

## Many Partners and Many Methods

### The U. S. Experience

**T**hank you for the opportunity to participate in this important conference and to say a few words about historic preservation legislation and related economic strategies in the United States. It is important to emphasize at the outset that historic preservation legislation and economic strategies in the United States have developed slowly, over a period of many years, often through a process of experimentation and sometimes almost accidentally. Historic preservation attorneys in the United States often envy the powers of national historic preservation agencies in other countries, but our system of dispersed governmental powers means that much of our governmental involvement in historic preservation comes in the form of financial incentives rather than direct regulation.

It is important to point out that governmental funding for historic preservation has not been constant, or increasing, in the United States. Because the amounts of federal funding available in the United States have both increased and decreased over time, certain federal programs that once existed no longer exist today except as paper possibilities. Although modest grants for private owners of major historic properties were formerly sometimes available from federal funds, such grants from federal funds do not exist at this time. Other funds may be available from state budgets, but each state decides separately whether such funds will be available and how they must be requested and will be administered. Government grants for private owners of historic monuments are therefore available only in very small amounts when they are available at all. Funding for historic properties owned by non-profit organizations may be available from foundations, corporations, or various levels of government, as well as in the form of donations from members of the general public or income from permanent endowments, admission receipts, and sales of merchandise.

What is highly unusual in the United States is the complex network of thousands of charitable non-profit organizations which play a role in the maintenance and protection of historic structures. Technically, these organizations are corporations, set up under state laws. Once they have been incorporated, though, it is common for their founders to seek federal tax-exempt status. This is absolutely necessary if an organization is to hope to raise funds through private contributions. The private citizen who makes a donation to an organization which does not have tax-exempt status has perhaps been charitable, but will receive no tax concession for making such a contribution. If, however, the private citizen gives the same amount to a tax-exempt charitable organization, the private citizen may choose to "itemize" on a federal tax return and may effectively deduct the donated amount from his overall income. (There are upper limits to how much may be deducted, but they are irrelevant for the present illustration). Most taxpayers with high incomes itemize in order to aggregate significant allowable expendi-

tures such as mortgage interest paid on a primary residence and state and local sales taxes or unusual medical expenses. Charitable contributions are often an important part of a taxpayer's overall tax-paying strategy.

You are perhaps aware of on-going discussions in the United States about whether the donor of a work of art may deduct the entire current value of the work of art or should be limited to his original cost in acquiring the work of art. Currently, the entire current value is typically deducted. This makes it possible for the owner of a valuable piece of furniture to donate it to a suitable historic property in the ownership of a tax-exempt non-profit organization and realize a handsome tax advantage, as well as the knowledge that one has helped a worthwhile charity.

Almost every non-profit historic preservation organization in the United States has a "development" strategy to encourage donations of cash or appreciated personal property. Unless an organization is "publicly-supported", it is subject to additional tax requirements that force it to spend annually a stated percentage of its overall wealth and require other information.

#### The role of advocacy organizations

It is often difficult to predict in advance what governmental historic preservation strategies will work, and which will not. Because private property owners have unusually strong voices in the United States, government programs cannot automatically succeed unless they are widely understood and accepted by affected owners and others such as pertinent non-profit organizations which expect to have a role in developing public policy affecting historic properties.

Non-profit organizations are generally publicly-supported charitable organizations, which may be quite small or may have large permanent endowments. When these organizations urge the passage of new legislation, they are engaged in a function called "lobbying". Tax laws in the United States restrict the amount of a charitable organization's annual budget that may be used for lobbying purposes, but do not prohibit lobbying by such organizations.

We encourage, and expect, vigorous public debate and discussion in legislative bodies, public forums, newspapers, and magazines. Viewpoints sometimes change slowly, and we have in the United States hundreds of historic preservation groups at the national, state, and local levels that spend some portion of their funds and energy attempting to shape public opinion. These advocacy efforts are loosely coordinated through the National Trust for Historic Preservation and Preservation Action.

The problem of coordinating historic preservation advocacy is so serious in the United States that an informal group known as the Historic Preservation Coordinating Council



meets often in Washington so that the primary national organizations can share viewpoints and attempt to avoid disagreeing in public on historic preservation policy objectives. Several federal agencies concerned with historic preservation send non-voting observers to these meetings in order to understand how decisions have been reached.

