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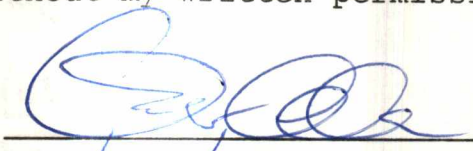
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HOW A SELECT GROUP OF NONPROFIT LAND CONSERVATION ORGANIZATIONS HAVE RESPONDED TO NEW CONGRESSIONAL DEFINITIONS OF OPEN SPACE

A Thesis

Presented for the

Master of Science in Planning

Degree

The University of Tennessee, Knoxville

Robert Badgett Allen

August 1986

DEDICATION

I dedicate this work in honor of my mother, Frances Lona Badgett Allen, whose understanding and support help make it possible.

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In the course of thesis research, a number of people have assisted me generously. I especially wish to thank Elizabeth Watson, Washington Representative of the Land Trust Exchange, and Janet Diehl, Research Assistant with the Trust for Public Land, for their advice, suggestions, information sharing, and encouragement. An extra special thanks goes to William Theodore Brown, Jr., Esq. of Atlanta, Georgia, for his editing assistance of my proposal which helped me make style and format changes. I am particularly indebted to Professors Prochaska, Bowen, and Spencer, who served as my Chairman and committee respectively. Their consultation and criticism helped to move my work along at a rapid pace. Whatever errors remain in my work, however, are solely my responsibility.

ABSTRACT

The use of conservation easements for land conservation purposes is an old idea which received new recognition with Congress' passage of the Tax Treatment Extension Act of 1980. That legislation allowed for tax deductions of "qualified conservation contributions" and included a new open space conservation purpose in that definition.

This study undertook a literature review and a survey (via questionnaire) of twenty-two nonprofit land conservation organizations to determine the problems with the easement approach. In particular common law problems, the Treasury Regulations, and management issues were reviewed.

The results show few problems to date with the easement approach, but it is still early in the slow evolution of the conservation easement tool. It will take several generations to completely answer the common law and policy questions. The questions presented by the I.R.S. regulations will largely center around the question of valuation, but will for the most part, be found workable by the local groups.

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CHAPTER I

INTRODUCTION

Statement of the Problem

Need for the Study

In 1976 local nonprofit land conservation organizations were given a potentially strong tool by Congress in its decision to allow charitable tax deductions for donations of land for "conservation purposes." In 1980 Congress increased the scope of this tool by adding "open space preservation" to the list of "conservation purposes" for which a donor can receive a tax deduction for a "qualified conservation contribution" defined as the contribution of a "real property interest" to a qualified organization" exclusively for "conservation purposes" protected in perpetuity (Brenneman 1984; I.R.C. § 170(h)(4)(A) (i)-(v) (1982); Small 1986). The legislation, for the most part, clearly defined these terms. After 1976 and prior to 1980, the conservation purposes had been limited to those for (a) recreation or education of the general public, (b) protection of a natural habitat or ecosystems, and (c) for the preservation of a "historically important" land area or certified structure (I.R.C. § 170(f)(3)(B)(1976)).

The land conservation community was both excited and confused, however, by the 1980 legislation when this new conservation purpose was added, hence the need for this study. The law defines this new open space preservation purpose:

> The preservation of certain open space (including farmland and forest land . . .) will meet the conservation purposes of this section if such preservation is--
> (A) Pursuant to a clearly delineated Federal, state, or local conservation policy, and will yield a significant public benefit, or
> (B) For the scenic enjoyment of the general public and will yield a significant public benefit. (I.R.C. § 170(h)(d)(1)(iii)(1982))

On May 23, 1983, The Internal Revenue Service released the Temporary Regulations concerning qualified conservation contributions and held hearings on September 15, 1983 (48 Fed. Reg. 22940).

In adding this new conservation purpose for charitable land donations, Congress knew the term would be vague and subject to abuse so it added new "tests." Stephen Small, Esq., former I.R.S. attorney involved in drafting the Temporary Regulations and author of The Tax Law of Conservation Easements, describes the problem in this manner:

> In 1980, Congress generally repeated what was said in 1976 and added a fourth category, the preservation of open space. In 1980, however, Congress said, "Not just any donation of open space will do. Unlike the other three ways to get a deduction, for open space you must meet independent tests that we are now establishing." In other words, "significant public benefit" is implicit in the case of a gift for recreation or

> education, or to protect habitat, or to preserve historic buildings, but it is not implicit in a gift "merely" to preserve space. (Small 1986, pp. 4-1, 4-2)

In developing the Temporary and Final Regulations, I.R.S. and the Treasury Department relied heavily on the legislative history for guidance. For each test the regulations list "factors to be considered." Small discusses these tests and factors at length; in discussing the scenic enjoyment factors, he emphasizes that the list of factors for each test in the Regulations "is not an all inclusive list, not a checklist, not a weighted list of the only factors the Service considers important. Rather it is the Service's attempt to suggest certain criteria that may or may not be relevant to the evaluation of a particular donation" (Ibid., p. 7-3). The final regulations were released on January 14, 1986 (51 Fed. Reg. 1496; see Appendix A).

"Scenic Enjoyment" Test and Factors To Be Considered

According to the final regulations, "Among [emphasis added] the factors to be considered are:

> (1) The compatibility of the land use with other land in the vicinity;
> (2) The degree of contrast and variety provided by the visual scene;
> (3) The openness of the land (which would be a more significant factor [in] an urban or densely populated setting or in a heavily wooded area);
> (4) Relief from urban closeness;

> (5) The harmonious variety of shapes and textures;
> (6) The degree to which the land use maintains the scale and the character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;
> (7) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and
> (8) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency. (Treas. Reg. § 1.170 A-14(d)(4)(ii))

The Regulations also state, "To satisfy the requirement of scenic enjoyment by the general public visual access is sufficient . . . the entire property need not be visible to the public, visual [rather than physical] access is sufficient . . . although the public benefit . . . may be insufficient . . . if only a small portion is visible to the public" (Ibid.).

Clearly Delineated Governmental Conservation Policy

In discussing the requirement that preservation of open space be pursuant to a clearly delineated federal, state, or local governmental conservation policy, the regulations state:

> A general declaration of conservation goals by a single official or legislative body is not sufficient. However, a governmental conservation policy need not be a certification program that identifies particular lots. . . . This requirement will be met by donations that further a specific, identified conservation project. . . . For example, the donation of a perpetual

> conservation restriction to a qualified organization pursuant to a formal resolution of certification by a local governmental agency established under state law specificalty [sic] identifying the subject properly [sic] as worthy of protection for conservations purposes will meet the requirement of this paragraph. A program need not be funded to satisfy this requirement, but the program must involve a significant commitment by the government . . . . For example, a governmental program according preferential tax assessment or preferential zoning for certain property deemed worthy of protection for conservation purposes would constitute a significant commitment by the government. (Treas. Reg. § 1.170A14(d))

The regulations also address the effect of acceptance by a governmental body on this test. The regulations state that this acceptance "tends to establish the requisite clearly delineated governmental policy, although such acceptance, without more [documentation? proof?], is not sufficient. The more rigorous the review process . . . the more the acceptance of the Easement tends to establish the requisite clearly delineated governmental policy" (Ibid., § (4)(iii)(B)).

In a discussion of access, the regulations state, "A limitation on public access shall not render the deduction nondeductible unless the conservation purpose of the donation would be undermined or frustrated without public access (Ibid., §(4)(iii)(C)).

Significant Public Benefit

All donations of open space must meet the public benefit test. The Regulations state:

> Public benefit will be evaluated by considering all pertinent facts and circumstances . . . . Factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution. No single factor will necessarily be determinative. Among the factors to be considered are:
> (1) The uniqueness of the property to the area;
> (2) The intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);
> (3) The consistency of the proposed open space with public programs (whether Federal, state or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area;
> (4) The consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by ["qualified"] organizations . . . in close proximity to the property;
> (5) The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;
> (6) The opportunity for the general public to use the property or to appreciate its scenic values;
> (7) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
> (8) The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
> (9) The cost to the donee of enforcing the terms of the conservation restriction;
> (10) The population density in the area of the property; and

(11) The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection. (Treas. Reg. § 1.170A-14(d)(4)(iv))

Limitations

The Regulations state that a deduction for preservation of open space will not be allowed "if the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation" (Treas. Reg. § 1.170A-14(d)(4); also see § 1.170A-14(e)(2) for rules relating to inconsistent use).

Relationship of the Tests

There is a relationship between the clearly delineated governmental conservation policy test and the public benefit test, even though both "must be met independently." The more site specific the governmental policy, "the more likely the governmental decision, by itself, will tend to establish significant public benefit (Treas. Reg. § 1.170A-14(d)(4)(vi)(A)).

Whereas, such is not the case with the "scenic enjoyment" tests and the "significant public benefit" tests ". . . since the degrees of scenic enjoyment offered by a variety of open space easements are subjective and not as easily delineated as are increasingly specific levels of

governmental policy, the significant public benefit of preserving a scenic view must be independently established in all cases" (Ibid.).

Summary

In 1980 Congress added preservation of open space to the list of "conservation purposes" for which donors could receive a deduction for a "qualified conservation contribution." This broad new purpose provided both opportunity and confusion to nonprofit organizations involved in land conservation, especially in regard to their easement programs. Many had fee-simple or conservation easement programs that had been in existence for years. These nonprofit conservation organizations wanted to use this new purpose in their land conservation efforts but were confused by the vagueness of the legislation. When the temporary regulations were released on May 23, 1983, these organizations were further confused by the discussion of "scenic enjoyment," "clearly delineated governmental conservation policy," and "significant public benefit" tests.

Many organizations did not put their work "on hold" to await the final regulations, but may have been afraid to use this new purpose (the preservation of open space). Stephen Small describes the trends in the land conservation

community in the period between release of the temporary regulations and the final regulations:

> First, there was a growing recognition that the Proposed Regulation generally represented the rules donors and conservation groups were going to have to work with, and that no magic formula was going to appear in the Final Regulation. . . . Second . . . there also seems to be a growing recognition that with the exercise of good judgement and common sense the statute and Regulation are in fact workable, that conservation programs do not have to wither and die because of the "uncertainty" created by the statute, and that with the exception of continuing easement valuation controversies, the Service generally seems to be administering this Code section in a reasonable manner. This latter perception has been considerably enhanced by the publication by the I.R.S. of more than twenty favorable letter rulings on Code Section 170(h). (Small 1986, pp. 4-2)

The Final Regulations were released on January 14, 1986, and may have offered some clarification, but these nonprofit conservation organizations--depending in large part on the volunteer efforts of lay citizens--may still be perplexed by the vagueness. Their common experiences in dealing with these Regulations may offer guidance for organizations seeking to plan and implement strong easement programs.

Purpose of the Study

The purpose of this study is to determine how a select group of local nonprofit land conservation organizations with Easement programs have responded to the 1980 decision by Congress to add "preservation of certain open space

(including farmland and forest land)" (I.R.C. § 170(h)(d)(1)(iii)) to the list of "conservation purposes" for which a donor can receive a deduction for a "qualified conservation contribution." In particular this study is designed to address the following research questions:

1. Have these organizations changed their easement programs to reflect the Temporary/Final Regulations?
2. Have the Temporary and/or Final Regulations caused any problems with these groups' easement programs?
3. Have these nonprofit land conservation organizations addressed the "public benefit," "scenic enjoyment," and "clearly delineated governmental conservation policy" tests for open space easements?
4. Would the experience of a select group of these land conservation organizations since 1980 provide guidance to the land conservation community in planning and implementing easement programs?
5. Have these groups experienced any problems with their state legislation and/or common law regarding easements?

The Focus of the Study

The focus of the study is the easement programs of private easement programs of private nonprofit land

conservation organizations, in particular those which have developed criteria for their easement programs. The emphasis is on identifying problems with their easement programs; especially any created by the Temporary or Final Treasury Regulations. Detailed attention is given to the new open space conservation purpose and the "scenic quality," "clearly delineated governmental conservation policy," and "public benefit" tests.

Methodology

Questionnaire

Design

The questionnaire (Appendix B) is designed to identify (1) problems with state legislation/common law, (2) problems with the Temporary and/or Final Treasury Regulations and (3) other issues. The questionnaire is structured to begin with basic introductory, practical questions and to end with an open-ended philosophical question.

The heart of the questionnaire deals with the Temporary and/or Final Regulations, particularly the new open space conservation purpose with the "scenic quality," "public benefit" and "clearly delineated conservation policy" tests. Questions are also asked to determine if the Temporary and/or Final Regulations have caused any

problems with these groups' easement programs and, if so, what steps have been taken to address those problems.

Questions addressed under other issues include the number of term easements prior to 1976, the percentage of scenic/open space easements since 1976, the issue of quality of the view vs. the number of people viewing, and steps taken since 1980 to qualify/quantify easements.

Organizations Surveyed

In 1985 the Land Trust Exchange, a national network of land conservation organizations, conducted a comprehensive national survey of national, regional, and local land conservation organizations and agencies. The total number of organizations and agencies responding was 210. A total of 127 of those were nonprofit organizations. (See "Report on the 1985 National Survey . . .")

This questionnaire (Appendix B) was sent to the twenty-two nonprofit organizations (Appendix C) which responded to the 1985 survey that they have developed criteria for their easement programs (A. E. Watson, personal communication, May 9, 1986). The reasons for choosing this select group of nonprofit organizations are:

1. They demonstrated their concern with the issues raised by this study by their response to the 1985 National Survey.

2. Likewise, they demonstrated a good likelihood of responding to this questionnaire by their response to the 1985 National Survey.
3. The fact, that these organizations have developed criteria for their easement programs indicates a studied and rational approach to their easement programs.
4. The response to the National Survey and the development of criteria indicates these groups have likewise studied the development of the I.R.S. Regulations which are the subject of this study.
5. Government agencies which have developed criteria for their easement programs are eliminated because it is felt the "public benefit" tests and "clearly delineated governmental conservation policy" tests were more of concern to the nongovernmental nonprofit organizations.

These groups are geographically distributed over thirteen states and the District of Columbia.

Time-Frame

The major changes in tax law which have encouraged donations of land for conservation purposes have occurred since passage of the Tax Reform Act of 1976 and, more importantly, the Tax Extension Act of 1980. For this

reason, the study emphasized changes, trends and developments since 1976. A particular effort is made to determine any trends among these organizations between 1980 and the present.

The questionnaires were mailed to the twenty-two organizations on June 21, 1986 with follow-up phone calls on June 27, 1986 and July 7, 1986. Of the 22 organizations surveyed, sixteen (72%) responded, but three did not return the questionnaire. Thirteen of the organizations surveyed (59%) responded with the questionnaire.

The organizations were encouraged to respond by the author's promise to share results with them. Many of the respondents expressed an interest in seeing the results of this questionnaire.

Literature Search

As with the questionnaire, the literature search was designed to identify: (1) problems with state legislation/common law, (2) problems with the Temporary and/or Final Treasury Regulations, and (3) other problems. The emphasis was on any material published since 1980.

Nearly one-third the material was contained in law review articles. Most of that material dealt with the theorical/legal and common law problems associated with easements. A few of the articles dealt with problems with the Temporary Treasury Regulations (especially useful are

Madden 1983; and Willbanks 1984). Small's 1985 edition of the Tax Law of Conservation Easements is an interesting history and discussion of the draft regulations; the 1986 revision is an excellent analysis of the final regulations.

Organization of Thesis

This thesis proceeds with a historical background in Chapter II. A brief overview of open space preservation and the development of the conservation easement approach will introduce the reader to these concepts.

Chapter III is a lengthy discussion of issues discovered in the literature search. Receiving particular attention are: (1) problems with legislation, common law, equity rules; and, (2) problems with the Treasury Regulations. Other issues addressed in summary fashion are: criteria, drafting of the document, monitoring and enforcement, other approaches/state models, and the issue of a tax credit versus a deduction.

Chapter IV is a summary of the survey results, presented in narrative fashion. These results are discussed as they relate to the research questions.

Chapter V is the concluding chapter. Examined in this chapter are the implications of the findings and suggestions for further research.

CHAPTER II

HISTORICAL BACKGROUND

The Concern with Open Space Preservation

As a Human Need

Open space is many different things to many different people. As Chapin says, "Open space has several meanings, depending on one's point of view" (Chapin, p. 375). The planner sees it as a problem of allocation and views the issue as part of either an "environmental systems" or an "ecological approach" (Ibid., pp. 376-386). The real estate investor sees open space as raw land in the path of future urbanization. The civil engineer sees it as a water quality or flood control issue. A forester sees the need to retain urban woodlands. A family farmer sees it as productive land and as preservation of a way of life for future generations. His friend, the district conservationist, sees open space as a matter of resource retention. A landscape architect sees open space as a scenic, historic, or cultural landscape. The average citizen sees open space as a pleasing buffer in the urban scene, a pastoral view of the rural countryside, a breathtaking vista, and/or as an urban/suburban playground.

The need for open space is to serve a basic, even spiritual need. One writer describes the healing power of desert landscapes and laments the loss of open space,

> Landscape is broken up into pieces. The loss is subtle, largely to the eye; but some believe it as a loss that registers on the human spirit as profoundly as the loss of a trace amount of zinc in the blood will affect the health of the human body. (Lopez 1982, p. 53)

He writes of the power of deserts to heal the depression of urban living by the power of "open space, where one can see clearly" to release the imagination (Ibid., p. 55).

Ancient Roots

One author credits F. J. Osborn with tracing the concern with open space back to the 13th Century B.C. when, [the Lord said to Moses] "the fields of common land belonging to their [the Levites'] cities may not be sold; for that is their perpetual possession" (Leviticus 25:34) (Ibid.). But Correll mentions that it is Ebenezer Howard's Garden Cities of Tomorrow that Osborn credits with "uniting the complimentary purposes of limiting urban spread by preserved open space" (Ibid.).

In Planning

Roots in Profession

Urban and regional planning has its roots in the garden city movement (for a good history see Birch,

Schaffer, and Wilson) and the city beautiful movement (good history by Peterson). The term "open space" became a popular part of the planning vocabulary in the 1950's and 1980's and the publication of The Last Landscape by William Whyte popularized the term for a larger number of Americans in the late 60's and early 70's (Whyte 1968, see especially pp. 15-32).

Functions of Open Space

Howe has described six basic functions of open space:

1. open space for managed resource production, typically forests, minerals, and agriculture
2. open space for urban expansion
3. open space for public safety, especially fire and flood control
4. Open space for service corridors
5. open space for preservation of natural and human resources, wildlife, etc.
6. open space for human health and well being essentially through visual amenity, recreational opportunity, and measures to shape and guide commercial and residential development. (Howe 1974, p. 124)

Howe argues "Land must be recognized for what it is: a limited resource. . . . Much of this land, it is submitted, ought to be preserved as open space, because in that state it can best fulfill some of man's most basic needs, some of them tangible and obvious, but others, equally basic, intangible and consequently more easily forgotten or ignored" (Ibid., p. 123).

Range of Protection Techniques

Antherton has outlined the "Property Right Transfer Techniques and Land Use Controls" used to protect conservation land:

I. Fee Simple
   A. Full Sale
   B. Bargain Sale
   C. Sale with Retention of Certain Rights
      1. Life Estate
      2. Compatible Surface Use
   D. Purchase and Sell-back or Lease-back
   E. Land Banking
II. Less-than-fee Simple
   A. Lease
   B. Common Law Easements, Real Covenants, Equitable Servitudes
   C. Statutory Conservation Easement
III. Public Land Use Controls
   A. Zoning
   B. Easements by Dedication
   C. Planned Development Regulations

(Atherton 1985, p. 90)

A more comprehensive, but similar, table entitled "Summary of Land Protection Methods" was developed by Reitze:

I. Regulation to Protect Open Space
   A. Police Power
      1. Banning Nuisances (Trailer park restrictions, health ordinances)
      2. Building Codes (Housing size, septic tank controls, material specifications set back requirements)
      3. Zoning-Restrictive (Use limitations, minimum acreage, Flood Plain zoning)
      4. Subdivision Controls
      5. Critical Area Legislation
   B. Taxation
      1. Preferential taxation for open space land (generally a failure)
      2. Extractive Taxes (to discourage mining)

3. Preferential taxes to encourage forestry
4. Tax penalties for construction in areas where protection was desired. (Denial of accelerated depreciation).

C. Control of Developers
1. State and Federal Environmental Quality Acts
2. Consumer legislation directed at land sales
3. Sewer and Construction Moratoriums

D. Land Conservation Trusts and other private agreements in which the public is a third party beneficiary

II. Acquisition of Interests in Land

A. Fee
1. Purchase
2. Lease
3. Gift
4. Condemnation

B. Less than fee
1. Incorporeal Interests
a) Covenants running with the land
b) Equitable servitudes
c) Easements
d) Profits
2. Dividing the Fee
a) Mineral rights
b) Timber rights
c) Lateral and Subjacent support
d) Water rights
e) Air rights
3. Remainder Interests

(Reitze 1974, p. 1-68)

The Antherton outline emphasizes the nature and scope of the land right, whereas, the Reitze table outlines acquisition versus regulatory techniques. This thesis is focused on: II(a) of the Antherton outline--"Statutory Conservation Easement," and D of the Reitze Outline--"Land Conservation Trusts and other private agreements in which the public is a third party beneficiary."

The 1985 National Survey by the Land Trust Exchange revealed that 85 nonprofit organizations which had once accepted easements but no longer do or had seriously considered easements but had not accepted any, ranked "uncertainties about federal tax law relating to gifts of conservation easements as the highest of seven reasons for why easements were not being accepted. Thirty of these programs answered that the tax law uncertainties are a reason for not accepting easements" ("Report on the 1985 National Survey . . . ," p. 22).

Limits of Governmental Action

The increase of interest in open space preservation has come at a time of an increase in land prices and of budgetary constraints (Coughlin and Plaut 1980, p. 5; Pearce 1975 p. 4). In addition, the benefits and costs of open space preservation cross city and county lines (Correll 1978, p. 216). In this political climate then have come attempts to mix regulation and acquisition techniques (Pearce, 1975, p. 4).

But others have attacked zoning, the traditional land development tool:

> Zoning is no panacea because it is transitory and all too frequently influenced by the immediate economic interests of local policymakers. (Teitell 1980, p. 1)

> Techniques such as zoning, tax breaks, leases and licensing do not offer absolute assurance of

> permanent protection of open space. (Pearce 1975, p. 5)
>
> Faced with rapid population growth and increasing urban sprawl, conservationists were finding that zoning . . . was inadequate to restrict the exploitation of individual or isolated parcels of land. (Small 1979, p. 306)

One of the problems with zoning for open space protection may be "the ready granting of variances when political pressure to develop increases" (Fenner 1980, p. 1040), but a larger problem also exists with the fact that open space "zoning regulations are subject to attack on multiple constitutional grounds including alleged violations of due process, equal protection and the 'taking' clause of the fifth amendment" (Ibid.). In addition to confusing federal taking standards, others cite "the absence of governmental immunities" and "enormous monetary liability" (Bowen and Feldman 1981, p. 396) as reasons that cities and counties have avoided open space zoning techniques (for further discussion of the taking standard see: Dawson 1982, pp. 44, 150; Mandelker and Cunningham 1985, pp. 75, 106).

