gardens.³⁹⁸ Gardens that are to remain privately owned are inspected annually by the staff of The Garden Conservancy.³⁹⁹ At the present time, all of the encumbered gardens that are to remain privately owned are located in Northern California, allowing the staff of The Garden Conservancy to closely supervise the gardens. The Garden Conservancy feels strongly that staff and consultants should be able to appropriately assist in overseeing easements, helping to keep relationships between the Garden Conservancy and the garden owners strong.⁴⁰⁰ It is felt that the annual inspection plays a significant role in helping to build long-term relationships between the Conservancy and garden owners.

When inspecting a garden for violations, the easement inspector closely examines all of the character defining features that have been identified in the easement document. Generally, the inspector looks closely at trees, groupings of plants, hardscape, views and vistas, irrigation, lawns, structures, and utilities.⁴⁰¹

12. How Provisions are Enforced and Violations Addressed

At the present time, there have been no legitimate violations concerning any of the easements held by The Garden Conservancy.⁴⁰² In large part, this can be attributed to The Garden Conservancy’s policy of maintaining close and cordial relations with easement donors. In rare instances, there have been issues concerning “potential violations,” which The Garden Conservancy effectively responded to by initiating “frank and open discussions” in order to

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

⁴⁰² Ibid.

resolve the disputes amicably.⁴⁰³ It is hoped that by being polite yet candid, the Conservancy will successfully convince the garden owner to “respond in a way that is consistent with the objectives of the easement.”⁴⁰⁴

A good example of the type of issues faced by The Garden Conservancy is a particular situation that once arose concerning the Ruth Bancroft Garden. As this is a garden that will one day be publicly owned, the easement allows for the construction of a visitor center on the premises, the exact square footage being specified in the easement document. After the Ruth Bancroft garden was incorporated as a non-profit, The Ruth Bancroft Garden, Inc., it was discovered that a visitor center larger than the maximum permitted square footage would be needed in order to accommodate the anticipated number of visitors.⁴⁰⁵ The Garden Conservancy was subsequently alerted to the fact that a larger visitor center would be needed. Discussions were held, and a larger square footage was agreed upon.⁴⁰⁶ Although no violation ever actually occurred, the successful resolution of this conflict is indicative of the manner in which The Garden Conservancy prefers to handle conflicts.

13. Addressing Proposed Changes

As can be seen from the above example, The Garden Conservancy is often amenable to reasonable changes provided that they are approached through proper channels with convincing evidence. When presenting a request for changes to features protected by an easement, The Garden Conservancy requires a variety of materials in order to ensure that “proposed changes are in keeping with the easement.”⁴⁰⁷ These include written forms, photographic documentation, and measured drawings. While The Garden Conservancy does not specify a timeframe for

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

submittal and review of alterations, they do request that owners submit proposals “in a manner [that will] allow The Garden Conservancy sufficient time to review the proposed changes.”⁴⁰⁸ Some examples of changes to a garden that would require review by The Garden Conservancy include alterations or replacement of trees, plantings, buildings, fences, or surface finishes.⁴⁰⁹

When presented with reasonable requests in a proper format, The Garden Conservancy will often be agreeable to changes. For example, The Garden Conservancy has been actively working with the owners of a garden in California that had a “moisture loving turf grass” that was actively managed to remain green all year around. However, due to long-term drought conditions, there is now less water available in this region, and with The Garden Conservancy’s support, the family that owns the garden is looking into alternatives that would allow them not to use this grass, and therefore be more environmentally sustainable.⁴¹⁰

14. Legal Challenges to Garden Easements

At the present time, there have been no significant legal challenges concerning any of the easements held by the Garden Conservancy.

15. Fees Associated With Easement Donation

As can be seen from the numerous examples already illustrated, holding and enforcing an easement is an expensive long-term responsibility, both for the easement donor and The Garden Conservancy. Some of the costs that The Garden Conservancy incurs through stewardship of its easement program include the annual monitoring visit and report, which averages \$2,500 a

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

garden.⁴¹¹ Other potential costs include proposed changes to the easement document, (est. \$3,000-\$5,000), and the periodic update of management plans (\$6,000-\$8,000).⁴¹²

In order to defray some of these costs, The Garden Conservancy solicits a ‘gift’ at the time of donation in order “to cover initial expenses, such as the costs of designing, drafting, and executing the easement; preparing a baseline document report and management plan; and paying for legal and closing fees.”⁴¹³ The Garden Conservancy also requests an additional gift to help finance the costs associated with perpetual stewardship. This monetary gift is held in what is referred to as the ‘stewardship fund,’ which is an endowment where the funds from other easements are commingled, the goal being to use 5% of the funds held in the stewardship fund on an annual basis to cover The Garden Conservancy’s costs in managing a specific easement.⁴¹⁴ In certain instances, the initial gift may also be supplemented by repeated annual gifts on the part of the garden owner, which are also held in the stewardship fund.⁴¹⁵

If an encumbered garden that is privately owned is ever sold, The Garden Conservancy levies what is referred to as a ‘transaction fee.’ This fee is a certain percentage of the sale price of the property.⁴¹⁶

16. Claiming A Garden Easement as a Charitable Donation

The Garden Conservancy, in an effort to discourage easements donated for financial gain, does not actively advise garden easement donors concerning the potential tax benefits that may result from easement donation. The Garden Conservancy limits its involvement to notifying easement donors that they may be eligible for certain tax benefits.⁴¹⁷

⁴¹¹ Ibid.

⁴¹² “The Garden Conservancy Conservation Easement Program.”

⁴¹³ “The Garden Conservancy Conservation Easement Program: Guides for the Owner,” 5.

⁴¹⁴ William Noble, telephone interview with author, 17 Dec. 2008.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid. At this time, the fee remains confidential.

⁴¹⁷ Ibid.

Since The Garden Conservancy distances itself from this activity, it is uncertain if any of their easement donors have benefited from the available tax incentives. Mr. Noble believes that some donors have claimed their gardens, but emphasizes, “it’s a matter between the IRS and the owners, [who are] not required to notify The Garden Conservancy.”⁴¹⁸

17. Future Mission and Direction of Easement Program

Although much has been done to clarify the goals and requirements of The Garden Conservancy’s easement program, Mr. Noble admits that at the present time “The Garden Conservancy does not have an articulate easement program plan.”⁴¹⁹ Perhaps this is to be expected, as The Garden Conservancy pioneered the use of easements specifically for gardens, and had no prior precedents to follow.

In the future, Mr. Noble foresees gradual growth for the easement program. Easements will likely become a requirement for gardens that are regarded as preservation projects and will one day be publicly owned.⁴²⁰ Easements on private gardens will likely continue to grow at the present rate where a new easement acquired every 2-3 years.⁴²¹

Case Study #3: Triangle Land Conservancy

1. Introduction

The third and final case study examines Triangle Land Conservancy’s (TLC) easement program. Although TLC’s primary mission as a land trust is to preserve important areas of open space such as farmland or forest, the easement program has also been used to help protect a small number of gardens in the Raleigh-Durham area.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

2. Mission and History

Triangle Land Conservancy was founded in 1983 with the mission of preserving “open space in the Triangle region of NC,” a six county region roughly defined by the cities of Raleigh, Durham, and Chapel Hill.⁴²² (Figure 23) The Triangle, which is a region known for quality universities and an abundance of high-technology industries, has for decades been experiencing an astronomical rate of population growth. “Between 1950 and 2000, the population of TLC’s six county region [has] tripled to 1.5 million.”⁴²³ Inevitably, this rate of growth has been to the detriment of the natural landscapes located within The Triangle, regardless of whether they are working landscapes such as farms, or natural unspoiled landscapes like forests or stream corridors. It is estimated that every year, 14,000 acres of land within The Triangle are permanently lost to development.⁴²⁴

⁴²² Chatham, Durham, Johnston, Lee, Orange, and Wake Counties are the counties within the Triangle served by the Triangle Land Conservancy.

Katherine Wright, “RE: Garden Easements at The Triangle Land Conservancy,” e-mail to the author, 3 April, 2008.

⁴²³ “Our Work,” Triangle Land Conservancy, 17 Feb 2009, 2 April 2009
< http://www.triangleland.org/lands/our_work.shtml >.

⁴²⁴ Ibid.

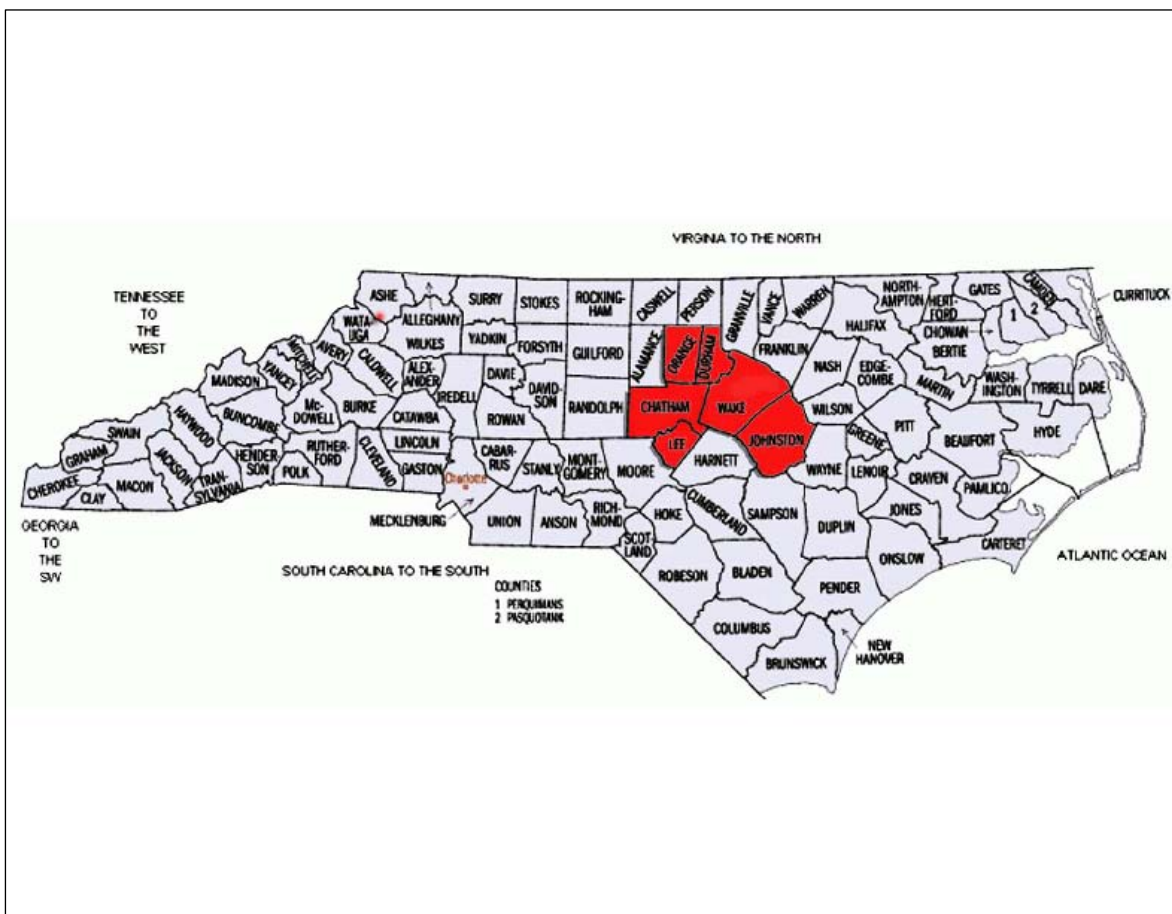


Figure 23: The six counties in The Triangle served by Triangle Land Conservancy. Image from www.carolinayellow.com.

In accordance with its mission, Triangle Land Conservancy works toward preserving natural and working lands within The Triangle in order to enhance the quality of life for its inhabitants.⁴²⁵ TLC takes a realistic stance in pursuing this goal, stressing the need for a balanced approach between economic growth and land conservation.⁴²⁶ Consistent with this pragmatic approach, TLC focuses its finite resources on identifying and preserving the natural

⁴²⁵ “About TLC,” Triangle Land Conservancy, 17 Feb. 2009, 3 April 2009 <<http://www.triangleland.org/about/about.shtml>>.

⁴²⁶ Ibid.

resources within The Triangle that it considers to be most worthy of conservation.⁴²⁷ To date, TLC's efforts have preserved over 12,000 acres of land as part of its long-term objective of ensuring that 45,000 acres within The Triangle are permanently preserved.⁴²⁸

In order to facilitate this goal, Triangle Land Conservancy utilizes multiple tools in order to encourage land conservation and protect open space.⁴²⁹ These include the use of advocacy and education in order to ensure that elected officials, developers, and landowners understand the value of land conservation in future land use planning, as well as other methods such as ownership and stewardship, partnerships, and transfers of partial interests in real property, such as conservation easements.⁴³⁰

Triangle Land Conservancy is a member supported non-profit land trust with 501(c)(3) status. Although originally a volunteer based organization, TLC has since grown to become "a professionally staffed organization with a national reputation."⁴³¹ Today, TLC enjoys a

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ "RE: Garden Easements at The Triangle Land Conservancy."

⁴³⁰ Triangle Land Conservancy maintains ownership in fee-simple of 20 properties of varying size. These properties were acquired through varied methods, such as purchase, donation, bargain sale, et. al.

TLC also preserves land by engaging in partnerships with other entities such as land trusts or government agencies. TLC assists in this process by engaging in activities such as coalition building, participating in negotiations, and fundraising. In certain instances, TLC will purchase lands, and then transfer ownership to other organizations that are better qualified to be stewards of the land.

It is worth noting that of the sites that TLC has saved through ownership or partnerships, 19 are open to the public. TLC believes that as a land trust it is preserving land for the public interest, and therefore wherever possible the public should have access to these lands. TLC has three categories of properties open to the public: Nature Preserves, Open Lands, and Partnership properties. Nature Preserves are properties designed for low-impact activities such as hiking. They usually contain well-marked trails, information kiosks, and places to park. TLC currently owns five nature preserves. Open Lands properties are sites that are owned by TLC but are not actively managed. Although open to the public, there are no services provided for visitors. TLC presently owns 11 Open Lands sites. Partnership properties are sites that TLC helped to protect at some point, but no longer owns or actively manages. There are currently 3 Partnership sites open to the general public.

"TLC Conservation Lands," Triangle Land Conservancy, 24 Nov. 2008, 3 April 2009, <http://www.triangleland.org/lands/conservation_lands.shtml>.

"Places to Visit," Triangle Land Conservancy, 24 Nov. 2008, 3, April 2009, <http://www.triangleland.org/lands/places_to_visit.shtml>.

⁴³¹ "Our Work."

membership of over 2,000, and is governed by an 18-member board of directors who oversee a permanent staff of 15 employees.⁴³²

3. Overview of Triangle Land Conservancy's Easement Program

Since its inception in 1983, Triangle Land Conservancy has accepted conservation easements as part of its multifaceted approach to land conservation.⁴³³ Consistent with its mission of protecting important areas of open space, TLC has used easements to protect a diverse repertoire of natural resources.⁴³⁴ Some of the more common resources that TLC has helped to protect through the use of easements include the following:⁴³⁵

- Forests (in particular old-growth hardwoods)
- Farmland
- Pasture
- Rock outcrops
- Wetlands
- Watersheds
- Gardens

Conservation easements held by Triangle Land Conservancy are voluntary legal agreements designed to last in perpetuity.⁴³⁶ Depending upon circumstances, TLC will accept

⁴³² "About TLC," "Who We Are," Triangle Land Conservancy, 24 Nov. 2008, 3 April 2009
<http://www.triangleland.org/about/about_who_we_are.shtml>.

⁴³³ The first easement accepted by Triangle Land Conservancy was Morgan Glen in Carborro, North Carolina, a 9-acre floodplain containing a number of unique rock formations

⁴³⁴ Ibid. "RE: Garden Easements at the Triangle Land Conservancy."

⁴³⁵ "Private Conservation Lands."

⁴³⁶ Technically, Triangle Land Conservancy can accept term easements, or easements of a limited duration, though this practice is strongly discouraged. None of the easements presently held by TLC are term easements. Katherine Wright, telephone interview with author, 9 April 2009.

easements that are either donated or sold.⁴³⁷ Every easement drafted by TLC is different, reflecting the nature of the resource being protected, as well as the wishes of the easement donor. As TLC's primary objective in using conservation easements is to prevent development from destroying natural landscapes, their easements tend to be quite broad, and usually confine their provisions to limiting or prohibiting the following:⁴³⁸

- industrial or commercial development
- mineral development or exploration
- extensive timbering (if applicable)
- subdivision of land

4. How Triangle Land Conservancy acquires easements on gardens

Triangle Land Conservancy does not actively promote its easement program, and it is usually “by word of mouth that people find out about the easement program.”⁴³⁹ To date, TLC has acquired most of its easements from landowners who have taken the initiative in approaching TLC in regard to protecting their land in perpetuity after having heard about the program “from friends, neighbors, fellow landowners, etc.”⁴⁴⁰

Promotion of TLC's easement program is limited to pamphlets, information featured on its website, and occasionally collaborating with other organizations and local government agencies “to hold workshops in order to reach out to and educate landowners” about TLC's programs and services.⁴⁴¹

⁴³⁷ Ibid.

⁴³⁸ “RE: Garden Easements at the Triangle Land Conservancy.”

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

If a garden owner is interested in donating (or selling) an easement to TLC, TLC will have a Consultation Project Manager consult with the landowner concerning their motives for easement donation, financial intentions, their anticipated use of the land in the future, and whether or not grant monies are available to fund the creation of the easement.⁴⁴² The Project Manager will subsequently make a site visit to the garden in order to determine whether the garden has significant conservation values.⁴⁴³ If the easement does go forward, it generally will take between twelve and eighteen months for TLC to produce the easement and have all parties close on it.

5. Number of Garden Easements Held

At the present time, Triangle Land Conservancy holds conservation easements on twenty-four properties, of which three are gardens.⁴⁴⁴ (Figures 24 & 25) TLC's easements protect a wide variety of natural resources, and encumber parcels ranging in size from 1-acre to 401-acres.⁴⁴⁵ All of the easements held by TLC were acquired between 1988 and 2006.



Figures 24 Joslin Garden, Raleigh, North Carolina. Image Courtesy of www.raleighconews.com

⁴⁴² Katherine Wright, telephone interview with author, 9 April 2009.

⁴⁴³ Ibid.

⁴⁴⁴ "Private Conservation Lands." The three gardens encumbered by easements held by TLC are Joslin Garden, a 4-acre garden in Raleigh, NC that was begun in 1951 and contains a mixture of formal and informal plantings that has been bequeathed to North Carolina State University. Montrose Estate and Gardens in Hillsborough, NC, an elaborate complex consisting of a c. 1890 estate along with a series of formal gardens that were initially created in the mid-nineteenth century by former North Carolina governor William Alexander Graham and his wife. The third garden, the Margaret Reid Wildflower Garden, a 1-acre garden in Raleigh, is profiled in greater detail later in this text.

All three garden easements were donated to TLC.

⁴⁴⁵ Average parcel size is 116.5 acres.

Figure 25: Montrose Gardens, Hillsborough, North Carolina. Picture courtesy of www.gardenconservancy.org.



6. Requirements for Gardens to be Encumbered by an Easement

Due to the fact that Triangle Land Conservancy is not a garden-centered land trust, it has no specific criteria that gardens must meet in order for them to be considered worthy of being encumbered by an easement. Generally, a garden’s suitability will be determined on a “case-by-case basis.”⁴⁴⁶ Some of the attributes that TLC will examine when analyzing the viability of an easement are the garden’s conservation value, its level of significance, as well as the threat that future development may pose to the garden’s continued existence.⁴⁴⁷ TLC also takes into account certain financial considerations, such as “whether the easement is donated 100%, a bargain sale or purchased, and whether funding is available for transaction costs and stewardship endowment.”⁴⁴⁸

7. Qualities of Gardens Protected by Easements

As Triangle Land Conservancy does not have specific policies governing the donation of garden easements, the three garden easements currently held by TLC do not explicitly denote specific features within the gardens that are to be protected. According to TLC’s Easement

⁴⁴⁶ “RE: Garden Easements at the Triangle Land Conservancy.”

⁴⁴⁷ “RE: Garden Easements at the Triangle Land Conservancy,” “Our Work.”

⁴⁴⁸ “RE: Garden Easements at the Triangle Land Conservancy.”

Steward, Ms. Katherine Wright, TLC’s easements tend to be “very broad, and not very restrictive of management.”⁴⁴⁹ This is a direct consequence of the fact that historically, the main goal of the majority of TLC’s easements has simply been “to protect the land from future development and protect water quality.”⁴⁵⁰ In essence, the majority of TLC’s easements aim to protect natural resources by prohibiting uses of the land that are incompatible with their continued existence, although it must be stressed that a few of the easements held by TLC do provide some level of protection for flora by prohibiting the “removal of plants and any activities that would disturb the soil or diversity of plants.”⁴⁵¹

8. Public Access Requirements

Triangle Land Conservancy does not require that easement donors grant public access to encumbered properties, and the majority of its easements do not contain specific provisions requiring that landowners make their properties accessible to the general public. The main exceptions to this rule are easement donors who are seeking to claim their easement as a charitable deduction.⁴⁵² In addition, certain landowners of easement-encumbered properties have at their own discretion provided public access to their properties for special events, such as scientific research or field trips by TLC members.⁴⁵³ If public access is to be allowed, provisions stating as such are always clearly stipulated within the easement document.⁴⁵⁴ All

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid. The Margaret Reid Wildflower Garden is a notable example.

⁴⁵²“Conservation Easements: Frequently Asked Questions,” *Triangle Land Conservancy*, 24 Nov. 2008, 4 April 2009 <<http://www.triangleland.org/landowner/CEFAQ.shtml>>.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

three gardens encumbered by easements held by TLC are open to the public only on special occasions or by appointment.⁴⁵⁵

9. Materials Required for Baseline Documentation

All easements held by Triangle Land Conservancy require baseline documentation that adequately documents the resource that is being protected. TLC requests that the following items be included within the baseline document:⁴⁵⁶

- Maps depicting, topography, soils, natural and manmade features
- Aerial photography
- Brief written history of the property
- Written description of the natural features that are protected by the easement

Generally, TLC's staff is responsible for compiling information for the baseline document.⁴⁵⁷ If necessary, TLC may request that the landowner help supply additional information.⁴⁵⁸

10. Management Plans: Use and Duration

Although Triangle Land Conservancy requires the creation of a management plan for certain resources it protects through easements such as forests or farmland, they are not a requirement for gardens encumbered by easements.⁴⁵⁹ Of the three gardens that TLC protects with easements, only the Margaret Reid Wildflower Garden has a management plan.⁴⁶⁰

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid. Some examples of landowner-supplied information include site history and historic land use.

⁴⁵⁹ Katherine Wright, telephone interview with author, 9 April 2009.

⁴⁶⁰ Amy MacKintosh, "RE: Information on Margaret Baker Reid," e-mail to author 29 April 2009.

11. Interval and Procedures for Inspection

Triangle Land Conservancy conducts inspections of properties encumbered by easements on an annual basis.⁴⁶¹ While the exact nature of the items that are assessed during inspections will vary depending upon the specific restrictions of the easement, usually TLC will look for signs of the following items:⁴⁶²

- Encroachment from neighboring parcels
- Degradation in water quality (if applicable)
- Unauthorized construction
- Disturbance of soil or topography
- Disturbance of vegetation

12. How Provisions are Enforced and Violations Addressed

At the present time, Triangle Land Conservancy has not had to address any issues concerning easement violations with any of the three gardens it has encumbered.⁴⁶³ However, should a contentious issue arise in the future, TLC has a series of regimented measures in place in order to ensure that compliance with the easement is assured.⁴⁶⁴ If a violation were to be detected, the first step would be for TLC to send a letter to the landowner informing them of the violation, along with a timeframe in which to correct the aforementioned violation.⁴⁶⁵ This will

⁴⁶¹ “RE: Garden Easements at the Triangle Land Conservancy.”