### **Overall objectives for governmental involvement**

A book published in England in 1905 and titled *The Care of Ancient Monuments* gives a worldwide perspective on historic preservation legislation in place in many countries almost one hundred years ago. At that time, there was virtually no applicable legislation in the United States. As new technologies have permitted the rapid deliberate destruction of uncountable numbers of historic buildings during the 20th century – in addition to unfortunate damage during wars and other conflicts – there has been a growing understanding that such resources constitute crucial and irreplaceable components of national heritage, indeed of national identity.

### **A decentralized program in the United States**

The most important thing to remember about the overall governmental historic preservation program in the United States is that we have no single governmental program, and that no governmental body, at any level of government in the United States, has the power to make binding decisions that will affect all owners of important historic monuments, no matter how important they may be individually. We have in the United States, therefore, a very decentralized approach to historic preservation regulation.

### **Formerly destructive federal governmental programs**

In the United States, two particularly destructive governmental programs were a new system of interstate highways in the 1950s and a large program of “urban renewal” designed to fund the costs of demolishing substandard housing in many inner-city areas. Unfortunately, the interstate highways tended to be designed to go through older neighborhoods in the most important cities, and the urban renewal program obliterated large areas of historic structures on the pretext that they were in irretrievably dilapidated condition. Major buildings that could have been saved if these programs had been well designed in the beginning were needlessly demolished in many cities.

### **The National Register of Historic Places**

The National Historic Preservation Act of 1966, the primary national historic preservation legislation in the United States and a statute that has been repeatedly amended and expanded, created a National Register of Historic Places and an Advisory Council on Historic Preservation. The theory was that federal agencies should submit their projects likely to affect historic properties to the Advisory Council for its comments, so that the most destructive projects might be discussed and ideally would be re-designed. Section 106 of the Act defines a federal “undertaking”, and has led to a long generation of vigorous litigation over its complex meaning.

Properties eligible for the National Register of Historic Places but not yet formally listed must also be considered by federal agencies under Section 106. The Advisory Council has steadily expanded its authority through imaginative interpretations of its role and complex regulations that now permit a federal agency to sign a negotiated document known as a “Memorandum of Agreement”. A federal agency which enters into a Memorandum of Agreement can avoid direct comments from the Council and may therefore avoid delays.

### **An evolving concept of historic properties**

The understanding of what constitutes a historic property has also evolved steadily during this century in the United States. From an early concern with individual structures connected with the lives of colonial or military leaders, the historic preservation movement in the United States has grown to its present focus on neighborhoods, districts, and cultural landscapes. But compared to historic preservation programs in other countries, the typical program in the United States is still focused almost exclusively on visible street facades of structures, and offers little protection for interior architectural features.

Significant historic properties can be recognized in the United States in two ways. They may be recognized for their individual significance as “landmarks” or single National Register properties, or they may be recognized for their meaning as ensembles, as “historic districts” at the local level or in the National Register. But local designation and National Register listing are entirely separate procedures, and listing at one level does not automatically translate into listing at the other level. (Almost certainly a property listed at one level qualifies conceptually for listing at the other level, but there is always a political component to a local decision to designate, and boundary decisions must be thoroughly professional for National Register purposes, leading to an inevitable disparity that is unlikely to be resolved.)

### **Regional planning challenges**

Increasingly historic preservation leaders in the United States advocate the need to focus on regional planning issues rather than merely local problems. We have major monuments such as Thomas Jefferson’s home “Monticello” or George Washington’s home “Mount Vernon” where the setting must be protected if visitors are to understand the surroundings in which great thinkers conceived concepts crucial to the development of our country.

Yet often these resources are located in more than one governmental unit, and governmental cooperation is necessary if the properties are to be effectively protected. The scenic vistas from both properties have been professionally studied, and a private non-profit organization, the Accokeek Foundation, was created almost thirty years ago to hold easements on undeveloped land across the Potomac River from “Mount Vernon”.

### **The role of non-profit real estate organizations**

Tax laws in the United States make an important distinction between profit-making organizations, which are intended to



earn money for their owners, and non-profit organizations, which are charitable and may have members but do not have owners. There are now historic preservation organizations in the United States whose main purpose is to protect historic properties through purchase, which may lead to: (1) permanent ownership; (2) restoration and resale; or (3) resale with protective restrictions that will apply to all future owners. In 1975, a statewide historic preservation organization was created in North Carolina with the sole purpose of purchasing and reselling historic properties to qualified buyers with suitable restrictive covenants that would require restoration within stated periods of time to agreed-upon standards. This "revolving fund" approach had been pioneered in several important cities such as Charleston, South Carolina or Savannah, Georgia, but had seldom been attempted on a statewide basis.