Conservation Easements--As "A Substitute for Zoning"

Howe refers to the "development easement approach" as "a substitute for zoning" and says it "resembles the scheme of the English Town and County Planning Act of 1947 (Howe 1974, p. 135). Unlike zoning regulations based on the

police power, however, it should be remembered that these restrictions are voluntary, binding agreements:

> entered into by private citizens with nonprofit organizations or governmental units under the aegis of specific state enabling legislation . . . In order to attack a municipality's use of conservation easements as exclusionary, a party would have to establish that the restrictions were exclusionary in fact, a burden more easily carried in actual zoning cases that in conservation programs. Given the status of conservation easements as statutory, nonzoning devices, it is unlikely that they can be equated with exclusionary zoning. (Goetsch 1975-76, p. 409)

Conservation Easements--Extension of an Old Idea

Early Use

The first American use of conservation easements was written in the 1880's to protect parkland near Boston designed by Frederick Law Olmstead, Sr., "although these were invalidated in the 1920's on the basis of a technicality in their drafting" ("Report on the 1985 National Survey . . . ," p. 11). In 1900 Charles Eliot incorporated easement provisions into the Massachusetts Bay Circuit Act (Goetsch 1975-76, p. 383). Olmstead undertook easement acquisitions in California in the early part of this century. The 1930 Capper-Cramton Act gave congressional authorization for easements along streams in Washington, D.C. (Ibid.).

The most extensive use was that of the National Park Service in the 1930's along the Blue Ridge Parkway and the Natchez Trace Parkway (Barrett and Livermore 1983, p. 4; Coughlin and Plaut 1978, p. 458-459; Goetsch 1975-1976, p. 383; Report on the 1985 National Survey). This experience is often cited as a failure and a reason for federal reluctance to enter into easement programs, however, Coughlin and Plant 1978 cites the following reasons for the failure of this effort: (1) the bulk of the easements were acquired by the states in the 1930's--they were more interested in acquiring the easements than in explaining the restrictions, (2) the easements have since transferred two to three times--these owners either were not aware of the restrictions or did not consider their implications, (3) these were rural areas totally unfamiliar with any type of land use regulation and (4) these easements were not drafted to consider the landowner's need for economic return on land (Coughlin and Plaut 1978, p. 458-459).

Coughlin and Plaut contrast this experience with the successful easement program of Piscataway Park by the National Capital Parks Commission in the 1960's and the "generally successful 1950 easement program along Wisconsin's Great River Road" (Ibid., p. 459).

The 1960's

In the 1960's the National Park Service undertook an easement program around Mount Vernon and federal funds became available for scenic and open space easement acquisition as part of the Open Space Land Program of the U.S. Dept. of Housing and Urban Development (Title III of the Housing Act of 1961, 42 U.S.C. §§ 1500-1500d-1) and Title III of the Highway Beautification Act of 1965 (779 Stat. 1028 23 U.S.C. §§ 131,136,319; also see Barrett and Livermore 1983, p. 4-5).

This renewed interest in the conservation easements during the 1960's is attributed to the publication in 1959 by William Whyte of a small technical bulletin for the Urban Land Institute entitled, Securing Open Space for Urban America: Conservation Easements (Danziger 1962, p. 483; Goetsch 1974-75, p. 384; Pearce 1975, p. 8; "Report on the 1985 National Survey . . . ," p. 11; "Techniques for Preserving . . ." 1975, p. 1635; Watson 1981, p. 27; Whyte 1959).

An intensive workshop for practitioners was held in 1966 at the University of Wisconsin in Madison. The conference concluded with several points stressed as a necessary part of a "successful easement acquisition program":

1. It is helpful to have a solid legislative base which spells out in some detail the public interest in preserving certain natural values and to have expressly authorized easement language which will help to avoid needless debate and court action.
2. To be successful, the power to condemn the rights in land to be acquired should be spelled out.
3. Easement programs should be incorporated within well-developed and acceptable comprehensive plans which identify areas to be preserved and the methods for achieving preservation goals, to include: fee simple acquisition, zoning, subdivision controls, and other appropriate regulatory measures.
4. The easements document must be carefully developed and spelled out in sufficient detail to protect the rights in land which are sought to be preserved. Moreover, the landowner must be carefully apprised of the rights being purchased. The courts will not interpret careless thinking nor careless documents in favor of acquiring agencies.
5. Use only competent and experienced appraisers and negotiators allowing them maximum flexibility in achieving objectives which they clearly and thoroughly understand beforehand.
6. The strictly negative easement in gross is, according to some authorities, a legal impossibility and enforcement of it might present difficulties. Therefore, enabling legislation should be specific in its language by attempting to circumvent the common law technical problems associated with easements in gross.
7. Public relations (selling) in advance of even preliminary negotiations for easements is a must. It then must continue unabated throughout the entire process of acquiring the interests sought. This is essential to success in that the owner must absolutely understand what he is selling and exactly what that will mean to him now and in the future, under virtually all circumstances.
8. Include as many positive clauses as possible in the easement document, such as: right to inspect, maintain, do studies, etc. This is necessary even if carefully worded and specific enabling legislation has been enacted.

> 9. Provide, within enabling legislation, for nonprofit land preservation organizations to receive state or federal financing to acquire easements in and manage lands. This will relieve the state of management burdens and will broaden the impact of state land preservation programs. (Pearce 1975, p. 25)

Following the Wisconsin Workshop came publication in 1967 of Private Approach to the Preservation of Open Land by Russell Brenneman of the Conservation and Research Foundation (Brenneman 1967). This work captured the attention of policymakers and conservation minded citizens. The publication by Whyte in 1968 of The Last Landscape (Whyte 1968) popularized the term for a larger audience (Goetsch 1974-75; Pearce 1975, p. 8; Watson 1981, p. 27). The 1960's also witnessed rapid change regarding easements on the part of the I.R.S.. The first specific I.R.S. statement regarding the deductibility of a scenic easement came in a 1964 Revenue Ruling (Madden 1983, p. 125; Rev. Ruling 64-205, 1964 2 C.B. 62). In 1965 came an I.R.S. news release announcing the availability of charitable deductions for donations of a scenic easement to a qualified recipient (I.R.S. News Release No. 784, Nov. 15, 1965, noted in Teitell 1980, et. al., note 45 at p. 4; as referenced in Madden 1983, note 122 at p. 126). However, in 1969, easement programs stalled when Congress enacted the Tax Reform Act of 1969 (Pub. L. No. 91-172, § 201(a), 83 Stat. 487, 549-50). In section 170 (F) Congress limited

deductions for partial interests to remainder interests in a personal residence or farm (I.R.C. § 170(F)(3)(b)(1970)) and "this provision seems to preclude deduction of conservation easements because the retention of substantial rights barred classification as an undivided interest" (Willbanks 1984, p. 325), although the Conference Committee Report (H.R. Report. No. 782, 91st Congress, 1st Session. 294 (1969)) "expressed a legislative intent to consider the gift of an open space easement in gross to be the gift of an undivided interest in property where the easement was granted in perpetuity . . . by creating a legal fiction that equated an open space easement in gross (granted in perpetuity) with an undivided property interest" (Madden 1983, p. 127-129).

The 1970's: Evolution in "The Environmental Decade"

The 1970's saw further change and evolution both in regard to I.R.S. thinking and also in regard to state legislation. The Treasury Department revived the easement progress stalled under the 1969 Tax Reform Act by publication of Treas. Reg. § 1.170-A(b)(1)(ii) and a series of revenue and private letter rulings (Watson 1981, p. 29 note 33 [appearing at p. 35] and Willbanks 1984, note 21, p. 326). Watson cites a 1975 compilation of state legislation

> which counted sixteen states with "specific state enabling legislation" and a total of twenty-five states with relevant legislation. By September of that year, the total reached twenty-nine. A compilation published in 1979 lists forty states with relevant legislation. (Watson 1981, p. 29)

But continued "Uneasiness with the weak basis for regulation" lead to amendments to the Tax Reduction Act of 1976 which permitted "the deduction of contributions of leases, options or easements of the least 30 years duration if they were exclusively for conservation purposes (Willbanks 1984, p. 326). These conservation purposes were defined in 170(f)(3)(C) as:

(i) the preservation of land areas for public outdoor recreation or education, or scenic enjoyment;
(ii) the preservation of historically important land areas or structures
(iii) the protection of critical environmental systems

The Tax Reduction and Simplification Act of 1977 further attempted to refine conservation purposes to guarantee that the purposes would be carried out (Madden 1983, p. 129), required that the interest be held in perpetuity (Madden 1983, p. 130; Willbanks 1984, p. 326), and set a "sunset date" allowing for charitable deductions under the 1977 legislation (Madden 1983, p. 130).

1980: Changes in the Tax Code Send a Strong Signal

In 1980, a year before the "sunset" date of the 1977 legislation, Congress addressed the continuing confusion

(especially as a result of questions dealing with mineral interests) by creating a new subsection of the Internal Revenue Code, Section 170(h) to define "Qualified Conservation Contributions." In particular, the legislation and resulting regulations are designed to define "Qualified Real Property Interest," "Qualified Organizations," "Conservation Purposes" [a definition generally and addressing particular issues under the heading "Exclusively for Conservation Purposes": perpetuity, surface mining, and mineral interests], and questions of valuation (see I.R.C. § 170(h)(1)(A)(B)(C); Madden 1983, pp. 131-148; Small 1986; Willbanks 1984, pp. 324, pp. 324-345). The conservation purposes were expanded to include the new open space purpose that is the primary subject of this research.

Rising Popularity of Easements

One good indication of the popularity of easements is the number of states passing specific conservation easement legislation which deals with the problems of nonstatutory common law easements. The first of these was the Massachusetts Conservation and Preservation Restrictions Act passed in 1969 ("Report on the 1985 National Survey, p. 30); since then, legislation has passed in numerous states although the estimates vary: 27 states (Partigan 1985, p. 433), 30 states (Antherton 1985, p. 63), 44 states (Garrett 1984-85,

p. 258, and "Report on the 1985 National Survey," p. 30). [The difference appears to be reflected in how each compiler counts "preservation" vs. "conservation" legislation]. Also directly as a result of the 1980 legislation, "the National Conference of Commissioners on Uniform State Laws drafted a model statute--the Uniform Conservation Easement Act (U.C.E.A.)" (Garrett 1984-85, p. 268 12 U.L.A. 52-61 (supp. 1986)). In five years this legislation has passed in seven states: Arizona, Indiana, Maine, Minnesota, Nevada, Texas, and Wisconsin (12 U.L.A. 52 (supp. 1986)). The discussion of the literature search will address the problems with common law which give rise to the need for the Uniform Conservation Easement Act.

Another indication of the popularity of easements is the number of organizations which have begun easement programs. The Land Trust Exchange notes, "Sixty-two of the [210] respondents to the survey have begun using easements since 1980. There has been an explosion of printed materials and conferences on the subject" ("Report of the 1985 National Survey," p. 30).

Summary

Open space preservation is a concern with ancient roots in human history and with more modern roots within the planning profession. Open space functions to serve

human needs. The range of protection techniques varies according to the types of land rights conveyed (full fee or less-than-fee) and according to the types of protection strategies used (acquisition, regulation, donation, public or private). The emphasis of this study is the use of conservation or open space easements by private nonprofit land trusts or conservancies.

Conservation easements are a less-than-fee simple techniques based on statutory authority and borrowing principles from common law. They are a "new" idea with old roots. The first use of a conservation easement in America was in the 1880's and early 1900's in Massachusetts. The first large scale federal government experience was by the National Park Service with the Blue Ridge and Natchez Trace Parkways in the 1930's. Problems with those programs have given public administrators insights to the short term strategies and long term enforcement responsibilities of successful easement programs. The use of scenic easements along the Great River Road in Wisconsin in the 1950's is the first large scale state approach. The 1960's brought the introduction of the modern statutory conservation easement with the publication in 1959 by William Whyte of "Securing Open Space for Urban America: Conservation Easements," a 1966 workshop for land conservation practitioners at the University of Wisconsin, the publication in

1967 by Russell Brenneman of Private Approaches to the Preservation of Open Land, and Whyte's publication in 1968 of The Last Landscape.

The real incentive for the use of easements came with the I.R.S.'s recognition of their use as donations or gifts to public charities allowing income tax deductions to qualified donors for qualified purposes. This use started during the 1970's after a series of favorable private letter rulings by the I.R.S., and was given statutory authority by the Tax Reduction Act of 1976 and the Tax Treatment Extension Act of 1980 (which created a whole new subsection of the Internal Revenue Code, I.R.C. § 170(h) to acknowledge the deductibility and qualifications of qualified easements). Since the 1980 legislation, a flood of conferences, articles, state legislation, and action by nonprofit land conservation organizations has centered around the use of the conservation easement technique.

CHAPTER III

LITERATURE SEARCH

Problems with Legislation, Common Law and Equity Rules

Overview

The literature on less-than-fee techniques for land conservation is very legalistic, theoretical, and confusing (for readable, current discussions see: Antherton 1985, pp. 56-72; Madden 1983, pp. 108-122; Netherton 1979). This writer agrees with Watson when she says, "It is apparent from any number of theoretical, legal discussions of the characteristics and merits of the various legal forms of the recorded land use agreement is here a pursuit without profit." However, as Watson finds, a brief discussion of these books is necessary to study the easement concept.

There are three basic less-than-fee techniques discussed in the literature: restrictive covenants, equitable servitudes and conservation easements. Some authors use the terms restriction covenants and conservation easements interchangeably (Browne and Dorne 1975, p. 70), while others argue that covenants are contracts and not eligible to be considered as qualified gifts to conservation organizations, hence the need for the distinction (Thomas 1975, p. 571). Likewise, there is a confusion ("two theories"

Netherton 1979, p. 552; Watson 1981, pp. 14-15) as to whether equitable servitudes are contracts or easements. Money damages are the only award available for breech of covenant (Netherton 1979, p. 550), whereas equitable servitudes can be enforced in equity (common law), as well as at (statutory) law. Specific performance of the agreement, as well as money damages, may be granted (Ibid., pp. 551-552). However, it is generally agreed that easements are the "most versatile" (Antherton 1985, p. 55) and "most effective" (Madden 1983, p. 105). Rather than a paper contract, "an easement is an interest in land that is in the possession of another" (Watson 1981, p. 14). Of the three less-than-fee interests, the easement is the strongest interest in land.

Before discussing common law and equity rules as they relate to these instruments, it is necessary to introduce some property law terms used in this discussion. The interests held are said to impact a dominant or servient estate with either affirmative (positive) or negative obligations. The nature of the estate and obligations are spelled out in the agreement, whereas, negative obligations give the holder (dominant estate) a veto power over otherwise lawful acts of the servient estate (Madden 1981, p. 113-114; Netherton 1979, p. 544; Watson 1981, pp. 15-16).

Another important classification which distinguishes these interests is whether the interest is appurtenant or in gross. An appurtenant easement benefits a particular and adjacent dominant estate. An interest in gross belongs to the owner (holder) "independent of his ownership or possession of other (dominant) land which is benefited by this interest in the servient estate (Netherton 1979, p. 544).

Another term used is in discussing whether the interests "run with the land." This concept deals with the assignability and transferability of the interest beyond the original holder. If the interests "run with the land" they can be assigned or transferred as the dominant or servient estate is transferred.

Common Law and Equity Rules

Background

Common law rules place restraints on the establishment, transferability, and enforceability of less-than-fee interests (Madden 1981, p. 103). Traditionally these rules have favored appurtenant easements over easements in gross (Netherton 1979, p. 546). One author cites these rules as the reason "the potential for developing innovative arrangements for protection of environmental resources through less-than-fee interests held by charitable

corporations or trusts or public agencies never has been seriously reached or even seriously approached" (Ibid., p. 541).

Covenants must meet rigid requirements of form, intent, "privity" and "touch and concern." In addition the holder can only seek money damages, not performance, and there are larger problems with enforcement, transferability, and assignability than with easements (Netherton 1979, p. 550-551). A majority of American courts have denied transferability by the holder of a restrictive covenant in gross (Madden 1983, p. 111).

Equitable servitudes also have problems with assignability when in gross (Netherton 1979, p. 541) even though "a minority hold the view that the burden of an equitable servitude runs whether or not the benefit is in gross, and this view has enjoyed support in some legal literature" (Ibid., p. 553).

Easements under common law are the less-than-fee interest with "relatively few common law restrictions" (Madden 1983, p. 105). Appurtenant easements are the ones with the least restrictions (Brenneman 1967, p. 32), although one commentator notes that articles and statutes on the subject ignore the issue of transferring the dominant estate with the appurtenant estate "otherwise the easement is terminated" (Cohen 1981, p. 754). The rulings

on the assignability of easements in gross are in conflict: in twelve states they can not be assigned; five states sustain assignability; six states base assignability on statutes; and in nine states the rulings are in conflict (Netherton 1979, p. 546-547); but the majority of American courts have ruled against assignability (Madden 1983, p. 550-551). Also, "The strictly negative easement in gross is, according to some authorities, a legal impossibility . . ." (Pearce 1975, p. 26). Some easements in gross are valid if held for a profit (Netherton 1979, p. 545).

Reasons for Confusion

This writer has observed that the following factors contribute to the confusion in the common law literature and cases:

1. Changes in Roman Law and English Common Law--The Roman Law offered greater flexibility and placed "no limit on the affirmative or negative obligation" (Netherton 1979, p. 543).
2. Difference Between English and American Courts--particularly important for easements in gross without a profit (Ibid., p. 545).
3. The few and often conflicting number of cases, with very few of those cases contemporary (see

Madden 1983, pp. 117-119; Netherton 1979, pp. 546-549, 551, 553).

Changes in The Rules as They Affect Conservation Easements

The literature review reveals that the common law is changing to allow for conservation easements. These changes are coming because "the policy reasons for creating such restrictions are no longer valid" (Madden 1983, p. 111). It was the clouding of titles and concern with excessive encumbrances which was the fear underlying common law's hostility toward easements (Madden 1983, p. 120; Netherton 1979, p. 554). But the modern practice of title searches and, more importantly, recording statutes should minimize this concern (Ibid.).

There are four developments which underscore this policy change:

1. Restatement of Property--Netherton states:

> the issue remained unclear well into the twentieth century, when Sims became the prime mover in working for a change in the rules of American common law to recognize noncommercial easements in gross as assignable interests. As a result the Restatement of Property adopted the position that such interests are alienable, if made so by the terms of their creation. (Netherton 1979, p. 544; see also Restatement of Property §§ 491, 492 (1944))

2. U.S. v. Albrecht (364 F. Supp. 1349 (N.N.D. 1973), affd, 496 F. 2nd 906 (8th Circuit 1974)). This

case upheld the right of the United States to enforce a restriction in gross pursuant to the Migratory Bird Conservation Act (45 Stat. 1222, 28 U.S.C. § 1345). Netherton notes that the case "may point the way to a liberalization of the rules of assignability and enforceability, at least in cases where the holder of an interest in gross is a public agency. Being immortal and fixed . . ." (Netherton 1979, p. 558).

3. State Statutes--The number of state statutes written to correct or address common law problems is often cited as evidence that the public recognizes "the usefulness of this device" (Fenner 1980, p. 1067).

4. Uniform Conservation, Easement Act--U.C.E.A.--(U.L.A. Vol. 12, p. 52-61 (Supp. 1986))--In 1981, the National Conference of Commissioners on Uniform State Laws, drafted a model statute "in direct response to the 1980 Tax Treatment Extension Act" (Garrett 1984-85, p. 268) with "the primary focus of U.C.E.A. . . . the removal of all common law barriers to conservation easements" (Ibid., p. 269).

The State Statutes

Three Approaches

The prefatory note to the Uniform Conservation Easement Act (U.L.A. Vol. 12, p. 52-61 (Supp. 1986)) helps to clear much of the confusion regarding the discussion of conservation easements. The U.C.E.A. is a rejection of two alternatives which states had been taking in conservation legislation:

> The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with nonpossessory 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. (Ibid.)

The U.C.E.A. is then a third approach. In some ways the Uniform Code is more comprehensive (in its consideration of all potential common law and equity problems), but it leaves a lot of issues for the legislatures to address (see discussions below). Antherton states:

> All the statutes have one characteristic in common: simplification and clarification of common law doctrines. . . . The major areas addressed by the easement legislation include: definition and categorization of the interest; the nature of the interest granted; who may

> acquire it; methods of acquisition; enforceability by subsequent holders of both benefited and broadened interests; duration; termination; and enforcement. (Antherton 1983, p. 63)

Issues To Be Considered in State Legislation

Antherton addresses the subject of Issues to be considered in State Legislation:

1. Is the use of eminent domain by public agencies allowed for acquiring the easements? (Ibid., p. 64)
2. Are nonprofit organizations allowed to hold easements? (Ibid., p. 64)
3. The extent to which subsequent holders of dominant and servient estates are bound. (Ibid., p. 64)
4. Durational requirements. (Ibid., p. 65)
5. Enforceability by the holder, designated third parties, citizen suits [used in California], and actions by the Attorney General [in Capacity as supervisor of charitable trusts either by statute or of common law]. (Ibid., p. 65)
6. Remedies [damages, injunction, court costs, and other fees]. (Ibid., p. 65)
7. Legislative findings. (Ibid., p. 66)
8. Property tax benefits. (Ibid., p. 66)
9. Government methods to finance easement acquisition. (Ibid., p. 66)
10. Governmental approval or review. (Ibid., p. 66)

Uniform Conservation Easement Act

The Prefatory Note to the Uniform Conservation Easement Act (U.L.A. Vol. 12, p. 53 (Supp. 1986)) states that the easement approach was chosen 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 equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, nonpossessory interests satisfying the requirements of covenants 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.

A key difference in the Uniform Act and the statutes in some states is a rejection of subjection of easements for review to public planning agency review. As the Prefatory Note states, "There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system." Among these reasons are:

> [1] The Act has the relatively narrow purpose of sweeping away certain common law impediments . . .
> [2] the requirement of public agency approval adds a layer of complexity which may discourage private actions . . .
> [3] Placing such a requirement in the Act may dissuade a state from enacting it . . .
> [4] Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organizations, neither of which is likely to accept them on an indiscriminate basis.
> [5] Government programs that extend benefits to private donors of these easements provide additional controls against potential abuses.
> [6] Controls relating to real estate assessment easement and taxation . . . have been, or can be, imposed by state legislatures to prevent abuses . . .