⁴⁶² Ibid.

⁴⁶³ Katherine Wright, telephone interview with author, 9 April 2009.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

usually be between three and six months.⁴⁶⁶ If this measure does not work, TLC will then pursue varying degrees of arbitration, only relying on litigation if and when all other measures fail.⁴⁶⁷

13. Addressing Proposed Changes

Any changes or alterations that a landowner wishes to carry out to a garden encumbered by an easement require the prior approval of Triangle Land Conservancy. Generally, changes that would require prior approval by TLC include construction proposals or other activities that may adversely affect water quality, contribute to soil erosion, or compromise the integrity of the garden that is being protected.⁴⁶⁸

In order to obtain approval, a landowner “must write a letter requesting permission to move forward with a plan.”⁴⁶⁹ Depending upon the extent of the proposed changes, TLC may request updated photographs and plans, and a site visit by the easement steward will always be required.⁴⁷⁰ Although the time TLC requires for review will vary, TLC tries whenever possible to promptly render a decision.⁴⁷¹

If the landowner’s proposal entails changing the language of the easement in order to accommodate the proposed changes, “the landowner must go through a formal amendment process which requires board approval, and the approval will be contingent upon strengthening the remaining conservation values that are protected by the easement.”⁴⁷² As can be expected, proposals that necessitate amending the easement document will take significantly longer to carry out than proposals that do not.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ “RE: Garden Easements at the Triangle Land Conservancy.”

⁴⁶⁹ Ibid.

⁴⁷⁰ Katherine Wright, telephone interview with author, 9 April 2009.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

14. Legal Challenges to Garden Easements

To date, there have been no legal challenges concerning the garden easements held by Triangle Land Conservancy.⁴⁷³

15. Fees Associated with Easement Donation

Currently Triangle Land Conservancy requests that the easement donor donate funds to support both TLC's stewardship endowment fund and their legal defense fund.⁴⁷⁴ Normally, the amount requested for the stewardship endowment fund is between \$10,000 and \$15,000, but this amount will vary depending upon factors such as the "size of the easement, location, and the number of reserved rights."⁴⁷⁵ An additional \$2,000 - \$3,000 is requested for the legal defense fund.⁴⁷⁶

16. Claiming a Garden Easement as a Charitable Deduction

Landowners who donate easements that meet federal and State of North Carolina requirements are eligible for both federal tax deductions and North Carolina conservation tax credits.⁴⁷⁷ In order to claim these tax incentives, the landowner must obtain "an independent appraisal from a certified appraiser."⁴⁷⁸ Like all of the other organizations profiled in this thesis, Triangle Land Conservancy does not assist in this process "beyond providing the landowner with a list of appraisers" that they have the option of choosing.⁴⁷⁹

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ "Potential Tax Benefits," Triangle Land Conservancy, 24 Nov. 2008, 5, April 2009, <<http://www.triangleland.org/landowner/tax.shtml>>.

⁴⁷⁸ "RE: Garden Easements at the Triangle Land Conservancy."

⁴⁷⁹ Ibid.

17. Future Direction of the Easement Program

At the present time, Triangle Land Conservancy does not plan any future changes to the easement program's policies, and would gladly consider accepting an easement on a garden in the future, provided "it offers significant conservation value, and funding is available."⁴⁸⁰

One item of note concerning gardens is that TLC is currently in the process of expanding its mission to also include community gardens. This is part of a broader program that is being considered by TLC that would allow TLC to lease the conservation lands it owns to farmers who no longer can afford to own their land. One parcel of land that TLC owns is located in an ideal location to serve as a community garden, and TLC is currently in talks with other groups to try to turn this idea into reality.

⁴⁸⁰ Ibid.

CHAPTER 10. CASE STUDIES: GARDEN EASEMENTS

Case Study #1:

Loutrel Briggs Garden at the William Gibbes House:

64 South Battery, Charleston, South Carolina

1. Introduction

This case study examines the easement held by Historic Charleston Foundation on the William Gibbes House and Garden in Charleston, South Carolina. Located at 64 South Battery, the William Gibbes House is historically significant for its age, construction materials, occupant history, and its noteworthy landscape features, in particular its c. 1929 garden designed by Loutrel Briggs. This easement serves as an interesting case study because of the many attributes it protects, the conflicts that have resulted from this, as well as how they were subsequently addressed by HCF.

2. Property Description and History

a. The House

The William Gibbes house was constructed around 1772 at the behest of William Gibbes, a wealthy Charleston ship owner and merchant. The house is located on the southern shore of Charleston, where Mr. Gibbes owned and operated a large wharf.⁴⁸¹ Unlike many of his contemporaries in Charleston, Mr. Gibbes chose wood-frame construction for his house, and today, the house is considered to be one of the finest wood-frame houses still in existence.⁴⁸² (Figure 26)

⁴⁸¹ Poston, 276.

⁴⁸² Jonathan Poston, telephone interview with author, 23 Dec. 2009.

The William Gibbes House is a textbook example of a “Georgian double house,” meaning that each floor contains two rooms flanking each side of a central hallway.⁴⁸³ The two-story wood-framed structure is supported by a raised foundation constructed of “dressed stone.”⁴⁸⁴ The elevated first floor, a feature known as “piano nobile,” although a common feature in Georgian architecture, also served a functional purpose by protecting the waterfront house from flooding. The 6-bay, rectangular shaped house is sheathed in clapboard siding, and is finished with a low-pitched hipped roof, again, a common feature of late-Georgian architecture.



Figure 26: William Gibbes House,
Charleston, South Carolina c. 1772.
Picture courtesy of www.historicharleston.org

⁴⁸³ Sully, 187.

⁴⁸⁴ Dillon, James. National Register of Historic Places Inventory - Nomination Form for William Gibbes House, unpublished, 1976.

The Gibbes House uses numerous high-style late-Georgian architectural motifs that were common in colonial residential architecture in the late 18th Century. Fittingly, the house contains numerous stylistic elements indicative of this era. The main (south) façade of the house is dominated by a large, centrally mounted triangular pediment supported by two prominent consoles adorned with acanthus leaves. The pediment itself is decorated with a prominent dentil course, and contains a centrally located lunette window. The dentil course motif is again repeated on the main cornice as well as on the smaller triangular pediment adorning the elevated front entryway. The design of the entryway pediment mimics that of the roof, and is supported by four Doric pilasters that flank sidelights. The door itself is accompanied by a rectangular shaped transom, the panes of which are divided in order to give the illusion of being a fanlight.

The windows of the Gibbes House are 9 over 9, and are accompanied by shutters. First floor windows are festooned with triangular shaped pediments that mimic the shape of the main pediment, while the second floor windows are adorned with flat pediments supported by consoles that are miniature copies of the consoles supporting the main roof-mounted pediment.

Upon its completion, the house became the primary residence of the Gibbes family. They continued to reside in the house until 1780, when the British, as part of their 'Southern Strategy,' occupied Charleston. The British forces subsequently commandeered the house for use as a hospital, evicting the Gibbes family and imprisoning Mr. Gibbes at St. Augustine.

Like many others, the rigors of the Revolutionary War bankrupted Mr. Gibbes, who died in 1789. In 1794, the house was sold to a wealthy widow by the name of Sarah Moore Smith for the equivalent of £25,000, then an astronomical sum.⁴⁸⁵ It was under the stewardship of Ms. Smith and her son Peter that the Gibbes House received its first significant interior and exterior modifications.

⁴⁸⁵ Ibid. 3.

Around 1800, Ms. Smith had the exterior and interior extensively refashioned in the Federal idiom, which was the dominant style of residential architecture at the time. Interior modifications include the addition of neoclassical mantels and pedimented door surrounds, a coved ceiling in the ballroom, and a wrought iron balustrade in the central hall.⁴⁸⁶ On the exterior, a welcoming arm staircase with marble steps and a wrought iron railing was constructed on the South façade.⁴⁸⁷

For the remainder of the nineteenth century, the Gibbes House was owned by a number of Ms. Smith's descendants. Aside from the exterior masonry wall, which was constructed in 1834, very little is known of the architectural evolution of the Gibbes House during this period. Most likely, given Charleston's dire economic circumstances in the late 19th Century, the house remained in a static state. Like many other structures, the house, in particular the front drawing room, was damaged in the earthquake of 1886.⁴⁸⁸

In 1928, Cornelia Roebling, widow of Washington Roebling of Brooklyn Bridge fame, purchased the house. The following year Ms. Roebling commissioned extensive renovations, hiring the famed Charleston architect Albert Simons to renovate the library and repair the front drawing room.⁴⁸⁹ Ms. Roebling also added a small addition to the rear (North) facade, and installed a basement kitchen.⁴⁹⁰ With few exceptions, the Gibbes House has remained in this state to the present day.

b. The Garden

Like the house itself, the landscape of the William Gibbes House enjoys a storied history. Unfortunately, much less is known about the history and development of the landscape,

⁴⁸⁶ Poston, 277; Sully, 189-190.

⁴⁸⁷ Dillon..

⁴⁸⁸ Sully, 190.

⁴⁸⁹ Ibid.

⁴⁹⁰ Dillon.

reflecting the traditional failure of historians and preservationists alike to afford noteworthy landscapes appropriate recognition.

Up until 1929, little is known concerning the history and development of the grounds. Most likely, the majority of the grounds were originally used strictly for functional purposes.⁴⁹¹ At some point in the late 18th century, a “double-axial parterre garden” was installed along the east side of the house.⁴⁹²

The documented history of the garden is a lot clearer after 1929, when Cornelia Roebing commissioned Loutrel Briggs to design and build the present day garden. The garden represented Briggs’ first commission in Charleston, and was crucial in helping to establish his later stature as Charleston’s premier garden designer.

Reflecting the spirit of the Colonial Revival movement that prevailed at the time, “Roebing was eager to create a new garden but insistent that it be done in the spirit of the past.”⁴⁹³ Taking this mandate literally, Briggs began his quest to create a garden metaphorically evoking the past by examining the landscape’s physical past. These examinations led Briggs to rediscover the late-eighteenth century garden, which was then restored as a rose garden for Mrs. Roebing.⁴⁹⁴ Briggs used this garden as his inspiration for the design of the new garden, “reinterpreting the property as a series of symmetrical garden rooms, including a long allee leading from the back door to the back of the garden and a reflecting pool with a fountain in the center.”⁴⁹⁵ (Figures 27-35) A masterpiece of Colonial Revival landscape design, the garden, which was finished in 1933, “beautifully illustrated Loutrel Briggs’ sensitivity for design within the framework of a historic setting.”⁴⁹⁶ It is a sentiment that is still valid today.

⁴⁹¹ Sully, 190.

⁴⁹² Ibid.

⁴⁹³ Cothran, 56.

⁴⁹⁴ Poston, 277.

⁴⁹⁵ Sully, 191; Cothran, 56.

⁴⁹⁶ Cothran, 56; Poston, 277.

3. Development of the Easement

After Cornelia Roebing's death, the Gibbes House passed into the hands of a number of her descendants until 1984. Similar to the circumstances that befell the house in the nineteenth century, this period saw the house and garden once again gradually fall into a state of decay.

Although the condition of the house and garden had declined, their integrity was not seriously threatened until 1984, when long-time owner John Ashby Farrow died. The house passed into the hands of his widow and executrix, Emily Ravenel Farrow, who wished to sell the house.⁴⁹⁷ Unfortunately, at this time, the only parties who expressed a sincere interest in purchasing the Gibbes House were developers who wanted to either subdivide the house into condominiums, or convert it for use as a restaurant or inn.⁴⁹⁸

These developments concerning the potential fate of the Gibbes House were of grave concern to Historic Charleston Foundation. Even by the lofty standards of Charleston, the Gibbes House, with its wood-frame construction, Federal interior, intact outbuildings and Loutrel Briggs garden was particularly significant.⁴⁹⁹ HCF understood that unless decisive action was taken, it would remain uncertain whether or not all of these unique qualities would continue to survive intact.

In May 1984, with no suitable buyers having yet appeared, HCF took up an option to buy the house in the event that an appropriate buyer was not found.⁵⁰⁰ When no buyer materialized, HCF, using monies from its revolving fund, purchased the house on July 3, 1984 for \$750,000.⁵⁰¹

⁴⁹⁷ Jonathan Poston, "RE: A few questions," 6 Feb. 2009.

⁴⁹⁸ Weyeneth, 108; Jonathan Poston, telephone interview with author, 23 Jan. 2009.

⁴⁹⁹ Jonathan Poston, phone interview, 23 Jan. 1980.

⁵⁰⁰ Weyeneth, 108.

⁵⁰¹ Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., 19 Feb. 1986, (filed 19 Feb. 1986), Charleston County, South Carolina, Charleston County Registers Office, Charleston, SC. Pg. 2.

After taking legal possession of the house, HCF encumbered the property with restrictive covenants protecting the exterior, interior, and the grounds.⁵⁰² In Feb. 1986, HCF sold the property to Jefferson Leath and Susanne Trainer-Leath for \$655,000. On February 19, the Leaths donated a conservation easement designed to protect the façade, interior, and open space (gardens) of the William Gibbes House.⁵⁰³ Although it had taken almost two years and HCF had lost almost \$100,000, the fact that Charlestonians could be assured that all of the unique attributes of the Gibbes House would be preserved for posterity was more than just compensation.

4. Provisions of the Easement

In order to protect the many unique attributes surrounding the Gibbes House, Historic Charleston Foundation crafted an extremely comprehensive easement document addressing *all* of the major conservation values of the property. As mentioned above, the easement conveyed by the Leaths to HCF is designed to protect the façade, interior, and open spaces such as the garden. The easement also contains a number of clauses designed to prevent the particular set of circumstances that potentially jeopardized the overall integrity of the Gibbes House and Garden in early 1984 from reoccurring. As this thesis is mainly concerned with the use of easements to protect gardens, most of this section will be devoted to explaining the various provisions within the easement document that assist in protecting the garden. Other unique provisions of the easement will only be explained in brief.

From the very beginning, HCF knew that the garden was an extremely important component of the property, and that in order to ensure its permanent protection, it would be

⁵⁰²At this time, it was standard practice at Historic Charleston Foundation to place covenants on properties bought and sold with monies from the revolving fund. Jonathan Poston, "RE: A few questions," 6 Feb. 2008.

⁵⁰³Despite the existence of the covenants, Historic Charleston Foundation still sought out an easement as an easement allowed for more restrictions. Jonathan Poston, "RE: A few questions," 6 Feb. 2008.

necessary to encumber the garden with an easement. This being decided, the clauses within the easement protecting the garden were designed with two main goals in mind: First, to protect the original 18th Century garden that Loutrel Briggs had rediscovered, and second, the overall plan of the c. 1929 garden designed by Loutrel Briggs.⁵⁰⁴ The main protection afforded to the garden by the easement is provided by Article VII, which clearly states:

*The basic architectural design of the gardens and grounds shall not be changed; except that a swimming pool and/or a tennis court may be constructed in a location and manner subject to prior express written consent of Grantee.*⁵⁰⁵

While not lengthy, this clause successfully meets the goals that HCF set out to achieve. The brilliance of the above clause lies in the fact that while the easement clearly protects the overall plan of the garden, the owner of the garden is allowed considerable latitude in changing certain decorative elements of the garden such as plantings or lawn ornaments that do not compromise the basic appearance of Briggs' plan. The reasonability of this clause is further evinced by the fact that it allows the owner the option of constructing a pool or tennis court, contingent upon the prior approval of HCF.

While this is the sole clause within the easement specifically protecting (or mentioning) the garden, other clauses assist in protecting the garden through implication. For example, clause (c) of Article I states that the Grantor shall not undertake or permit without the prior permission of the Grantee:

*the exterior extension of the existing structures or the erection of any new or additional structures on the property or in the open space above the land.*⁵⁰⁶

⁵⁰⁴ Jonathan Poston, telephone interview, 23 Jan. 2009.

⁵⁰⁵ Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., Article VII. Pg. 4.

While not specifically protecting the garden per se, by preventing the erection of any new structure on the open land without the approval of HCF, the garden is further protected from any potential alterations that may prove harmful.

Destruction or adverse alterations to the garden are further prohibited by Article V, which prohibits future subdivision of the property.⁵⁰⁷ By Charleston standards, the Briggs House occupies a massive parcel of land almost an acre in size, the garden itself taking up almost a ½ acre. If the property were ever to be subdivided, it would almost certainly be at the expense of the gardens, which would be either drastically modified or destroyed outright.

As crucial as all of the above clauses are to protecting the gardens of the Gibbes House, they would all be irrelevant if the easement did not contain specific measures allowing HCF to enforce its terms and provisions. Effective enforcement of the open space easement on the Gibbes House is contingent upon two particular factors: First, the ability of HCF to conduct periodic inspections of the property in order to ensure that no violations have occurred, and second, the thorough documentation of the conservation values of the garden at the time that the easement was donated.

Concerning the former, this is specifically addressed within the confines of the easement document, which like most HCF easements, clearly stipulates the rights of the Grantee to:

*be permitted annually, at a reasonable time, to come upon the premises to inspect for violation of any of the covenants of the deed of easement*⁵⁰⁸

However, in regards to the latter, the easement states that photographic documentation and drawings or plans of the façades of all ‘improvements’ is to be included as an attachment

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid. Article V. Pg. 4.

⁵⁰⁸ Ibid. Article VIII(a). Pg. 4.

separate from the easement.⁵⁰⁹ While ostensibly, the gardens should be considered to be “improvements,” they are not defined as such by the easement document, which only considers ‘façades of improvements’ to include “*exterior walls, roofs, chimneys of all principles structures and outbuildings and walls, and fences and gates.*” While all well-written easement documents are designed to be flexible, with the exception of walls, fences, and gates, it would hard to construe any of the other categories classified as ‘improvements’ to include the major components within a garden.

Unfortunately, the vast majority of HCF’s open space easements are sadly lacking in sufficient baseline documentation.⁵¹⁰ As the easement fails to mention any specific baseline documentation that is required for the garden, it is fair to assume that little or no evidence of the garden’s condition at the time of easement donation exists. While this would ostensibly make violations concerning the garden of the Gibbes House potentially unenforceable, this is mitigated by a clause stating:

*The nonexistence or nonavailability of these photographs shall not preclude or prevent a future determination of the present state by any other means of evidence thereof.*⁵¹¹

In essence, although HCF may not have originally documented the conservation values within the garden to the desired extent, they still have the right to prohibit changes or alterations which in their opinion, compromise the conservation values of the garden.

As mentioned previously, the easement on the Gibbes House also seeks to prevent some other harmful changes that would have compromised the integrity of the property. One of the

⁵⁰⁹ Ibid. Article I(d). Pg. 4.

⁵¹⁰ April Wood, “RE: Some questions to start a Monday with,” 30 Jan. 2009.

⁵¹¹ Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., Article I(d). Pg. 3.

contentious issues facing the property in early 1984 was the use of the house as either a restaurant or inn. This dilemma is addressed through Article IV, which states:

*The said premises are to be used principally as a single family residence, however the ground floor may contain one rental unit, and the kitchen/carriage house building may be used as two rental units. Grantor hereby covenants and agrees to restrict the use of these rental units to no more frequent than monthly tenancies.*⁵¹²

This clause has several implications. First, it prohibits certain types of mainstream commercial usages that would severely compromise the residential character of the house. For example, the house may never be used as a restaurant, and basement aside, the majority of the main house must be used exclusively for residential purposes. However, consistent with the fair but firm demeanor of the easement as a whole, the clause is generous enough to permit the property owner limited commercial usage, provided it is appropriate to the residential nature of the property and the neighborhood as a whole. If the owner of the Gibbes House wished to privately rent out space in the aforementioned areas, this is clearly allowed, provided it is not a semi-permanent tenancy. An innocuous bed and breakfast would be entirely in keeping with the objectives of the easement. In short, the entire clause makes it patently clear that although HCF's intention is that the Gibbes House maintain a residential demeanor, limited commercial development is acceptable on the condition that it does not overwhelm the largely residential character of the property.

The Gibbes House and Garden are further protected by Article XIII, which grants HCF the right of first refusal if the property is put up for sale.⁵¹³ In the event that this scenario occurs,

⁵¹² Ibid. Article IV. Pg. 4.

⁵¹³ 'Right of first refusal' is defined as "a provision within an agreement stating that a specified party must be given an opportunity – before any others – to either reject or accept the offer. The right of first refusal may extend, for

Article XIII states that upon notification of the offer, “*the Director of Historic Charleston Foundation shall have ninety-six (96) hours after personal receipt of the offer to match the terms of the offer.*”⁵¹⁴ By possessing the right of first refusal, HCF can effectively prevent the sale of the house to buyers who would not be amicable to the historic nature of the house, the easement, and by extension Historic Charleston Foundation.

The easement on the Gibbes House is also noteworthy in that it was one of the first easements employed by HCF to protect a historic interior.⁵¹⁵ Although the interior easement protects the whole interior of the main structure (The Gibbes House), HCF was initially more concerned with protecting the older Federal interior features as opposed to the modifications made by Mrs. Roebing during her 1929 renovation.⁵¹⁶

In most other key areas, the easement on the Gibbes House contains conventional clauses indicative of HCF easements. The easement qualifies as a “qualified conservation contribution” in accordance with the principles set forth in Section 170(h) of the U.S. Internal Revenue Code.⁵¹⁷ Like all HCF easements, the easement on the Gibbes House specifies a series of backup holders who will assume control of the easement in the event that Historic Charleston Foundation as Grantee ceases to exist.⁵¹⁸ Finally, consistent with HCF’s policy concerning public access on easement encumbered properties,, the easement on the Gibbes House does not require that the house and garden be opened to the public, going so far as to maintain that:

example, to the act of selling property. In this case, if and when the owner decides to sell, the property must first be offered to the specified party. Upon refusal of the specified party, the property may then be offered under the same terms and conditions to others.”

McCrackern, Mark, “Right of First Refusal,” [Teachmefinance.com](http://teachmefinance.com), 4 Feb. 2009, <http://teachmefinance.com/Financial_Terms/right_of_first_refusal.html>.

⁵¹⁴ Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., Article XIII.

Pg. 6.

⁵¹⁵ Jonathan Poston, telephone interview with author, 23 Jan. 2009.

⁵¹⁶ Ibid.

⁵¹⁷ Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., 2.

⁵¹⁸ If Historic Charleston Foundation was terminated, the easement would be assumed, in order of the following, by the following three organizations: The Charleston Museum, the Carolina Art Association, and the City of Charleston. Ibid. Article IX. Pg. 5.

*the Grantor, their heirs, successors or assigns, shall retain exclusive right to access and use, subject only to the provisions herein recited.*⁵¹⁹

5. Subsequent History

Shortly after purchasing the house in 1986, Ms. Trainer began a lengthy restoration of the house.⁵²⁰ Both the exterior and interior of the Gibbes House were restored in a manner that respected the historic fabric of the house in accordance with the terms of the easement. Simultaneously, Ms. Trainer turned their efforts to the garden, which like the house, had through neglect, fallen into decay.⁵²¹ Gradually, Ms. Trainer's patience and vision gradually brought the garden back to life:

Maintaining a policy of selective pruning and benign neglect, Susanne and her gardener have brought forth a landscape of combined structure and tumbling growth that exudes an aura of bygone romance, mystery and serenity.⁵²²

While for the most part, the Trainer's did a commendable job in restoring and maintaining the house in accordance with the terms of the easement, a few controversies arose during their tenure of ownership. The first occurred in 1986, shortly after the Trainer's had moved in and were in the process of restoring the house and gardens. The dispute arose over the appropriateness of an in ground swimming pool that the Trainer's wished to have installed at the rear of the property.⁵²³ While the open-space provisions of the easement clearly allowed for the

⁵¹⁹ Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., Article XII. Pg. 5.