Many historic preservation organizations in the United States operate revolving funds of varying sizes. The success of such a revolving fund depends on an organization's ability to master fairly sophisticated marketing skills, in order to find potential purchasers.

### **Voluntary real estate protections by private owners**

In addition to revolving funds, which can create permanently binding restrictions through real estate sales, there are in the United States many historic preservation easements that have been voluntarily created by property owners who donate or sell to a non-profit organization an agreement to maintain the property in the future combined with an agreement to refrain from certain defined actions (such as strip-mining, cutting of timber, or subdivision and new construction). Under the national tax system in the United States, there can be significant tax advantages to a property owner who creates a perpetual preservation easement.

It is important to remember that easements are typically voluntary arrangements, each of which can be specifically tailored to the characteristics of an individual property. Easements can be created in the total absence of other historic preservation controls, or can supplement such controls and guarantee that despite possible damaging governmental decisions in the future certain aspects of a property are permanently protected. In the District of Columbia, the L'Enfant Trust now holds more than 100 historic preservation easements, and its sole purpose is to acquire and protect such permanent easements.

### **Many categories of ownership for historic properties**

In the United States, relatively few historic monuments belong to the federal government and are administered by the National Park Service, an agency within the Department of the Interior. Many historic monuments belong to state governments or are owned and administered by nonprofit organizations. Some of these non-profit organizations have historic preservation as a primary purpose, but many have other primary purposes such as an educational mission or a religious function. But the vast majority of historic properties in the United States are still privately owned and used as private residences or for commercial purposes.

### **Three levels of government in the United States**

It is difficult to make general statements about such a wide variety of ownership options without indicating how complicated the network of historic preservation legislation is in the United States. There are in the United States three general levels of government: federal, state, and local. New York City is a local government in New York State, which is a state within the United States. Land use regulations in the United States are almost always carried out by local governments rather than by state or national agencies. Different regulations and protections are possible at each of these three levels of government. There is no question that in the United States the strongest protections are possible through local municipal governments, which exercise broad land use regulation functions. State governments, except in a minority of states, have relatively limited powers to protect historic properties, but may be able to restrain actions by state agencies that would damage such properties. (This means that state governments do not prevent private owners from doing things which would damage historic properties in the state, but may be able through tax incentives or small grant programs to encourage suitable restoration and on-going maintenance activities.) Although the programs of the National Park Service can give great prestige to historic properties – perhaps through designation as a National Historic Landmark or listing in the National Register of Historic Places – these federal programs do not in any way prohibit actions that a private owner might wish to undertake. A private owner in the United States can, in fact, demolish or alter beyond recognition a property listed in the National Register of Historic Places – unless it is protected by a preservation easement!

### **Multiple owners for apartment buildings**

In large cities such as New York or Washington, apartment buildings are often owned by multiple owners. Whether the form of ownership is what we call a "condominium" or a "cooperative", the owner or occupant of each apartment has a separate ownership interest. A condominium owner owns a specified portion of a building, and a cooperative owner owns a specified number of shares in the corporation which controls a building (the number of shares will depend on the size of the individual apartment). Some owners are permitted to rent their apartments, and others are prohibited from doing so. These buildings are governed by associations or boards with the power to make "special assessments" against owners and to hold reserve funds until the time when a major repair or renovation affecting the entire building becomes necessary. Roofs need to be replaced, brickwork must be periodically repointed, and heating or plumbing systems become archaic. Common spaces such as lobbies and laundry rooms or corridors and elevators must be uniformly maintained to enhance the prestige of the building and protect the investment interests of the individual owners.

Condominium associations and cooperative boards may also play a role in deciding who will be permitted to purchase or lease apartments in individual buildings. Cooperative boards in New York have been known to turn down prominent individuals – such as former President Richard Nixon – on the grounds that they are too "controversial" and would bring undesirable attention to a building. There



may be very stringent financial requirements for owners seeking to purchase a unit in an important building. In Washington, many condominium buildings permit only owners compelled by government jobs to take long assignments overseas to sub-lease their apartments.

The obvious advantage of such associations and boards is that they can make important decisions affecting the appearance and maintenance of a large apartment building. By collecting fees and special assessments from all owners in the building, an association or board can afford to plan and fund a major project to restore key portions of the structure in phases over a period of time. If windows are aging and must be replaced, the association or board can either undertake a single window-replacement project that would be completed according to plans approved by the association or board, or could require that individual owners meet specified standards and select pre-approved window units as they plan window replacement for individual apartments.