> [7] 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 nonpossessory interests by and among public 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. (Ibid.)

This final point appears to be a largely philosophical one that might be classified as "anti-planning" (see Watson 1981, pp. 17-21). The rejection of planning agency review is of interest here because of the requirements in the Final Treasury Regulations that certain open space easements meet a "clearly delineated governmental conservation policy test" (Treas. Reg. § 1.170A14(d)). Any state considering the Uniform Conservation Easement Act could, of course, include such a public ordering system or agency review in their state's legislation.

The Uniform Conservation Easement Act does require recording (§2(b)), but leaves to the states the task of spelling out the formalities. The Act does not address the impacts of states' Marketable Record Title Acts but the Prefatory Note says, "The relationship . . . should be considered" (U.L.A. Vol. 12, p. 53 (Supp. 1986)). The Act also does not address the relationship with the local property assessor and tax policy (Ibid.). It does not

further expand or limit the use of eminent domain (Ibid., p. 54). §3(a) of the Act deals with the three types of parties which may brings enforcement action: (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 a person authorized by other law (Ibid., pp. 54-55).

Possible Court Challenges

Goetsch (Goetsch 1975-76, pp. 383-411) wrote an article in 1975-76 detailing possible constitutional and nonconstitutional challenges to the use of easements. He cites as leading state cases upholding the constitutionality of easements as Kamsowski v. State (31 Wis. 2d 256, 142 N.W. 2d. 793 (1966) cited Ibid., p. 399), and Bucks County Commissioners v. Kowalski (22 Bucks Cty. L. Rep. 293 (1972)) and Bensalem Township School District v. County Commissioner (8 Pa. Cmnwlth. 411, 303 a.2d258 (1973)) (Ibid., p. 401).

Goetsch also lists a number of legal rules and situations which might be invoked to challenge conservation easements:

> (1) eminent domain, (2) changed conditions, (3) the rule against perpetuities, (4) tax foreclosure sales, (5) marketable record title acts, (6) public policy, and (7) exclusionary zoning. The threat these doctrines or situations pose would be greatly limited by the presence of well drawn

> enabling legislation . . . since conservation restrictions are the creations of legislation, are designed to protect open space, and usually are held by public bodies, the threat posed by most of these rules is indirect at best. (Goetsch 1975-76, p. 402-403)

Goetsch concludes his discussion of conservation restrictions by noting:

> When first invented, the conservation easement was an ingenious device with little to recommend it except a laudable purpose and a dubious claim of descendancy from the common law . . . Adoption . . . by the federal government and well over half the states has removed the taint of illegitimacy, and now with their use multiplying and a uniform law in the offing, conservation restrictions stand ready to assume a mature role in the land use programs of the future. (Ibid., p. 409)

Problems with the Treasury Regulations

Overview

The Tax Treatment Extension Act of 1980 (Pub. L. No. 96-541, § 6,94 Stat. 3204, 3206 (1980)) created a new section of the I.R.S. Code (IRC 170(h)) to deal with the question of "Qualified Conservation Contributions" (Madden 1983; Richardson 1983; Small 1985 and 1986; Thompson 1986; and, Willibanks 1984). The 1980 Legislation consisted of a definition of three primary elements: qualified real property interest, qualified organization, and qualified conservation purposes. In May 1983, the I.R.S. released the Temporary Regulations attempting to further define

these terms and to deal with the subject of Valuation and Appraisal (51 Fed. Reg. 1496,1497).

The qualified real property interest element centers around Congress' concern that the donor does not retain any control over the future use of the donated portion of the property. The regulations define a partial interest rule which does not allow a deduction "of any interest in property that consists of less than the donor's entire interest in the property" (Treas. Reg. § 1.170A-14(a)) [with an allowable deduction for a conservation easement a notable exception]. Issues addressed in the proposed regulations, the hearings, and by the final regulations deal with the partial interest rule, prior transfers, the "perpetual" requirement of conservation easements, and the issue of retention of mineral rights (by the donor or a third party).

The qualified organization element dealt with Congress' concern that the Tax Code not be used to convey a private benefit by allowing a deduction of "backyard" easements by three acre (or less) land owners (Small 1986, p. 3-2). The proposed and final regulations defined a qualified organization as a governmental unit or a public charity and disallowed deductions to private foundations and charities (Treas. Reg. § 1.170A-14(c); see also Small 1986, pp. 3-1-- 3-6).

The conservation purposes element consisted of two parts. First was the definition of the four conservation purposes (with the public access requirements for each). The "new" open space purpose had new "tests" added to ensure "clearly delineated governmental conservation policy," "public benefit," and "scenic quality." Public access requirements were different for the "new" open space purpose depending on the nature of the resource (examined later in this chapter). The second part of the conservation purpose element was a requirement that the donation be used "exclusively for conservation purposes." Here the Regulations (Treas. Reg. § 1.170A-14(e)) dealt with the subject of inconsistent uses and permissible uses.

The concern with Valuation and Appraisal is a real one (some would say due to I.R.S.'s mandate, structure, and nature, a primary one). The concern by Congress is with "aggressive and abusive valuations" ("Hearings on H.R. 7318 . . . ," p. 20; Hambrich 1981, p. 351; Madden 1984, p. 139; Small 1986, pp. 9-2--9-3, 17-4--17-5).

The primary source for understanding the I.R.S. Regulations is Small's The Law of Conservations Easements. Stephen Small was the staff attorney in the I.R.S. who was primarily involved in drafting the purposed regulations. The 1985 edition is an interesting background of the history behind the purposed regulations; the 1986 revision

is the definitive work on the Final Regulations (Small 1986). From an analysis of the number of pages spent in discussing the Final Regulations, three issues emerge as the most controversial: conservation purposes (56 pages), Valuation and Appraisal (26 pages), and Mineral Rights (10 pages). The discussion of the literature review of problems with the regulations will focus on these three areas. For an in depth review of all issues in the proposed and final regulations, the reader should refer to Small. The book includes as Appendices: Private Letter Rulings and Revenue Rulings from the I.R.S., Committee Reports (for legislative history) and other useful reference material. The book will be updated annually (Small 1986, p. 1-7).

Qualified Conservation Purposes

Recreation and Education

Each of the conservation purposes by their very nature have different requirements for public access. The public requirement for lands donated under the recreation and education purpose require that the donation be ". . . for the substantial and regular use of the general public" (Treas. Reg. § 1.170A14(d)(2)(ii). Small notes:

> Obviously, "substantial and regular" does not necessarily mean "constant and just as obviously the specific number of days or months of use a year may vary depending on the characteristics and of the property and the purpose of the

> donation. This is simply another rule that defies precise articulation and that, in the end, depends on the good judgement and good sense of donee organization to make it workable. (Small 1986, p. 5-4)

Small also spends some time discussing the refusal by I.R.S. to become involved in determining which "use is better." Small notes that some would argue that hunting and snowmobiling are inconsistent uses with conservation purposes and adds "the Service did not want to be put in a position of deciding which are 'better' than others, avoiding (and I think properly so) the difficult value judgements . . ." (Ibid., p. 5-5).

Protection of Habitat and Environmental Systems

This conservation purpose is defined in I.R.C. § 170(h)(4)(A)(ii) and Treas. Reg. § 1.170A-14(d)(3) and is termed "The Nature Conservancy Sections" by Small (Ibid.). For this purpose the regulations recognize that public access may in fact destroy the public benefit and states "Limitations on public access to the property . . . shall not render the donation nondeductible" (Treas. Reg. 1.170A(14)(d)(3)(iii); and Small 1986, p. 5-6). Small also discusses how donation of an undeveloped island would meet this purpose (Ibid., p. 5-5) and how donation of a buffer zone around parks, preserves, natural areas, etc. would also meet this test (Ibid., p. 5-6).

Historic Preservation

For the historic preservation purpose the regulations note that visual access is sufficient but if there is no visual access to the property or if it is so small as to question the public benefit of the donation, the regulations state, "the terms of the easement must be such that the general public is given the opportunity to view the characteristics and features of the property which are preserved . . . to the extent consistent with the nature and condition of the property" (Treas. Reg. § 1.170A-14(d)(5)) and expands upon those definitions in the subsection. Small discusses the term "historically important land area" (Small 1986, p. 11-5--11-6) and "certified historic structure" (Ibid., p. 11-7), but for the most part the regulations clearly define these terms.

The "New" Open Space Purpose

Edward Thompson, General Counsel for the American Farmland Trust, recently (April 1986) wrote an article for the Zoning and Planning Law Report in which he states "of the various conservation purposes listed, "open space" is potentially the broadest and affords local planners with the greatest opportunity to encourage private-sector initiatives that will complement master plan objectives" (Thompson 1986, p. 27). As discussed earlier this open

space purpose is defined by I.R.C. § 170(h)(d)(1)(iii) (1982):

> The preservation of certain open space (including farmland and forest land . . .) will meet the conservation purposes of this section if such preservation is--
> (A) Pursuant to a clearly delineated Federal, state, or local conservation policy, and will yield a significant public benefit, or
> (B) For the scenic enjoyment of the general public and will yield a significant public benefit.

In adding this new conservation purpose, Congress knew the term would be vague and subject to abuse, so it added the "clearly delineated governmental policy test," the "scenic enjoyment" test, and the "significant public benefit" test (Small 1986, pp. 4-1--4-2). Farmland and forest land are not a special category but must meet these tests as would any other donation (Ibid., pp. 6-4).

Scenic enjoyment test. The final regulations list the factors to be considered:

> (1) The compatibility of the land use with other land in the vicinity;
> (2) The degree of contrast and variety provided by the visual scene;
> (3) The openness of the land (which would be a more significant factor [in] an urban or densely populated setting or in a heavily wooded area);
> (4) Relief from urban closeness;
> (5) The harmonious variety of shapes and textures;
> (6) The degree to which the land use maintains the scale and the character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;

> (7) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and (8) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency. (Treas. Reg. § 1.170A14(d)(4)(ii))

The Regulations also state, "To satisfy the requirement of scenic enjoyment by the general public visual access is sufficient . . . the entire property need not be visible to the public, visual [rather than physical] access is sufficient . . . although the public benefit . . . may be insufficient . . . if only a small portion is visible to the public" (Ibid.; also see Small 7-3--7-4 for a discussion of this visual access requirement).

Small finds three important points in the list of factors:

1. "note the possibility of an open space easement in an urban environment, both in factor (4) and factor (6)" (Small 1986, p. 7-2). He also notes the little recognized provision for an easement to preserve sunlight in factor six (Ibid.).
2. factors seven and eight in combination with Treas. Reg. 1.170A-14(d)(4)(vi)(c) ["Relationships of Requirements" section] notes that "Donations may satisfy more than one test," and states "the preservation of a particular scenic view

identified as part of a scenic landscape inventory by a rigorous governmental review process will meet the tests . . . of this section" (see Small 1986, pp. 7-2--7-3).

3. as cited previously, Small notes the list of factors

> . . . is not an all-inclusive list, not a checklist, and not a weighted list of the only factors the Service considers to be important. Rather, it is the Service's attempt to suggest certain criteria that may or may not be relevant to the evaluation of a particular donation. (Ibid., p. 7-3).

"Clearly delineated governmental conservation policy." In discussing the requirement that preservation of open space be pursuant to a clearly delineated federal, state, or local governmental conservation policy, the regulations state:

> A general declaration of conservation goals by a single official or legislative body is not sufficient. However, a governmental conservation policy need not be a certification program that identifies particular lots. . . . This requirement will be met by donations that further a specific, identified conservation project. . . . For example, the donation of a perpetual conservation restriction to a qualified organization pursuant to a formal resolution of certification by a local governmental agency established under state law specificalty [sic] identifying the subject properly [sic] as worthy of protection for conservations purposes will meet the requirement of this paragraph. A program need not be funded to satisfy this requirement, but the program must involve a significant commitment by

> the government . . . . For example, a governmental program according preferential tax assessment or preferential zoning for certain property deemed worthy of protection for conservation purposes would constitute a significant commitment by the government. (Treas. Reg. § 1.170A14 (d))

The regulations also address the effect of acceptance by a governmental body on this test. The regulations state that this acceptance "tends to establish the requisite clearly delineated governmental policy, although such acceptance, without more [documentation? proof?], is not sufficient. The more rigorous the review process . . . the more the acceptance of the easement tends to establish the requisite clearly delineated governmental policy" (Ibid., § (4)(iii)(B)).

In a discussion of access, the regulations state, "A limitation on public access shall not render the deduction nondeductible unless the conservation purpose of the donation would be undermined or frustrated without public access" (Ibid., §(4)(iii)(C)).

Thompson in his analysis of this section sees three things that I.R.S. is looking for under this test: a strong policy statement, governmental identification of conservation lands, and the strength of the governmental commitment to the policy (Thompson 1986, pp. 28-29).

On the point of preferential assessment and zoning Small reminds, "This new rule says simply that preferential

assessment or zoning, for farmland, for example, or for open space, is a governmental conservation policy; it does not say that an easement pursuant to such a policy, without more, meets the requirement of significant public benefit" (Small 1986, p. 8-4).

Small finds a "safe harbor" in Treas. Reg. § 1.170A-14(d)(4)(iii) which states:

> For example, the donation of a perpetual conservation restriction to a qualified organization pursuant to a formal resolution or certification by a local government agency established under state law specifically identifying the subject property as worthy of protection for conservation purposes will meet the requirement of this paragraph.

Small says that this read in conjunction with the "Relationship of Requirements Section" [Treas. Reg. 1.170A-14(d)(vi)(A)] says, "if the local governmental body, whether selectmen, aldermen, freeholders, town council, or whatever, takes formal action and says, 'we want this property protected,' the donor has a good gift" (Small 1986, p. 8-3).

"Significant public benefit." All donations of open space must meet the public benefit test. The Regulations state:

> Public benefit will be evaluated by considering all pertinent facts and circumstances . . . . Factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another

contribution. No single factor will necessarily be determinative. Among the factors to be considered are:
(1) The uniqueness of the property to the area;
(2) The intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);
(3) The consistency of the proposed open space with public programs (whether Federal, state or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area;
(4) The consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by ["qualified"] organizations . . . in close proximity to the property;
(5) The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;
(6) The opportunity for the general public to use the property or to appreciate its scenic values;
(7) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
(8) The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
(9) The cost to the donee of enforcing the terms of the conservation restriction;
(10) The population density in the area of the property; and
(11) The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection. (Treas. Reg. § 1.170A-14(d)(4)(iv))

Thompson says in his article, "Significant public benefit can probably be shown by demonstrating that the land in question has some characteristics that

distinguishes it from what might be called 'ordinary' land" (Thompson 1986, p. 29). Thompson also calls on planners to help in this area,

> In short, the more exacting planners are in defining or delineating conservation lands, and in explaining through the master plan why [sic] conservation program will benefit the community, the greater are the chances that prospective easement donors can satisfy the significant public benefit test and, hence, qualify for tax reductions that will give them an incentive to help achieve public land use management objectives through private initiative. (Ibid., p. 30).

"Sliding scale"--the relationship of tests. There is a relationship between the clearly delineated governmental conservation policy test and the public benefit test, even though both "must be met independently." The more site specific the governmental policy, "the more likely the governmental decision, by itself, will tend to establish significant public benefit (Treas. Reg. § 1.170A-14(d)(4)(vi)(A)).

Whereas, such is not the case with the "scenic enjoyment" tests and the "significant public benefit" tests ". . . since the degrees of scenic enjoyment offered by a variety of open space easements are subjective and not as easily delineated as are increasingly specific levels of governmental policy, the significant public benefit of preserving a scenic view must be independently established in all cases" (Ibid., pp. 10-2--10-3).

Small terms the "Relationship of Requirements of this section of the Regulation "the sliding scale" and identifies it as "the most significant contribution the Regulation makes towards simplifying the operation of the statute" (Small 1986, p. 10-2). Small explains:

> The "sliding scale" works like this: a general declaration by a unit of government that a particular resource must be protected is of course, "governmental policy" . . . that endorsement . . . certainly gets the donor in the door for the statute. But that is also a general declaration of policy goals . . . not what Congress meant by the term "clearly delineated governmental policy." Rather, Congress was looking for specific, identifiable, conservation projects . . . what the Regulation says, then, is that if the donor has a donation that furthers a general declaration of policy, the donor must show how an easement on that particular piece of land would establish significant public benefit, and must go to the list of factors, and to anything else creative the donor might add. . . . I suggest the "tends to" in the "tends to establish" of this section of the Regulation tends to disappear as the governmental policy becomes more site specific. (Ibid., pp. 10-2--10-3)

"Exclusively for conservation purposes." This issue is at the heart of the matter as to whether the donor has in fact made a charitable contribution. If a donor makes a "gift" with the expectation of getting something in return, then a "gift" has not been made (Small 1986, p. 12-2; see Treas. Reg. § 1.170A-14(e)).

The regulation speaks of "Inconsistent Use" in Treas. Reg. § 1.170A-14(e)(2). On this section Small comments:

> The rule in Reg. Sec. 14(e)(2) raises more questions than it answers, and the examples are flawed that attempt to illustrate both the inconsistent use rule and the rule prohibiting development that "interferes with the essential scenic quality of the land." One thing the Regulation does is take an unworkable rule from the legislative history and perhaps make it slightly less workable, and that is the pesticide rule. The committee reports state that an easement to protect farmland would not be a good gift "if a natural ecosystem has been or . . . can be significantly injured or destroyed by the use of pesticides on the farm." . . . the Regulation makes a very slight modification in the committee report rule so that a deduction would be denied only if "a <u>significant</u> naturally occurring ecosystem" (emphasis added) could be destroyed. (Small 1986, p. 12-3)

Valuation and Appraisal

Background

The I.R.S. expressed concern with the 1980 legislation that valuation and appraisal of easements involved practical and conceptual difficulties which could lead to "aggressive and abusive valuations" ("Hearings on H.R. 7318 . . . ," p. 20; also see comments by: Hambrick 1981, p. 351; Madden 1984, p. 139; Small 1986, pp. 9-2--9-3, 17-4--17-5).

In 1983 the I.R.S. began audits of donors who had contributed conservation easements. In order to prevent a "chilling" effect these audits could have on easement programs nationally, the Land Trust Exchange published a special issue in the Summer of 1984 explaining the status

of various audits ("Easement Programs: Valuation Conflicts . . ."). Evidently one of the biggest reasons behind the 1984 audits was to prepare a 1985 Report to Congress on Easements (Ibid., p. 7).

Also in 1984 the Land Trust Exchange and the National Trust for Historic Preservation jointly published Appraising Easements, which Small refers to as "the best current source on the subject of valuation . . . an in-depth discussion of the various appraisal methodologies, as they relate to conservation easements . . ." (Small 1986, p. 17-5).

Although some land conservation professionals might feel the I.R.S. to be hostile to easements ("Easement Programs: Valuation Conflicts . . . ," p. 8), the real problem may be the nature of appraisals themselves as Small notes, "It was not difficult to determine the factors that went into valuing easements, but those factors were (and still are) both objective and subjective, economic and aesthetic" (Small 1986, p. 17-5).

The Regulations

Valuation of reserved mineral interest. Treas. Reg. § 1.170A-14(h)(1) deals with the valuation of the "Entire interest of the donor other than qualified mineral interest." The regulation simply states that the value of the

donation is the fair market value of the surface rights. Small finds, "The approach of the Regulation is slightly arbitrary but it is clear and it does make sense" (Ibid., p. 17-3).

Remainder interests. Treasury Regulation § 1.170A-14(h)(2) speaks to the question of "Remainder Interest in Real Property." Small explains the general rules and examples in the Regulation for determining the value of remainder interests and reminds:

> if you donate a remainder interest for conservation purposes in property that is already encumbered by an easement for conservation purposes, you must take into account . . . that the easement has already reduced what would otherwise be the full market value of the property. . . . There are additional significant [emphasis added] tax law and property law questions . . . discussed at length in the material at Appendix E. (Ibid., p. 17-4)

Comparable sales approach. Treasury Regulation § 1.170A-14 13(h)(3)(i) adopts the comparable sales approach to valuation as the preferred method of valuation (see Appraising Easements for a discussion of this technique). Small states:

> The Final Regulation has now elected comparable sales in the marketplace to the rule in the first instance. Only if no such record exists, according to the Regulation, should the before and after test be used. Although the new ordering of these rules is appropriate, the substantive rule, in the overwhelming majority of cases, will continue to be the before and after rule. (Small 1986, p. 17-5--17-6)

Enhanced value. Treasury Regulation § 1.170 A-14 14(h)(3)(i) also addresses what Small calls "the 'enhancement' rule" (Ibid., p. 17-7). The rule basically says the valuation must take into consideration any enhanced value the easement donation has on any other property of the donor. The proposed regulation was concerned with contiguous tracts owned by the taxpayer or his family, but

> The Final Regulation goes some considerable distance further by applying the enhancement rule to any increase in the value of any other property whether contiguous or not, owned by the donor or a related person now defined not only as a family member under Code Section 267(c)(4), but also as "related" (as defined in Code Sections 267(h) and 707(b)) corporations and shareholders, corporations and partnerships, corporations and other corporations, partners and partnerships, and trusts and their grantors, fiduciaries, and beneficiaries. (Ibid., p. 17-7)

Small observes that even if "conceptually correct," it may be impossible to apply the rule because this expanded rule goes beyond "accepted appraisal practices" (Ibid.).

The "quid pro quo" rule. Treasury Regulation § 1.170A-14 14(h)(3)(i) also addresses the "quid pro quo" rule. The Latin term translated literally means "this for that." In the view of I.R.S. when someone gets something in return for a "gift" then a true "gift" has not taken place. This rule is very important for the planner to understand when looking at potential donations for conservation purposes:

> In the conservation area, the quid pro quo situation comes up most frequently when a developer strikes a bargain with a municipality to donate to the municipality parkland or open space, or an easement to preserve parkland or open space, in return for the desired zoning or subdivision approval. In such a case the "donation" is really a bargained-for exchange, and there is no deduction because there is no gift. (Ibid., pp. 17-8--17-9)

Fair market value--before and after restriction. Treasury Regulation § 1.170A-14(h)(3)(ii) is a long discussion of determining the fair market value of the restriction--before and after the restriction is put in place on the subject property. Small breaks this regulation into five discussion points:

1. Before and After--Highest and Best Use. (Ibid., p. 17-9)
2. "Material Effect" on Value. (Ibid., p. 17-10--17-11)
3. Value After Donation. (Ibid., p. 17-11--17-12)
4. Restrictions on Transfer. (Ibid., p. 17-12--17-13)
5. Need for Specificity in Drafting. (Ibid., p. 17-13)

Allocation of basis. Treasury Regulation § 1.170A-14(h)(3)(iii) is the rule on the allocation of basis (original investment in the property). Small concludes: "The answer to this particular allocation question is not clear, and at this still early point in the historical development of the art of appraising easements, the matter may best be left to individual appraisals (Ibid., p. 17-15).