⁵²⁰ Poston. Pg. 276.

⁵²¹ Sully, 191.

⁵²² In the late 1980's, Susanne & Hughes Leath obtained a divorce, with Susanne retaining ownership of the Gibbes House. She later married Thomas Trainer, an attorney, and assumed his surname. Ibid. 193; Jonathan Poston, "RE: A few questions," 6 Feb. 2009.

⁵²³ Jonathan Poston, telephone interview with author, 23 Jan. 2009.

construction of a swimming pool, the location that that Trainer's proposed was directly in the middle of the garden, disrupting the harmony of two of the north-south axes.⁵²⁴ Given that one of the main goals of the open-space easement was to protect the gardens from harmful alteration or destruction, HCF expressed their opposition to the construction of the pool in the proposed location.⁵²⁵

This conflict was eventually resolved when a compromise agreement was reached, with Historic Charleston Foundation granting the Trainer's permission to construct the swimming pool in the desired location on the condition that they hire a certified archaeologist to conduct excavations in and around the area impacted by the construction of the pool in order to ensure that all below ground historic resources would be documented and preserved.⁵²⁶

Later on, another significant dispute arose when the Trainer's constructed a brick driveway without having obtained permission from Historic Charleston Foundation.⁵²⁷ Although HCF only became aware of the violation after the driveway had been constructed, they promptly took up the issue with the Trainers. HCF had two main concerns: First, that the driveway was subject to the open-space provisions within the easement, meaning that the project required the approval of HCF, and second, the fact that the Trainer's had used brick paving, which HCF felt was an inappropriate choice of material.⁵²⁸

When confronted with these concerns, Mr. Trainer, who was a lawyer, adamantly maintained that "the driveway was not a part of the easement," and therefore he was rightfully entitled to have constructed the driveway without having sought HCF's approval.⁵²⁹ Although HCF rigorously disputed this point, HCF eventually decided to let the matter drop on the pretext

⁵²⁴ Elizabeth Bradham, "RE: Some Questions About Your Garden," e-mail to author, 24 April 2009.

⁵²⁵ Jonathan Poston, telephone interview with author, 23, Jan 2009.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

⁵²⁸ Ibid.

⁵²⁹ Ibid.

that the new driveway did not adversely affect the integrity of either the Gibbes House or the Loutrel Briggs garden, which are the main conservation purposes of the easement.⁵³⁰

Aside from these two issues, the easement on the William Gibbes House has functioned as intended. Throughout their tenure of ownership, the Trainer's made a few minor modifications to the plantings within the garden, all of which were approved by HCF.

On January 4, 2006, after twenty years of ownership, the Trainer's sold the Gibbes House to J. Elizabeth Bradham for \$6.1 million, which at the time, was the highest recorded price ever paid for a Charleston home. A native Charlestonian, Ms. Bradham is very involved with the history of the house and garden and maintains it to the highest standard.

Upon moving in, Ms. Bradham began a thorough renovation of the main house, the carriage house, and the garden, which at the time was overgrown and suffered from overgrown and diseased ridden plantings.⁵³¹ Ms. Bradham immediately began to replace the diseased plantings, and overgrowth was trimmed back. Overgrown hydrangeas obscuring one of the north-south axes were also removed.⁵³²

For the most part, Ms. Bradham has refrained from making structural or design changes to the garden, with the exception of adding some features that were part of Mr. Briggs' original plans for the garden.⁵³³ For example, Ms. Braham had walkways installed behind the shrubberies located along the north and east walls of the garden. These walkways were part of Mr. Briggs' original plan, but had never been executed.⁵³⁴

The remainder of Ms. Bradham's efforts have been expended on replacing plants that no longer thrive in the garden. Wherever possible, Ms. Bradham attempts to have plants installed

⁵³⁰ Ibid.

⁵³¹ "RE: Some Questions about your garden."

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ Ibid.

that are “sympathetic to Briggs’ design,” though obviously exceptions are made if such plants are unable to survive in Charleston’s climate.⁵³⁵

⁵³⁵ Ibid.



Figures 27 & 28: Loutrel Briggs garden at 64 South Battery.
Photos courtesy of J. Elizabeth Bradham





Figures 29 & 30: Loutrel Briggs garden at 64 South Battery.
Photos courtesy of J. Elizabeth Bradham





Figures 31& 32: Loutrel Briggs garden at 64 South Battery.
Photos courtesy of J. Elizabeth Bradham





Figures 33: Loutrel Briggs garden at 64 South Battery.
Photo courtesy of Historic Charleston Foundation



Figures 34 & 35: Modern swimming pool.
Loutrel Briggs garden, at 64 South Battery.
Photos courtesy of J. Elizabeth Bradham



Case Study # 2

Elizabeth Lawrence House and Garden:

348 Ridgewood Ave. Charlotte, NC

1. Introduction

This case study examines the easement held by The Garden Conservancy on the Elizabeth Lawrence House and Garden in Charlotte, North Carolina. This particular easement serves as an interesting case study, for unlike other easements currently held by The Garden Conservancy, this easement protects a house in addition to the garden. The easement is also unique in that it was created through the collaboration of several parties with contrasting agendas united by a common goal: To ensure the permanent preservation of the Elizabeth Lawrence House and Garden.

2. Property Description and History

Although not particularly old, the Elizabeth Lawrence House and Garden enjoys a storied history that is largely centered around the life and work of Elizabeth Lawrence (1904-1985), one of the United States' premier garden writers and a leading authority on Southern gardens. Ms. Lawrence's garden, which has been in almost continual cultivation since 1950, is one of the few remaining gardens designed by Ms. Lawrence still in existence, and the sole remaining garden associated with her life and career.⁵³⁶

Born in Marietta, GA, Elizabeth Lawrence spent much of her early years in Raleigh, NC, where at a young age, she developed an interest in gardening through working in the family

⁵³⁶ Davyd Foard Hood, "Survey and Research Report on the Elizabeth Lawrence House and Garden," Charlotte – Mecklenburg Historic Landmarks Commission, 30 June 2005, 15 Jan. 2009, <<http://www.cmhpf.org/surveys&rlawrencegarden.htm>>.

garden.⁵³⁷ With the encouragement of her mother, in 1929, Ms. Lawrence enrolled in the North Carolina State College of Agriculture and Engineering to study Landscape Architecture. Upon graduating in 1932, Ms. Lawrence became the first woman to graduate from NC State with a degree in Landscape Architecture.⁵³⁸

Although trained as a landscape architect, Ms. Lawrence is today best known for her prolific writings on gardens. During her lifetime, Ms. Lawrence wrote a number of influential and popular books on gardening, many of which are still in print today.⁵³⁹ Ms. Lawrence also gained a devoted following through her weekly gardening column in *The Charlotte Observer*, for whom she wrote from 1957-1971.⁵⁴⁰ In addition to her public writings, throughout her life, Ms. Lawrence maintained numerous private correspondences with garden aficionados throughout the world, enabling her

to converse with people she had met and those she might never meet, to share her knowledge with fellow gardeners, to gain theirs in turn, and all the while, to further develop her talents as a writer and a gardener.⁵⁴¹

The history of the Elizabeth Lawrence garden begins in 1948, when Ms. Lawrence and her mother moved from Raleigh to Charlotte. In May of that year, Ms. Lawrence purchased an undeveloped 1-acre lot for \$2200 from Timothy and Esther Pridgen.⁵⁴² Measuring 75 x 220 ft., Ms. Lawrence's new lot was located on Ridgewood Ave. in the Poplar Gables subdivision near

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹The three works that Lawrence published during her lifetime and which helped earn her international acclaim are *A Southern Garden*, (1942), a valuable resource on gardens and gardening in the southeast, *The Little Bulbs: A Tale of Two Gardens*,(1957) still one of the leading works on small bulbs, and *Gardens in Winter*, (1971) where Lawrence extols the myriad aesthetic virtues that gardens have to offer even in the dead of winter. Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

Myers Park, a prestigious Charlotte suburb.⁵⁴³ At the same time, Ms. Lawrence's sister Ann and her husband Warren, who were already living in Charlotte, purchased the lot adjacent to Ms. Lawrence's lot.⁵⁴⁴ A close familial bond had always existed within the Lawrence family, and in Charlotte the Lawrence sisters would remain close - both emotionally and physically, for the remainder of their lives.

Construction on a new house commenced almost immediately, with Ms. Lawrence staying on hand to personally supervise construction. The house was completed in 1949.⁵⁴⁵ In contrast to the majority of her neighbors in Poplar Gables, who inhabited large elaborately styled multi-story houses, Ms. Lawrence commissioned a much more mundane structure. Sitting on a brick foundation, with wood frame construction, Ms. Lawrence's house was a simple, one-story, 2-bedroom dwelling laid out in a rectangular plan. As was common in the immediate postwar period, the exterior of the house features subtle Colonial Revival elements such as stained cedar shingle cladding accented by white trim on the doors and windows, and multi-paned sash windows.⁵⁴⁶

Almost as soon as Ms. Lawrence moved in, she began to design the garden that would accompany her home. Although the 75x220 ft. lot lacked the extensive acreage of her former home in Raleigh, Ms. Lawrence compensated by cultivating the entire lot, with the exception of the house and driveway, for use as a private garden.⁵⁴⁷

Indicative of the era that Elizabeth Lawrence lived and worked in, the garden that she envisioned for her new homestead was textbook Colonial Revival. Since the house was situated towards the front (south) of a long and narrow lot, Ms. Lawrence placed the greatest emphasis on designing a formal garden at the rear (north) of the property. By the middle of 1950, she had laid

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

out a garden plan consisting of a series of primary and secondary axial paths corresponding with the plan of the house and centered on a reflecting pool.⁵⁴⁸ Within the crosshatch pattern created by the paths, Lawrence created four flowerbeds, which she filled with mixed plantings.⁵⁴⁹

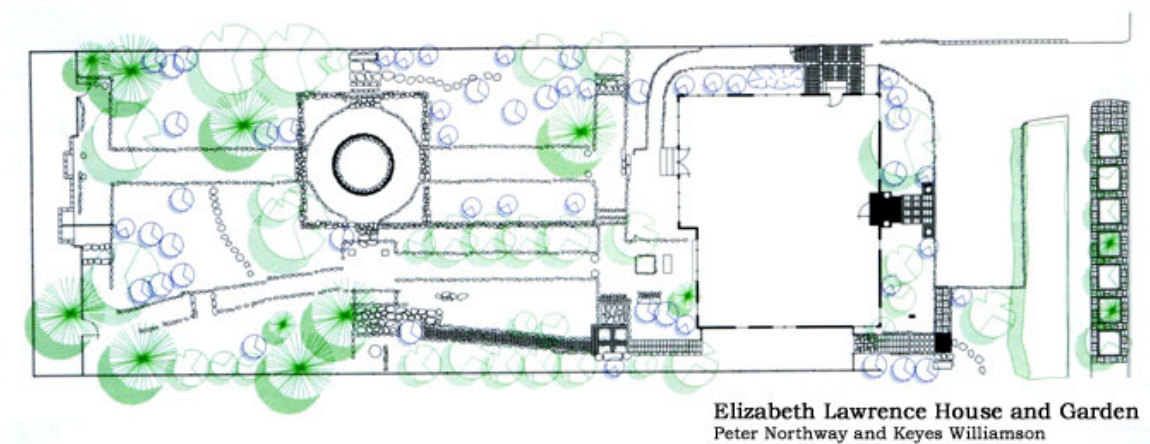
The primary axis consists of a wide gravel pathway leading from the rear (south) of the house to the back of the garden, which appropriately ends at the back (north) of Ms. Lawrence's property. The reflecting pool is located in the center of this path. It is lined with stones and surrounded with brick pavers, and serves as the visual focal point for the garden.⁵⁵⁰ The main gravel walk is flanked by a narrower path to the west that runs almost parallel to the main path. In between these two paths, Ms. Lawrence planted a series of cherry laurels.⁵⁵¹ (Figures 36-37)

⁵⁴⁸ Ibid.

⁵⁴⁹ "History of the Garden."

⁵⁵⁰ Hood.

⁵⁵¹ Ibid.



Figures 36 & 37: Elizabeth Lawrence House and Garden.
From top, colored plan of garden, plan of hardscape.
Renderings courtesy of Keyes Williamson

The secondary axis consists of three smaller paths that run perpendicular to the primary axis. The northernmost path at the rear of the garden is a gravel path that leads to a bench that is situated in a recessed alcove in the concrete boundary wall.⁵⁵² This path is mirrored by a path at the front of the garden that provides access to the two paths on the primary axis. Finally, just north of the reflecting pool, Ms. Lawrence installed a series of stepping-stones connecting the two paths of the primary axis.

⁵⁵² Ibid.

In front of the south façade of the house facing the street, Ms. Lawrence placed a series of *camellia sasanquas* near the street in order to screen the gravel driveway between the front of her house and the street from public view.⁵⁵³ On the east side of the house, Lawrence created a narrow path leading from the southeast corner of the house to the garden in order to allow access to the garden from the front of the house. This path is entered through a cast-iron gate. The gate is crowned with an arch that is festooned with climbing roses.⁵⁵⁴ (Figure 42) Ms. Lawrence chose to site the path on this side of the property in order to ensure that the garden would be easily accessible to her sister's family.⁵⁵⁵

In many respects, the garden designed and created by Ms. Lawrence embodied many of her core principles concerning gardens.⁵⁵⁶ Reflecting the theme of many of her writings, in particular *Gardens in Winter*, Ms. Lawrence intended her garden to be both presentable and usable all year round.⁵⁵⁷ Therefore, she carefully chose plants that would be able to survive in Charlotte's varied annual climate.⁵⁵⁸ Ms. Lawrence also treated her garden as a living laboratory, constantly experimenting with "a wide range of both heirloom plants and modern cultivars," for use in her studies.⁵⁵⁹

After settling in Charlotte, Ms. Lawrence soon became a fixture in the City's gardening circles, and quickly befriended a number of prominent Charlotte gardeners.⁵⁶⁰ One such individual was Elizabeth Barnhill Clarkson (1904-1988), who lived down the street from Ms. Lawrence at 248 Ridgefield Ave.⁵⁶¹ Like Ms. Lawrence, Mrs. Clarkson was also a migrant to

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

Charlotte, having moved to the city with her husband Edwin in 1927.⁵⁶² Almost immediately after moving into her new home, Mrs. Clarkson began work on a garden of her own. By the time that Elizabeth Lawrence had moved to Charlotte two decades later, Mrs. Clarkson's garden, which she had named 'Wing Haven', had gained renown as one of Charlotte's most prominent gardens.⁵⁶³ A close friendship that would last the rest of their lives soon flourished between the two avid gardeners. Their mutual friendship helped to determine the fate of both gardens long after their deaths.

Ms. Lawrence continued to maintain her garden up until the early 1980's, when her health began to decline.⁵⁶⁴ Sensing her mortality, Ms. Lawrence gradually began making arrangements to leave the Charlotte area and move closer to surviving family members.⁵⁶⁵ In the summer of 1984, Ms. Lawrence left Charlotte to live with her niece in Annapolis, MD, never to return to her beloved garden.⁵⁶⁶ Her ties with the Charlotte area were permanently severed on October 17, 1984, when she sold her house to Mr. James B. Sommers for \$90,000.⁵⁶⁷ Growing

⁵⁶² "The Story of Wing Haven Gardens – A Bird in the House," Wing Haven Gardens and Bird Sanctuary, 11 Feb. 2009 <http://www.winghavengardens.com/about_us.htm>

⁵⁶³ Elizabeth Clarkson's Wing Haven is a large Colonial Revival Garden. Situated on 3-acres, the garden is completely enclosed by brick walls, and contains a mixture of formal elements such as outdoor rooms and more natural wooded areas. As its name aptly suggests, Wing Haven was conceived by Elizabeth Clarkson as a bird sanctuary. This is reflected in the type of plantings chosen, as well as the abundance of fountains designed to encourage birds to nest in the garden and make it their home.

Having put so much effort into creating and maintaining the garden, the Clarksons gradually began to take steps to ensure its preservation. In 1970 the Clarksons founded the Wing Haven Foundation in order to protect their garden and bird sanctuary. Later that year, the Clarksons transferred ownership of their garden to the Wing Haven Foundation, while continuing to live in their home until 1988.

The Wing Haven Foundation is a non-profit with 501(c)(3) status. Today, both the house and garden are open to the public.

Whiteside, Katherine. "A Spring Sampler; Charlotte's Garden for the Birds." *New York Times*. April 9, 1988. (find pg.)

⁵⁶⁴ For some time in the late 1970's to early 1980's, Ms. Lawrence attempted to maintain the garden by enlisting help, but by 1983 she abandoned these efforts. Hood.

⁵⁶⁵ The death of Elizabeth Lawrence's mother in 1964, and her sister Ann in 1980, combined with the onset of old age, made it increasingly difficult for Ms. Lawrence to carry on living independently. Ibid.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

increasingly infirm, Ms. Lawrence lived less than a year in Maryland before passing away on June 11, 1985.⁵⁶⁸

After purchasing the property, Mr. Sommers continued to live in the house until early 1986. During his brief tenure of ownership, Mr. Sommers, a Vice President of North Carolina Bank, did not make any changes to the house, and continued to neglect the garden.⁵⁶⁹

The next phase in the garden's history began on February 11, 1986, when Mary Lindeman "Lindie" Wilson (1932-) purchased the property from Mr. Sommers for \$121,000.⁵⁷⁰ From the beginning, Ms. Wilson, a life-long gardener, took an active interest in the garden. Through hard work and patience, Ms. Wilson slowly reclaimed the physical fabric of the garden by pruning, weeding, and removing invasive plants.⁵⁷¹ Within a few years, her efforts paid off, as the simple plan created by Ms. Lawrence once again "reappeared with all its simple linear clarity."⁵⁷² The success Ms. Wilson enjoyed in restoring the garden is reflected in the fact that in 1992, the garden was open for viewing for the Mint Museum House and Garden Tour, something that would have been unimaginable when Ms. Wilson purchased the property a mere six years previously.⁵⁷³

It was under Ms. Wilson's stewardship that the first major modifications were made to the house. Prior to moving in, Ms. Wilson hired local architect David Wagner to create additional living space in the house.⁵⁷⁴ Mr. Wagner converted the previously unfurnished attic into second-floor living space by expanding the roof through the construction of a shed like

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid.

dormer on the northern gable.⁵⁷⁵ Mr. Wagner also enclosed the rear terrace in the northeast corner of the house, effectively converting the space into a garden room.

3. Development of the Easement

Driven by her dedication and respect for the legacy of Elizabeth Lawrence, the garden continued to flourish under Ms. Wilson's stewardship. However, as time passed, Ms. Wilson grew increasingly concerned about the garden's potential fate once her tenure of ownership came to an end.

In 2002, Ms. Wilson took the first steps towards ensuring the permanent preservation of the garden when she contacted The Garden Conservancy to ask for assistance.⁵⁷⁶ Later that year, representatives from The Garden Conservancy met with Ms. Wilson to assess the garden's viability and discuss some of the options available that would help to ensure its long-term preservation.⁵⁷⁷

A short time after viewing the garden, Mr. Noble met with The Garden Conservancy's Projects Committee, the board committee tasked with advising The Garden Conservancy on the appropriateness of potential preservation projects, in order to determine if the Elizabeth Lawrence house and garden would be a suitable preservation project.⁵⁷⁸ Although interested in the garden's preservation, the Projects Committee declined to designate the garden a preservation project, suggesting instead that for the time being, The Garden Conservancy limit its role to providing Ms. Wilson with technical assistance through The Garden Conservancy's

⁵⁷⁵ Ibid.

⁵⁷⁶ Bill Noble, telephone interview with author, 22 Jan. 2009.

⁵⁷⁷ Ibid.

⁵⁷⁸ William Noble, Letter to Lindie Wilson, 21 Oct. 2002.

Preservation Assistance Center.⁵⁷⁹ The Projects Committee cited two specific reasons for its decision, foremost of which was its opinion that The Garden Conservancy did not “have the staff and financial resources to put into what could turn out to be a substantial undertaking.”⁵⁸⁰ The second concern at that point in time, was that it remained to be seen whether sufficient support for the garden’s preservation existed within the Charlotte area.⁵⁸¹

The Garden Conservancy concluded that the next logical step would be to convene a meeting of potential stakeholders in order “to gauge whether there is sufficient public interest in preserving the garden and to consider potential strategies to ensure its future.”⁵⁸² This meeting, which was arranged largely through the efforts of Mrs. Patti McGee, a board member of The Garden Conservancy, was held on March 4, 2002 and was attended by over twenty people representing various preservation and conservation related interest groups with a vested interest in the garden’s future.⁵⁸³

Following much discussion, the participants at this meeting reached a number of conclusions. First, the majority of the participants agreed that the garden was a valuable asset in need of preservation, ending the question of whether the garden’s fate would attract “broad

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

⁵⁸² William Noble and Patti McGee, “Roundtable discussion concerning the Elizabeth Lawrence Garden,” letter to participants, 3 Dec, 2002.

⁵⁸³ In addition to Lindie Wilson, the participants at this meeting were William Noble, Director of Preservation Projects, The Garden Conservancy; Patti McGee, Board Member, The Garden Conservancy; Gordon W. Chappell, President, Southern Garden History Society; James R. Cothran, Vice President, Southern Garden History Society; Flora Ann Bynum, Secretary – Treasurer, Southern Garden History Society; Davyd Hood, independent scholar and member, Board of Directors, Southern Garden History Society; Bobby Ward, President, North American Rock Garden Society; J. Myrick Howard, President, Preservation North Carolina; Dia Steiger, Executive Director, Wing Haven Gardens and Bird Sanctuary; Emily Wilson, Elizabeth Lawrence scholar; Nancy Goodwin, Montrose; Peggy Cornett, Director, Center for Historical Plants at Monticello; Staci Carton-Sullivan, Director, Cherokee Garden Library; Pat Hargett, Cherokee Garden Library; Allen Lacy, Roddey Dowd; Lisa Renstorm; Genie White; Jane Avinger; Katherine Belk-Cook.

interest in the southern horticultural community.”⁵⁸⁴ More importantly, the participants left the meeting with the understanding that it would be necessary to protect both the house and the garden in order to ensure that the integrity of the property as a whole was preserved.⁵⁸⁵ For although the Lawrence’s house is not in itself architecturally significant, a good portion of Ms. Lawrence’s writings were produced in the house, in particular at her desk in the study which overlooked the garden that she had created, and which in turn helped to inspire many of her writings.⁵⁸⁶ In essence, it was deemed essential to preserve “the relationship between garden and home; the combination of garden and writer.”⁵⁸⁷ Therefore, it was resolved that any steps taken to preserve the property would have to protect both the garden and certain elements of the house in order to preserve the integral relationship that Elizabeth Lawrence had shared with her house and garden.

The participants also explored a wide range of strategies that could be used to help preserve the garden, such as outright purchase or the use of easements. Although no specific strategy was confirmed at the meeting, most participants agreed that the ideal solution would be to find a local organization qualified to assume ownership of the property.⁵⁸⁸ Consistent with this line of reasoning, it was suggested that a partnership be formed with Wing Haven Foundation, the non-profit that had been formed to manage and protect the nearby Wing Haven Conservancy.⁵⁸⁹ There were a number of strong proponents of this idea, in particular Ms. Wilson and the representatives of The Garden Conservancy, who from the beginning felt

⁵⁸⁴ William Noble, “Minutes of Meeting,” Memo to Participants in Elizabeth Lawrence Garden roundtable discussion, 11 March 2003.

⁵⁸⁵ Ibid.