A secondary impact of condominium or cooperative ownership for major apartment buildings is that it is almost impossible for such a building to be demolished in the future. Anyone planning demolition would need to contract with a large number of individual owners, any one of whom would be able to halt a planned project. This is probably why several major apartment buildings in the District of Columbia have never been nominated to the National Register of Historic Places or locally designated as landmarks. They are already effectively protected from demolition through multiple ownerships, though nothing restrains bad decisions by an association or board to undertake undesirable alterations that could damage permanently the architectural character of these buildings.

### Specific design guidelines

Although the National Park Service has published standards and guidelines that are widely used to approve proposed historic preservation renovation work in the United States, most design guidelines are administered by local historic preservation commissions. Often these design guidelines are developed by local governments and are only applicable to specific local historic districts. Twenty years ago, in 1976, there were already so many of these design guidelines that the National Endowment for the Arts published a "Bibliography of Design Guidelines".

Design guidelines can be quite specific. They may deal with minor details such as window shutters or door and window hardware. Often they will explain architectural styles so that building owners can understand why something that would be appropriate to a building in one style could be very inappropriate for a building in a different architectural style. Design guidelines for a residential neighborhood may be different from design guidelines for a commercial area, where owners are likely to want to make frequent changes to store fronts and windows. (In New York City, the Upper Madison Avenue Historic District gives building owners greater flexibility for the bottom two floors of their buildings than for upper floors, which often retain the character of opulent residential structures.)

### Design review in the United States

Perhaps the most distinctive feature of local historic preservation programs in the United States is that decisions are

made by administrative committees of local residents. More than 2,000 counties and municipalities have enacted local historic preservation ordinances. Although these ordinances can vary greatly from location to location, certain features have become typical. The size of the commission created by the ordinance will range in number from five persons to nine. There will probably be some membership requirements, such as requiring an architect member and requiring one historian as a member. There may be a requirement that someone active in purchasing and selling real estate also be a member. Increasingly, there is a requirement that the "public" members have some knowledge of or interest in historic preservation.

These local historic preservation commissions meet monthly to consider applications by property owners requesting permission to make changes to their properties. In smaller communities, the commission will have at most a very modest annual budget for expenses, and may be able to call on the professional expertise of someone in the city planning department for staff assistance. In larger cities (such as New York), the commission may have a budget as great as \$ 500,000 annually, and a staff of twenty or thirty professionals. But local historic preservation commissions almost never have funds from which they can make grants to individual owners of historic properties.

Historic preservation commissions review four major categories of proposed changes: alteration, demolition, new construction and subdivision. Subdivision is a term which refers to any change in the size or shape of a defined piece of real estate, though it most often refers to a change that would create two (or more) smaller parcels from a single larger parcel.

Certainly subdivision has the potential to lead to denser construction in a neighborhood, and is likely to facilitate the construction of new buildings. New construction in the District of Columbia often involves putting additional residences on a single large parcel that was developed originally with one significant structure and extensive surrounding landscaping. (In a number of situations, wealthy purchasers have bought a handsome property in a prime location simply to demolish the house and build a newer and much larger residence.)

But it is alteration and demolition that cause the greatest challenges for effective local historic preservation commissions in the United States. Alteration can run the spectrum from changing the size or location or style of windows in the front of a structure to adding an additional upper floor or extending a new wing into a garden area. Obviously an extensive set of alterations can completely change (or obliterate) the architectural character of a building. Property owners often argue that they have a legal right to make whatever changes they wish to make if they are private owners. But these owners are already subject in municipal areas to building codes designed to protect public health and safety, and many United States courts have upheld the purposes of local historic preservation commissions as merely another means of accomplishing "public welfare" objectives.

Often an owner has purchased an older property with the hope of demolishing it and building a new structure for a different use on the property. A small wooden residential bungalow from the early 20th century may sit on a property zoned for business purposes in a neighborhood where potential structures would be allowed to be forty feet higher than



the bungalow. In such situations, and they exist by the tens of thousands in our country in areas with weak historic preservation controls or in neighborhoods that have not yet been designated as historic districts, the owner has a strong economic incentive to demolish the existing structure in order to "re-develop" the property. If the owner cannot demolish the structure, he will argue that he has been deprived of significant economic benefits, and will act as if the municipality has actually taken money from his pocket, even though the money represents only anticipated or hoped-for profits. In the District of Columbia, a two-story group of shops with surface parking is located above a subway station which opened in the late 1970s. Because an effective case was made that this shopping complex had great historical significance as one of the first "drive-in" shopping malls to be built in the United States, it was included within a local historic district and applicable height restrictions for these buildings and a nearby commercial area were reduced to discourage further attempts to demolish the significant low structures.