Appraisal requirements. Treas. Reg. § 1.170A-14(i) deals with substantiation requirements and is further defined in Temporary Regulations (Treas. Reg. 1.170A-13T(c)(1) which requires:

1. a "qualified appraisal" by a "qualified appraiser,"
2. a "fully completed appraisal summary" attached to the donors tax forms, and
3. specified records kept by the donor (Small 1986, p. 19-2).

This substantial requirement is the first of a "two pronged attack by Congress" on the subject of overvaluation (Ibid.).

Overvaluation penalty. The second of "Congress' two-pronged attack" is a strong and stiff penalty on overvaluation under I.R.C. § 6659(f):

> The overvaluation penalty applies if the valuation claimed on the taxpayer's return is 150% or more of the correct valuation. The penalty amounts to a payment of 30% of the additional tax liability attributable to a valuation overstatement. (Ibid., p. 19-3).

Small notes, "Once again we must await regulation on Code Section 6659(f) for additional guidance from the Service with respect to this matter."

The Outlook

In discussing the "Material Effect" on fair market value, Small makes an observation that summarizes the concern with the valuation issue,

> The speculation in the Regulation, as well as the decided cases to date, should serve to put landowners on notice: the service is prepared to take a hard line, and easement valuation, while an increasingly objective task, will continue to be difficult and controversial. (Ibid., p. 17-11).

The conservation professional will need to refer to Appraising Easements and Small's Tax Law of Conservation Easements (as updated). Related land professionals (real estate and tax attorneys, M.A.I. appraisers) with whom the local groups work would be well advised to have these materials for their ready use and continued reference.

Mineral Rights

In his comments on Treas. Reg. § 1.170A-14(g)(4) Stephen Small notes:

> I think the qualified mineral interest exception is the most unexploited provision of the statute. I am convinced that there are corporate and individual landowners across the country who would be pleased as punch to know they can retain the subsurface mineral rights on some of their significant landholdings and take an income tax deduction for donating the fee to a qualified conservation organization. (Small 1986, p. 15-2)

Once again Small's analysis in helping the reader understand the background to the proposed and final regulations. Prior to release of the proposed regulations, two

laws emerged, (1) the statute and legislative history were unclear as to whether retention of mineral rights applied to an easement donation, and (2) it was also unclear as to whether a donor receives a deduction for contribution of the surface rights when the mineral rights were held by a third party (Ibid., p. 15-3). The Service was tending to answer in the negative to both questions, but when news of the I.R.S. thinking leaked to the conservation community during a routine request for a private letter ruling, "all hell broke loose" (Ibid., p. 15-4). The Treasury Department and I.R.S. reexamined the issue and decided in the Proposed Regulations: to (1) hold to their decision that a donor not holding mineral rights to land would be unable to take a deduction for an easement, and (2) added a new section 1.170 A-14(g)(5) known as the documentation section, requiring the donor to document the condition of the land at the time of donation in an attempt to protect the "conservation purpose where taxpayer reserves certain rights (Treas. Reg. § 1.170 A-14(g)(5); see Small 1986, pp. 15-5--15-6). The Conservation Easement . . . Handbook describes the "basics" of the Final Regulation:

> For donations made after July 1984, a deduction is allowed if: 1) The surface estate and mineral rights were severed before June 13, 1976, and remain so severed up to and including the time of the gift; and 2) the probability of surface mining occurring on the property is "so remote as to be negligible." (draft Criteria Chapter, p. 11)

The final regulation added flexibility to the flat rule against cases involving third party mineral rights by adding a "so remote as to be negligible" rule (Treas. Reg. § 1.170 A-14(g)(4)(ii)(3)) to be determined on a case by case basis; factors to be included: "geological, geophysical, or economic data showing absence of reserves on the property, or the lack of commercial feasibility at the time of the contribution [emphasis added] of surface mining the mineral interest (Ibid.; see Small 1986, p. 15-9--15-10). Deductions are disallowed if the third party owner of the mineral interest is "related" (a broad and "sweeping" term) (Ibid., p. 15-9, Treas. Reg. § 1.170A-14(g)(2)).

Example (1) of Treas. Reg. § 1.170A-14(g)(4)(iii) illustrates what is an acceptable donation under the language "a deduction under this section will not be denied in the case of certain methods of mining that may have limited, localized impact" (Treas. Reg. § 1.170A-14(g)(4)(i)). Small finds that this example raises more questions than it answers and "raises once again, the inconsistent use question, the only good answer to which seems to be, once again, to rely on the donee organization to exercise good judgement about what will or won't be permitted (Small 1986, p. 15-10).

The reader should refer at this point to the above discussion of "Valuation of reserved mineral interests"

(see p. 68). Even though restrictions placed on the mineral rights might lessen their value, they do not make the value of the gift of surface rights worth more (see Treas. Reg. § 1.170A-14(h)(1) and § 1.170A-14(h)(4)(1) [Example] and Small 1986, pp. 17-3,18-4).

Other Issues

Criteria

The Trust for Public Land and the Land Trust Exchange are writing a handbook on conservation easements. The introduction to the chapter on criteria begins, "If this handbook could make only one point, it would be this: Every conservation organization and agency should have a written list of what types of properties it will aim to protect with easements" (Conservation Easement . . . Handbook, draft Criteria Chapter, p. 1). Three reasons are given for this need:

1. legal obligation "No law on the books . . . a broader matter of public accountability"
2. ethical obligation [as a matter of public trust]
3. "to save time and money" (Ibid.).

The Handbook lists four questions every group must ask before accepting an easement:

1. Is this the type of property that we were formed to protect?
2. Is this an excellent example of that type of property?

3. Is the easement the appropriate protection tool?
4. Can we handle the responsibility of protecting it--forever? (Ibid., p. 3)

The Handbook then continues with an analysis of the four conservation purposes and farmland protection, these purposes relate to: I.R.S. requirements, examples of what other organizations and agencies consider in their criteria, and other steps that can be taken to determine if the property includes this resource (Ibid., pp. 4-10). Included also in this Chapter is a discussion of third party mineral rights and mortgaged property, the relationship of states' law, and a discussion of cost of easements as a criteria. The handbook will contain a number of sample criteria checklist as an appendix (see Appendix D for sample criteria checklist gathered from survey results).

The publication of the Conservation Easement . . . Handbook will greatly aid local groups to understand the obligations of the final I.R.S. regulations, but it is written in such a way as not to confound and confuse with legalese. It will join Small's The Tax Law of Conservation Easement and Appraising Easements as the essential reading and reference manuals for easement programs.

The National Park Service has recently released an Easement Guideline which also will help groups in drafting criteria (Planning Process Guideline NPS-2).

Drafting of the Document

Barrett and Livermore include in their book, The Conservation Easement in California, "an annotated checklist of elements commonly found in conservation easements" (Barrett and Livermore 1983, pp. 83-94; with sample easement, pp. 135-141). The following is a summary of that checklist:

1. Parties (grantor and grantee, especially important to show how grantee holds easement under authority of federal and state law, p. 83-84).
2. Legal and Qualitative Description of the Property (important to state why the conservation values of this property are worthy of protection, p. 84).
3. Type and Purpose of Easement

   > The language of the relevant statutes should be tracked rather closely . . . particular care should be taken to illustrate the public benefit . . . Express reference should be made to the governing statute or statutes, and their purposes and authority, along with a recital that the easement meets all statutory requirements and is created pursuant to the applicable statutes. (p. 84-85)

4. Statement of Interest of Grantor and Grantee

   > intent of grantor . . . clearly stated . . . to begin with a general charitable motive . . . intention to create an easement running with the land for the protection of specified conservation values should be clearly set forth. . . . The grantees intention to honor, in perpetuity, or for term stated, the intentions of grantor and to carry out the protection and preservation . . . the touchstone of the easement [emphasis added]. (p. 85).

5. Reference to Documentation of Conservation Values (incorporation of documentation into easement as evidence of conservation values and as baseline for future reference, pp. 85-86).
6. Grant of Easement ("contains the words of conveyance that effect the transfer . . . recites consideration . . . and sets forth duration of easement . . ." p. 86).
7. Rights, Restrictions, Permitted Uses and Reservations (good discussion of Rights of the Grantee, Restrictions and Permitted Uses and Reservations, pp. 86-91).
8. Allocations of Costs (inspection and monitoring, burden assumed by grantee, often with endowment from grantor, pp. 91-92).
9. Subsequent Deeds (p. 92).
10. Executory Limitation (p. 92).
11. Assignments (p. 92).
12. Integration (p. 93).
13. Severability (p. 93).
14. Costs of Enforcement (should be borne by grantor, p. 93).
15. Habendem Clause (p. 93).
16. Dates, Signatures, and Acknowledgement (p. 93-94).
17. Exhibits (p. 94).

Also the reader should refer to Small for discussions of the importance of drafting the easement document for purposes of valuation (Small 1986, p. 17-3), Documentation of Conservation Purposes (Ibid., pp. 16-2--16-3), and meeting the Public Benefit Test (Ibid., p. 10-4).

Monitoring and Enforcement

Well drafted easement documents are also important in preventing violations of the easement and keeping monitoring and enforcement costs low. The Conservation Easement Program Management Handbook says of monitoring and enforcement programs:

> The best defense is a good offense. The surest way to avoid future costly monitoring problems is to be certain before you take the easement that: 1) an easement is the right tool for the property, and 2) the terms of the easement are neither too restrictive nor too loose.
>
> The cost of monitoring is proportional to the number of rights that the easement gives the holder. The more the rights, the more the monitoring costs. (draft of Monitoring Funds Chapter, p. 2).

The failure of the Blue Ridge Parkway and Natchez Trace Parkway easement programs (violations, enchroachments, court action, misunderstandings, etc.) was largely due to a failure to explain the restrictions to the original landowners, failure to inform later landowners of existence of the easements and the fact that the easements

were not drafted to consider the need for economic return (Coughlin and Plaut 1978, pp. 458-459).

In this vein and consistent with the "Best Defense . . ." theme, "three key players" for an easement holding organization are listed in the Conservation Easement . . . Handbook as:

(1) a good relationship with the landowner
(2) an easement document with clear and enforceable restrictions
(3) a long paper trail that documents acquisition, monitoring and enforcement activities on every easement. (draft of "Monitoring" Chapter, p. 1)

The handbook also offers advice from those around the country involved in easement programs. Stressed as approaches are informal remedies and arbitration techniques. Three key "bits of advice" are:

(1) Stay out of court whenever possible
(2) Make sure you can go to court, if you have to
(3) If you do decide to go to court, make sure you can win. (Ibid., p. 4)

The handbook will offer examples from around the country on establishing monitoring programs and building endowment funds.

Other Approaches/State Models

Alternatives--Land Banking, Preemption, Compensable Regulation

Coughlin and Plaut list three alternative programs to the traditional public or private land acquisition

programs: (1) land banking, (2) power of preemption, and (3) compensable regulation (Coughlin and Plaut 1978, p. 454). The advantages to land banking are:

> (1) the land can be acquired well in advance of need when prices are low,
> (2) the gains from public development decisions will accrue to the public-at-large rather than to the few landowners who hold key sites,
> (3) public investment in infrastructure can proceed efficiently, unimpeded by negotiations for land acquisition,
> (4) the costs of acquisition and development can be averaged out over a broader area . . .
> (5) land can be offered for development in an orderly sequence, and
> (6) if sites are leased, the public can continue to benefit from their increasing value. (Ibid.)

Land banking has been used in France, Sweden, and the Netherlands (Ibid.). Strong's book Land Banking is a detailed examination of these efforts and a discussion of American concepts of land ownership and the prospects for land banking in the U.S. (Strong 1979).

The power of preemption is used by the SAFER program in France and is similar to the right of first refused contract in American property law (Coughlin and Plaut 1978, p. 454). The concept of compensable regulation has received a "considerable amount of attention among theorists, [but] it has never been implemented" (Ibid.).

State Models--California and Florida

Danziger argues for a "marriage" of regulatory and acquisition powers in a broader regional open space preservation program (Danziger 1962, p. 498). In 1976, the California legislature chose to create a separate "sister" agency to the State Coastal Commission known as the California State Coastal Conservancy (Fisher 1985, p. 318). The agency is so popular that it is often "identified as the 'good' or 'problem solving' coastal agency; unlike, the 'bad' regulatory coastal commission" (Ibid.). The agency is involved in wetland restoration, public access, transfer of development credits, and lot consolidation (Ibid., p. 319-320).

But by far the most unique feature of the California State Coastal Conservancy is its Nonprofit Organizational Assistance Program (see Harper 1985). This program began in 1978 to offer grants and technical assistance to local nonprofit organizations. The Harper article is an excellent description of the history and operation of the program. The article addresses the management issues that nonprofits face and ends with a series of "lessons" from the program's experience that may prove useful to state agencies elsewhere in adopting the Nonprofit Program as a model (Harper 1985, pp. 16-19).

Efforts to establish a state conservancy on the Florida model are in the exploratory stages (Alternatives to Fee Simple Acquisition). A draft report now being circulated in state government states:

> The establishment of a Florida Conservancy, using the California model, would greatly facilitate the use of innovative land acquisition and management techniques. . . . The Conservancy approach would help address many of the problems facing Florida's land protection programs by helping to integrate various acquisition efforts into a planned program that effectively meets the needs of diverse interests. The Conservancy would accomplish this goal through a combination of its own unique acquisition efforts, the establishment and funding of local land trusts, and the provision of technical assistance. (Ibid., p. 68)

Tax Credit vs. Deduction

Madden argues that a tax credit in addition to, or in place of, a charitable deduction would be more effective and more equitable:

> Higher bracket taxpayers would not get a larger subsidy from the government for their contributions. A comprehensive tax credit would also be attractive to those taxpayers who have land to donate, but whose incomes are not high enough to make a deduction advantageous. (Madden 1984, p. 147)

The current political climate regarding "tax reform" would probably not make this a timely topic. According to one professional close to the scene, the current "tax reform" proposals will not directly impact regulations regarding public charity donations, but lowering the tax

rate will decrease the incentive for charitable giving. It will be several years before the tax reform impacts on public charities (especially changes in capital gains and the alternative minimum tax) can be evaluated. (Telephone conservation with Elizabeth Watson 5/5/86, 5/19/86, and 7/31/86).

Summary

This chapter began with an analysis of theoretical and potential common law problems with conservation easements. Next, three of the most complex subject areas within the I.R.S. Regulations dealing with "Qualified Conservation Contribution" (I.R.C. § 170(h)) were addressed: conservation purposes (especially open space), valuation, and mineral rights. The last section of the chapter treated, in summary fashion other issues discovered in the literature: criteria; drafting of the easement document; monitoring and enforcement; other alternative approaches; state models (especially the California State Coastal Conservancy); and tax credits as opposed to tax deductions.

Easements and easement programs are relatively new. These issues can only become more important in the coming years. The recent publication of Appraising Easements and The Tax Law of Conservation Easements (Small 1986) will help groups deal with the complexity of the I.R.S.

Regulations. Forthcoming publication of the Conservation Easement Program Management Handbook will help these groups to "get down to basics" and overcome the confusion and complexity of common law, federal regulations, and the details of long term management.

CHAPTER IV

RESULTS OF THE SURVEY

Background

The questionnaire (Appendix B) was sent to the twenty-two nonprofit organizations which responded to the 1985 Land Trust Exchange Survey that they had developed criteria for their easement programs. The questionnaires were mailed on 6/21/86 with follow-up phone calls on June 27, 1986, and July 7, 1986. Of the 22 organizations surveyed, sixteen (72%) responded, but three did not return the questionnaire (one organization does not have an active easement program, one accepted restrictive covenants in 1968 prior to tax benefits, and the other did not wish to impose upon their attorney's time). Thirteen (59%) of the organizations surveyed responded with the questionnaire.

Research Questions

1. Have these organizations changed their easement programs to reflect the Temporary/Final Regulations?

Perhaps, a better question would have been", Did you begin your easement programs as a result of the Tax Treatment Extension Act of 1980?" In answer to question #1 of the questionnaire: "When was your easement program first

established?", 42.9% (six groups) said their programs had begun after 1980, 28.6% said their programs began prior to 1976 and 28.6% said their programs began between 1976-80. This question got a total of 14 responses.

Of question #4 of the questionnaire: Did your organization acquire scenic easements prior to 1976?, 84.6% responded "No." All thirteen groups returning the questionnaires responded to this question.

Question #6 of the questionnaire asked:

> Since the Tax Treatment Extension Act of 1980 (P.L. 96-5411), have any of your easements been for: (one or more)
> (a) preservation of land for recreation or education of the general public
> (b) the protection of habitat or ecosystems
> (c) open space easements
> (d) preservation of historically important land or a certified structure

All thirteen groups returning the questionnaire responded to this question. 46% had accepted easements for (a) recreation or education; 76.9% had accepted easements for (b) habitat protection; 92% had accepted easements for open space; and 7.6% had accepted easements on historically important land.

Question #9 asked: "What percentage of your easements have been open space easements since 1980?" Only ten organizations responded to this question. Of these 6 (60%) responded that 100% of their easements had been open space easements since 1980. Perhaps more significant is that 9

out of ten (90%) of those responding to this question said that over 60% of their easements had been open space easements since 1980.

Question #18 asked, "Since 1980 have you taken any extra steps to qualify/quantify the easements in your program?" Three groups (25%) answered "No," to this question. Another group placed a "question mark" over the question. This was an open ended question and more than one answer was possible. Table I summarizes the results. The results were surprising when you consider that this questionnaire was only sent to nonprofit groups which have developed criteria for their easement programs.

The clearest message from the findings to questions # 1, 4, 9, and 18 is that the "new" open space purpose has caused a number of new groups to form and that all groups are now accepting a large percentage of open space easements. It is also clear that these groups have not put their easement programs "on hold"; however it appears that only a small number of groups have taken steps to qualify/quantify their easements.

2. Have the Temporary and/or Final Regulations caused any problems with these groups' easement programs?

Question #10 asked: Did the Temporary Regulations issued in 1983 cause your programs problem(s) with (one or more):

TABLE I

STEPS TAKEN TO QUALIFY/QUANTIFY EASEMENTS

# of Groups	% of Respondents	Response
3	25%	"No"
1	8%	[Blank]
1	8%	"?"
4	33%	developed criteria for accepting.
2	16.6%	guidelines for drafting document; model document.
2	16.6%	comprehensive, baseline data attached.
2	16.6%	town or county plan amendment.
2	16.6%	monitoring policy.
1	8%	stewardship fund.
1	8%	newsletter.

(a) public access

(b) third party mineral rights

(c) inconsistent use

(d) definition of open space

(e) others (list)

The highest number of responses was for (e) other, with 4 groups out of eleven (36%) saying "none", and one other group (8%) listing "valuation" under (e). Responses (a) public access; (b) third party mineral rights; and

(c) definition of open space; were chosen by three groups (27% each).

Question #11 was a follow-up question to #10, but only 7 groups answered this question: "Which caused your program the most problem?" Answer (b) third party mineral rights got 3 out of 7 responses (48%), and answer (a) public access got 2 out of 7 responses (29%).

Question #12 was an open-ended follow-up question to #10 and #11 and asked, "What steps did you take to address these problems?" Eight groups answered this question as indicated in Table II. Note that more than one response was possible.

TABLE II

STEPS TAKEN TO ADDRESS PROBLEMS WITH TEMPORARY REGULATIONS

Steps Taken	# of Groups	% of Respondents
Drafted (or renegotiated) tighter easements	3 groups	(37.5%)
Part of national lobbying effort on proposed regulations	2 groups	(25%)
Sought private letter rulings	2 groups	(25%)
Appeal of negative I.R.S. ruling	1 group	(12.5%)
New guidelines drafted	1 group	(12.5%)
Public education to end donor confusion	1 group	(12.5%)

Question #19 asked "Do you anticipate that the Final Treasury Regulations released on January 14, 1986, will cause your organization problems with planning or implementing your program?"

Twelve groups responded to this question. Of that group eleven answered "No" (91.6%) and only one answered "yes." Of the people answering that they expected no problems, one group added "only as interpreted and administered by the I.R.S." and another group answered "except severed mineral rights." Clearly this finding squares with Small's observation:

> there seems to have been a growing recognition that with the exercise of good judgement and common sense the statute and the Regulation are in fact workable, that conservation programs do not have to wither and die because of the "uncertainty" created by the statute, and that with the exception of continuing easement valuation controversies, the Service generally seems to be administering this Code section in a reasonable manner. (Small 1986, p. 4-2)

3. How have these nonprofit land conservation organizations addressed the "public benefit," "scenic enjoyment," and "clearly delineated governmental conservation policy" tests for open space easements?

Questions # 13, 14, and 16 deal with the scenic enjoyment test, the clearly delineated governmental policy test, and the public benefit test for open space easements.

The groups were asked to identify how their organizations addressed each test (by circling one or more of the factors). The results are displayed in Table III. The top factors for scenic quality are:

1. (b) contrast, variety, openness, maintenance of scale and character of visual scene (69%),
2. (a) compatibility with other land uses (46%),
3. (d) landscape inventory or other objective assessment and (e) to protect the viewshed of a park, nature preserve, historical land or certified structure (36% for each).

The top factors for the clearly delineated governmental conservation policy (with one or more choices possible) are:

1. (a) a strong local or state conservation policy, as part of a regulatory scheme or a funded program (69%),
2. (e) general policy goals of an elected body formed under state law (62%),
3. (d) protection of areas adjacent to existing conservation sites (46%).

One group did mark (g) "other," to indicate that they "avoid" this factor by tying their program to scenic quality and public benefit tests only.

TABLE III

"TESTS" FOR OPEN SPACE EASEMENTS UNDER I.R.C. § 170(H)

Factors	Number of Groups	Percentage of Use
Scenic Quality		
(a) compatibility--existing uses	6	46%
(b) contrast, variety, openness	9	69%
(c) visual relief--urban closeness	5	31%
(d) landscape inventory	5	38%
(e) viewshed-park, preserve	5	38%
(f) viewshed--scenic corridor	2	8%
(g) other	0	0%
Clearly Delineated Governmental Conservation Policy		
(a) strong policy--funded or part of regulatory scheme	9	69%
(b) site specific certification	2	15%
(c) preservation land within historic landmark program	2	15%
(d) areas adjacent to existing conservation sites	6	46%
(e) general policy goals	8	62%
(f) acceptance contingent upon formal resolution government agency	2	15%
(g) other	1*	8%
Public Benefit Test		
(a) uniqueness to area	6	46%
(b) intensity of development in area (present or future)	7	54%
(c) consistent with government policy	11	85%
(d) development likely to destroy conservation value	10	77%
(e) existing private conservation program	4	31%
(f) opportunity for public to use	8	62%
(g) preserve landscape or resource that attracts tourism, commerce	6	46%
(h) likelihood of acquiring equal property	1	8%
(i) cost of enforcing restriction	1	8%
(j) population density	7	8%
(k) consistency with legislatively mandated programs	4	31%
(l) other	0	0%

*"avoid" use of this test.