⁵⁸⁶ William Noble, telephone interview with author, 22 Jan 2009.

⁵⁸⁷ Ibid.

⁵⁸⁸ William Noble, “Minutes of Meeting,” Memo to Participants in Elizabeth Lawrence Garden roundtable discussion, 11 March 2003.

⁵⁸⁹ Ibid.

strongly that Wing Haven Foundation should assume control of the garden.⁵⁹⁰ This strategy made sense for a number of reasons. First, Wing Haven is literally located just down the street from the Elizabeth Lawrence Garden, which would make the garden's management considerably easier.⁵⁹¹ This proposal also made sense from a historical perspective, as the gardens were in close physical proximity to each other, and Elizabeth Lawrence and Elizabeth Barnhill Clarkson had always been spiritually close, united by their mutual passion for gardening.

In order to help facilitate this goal, a small committee, known as The Friends of Elizabeth Lawrence Garden was established.⁵⁹² This committee was tasked with presenting the proposal to Wing Haven's board that Wing Haven accept the property as a gift. If Wing Haven's board proved receptive to the proposition, the Friends would then proceed to develop a scheme to raise the funds needed to purchase the property from Ms. Wilson, as well as to create an endowment for the property's perpetual upkeep.⁵⁹³ Even at this preliminary stage, this was regarded as a daunting task, for it was thought that approximately \$1 million would have to be raised.⁵⁹⁴

When The Friends of Elizabeth Lawrence Garden approached Wing Haven's board with this proposal, the board stated that although they would be interested in managing the garden, they were hesitant to assume outright ownership.⁵⁹⁵ This created a quandary for The Friends of Elizabeth Lawrence Garden, for it made little sense to develop a fundraising program to raise sufficient funds to purchase the property if Wing Haven or another suitable organization was not standing by ready to assume the responsibilities of ownership.

⁵⁹⁰ William Noble, telephone interview with author, 22 Jan 2009.

⁵⁹¹ Ibid.

⁵⁹² William Noble, "Minutes of Meeting," Memo to Participants in Elizabeth Lawrence Garden roundtable discussion, 11 March 2003.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid. \$500,000 to purchase the property from Elizabeth Wilson, and \$500,000 for an endowment for Wing Haven.

⁵⁹⁵

In order to resolve this dilemma, a second meeting of the Friends of the Elizabeth Lawrence Garden was subsequently held on May 12, 2003. Wing Haven's reluctance compelled the Friends to change tactics, and they elected to postpone public outreach efforts until a more definitive plan was developed for the property's preservation.⁵⁹⁶ In order to meet this objective, an ad hoc committee was created in order to "determine the scope, timeline and budget for the program and business plan."⁵⁹⁷ This committee was chaired by Dia Steiger, the Executive Director of Wing Haven Foundation. One of the first tasks that this committee set out to accomplish was raising sufficient funds in order to hire consultants to create these plans.⁵⁹⁸ For this endeavor, The Garden Conservancy provided assistance, applying for and receiving a grant of \$3,000 from the National Trust Preservation Services Fund.⁵⁹⁹ This grant was subsequently matched by the Southern Garden History Society.⁶⁰⁰

Since Wing Haven's future role in either owning or managing the garden remained uncertain, the Friends of the Elizabeth Lawrence Garden formed an additional subcommittee to investigate other preservation options that might be of use.⁶⁰¹ In early 2004, the committee recommended three alternative options that could also be pursued. These are listed as follows:

1. Outright purchase and management of the Property
2. Easement with private ownership
3. Move the garden to a vacant lot behind Wing Haven

⁵⁹⁶ William Noble, "Report on meeting of May 12, 2003," 20 May 2003.

⁵⁹⁷ William Noble and Lisa Renstrom, "Minutes of May 12, 2003 meeting," Memo to Participants and invitees to second meeting of the Friends of the Elizabeth Lawrence Garden, 15 May 2003.

⁵⁹⁸ Ibid.

⁵⁹⁹ William Noble, "Report on meeting of May 12, 2003," 20 May 2003.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid.

Of these three options, purchase and management of the property was considered the most desirable choice, the reasons for which have been already stated above.⁶⁰² However, while the Friends unanimously agreed that this option was the most desirable course of action, they were also aware that it presented the most difficulties.⁶⁰³ For although over a year had passed since the first roundtable discussion in 2003, Wing Haven remained uncommitted, and no other organization had been found to assume the mantle of ownership. This meant that the Friends would either have to assess the suitability of other compatible organizations, or attempt to create an entirely new 501(c)(3) organization for the purpose of owning and managing the garden. The Friends were hesitant to pursue the latter path for fear that a new organization would compete with Wing Haven Foundation for potential donations.⁶⁰⁴ In addition to all of the above factors, the Friends proved reluctant to pursue this proposal due to the excessive costs involved: By mid-2004, estimates had ballooned to \$1.5 to \$2 million.⁶⁰⁵

The second option that enjoyed widespread support was for Ms. Wilson to place a conservation easement on the property prior to its eventual sale to a private party.⁶⁰⁶ While not as desirable as ownership, it was thought that encumbering the garden with a conservation easement would help to provide a means of ensuring that the garden's significant attributes would be protected in the event that Wing Haven failed to eventually acquire ownership of the property.⁶⁰⁷

⁶⁰² The Friends of Elizabeth Lawrence, Update on the Effort to Preserve the Home and Garden at 348 Ridgewood Avenue, May 2004.

⁶⁰³ Ibid.

⁶⁰⁴ William Noble and Lisa Renstrom, "Minutes of May 12, 2003 meeting," Memo to Participants and invitees to second meeting of the Friends of the Elizabeth Lawrence Garden, 15 May 2003.

⁶⁰⁵ The Friends of Elizabeth Lawrence, Update on the Effort to Preserve the Home and Garden at 348 Ridgewood Avenue, May 2004.

⁶⁰⁶ Ibid.

⁶⁰⁷ William Noble, telephone interview with author, 22 Jan 2009.

Although this proposal was also acceptable to all parties, it too was not without difficulties. First, due to the garden's intricate design, it was thought that a conservation easement would only realistically work if a sympathetic buyer that would care for and appreciate the garden could be found.⁶⁰⁸ Furthermore, while this option promised to be less costly than outright purchase, it would still require a significant amount of money, for it was felt that an endowment should be created to fund future maintenance and repairs, and that Ms. Wilson would also need to be compensated for her financial loss due to the property's encumbrance.⁶⁰⁹

Finally, the third option entailed transplanting the "basic elements" of the garden to a vacant lot located behind the rose garden at Wing Haven.⁶¹⁰ While the committee acknowledged that "this option is not in keeping with the Committee's charge to 'preserve' the Lawrence property," it was felt that this proposal would at the very least help "to commemorate the spirit and design of the garden and provide a tribute to Elizabeth Lawrence."⁶¹¹ Given the controversial nature of this proposal, it did not enjoy widespread support, as even the committee members themselves were "not unanimous in endorsing this idea."⁶¹² Fortunately, this proposal was never seriously discussed in earnest, as Ms. Wilson opposed the idea when it was presented to her.⁶¹³

Faced with these choices, in April 2004, Ms. Wilson elected to place a conservation easement on the property, with Wing Haven Foundation being the grantee. This strategy was to be dramatically altered in 2005, when Wing Haven Foundation finally agreed to assume ownership of the property. However, this meant that Wing Haven could no longer accept the

⁶⁰⁸ The Friends of Elizabeth Lawrence, Update on the Effort to Preserve the Home and Garden at 348 Ridgewood Avenue, May 2004.

⁶⁰⁹ Ibid.

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

⁶¹² Ibid.

⁶¹³ Ibid.

easement, which meant that another qualified organization had to be found to accept it. At this point, The Garden Conservancy stepped in and agreed to accept a grant of easement, and officially designated the Elizabeth Lawrence House and Garden a preservation project.⁶¹⁴ The fact that The Garden Conservancy was able to accept the easement proved advantageous, for now the easement could be designed to protect all the relevant aspects of the property such as the garden, the exterior of the house, and Ms. Lawrence's study.

Just as many different parties were involved in the dialogue that helped to create an effective vision for the Elizabeth Lawrence House and Garden as a public property; several distinct parties with varying agendas were intimately involved in the creation of the easement.⁶¹⁵ In the beginning, Historic Charlotte, Inc. was heavily influential in creating the first preliminary drafts of the easement.⁶¹⁶ Historic Charlotte's involvement with the easement was initially deemed essential due to the fact that The Garden Conservancy had no prior experience with façade and interior easements, while Historic Charlotte Inc. held several façade easements in the Charlotte area and had past expertise concerning these types of conservation easements.⁶¹⁷

Later on, Historic Charlotte's involvement with the easement declined once their attorney, Autumn Rierson-Michael, left the project. As a direct consequence of Ms. Rierson-Michael's departure, later drafts of the easement contained fewer provisions specifically protecting the interior of the house.⁶¹⁸ As the development of the document progressed, The

⁶¹⁴As mentioned previously, "preservation projects" are gardens that will one day be publicly owned. The Garden Conservancy will only designate a very limited number of preservation projects, which in their transition from private to public, are subject to intense guidance. Preservation Projects Program," The Garden Conservancy, 15 Feb. 2009 <<http://www.gardenconservancy.org/index.pl?Title=Preservation%20Projects>>

⁶¹⁵ Ibid.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid.

Friends of Elizabeth Lawrence also had several revised drafts commissioned on a pro-bono basis.⁶¹⁹

While this collaborative effort involving several parties ensured that all the important attributes of the property that needed to be protected would be, one of the main disadvantages of this process was that it created numerous delays, as the various parties debated the merits of specific provisions within the easement. Eventually, Ms. Wilson took control of the process, hiring an attorney who worked closely with representatives of Wing Haven in order to create a finalized easement document. After the provisions and language of the easement were reviewed and approved by both The Garden Conservancy and Wing Haven Foundation, Ms. Wilson granted the easement to The Garden Conservancy on April 25, 2008. Once the easement was conveyed, Ms. Lawrence then conveyed the property to Wing Haven Foundation.

4. Easement Provisions

In order to preserve the unique relationship that Elizabeth Lawrence enjoyed with her house and garden, the easement held by The Garden Conservancy on the Elizabeth Lawrence House and Garden protects three main aspects of the property: The garden, the exterior of the house, and Ms. Lawrence's study. By protecting these features, the easement prevents the wrongful modification or destruction of the architectural and horticultural attributes of the property that were most important to Ms. Lawrence during her tenure of ownership.

The features of the house and garden that are protected by the easement have been identified in the baseline document that accompanies the easement as an attachment. Like most conservation easements, the purpose of this specific baseline document is to identify the key “*conservation and preservation values*,” as they existed at the time that the easement was

⁶¹⁹ Ibid.

donated in order to establish a baseline for future maintenance obligations.⁶²⁰ The baseline document consists of a compilation of reports, drawings, plans, and photographs as listed below:⁶²¹

- 1) *Site plan of the Property showing the location of the House and Garden;*
- 2) *Floor plans and elevations of the House;*
- 3) *Photographs of protected features of the House and Garden;*
- 4) *Site plan showing the layout, hardscape, and plants of the Garden;*
- 5) *Plant identification map;*
- 6) *An aerial photograph of the Property;*
- 7) *Photocopy of the application to the National Register of Historic Places, accepted by Registry on September 14, 2006;*
- 8) *Photocopy of the Survey and Research Report submitted to the Charlotte Mecklenburg Historic Landmarks Commission, dated 2005; and*
- 9) *Survey of the Property, dated December 27, 2005;*

As to be expected given the stated mission of the easement holder (i.e. The Garden Conservancy), the main goal of the easement is to ensure the permanent preservation of the garden that Elizabeth Lawrence had lovingly created and nurtured for over thirty years. The easement document achieves this goal by requiring a number of proactive maintenance interventions on the part of the owner (i.e. Wing Haven Foundation), in addition to prohibiting unauthorized alterations or demolition of the key natural or manmade features that have been identified in the baseline document.

⁶²⁰Deed of Historic Preservation and Conservation Easement from Mary Lindeman Wilson to The Garden Conservancy, Rough Draft. 25, April 2008, 3-4.

⁶²¹ Ibid.

The provisions addressing proper maintenance of the property are thoroughly explained within Article 3:1 of the easement, which is appropriately entitled, *Covenant to maintain*. This clause makes it patently clear that it is the responsibility of the property owner to “*maintain the Property in the same structural and landscaping condition, and general state of repair, as that existing on the effective date of the easement.*”⁶²² Concerning the garden, Wing Haven Foundation is required to maintain the garden’s:

*layout, hardscape, and woody plants, as indicated in the Survey and Site Plan of the Property, Architectural Drawings of Hardscape and Layout of the garden and the Plant Identification Map.*⁶²³

This clause is quite thorough, not only specifying the features within the garden that are to be maintained, but also the items within the baseline document are being referenced in regard to acceptable maintenance.

Although for the most part, it is the responsibility of the garden owner to maintain the garden as it appeared at the time of easement donation using “*substantially similar materials,*” the easement does allow for some changes to occur, duly recognizing the fact that Elizabeth Lawrence regarded her garden as a personal scientific laboratory, which she used for the analysis of different types of plants.⁶²⁴ Therefore, the maintenance clauses within the easement addressing the garden allow for a degree of “*annual horticultural experimentation,*” subject to the constraints that have been specified above.⁶²⁵

⁶²² Ibid. Article 3:1(a), 6.

⁶²³ Ibid. Article 3:1(a), 7.

⁶²⁴ Ibid.

⁶²⁵ Ibid.

In addition to its proactive maintenance requirements, the easement also protects the garden by prohibiting any changes that would have an adverse affect on the garden’s appearance and integrity. For obvious reasons, demolition of the garden (in addition to the house) is strictly prohibited.⁶²⁶ Specifically, Article 3:2(o) prevents “*the removal, demolition, or alteration*” of the following features within the garden listed below without the express permission of the Grantee.⁶²⁷

1. *The overall layout of paths and plantings;*
2. *Trees and woody plants that are identified in the Substantial Plant Identification in Exhibit C. The removal of dead, diseased or potentially hazardous vegetation shall not require the approval of the Grantee, but the Grantee shall be notified of plans to remove any features of the landscape designated as key plantings for such reasons. As described in Paragraph 6.1, Grantor may introduce plants in the Garden beds.*
3. *Any improvement or structural feature designated as an important design feature in the Baseline Documentation, including but not limited to, any path, wall, fence, edging, pond, arbor, and sculpture or other garden ornamentation; provided, any such structural feature may be repaired or replaced provided that such repair or replacement does not alter the basic design of the feature and is accomplished with substantially similar materials and color as the feature being repaired or replaced;*
4. *Existing irrigation or drainage systems*

As can clearly be seen, the four sub-clauses cited above effectively prevent the destruction of all of the main components of the garden. However, both Articles 3:2(o)(2) and 3:2(o)(3) clearly demonstrate that while the easement is restrictive enough to prevent key

⁶²⁶ Ibid. Article 3:2(i), 8.

⁶²⁷ Ibid. Article 3:2(o), 9.

features from being dramatically altered or destroyed, Wing Haven Foundation has been granted considerable latitude to repair or replace certain elements provided that they are in keeping with the overall theme of the garden.

Some of the more interesting aspects of the easement are the provisions that it contains addressing the preservation of Elizabeth Lawrence's study and library. Earlier drafts of the easement that were prepared by Historic Charlotte, Inc. initially contained more extensive provisions regarding the interior, going so far as to prevent any changes or alterations throughout the entire 1st floor of the house.⁶²⁸ However, these restrictions proved unacceptable to Wing Haven Foundation, so later drafts focused specifically on preserving Elizabeth Lawrence's study.⁶²⁹ Although providing less protection for the interior than earlier drafts, the final clauses successfully preserve "the relationship between the house, study, and the exterior view of the garden."⁶³⁰

Ms. Lawrence's study is important for a number of distinct reasons. It was in the study overlooking her treasured garden that Ms. Lawrence wrote many of her monumental works on gardening.⁶³¹ At the time when the easement was being drafted, two features important to Ms. Lawrence remained in this room; her desk directly overlooking the garden, and the built-in-wall bookshelves that once housed her voluminous library that contained hundreds of works on gardening and horticulture.⁶³²

The easement successfully protects both of these key attributes. The crux of the protection afforded to Ms. Lawrence's study is contained in two particular clauses of the easement. Article 3:2(m) clearly prohibits "*The removal, demolition, or alteration of Ms.*

⁶²⁸ William Noble, telephone interview with author, 22 Jan. 2009.

⁶²⁹ Ibid.

⁶³⁰ Ibid.

⁶³¹ Hood.

⁶³² Ibid.

Lawrence's study located on the first floor of the House except for needed repairs."⁶³³ The unique status of the study in relation to the other rooms in the house is further clarified in Article 4:1(a), which states:

*Grantor may alter any and all interior spaces within the first and second floors of the House; provided, however, Grantor may not alter the study on the first floor of the House nor may Grantor make any alteration that expands the footprint of the House.*⁶³⁴

As can clearly be seen, the above clause successfully delineates the features within the interior that are protected by the easement and those that are not.

As with some of the other easements examined in this thesis, some of the clauses that were designed to preserve the house also help to protect the garden as well. Article 3:2(n) prohibits any alterations to the pre-1985 footprint of the house.⁶³⁵ This is important; since the garden literally 'wraps around' the house, any addition to the main structure would effectively destroy at the very least a small portion of the garden.⁶³⁶ The easement also prohibits the erection of temporary structures that would compromise the integrity of the garden, unless such structures are absolutely essential for the support of a preexisting maintenance or restoration project.⁶³⁷ Destruction or adverse alterations to the garden are further prohibited by Article 3:2(a), which prevents future subdivision of the property. Finally, as the easement mandates that

⁶³³ Deed of Historic Preservation and Conservation Easement from Mary Lindeman Wilson to The Garden Conservancy, Article 3:2(m), 8.

⁶³⁴ Ibid. Article 4:1(a), 10.

⁶³⁵ Ibid. Article 3:2(n), 8.

⁶³⁶ William Noble, telephone interview with author, 22 Jan 2009.

⁶³⁷ Deed of Historic Preservation and Conservation Easement from Mary Lindeman Wilson to The Garden Conservancy, Article. 3:2(h), 8.

the property can only be used for residential or academic purposes, any motivation to develop the property beyond its existing use and appearance is effectively eliminated.⁶³⁸

One unusual feature of this easement are the provisions pertaining to the annual inspections that will be conducted in order to ensure compliance with the easement. As this is the first easement held by The Garden Conservancy that protects a structure in addition to a garden, The Garden Conservancy felt that they did not have the necessary level of expertise to accurately gauge the condition of the house.⁶³⁹ Therefore, Historic Charlotte Inc. was invited as “representative of the Grantee, to help monitor the part of the easement concerning the house.”⁶⁴⁰ By delegating portions of the monitoring duties to Historic Charlotte, Inc., The Garden Conservancy helped to ensure that the overall condition of the property will be monitored by those most qualified to assess its condition.

In the event that violations do occur, the condition of the garden can easily be referenced through both the baseline document and the management plan, both of which play unique roles in helping to reinforce the terms of the easement. As stated previously, the goal of the baseline document is to establish the preservation and conservation values of the house and garden at the time when the easement was donated for future reference. In contrast, the goal of the management plan is to “*identify the principles by which the Garden was originally planned and maintained and as it can be maintained to interpret the horticultural legacy of Ms. Lawrence for the public.*”⁶⁴¹ The management plan will accomplish this goal through:

*Establish[ing] certain preservation goals and standards and
Recommend[ing] proposed actions which shall or may be
implemented by the Grantor (including Wing Haven) to*

⁶³⁸ Ibid. Article. 3:2(1), 8.

⁶³⁹ William Noble, telephone interview with author, 22 Jan. 2009.

⁶⁴⁰ William Noble, telephone interview with author, 22 Jan. 2009; Deed of Historic Preservation and Conservation Easement from Mary Lindeman Wilson to The Garden Conservancy, Article 11:2., 18.

⁶⁴¹ Ibid. Article 6, 12.

further the goals and standards in connection with:

- (a) the management of the House and Garden, and*
- (b) the expansion or replacement of any existing building, structure or improvement.”⁶⁴²*

In essence, the main difference between the baseline document and the management plan is that while the former addresses the actual physical values of the garden, the latter is more concerned with identifying the intangible principles embodied within the property that contribute to its significance.

Although the management plan had yet to be developed when the easement was donated in April 2008, the easement specifies that one must be completed “*within 1 year of the easement being signed.*”⁶⁴³ The easement also stipulates that the management plan must set policies for the following six criteria.⁶⁴⁴

- (a) Introducing plants within the Garden beds.*
- (b) Replacing the hardscape and woody plants as necessary.*
- (c) Maintaining and repairing parts of the House.*
- (d) Altering interior features of the house.*
- (e) Renovating outside storage and propagation areas.*
- (f) Adapting the House for limited public use, consistent with the Easement.*

5. Subsequent History

Although almost a year has passed since the easement was donated, a good deal remains to be accomplished in order to successfully complete the property’s transition from private residence to public garden.

⁶⁴² Ibid.

⁶⁴³ Effectively, this means the completed management plan should be created no later than April 25, 2009.

⁶⁴⁴ Ibid. Article 6, 12.

Although, Wing Haven Foundation has owned the Elizabeth Lawrence House and Garden for less than a year, they are progressing with plans to open it to the public sometime in 2009.⁶⁴⁵ One of the philosophical issues that needs to be addressed prior to this occurring is for Wing Haven to decide how best to effectively “manage and integrate the garden” in accordance with their own stated mission.⁶⁴⁶ While both Wing Haven and The Garden Conservancy have been actively working to try to clarify the mission of the property, both agree that “Wing Haven will maintain the Elizabeth Lawrence Garden as a living horticultural laboratory – showcasing many of the plants that flourish in the area – in order to promote Ms. Lawrence’s legacy.”⁶⁴⁷

In addition to the garden, The Garden Conservancy and Wing Haven have been working together to try to find appropriate uses for the house. At some point, a garden library will be donated to replace the gardening library that Elizabeth Lawrence once owned.⁶⁴⁸ The house will likely be used to host workshops and programs, as well as helping to “promote the mission of the garden.”⁶⁴⁹

Another important issue that needs to be addressed is the restoration of the garden to its former appearance during Elizabeth Lawrence’s tenure. It is important to remember that although Ms. Wilson was an exceptional steward of the garden, having ensured the survival of Ms. Lawrence’s basic garden design, the garden was still very much Ms. Wilson’s garden for a period spanning over twenty years. Although still in its conceptual stages, The Garden Conservancy would very much like to see certain components of the garden changed to how they appeared during Elizabeth Lawrence’s tenure of ownership.⁶⁵⁰

⁶⁴⁵ William Noble, telephone interview with author, 22 Jan. 2009.

⁶⁴⁶ Ibid.

⁶⁴⁷ Ibid.

⁶⁴⁸ Ibid.

⁶⁴⁹ Ibid.