### **Economic incentives for historic preservation in the United States**

The principal source for municipal revenues in the United States is the property tax, which is uniformly applicable to categories of property located within municipal boundaries. The second important source for municipal revenues may be a sales tax derived from sales of certain goods and services. (Food in restaurants is almost always covered, often at a very high rate, but food purchased uncooked may not be covered.) Other revenues will supplement these basic funds.

Local governments in the United States therefore have a strong interest in protecting their property base, because any reduction in the overall value of taxable property within a government's boundaries will lead immediately to a reduction in available government funds. If a community is prospering, the property base tends to rise as values of individual properties go up. For several decades, property owners in the United States have benefitted from strong increases in the values of private property. Correspondingly, municipalities have benefitted from great increases in municipal revenues from the property tax.

In the United States, sales prices for properties become public information, easily available in a local government office through the interpretation of tax stamps attached to a recorded deed. Each piece of property is "assessed" to determine the annual tax rate. Reassessment is often conducted every two years, or even annually. Where permitted by law, a temporary "freeze" in the assessed value of a piece of property can be a significant economic benefit to a property owner. Many communities now permit a property owner to enjoy a five-year (or longer) "freeze" in tax assessment in conjunction with a rehabilitation of the property. Because the rehabilitation of an inner-city structure can often increase greatly the value of the structure, the effective saving to the property owner is quite substantial. Other economic incentive programs may permit a property owner to use a portion of rehabilitation expenses as a direct tax credit, effectively an amount subtracted from the taxes otherwise due in cash.

Congress created in the late 1970s an important program of federal tax incentives that permitted private owners of commercial (but not residential) properties in the United

States to spend at least as much as the cost of the structure on the property for a "certified" rehabilitation project and thereby qualify for a federal tax credit. The National Park Service and state historic preservation offices were responsible for seeing that owners complied with specific federal guidelines for such projects, and owners who violated these guidelines would often be disqualified from the available tax credits. This program encouraged the rehabilitation of an extraordinary number of otherwise neglected former industrial structures as well as smaller office buildings and rental residential properties during the 1970s and 1980s. Unfortunately, when Congress became concerned that this was too attractive an economic incentive because the favourable tax consequences were too great, it changed the requirements for the program in 1986. Fewer projects have qualified since.

Currently, historic preservation groups in the United States are attempting to develop support in Congress for a "Homeowner Tax Credit" that would be available to owner/occupants of inner-city residential housing, in order to encourage rehabilitation of often neglected older neighborhoods in our major cities. It can take several years for adequate support for such new legislation to develop, so it is too early to tell whether the proposal will pass, and whether it will pass in its present proposed form.

### **Summary and conclusion**

This is a very brief overview of a complicated set of interlocking programs operating at several levels of government in the United States. You should remember that there are in the United States only very minimal programs that can make direct cash grants to owners of historic properties. (Such programs were much larger twenty years ago.) Although many historic monuments are owned by private non-profit organizations, these organizations have constant money problems as they attempt to raise funds for on-going administrative expenses and to stay ahead of the possible erosion of the value of money. Often such organizations have been forced to implement creative strategies for generating special revenues from historic properties through rentals for receptions or conferences (or potentially as movie sets!).

Governmental historic preservation programs in the United States depend on a regulatory approach and/or the creation of attractive economic incentives which will encourage a property owner to avoid certain conduct in order to qualify for the incentives, or to undertake other conduct in order to qualify. Only local historic preservation commissions have the power to tell a property owner "no", and more than one hundred valuable court decisions in the United States have upheld this power.

US/ICOMOS looks forward to the opportunity to participate in the important work the members of the new Legislation Committee will undertake. The rapid growth of a network of regulatory measures designed to supplement and buttress efforts by private owners suggests that there is a continuing role for historic preservation legislation. Not every country will be able to implement all strategies, but the close comparison of existing laws is bound to be beneficial to those countries which now look to the future as they re-design legislative and regulatory approaches.