The top factors for the public benefit test (with one or more choices possible) are:

1. (c) consistency with federal, state, or local conservation policy (85%),
2. likelihood that development would destroy natural, scenic or historical character (77%),
3. opportunity for the public to use the property or otherwise appreciate its value (62%),
4. (b) intensity of land development in the area (present or future) (54%),
5. (a) uniqueness of property to the area, and (g) preserving a landscape or natural resource that attracts tourism or commerce to the area (46% for each).

The response to question # 15 was surprising to the researcher. The question asked:

"For scenic easements are you more concerned with:

(a) the number of people likely to see the view

(b) the quality of the view

(c) other

Twelve groups responded to this question. The results were that eleven groups (91%) responded (b) the quality of the view. This may, or may not, be the response that the I.R.S. will find satisfactory. Many practitioners feel the I.R.S. is equally concerned with the number of people

likely to see the view, as evidenced by the requirement for visual access.

Question # 17 dealt with the relationship of the tests (Small's "sliding scale"). Fifty-four percent left this question blank. Another respondent placed a question mark over the question and another simply responded "Have not addressed." Perhaps, the groups are not aware of the relationship between the "clearly delineated governmental policy" and "public benefit" tests. One group may have said it best when they responded to the relationship of tests requirement "Don't [address]--just meet all three very adequately."

However, in summary it should be emphasized that the response rate on questions 13, 14, and 16 was high (all who returned the questionnaire responded in depth). This indicates the groups have a solid understanding of this new open space purpose. Furthermore, the most often used factors appear also to be the strongest. One matter that is not clear is whether these choices reflect "before the fact" policy choices of if they merely reflect the tests that were applicable in the particular cases these groups have handled.

4. Would the experience of a select group of these land conservation organizations since 1980 provide guidance to the land conservancy community in planning and implementing easement programs?

Question #21 and the cover letter encouraged these groups to share ideas with the researcher. Four groups sent copies of their criteria checklists. In addition, the Jackson Hole Land Trust sent copies of their monitoring policies and procedures, information on their stewardship fund, and a copy of the scenic preservation element from the Teton County Comprehensive Land Use Plan.

The criteria checklists [Appendix D] are from the American Farmland Trust, the Delaware Nature Education Society, the Jackson Hole Land Trust, and the Marin Agricultural Land Trust. All are well drafted, methodological approaches to nonprofit land conservation and would be good models for other groups.

The American Farmland Trust (AFT) and Marin Agricultural Land Trust (MALT) criteria would be useful to any group planning to form an agricultural land trust (especially in regard to the "clearly delineated governmental conservation policy" test). The AFT criteria consists of two parts: an agricultural assessment and a public policy assessment. Ed Thompson, General Counsel for AFT, notes on the questionnaire, "1/3 of all inquiries and proposed donations are turned down by the staff or board." Mr. Thompson, in speaking of the factors for three "tests" for open space easements, also noted, "varies case by case. Basically, we look at the total fabric of applicable policy." The MALT criteria are divided into four areas:

A. Consideration which establish the Agricultural Characteristics of the property;

B. Considerations which establish resource preservation and/or open space attributes of the property;

C. Considerations that establish the urgency and cost-effectiveness of the project for the purpose of allocating funds;

D. [Governmental] Program Related Criteria.

The criteria of the Delaware Nature Education Society are divided into three categories

I. Gifts of Land;

II. Gifts of Conservation Easements;

III. Purchase of Land.

Under each of these categories are two subcategories: A. Defined Natural Area Parcels; and, B. Other Land Parcels. For each of these four factors are considered: (1) geographic limitation; (2) acceptable restrictions; (3) endowment; and (4) management or disposition. These criteria would be of special use to those groups whose focus is primarily natural area or habitat oriented.

The criteria of the Jackson Hole Land Trust are divided into three areas: (A) Considerations which contribute to significant public benefit of land protection; (B) Considerations which may preclude land trust involvement; and (C) Specific Considerations for density bonus

easements. These criteria would be of use to those groups interested in protecting wildlife, scenery, and open productive land.

No attempt is made here to compare and contrast these criteria checklists, but they are included in Appendix D in the hopes of future research along those lines. Future researchers are also reminded of the recently released Guideline on Easements by the National Park Service (Planning Process Guideline, NPS-2, March 1986). Included in Appendix E are the other materials sent from the Jackson Hole Land Trust: "Easement Monitoring: Policies and Procedures," "Stewardship Fund," and the "Scenic Preservation Element" of the Jackson County Comprehensive Land Use Plan.

5. Have these groups experienced any problems with their state legislation and/or common law regarding easements?

Question # 2 asked "Does the law in your state provide statutory authority for conservation easements?" The response from twelve groups was "Yes" by nine groups (75%); "No" by two groups (17%); and "NA" by one group (8%).

Question #3 then asked "Are there any problems with your state's legislation (or common law decisions) that affect your easement program? The response (from a total of eleven groups) was "Yes" by two groups (18%); and "No"

by eight groups (73%); "NA" by one group (9%). Of the two groups which responded Yes, one explained, "property tax assessment problems" and another remarked, "minor." The NA (not applicable) response to questions 2 and 3 explained that their group took appurtenant easements only, not easements in gross.

Considering the theoretical problems discussed with easements and common law in the literature, this result was somewhat surprising. But it is the real world where problems arise. Thus far, the practical problems seem far less than imagined by the theorists.

Summary

The findings indicate that the changes in the 1980 law have caused more groups to begin easements programs than have caused a reassessment or redefinition of existing programs (42.9% of the groups responding had begun their programs since 1980). Also clear is that the "new" open space conservation purpose is what has caused a number of new groups to form and that all groups are now accepting a large percentage of open space easements (90% of respondents indicating that 60% of their easements since 1980 were for this "new" conservation purpose).

The groups also indicated no large problems with Treasury Regulations. When asked the problems caused by

the Temporary Regulations, 36% of the respondents said "None." More important and significant was the response to a similar question regarding the Final Regulation. When asked if the groups anticipated any problems with the Final Regulations, 91.6% of the respondents answered "No." The groups clearly see the final regulations as workable.

Likewise, the groups demonstrated a good understanding of the three "tests" for the "new" open space conservation purpose by a high response rate to this question and by the thoroughness of the answers. The question concerning the "relationship of the requirements" or "sliding scale" between the public benefit and clearly delineated governmental conservation policy tests did not, however, have a strong response rate, which is disturbing if the groups do not understand the relationship between these tests). Responses to a question concerning quality of the view versus the number of people viewing the scene indicate that groups may not fully understand the visual access requirement. Forthcoming publication of the Conservation Easement Program Management Handbook will explain these tests in a readable manner.

A small number of groups have taken steps to further qualify/quantify their easements since publication of the proposed regulations, but those that have done so have an excellent body of knowledge to share. It must be

remembered that all the groups in this survey had already indicated that they had developed criteria for their easement program. The groups that have not developed criteria (70% of the 1985 Land Trust Exchange Survey) is the more disturbing statistic. Publication of the Conservation Easement Program Management Handbook will stress the need for groups to develop criteria.

Few groups have experienced either common law or legal problems with their easement programs. It may take several generations before it is clear whether any common law problems will develop, but in the meantime these groups are actively lobbying for changes in state legislation. Valuation problems will continue, and a conservative and cautious approach is the best advice.

CHAPTER V

CONCLUSION

Results of the Study

This study began by tracing the evolution of conservation easements as a tool for open space preservation. The rising popularity of the easement approach has caused a number of states legislatures to address the potential problems under common law with the easement approach.

In 1976 Congress allowed for charitable tax deductions for donations of land for conservation purposes and in 1980 Congress expanded the list of purposes to include:

> The preservation of certain open space (including farmland and forest land . . .) will meet the conservation purposes of this section if such preservation is--
> [A] Pursuant to a clearly delineated federal, state, or local conservation policy, and will yield a significant benefit, or
> [B] For the scenic enjoyment of the general public and will yield a significant public benefit. (I.R.C. § 170(h)(d)(1)(iii)(1982)

On May 23, 1983, the Internal Revenue Service released the Temporary Regulations concerning qualified conservation contributions and held hearings on September 15, 1983 (48 Fed. Reg. 22940). Final Regulations were released on January 14, 1986 (51 Fed. Reg., 1496; see Appendix A).

This study is divided into two parts. First is a literature review of problems with common law and equity

rules, a review of the I.R.S. regulations, and a survey of other problems presented by easement programs. The second part of this study is a survey of twenty-two nonprofit organizations (Appendix C) which consisted of a questionnaire (Appendix B) which addressed the same questions as were being raised in the literature review.

Literature Review

The review of the literature found a lot of theoretical discussion on potential common law problems with easements but few court decisions or practical experience. The evidence is that the states have responded to the rapid popularity of the easement approach by taking statutory action to overcome the common law problems. Also, the National Conference of Commissioners on Uniform State Laws, drafted a model statute, known as the Uniform Conservation Easement Act (U.L.A., Vol. 12, p. 52-61 (Supp. 1986)), in 1981 "in direct response to the 1980 Tax Treatment Extension Act" (Garrett 1984-85, p. 268).

The review of the literature found that three issues are primary in the discussion of the Federal Regulations: the conservation purposes, mineral rights, and valuation. Of these three, valuation is the issue that is likely to grow more complex with time.

Several other issues were treated in summary fashion: criteria, drafting of documents, monitoring and enforcement, other approaches and state models, and a policy discussion of tax credits vs. deductions as an incentive for open space preservation. Development of criteria, tighter drafting of easement documents, and monitoring and enforcement programs are all seen as means to avoid future problems with the easements programs generally, and the I.R.S. in particular. The model of the California State Coastal Conservancy's nonprofit program is presented as a means to offer funding, training and technical assistance for local nonprofits.

The Survey

The survey confirmed that the 1980 legislation has caused a dramatic increase (42%) in the number of land trusts having been created and in the number of all land trusts seeking open space easements.

Also, despite confusion and misunderstanding caused by the proposed regulations, most groups (91.6%) think the final regulations will cause their organizations no problems in planning and implementing their easement programs. This confirms the suggestions in the literature that these groups have come to see the regulations as "workable" (Small 1986, p. 4-2).

The groups demonstrated a good understanding of the "clearly delineated governmental policy," "scenic quality," and "public benefit" tests for open space easements. Most groups, however, do not seem to understand the relationship of requirements ("sliding scale") between the tests.

Four groups have revised their criteria as a result of the final regulations and those are included in Appendix D to assist other groups as they undertake to build strong easement programs under the final regulations. Also material from the Jackson Hole Land Trust related to their Stewardship Fund, Monitoring Policy and Procedures, and scenic element to the county plan is included in Appendix E.

Finally, a majority of the groups (75%) report that their states provide statutory authority for easements. Likewise, 73% report no problems with their state legislation or common law.

Need for Further Study

A major conclusion of this study is that further research is warranted on the subject of criteria, on the interaction between "clearly delineated governmental policy" and the tax benefits of charitable giving, on the need for technical assistance, and on the need for follow up research with local land trusts as they work with the

I.R.S. regulations. These regulations, although well discussed and debated within the land conservation community in the last three years, are still relatively new. To a large degree they will be implemented by these local groups on a daily basis. Information sharing will be necessary to strengthen this new tool for open space preservation and to prevent abuse which would threaten its future availability.

Criteria

More research is needed on the subject of criteria for easements. While every group works in a different political and geographical environment there should be a strong effort made to encourage these groups to develop objective criteria that will not hamper creativity or flexibility. Subjective criteria will only lead to weak easement programs and stronger administrative oversight. Tighter criteria will either come from the land trust community itself or from I.R.S.. Furthermore, abuse of the deduction will lead to its repeal by Congress.

Effect of Zoning on Valuation

More research is needed on the interaction between "clearly delineated governmental conservation policy" (especially zoning) and the tax benefits of charitable giving. The regulations require there to be "clearly

delineated governmental conservation policy," however, a strong zoning control will have a negative effect on the appraiser's consideration of "highest and best use." The stronger the regulation, the less the value of a gift of that land--hence, a disincentive for charitable giving for conservation purposes. An article which considers a range of "clearly delineated governmental conservation policy" alternatives and their impacts on the tax benefits of charitable giving would be most helpful.

Technical Assistance

The discussion of the potential common law problems with easements and the potential problems with the I.R.S. Regulations (especially regarding valuation) leaves this researcher with the opinion that these local groups will be needing national resources at their disposal in the future. This assistance goes beyond the present abilities of such groups as the Nature Conservancy, the Trust for Public Land, and the Land Trust Exchange to provide training and technical assistance. The need here described deals with the more expensive services that will be needed (appraisers, tax attorneys, legal assistance, etc.) to fight an occasional national issue on the local scene. The assistance of national talent on an "as needed" basis will help to raise the confidence level of local groups.

Follow-up

The land conservation community will to a large degree be implementing the new I.R.S. regulations on a day-by-day basis as they proceed with the work at hand. Follow up surveys will be needed in two to three years to trace the types of problems these groups are experiencing with the new regulations and the actions these groups are taking to prevent future problems.

Outlook for the Future

The conservation easement and land trust movements are here to stay. They can be expected to grow and mature at a conservative rate. (The increase of interest in land trusts and conservation easements following the 1980 Tax Treatment Extension Act, came after nearly two decades of theorizing on the subject of easements. While called a "new" idea, easements are really an old idea with new incentives.)

The tax incentives that came with the 1980 Tax Treatment Extension Act could disappear overnight, but on the eve of major tax reform this new section of the code appears sacred for now (due in large part to the bipartisan nature of public charity and environmental issues). The indirect impacts such as changes in capital gains, the

alternative minimum tax, and the tax rate will take years to analyze.

The need for open space preservation will not lessen in the years ahead. Indeed, the need will grow as our cities grow. Conservation easements will fill part of that need.

Shortly, the Trust for Public Land and the Land Trust Exchange will publish The Conservation Easement Program Management Handbook. The central theme of that work is that the "best defense" against potential problems with easement programs is with a "strong offense." Groups will need to reexamine their state legislation concerning easements and compare it with the Uniform Conservation Easement Act (U.S.A. Vol. 12, p. 53 (Supp. 1986)). They will need to reexamine their criteria, enforcement and monitoring policies, and they will need to strengthen their endorsement funds. Without becoming burdened by legalese they will need to have a solid understanding of the new I.R.S. Regulations.

The real strength of the land conservation efforts by these local land trusts lies in their ties to the community and their diverse talents. As they go about the work of local land conservation they will increase their level of skills and will educate a larger constituency as to the importance of land stewardship. Steps taken locally to

build stronger programs will lead to a stronger movement nationally.

Stronger local efforts for land conservation and open space preservation will make for a stronger and more effective national movement. As this happens, open space preservation will become a part of sound and responsible land use planning of all levels of government.

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APPENDIXES

APPENDIX A

FINAL TREASURY REGULATIONS

they have predicted economic hardship to the industry unless some transitional relief is granted. In many instances, such homes were sold under wholesale marketing plans or arrangements that would not qualify under the new Title I final rule. In such cases, the manufacturers' invoices do not conform to the invoice requirements of the new rule, and the manufacturers cannot execute the required certifications in such invoices or detail the various wholesale (base) prices of the manufactured homes, furniture, options and specialty items, or the charges for sales taxes and freight.

To assist manufacturers and dealers in marketing new homes which have been sold through such wholesale transactions under the currently applicable regulations, the Department has concluded that a reasonable transition period—which takes into account the winter months' impact upon marketing—can be justified. Therefore, provided that such new homes would have been eligible for manufactured home loans under the currently applicable Title I regulations, HUD will allow them to be purchased with the proceeds of Title I loans for an additional six-month period after the effective date of the new Title I final rule. As set forth below, certain current regulatory provisions will continue to apply to the origination of loans to finance the purchase of such homes, and certain provisions of the new Title I rule will not apply to such loans' origination. All other provisions of the new final rule will apply to such loans once they are originated.

For all property improvement loans, the effective date of the final rule revising 24 CFR Part 201 and published on October 25, 1985 is January 15, 1986.

For manufactured home loans, the effective date of the final rule is as follows:

A. For new manufactured homes produced on or after January 15, 1986, as evidenced by the data plate affixed in each home by its manufacturer, the effective date of the final rule in its entirety is January 15, 1986.

B. For new manufactured homes produced before January 15, 1986, as similarly evidenced, but sold under a wholesale manufacturer's invoice dated on or after January 15, 1986, the effective date of the final rule in its entirety is January 15, 1986.

C. For a new manufactured home produced with a data plate and sold with a wholesale manufacturer's invoice that are both dated before January 15, 1986, and whose invoice wholly meets the requirements of the new Title I final rule, the effective date of the final rule in its entirety is January 15, 1986.

D. For a new manufactured home produced with a data plate and sold with a wholesale manufacturer's invoice that are both dated before January 15, 1986, but which has been sold with a manufacturer's invoice prepared under current Title I regulations that is not in compliance with the requirements of the new Title I final rule, the effective date of the final rule is January 15, 1986, *except* compliance with the following provisions of the new rule will not be required until July 15, 1986: §§ 201.2 (p), (hh), (ii), (kk), and (ll); 201.10 (b)(1) and (d)(1); 201.21(b)(3); the first sentence of § 201.10(b)(4) and the first sentence of § 201.10(d)(4). With respect to the origination of Title I manufactured home loans concerning these homes during the period January 15, 1986 through July 1986, §§ 201.501(i), 201.530(a), 201.1502(i), and 201.1504(a)(2) of the current Title I regulations shall continue in effect. Thereafter, such new homes shall only be eligible for Title I manufactured home loans originated on or after July 15, 1986 if their wholesale manufacturers' invoices wholly meet the requirements of the new Title I final rule.

Correction

In addition to establishing the effective date and compliance date discussed above, this document also corrects an error contained in the October 25, 1985 final rule—

Accordingly, in FR Doc. 85-25302, appearing in the October 25 issue of the Federal Register, the following correction is made:

In § 201.21(d)(2), on page 43530, in the left column, the phrase "and (c)(2)" is removed.

Dated: January 10, 1986.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 86-847 Filed 1-13-86; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 20, 25, and 602

[T.D. 8066]

Income Taxes; Qualified Conservation Contributions

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to contributions not in trust of partial interests in property for conservation purposes. Changes to the applicable law made by the Temporary Tax Provisions, Extension and the Tax Reform Act of 1984 are reflected in this document. These regulations provide necessary guidance to the public for compliance with the law and affect donors and donees of qualified conservation contributions

DATES: Except as otherwise provided in § 1.170A-14(g)(4)(ii), the regulations apply to contributions made on or after December 18, 1980, and are effective on December 18, 1980.

FOR FURTHER INFORMATION CONTACT: Ada S. Rousso of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attention: CC:LR:T). Telephone 202-566-3287 (not a toll free call).

SUPPLEMENTARY INFORMATION:

Background

On May 23, 1983, the Federal Register (48 FR 22940) published proposed amendments to the Income Tax Regulations (26 CFR Part 1) and Estate and Gift Tax Regulations (26 CFR Parts 20 and 25) under sections 170(h), 2055 and 2522 of the Internal Revenue Code of 1954 (Code). The amendments were proposed to conform the regulations to section 6 of the Temporary Tax Provisions, Extension (Pub. L. 98-541, 98 Stat. 3206). A public hearing was held on September 15, 1983. Subsequent to the hearing, section 170(h)(5) of the Code was amended by section 1035(a) of the Tax Reform Act of 1984 (Pub. L. 98-369, 98 Stat. 1042). On December 10, 1984, the Service issued a news release (IR-84-125) reminding taxpayers claiming deductions for donations of conservation easements that such deductions are limited to the fair market value of the easement at the time of the contribution. The news release further indicated that if the donation of the easement does not decrease the value of the property on which the easement is granted, the fair market value of the easement, and thus, the deduction, is zero.

After consideration of all comments regarding the proposed amendments and of the revision made by the Tax Reform Act of 1984, those amendments are adopted as revised by this Treasury decision.

Summary of Comments

Qualified Contribution of Entire Interest of Donor Other Than Qualified Mineral Interest

In response to many comments regarding the donation of an entire interest of the donor other than a qualified mineral interest, proposed § 1.170A-14(b) has been revised to provide that section 170(h) will not disallow a deduction for a conservation contribution where the donor has previously transferred a portion of the entire interest unless the donor has purposefully reduced his interest before the contribution is made, for example, by transferring a portion to a related person in order to retain control of more than a qualified mineral interest.

Access

The final regulations have been revised to clarify the extent of public access required for each type of qualified conservation contribution under section 170(h). Thus, in order to qualify for a deduction under section 170(h), donations of property to preserve land areas for outdoor recreation by or for the education of the general public, for the preservation of a view, for the preservation of land pursuant to a governmenal conservation policy, or for the preservation of historic structures or land areas must provide for either physical or visual access. Examples have been included to clarify the public access requirement in specific circumstances.

Inconsistent Use

Section 1.170A-14(e)(2) provides that a deduction will not be allowed if a contribution would accomplish one of the enumerated conservation purposes but would permit impairment of other enumerated conservation interests. However, inconsistent use of the property is permitted if that use is necessary for the protection of the conservation interests that are the subject of the contribution. Commenters felt that the proposed regulations were not specific enough regarding permitted inconsistent uses. Therefore, the final regulations have been revised to include examples of certain uses that are not prohibited if, under the circumstances, they do not impair significant conservation interests. See § 1.170A-14(e)(2).

Third Party Mineral Rights

The proposed regulations provided that the interest in property that is retained by the donor (and the donor's successor in interest) must be subject to legally enforceable restrictions that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation. In addition, there was a prohibition against any method of mining on property that is the subject of a gift that would be inconsistent with the conservation purposes of the donation. Furthermore, a contribution was disallowed if at any time there may be surface mining on the property.

Many comments were received requesting relief from this rule because in many areas of the country, the mineral rights are not and may never have been owned by the donor; thus the donor cannot ensure that a third party owner of the mineral rights will not engage in surface mining on the property that is the subject of the gift.