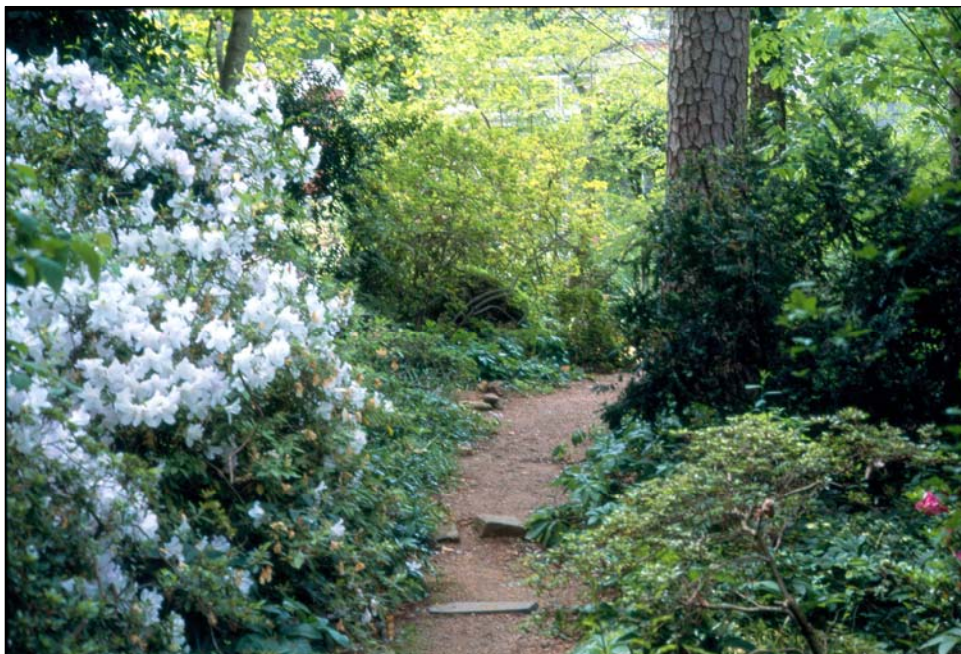
⁶⁵⁰ Ibid.

Most of the above issues can only be adequately addressed once a management plan is created. Only by creating a management plan that outlines specific strategies for the rehabilitation of the garden, in addition to developing a consistent philosophy for programmatic uses for both the house and garden, can any of the above issues hope to be addressed. At the time of this writing, although a rough draft of the management plan has been circulated for review, no document has been finalized.⁶⁵¹

⁶⁵¹ Patti McGee, telephone interview with author, 7 July 2009.



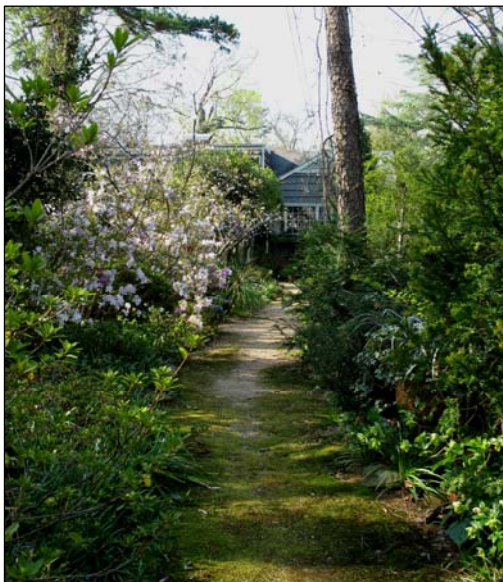
Figures 38 & 39: Main paths.
Elizabeth Lawrence Garden, Charlotte, North Carolina.
Photos courtesy of The Garden Conservancy





Figures 40:
 Central Reflecting Pool,
 Elizabeth Lawrence garden,
 Charlotte, North Carolina.
 Photo courtesy of The Garden
 Conservancy

Figures 41 & 42: From left, main axial path.
 Elizabeth Lawrence standing in front of wrought iron gate on southeast corner of house.
 Elizabeth Lawrence garden, Charlotte, North Carolina.
 Photos courtesy of the Garden Conservancy



Garden Easement Case Study # 3
Margaret Reid Wildflower Garden:
1439 Dixie Trail Rd. Raleigh, NC

1. Introduction

The last case study examines the easement held by Triangle Land Conservancy on the Margaret Reid Wildflower Garden, a small but important local garden in Raleigh, North Carolina. This particular easement serves as an interesting case study, for in contrast to the other easements profiled in this thesis, the maintenance and upkeep of the garden are the responsibility of the Grantee, i.e. TLC.

2. Property Description and History

The Margaret Reid wildflower garden is a privately owned 1.4 acre garden in Raleigh, North Carolina located on a 1.949 acre parcel bordered by Dixie Trail Rd. to the East, Lewis Farm Rd. to the North, and Lutz Rd. to the West. In addition to the garden, which occupies almost 75% of the parcel, the property also contains a large two-story Colonial Revival House that was built in 1943.

As its name aptly suggests, the Margaret Reid Wildflower Garden was created by Margaret Baker Reid (1912-1995). A Raleigh native “vitaly interested in plants,” Mrs. Reid was a lifelong horticulturalist who was well known in North Carolinian gardening circles.⁶⁵² Renowned for being “a conservationist before it became popular,” Mrs. Reid first began to

⁶⁵² Patricia Spearman, telephone interview with author, 4 May 2009.

design her garden in the early 1940's, gradually continuing to expand its size and scope over the course of her lifetime.⁶⁵³

In creating the garden, Mrs. Reid was greatly influenced by the principles of ecology that she had learned from Dr. Bertram Whittier Wells, a preeminent North Carolina botanist who was a friend and mentor to Mrs. Reid.⁶⁵⁴ Mrs. Reid first made the acquaintance of Dr. Wells through her husband, who like Dr. Wells, was a PhD faculty member at North Carolina State University.⁶⁵⁵ For many years, Mrs. Reid would accompany Dr. Wells on his frequent weekend outings to natural environments throughout The Triangle region, all the while absorbing his ecological ideas and gradually obtaining an encyclopedic knowledge of The Triangle's Native Plants.⁶⁵⁶ Among the many beliefs Mrs. Reid developed through her association with Dr. Wells is that humanity can only live with nature if and when we truly understand our natural environment.⁶⁵⁷ Throughout her life, Mrs. Reid stayed true to this belief, actively studying the various components of particular plants, gaining a keen understanding of how plants interact with other natural elements in the environment. In large part, the appearance of the wildflower garden as we know it today can be attributed to Mrs. Reid's keen observation of plant associations that she observed in natural environments.⁶⁵⁸

⁶⁵³ Patricia Spearman, e-mail to author, "RE: Margaret Reid Wildflower Garden," e-mail to author, 2 May 2009.

⁶⁵⁴ Dr. Bertarm Whittier Wells (1884-1978) was North Carolina's first full-fledged botanist, and was head of the Department of Plant Pathology at North Carolina State University from 1919-1948. Dr. Wells was the first PhD to be employed in NCSU's Plant Pathology department, and did much to increase the department's academic credibility. Today, Wells is known for being an innovator in the fields of botany and ecology, and is credited with having discovered many of the species of wildflower that exist in North Carolina. His book *Natural Gardens of North Carolina*, is still in print and widely regarded as the definitive source on the ecology of North Carolina. Kevin Brice, "The Margaret Reid Wildflower Garden," *Triangle Land Conservancy*, 24 Nov. 2008, 25 April, 2009, <http://www.triangleland.org/news/articles/properties/margaret_reid_brice.shtml>.

"Brief History," *B.W. Wells Association*, 25 April 2009, <www.bwwells.org>.

⁶⁵⁵ Benson Kirkman, telephone interview with author, 8 May 2009.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ Amy, Mackintosh, Mark Robinson & Associates P.A., and W. Benson Kirkman, consultant, *Management Plan for the Margaret Baker Reid Wildflower Garden, 1439 Dixie Trail, Raleigh, North Carolina*, 21 Nov. 1997. Pg. 3.

⁶⁵⁸ *Ibid.*

The garden also owes its creation to the rapid development that has been occurring in The Triangle. Mrs. Reid obtained the majority of the garden's plants from sites that would soon be lost permanently to development such as shopping centers, industrial parks, and housing subdivisions.⁶⁵⁹ Mrs. Reid gradually gained a certain amount of notoriety for her efforts, for once given permission, she could be reliably counted on to "head out with her shovel to rescue interesting native plants which she would then put in her 2-acre garden."⁶⁶⁰ Through her efforts, Mrs. Reid helped to ensure that many uncommon species of wildflowers indigenous to the Carolina Piedmont were saved from extinction.⁶⁶¹ Today, the 1.4-acre garden is home to over 400 species of plants, the vast majority of which were "rescued" or propagated.⁶⁶²

On many occasions, Mrs. Reid's outings to rescue plants were group efforts, as she was quick to share her enthusiasm for plants with other friends and amateur botanists.⁶⁶³ Even today, some twenty years after the last of these expeditions took place, memories of these outings are still fondly recalled by Mrs. Reid's friends, who considered it a great honor to be asked to accompany her. Among their many recollections that still remain vivid today include Mrs. Reid's enthusiasm when finding native plants, along with her ability to successfully remove a plant from the ground with its whole root system intact, thereby ensuring that it could be successfully replanted in her garden.⁶⁶⁴

Although carefully planned, in keeping with the principles that Margaret Reid held dear, the garden maintains a naturalistic appearance and feel.⁶⁶⁵ Its appearance can be described to resemble "a natural Piedmont woodland, with narrow meandering trails through a layered woods,

⁶⁵⁹ Ibid.

⁶⁶⁰ Patricia Spearman, "RE: Margaret Reid Wildflower Garden."

⁶⁶¹ Ibid.

⁶⁶² Ibid.

⁶⁶³ Sue Yarger, telephone interview with author, 1 May 2009.

⁶⁶⁴ Ibid.

⁶⁶⁵ Reid Garden Management Plan. Pg 4.

with high hardwood and pine canopy, understory trees, shrubs, and a carpet of herbaceous wild flowers and small shrubs.”⁶⁶⁶ Reflecting her naturalist tendencies, Mrs. Reid carefully located plants “primarily in portions of the site which approximate their natural habitat, and are arranged in association with other species that characteristically occur together in the wild.”⁶⁶⁷

Although naturalistic in appearance, the garden does contain a number of highly developed micro-environments, such as the Square, Dixie, and Flood Plain Gardens, which coexist with more forested areas such as the West and South Woods. In addition, the garden contains a number of unique aesthetic features, which Mrs. Reid affectionately referred to as ‘playhouses.’⁶⁶⁸ These playhouses, which in addition to plants also contained rock and wood formations, were specifically designed by Mrs. Reid to “draw attention to particular plant forms, foliage texture and color, as well as flowers.”⁶⁶⁹

Today, the Margaret Reid Wildflower Garden is primarily significant for serving as a floral repository for many of the Piedmont’s native plants, helping to illustrate “the range of wildflowers, particularly herbaceous species, which existed in Wake County and the Triangle region before major urban development occurred.”⁶⁷⁰ The garden is also notable in that it provides a large area of green space in what is today a fully developed residential neighborhood.⁶⁷¹ In addition, the garden is considered to be a valuable educational resource in lieu of the fact that it contains “a rich variety of native plant materials and micro-habitat types, assembled in a small, easily accessible garden space,” that is located near a major metropolitan

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid. Pgs. 3-4.

⁶⁷¹ Ibid. Pg. 4.

hub.⁶⁷² Finally, it is important to remember that the garden exists as a physical monument to the ecological values that were important to Mrs. Reid, and which she devoted her life to fulfilling.

3. Development of the Easement

The story behind the easement's creation began in the late 1980's. Although Margaret Reid had successfully overseen the growth and development of the garden for over 40 years, as she aged and her health began to decline, she astutely realized that unless she took the initiative in making arrangements to preserve the garden, it would be unlikely to survive long beyond her lifetime.

As can be imagined, although Mrs. Reid possessed a clear vision of the goal she hoped to accomplish, she was unaware of the various options available that could help her to achieve these objectives. Like others facing similar situations, Mrs. Reid initially felt that the only viable option that could successfully guarantee the garden's survival would be to donate the property to an organization interested in its continued existence, for example a garden club or nature conservancy.⁶⁷³ While not an ideal solution due to the financial sacrifice this would have meant for her two children, Mrs. Reid's family eagerly supported her wishes.⁶⁷⁴

Luckily for Mrs. Reid, destiny intervened. In addition to making her intentions known to her family, Mrs. Reid had also kept her friends abreast of the situation, as they too took an active interest in the garden's fate. One such friend was Benson Kirkman. A long-time friend of Mrs. Reid who was also active in Raleigh politics, Mr. Kirkman was at this time a member of Triangle Land Conservancy's Board of Directors, serving in the capacity as Chairman of the Stewardship

⁶⁷² Ibid.

⁶⁷³ Patricia Spearman, "RE: Margaret Reid Wildflower Garden."

⁶⁷⁴ Ibid.

Committee, which was tasked with determining the appropriateness of encumbering specific properties with conservation easements to be held by TLC.⁶⁷⁵

Mr. Kirkman soon realized that a conservation easement would be the most appropriate tool that would allow Mrs. Reid to realize her objectives, and sought to convince Mrs. Reid of this as well. Although Mrs. Reid proved receptive to the idea, at first she was a bit apprehensive due to the fact that she was unfamiliar with the concept of conservation easements. Such concerns were quickly addressed, as Mr. Kirkman generously explained the basic principles of conservation easements “using standard law school analogies,” such as the inevitable “bundles of sticks,” metaphor.⁶⁷⁶

Having convinced Margaret Reid that the best option to pursue was a conservation easement, Mr. Kirkman then had to gain the support of a majority of the members of TLC’s board. Despite Mr. Kirkman’s status both on TLC’s board and in the community as a whole, the board was initially reluctant “to assume an easement on an urban garden,” going so far as to question whether such an easement would be consistent with TLC’s mission.⁶⁷⁷ Another concern that the board raised was in regards to what would happen to the garden once the property changed hands, for it would not be easy to find a potential owner both interested in and qualified to care for the garden.⁶⁷⁸ Despite such objections, TLC’s board eventually gave their approval to the project.

After having gained the support of TLC’s Board of Directors, Mrs. Reid and Mr. Kirkman turned their attention to having a suitable easement document created. For this task, they turned to Mr. William Joslin, a Raleigh area real estate attorney with the firm of Joslin,

⁶⁷⁵ Benson Kirkman, telephone interview with author.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid.

Sedberry and Lamkin LLP. Mr. Joslin was a personal friend of Mr. Kirkman, and agreed to create the easement for Mrs. Reid on a pro bono basis.⁶⁷⁹

As Mr. Joslin did not have any prior experience with conservation easements, to gain further insight into what was required, he consulted “a book or two that had examples of conservation easements,” in addition to conversing with “one or two people who had experiences with them for other purposes.”⁶⁸⁰ Looking back on the experience, Mr. Joslin recalled with satisfaction that “we kind of stumbled through it, but in the end we came up with a pretty workable solution to her wishes about preserving and helping to sustain the garden perpetually.”⁶⁸¹ After having completed the easement, which took about a month to create, the parties involved closed on August 19, 1992.⁶⁸²

4. Easement and Management Plan Provisions

a. Easement Document

The easement encumbering the Margaret Reid Wildflower Garden has two main objectives. First, the easement gives TLC “*the right and obligation to preserve and protect the conservation values of the Wildflower Garden and Plants on the property in perpetuity.*”⁶⁸³ Secondly, the easement seeks to ensure that “*the integrity and design of the garden as created by Grantor*” is also permanently protected.⁶⁸⁴

One of the main methods in which the easement helps to protect the garden is by prohibiting land uses “*that will significantly impair or interfere with its [the garden’s]*

⁶⁷⁹ Ibid.

⁶⁸⁰ William Joslin, telephone interview with author, 14 May 2009.

⁶⁸¹ Ibid.

⁶⁸² Ibid.

⁶⁸³ Deed of Conservation Easement from Margaret Reid Baker to Triangle Land Conservancy, 19 Aug. 1992 (filed 1 Sept. 1992), Wake County, North Carolina, Deed Book 5311, Pg. 804. Wake County Register of Deeds, Raleigh, NC, 2.

⁶⁸⁴ Ibid.

*conservation value.*⁶⁸⁵ These provisions are contained within Article 5 of the easement, appropriately entitled “*Prohibited Uses.*”⁶⁸⁶ Among the uses of the garden that are prohibited by Article 5 include the following:⁶⁸⁷

- *legal or de facto subdivision*
- *Any, residential, commercial, or industrial use of or activity of the Wild Flower Garden and its Plants.*
- *The placement or construction of any buildings, structures, or other improvements of any kind*
- *Any substantial alteration of the surface of the land*
- *Any use or activity that causes or is likely to cause significant soil degradation or erosion or significant pollution of any surface or subsurface waters*
- *The above ground installation of new utility systems*
- *The placement of any signs or billboards on the Wild Flower Garden and Plants*

In essence, the above clauses prevent any future usage of the land that would be incompatible with the garden’s preservation. These restrictive clauses are further reinforced by the easement document, which states that the garden’s sole permitted uses are “*those involving preservation, research, and education.*”⁶⁸⁸

The key strategies that allow TLC to ensure the preservation of the garden are the easement’s maintenance and enforcement provisions. In contrast to the other garden easements held by Triangle Land Conservancy, the easement encumbering the Margaret Reid Wildflower

⁶⁸⁵ Ibid. Article 3, 4.

⁶⁸⁶ Ibid. Article 5, 6-8.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid.

Garden transfers responsibility for maintenance and upkeep of the garden to TLC as grantee.⁶⁸⁹

In particular, the easement grants TLC the authority to assume a proactive role in the following activities:⁶⁹⁰

- Plant Propagation
- Selection of new plants
- Eradication of undesirable vegetation
- Opening of trails

TLC's managerial authority is further reinforced by Article 9 of the easement, which clearly states that TLC as grantee: "*shall bear all costs and liabilities of any kind related to the operation, upkeep, and maintenance of the Wild Flower Garden and Plants.*"⁶⁹¹

The garden's permanent preservation is also ensured by the easement's enforcement clauses. Article 4(c) of the easement grants TLC the authority to:

Enter upon the Wild Flower Garden and Plants at reasonable times in order to monitor its condition, provided that such entry shall be after reasonable notice to Grantor and her heirs and assigns, or in accordance with an established schedule

In accordance with this provision, TLC carries out annual inspections of the garden.

TLC fulfills the research and educational objectives of the easement by carrying out a limited number of annual guided tours and workshops on the garden's premises.⁶⁹² Due to the fragile and ephemeral nature of The Reid Wildflower Garden, TLC strictly limits the number of

⁶⁸⁹ Of the three gardens easements held by Triangle Land Conservancy, the easement on the Reid Wildflower Garden alone has provisions charging TLC with the maintenance of the garden. Katherine Wright, "RE: Garden Easement Questionnaire," 3 April 2009.

⁶⁹⁰ Deed of Conservation Easement from Margaret Baker Reid to Triangle Land Conservancy, Article 4(a), 5.

⁶⁹¹ Ibid. Article 9, 10.

⁶⁹² Brice.

participants at such events, and all tours or workshops must be conducted “*under the supervision of a recognized leader.*”⁶⁹³

Consistent with the easement’s overall objective of preserving the garden in perpetuity, the general public is not allowed access to the garden at will.⁶⁹⁴ In regards to the organized group activities carried out by TLC that are mentioned above, these events may only take place “*after consultation with Grantor and the succeeding occupants of the dwelling house.*”⁶⁹⁵

While the easement document is primarily concerned with ensuring the permanent protection of the 1.4 acres of the property that the garden occupies, the easement does restrict the usage of “*the 0.518 lot dwelling parcel*” to “*a single family dwelling unit,*” unless TLC as grantee permits otherwise.⁶⁹⁶ That said, the easement does not require that the grantor or any future property owners to consult TLC if they wish to make any alterations to the house or any other features on the 0.518-acre residential portion of the property.

Like most other easements held by TLC, the easement on the Reid Wildflower Garden is a ‘qualified conservation contribution’ designed to last in perpetuity and is in full compliance with IRS Section 170(h).⁶⁹⁷ In the event that Triangle Land Conservancy ceases to exist, the rights and obligations of the easement will then be transferred to the North Carolina Botanical Garden Foundation.⁶⁹⁸

⁶⁹³ Ibid. Article 6(b), 9.

⁶⁹⁴ Ibid. Article 8, 10. “*No right of access by the general public to any portion of the Property is conveyed by this Conservation Easement.*”

⁶⁹⁵ Ibid. Article 6(c), 9. See also Article 7(b), Pg. 9 for clarification.

⁶⁹⁶ Ibid. Article 7(e), 10.

⁶⁹⁷ Ibid. Article 10:1, 12.

⁶⁹⁸ Ibid. Article 12:1, 14.

b. Management Plan

In 1997, a management plan was created for the Margaret Reid Wildflower Garden. Although a management plan was originally thought to be unnecessary when the easement was created in 1992, by 1997 a number of unresolved issues, both pragmatic and philosophical, had convinced the garden's primary stakeholders that the easement document by itself was insufficient, and that a management plan would be required in order "to provide direction and guidance for the level of management needed to provide basic protection of the conservation values of the area covered by the easement."⁶⁹⁹

The need for a comprehensive management plan was highlighted by the easement document's inability to resolve two particular conflicts. First, in September 1996, the garden suffered significant damage at the hands of Hurricane Fran.⁷⁰⁰ The intensity of the storm toppled a number of tall hardwood trees, blocking some of the garden's trails as well as destroying some vegetation. The loss of the trees was particularly significant, as it changed the canopy structure of the garden, the resultant increase in sunlight causing a dramatic increase in the number of unwanted plants such as vines and brambles.⁷⁰¹ Unfortunately, since the easement document did not specifically explain the proper response to natural calamities such as the hurricane, there was initially some debate among the garden's stakeholders as to what treatments would be appropriate for the garden.⁷⁰²

⁶⁹⁹ Reid Management Plan, 5.

⁷⁰⁰ Hurricane Fran was a Category 3 Hurricane that made landfall at Cape Fear, North Carolina on September 5, 1996. Although once inland, the hurricane's strength quickly dissipated, it was still classified as a Tropical Storm when it passed over Raleigh, causing significant damage. Hurricane Fran was responsible for over \$3 billion in damage and the loss of 26 lives.

⁷⁰¹ Reid Management Plan, 9, 21.

⁷⁰² While the blocked trees and increased sunlight posed a threat to the garden's integrity, a quick restoration of the garden's physical attributes would have been at odds with Mrs. Reid's philosophy of allowing the garden to naturally evolve.

Secondly, it was felt that a management plan would be needed in order to clarify the roles that each of the stakeholders possessed in regards to the garden's oversight and management. Triangle Land Conservancy was particularly concerned with this point, as representatives of the organization felt that the easement document "as written might be construed to put more responsibility for garden management on TLC than they were prepared to provide."⁷⁰³

The management plan begins by formally defining the 'conservation values' present in the garden that the easement was designed to protect. These values were originally supposed to have been identified in an 'inventory' (i.e. baseline document) that should have been completed at the time when the easement was donated.⁷⁰⁴ Unfortunately, this inventory, which was supposed to consist of lists, reports, maps, photographs and other miscellaneous documentation that were intended to thoroughly describe the garden's features, was never prepared, and the garden's conservation values were to remain undefined until the management plan was subsequently created.⁷⁰⁵ The 'conservation values' that are identified in the management plan are listed as follows.⁷⁰⁶

- Physical integrity of site as undeveloped open space
- Ecological integrity of native plant communities
- The diversity and abundance of wild flowers
- Integrity and design of the garden
- Accessibility for educational and research purposes

For each of the principal 'conservation values' cited above, the management plan provides a list of specific criteria that must be met in order to ensure that these 'conservation

⁷⁰³ Amy Mackintosh, "RE: Information on Margaret Reid," e-mail to author, 29 April 2009.

⁷⁰⁴ Deed of Conservation Easement from Margaret Baker Reid to Triangle Land Conservancy, 2.

⁷⁰⁵ Deed of Conservation Easement from Margaret Baker Reid to Triangle Land Conservancy, 2. Reid Management Plan, 5.

⁷⁰⁶ Reid Management Plan, 5-6.

values’ are being protected. These criteria, which are referred to as ‘measures of achievement,’ differ for each specific conservation value.⁷⁰⁷

Having established the principal ‘conservation values’ that apply to the garden as a whole, the management plan then proceeds to discern the fact that “the quality of the existing ecological and aesthetic site conditions varies within the garden.”⁷⁰⁸ In response, the management plan divides the garden into spatial areas based upon their level of significance. These areas are referred to as “core areas” and “transition areas.”⁷⁰⁹

“Core areas,” which obviously constitute the more significant areas within the garden, are defined as sections that contain:

rich, well-developed native plant communities with concentrations of abundant and diverse herbaceous native wildflowers and trees and shrubs, including rare and unusual species, and a good representation of the herbaceous woodland flora of Wake County.⁷¹⁰

Due to the important nature of the plants that are contained within the core areas, the management plan states that these areas will require more aggressive maintenance on the part of the stakeholders, in particular emphasizing the need to control or remove weeds or other plants of an invasive nature.⁷¹¹ The management plan designates the following areas within the garden as ‘core areas.’⁷¹²

⁷⁰⁷ Ibid. 6-7.

⁷⁰⁸ Ibid. 7.

⁷⁰⁹ Ibid. 7-8.

⁷¹⁰ Ibid. 7-8.

⁷¹¹ Ibid. 24-25.

⁷¹² Ibid. 7.

- Dixie Trail Garden
- South Woods
- Flood Plain Garden

In contrast to the core areas, “transition areas,” are defined as areas that “in general contain few elements of a native plant community and large concentrations of invasive exotic species.”⁷¹³ Transition areas are primarily valuable both as wildlife habitats and as buffers to the garden’s ‘core areas.’⁷¹⁴ Befitting the diminished importance of “transition areas” the management plan states that invasive plants in the transition areas should be allowed to grow unhindered provided that they do not spread into the garden’s core areas.⁷¹⁵ Furthermore, transition areas can also be used as testing grounds for introducing new native plants that are not currently present in the garden.⁷¹⁶

In addition to listing management goals for both the core and transition areas, the management plan also provides specific instructions for the management of the following individual microenvironments that feature prominently within the garden.⁷¹⁷

- Flood Plain Garden
- Dixie Trail Garden
- South Woods
- West Woods
- Square Garden

⁷¹³ Ibid. 8.

⁷¹⁴ Ibid.

⁷¹⁵ Ibid. 24.

⁷¹⁶ Ibid. 14.

⁷¹⁷ Ibid. 24-33.

For each of the microenvironments listed above, the management plan identifies the following specific features in order to facilitate their proper care and maintenance:⁷¹⁸

- Main plant communities
- Boundaries of core areas
- Characteristic vegetation
- Rare and individual species of plants (if applicable)
- Invasive plants
- A list of tasks to be carried out in order to ensure proper maintenance

As mentioned previously one of the main goals of the management plan is to clearly define the role that each of the stakeholders possess in maintaining the garden – in particular TLC. This issue had never before been adequately addressed, for in the five years that had passed since the closing of the easement, the garden had been besieged by instability that had been brought about first by Mrs. Reid’s illness and subsequent death in April 1995, then the destruction wrought by Hurricane Fran in September 1996, and finally the subsequent quest that ensued to find a suitable owner for the garden.⁷¹⁹ The management plan attempts to rectify this problem by identifying two fundamental problems that had limited TLC’s ability to effectively manage the garden: First “the nature of the site’s ownership and TLC’s rights and responsibilities,” and second, the unique “character of the resource” as a garden.⁷²⁰

In regards to the extent of TLC’s responsibilities, the management plan acknowledges the difficulty of TLC’s position, noting that “the Terms of the Conservation Easement over the garden place management responsibilities on TLC while limiting TLC’s use of land and access

⁷¹⁸ Ibid. 24-33.

⁷¹⁹ Ibid. 10.

⁷²⁰ Ibid. 8, 21.

to the property.”⁷²¹ In order to alleviate this, the management plan stresses that management responsibilities are to be divided among each of the following stakeholders listed below:

- Staff of Triangle Land Conservancy
- The garden owner
- Volunteers
- Friends of Reid Garden

According to the management plan, TLC is primarily responsible for overseeing the physical work that is to be carried out in the garden by the landowner and volunteers, as well as establishing “a clear understanding between TLC, any organized group of volunteers and the landowner as to the rights and management responsibilities of each.”⁷²² While the management plan does not attempt to discourage TLC from taking a more active role in the management of the garden, it does stress that any physical activity that TLC elects to carry out in the garden should be “narrowly defined and have recognizable boundaries so that the management tasks are achievable,” and therefore not burdensome to TLC.⁷²³

One of the ways in which the management plan seeks to reduce TLC’s level of responsibility is by cultivating the enthusiasm and goodwill of the garden owner. The management plan recommends that whenever possible, “TLC should encourage the landowner to take an active interest in the garden and to undertake management tasks within the easement.”⁷²⁴ In essence, the overall goal is to try to make the landowner “a partner in the management of the

⁷²¹ Ibid. 9.

⁷²² Ibid. 12-13.

⁷²³ Ibid. 12.

⁷²⁴ Ibid. 12.

easement.”⁷²⁵ Obviously, for such a strategy to work, it is essential for TLC to establish a strong working relationship with the owner based upon clear communication in order to ensure that there is no ambiguity in regards to “the goals and objectives to each party relative to the garden.”⁷²⁶ Some of the tasks that the management plan has deemed suitable for the garden owner to carry out include protecting the garden’s diversity of native plants and its ecological and design integrity, as well as enhancement of the garden’s aesthetic qualities “provided they are in keeping with the guiding principles and terms of the easement.”⁷²⁷

In addition to the garden owner, the management plan envisions that a large portion of the garden’s physical maintenance will also be carried out by volunteers working under the supervision of TLC. The management plan stresses the importance of establishing a ‘core group of volunteers’ who are knowledgeable enough about the garden to be able to carry out the majority of its routine maintenance activities with only a minimal amount of supervision.⁷²⁸ In order to ensure that volunteers work as efficiently as possible, the management plan recommends that volunteers should be made aware of the principal goals of the management plan, and that they should be assigned to work on projects with a clearly defined focus in order to foster a “sense of accomplishment.”⁷²⁹

In order to relieve TLC of the burden of directly recruiting and managing the volunteers, the management plan calls for the creation of a quasi-independent group answerable to TLC that is designed specifically to oversee such efforts. This group came to be known as The Friends of the Reid Garden.⁷³⁰

⁷²⁵ Ibid. 12.

⁷²⁶ Ibid. 16.

⁷²⁷ Ibid. 33.

⁷²⁸ Ibid. 12-13, 35.

⁷²⁹ Ibid. 12.

⁷³⁰ Ibid. 35.

In regards to the other dilemma of how to effectively manage a unique resource such as a garden, the management plan acknowledges that since the resource in question is a garden, it will by its very nature require more intensive management in order “to preserve the ecological integrity and species diversity of the site.”⁷³¹ The management plan reiterates that TLC’s “primary interests” in the garden are “protection of the species diversity, basic garden philosophy, and open space.”⁷³² However, the management plan makes it patently clear that due to TLC’s finite resources, the organization does not have the ability to carry out maintenance and management operations addressing every aspect of the garden.

In response to this dilemma, the management plan states that TLC shall focus the majority of its efforts primarily on protecting the garden’s ecological values, while limiting its responsibility “for the protection of the basic garden structure and design philosophy to monitoring work in the easement area [that has been carried out] by the landowner and independent volunteers.”⁷³³ The justification given for this decision is stated as follows:⁷³⁴

While the easement has potential value for demonstrating the use of native plants in a garden setting, management for aesthetic purposes requires more effort than TLC is able to provide at the present, especially in the context of a private property with very limited public use.

The management plan also helps to clarify what constitutes appropriate changes to the garden and how they should be addressed by TLC. One of the main shortcomings of the

⁷³¹ Ibid.

⁷³² Ibid. 11.

⁷³³ Ibid. 23

⁷³⁴ Ibid.

easement document is that although it clearly gives TLC the authority to review and approve all changes concerning the flora and design of the garden, it does not make any attempt to define what changes are in fact appropriate.

While the management plan does not provide specific examples of ‘appropriate changes,’ it does provide broad philosophical guidelines for TLC to follow. The management plan stresses the value of design consistency, noting that all changes that are carried out “should be in harmony with the basic theme, palette, and style which exists in the garden.”⁷³⁵ In addition, changes that are made should be in accordance with Margaret Reid’s original philosophy that any plants introduced into the garden should be native to The Triangle region of North Carolina.⁷³⁶

The management plan also provides suggestions as to how TLC may fulfill the educational purposes of the easement. As the easement document does not permit any grant of public access, any benefit that the public can derive from the garden is consequently dependent upon the goodwill of the current garden owner. The management plan recognizes this fact and encourages “TLC to pursue a formal agreement with the landowner for greater access to the site for educational purposes and enjoyment of the resource.”⁷³⁷ However, in order to ensure that the garden’s integrity is protected, the management plan limits the size of educational groups to no more than 16-20 closely supervised individuals.⁷³⁸

The management plan also establishes biannual monitoring of the garden by the easement steward.⁷³⁹ The first inspection should be made in the spring in order to identify newly bloomed

⁷³⁵ Ibid. 14.

⁷³⁶ Ibid.

⁷³⁷ Ibid. 12.

⁷³⁸ Ibid. 18.

⁷³⁹ Ibid. 15.

leafed species of plants, while an additional inspection should be carried out in the fall to assess the condition of “late-blooming wildflowers.”⁷⁴⁰

Finally, the management plan states that both the baseline document and management plan should be reviewed either every five years or when the property changes ownership.⁷⁴¹ Both documents should be updated if necessary to reflect the garden’s “changing conditions and goals.”⁷⁴²

5. Subsequent History

The five-year period between the time when Margaret Reid donated the easement to TLC in 1992 and the purchase of the property by the current owners in June 1997 was a tumultuous time for the garden. Shortly after having donated the easement, Mrs. Reid’s health began to decline and she was no longer able to actively participate in the garden’s daily maintenance.⁷⁴³ In April 1995, Mrs. Reid passed away, and the property was subsequently leased to two tenants who continued to occupy the property until early 1997.⁷⁴⁴ During this time, only minimal maintenance was carried out on the garden, which suffered a further blow in September 1996 when Hurricane Fran destroyed a number of the garden’s trees, altering the garden’s canopy structure.

Despite the turmoil and neglect that the garden experienced during this period, the basic design of the garden managed to survive intact. In large part, this can be attributed to Mrs. Reid’s foresight, for having cultivated wildflowers indigenous to the region, she was able to ensure that by the time of her death the garden could survive for extended periods of time with

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.

⁷⁴² Ibid.

⁷⁴³ Ibid. 10.

⁷⁴⁴ Ibid.

minimal intervention.⁷⁴⁵ However, the chaotic state of affairs that had resulted in the garden's long-term neglect was clearly unacceptable to the garden's stakeholders, who decided that a management plan would be needed in order to provide more specific guidelines on the garden's proper maintenance. Work on the management plan commenced in mid-1997, as Benson Kirkman and Amy Mackintosh (who later became the coordinator of The Friends of the Reid Garden) collaborated with the firm of Mark Robinson & Associates, P.A. to write the plan, which was completed in November 1997.

In an ironic twist of fate, it was Ms. Mackintosh's work on the management plan that brought the property to the attention of her parents, Robert and Julia Mackintosh, who purchased the property on June 4, 1997 and remain its owners to the present day.⁷⁴⁶ This was fortuitous, for the Mackintoshes, who had previously owned a large nursery in South Carolina, were looking to retire in the Raleigh metro-area, and relished the challenge of "an adventure that involved gardening."⁷⁴⁷ The Reid Garden was ideally suited for the Mackintoshes, as Mr. Mackintosh, who had once been a licensed landscape architect, possessed the necessary knowledge and expertise required to maintain the garden.⁷⁴⁸

Since assuming ownership of the garden, the Mackintoshes have maintained the garden in accordance with Mrs. Reid's principles, only adding native plants as needed.⁷⁴⁹ With three exceptions, the garden has remained unchanged. First, in the Square Garden, a slope was leveled and brick retaining walls were built at the top and at the bottom, and the contained area in between was "then planted with lawn and surrounded by shrubs."⁷⁵⁰ In the Flood Plain Garden,

⁷⁴⁵ Pat Spearman, telephone interview with author, 4 May 2009.

⁷⁴⁶ Amy Mackintosh, "RE: Information on Margaret Reid."

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid.

⁷⁴⁹ Ibid.

⁷⁵⁰ Ibid.

an ‘on-grade boardwalk’ was later added to help define the path.⁷⁵¹ Finally, in the Dixie Trail Garden, a small pond was constructed to fill a void that had been left by a tree that had fallen during Hurricane Fran.⁷⁵² The area around this pond has also been developed as a rock garden.⁷⁵³ During their tenure of ownership, the Mackintoshes have also overseen the removal of large portions of ivy and vinca, two of the invasive plants that were identified as hazardous in the management plan.⁷⁵⁴

Although most of the garden’s maintenance is carried out by Mr. Mackintosh, he is also assisted by 2-3 “stalwart volunteers” from The Friends of Reid Garden, who convene at the garden once a month on prearranged ‘workdays.’⁷⁵⁵ This organization, which when founded in 1997 was “a semi-independent organization under the tutelage of TLC,” has since evolved to become the local Raleigh-area chapter of the North Carolina Native Plant Society, and is largely run through e-mail correspondences.⁷⁵⁶

The Mackintoshes have also been active in ensuring that the educational purposes of the easement are fulfilled. The garden is occasionally open to the public for special events, and every Spring for the last ten years the Mackintoshes have taught an Encore class on native plants, using the garden as their base.⁷⁵⁷ The tremendous efforts on the part of the Reids has not gone unnoticed, for in 2001, the garden won the Sir Walter Raleigh Award for Community

⁷⁵¹ Ibid.

⁷⁵² Ibid.

⁷⁵³ Ibid.

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid.

⁷⁵⁷ Barbara Whitaker, “Mind Games: The Fit Mind Keeps Working,” The New York Times, 11 April 2006, 13 April 2009

<http://www.nytimes.com/2006/04/11/business/retirement/1education.html?_r=1&scp=1&sq=Margaret%20Reid%20Wildflower%20Garden&st=cse>.

Appearance from the City of Raleigh, on the basis of the garden's outstanding 'Tree and Landscape Conservation.'"

Since taking over ownership of the garden in 1997, relations between the Mackintoshes and TLC have remained open and cordial. Due to the fact that the Mackintoshes have demonstrated great prudence and skill in maintaining and implementing changes to the garden, TLC has concluded that for the time being it is unnecessary to put into practice every facet of the management plan, and has largely been content to "relax and trust their (the Mackintoshes) judgment, since their goals are similar to Margaret Reid's."⁷⁵⁸

⁷⁵⁸ Amy Mackintosh, "RE: Information on Margaret Reid."



Pictures 43, 44, 45, 46:
Various views of Margaret Reid Wildflower Garden,
Raleigh, North Carolina.
Pictures courtesy of Triangle Land Conservancy





Figures 47-52: Examples of the diverse range of native flora found in the Margaret Reid Wildflower Garden , Raleigh North Carolina.
Photos Courtesy of Triangle Land Conservancy

The love of gardening is a seed once sown that never dies. – Gertrude Jekyll⁷⁵⁹

CHAPTER 11. CONCLUSION

The purpose of this last chapter is to briefly evaluate the relative level of success that easements have enjoyed in protecting the three gardens examined in this work. In addition, this chapter concludes with a small list of recommendations targeted toward garden owners who are considering donating a conservation easement on their garden. These recommendations, which were formulated based upon the thorough analysis of each of the three organizations' easement programs, are intended to assist in the construction of a proficient easement document that will withstand legal challenges and help to preserve a garden owner's garden in perpetuity.

Summary of Garden Easement Case Studies

1. HCF: Loutrel Briggs Garden: (64 S. Battery, Charleston, SC)

Since its creation in 1986, this easement has proven to be a successful tool in ensuring that the c. 1933 garden designed by Loutrel Briggs continues to be preserved. In regards to the garden, the easement document is of particular importance, as it constitutes the first official recognition of the garden's importance. For although the William Gibbes House had been nominated to the National Register of Historic Places in 1976, the garden, which at the time was forty-three years old, was not even mentioned in the property's description. To this day, the National Register listing has not been updated, despite the fact that the Loutrel Briggs garden

⁷⁵⁹ "Gardening Quotes and 'Gardenisms,'" Northern Gardening, 15 June 2009, <<http://www.northerngardening.com/quotes.htm>>.

now meets the 50-year age requirement clearly outlined in National Register Criteria Consideration G, and would also most likely be eligible for inclusion under most of the current criteria.⁷⁶⁰

While history has shown that the easement has clearly been successful, upholding the terms of the easement has not always been an easy task for Historic Charleston Foundation. As mentioned previously, during the Trainer's twenty-year tenure of ownership, tensions arose twice, first over the proposed location of the in ground pool, and later over the unauthorized construction of the paved brick drive. In regards to the former, after some dialogue, the matter was settled through a compromise agreement allowing the Trainer's to construct their pool in the desired location provided that a thorough archaeological excavation was carried out beforehand. In regards to the latter, after some deliberation, HCF elected to drop its dispute with the Trainers over the unauthorized construction of the driveway, even though its construction was in clear violation of the easement.

The decisions that HCF reached concerning the latter violation serve as a valuable lesson to prospective easement holders: When dealing with violations, it is important to exercise prudence and diplomacy and carefully pick and choose which issues are important enough to fight for. In this particular instance, since the purpose of the open-space component of the easement was primarily to protect the Loutrel Briggs garden, HCF made the decision to let the matter drop on the grounds that although unauthorized, the construction did not occur at the garden's expense.

⁷⁶⁰ The Loutrel Briggs garden is arguable eligible for inclusion B, due to its association with the lives of famous and noteworthy individuals such as Loutrel Briggs, and Cornelia Roebing. The garden is also eligible under Criterion C, as Loutrel Briggs was arguably a master landscape architect, and the garden is a superb example of the Colonial Revival medium in which he worked. Finally, the garden will be eligible under Criterion D, for past archaeological excavations carried out when the pool was constructed in the late 1980's did yield notable information about history, and further excavations would likely yield further data.

Another important fact worth noting is that this particular easement dispels the commonly held notion that a property encumbered by a conservation easement will be permanently limited in value. In 2006, the current owner of the William Gibbes House, J. Elizabeth Bradham, purchased the house from the Trainer's for \$6.1 million, which at the time was the highest price ever paid for a house on the Charleston peninsula. While obviously this will not occur in every given circumstance, the fact remains that between 1986 and 2006, the value of the property increased by approximately 930%, despite the fact that the house, its interior, and the grounds – in essence the whole property, is encumbered by a conservation easement.

Finally, it is important to mention the pivotal role that HCF's revolving fund played in helping to facilitate the creation of the easement. A well-funded and competently managed revolving fund can often serve as a useful implement to support the objectives of an easement program, as it did in this particular situation. For if HCF did not have access to a revolving fund, it is highly unlikely that they would have been able to raise the money to purchase the house, and it was the purchase of the Gibbes House which gave HCF the authority to amend the deed to include restrictive covenants, which ultimately led to the creation of the easement document as it exists today.

This transaction also effectively illustrates that it is sometimes necessary for a revolving fund to lose money in order to achieve a stated goal. Case in point, although HCF's revolving fund lost almost \$100,000 in the resale of the Gibbes House to the Trainers, in exchange they extracted legal guarantees (i.e. the easement) that ensured that the house, its interior décor, and the garden would be preserved in perpetuity. In essence, it can also be argued that despite the financial loss, HCF came away from this agreement with the superior deal.

Given the existence of Charleston's historic preservation ordinance, along with the general preservation ethos that prevails among Charlestonians, some critics may argue that the Loutrel Briggs garden (in addition to the William Gibbes House) could have successfully been preserved without the presence of the easement. Unfortunately, in many respects this skepticism is unfounded, for history has repeatedly demonstrated that public sentiment is subject to the winds of change, and with it, the laws and regulations that were once inspired by it, a notable example being historic preservation ordinances. In contrast, the conservation easement encumbering the property is a legal contract that will protect the house and garden in perpetuity, provided that these resources remain to be preserved.

2. The Garden Conservancy: Elizabeth Lawrence House and Garden

As the easement encumbering the Elizabeth Lawrence House and Garden was only adopted a little over a year ago, it is extremely difficult to measure the effect that the easement has had on ensuring the garden's long-term preservation. Such a determination is made even more difficult by the fact that unlike the other two gardens examined here, which are and will remain privately owned, the Elizabeth Lawrence House and Garden is now owned and operated for the benefit of the public by Wing Haven Conservancy, a private non-profit committed to its preservation. In all likelihood, provided that Wing Haven Conservancy retains ownership of the property, there will never be any conflicts of interest concerning the appropriate care and preservation of the house and garden.

In analyzing this easement, one may dispute whether the easement is actually needed to protect this property, in lieu of the fact that from the beginning it had always been the intention of all of the stakeholders to make the Elizabeth Lawrence House and Garden a public garden.

However, it is important to keep in mind that the finances of Wing Haven Conservancy, like all non-profits, are at the mercy of the largesse of its benefactors, and as mentioned previously, Wing Haven had to substantially readjust its budget in order to accommodate ownership of the Elizabeth Lawrence House and Garden. Despite the negative consequences that result, history has shown that non-profits do routinely fail, especially in dire economic times, such as those we are experiencing today. Taking this sobering fact into account, it appears to have been a prudent decision on the part of the stakeholders to create an all-encompassing conservation easement to provide a legal crutch in the unlikely event that Wing Haven Conservancy ceases to exist or is ever compelled to cede control of the property, especially when one considers the recent spate of teardowns that have been occurring within the vicinity of the property.

If there is one major lesson that can be learned from this easement, it is the fact that having a large number of stakeholders involved with an easement's creation greatly complicates the process. Although all of the major stakeholders involved with the easement's creation such as Wing Haven Conservancy, Historic Charlotte, Inc., The Garden Conservancy, and Ms. Elizabeth Wilson were united by a common goal – the permanent preservation of the house and garden, they all had slightly different, and sometimes conflicting views as to how this goal could best be achieved. Even under the best of circumstances, attempting to create an easement that serves its purpose while simultaneously accommodating the varied interests of all concerned stakeholders can be a trying process. In this particular instance, the disagreements among the stakeholders were a major factor as to why it took almost five years for the easement document to be finalized. Although these delays did not become a problem, if a scenario arises where time is of the essence, it might be prudent to deliberately limit the number of stakeholders who are to be involved with an easement's creation in order to streamline the process.

3. TLC: The Margaret Reid Wildflower Garden

Since its creation in 1992, the easement encumbering the Margaret Reid Wildflower Garden has so far proven to be successful. However, when analyzing the easement's success, one must take into account the fact that since the easement's creation, the garden has technically only had two owners, the Reids and the Mackintoshes, both of whom possessed the knowledge, expertise, and passion that is required in order to ensure that the garden continues to flourish. In this author's opinion, the true effectiveness of the easement will only be determined if and when the garden ever passes into the hands of an owner who lacks the necessary ability or desire to accommodate the garden's significant maintenance requirements.

If such an undesirable scenario were in fact ever to occur, many of the negative consequences that could result can probably be mitigated by the fact that TLC has the authority to carry out active maintenance of the garden. Yet this authority is very much a double-edged sword, for if TLC were ever compelled to use this authority to the degree permitted by the easement, they would be forced to expend greater amounts of time and money – two commodities perennially in short supply at land trusts – in order to ensure that the garden continues to be adequately maintained in accordance with the goals of the easement. In short, although ostensibly a tremendous advantage for TLC, the maintenance provisions conveyed to TLC by the easement might one day become a liability if the garden ever suffers the misfortune of falling into the hands of an incompetent or uncaring owner.