Subsequent to publication of the proposed regulations, section 1035(a) of the Tax Reform Act of 1984 amended section 170(h)(5)(B) (relating to surface mining) to provide an exception to the general rule precluding a deduction for a conservation contribution if there is any likelihood of surface mining occurring at any time on the property to which the contribution relates. For conservation contributions made after July 18, 1984, the general rule with respect to surface mining will not apply to preclude a deduction if the surface estate and mineral interests were separated before June 13, 1976, remain so separated up to and including the time of the gift, and the probability of surface mining occurring on the property is so remote as to be negligible. Factors that may be considered in determining if the probability of surface mining is so remote as to be negligible are provided in the final regulations. In addition, the regulations provide that no deduction for a conservation contribution of the surface estate is permitted under this exception if the present owner is related to the owner of the surface estate at the time of the gift. Finally, these regulations clarify that any person may retain the mineral interest so long as the donor can guarantee observance of the restrictions to protect the conservation interests. See § 1.170A-14(g)(4) and the example thereunder.

Preservation of Open Space

In general, the statute provides that a donation of real property to preserve open space for conservation purposes (including farmland and forestland) will qualify as a deductible contribution if either of two tests are met: (1) The preservation must be pursuant to a clearly delineated governmental policy and must yield a significant public benefit, or (2) the preservation must be for the scenic enjoyment of the general public and must yield a significant public benefit. In connection with the first test, the final regulations retain the "sliding scale" approach adopted in the proposed regulations which is used to establish a relationship between the two requirements. Thus, although the requirements of governmental policy and public benefit must be met independently, the more specific the governmental policy with respect to a particular site to be protected, the more likely the governmental decision, by itself, will tend to establish the significant public benefit associated with the donation.

Commenters felt the regulations did not sufficiently clarify the standards under which deductions are allowed for the preservation of open space. Many of the comments received suggested revisions in the final regulations to provide donors with procedural "safe harbors" to avoid uncertainty regarding the deductibility of their donations. Commentators believed that without safe harbors, donors either will have to bear the expense of seeking advance rulings, or will risk additional tax liability if their deductions are later disallowed. Generally, the commenters suggested the following:

(1) A declaration by a unit of government identifying a particular property as worthy of protection should meet the clearly delineated governmental policy test and thus be sufficient to eliminate the need to meet the significant public benefit test.

(2) Acceptance of a donation by a unit of government (federal, state or local) or a duly constituted commission of such unit of government, should establish both a clearly delineated governmental policy and significant public benefit.

(3) A sliding scale approach should be extended to the relationship between scenic enjoyment of the general public and significant public benefit. Thus, the more scenic the view and the more people who see it, the more it tends to confer a significant public benefit.

(4) The regulations should encourage donations of farmland for agricultural uses by expanding references to the preservation of farmland to uses other than just the preservation of farmland pursuant to a state program for flood prevention and control. See § 1.170A-14(d)(4)(iv)(B). Commenters believed the reference was misleading because it implied that such is the only use for which there can be a deductible donation of farmland.

(5) Acceptance of a donation by a qualified conservation organization should be conclusive evidence of deductibility. Because the Internal

Revenue Service lacks the expertise to make the subjective determinations of "significant public benefit" and "scenic enjoyment", that responsibility should be delegated to either a private organization or to another governmental agency with acknowledged expertise in this area.

In general, the rules in the proposed regulations relating to open space easements have been retained in the final regulations. However, in response to the comments, some clarifications have been made regarding such easements. First, the fact that a unit of government has identified a particular property as worthy of protection does not by itself show the existence of a clearly delineated governmental policy, and thus, the significant public benefit associated with the donation must be independently demonstrated. Second, when there is a rigorous review of a donation by a unit of government or a duly constituted commission of a unit of government, the acceptance of a donation by such unit or commission of government tends to establish the clearly delineated governmental policy.

An example of a rigorous review process has been included in the final regulations. The more specific the governmental policy with respect to a particular site to be protected, the more likely it is that the governmental decision to accept the donation will tend, by itself, to establish the significant public benefit associated with the donation. A degree of certainty is available to donors in jurisdictions that have clearly articulated preservation policies, but as with any subjective test, there must ultimately be some exercise of judgment and responsibility by both donors and donees. Third, the terms "significant public benefit" and "scenic enjoyment" necessarily require a case-by-case factual determination and hence cannot be defined precisely. The list of factors included at § 1.170A-14(d)(4)(iv) with respect to "significant public benefit" and § 1.170A-14(d)(4)(ii) with respect to "scenic enjoyment" are intended to be illustrative, rather than all-inclusive. In a particular case, other facts and circumstances may be relevant. Fourth, the regulations clarify that farmland, as recognized by the statute, is merely a category of open space that must meet either of the two prescribed tests in order to be a deductible contribution. Finally, acceptance of a donation by a qualified organization is not conclusive evidence of the deductibility of a donation. The Internal Revenue Service has the responsibility for making final determinations as to the deductibility of donations. That responsibility cannot be delegated to a private organization or to another governmental agency, although the Service accords substantial weight to the determinations of qualified organizations and governmental agencies in its decision-making process.

Donations of Mortgaged Property

Section 170(h)(5) provides that the conservation purposes of the donation must be protected in perpetuity. The proposed regulations did not specifically address how this requirement applies to mortgaged property.

In response to comments received, the final regulations clarify that when a contribution of mortgaged property is made to a qualified organization, the mortgagee must subordinate its rights under the mortgage to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity. However, since certain donees, unaware of this clarification, accepted (or will have accepted) contributions of mortgaged property prior to February 12, 1986, without requiring subordination of the mortgagee's rights in the property, a donor will be allowed a deduction for such a contribution provided that the donor can demonstrate that the conservation purposes of the gift are protected in perpetuity absent subordination.

Valuation

Section 1.170A-14(h)(3)(i) of the final regulations has been revised to indicate that increases in the value of *any* property owned by the donor or a related person—not just contiguous property—resulting from the granting of a perpetual conservation restriction must be taken into account in determining the amount of the deduction.

Paperwork Reduction Act

The collection of information requirements contained in these regulations have been submitted to the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act of 1980. These requirements have been approved by OMB.

Special Analyses

The Commissioner of Internal Revenue has determined that this final rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required. Although a notice of proposed rulemaking which solicited public comments was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public comment procedure requirement of 5 U.S.C. 553 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Drafting Information

The principal author of these regulations is Ada S. Rousso of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.61-1—1.281-4

Income taxes, Taxable income, Deductions, Exemptions.

26 CFR Part 20

Estate taxes.

26 CFR Part 25

Gift taxes.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1, 20, 25, and 602 are amended as follows:

PART 1—[AMENDED]

Paragraph 1. The authority for Part 1 continues to read in part:

Authority: 26 U.S.C. 7805. * * *

§ 1.167(a)-5 [Amended]

Par. 2. Section 1.167(a)-5 is amended by adding at the end thereof the following new sentence: "For the adjustment to the basis of a structure in the case of a donation of a qualified conservation contribution under section 170(h), see § 1.170A-14(h)(3)(iii)."

Par. 3. Section 1.170A-7 is amended as follows:

a. The first sentence of paragraph (b)(1)(ii) is amended to begin with the phrase "With respect to contributions made on or before December 17, 1980,".

b. Paragraph (b)(1)(ii) is amended by adding at the end the following new sentence: "For the deductibility of a qualified conservation contribution, see § 1.170A-14".

c. A new paragraph (b)(5) is added immediately after paragraph (b)(4), as set forth below.

d. The first sentence of paragraph (c) is amended to begin with the phrase "Except as provided in § 1.170A-14,".

e. Paragraph (e) is revised as set forth below.

§ 1.170A-7 Contributions not in trust of partial interests in property.

* * * * *

(b) *Contributions of certain partial interests in property for which a deduction is allowed.* * * *

(5) *Qualified conservation contribution.* A deduction is allowed under section 170 for the value of a qualified conservation contribution. For the definition of a qualified conservation contribution, see § 1.170A-14.

* * * * *

(e) *Effective date.* This section applies only to contributions made after July 31, 1969. The deduction allowable under § 1.170A-7(b)(1)(ii) shall be available only for contributions made on or before December 17, 1980. Except as otherwise provided in § 1.170A-14(g)(4)(ii), the deduction allowable under § 1.170A-7(b)(5) shall be available for contributions made on or after December 18, 1980.

Par. 4. A new § 1.170A-14 is added after § 1.170A-13T to read as set forth below.

§ 1.170A-14 Qualified conservation contributions.

(a) *Qualified conservation contributions.* A deduction under section 170 is generally not allowed for a charitable contribution of any interest in property that consists of less than the donor's entire interest in the property other than certain transfers in trust (see § 1.170A-6 relating to charitable contributions in trust and § 1.170A-7 relating to contributions not in trust of partial interests in property). However, a deduction may be allowed under section 170(f)(3)(B)(iii) for the value of a qualified conservation contribution if the requirements of this section are met. A qualified conservation contribution is the contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity.

(b) *Qualified real property interest*—(1) *Entire interest of donor other than qualified mineral interest.* (i) The entire interest of the donor other than a qualified mineral interest is a qualified real property interest. A qualified mineral interest is the donor's interest in subsurface oil, gas, or other minerals and the right of access to such minerals.

(ii) A real property interest shall not be treated as an entire interest other than a qualified mineral interest by reason of section 170(h)(2)(A) and this paragraph (b)(1) if the property in which the donor's interest exists was divided prior to the contribution in order to enable the donor to retain control of more than a qualified mineral interest or to reduce the real property interest donated. See Treasury regulations § 1.170A-7(a)(2)(i). An entire interest in real property may consist of an undivided interest in the property. But see section 170(h)(5)(A) and the regulations thereunder (relating to the requirement that the conservation purpose which is the subject of the donation must be protected in perpetuity). Minor interests, such as rights-of-way, that will not interfere with the conservation purposes of the donation, may be transferred prior to the conservation contribution without affecting the treatment of a property interest as a qualified real property interest under this paragraph (b)(1).

(2) *Perpetual conservation restriction.* A perpetual conservation restriction is a qualified real property interest. A "perpetual conservation restriction" is a restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covennant or equitable servitude). For purposes of this section, the terms "easement", "conservation restriction", and "perpetual conservation restriction" have the same meaning. The definition of "perpetual conservation restriction" under this paragraph (b)(3) is not intended to preclude the deductibility of a donation of affirmative rights to use a land or water area under § 1.170A-13(d)(2). Any rights reserved by the donor in the donation of a perpetual conservation restriction must conform to the requirements of this section. See *e.g.*, paragraph (d)(4)(ii), (d)(5)(i), (e)(3), and (g)(4) of this section.

(c) *Qualified organization*—(1) *Eligible donee.* To be considered an eligible donee under this section, an organization must be a qualified organization, have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions. A conservation group organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) will be considered to have the commitment required by the preceding sentence. A qualified organization need not set aside funds to enforce the restrictions that are the subject of the contribution. For purposes of this section, the term "qualified organization" means:

(i) A governmental unit described in section 170(b)(1)(A)(v);

(ii) An organization described in section 170(b)(1)(A)(vi);

(iii) A charitable organization described in section 501(c)(3) that meets the public support test of section 509(a)(2);

(iv) A charitable organization described in section 501(c)(3) that meets the requirements of section 509(a)(3) and is controlled by an organization described in paragraphs (c)(1) (i), (ii), or (iii) of this section.

(2) *Transfers by donee.* A deduction shall be allowed for a contribution under this section only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement (or, in the case of a remainder interest or the reservation of a qualified mineral interest, the property), whether or not for consideration, unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee under paragraph (c)(1) of this section. When a later unexpected change in the conditions surrounding the property that is the subject of a donation under paragraph (b)(1), (2), or (3) of this section makes impossible or impractical the continued use of the property for conservation purposes, the requirement of this paragraph will be met if the property is sold or exchanged and any proceeds are used by the donee organization in a manner consistent with the conservation purposes of the original contribution. In the case of a donation under paragraph (b)(3) of this section to which the preceding sentence applies, see also paragraph (g)(5)(ii) of this section.

(d) *Conservation purposes*—(1) *In general.* For purposes of section 170(h) and this section, the term "conservation purposes" means—

(i) The preservation of land areas for outdoor recreation by, or the education of, the general public, within the meaning of paragraph (d)(2) of this section,

(ii) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, within the

meaning of paragraph (d)(3) of this section.

(iii) The preservation of certain open space (including farmland and forest land) within the meaning of paragraph (d)(4) of this section, or

(iv) The preservation of a historically important land area or a certified historic structure, within the meaning of paragraph (d)(5) of this section.

(2) *Recreation or education*—(i) *In general.* The donation of a qualified real property interest to preserve land areas for the outdoor recreation of the general public or for the education of the general public will meet the conservation purposes test of this section. Thus, conservation purposes would include, for example, the preservation of a water area for the use of the public for boating or fishing, or a nature or hiking trail for the use of the public.

(ii) *Access.* The preservation of land areas for recreation or education will not meet the test of this section unless the recreation or education is for the substantial and regular use of the general public.

(3) *Protection of environmental system*—(i) *In general.* The donation of a qualified real property interest to protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives will meet the conservation purposes test of this section. The fact that the habitat or environment has been altered to some extent by human activity will not result in a deduction being denied under this section if the fish, wildlife, or plants continue to exist there in a relatively natural state. For example, the preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond were a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.

(ii) *Significant habitat or ecosystem.* Significant habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial community or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact; and natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.

(iii) *Access.* Limitations on public access to property that is the subject of a donation under this paragraph (d)(3) shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under this paragraph (d)(3) would not cause the donation to be nondeductible.

(4) *Preservation of open space*—(i) *In general.* The donation of a qualified real property interest to preserve open space (including farmland and forest land) will meet the conservation purposes test of this section if such preservation is—

(A) Pursuant to a clearly delineated Federal, state, or local governmental conservation policy and will yield a significant public benefit, or

(B) For the scenic enjoyment of the general public and will yield a significant public benefit.

An open space easement donated on or after December 18, 1980, must meet the requirements of section 170(h) in order to be deductible.

(ii) *Scenic enjoyment*—(A) *Factors.* A contribution made for the preservation of open space may be for the scenic enjoyment of the general public. Preservation of land may be for the scenic enjoyment of the general public if development of the property would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed from a park, nature preserve, road, waterbody, trail, or historic structure or land area, and such area or transportation way is open to, or utilized by, the public. "Scenic enjoyment" will be evaluated by considering all pertinent facts and circumstances germane to the contribution. Regional variations in topography, geology, biology, and cultural and economic conditions require flexibility in the application of this test, but do not lessen the burden on the taxpayer to demonstrate the scenic characteristics of a donation under this paragraph. The application of a particular objective factor in to help define a view as "scenic" in one setting may in fact be entirely inappropriate in another setting. Among the factors to be considered are:

(*1*) The compatibility of the land use with other land in the vicinity;

(*2*) The degree of contrast and variety provided by the visual scene;

(*3*) The openness of the land (which would be a more significant factor an urban or densely populated setting or in a heavily wooded area);

(*4*) Relief from urban closeness;

(*5*) The harmonious variety of shapes and textures;

(*6*) The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;

(*7*) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and

(*8*) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.

(B) *Access.* To satisfy the requirement of scenic enjoyment by the general public, visual (rather than physical) access to or across the property by the general public is sufficient. Under the terms of an open space easement on scenic property, the entire property need not be visible to the public for a donation to qualify under this section, although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public.

(iii) *Governmental conservation policy*—(A) *In general.* The requirement that the preservation of open space be pursuant to a clearly delineated Federal, state, or local governmental policy is intended to protect the types of property identified by representatives of the general public as worthy of preservation or conservation. A general declaration of conservation goals by a single official or legislative body is not sufficient. However, a governmental conservation policy need not be a certification program that identifies particular lots or small parcels of individually owned property. This requirement will be met by donations that further a specific, identified conservation project, such as the preservation of land within a state or local landmark district that is locally recognized as being significant to that district; the preservation of a wild or scenic river, the preservation of farmland pursuant to a state program for flood prevention and control; or the protection of the scenic, ecological, or historic character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites. For example, the donation of a perpetual conservation restriction to a qualified organization pursuant to a formal resolution or certification by a local governmental agency established under state law specifically identifying the subject property as worthy of protection for conservation purposes will meet the requirement of this paragraph. A

program need not be funded to satisfy this requirement, but the program must involve a significant commitment by the government with respect to the conservation project. For example, a governmental program according preferential tax assessment or preferential zoning for certain property deemed worthy of protection for conservation purposes would constitute a significant commitment by the government.

(B) *Effect of acceptance by governmental agency.* Acceptance of an easement by an agency of the Federal Government or by an agency of a state or local government (or by a commission, authority, or similar body duly constituted by the state or local government and acting on behalf of the state or local government) tends to establish the requisite clearly delineated governmental policy, although such acceptance, without more, is not sufficient. The more rigorous the review process by the governmental agency, the more the acceptance of the easement tends to establish the requisite clearly delineated governmental policy. For example, in a state where the legislature has established an Environmental Trust to accept gifts to the state which meet certain conservation purposes and to submit the gifts to a review that requires the approval of the state's highest officials, acceptance of a gift by the Trust tends to establish the requisite clearly delineated governmental policy. However, if the Trust merely accepts such gifts without a review process, the requisite clearly delineated governmental policy is not established.

(C) *Access.* A limitation on public access to property subject to a donation under this paragraph (d)(4)(iii) shall not render the deduction . ondeductible unless the conservation purpose of the donation would be undermined or frustrated without public access. For example, a donation pursuant to a governmental policy to protect the scenic character of land near a river requires visual access to the same extent as would a donation under paragraph (d)(4)(ii) of this section.

(iv) *Significant public benefit*—(A) Factors. All contributions made for the preservation of open space must yield a significant public benefit. Public benefit will be evaluated by considering all pertinent facts and circumstances germane to the contribution. Factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution. No single factor will necessarily be determinative. Among the factors to be considered are:

(*1*) The uniqueness of the property to the area;

(*2*) The intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);

(*3*) The consistency of the proposed open space use with public programs (whether Federal, state or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area;

(*4*) The consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in § 1.170A-14(c)(1), in close proximity to the property;

(*5*) The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;

(*6*) The opportunity for the general public to use the property or to appreciate its scenic values;

(*7*) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;

(*8*) The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;

(*9*) The cost to the donee of enforcing the terms of the conservation restriction;

(*10*) The population density in the area of the property; and

(*11*) The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.

(B) *Illustrations.* The preservation of an ordinary tract of land would not in and of itself yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit or the preservation of a unique land area for public employment would yield a significant public benefit. For example, the preservation of a vac nt downtown lot would not by itself yield a significant public benefit, but the preservation of the downtown lot as a public garden would, absent countervailing factors, yield a significant public benefit. The following are other examples of contributions which would, absent countervailing factors, yield a significant public benefit: The preservation of farmland pursuant to a state program for flood prevention and control; the preservation of a unique natural land formation for the enjoyment of the general public; the preservation of woodland along a public highway pursuant to a government program to preserve the appearance of the area so as to maintain the scenic view from the highway; and the preservation of a stretch of undeveloped property located between a public highway and the ocean in order to maintain the scenic ocean view from the highway.

(v) *Limitation.* A deduction will not be allowed for the preservation of open space under section 170(h)(4)(A)(iii), if the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation. See § 1.170A-14(e)(2) for rules relating to inconsistent use.

(vi) *Relationship of requirements*—(A) *Clearly delineated governmental policy and significant public benefit.* Although the requirements of "clearly delineated governmental policy" and "significant public benefit" must be met independently, for purposes of this section the two requirements may also be related. The more specific the governmental policy with respect to the particular site to be protected, the more likely the governmental decision, by itself, will tend to establish the significant public benefit associated with the donation. For example, while a statute in State X permitting preferential assessment for farmland is, by definition, governmental policy, it is distinguishable from a s state statute, accompanied by appropriations, naming the X River as a valuable resource and articulating the legislative policy that the X River and the relatively natural quality of its surrounding be protected. On these facts, an open space easement on farmland in State X would have to demonstrate additional factors to establish "significant public benefit." The specificity of the legislative mandate to protect the X River, however, would by itself tend to establish the significant public benefit associated with an open space easement on land fronting the X River.

(B) *Scenic enjoyment and significant public benefit.* With respect to the relationship between the requirements of "scenic enjoyment" and "significant public benefit," since the degrees of scenic enjoyment offered by a variety of open space easements are subjective and not as easily delineated as are

increasingly specific levels of governmental policy, the significant public benefit of preserving a scenic view must be independently established in all cases.

(C) *Donations may satisfy more than one test.* In some cases, open space easements may be both for scenic enjoyment and pursuant to a clearly delineated governmental policy. For example, the preservation of a particular scenic view identified as part of a scenic landscape inventory by a rigorous governmental review process will meet the tests of both paragraphs (d)(4)(i)(A) and (d)(4)(i)(B) of this section.

(5) *Historic preservation*—(i) *In general.* The donation of a qualified real property interest to preserve an historically important land area or a certified historic structure will meet the conservation purposes test of this section. When restrictions to preserve a building or land area within a registered historic district permit future development on the site, a deduction will be allowed under this section only if the terms of the restrictions require that such development conform with appropriate local, state, or Federal standards for construction or rehabilitation within the district. See also, § 1.170A-14(h)(3)(ii).

(ii) *Historically important land area.* The term "historically important land area" includes:

(A) An independently significant land area including any related historic resources (for example, an archaeological site or a Civil War battlefield with related monuments, bridges, cannons, or houses) that meets the National Register Criteria for Evaluation in 36 CFR 60.4 (Pub. L. 89-665, 80 Stat. 915);

(B) Any land area within a registered historic district including any buildings on the land area that can reasonably be considered as contributing to the significance of the district; and

(C) Any land area (including related historic resources) adjacent to a property listed individually in the National Register of Historic Places (but not within a registered historic district) in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.

(iii) *Certified historic structure.* The term "certified historic structure," for purposes of this section, means any building, structure or land area which is—

(A) Listed in the National Register, or

(B) Located in a registered historic district (as defined in section 48(g)(3)(B)) and is certified by the Secretary of the Interior (pursuant to 36 CFR 67.4) to the Secretary of the Treasury as being of historic significance to the district.

A "structure" for purposes of this section means any structure, whether or not it is depreciable. Accordingly easements on private residences may qualify under this section. In addition, a structure would be considered to be a certified historic structure if it were certified either at the time the transfer was made or at the due date (including extensions) for filing the donor's return for the taxable year in which the contribution was made.