To their credit, TLC has long since recognized this fact. The management plan that was created in 1997 was largely in response to TLC's discomfort and uncertainty regarding the maintenance obligations that were conveyed to them by the easement document. However, while the management plan has successfully clarified the garden's conservation values in

addition to the responsibilities of each of the garden's specific stakeholders, it is questionable how much use the management plan will be to TLC in the event of a future legal dispute. As stated previously, the management plan was never formally implemented, in large part due to the fact that the current owners (the Mackintoshes) have been responsible for the exemplary care and maintenance of the garden. However, if future owners of the garden prove to be lackadaisical in their care for it, TLC may be forced to implement the management plan, in order to ensure that the garden is properly cared for. However, by failing to formally implement the management plan at the time of its creation, TLC may have inadvertently invalidated it, which in turn may make oversight of the garden more difficult if the garden ever falls into the hands of the wrong type of owner, however unlikely.

While the easement encumbering the Margaret Reid Wildflower Garden has so far proven to be successful, its creation was very much a learning experience for TLC, which at the time of its creation in 1992 had no prior experience with garden easements. Since this time, although TLC has accepted two additional garden easements, none of these have been structured to give TLC affirmative maintenance obligations, and TLC has stated that they have no wish to assume such obligations on any future easements.⁷⁶¹

Recommendations for Easement Documents

Having examined three easement-holding organizations along with their pragmatic application of garden easements, a few conclusions can be reached concerning specific elements that are essential in order to create an easement document that will be effective in protecting the unique needs of a garden. Listed below are several recommendations that all parties who are involved with an easement should consider prior to the creation of an easement document.

⁷⁶¹ Katherine Wright, "RE: Garden Easement Questionnaire."

1. Clearly define the resources on the property that the easement protects within a baseline document

The importance of this cannot be stressed enough. More often than not, a garden will be made up of many intricate components that are equally worthy of being protected. While all of these features cannot and should not be included within the easement document, all of the specific features within a garden that are being protected by an easement should clearly be identified within a baseline document created at the time when the easement is donated, and which should serve to supplement the principles that the easement document intends to protect.

This argument is further reinforced by the fact that the above case studies clearly illustrate the negative consequences that can result if a garden's conservation values are not identified at the time when the easement is donated. Both the conflict that HCF had to address in regard to the driveway's unauthorized construction by the Trainer's, as well as TLC's creation of a management plan for the Reid Garden were direct results of the fact that both of these organizations failed to adequately define the property's conservation values at the time when the easement was initially created.

2. All garden easements should include a management plan, regardless of the size or complexity of the garden

While some parties may maintain that management plans are unnecessary for gardens of a small size or simple design, it is this author's opinion that such a belief is in error. Due to the fact that a garden is a natural environment designed and manipulated by mankind, gardens will inevitably be more intricate than other natural environments, and therefore will require a greater degree of guidance in order to assure that they are effectively managed and maintained. Some of the topics that should be addressed by the management plan include the garden's everyday care

and maintenance, as well as the appropriate procedures for addressing changes to the garden, both intended and unintended.

3. Maintenance of the garden should be the responsibility of the garden owner, not the organization holding the easement

As can be seen from the situation that Triangle Land Conservancy faced concerning the affirmative maintenance obligations that it was granted as part of the easement on the Margaret Reid Wildflower garden, easement holding organizations should avoid accepting such obligations, unless absolutely necessary. For by assuming affirmative maintenance obligations for a garden, the easement holding organization is essentially assuming one of the foremost responsibilities of private property ownership while not partaking equally in all of its benefits. This is an important point to remember, for the main reason that conservation easements were developed in the first place is so that privately owned land could be protected for public purposes without having to assume the burdens of fee-simple ownership. The only affirmative obligations that a potential holder of a garden easement should be willing to accept are inspection and enforcement duties.

4. All easements should include sufficient inspection and enforcement clauses

This is very important, for as can be seen from some of the examples illustrated in this thesis, violations can and do occur, even if they arise from unintended actions or differing interpretations of the easement. However, through vigilant inspection and enforcement, violations of a garden easement's provisions can be kept to a minimum.

A well-written garden easement should contain detailed provisions addressing the procedures governing inspections. Gardens should be inspected at least once a year, perhaps more frequently if the garden is particularly intricate. The easement document should clearly explain the rights of access that the easement holder is allowed for inspection purposes, as well as the proper procedures for notifying property owners in regards to the timing of inspections as well as their outcome.

The easement document should also contain detailed enforcement clauses identifying the appropriate procedures for responding to violations of the terms of the easement. These should be easy to understand and implement. Ideally, an easement holding organization should insist on a tiered structure for enforcement, beginning with initial notification and culminating in formal litigation.

5. All easements should include public access clauses

Since the primary purpose of a garden easement is to protect the conservation values of a garden in perpetuity for the benefit of the public as a whole, it goes without saying that the general public should be able to derive some sort of tangible benefit from the easement's existence. Usually, this benefit can be guaranteed through the inclusion of public access provisions governing how and when the general public can utilize an easement property.

It is important to emphasize that it is not always necessary for the general public to have the right of physical access to a garden in order to derive some benefit from it. For example, although HCF's easements encumbering gardens do not permit any physical access to strangers, the general public can easily view the majority of a garden's features from public right-of-ways.

If this can be accomplished it is to everyone's benefit, for the garden will not be exposed to excessive use and wear, while the garden owner's right to privacy will remain uncompromised.

However, if this cannot be accomplished, there are still numerous methods that will allow the public to benefit from the garden while at the same time not allowing unlimited access. For example, the easement TLC holds on the Margaret Reid Wildflower Garden allows TLC to bring small, strictly controlled groups on to the property for 'educational purposes' provided that the property owner agrees and is given sufficient notification. In addition to being equitable to all of the concerned parties, such an arrangement also takes into account the fragile and ephemeral nature of a garden.

6. All garden easements should be 'qualified conservation contributions' in accordance with Section 170(h) of the Internal Revenue Code

While this suggestion should be blatantly obvious, in light of the more stringent regulations governing conservation easement donation that have followed the passage of Public Law 109-280 in 2006, these requirements have become even more crucial. In order to prevent any future problems that may materialize concerning a garden easement, all easements documents should contain language clearly stating the conservation purposes of the easement, and should only be donated to organizations that are clearly qualified to accept the easement. Finally, all garden easements should clearly meet at least one of the 'conservation purposes' criteria that are defined within Section 170 of the Internal Revenue Code.

7. All easement documents should clearly designate backup holders

All easement documents should clearly designate at least one backup holder to assume the responsibilities of the easement in the event that the primary grantee ceases to exist. While such an event will likely be rare, non-profits and land trusts do on occasion fail, especially smaller entities that are more dependent upon private donations for their continued existence.

8. An easement's stakeholders should be identified prior to the creation of the easement

When considering the creation of a garden easement, it would be greatly advantageous to identify the easement's primary stakeholders prior to commencing any other work related to the easement. By identifying the primary stakeholders early on, the easement can more easily be written to accommodate their main interests. Generally, the primary stakeholders will be the garden owner as grantor and the easement-holding organization as grantee.

In addition to identifying the stakeholders at an early stage, whenever possible, the number of stakeholders who are intimately involved with the creation of a garden easement should be limited to a select few. This will help to keep the focus of the easement concise, and will also help to facilitate the creation of the easement document as quickly as possible.

9. Whenever possible, the easement should not be the only legal instrument protecting a garden

While an easement serves as a powerful legal device that can prevent a garden from being destroyed, ideally, an easement should be paired with other forms of protection, for example landmark designation, which can also protect the garden in the rare event that an

easement is revoked. In addition to providing an increased level of protection, landmark designation also has the advantage of providing additional evidence of a garden's significance to society as a whole.

Of the three gardens identified above, the Elizabeth Lawrence House and Garden is listed both on the National Register of Historic Places, and as a local landmark by the Charlotte-Mecklenburg Historic Landmarks Commission. Also, the William Gibbes House (though not the garden) is listed on the National Register of Historic Places, and is part of one of the City of Charleston's historic districts.

The Future for Garden Easements

By now, it should be clear that garden easements enjoy many advantages as a tool for garden preservation. When a garden owner donates an easement on his or her garden, they are presented with many advantages that do not exist with other reliable forms of preservation. In exchange for sacrificing a limited amount of development rights, a garden owner is assured of protecting their garden for posterity, while still maintaining overall ownership of the property. In addition to the satisfaction of having done something for the common good, the garden easement donor is also entitled to numerous tax savings on income, estate, and property taxes. In essence, the beauty of garden easements is that through their use, all parties involved are satisfied.

As a tool for protecting gardens, the use of easements will likely become more common in the future. Considering the rapid growth of the use of conservation and preservation easements, it is only a matter of time before public awareness of the concept and utility of garden easements and how they can be effectively used to preserve gardens increases.

However, although the proliferation of garden easements will help to increase awareness of them, this will also expose such easements to increased scrutiny and criticism. Presently, there have yet to be any notable legal challenges to the use of conservation easements to protect gardens. However, this can largely be attributed to the fact that they are currently miniscule in number, and that conservation easements in general are a relatively new legal device that have yet to be rigorously challenged.⁷⁶² Times change, people change, economic conditions change. It remains uncertain if conservation easements designed to last in perpetuity will stand the test of time in subsequent decades and centuries, when those “not involved in the original transaction want to use their lands in ways circumscribed by the easement.”⁷⁶³ Taking this into account, the future may very well see easements either annulled or amended to meet changing conditions and realities.

While some of these concerns can be addressed through the creation of flexible easement documents, this too, is not without problems. A flexible easement document, while attractive to potential donors, may make it harder for an easement holding organization to enforce the terms of the easement, thereby compromising the easement’s purpose.⁷⁶⁴

Although less of a threat, the use of conservation easements as a means of receiving substantial tax benefits may eventually jeopardize their future use. In recent years, conservation easements have undergone significant scrutiny both from the media and the federal government, who are concerned that easement appraisals have been carefully manipulated to inflate tax benefits.⁷⁶⁵ Easement-holding organizations may be partially to blame for this phenomenon, as they tend to shun all aspects of easement donation that deal with the potential tax benefits that a

⁷⁶² Pidot, 10.

⁷⁶³ Fairfax & Grunzel, 153.

⁷⁶⁴ Meecham, 67.

⁷⁶⁵ Ginn, 126.

donor may receive. Although Public Law 109-280 was passed to close such loopholes and establish new standards of accountability, it remains to be seen just how effective the new law will be.

While the concerns highlighted above are important, and serve to demonstrate some of the liabilities associated with conservation easements in general, garden easements will likely continue to flourish as a tool for the preservation of culturally significant gardens in the United States. Their flexibility, versatility, and low cost in comparison to outright ownership have so far gone unrivaled as a means for ensuring the permanent preservation of privately owned gardens. As the present time, this outlook appears unlikely to change.

REFERENCES:

- “2006 Arborday.org Hardiness Zone Map.” Arbor Day Foundation. 25 March 2009
<<http://www.arborday.org/media/zones.cfm>>.
- “About the Friends of the Elizabeth Lawrence.” The House and Garden of Elizabeth Lawrence.
2 Feb. 2009 <<http://www.elizabethlawrence.org/friends.html>>.
- “About: History.” The Ruth Bancroft Garden. 23 Dec. 2007
<<http://www.ruthbancroftgarden.org/rbgarden/pages/about-history.html>>.
- “About TLC.” Triangle Land Conservancy. 17 Feb. 2009. 3 April 2009
<<http://www.triangleland.org/about/about.shtml>>.
- “A Guide to the Greene and Greene Collection, 1775-2000: Green and Greene Archives.”
University of Southern California School of Architecture. 2 Jan. 2009.
<<http://www.usc.edu/dept/architecture/greeneandgreene/findingaid/>>
- “A Message From the President – Looking Back and Forward.” The Garden Conservancy. 5
Nov. 2008. <<http://www.gardenconservancy.org/index.pl?Title=About%20Us>>.
- Alanen, Arnold R. and Robert Z. Melnick, ed. Preserving Cultural Landscapes in America.
Baltimore, MD: John Hopkins University Press, 2000.
- “Ann Pamela Cunningham.” National Women’s History Museum. 25 Nov. 2008
<http://www.nwhm.org/Education/biography_apcunningham.html>.
- Appraising Easements: Guidelines for Valuation of Historic Preservation and Land
Conservation Easements. 2nd ed. Alexandria, VA: The Land Trust Alliance, 1990.
- Barrett, Thomas S., and Putnam Livermore. Conservation Easements in California. Covelo,
CA: Island Press, 1983.
- Bick, Steven, and Harry L. Haney Jr. The Landowner’s Guide to Conservation Easements.
Dubuque, IA: Kendall/Hunt Publishing Co., 2001.
- Birnbaum, Charles. A. “Protecting Cultural Landscapes: Planning, Treatment, and Management
of Historic Landscapes.” *Preservation Brief # 36*, U.S. Department of Interior, National
Park Service, 1994. 15 Sept. 2008
<<http://www.nps.gov/history/hps/tps/briefs/brief36.htm>>.

- Birnbaum, Charles A. and Mary V. Hughes. "Landscape Preservation in Context, 1890-1950." Design with Culture: Claiming America's Landscape Heritage. Charlottesville, VA: University of Virginia Press, 2005. 1-17.
- Boyd, James, Kathryn Caballero, and R. David Simpson. The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions. Washington D.C.: Resources For the Future, April 1999.
- Boykin, James, H. "Valuing Scenic Land Conservation Easements." Appraisal Journal. Vol.68, No. 4 (2000): 420-427.
- Bradham, Elizabeth. "RE: Some Questions About Your Garden." E-mail to author. 23 April, 2009.
- Brenneman, Russell L. Private Approaches to the Preservation of Open Land. New London, CT: The Conservation and Research Foundation, 1967.
- Brewer, Richard. Conservancy: The Land Trust Movement in America. Lebanon, NH: University Press of New England, 2003.
- Brice, Kevin. "The Margaret Reid Wildflower Garden." Triangle Land Conservancy. 24 Nov. 2008, 25 April, 2009, <http://www.triangleland.org/news/articles/properties/margaret_reid_brice.shtml>
- "Brief History," B.W. Wells Association. 25 April 2009, < www.bwwells.org>.
- Briggs, Loutrel W. Charleston Gardens. Columbia, SC: University of South Carolina Press, 1951.
- Burke, Barlow D. and Joseph A. Snoe. Property: Examples & Explanations. Gaithersburg, NY: Aspen Law & Business, 2001.
- Byers, Elizabeth and Karin Marchetti Ponte. The Conservation Easement Handbook. 2nd ed. San Francisco, CA: The Land Trust Alliance and The Trust for Public Land, 2005.
- Canlan, Michael. "Rooted in History – Growing Forever?" Rooted in History: Studies in Garden Conservation. London, UK: The National Trust. 2001. 191-211.
- Carter Jr., T. Heyward, W. Leighton Lord III, and Chalmers W. Poston. "Conservation Easements in the Fourth Federal Circuit." Protecting the Land: Conservation Easements Past, Present, and Future. Julie Ann Gustanski and Rocerick H Squires, eds. 2nd ed. Washington D.C.: Island Press, 2000. 186-208.
- Cheston, Emily Read. John Bartram: 1699-1777: His Garden and His House; William Bartram, 1739-1823. Philidelphia, PA: John Bartram Association, 1953.

Cheever, Frederico, and Nancy A. McLaughlin. "Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions." Environmental Law Reporter Vol. 34 (2004): 10223-10233.

Coffin, Margaret. Guide to Developing a Preservation Maintenance Plan for a Historic Landscape. Cultural Landscape Publication No. 7. Washington D.C.. National Park Service, 1995.

"Conservation Easement Baseline Documentation Preparation." The Garden Conservancy.

"Conservation Easements: Frequently Asked Questions." Triangle Land Conservancy. 24 Nov. 2008, 4 April 2009. <<http://www.triangleland.org/landowner/CEFAQ.shtml>>.

Cothran, James R. The Gardens of Historic Charleston. Columbia, SC: University of South Carolina Press, 1995.

Cothran, James R. "Preserving Charleston's Landscape Legacy." Historic Preservation Spring 2005: 2-3.

Cothran, James R. "RE: Follow-up calls on easement research." E-mail to author. 22 March 2008.

"Covenants and Easements." Historic Charleston Foundation. 29 Dec. 2008. <http://www.historiccharleston.org/preservation/how_covenants.html>.

Daniels, Tom & Katherine Daniels, AICP. The Environmental Planning Handbook for Sustainable Communities and Regions. Chicago: Planners Press, 2003.

Davis, Evangeline. Charleston: Houses & Gardens. Charleston, SC: Preservation Society of Charleston, 1975.

Deed of Historic Preservation and Conservation Easement from Mary Lindeman Wilson to The Garden Conservancy, Rough Draft. 25 April 2008.

Deed of Conservation Easement from Susan Hughes Leath to Historic Charleston Foundation, Inc., 19 Feb. 1986, (filed 19 Feb. 1986), Charleston County, South Carolina, Charleston County Registers Office, Charleston, SC.

Deed of Conservation Easement with Right of First Refusal from NationsBank Trust as Personal Representative for the Estate of Barbara H. Williams and Historic Charleston Foundation, 3 Aug. 1992 (filed 17 Sept. 1992), Charleston County, South Carolina, Deed Book E218, Pg. 834. Charleston County Registers Office, Charleston, SC.

Deed of Conservation Easement from Margaret Reid Baker to Triangle Land Conservancy, 19 Aug. 1992 (filed 1 Sept. 1992), Wake County, North Carolina, Deed Book 5311, Pg. 804. Wake County Register of Deeds, Raleigh, NC.

Dillon, James. National Register of Historic Places Inventory Nomination Form for William Gibbes House. Unpublished, 1976.

Eliot, Charles. Charles Eliot, Landscape Architect. Cambridge, MA: Houghton, Mifflin & Co., 1902.

Fairfax, Sally K. & Darla Guenzler. Conservation Trusts. Lawrence, KS: University Press of Kansas, 2001.

Favretti, Rudy J. Landscapes and Gardens for Historic Buildings. Nashville, TN: American Association for State and Local History, 1991.

Favretti, Rudy J. "The Story of Landscape Restoration in the South." Breaking Ground: Examining the Vision and Practice of Historic Landscape Restoration: Winston-Salem, NC: Old Salem, Inc., 1999. 1-16.

"Festival of Houses and Gardens." Historic Charleston Foundation. 29 Dec. 2000.
<http://www.historiccharleston.org/news_events/festival.html>.

Firth, Ian. "The Blue Ridge Parkway: The Road to the Modern Preservation Movement." Design With Culture: Claiming America's Landscape Heritage. Charles A. Birnbaum and Mary V. Hughes, eds. Charlottesville, VA: University of Virginia Press, 2005. 179-202.

Frasier, Walter J. Jr. Charleston! Charleston!: The History of a Southern City. Columbia, SC: University of South Carolina Press, 1989.

"Frequently Asked Questions About NCCUSL." Uniform Law Commission. 5 Oct. 2008
<<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>>.

"Frequently Asked Questions on Gift Taxes." Internal Revenue Service: United States Department of Treasury. 27 Oct. 2008. 9 Feb. 2009.
<<http://www.irs.gov/businesses/small/article/0,,id=108139,00.html>>

Fretwell, Katie. "Digging for History." Rooted in History: Studies in Garden Conservation. London UK: The National Trust, 2001. 63-79.

Fullerton, Christopher Todd. The Use of Cultural Easements for the Protection of Historic Resources in Georgia. Thesis. Athens, GA: The University of Georgia, 2004.

"Gardening Quotes and 'Gardenisms.'" Northern Gardening. 15 June 2009,
<<http://www.northerngardening.com/quotes.htm>>.

"Gardening Terms Starting With the Letter B." Plant and Plant. 24 Nov. 2008,
<http://www.planandplant.com/gardening_terms-B.html>.

- "Garden Quotes, Gardening Sayings, Quotations for Gardeners." The Quote Garden - Quotes, Sayings, Quotations, Verses. 15 Nov. 2007. 19 Dec. 2007
< <http://www.quotegarden.com/gardens.html>>.
- Ginn, William J. Investigating Nature: Case Studies of Land Conservation in Collaboration with Business. Washington D.C.: Island Press. 2005.
- Gregory, Stephen C. "Easements for Dummies." Virginia State Bar. 27 Jan. 2008
< <http://www.vsb.org/sections/rp/articles/gregory.html>>.
- "Greene Gables." The San Francisco Bay Area Arts and Crafts Movement. 12 Sept. 2005. 3 Jan. 2009.
<<http://www.geocities.com/SiliconValley/Orchard/8642/greengables.htm>>.
- Griswold, Mac and Eleanor Weller. The Golden Age of American Gardens: Proud Owners, Private Estates 1880-1940. New York: Harry N. Abrams, Inc., 1992.
- "Guidelines for the Treatment of Cultural Landscapes." The National Park Service. 12 Dec. 2008 <http://www.nps.gov/history/hps/hli/landscape_guidelines/index.htm>.
- Gustanski, Julie Ann, & Roderick H. Squires, eds. Protecting the Land: Conservation Easements, Past Present, and Future. 2nd ed. Washington D.C: Island Press, 2000.
- Handal, Leigh, ed. The Challenge of Charleston: 2003 Annual Report. Charleston, SC: Historic Charleston Foundation, 2003.
- Handal, Leigh, ed. Historic Charleston Foundation: 2007 Annual Report. Charleston, SC: Historic Charleston Foundation, 2008.
- Hilborn vs. Commissioner: *85 T.C. No. 40: 677 (1985)*
- "Historic American Landscape Survey." The National Park Service. 11 Dec. 2008
< <http://www.nps.gov/history/hdp/hals/index.htm>>.
- "Historic Charleston Foundation: Online Store Collection." Historic Charleston Foundation. 27 Dec. 2008.
<http://www.historiccharleston.org/mm5/merchant.mvc?Screen=SFNT&Store_Code=hcf>.
- "Historic Garden Week." The Garden Club of Virginia. 10 Dec. 2008
< <http://www.gcvirginia.org/HGW/HGW.html>>.
- "History of the Garden." Elizabeth Lawrence House and Garden. 18 Dec. 2008.
< <http://www.elizabethlawrence.org/history.html>>.

Hood, Davyd Foard. "Survey and Research Report on the Elizabeth Lawrence House and Garden." Charlotte – Mecklenburg Historic Landmarks Commission. 30 June 2005. 15 Jan. 2009 < <http://www.cmhpf.org/surveys&rlawrencegarden.htm>>.

Hosmer Jr., Charles B. "The Colonial Revival in the Public Eye: Williamsburg and Early Garden Restoration." The Colonial Revival in America. Alan Axelrod, ed. New York: W.W. Norton & Co., 1985. 52-70.

Howett, Catherine. "Grounding Memory and Identity: Pioneering Garden Club Projects Documenting Historic Landscape Traditions of the American South." Design With Culture: Claiming America's Landscape Heritage. Charles A. Birnbaum and Mary V. Hughes, eds. Charlottesville, VA: University of Virginia Press, 2005. 19-38.

Hutton, William T. "Conservation Easements in the Ninth Federal Circuit." Protecting the Past: Conservation Easements Past, Present, and Future. Julie Ann Gustanski and Roderick H. Squires, eds. 2nd ed. Washington D.C.: Island Press, 2000. 354-391.

Internal Revenue Code: Charitable, etc., contributions and gifts 26 U.S.C.S. § 170 (2008).

Internal Revenue: Charitable, etc., contributions and gifts 26 C.F.R. § 1.170A (2008).

Jolley, Harley E. The Blue Ridge Parkway. Knoxville, TN: The University of Tennessee Press, 1969.

Joslin, William. Telephone Interview with Author. 14, May 2009.

Jost, Daniel. "The Church Ladies." Landscape Architecture. (Dec. 2008): 46-55

Keller, Genevieve P. "The Inventory and Analysis of Historic Landscapes." Historic Preservation Forum. Vol. 7, No. 3 (May/June 1993): 26-35.

Keller, J Timothy, Genevieve P. Keller. "How to Evaluate and Nominate Designed Historic Landscapes," *National Register Bulletin # 18*. U.S. Department of Interior, National Park Service Interagency Resource Division.

Kirkman, W. Benson. Telephone interview with author. 8 May 2009.

Lindstrom, C. Timothy. A Tax Guide to Conservation Easements. Washington D.C.: Island Press, 2008.

Ling, David C. and Wayne R. Archer. Real Estate Principles: A Value Approach. Boston, MA: McGraw-Hill Irwin, 2005.

Losch vs. Commissioner: 55 TCM 909 (1988)

Mackintosh, Amy. "RE: Information on Margaret Baker Reid." E-mail to author. 29 April, 2009.

Mackintosh, Amy, Mark Robinson & Associates P.A., and W. Benson Kirkman, consultant. Management Plan for the Margaret Baker Reid Wildflower Garden, 1439 Dixie Trail, Raleigh, North Carolina. 21 Nov. 1997.

Maher, Neil M. Nature's New Deal: The Civilian Conservation Corps and the Roots of the American Environmental Movement. New York: Oxford University Press, 2008.

Malecki, Bill. "Conservation in Action." Rooted in History: Studies in Garden Conservation. London UK: The National Trust, 2001. 44-53.

Marchetti, Karin, and Jerry Cosgrove. "Conservation Easements in the First and Second Federal Circuits." Protecting the Past: Conservation Easements, Past, Present and Future. Julie Ann Gustanski and Roderick H. Squires, eds. 2nd ed. Washington D.C.: Island Press, 2000. 78-101. McAlester, Virginia & Lee. A Field Guide to American Houses. New York: Alfred A. Knopf, Inc., 2005.

McAllester, Lee & Virginia. A Field Guide to American Houses. New York: Alfred A. Knopf Inc., 2005.

McCracken, Mark. "Right of First Refusal." Teachmefinance.com. 4 Feb. 2009.
< http://teachmefinance.com/Financial_Terms/right_of_first_refusal.html>.

McGee, Patti. Telephone interview with author. 7 July 2009.

McLaughlin, Nancy A. "Increasing Tax Incentives for Conservation Easement Donations," Ecology Law Quarterly Vol. 31, No. 1. (2004): 1-116.

Mecham, Columbia Leighelen. Land Trust Activity Within the Context of Property Tax Assessment in Georgia, U.S.A. Thesis. University of Georgia, Athens, GA: 2003

Melnick, Robert Z., Daniel Spoon, and Emma Jane Saxe. Cultural Landscapes: Rural Historic Districts in the National Park System. Washington D.C.: U.S. Department of Interior, National Park Service, Historic Architecture Division, 1984.

Meyer, Ezra. "The Impacts of Conservation Easements on Property Taxes in Wisconsin." Madison WI: The Gathering Waters Conservancy. 2001.

Morris, Amy Wilson. "Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism." Geoforum. Vol. 39 (2008): 1215-1227.

"Nathaniel Russell House." Historic Charleston Foundation. 14 Jan. 2009.
< <http://www.historiccharleston.org/experience/nrh/>>.

- Nicoladis vs. Commissioner: 55 TCM: 624 (1988)
- Ninetieth Annual Conference of Commissioners on Uniform State Laws, "Uniform Conservation Easement Act," New Orleans, LA, 1981.
- Noble, William. Telephone interview with author. 17 Dec. 2008.
- Noble, William. Telephone interview with author. 22 Jan. 2009.
- Noble, William. "The Garden Conservancy Conservation Easement Program." PowerPoint Presentation. The Garden Conservancy, Cold Spring, NY. 16 Dec. 2008.
- Noble, William. Letter to Lindie Wilson. 21 Oct. 2002.
- Noble, William. "Minutes of Meeting." Memo to participants in Elizabeth Lawrence garden roundtable discussion. 11 March 2003.
- Noble, William. "Report on Meeting of May 12, 2003." Memo to Friends of Elizabeth Lawrence Garden. 20 May 2003.
- Noble, William and Patti McGee. Letter to Participants in Roundtable discussion concerning the Elizabeth Lawrence Garden. 3 Dec. 2002.
- Noble, William and Lisa Renstrom. "Minutes of May 12, 2003 Meeting." Memo to participants and invitees to second meeting of the Friends of Elizabeth Lawrence Garden. 15 May 2003.
- Nuss, J.J. "Ansonborough and H.A.N.A. Information." The Historic Ansonborough Neighborhood Association. July 2007. 29 Dec. 2008.
< <http://www.ansonborough.org/history.html> >.
- Ohm, Brian, Matthew B. Cobb, Julie Ann Gustanski, and Larry E. Meuwissen. "Conservation Easements in the Seventh and Eighth Federal Circuits." Protecting the Land: Conservation Easements Past, Present, and Future. Julie Ann Gustanski and Roderick H. Squires, eds. 2nd ed. Washington D.C.: Island Press, 2000. 292-326.
- "Our Work." Triangle Land Conservancy. 17 Feb. 2009. 2 April 2009.
< http://www.triangleland.org/lands/our_work.shtml >.
- Pallone, Melanie. "Conservation Easements in the Third Federal Circuit." Protecting the Past: Conservation Easements Past, Present, and Future. Julie Ann Gustanski and Roderick H. Squires, eds. 2nd ed. Washington D.C.: Island Press, 2000. 127-156.
- Parker, Dominic H. "Cost Effective Strategies for Preserving Private Land: An Economic Analysis for Land Trusts and Policy Makers." Working Paper. Bozeman, MT: Property and Environmental Research Center, October 2002.

- Pidot, Jeff. "Reinventing Conservation Easements: A Critical Examination and Ideas for Reform." Policy Focus Report. Cambridge, MA: Lincoln Institute of Land Policy, 2005.
- "Places to Visit." Triangle Land Conservancy. 24 Nov. 2008, 3 April 2009
<http://www.triangleland.org/lands/places_to_visit.shtml>.
- Poston, Jonathan H. The Buildings of Charleston: A Guide to the City's Architecture. Columbia, SC: University of South Carolina Press, 1997.
- Poston, Jonathan H. Telephone Interview with author. 23 Jan. 2009.
- Poston, Jonathan H. "RE: A few questions." E-mail to author. 6 Feb. 2009.
- "Potential Tax Benefits." Triangle Land Conservancy. 24 Nov. 2008, 5 April 2009
<<http://www.triangleland.org/landowner/tax.shtml>>.
- Power, Nancy Goslee. The Gardens of California: Four Centuries of Design from Mission to Modern. New York, NY: Clarkson Potter Publishers, 1995.
- "Preservation Projects Gardens: The Ruth Bancroft Garden, Walnut Creek, CA." The Garden Conservancy. 26 Dec. 2007
<<http://www.gardenconservancy.org/presGard.pl?ID=11>>.
- "Preservation Projects Program." The Garden Conservancy. 15 Feb. 2009
<<http://www.gardenconservancy.org/index.pl?Title=Preservation%20Projects>>.
- "Preservation Provisions." Historic Charleston Foundation. 16 Jan. 2009.
<http://www.historiccharleston.org/preservation/how_cov_provisions.html>.
- "Restorations." The Garden Club of Virginia. 10 Jan. 2009. 24 Jan. 2009
<http://www.gcvirginia.org/restorations_2_interface/restored.asp>.
- "Qualified Properties." Historic Charleston Foundation. 17Jan. 2001
<http://www.historiccharleston.org/preservation/how_cov_qualified.html>.
- Reynolds, Judith. Historic Properties: Preservation and the Valuation Process. 3rd Ed. Chicago, Ill.: The Appraisal Institute, 2006.
- Rhoads, William B. The Colonial Revival. Ph.D Dissertation for Princeton University. Vol. 1. New York: Garland Publishing, Inc., 1977.
- Rohe, John F. "Conservation Easements in the Sixth Federal Circuit." Protecting the Past: Conservation Easements Past, Present, and Future. Julie Ann Gustanski and Roderick H. Squires, eds. 2nd ed. Washington D.C.: Island Press, 2000. 263-286.

- “Sample Projects.” The National Park Service. 12 Dec 2008
<<http://www.nps.gov/history/hdp/samples/index.htm>>.
- Schofield, Claire, ed. “Historic Preservation Easements: A Directory of Historic Preservation Easement Holding Organizations.” Washington D.C.: U.S. Department of Interior, National Park Service, National Center for Cultural Resources Heritage Preservation Services Division, 2003.
- Simpson, Melissa. “The Plants.” Rooted in History: Studies in Garden Conservation. London, UK: The National Trust, 2001. 85-97.
- Spearman, Patricia. Telephone Interview with author. 4 May 2009.
- Spearman, Patricia. “RE: Margaret Reid Wildflower Garden.” E-mail to author. 2 May 2009.
- “State Conservation Tax Credits: Impact and Analysis.” Boulder, CO: Conservation Resource Center, 2007.
- Stoebuck, William B. and Dale A. Whitman. The Law of Property. 3rd. ed. St. Paul, MN: West Group, 2000.
- Stokes, Samuel N., Elizabeth A. Watson, and Shelly S. Mastran. Saving America’s Countryside: A Guide to Rural Conservation. 2nd ed. Baltimore, MD: John Hopkins University Press, 1997.
- Streatfield, David. “Standards for Historic Garden Preservation and Restoration.” Landscape Architecture. (April 1969) 98-204.
- Sully, Susan. Charleston Style: Past and Present. New York, NY: Rizzoli International Publications, Inc., 1999.
- Summary of August 18, 2004 meeting of The Friends of Elizabeth Lawrence Garden.
- Tabor, Grace. Old-Fashioned Gardening: A History and a Reconsturction. New York: McBride, Nast & Co., 1913.
- Tankard, Judith B. “Ellen Biddle Shipman’s Colonial Revival Garden Style.” Recreating the Past: Essays on the Colonial Revival. Richard Guy Wilson, Shaun Eyring, Kenny Marotta, eds. Charlottesville, VA: University of Virginia Press, 2006. 67-80.
- “Tax Guide for Gifts.” Fairmark.com. 3 March 2009
<<http://www.fairmark.com/begin/gifts.htm>>.
- “The Aiken-Rhett House: History of the Aiken Rhett House.” Historic Charleston Foundation. 29 Dec. 2008. <<http://www.historiccharleston.org/experience/arh/history.html>>.

- The Friends of Elizabeth Lawrence. Update on the Effort to Preserve the Home and Garden at 348 Ridgewood Ave. May 2004.
- The Garden Conservancy. The Garden Conservancy Conservation Easement Program: Guides for the Owner.
- The Garden Conservancy. "Possible scenarios for the purchase of the Elizabeth Lawrence garden.
- "The House and Garden of Elizabeth Lawrence." The House and Garden of Elizabeth Lawrence. 18 Dec. 2008. < <http://www.elizabethlawrence.org/>>.
- "The Story of Wing Haven Gardens – A Bird in the House." Wing Haven Gardens & Bird Sanctuary. 11 Feb. 2009. < http://www.winghavengardens.com/about_us.htm>.
- "TLC Conservation Lands." Triangle Land Conservancy. 24 Nov. 2008. 3 April 2009 < http://www.triangleland.org/lands/conservation_lands.shtml>.
- Tyler, Norman. Historic Preservation: An Introduction to Its History, Principles, and Practice. New York, NY: W.W. Norton & Co. 2000.
- United States Code Service: Lawyers Edition: Title 26 USCS 6621 (132-142)
- United States Department of Interior. *Summary of Changes Relating to Preservation Easements in the Pension Protection Act of 2006.* Pub L. No. 109-280 120 (Stat) 780 2006 <http://www.nationaltrust.org/legal/documents/PL109280.NTHP.Easement.Summary.Rev.pdf>
- Vicary, Bret P. "Trends in Appraising Conservation Easements." The Appraisal Journal. January 1994: 138-143.
- Watson, Elizabeth & Stefan Nagel. Establishing and Operating an Easement Program to Protect Historic Resources. Preservation Books. Washington D.C: The National Trust for Historic Preservation, 2007.
- Weyeneth, Robert R. Historic Preservation for a Living City: Historic Charleston Foundation 1947-1997. Columbia, SC: University of South Carolina Press, 2000.
- Whitaker, Barbara. "Mind Games: The Fit Mind Keeps Working." The New York Times. 11 April 2006. 13 April 2009. <http://www.nytimes.com/2006/04/11/business/retirement/11education.html?_r=1&scp=1&sq=Margaret%20Reid%20Wildflower%20Garden&st=cse>.
- White, Samuel G. The Houses of McKim, Mead, & White. New York, NY: Rizzoli International Publications, Inc. 1998.

“Who We Are.” Historic Charleston Foundation. 22 Dec 2008.
<<http://www.historiccharleston.org/about/who.html>>.

“Who We Are.” Triangle Land Conservancy. 24 Nov. 2008. 3 April 2009,
<http://www.triangleland.org/about/about_who_we_are.shtml>.

Williams, Barbara S. “Charleston.” World Book Encyclopedia. Chicago: World Book, Inc., 1998.

Williamson, Keyes. Gardens are So Perishable: Preserving the Elizabeth Lawrence Garden by Perpetuating the Spirit of its Use. Thesis. The University of Georgia, Athens GA: 2007.

Wood, April. Telephone Interview with author. 5 Dec. 2008.

Wood, April. “RE: Some questions to start a Monday with.” E-mail to the author. 30 Jan. 2009.

Wood, April. “RE: Garden Easements Again.” E-mail to the author. 8 Jan. 2009.

Wood, April. “RE: finalized reports.” E-mail to author. 23 Feb. 2009.

Wright, Katherine. “RE: Garden Easements at the Triangle Land Conservancy.” E-mail to the author. 3 April 2009.

Wright, Katherine. Telephone Interview with author. 9 April, 2009.

Yarger, Sue. Telephone Interview with author. 1 May 2009.

APPENDICIES

APPENDIX A

THE UNIFORM CONSERVATION EASEMENT ACT

UNIFORM CONSERVATION EASEMENT ACT

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

**APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES**

at its

WITH PREFATORY NOTE AND COMMENTS

**ANNUAL CONFERENCE
MEETING IN ITS NINETIETH YEAR
IN NEW ORLEANS, LOUISIANA
JULY 31 - AUGUST 7, 1981**

Approved by the American Bar Association
Chicago, Illinois, January 26, 1982

UNIFORM CONSERVATION EASEMENT ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Conservation Easement Act was as follows:

RUPERT R. BULLIVANT, 1000 Wilamette Center, 121 Southwest Salmon Street,
Portland, OR 97204, *Chairman*

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21801

ROBERT H. CORNELL, 25th Floor, 50 California Street, San Francisco, CA 94111

CHARLES M. HAAR, Harvard Law School, Cambridge, MA 02138

CHARLES G. KEPLER, P.O. Box 490, Cody, WY 82414

BROCKENBROUGH LAMB, JR., 1200 Mutual Building, Richmond, VA 23219

ANN REED, P.O. Box 629, Raleigh, NC 27602

ALLAN G. RODGERS, 2 Park Square, Boston, MA 02116

WILLIAM G. THOMAS, P.O. Box 820, Alexandria, VA 22313

ALLAN D. VESTAL, University of Iowa, College of Law, Iowa City, IA 52242

RUSSELL L. BRENNEMAN, 101 Pearl Street, Hartford, CT 06103, *Reporter*

JOHN J. COSTONIS, New York University, School of Law, Room 307, Vanderbilt Hall,
40 Washington Square, South, New York, NY 10012, *Reporter*

JOHN C. DEACON, P.O. Box 1245, Jonesboro, AR 72401, *President: 1979-81*
(Member Ex Officio)

GEORGE C. KEELY, 1600 Colorado National Building, 950 Seventeenth Street,
Denver, CO 80202, *President: 1977-79 (Member Ex Officio)*

M. KING HILL, JR., Sixth Floor, 100 Light Street, Baltimore, MD 21202,
Chairman, Executive Committee (Member Ex Officio)

WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109,
Executive Director

EDWARD F. LOWREY, JR., Suite 1650, 3300 North Central Avenue, Phoenix,
AZ 85012, *Chairman, Division B (Member Ex Officio)*

Review Committee

DON J. McCLENAHAN, 310 Simplot Building, Boise, ID 83702, *Chairman*

ALLISON DUNHAM, University of Chicago, School of Law, 1111 East 60th Street,
Chicago, IL 60637

EUGENE A. SCOLES, University of Oregon, School of Law, Eugene, OR 97403

R. BRUCE TOWNSEND, Indianapolis Law School, 735 West New York Street,
Indianapolis, IN 46202

**Advisors to Special Committee on
Uniform Conservation Easement Act**

JOHN M. FOWLER, Advisory Council for Historic Preservation

JOHN R. LINTON, National Association of Realtors

NORMAN MARCUS, New York, NY

ROSS B. NETHERTON, American Bar Association, Section of Real Property, Probate and Trust
Law

ROBERT E. STIPE, Chapel Hill, NC

GLENN T. TIDET, U.S. Department of Interior, National Park Service

WALTER G. VAN DORN, American Bar Association, Section of Taxation

ALBERT B. WOLFF, American Bar Association

Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611

UNIFORM CONSERVATION EASEMENT ACT

Commissioners' Prefatory Note

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of that right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first

removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason

that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easements serving the public interest. Other types of easements, real

covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organization, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and

the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the

income, estate and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

UNIFORM CONSERVATION EASEMENT ACT
1981 ACT

An Act to be known as the Uniform Conservation Easement Act, relating to
(here insert the subject matter requirements of the various states).

Section

1. Definitions.
2. Creation, Conveyance, Acceptance and Duration.
3. Judicial Actions.
4. Validity.
5. Applicability.
6. Uniformity of Application and Construction.

§ 1. [Definitions]. As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

Comment

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1(2) and (3), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

§ 2. [Creation, Conveyance, Acceptance and Duration].

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

Comment

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the easement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate it in states whose case or statute law accords their courts that power in the case of easement. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes and may be held only by certain "holders." These limitations find their place comfortably within similar limitations applicable to charitable trusts, whose duration may also have no limit. Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

§ 3. [Judicial Actions].

(a) An action affecting a conservation easement may be brought by:

- (1) an owner of an interest in the real property burdened by the easement;
- (2) a holder of the easement;
- (3) a person having a third-party right of enforcement; or
- (4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

Comment

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines,

including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot be carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

§ 4. [Validity]. A conservation easement is valid even though:

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch or concern real property; or
- (7) there is no privity of estate or of contract.

Comment

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements" - those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem - the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

§ 5. [Applicability].

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

Comment

There are four classes of interests to which the Act might be made applicable: (1) those created after its passage which comply with it in form and purpose; (2) those created before the Act's passage which comply with the Act and which would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly validated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or after the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those created before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-Act statutory or case law.

It is the purpose of Section 5 to establish or confirm the validity of the first three classes of interests. Subsection (a) establishes the validity of the first class of interests, whether or not they are designated as conservation or preservation easements. Subsection (b) establishes the validity under the Act of the second class. Subsection (c) confirms the validity of the third class independently of the Act by disavowing the intent to invalidate any interest that does comply with other applicable law.

Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the fourth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just compensation were that interest subsequently validated by the Act. Subsection (b) addresses this difficulty by precluding retroactive application of the Act if such application "would contravene the constitution or laws of (the) State or of the United States." That determination, of course, would have to be made by a court.

§ 6. [Uniformity of Application and Construction]. This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

APPENDIX B:
GARDEN EASEMENT QUESTIONNAIRES

Individual Garden Easement Questionnaire:

1. How did your organization [name of organization] become involved with this particular garden [name of garden]?
2. What convinced [name of organization] that an easement was a viable option?
3. Briefly, what are the main features of the garden?
4. How is the garden significant?
5. What are the specific features in the garden that the easement tries to protect?
6. Are there any special provisions that are specific to this easement?
7. Since the garden was encumbered by an easement, have there been any particular issues with violations?
8. Have there been any legal challenges concerning the existence of the easement?
9. How are inspections carried out?
10. Was a management plan prepared for the garden?
11. If yes, what specific issues/concerns does the management plan address?

Easement Program Director Questionnaires:

1. How long has your organization been accepting easements on gardens?
2. Who factors led to the founding of the easement program?
3. Do you know of any organizations that accepted easements specifically on gardens prior to your organization, or was a precedent established?
4. Where does the impetus for easement donation originate, with your organization, or with the easement donor?
5. What does your organization do to promote the easement program?
6. What are some of the requirements for gardens to be protected by an easement?
7. Is your organization the sole holder of the easement (i.e. no third party enforcement)?
8. How often are inspections carried out?
9. What specific items are assessed during inspections?
10. What type of violations typically occur (if they do)
11. How are the easements enforced?
12. What are typical fees associated with easement donation?
13. What materials are required for baseline documentation?
14. Who is responsible for compiling information for baseline documentation?

15. Are gardens encumbered by an easement subject to a management plan?
16. What type of changes to the gardens would require approval?
17. How does one go about getting changes approved?
18. How is the Public Access requirement met?
19. Do a good portion of easement donors claim their easement as a charitable contribution?
20. If yes, how is the garden appraised? Who is qualified to conduct the appraisal?
21. Does your organization assist in this process:
22. Have there been any legal challenges to easements held on gardens?
23. Can you suggest any particular gardens that you think would serve as interesting case studies?
24. Do you know of any other organizations, whether public or non-profit that also accept easements on gardens?
25. Any further comments/suggestions for my research?

APPENDIX C:

WAIVER FORM TO ACCOMPANY THE QUESTIONAIRES

I agree _____ to take part in a research study titled, "Easement Program Director Questionnaire," which is being conducted by Eric Reisman, Master of Historic Preservation, College of Environment & Design, University of Georgia, 914-475-6802 under the direction of James K. Reap, Master of Historic Preservation, College of Environment & Design, University of Georgia, 706-542-3996. My participation is voluntary; I can refuse to participate or stop taking part at any time without giving any reason, and without penalty or loss of benefits to which I am otherwise entitled. I can ask to have information related to me returned to me, removed from the research records, or destroyed

Item #1: REASON/PURPOSE

the reason for the study is to gain further understanding of the motives, workings, and logistics of easement holding organizations that hold conservation easements on gardens of historic or cultural significance.

Item #2: BENEFITS

At the present time, there are very few organizations that are either interested or qualified to accept easements on gardens. It is hoped that this research will provide greater understanding of how these programs were created and how they operate, in addition to helping expand the knowledge of garden easements in general.

Item #3: PROCEDURES

If I volunteer to take part in this study, I will be asked to do the following things:

- *Answer all questions concerning the easement holding organization to the best of my ability.*
- *Participate in an interview conducted via the telephone lasting approximately 30 minutes.*
- *No discomforts or stresses are expected.*

Item #5: RISKS

Participation entails the following risks:

No risks are expected.

Item #7: PUBLIC

My identity and the results of this participation will be identified within this thesis.

Item #8: FURTHER QUESTIONS

"The researcher will answer any further questions about the research, now or during the course of the project, and can be reached by telephone at: 914-475-6802".

Item #9: FINAL AGREEMENT & CONSENT FORM COPY

I understand the procedures described above. My questions have been answered to my satisfaction, and I agree to participate in this study. I have been given a copy of this form.

Item #10: CONSENT FORM SIGNATURE LINES FORMAT:

Name of Researcher
Telephone: _____
Email: _____

Signature

Date

Name of Participant

Signature

Date

Please

sign both copies, keep one and return one to the researcher.

Additional questions or problems regarding your rights as a research participant should be addressed to The Chairperson, Institutional Review Board, University of Georgia, 612 Boyd Graduate Studies Research Center, Athens, Georgia 30602-7411; Telephone (706) 542-3199; E-Mail Address IRB@uga.edu