(iv) *Access.* (A) In order for a conservation contribution described in section 170(h)(4)(A)(iv) and this paragraph (d)(5) to be deductible, some visual public access to the donated property is required. In the case of an historically important land area, the entire property need not be visible to the public for a donation to qualify under this section. However, the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is so visible. Where the historic land area or certified historic structure which is the subject of the donation is not visible from a public way (*e.g.*, the structure is hidden from view by a wall or shrubbery, the structure is too far from the public way, or interior characteristics and features of the structure are the subject of the easement), the terms of the easement must be such that the general public is given the opportunity on a regular basis to view the characteristics and features of the property which are preserved by the easement to the extent consistent with the nature and condition of the property.

(B) Factors to be considered in determining the type and amount of public access required under paragraph (d)(5)(iv)(A) of this section include the historical significance of the donated property, the nature of the features that are the subject of the easement, the remoteness or accessibility of the site of the donated property, the possibility of physical hazards to the public visiting the property (for example, an unoccupied structure in a dilapidated condition), the extent to which public access would be an unreasonable intrusion on any privacy interests of individuals living on the property, the degree to which public access would impair the preservation interests which are the subject of the donation, and the availability of opportunities for the public to view the property by means other than visits to the site.

(C) The amount of access afforded the public by the donation of an easement shall be determined with reference to the amount of access permitted by the terms of the easement which are established by the donor, rather than the amount of access actually provided by the donee organization. However, if the donor is aware of any facts indicating that the amount of access that the donee organization will provide is significantly less than the amount of access permitted under the terms of the easement, then the amount of access afforded the public shall be determined with reference to this lesser amount.

(v) *Examples.* The provisions of paragraph (d)(5)(iv) of this section may be illustrated by the following examples:

Example (1). A and his family live in a house in a certified historic district in the State of X. The entire house, including its interior, has architectural features representing classic Victorian period architecture. A donates an exterior and interior easement on the property to a qualified organization but continues to live in the house with his family. A's house is surrounded by a high stone wall which obscures the public's view of it from the street. Pursuant to the terms of the easement, the house may be opened to the public from 10:00 a.m. to 4:00 p.m. on one Sunday in May and one Sunday in November each year for house and garden tours. These tours are to be under the supervision of the donee and open to members of the general public upon payment of a small fee. In addition, under the terms of the easement, the donee organization is given the right to photograph the interior and exterior of the house and distribute such photographs to magazines, newsletters, or other publicly available publications. The terms of the easement also permit persons affiliated with educational organizations, professional architectural associations, and historical societies to make an appointment through the donee organization to study the property. The donor is not aware of any facts indicating that the public access to be provided by the donee organization will be significantly less than that permitted by the terms of the easement. The 2 opportunities for public visits per year, when combined with the ability of the general public to view the architectural characteristics and features that are the subject of the easement through photographs, the opportunity for scholarly study of the property, and the fact that the house is used as an occupied residence, will enable the donation to satisfy the requirement of public access.

Example (2). B owns an unoccupied farmhouse built in the 1840's and located on property that is adjacent to a Civil War battlefield. During the Civil War the farmhouse was used as quarters for Union troops. The battlefield is visited year round by the general public. The condition of the farmhouse is such that the safety of visitors will not be jeopardized and opening it to the public will not result in significant deterioration. The farmhouse is not visible from the battlefield or any public way. It is accessible only by way of a private road

owned by B. B donates a conservation easement on the farmhouse to a qualified organization. The terms of the easement provide that the donee organization may open the property (via B's road) to the general public on four weekends each year from 8:30 a.m. to 4:00 p.m. The donation does not meet the public access requirement because the farmhouse is safe, unoccupied, and easily accessible to the general public who have come to the site to visit Civil War historic land areas (and related resources), but will only be open to the public on four weekends each year. However, the donation would meet the public access requirement if the terms of the easement permitted the donee organization to open the property to the public every other weekend during the year and the donor is not aware of any facts indicating that the donee organization will provide significantly less access than that permitted.

(e) *Exclusively for conservation purposes.* (1) *In general.* To meet the requirements of this section, a donation must be exclusively for conservation purposes. See paragraphs (c)(1) and (g)(1) through (g)(6)(ii) of this section. A deduction will not be denied under this section when incidental benefit inures to the donor merely as a result of conservation restrictions limiting the uses to which the donor's property may be put.

(2) *Inconsistent use.* Except as provided in paragraph (e)(4) of this section, a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. For example, the preservation of farmland pursuant to a State program for flood prevention and control would not qualify under paragraph (d)(4) of this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.

(3) *Inconsistent use permitted.* A use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution. For example, a deduction for the donation of an easement to preserve an archaeological site that is listed on the National Register of Historic Places will not be disallowed if site excavation consistent with sound archaeological practices may impair a scenic view of which the land is a part. A donor may continue a pre-existing use of the property that does not conflict with the conservation purposes of the gift.

(f) *Examples.* The provisions of this section relating to conservation purposes may be illustrated by the following examples.

Example (1). State S contains many large tract forests that are desirable recreation and scenic areas for the general public. The forests' scenic values attract millions of people to the State. However, due to the increasing intensity of land development in State S, the continued existence of forestland parcels greater than 45 acres is threatened. J grants a perpetual easement on a 100-acre parcel of forestland that is part of one of the State's scenic areas to a qualifying organization. The easement imposes restrictions on the use of the parcel for the purpose of maintaining its scenic values. The restrictions include a requirement that the parcel be maintained forever as open space devoted exclusively to conservation purposes and wildlife protection, and that there be no commercial, industrial, residential, or other development use of such parcel. The law of State S recognizes a limited public right to enter private land, particularly for recreational pursuits, unless such land is posted or the landowner objects. The easement specifically restricts the landowner from posting the parcel, or from objecting, thereby maintaining public access to the parcel according to the custom of the State. J's parcel provides the opportunity for the public to enjoy the use of the property and appreciate its scenic values. Accordingly, J's donation qualifies for a deduction under this section.

Example (2). A qualified conservation organization owns Greenacre in fee as a nature preserve. Greenacre contains a high quality example of a tall grass prairie ecosystem. Farmacre, an operating farm, adjoins Greenacre and is a compatible buffer to the nature preserve. Conversion of Farmacre to a more intense use, such as a housing development, would adversely affect the continued use of Greenacre as a nature preserve because of human traffic generated by the development. The owner of Farmacre donates an easement preventing any future development on Farmacre to the qualified conservation organization for conservation purposes. Normal agricultural uses will be allowed on Farmacre. Accordingly, the donation qualifies for a deduction under this section.

Example (3). H owns Greenacre, a 900-acre parcel of woodland, rolling pasture, and orchards on the crest of a mountain. All of Greenacre is clearly visible from a nearby national park. Because of the strict enforcement of an applicable zoning plan, the highest and best use of Greenacre is as a subdivision of 40-acre tracts. H wishes to donate a scenic easement on Greenacre to a qualifying conservation organization, but H would like to reserve the right to subdivide Greenacre into 80-acre parcels with no more than one single-family home allowable on each parcel. Random building on the property, even as little as one home for each 90 acres, would destroy the scenic character of the view. Accordingly, no deduction would be allowable under this section.

Example (4). Assume the same facts as in *example (3)*, except that not all of Greenacre is visible from the park and the deed of easement allows for limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) located in areas generally not visible from the national park and subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park. The donor and the donee have already identified sites where limited cluster development would not be visible from the park or would not impair the view. Owners of homes in the clusters will not have any rights with respect to the surrounding Greenacre property that are not also available to the general public. Accordingly, the donation qualifies for a deduction under this section.

Example (5). In order to protect State S's declining open space that is suited for agricultural use from increasing development pressure that has led to a marked decline in such open space, the Legislature of State S passed a statute authorizing the purchase of "agricultural land development rights" on open acreage. Agricultural land development rights allow the State to place agricultural preservation restrictions on land designated as worthy of protection in order to preserve open space and farm resources. Agricultural preservation restrictions prohibit or limit construction or placement of buildings except those used for agricultural purposes or dwellings used for family living by the farmer and his family and employees; removal of mineral substances in any manner that adversely affects the land's agricultural potential; or other uses detrimental to retention of the land for agricultural use. Money has been appropriated for this program and some landowners have in fact sold their "agricultural land development rights" to State S. K owns and operates a small dairy farm in State S located in an area designated by the Legislature as worthy protection. K desires to preserve his farm for agricultural purposes in perpetuity. Rather than selling the development rights to State S, K grants to a qualified organization an agricultural preservation restriction on his property in the form of a conservation easement. K reserves to himself, his heirs and assigns the right to manage the farm consistent with sound agricultural and management practices. The preservation of K's land is pursuant to a clearly delineated governmental policy of preserving open space available for agricultural use, and will yield a significant public benefit by preserving open space against increasing development pressures.

(g) *Enforceable in perpetuity.*—(1) *In general.* In the case of any donation under this section, any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest

inconsistent with the conservation purposes of the donation. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution.

(2) *Protection of a conservation purpose in case of donation of property subject to a mortgage.* In the case of conservation contributions made after February 13, 1986, no deducion will be permitted under this section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity. For conservation contributions made prior to February 12, 1986, the requirement of section 170 (h)(5)(A) is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.

(3) *Remote future event.* A deduction shall not be disallowed under section 170(f)(3)(B)(iii) and this section merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible. See paragraph (e) of § 1.170A-1. For example, a state's statutory requirement that use restrictions must be rerecorded every 30 years to remain enforceable shall not, by itself, render an easement nonperpetual.

(4) *Retention of qualified mineral interest*—(i) *In general.* Except as otherwise provided in paragraph (g)(4)(ii) of this section, the requirements of this section are not met and no deduction shall be allowed in the case of a contribution of any interest when there is a retention by any person of a qualified mineral interest (as defined in paragraph (b)(1)(i) of this section) if at any time there may be extractions or removal of minerals by any surface mining method. Moreover, in the case of a qualified mineral interest gift, the requirement that the conservation purposes be protected in perpetuity is not satisfied if any method of mining that is inconsistent with the particular conservation purposes of a contribution is permitted at any time. See also § 1.170A-14(e)(2). However, a deduction under this section will not be denied in the case of certain methods of mining that may have limited, localized impact on the real property but that are not irremediably destructive of significant conservation interests. For example, a deduction will not be denied in a case where production facilities are concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state.

(ii) *Exception for qualified conservation contributions after July 1964.* (A) A contribution made after July 18, 1964, of a qualified real property interest described in section 170(h)(2)(A) shall not be disqualified under the first sentence of paragraph (g)(4)(i) of this section if the following requirements are satisfied.

(*1*) The ownership of the surface estate and mineral interest were separated before June 13, 1976, and remain so separated up to and including the time of the contribution.

(*2*) The present owner of the mineral interest is not a person whose relationship to the owner of the surface estate is described at the time of the contribution in section 267(b) of section 707(b), and

(*3*) The probability of extraction or removal of minerals by any surface mining method is so remote as to be negligible.

Whether the probability of extraction or removal of minerals by surface mining is so remote as to be negligible is a question of fact and is to be made on a case by case basis. Relevant factors to be considered in determining if the probability of extraction or removal of minerals by surface mining is so remote as to be negligible include: Geological, geophysical or economic data showing the absence of mineral reserves on the property, or the lack of commercial feasibility at the time of the contribution of surface mining the mineral interest.

(B) If the ownership of the surface estate and mineral interest first became separated after June 12, 1976, no deduction is permitted for a contribution under this section unless surface mining on the property is completely prohibited.

(iii) *Examples.* The provisions of paragraph (g)(4)(i) and (ii) of this section may be illustrated by the following examples:

Example. (1) K owns 5,000 acres of bottomland hardwood property along a major watershed system in the southern part of the United States. Agencies within the Department of the Interior have determined that southern bottomland hardwoods are a rapidly diminishing resource and a critical ecosystem in the south because of the intense pressure to cut the trees and convert the land to agricultural use. These agencies have further determined (and have indicated in correspondence with K) that bottomland hardwoods provide a superb habitat for numerous species and play an important role in controlling floods and purifying rivers. K donates to a qualified organization his entire interest in this property other than his interest in the gas and oil deposits that have been identified under K's property. K covenants and can ensure that, although drilling for gas and oil on the property may have some temporary localized impact on the real property, the drilling will not interfere with the overall conservation purpose of the gift, which is to protect the unique bottomland hardwood ecosystem. Accordingly, the donation qualifies for a deduction under this section.

Example (2). Assume the same facts as in example (1), except that in 1979, K sells the mineral interest to A, an unrelated person, in an arm's-length transaction, subject to a recorded prohibition on the removal of any minerals by any surface mining method and a recorded prohibition against any mining technique that will harm the bottomland hardwood ecosystem. After the sale to A, K donates a qualified real property interest to a qualified organization to protect the bottomland hardwood ecosystem. Since at the time of the transfer, surface mining and any mining technique that will harm the bottomland hardwood ecosystem are completely prohibited, the donation qualifies for a deduction under this section.

(5) *Protection of conservation purpose where taxpayer reserves certain rights.* (i) *Documentation.* In the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift.

Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. Such documentation may include:

(A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;

(B) A map of the area drawn to scale showing all existing man-made improvements or incursions (such as roads, buildings, fences, or gravel pits), vegetation and identification of flora and fauna (including, for example, rare species locations, animal breeding and roosting areas, and migration routes), land use history (including present uses

and recent past disturbances), and distinct natural features (such as large trees and aquatic areas);

(C) An aerial photograph of the property at an appropriate scale taken as close as possible to the date the donation is made; and

(D) On-site photographs taken at appropriate locations on the property. If the terms of the donation contain restrictions with regard to a particular natural resource to be protected, such as water quality or air quality, the condition of the resource at or nea the time of the gift must be established. The documentation, including the maps and photographs, must be accompanied by a statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying "This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer.".

(ii) *Donee's right to inspection and legal remedies.* In the case of any donation referred to in paragraph (g)(5)(i) of this section, the donor must agree to notify the donee, in writing, before exercising any reserved right, *e.g.* the right to extract certain minerals which may have an adverse impact on the conservation interests associated with the qualified real property interest. The terms of the donation must provide a right of the donee to enter the property at reasonable times for the purpose of inspection the property to determine if there is compliance with the terms of the donation. Additionally, the terms of the donation must provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings, including but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

(6) *Extinguishment.* (i) In general. If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

(ii) *Proceeds.* In case of a donation made after February 13, 1986, for a deduction to be allowed under this section, at the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time. See § 1.170A-14(h)(3)(iii) relating to the allocation of basis. For purposes of this paragraph (g)(6)(ii), that proportionate value of the donee's property rights shall remain constant. Accordingly, when a change in conditions give rise to the extinguishment of a perpetual conservation restriction under paragraph (g)(6)(i) of this section, the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

(h) *Valuation*—(1) *Entire interest of donor other than qualified mineral interest.* The value of the contribution under section 170 in the case of a contribution of a taxpayer's entire interest in property other than a qualified mineral interest is the fair market value of the surface rights in the property contributed. The value of the contribution shall be computed without regard to the mineral rights. See paragraph (h)(4), *example (1)*, of this section.

(2) *Remainder interest in real property.* In the case of a contribution of any remainder interest in real property, section 170(f)(4) provides that in determining the value of such interest for purposes of section 170, depreciation and depletion of such property shall be taken into account. See § 1.170A-12. In the case of the contribution of a remainder interest for conservation purposes, the current fair market value of the property (against which the limitations of § 1.17A-12 are applied) must take into account any pre-existing or contemporaneously recorded rights limiting, for conservation purposes, the use to which the subject property may be put.

(3) *Perpetual conservation restriction*—(i) *In general.* The value of the contribution under section 170 in the case of a charitable contribution of a perpetual conservation restriction is the fair market value of the perpetual conservation restriction at the time of the contribution. See § 1.170A-7(c). If there is a substantial record of sales of easements comparable to the donated easement (such as purchases pursuant to a governmental program), the fair market value of the donated easement is based on the sales prices of such comparable easements. If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction. The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor and the donor's family (as defined in section 267(c)(4)) is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction. If the granting of a perpetual conservation restriction after January 14, 1986, has the effect of increasing the value of any other property owned by the donor or a related person, the amount of the deduction for the conservation contribution shall be reduced by the amount of the increase in the value of the other property, whether or not such property is contiguous. If, as a result of the donation of a perpetual conservation restriction, the donor or a related person receives, or can reasonably expect to receive, financial or economic benefits that are greater than those that will inure to the general public from the transfer, no deduction is allowable under this section. However, if the donor or a related person receives, or can reasonably expect to receive, a financial or economic benefit that is substantial, but it is clearly shown that the benefit is less than the amount of the transfer, then a deduction under this section is allowable for the excess of the amount transferred over the amount of the financial or economic benefit received or reasonably expected to be received by the donor or the related person. For purposes of this paragraph (h)(3)((i), related person shall have the same meaning as in either section 267(b) or section 707(b). (See example (10) of paragraph (h)(4) of this section.)

(ii) *Fair market value of property before and after restriction.* If before and after valuation is used, the fair market value of the property before contribution of the conservation restriction must take into account not only the current use of the property but

also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use. Further, there may be instances where the grant of a conservation restriction may have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of property. In such instances no deduction would be allowable. In the case of a conservation restriction that allows for any development, however limited, on the property to be protected, the fair maket value of the property after contribution of the restriction must take into account the effect of the development. In the case of a conservation easement such as an easement on a certified historic structure, the fair market value of the property after contribution of the restriction must take into account the amount of access permitted by the terms of the easement. Additionally, if before and after valuation is used, an appraisal of the property after contribution of the restriction must take into account the effect of restrictions that will result in a reduction of the potential fair market value represented by highest and best use but will, nevertheless, permit uses of the property that will increase its fair market value above that represented by the property's current use. The value of a perpetual conservation restriction shall not be reduced by reason of the existence of restrictions on transfer designed solely to ensure that the conservation restriction will be dedicated to conservation purposes. See § 1.170A-14 (c)(3).

(iii) *Allocation of basis.* In the case of the donation of a qualified real property interest for conservation purposes, the basis of the property retained by the donor must be adjusted by the elimination of that part of the total basis of the property that is properly allocable to the qualified real property interest granted. The amount of the basis that is allocable to the qualified real property interest shall bear the same ratio to the total basis of the property as the fair market value of the qualified real property interest bears to the fair market value of the property before the granting of the qualified real property interest. When a taxpayer donates to a qualifying conservation organization an easement on a structure with respect to which deductions are taken for depreciation, the reduction required by this paragraph (h)(3)(ii) in the basis of the property retained by the taxpayer must be allocated between the structure and the underlying land.

(4) *Examples.* The provisions of this section may be illustrated by the following examples. In examples illustrating the value or deductibility of donations, the applicable restrictions and limitations of § 1.170A-4, with respect to reduction in amount of charitable contributions of certain appreciated property, and § 1.170A-8, with respect to limitations on charitable deductions by individuals, must also be taken into account.

Example (1). A owns Coldacre, a property adjacent to a state park. A wants to donate Coldacre to the state to be used as part of the park, but A wants to reserve a qualified mineral interest in the property, to exploit currently and to devise at death. The fair market value of the surface rights in Coldacre is $200,000 and the fair market value of the mineral rights is $100,000. In order to ensure that the quality of the park will not be degraded, restrictions must be imposed on the right to extract the minerals that reduce the fair market value of the mineral rights to $80,000. Under this section, the value of the contribution is $200,000 (the value of the surface rights).

Example (2). In 1984 B, who is 62, donates a remainder interest in Greenacre to a qualifying organization for conservation purposes. Greenacre is a tract of 200 acres of undeveloped woodland that is valued at $200,000 at its highest and best use. Under § 1.170A-12(b), the value of a remainder interest in real property following one life is determined under § 25.2512-5 of the Gift Tax Regulations. (See § 25.2512-9 with respect to the valuation of annuities, life estates, terms for years, remainders, and reversions transferred after December 31, 1970 and before December 1, 1983. With respect to the valuation of annuities, life estates, terms for years, remainders, and reversions transferred before January 1, 1971, see T.D. 6334, 23 FR 8904, November 18, 1958, as amended by T.D. 7077, 35 FR 18464, December 4, 1970). Accordingly, the value of the remainder interest, and thus the amount eligible for an income tax deduction under sections 170(f), is $55,966 ($200,000 × .27998).

Example (3). Assume the same facts as in example (2), except that Greenacre is B's 200-acre estate with a home built during the colonial period. Some of the acreage around the home is cleared; the balance of Greenacre, except for access roads, is wooded and undeveloped. See section 170(f)(3)(B)(i). However, B would like Greenacre to be maintained in its current state after his death, so he donates a remainder interest in Greenacre to a qualifying organization for conservation purposes pursuant to section 170 (f)(3)(B)(iii) and (h)(2)(B). At the time of the gift the land has a value of $200,000 and the house has a value of $100,000. The value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is computed pursuant to § 1.170A-12. See § 1.170A-12(b)(3).

Example (4). Assume the same facts as in example (2), except that at age 62 instead of donating a remainder interest B donates an easement in Greenacre to a qualifying organization for conservation purposes. The fair market value of Greenacre after the donation is reduced to $110,000. Accordingly, the value of the easement, and thus the amount eligible for a deduction under section 170(f), is $90,000 ($200,000 less $110,000).

Example (5). Assume the same facts as in example (4), and assume that three years later, at age 65, B decides to donate a remainder interest in Greenacre to a qualifying organization for conservation purposes. Increasing real estate values in the area have raised the fair market value of Greenacre (subject to the easement) to $130,000. Accordingly, the value of the remainder interest, and thus the amount eligible for a deduction under section 170(f), is $41,659 ($130,000 × .32030).

Example (6). Assume the same facts as in example (2), except that at the time of the donation of a remainder interest in Greenacre, B also donates an easement to a different qualifying organization for conservation purposes. Based on all the facts and circumstances, the value of the easement is determined to be $100,000. Therefore, the value of the property after the easement is $100,000 and the value of the remainder interest, and thus the amount eligible for deduction under section 170(f), is $27,998 ($100,000 × .27998).

Example (7). C owns Greenacre, a 200-acre estate containing a house built during the colonial period. At its highest and best use, for home development, the fair market value of Greenacre is $300,000. C donates an easement (to maintain the house and Green acre in their current state) to a qualifying organization for conservation purposes. The fair market value of Greenacre after the donation is reduced to $125,000. Accordingly, the value of the easement and the amount eligible for a deduction under section 170(f) is $175,000 ($300,000 less $125,000).

Example (8). Assume the same facts as in example (7) and assume that three years later, C decides to donate a remainder interest in Greenacre to a qualifying organization for conservation purposes. Increasing real estate values in the area have raised the fair market value of Greenacre to $180,000. Assume that because of the perpetual easement prohibiting any development of the land, the value of the house is $120,000 and the value of the land is $60,000. The value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is computed pursuant to § 1.170A-12. See § 1.170A-12(b)(3).

Example (9). D owns property with a basis of $20,000 and a fair market value of $60,000. D donates to a qualifying organization an easement for conservation purposes that is determined under this section to have a fair market value of $60,000. The amount of basis allocable to the easement is $15,000 ($60,000/$80,000 = $15,000/$20,000). Accordingly, the basis of the property is reduced to $5,000 ($20,000 minus $15,000).

Example (10). E owns 10 one-acre lots that are currently woods and parkland. The fair market value of each of E's lots is $15,000 and the basis of each lot is $3,000. E grants to the county a perpetual easement for conservation purposes to use and maintain eight of the acres as a public park and to restrict any future development on those eight acres. As a result of the restrictions, the value of the eight acres is reduced to $1,000 an acre. However, by perpetually restricting development on this portion of the land, E has ensured that the two remaining acres will always be bordered by parkland, thus increasing their fair market value to $22,500 each. If the eight acres represented all of E's land, the fair market value of the easement would be $112,000, an amount equal to the fair market value of the land before the granting of the easement ($8 \times $15,000 = $120,000) minus the fair market value of the encumbered land after the granting of the easement ($8 \times $1,000 = $8,000). However, because the easement only covered a portion of the deduction under section 170 is reduced to $97,000 ($150,000–$53,000), that is, the difference between the fair market value of the entire tract of land before ($150,000) and after [($8 \times $1,000) + ($2 \times $22,500)] the granting of the easement.

Example (11). Assume the same facts as in *example (10).* Since the easement covers a portion of E's land, only the basis of that portion is adjusted. Therefore, the amount of basis allocable to the easement is $22,400 [($8 \times $3,000) \times ($112,000/$120,000)]. Accordingly, the basis of the eight acres encumbered by the easement is reduced to $1,600 ($24,000–$22,400), or $200 for each acre. The basis of the two remaining acres is not affected by the donation.

Example (12). F owns and uses as professional offices a two-building that lies within a registered historic district. F's building is an outstanding example of period architecture with a fair market value of $125,000. Restricted to its current use, which is the highest and best use of the property without making changes to the facade, the building and lot would have a fair market value of $100,000, of which $80,000 would be allocable to the building and $20,000 would be allocable to the lot. F's basis in the property is $50,000, of which $40,000 is allocable to the building and $10,000 is allocable to the lot. F's neighborhood is a mix of residential and commercial uses, and it is possible that F (or another owner) could enlarge the building for more extensive commercial use, which is its highest and best use. However, this would require changes to the facade. F would like to donate to a qualifying preservation organization and easement restricting any changes to the facade and promising to maintain the facade in perpetuity. the donation would qualify for a deduction under this section. The fair market value of the easement is $25,000 (the fair market value of the property before the easement, $125,000, minus the fair market value of the property after the easement, $100,000). Pursuant to § 1.170A-14(h)(3)(iii), the basis allocable to the easement is $10,000 and the basis of the underlying property (building and lot) is reduced to $40,000.

(i) *Substantiation requirement.* If a taxpayer makes a qualified conservation contribution and claims a deduction, the taxpayer must maintain written records of the fair market value of the underlying property before and after the donation and the conservation purpose furthered by the donation and such information shall be stated in the taxpayer's income tax return if required by the return or its instructions. See also § 1.170A-13T(c) (relating to substantiation requirements for deductions in excess of $5,000 for charitable contributions made after 1984), and section 6659 (relating to additions to tax in the case of valuation overstatements).

(j) *Effective date.* Except as otherwise provided in § 1.170A-14(g)(4)(ii), this section applies only to contributions made on or after December 18, 1980.

PART 20—[AMENDED]

Par. 5. The authority for Part 20 continues to read in part:

Authority: 26 U.S.C. 7805. • • •

Par. 6. Paragraph (e)(2) of § 20.2055–2 is amended as follows:

a. The sixth sentence of paragraph (e)(2)(i) is revised to read: "However, except as provided in paragraphs (e)(2)(ii), (iii), and (iv) of this section, for purposes of this subdivision a charitable contribution of an interest in property not in trust where the decedent transfers some specific rights to one party and transfers other substantial rights to another party will not be considered a contribution of an undivided portion of the decedent's entire interest in property.".

b. The eight sentence of paragraph (e)(2)(i) is revised to read: "A bequest to charity made on or before December 17, 1980, of an open space easement in gross in perpetuity shall be considered the transfer to charity of an undivided portion of the decedent's entire interest in the property.".

c. Paragraphs (e)(2)(iv), (e)(2)(v), and (e)(2)(vi) and redesignated (e)(2)(v), (e)(2)(vi), and (e)(2)(vii), respectively.

d. A new paragraph (e)(2)(iv) is inserted after paragraph (e)(2)(iii) to read as set forth below.

§ 20.2055–2 Transfers not exclusively for charitable purposes.

• • • • • •

(e) *Limitations applicable to decedents dying after December 31, 1969.* • • •

(2) *Deductible interests.* • • •

(iv) *Qualified conservation contribution.* The charitable interest is a qualified conservation contribution. For the definition of a qualified conservation contribution, see § 1.170A–14

PART 25—[AMENDED]

Par. 7. The authority for Part 25 continues to read in part:

Authority: 26 U.S.C. 7805. • • •

Par. 8. Paragraph (c)(2) of § 25.2522(c)—3 is amended as follows:

a. The sixth sentence of paragraph (c)(2)(i) is revised to read: "However, except as provided in paragraphs (e)(2)(ii), (iii), and (iv) of this section, for purposes of this subdivision of charitable contribution of an interest in property not in trust where the decedent transfers some specific rights to one party and transfers other substantial rights to another party will not be considered a contribution of a undivided portion of the decedent's entire interest in property.".

b. The eight sentence of paragraph (c)(2)(i) is revised to read: "A bequest to charity made on or before December 17, 1980, of open space easement in gross in perpetuity shall be considered the transfer to charity of an undivided portion of the decedent's entire interest in property.".

c. Paragraphs (c)(2)(iv), (c)(2)(v), and (c)(2)(vi) are redesignated (c)(2)(v), (c)(2)(vi), and (c)(2)(viii), respectively.

d. A new paragraph (c)(2)(iv) is inserted after paragraph (c)(2)(iii), to read as set forth below.

§ 25.2522(c)-3 Transfers not exclusively for charitable, etc., purposes in the case of gifts made after July 31, 1969.

• • • • • •

(c) *Transfers of partial interest in property.*

(2) *Deductible interest.* • • •

(iv) *Qualified Conservation Contribution.* The charitable interest is a qualified conservation contribution. For the definition of a qualified conservation contribution, see § 1.170A–14.

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PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 9. The authority for Part 602 continues to read in part:

Authority: 26 U.S.C. 7805. • • •

Par. 10. Section 602.101(c) is amended by inserting in the appropriate place in the table "§ 1.170A–14 . . . 1545–0763".

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: December 20, 1985.

Ronald A Pearlman,

Assistant Secretary of the Treasury.

[FR Doc. 86–727 Filed 1–13–86; 8:45 am]

BILLING CODE 4830–01–M

APPENDIX B

QUESTIONNAIRE

¥date¥

¥address¥

Dear ¥name¥

The Land Trust Exchange suggested that I contact you regarding your easement program. Until recently, I worked for The Trust For Public Land (TPL) as Field Representative in their Land Trust Program for the Southeastern United States. Currently I am working on a master's thesis on the subject of "How A Select Group of Non-Profit Land Conservation Organizations Have Responded to New Congressional Definitions of Open Space."

Attached you will find a simple questionnaire regarding your easement program. Please take a minute to fill this out, attach a copy of any material relevant to particular easement or easement programs (board policy or written criteria; governmental legislation, programs, or policy; etc.) and return in the envelope provided. Results of this questionnaire and any follow-up research will be shared with you.

Land conservation has been given an extremely powerful and useful tool by Congress in it's decision to allow charitable tax deductions for conservation purposes (especially the expansion of those purposes in 1980 to include open space). Our task as conservation professionals is to plan and implement strong easement programs under the recently released IRS Regulations concerning "Qualified Conservation Contributions." Hopefully, your experience and knowledge gained will lead us in that direction.

Thank you for your time and cooperation!

Sincerely,

Bob Allen

Note: If you have any questions, please call me collect at the number above or call and leave a message at (615) 974-5227 or (615) 974-4620.

Vorganization

QUESTIONNAIRE

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1. When was your easement program first established?

2. Does the law in your state provide statutory authority for conservation easements?

Yes No

3. Are there any problems with your state's legislation (or common law decisions) that affect your easement program?

Yes No

(if yes, describe briefly)

4. Did your organization acquire scenic easements prior to 1976?

Yes No

If yes, what steps did you take to define scenic quality? :
(mark one or more)

(a) scenic inventory (local, state, regional, federal)

(b) part of a Federal, state, or local conservation program

(c) consistent with local plans or policies

(d) endorsed or certified by a governmental body

(e) others (list)

(Please comment on any of the above in more detail).

5. After the Tax Reform Act of 1976 was passed (and prior to 1980) which of the conservation purposes were used by your program?

[mark one or more from IRC K170 (f)(3)(B)(1976)):]

(a) "(i) the preservation of land areas for public outdoor recreation or education, or scenic enjoyment;"

(b) "(ii) the preservation of historically important land areas or structures; or,

(c) "(iii) the preservation of natural environmental systems"

6. Since the Tax Treatment Extension Act of 1980 (P.L. 96-5411), have any of your easements been for: (one or more)

(a) preservation of land for recreation or education of the general public

(b) the protection of habitat or ecosystems

(c) open space easements

(d) preservation of historically important land or a certified structure

7. What percentage of your easements were scenic easements prior to 1976?

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

8. What percentage of your easements were "scenic easements" prior to 1980?

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

9. What percentage of your easements have been open space easements since 1980?

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

10. Did the Temporary Treasury Regulations issued in 1983 cause your programs problem(s) with: (one or more)

(a) public access

(b) third party mineral rights

(c) inconsistent use

(d) definition of open space

(e) others (list)

11. Which one caused your program(s) the most problems:

(a) (b) (c) (d) (e)

12. What steps did you take to address these problems?

(list briefly)

13. For open space easements, how does your organization address the "scenic enjoyment" test?:

(one or more)

(a) compatibility with other land uses

(b) contrast, variety, openness, maintenance of scale and character of visual scene

(c) visual relief from urban closeness

(d) consistent with landscape inventory or other objective assessment

(e) to protect the viewshed of a park, nature preserve, historical land or certified structures

(f) to protect the viewshed along an officially designated scenic corridor

(g) other(s) [list]

14. For open space easements, how does your organization address the "clearly delineated governmental conservation policy" test?:

(one or more)

(a) a strong local or state conservation policy, as part of a regulatory scheme or funded program

(b) a site specific certification program

(c) preservation of land within a historic landmark program

(d) protection of areas adjacent to existing conservation sites

(e) general policy goals of an elected body formed under state law

(f) acceptance contingent upon formal resolution of a local agency established under state law

(g) other(s) [list]

15. For scenic easements, are you more concerned with:

(a) the number of people likely to see the view, or

(b) the quality of the view

(c) other (comment)

16. How does your organization address the "public benefit" test? :
(choose one or more)

(a) uniqueness of property to the area

(b) intensity of land development in the area (present or future)

(c) consistency with Federal, state, or local conservation policy

(d) likelihood that development would destroy natural, scenic, or historical character

(e) consistency with existing private conservation program

(f) opportunity of the public to use the property or otherwise appreciate its value

(g) preserving a landscape or natural resource that attracts tourism or commerce to the area

(h) likelihood of organization acquiring equally valuable property

(i) cost of enforcing the restrictions

(j) population density

(k) consistency with other legislatively mandated conservation programs

(l) other(s) [please list]

17. How does your organization address the relationship of these tests?
(Describe briefly)

18. Since 1980, have you taken any extra steps to qualify/quantify the easements in your program?

(Comment Briefly, including comments on the effectiveness of that effort, the need to do so, etc.; attach copies of relevant material: copies of governmental policy, new legislation, checklists, etc.)

19. Do you anticipate that the Final Treasury Regulations released on Jan. 14, 1986, will cause your organization any problems with planning or implementing your program?

Yes No

(If yes, briefly describe.)

20. Who is the main contact in your organization to answer any further questions regarding this questionnaire, if needed?

(please print)

Name Address

Phone #:

(_____)_____(h)

(_____)_____(o)

Name of person completing questionnaire (if different):

21. Other comments/ thoughts/ ideas generated in response to this questionnaire, would be greatly appreciated and useful. Thanks!

APPENDIX C

LIST OF ORGANIZATIONS SURVEYED

STATE	ORGANIZATION	ORG. FOUNDED	PROGRAM BEGAN	ACRES UNDER EASEMENT
CALIFORNIA				
	Robert Berner Executive Director Marin Agricultural Land Trust P. O. BOX 809 Point Reyes Station, CA. 94956	1980	1980	2340 acres
	Trust For Public Land 82 Second Street San Francisco, CA. 94105	*	*	*
COLORADO				
	Herman Allmaras Director Mesa County Land Conservancy 3544 East One Half Rd. Palisade, CO. 81526	1980	1981	90 acres
CONNECTICUT				
	Mrs. Edith Schade President Great Meadows Conservation Trust 400 Hartford Avenue Wethersfield, CT. 06033	1961		22 acres
	Ralph Goodno, Jr. Executive Director Housatonic Valley Assoc. P. O. BOX 515 Kent, CT. 06757	1954		805 acres
	Graham Thompson Director Litchfield Conservation Trust Chestnut Hill Road Litchfield, CT. 06759	1968	1980	37 acres
	Philip G. James, President Windham Land Trust P. O. BOX 33 Pomfret Center, CT. 06095	1975	1975	160 acres

STATE	ORGANIZATION	ORG. FOUNDED	PROGRAM BEGAN	ACRES UNDER EASEMENT
DELAWARE				
	Michael Riska Executive Director Delaware Nature Education Society P. O. BOX 7000 Hockessin, DE. 19707	1964	1975	9 acres
DISTRICT OF COLUMBIA				
	Edward Thompson, Jr. General Counsel The American Farmland Trust 1717 Massachusetts Ave.,N.W. Washington, D.C. 20036	*	1981	*
MAINE				
	William Locke Clerk Harpswell Hertige Trust High Head Farm South Harpswell, ME. 04079	1984		2 acres
	Bruce Jacobson Executive Director Maine Coast Heritage Trust P. O. BOX 426 Northeast Harbor, ME. 04662	1970	1970	479 acres
	Joseph Gray President Mid-Coast Audubon of Maine P. O. BOX 862 Rockland, ME. 04841	1970		54 acres
MASSACHUSETTS				
	C. D. Putnam Barnstable Conservation Foundation 265 Baxter Neck Road Marston, Mills, MA. 02648	--		0
	Elizabeth Bell Executive Director Essex County Greenbelt Assoc. 82 Eastern Ave Essex, MA. 01929	1961	1962	952 acres

STATE	ORGANIZATION	ORG. FOUNDED	PROGRAM BEGAN	ACRES UNDER EASEMENT
MONTANA				
	William Dunham, Executive Director Montana Land Reliance P. O. BOX 355 Helena, Mt. 59624	1978	1978	38020 acres
NEW HAMPSHIRE				
	Alan A. Smith President Chocorua Land Conservation Foundation Chocorua, N.H. 03817	1968	1968	4600 acres
	Meade Cadot Harris Center for Conservation Education Kings Highway Hancock, N. H. 03449	1970	1983	150 acres
NORTH CAROLINA				
	David Bland, Esq. President Triangle Land Conservancy P. O. BOX 13031 Research Triangle, N.C. 27709	1982		5 acres
PENNSYLVANIA				
	David Froehlich Executive Director Wissahickon Valley Watershed Association 12 Morris Road Ambler, PA. 19002	1957	1978	32 acres
VERMONT				
	Richard W. Carbin, Executive Director Ottauquechee Land Trust 39 Central Street Woodstock, VT. 05091	1977		6012 acres

STATE	ORGANIZATION	ORG. FOUNDED	PROGRAM BEGAN	ACRES UNDER EASEMENT
WASHINGTON				
	Robert Myhr Executive Director San Juan Preservation Trust Route #1 -- Box 2114 Lopez, WA. 98261	1979	1979	553 acres
WYOMING				
	Jean Hocker Executive Director Jackson Hole Land Trust P. O. BOX 2897 Jackson, WY. 83001	1980	1980	2303 acres

* The Trust for Public Land (CA.) and The American Farmland Trust (D.C.) are national organizations and hence are not listed in the 1985-86 Directory of Local and Regional Land Conservation Organizations, the source of the founding date and number of acres under easement.

* Source of program date--from surveys

APPENDIX D

CRITERIA

AFT LAND CONSERVANCY CRITERIA FOR CONSERVATION EASEMENT DONATIONS

(N.B. The AFT Board of Directors must approve every real estate transaction, including conservation easement donations. These are the criteria that the Board and staff use to evaluate such donations.)

In the case of every conservation easement donation, all of the following criteria must be satisfied.

a. Agricultural Assessment

(1) A substantial proportion of the property must be in actual agricultural production or be capable of producing an economic return from agricultural use, either by itself or as part of a larger operation.

(a) Agricultural production may include the raising of crops, pasturage or grazing of animals, and the harvesting of timber (only if in conjunction with other agricultural operations).

(b) Agricultural capability shall be determined by the size of the parcel and the quality of its soils in comparison with other parcels in actual farm use in its vicinity.

(2) A substantial proportion of the property must be tillable and be composed of prime or productive soils in SCS Classes I-III; must be officially designated as "farmland of statewide or local importance;" or, in the case of grazing and forestland, must be certified by local government officials as significant to local agriculture.

(3) For purposes of determinining what proportion of a property is "substantial" under the foregoing tests, the following factors may be considered:

(a) Important characteristics of the property other than its agricultural capacity, including value as wildlife habitat and scenic value.

(b) Conservation management of the land, including the dedication of marginal soils to grazing and forest uses, installation and maintenance of soil conservation improvements on tillable land, crop rotation systems and overall conservation management that improve the long-term productivity and agricultural capacity of the property.

(4) Property must be located in a viable agricultural region where --

(a) Adjacent settlement patterns, including anticipated or planned development, are compatible with continued agricultural use of the property, and

(b) Agricultural support systems (suppliers, services, markets, etc.) are stable or expanding.

b. Public Policy Assessment

(1) In every case, agricultural use of the property shall not contravene established public land use policies, including planning and zoning, except where a state policy favoring conservation of the property supercedes local policy that does not favor conservation. Where there is a question as to the intent of such established policies, the governmental officials who are responsible for administration of the policy shall be consulted for a determination or the resolution of conflicting policies.

(2) In cases where the easement donor has expressed an intention to claim a tax deduction for a "qualified conservation contribution," the following tests must be satisfied:

(a) The property must be identified in a local governmental comprehensive or master land use plan, zoning ordinance or other officially-adopted policy document as located within a district, zoning classification or other officially-designated area where local public policy calls for agriculture to remain the predominant use of land; or

(b) In the absence of such a local plan or other policy document, the property must possess the characteristics (soils, productivity, location, etc.) of agricultural land that state governmental policy deems worthy of conservation in farm use. This may be demonstrated by --

(1) Eligiblity of the property for a governmental purchase of development rights program; or

(2) Eligibility of the property for inclusion within an agricultural district where farming operations enjoy legal protections or qualify for benefits not generally available to all farmers or landowners, and the landowner has taken steps to enroll the property in such a district; or

(3) The property is encompassed by a state agricultural development plan or subject to an executive order or legislative resolution favoring the conservation of agricultural land, and is receiving agricultural use valuation for purposes of taxation.

(4) Qualification of the property under some other expression of official state governmental conservation policy, not necessarily limited to agricultural use (may include wildlife habitat, scenery, open space, etc.), which the state and/or local government has made an official commitment to promote, administer or enforce. Such a commitment may be demonstrated by the appropriation of funds or other evidence of expenditure (including revenue foregone and dedication of personnel) in pursuit of the policy objective.

APPROVED BY THE AFT BOARD 1-21-86
REVISION OF EARLIER CRITERIA

DELAWARE NATURE EDUCATION SOCIETY LAND ACQUISITION POLICY

To guide the DNES in decisions to acquire and manage lands in furtherance of DNES purposes - environmental education and preservation of representative natural areas in Delaware. This policy does not prescribe management practices; rather for each property managed by DNES an individual management plan will be developed.

I. Gifts of Land

Gifts of defined natural areas and other parcels of land that conform to the guidelines detailed below will be encouraged.

A. Defined Natural Area Parcels

1. Geographic limitation - Parcels must be located in Delaware.
2. Acceptable restrictions - It is preferred that the parcels be without restrictions, but appropriate deed restrictions or other conditions compatible with natural area preservation are acceptable.
3. Endowment - An endowment is not required, but one will be sought. The endowment principal would be determined by: (a) the size of tract, (b) the class of area - wetlands, uplands, geological site, etc., and (c) the extent of the land management required.
4. Management or disposition - (a) Parcels without an endowment will be managed for a short term and transferred to the state Office of Nature Preserves as soon as feasible. (b) Parcels with an endowment may be managed for a long term.

B. Other Land Parcels

Class 1 - Parcel possesses high natural area potential

1. Geographic limitation - Parcels must be located in Delaware.
2. Acceptable restrictions - It is preferred that parcels not have prior restrictions, but any restrictions existing will be reviewed for compatibility with natural area preservation principles on a case-by-case basis; incompatible restrictions are unacceptable.
3. Endowment - An endowment is not required but one will be sought. If an endowment is not available, a contribution will be sought from the donor to offset the expenses of temporarily holding the land.
4. Management or disposition - (a) Parcels without an endowment will be managed for a short term and sold, if necessary at less than fair market value, or otherwise transferred to an appropriate public agency as soon as feasible; the proceeds of the sale will be used for the Delaware Nature Education

Society Natural Areas Acquisition Program.
(b) Parcels with an endowment will be managed for a long term.

Class 2 - Parcel has low natural area potential (these are termed conversion or trade lands)

1. Geographic limitations - The parcel may be located anywhere in the United States.
2. Acceptable restrictions - A parcel must not have any restrictions that would interfere with its sale.
3. Endowment - An endowment is not required.
4. Management or disposition - The parcel will be sold as soon as feasible and the proceeds used for DNES purposes with final allocation to be determined by the DNES Board of Directors.

Class 3 - Exceptions to Classes 1 and 2 (Parcels that are acceptable regardless of natural condition.)

1. Geographic limitation - The parcels must be located contiguous to the Red Clay Reservation, the Abbotts Mill tract, or any other existing DNES nature center site.
2. Acceptable restrictions - It is preferred that the parcels be without restrictions, but appropriate deed restrictions or other conditions compatible with DNES goals are acceptable.
3. Endowment - An endowment is not required but one will be sought.
4. Management or disposition - The parcel will be managed for the period of time corresponding to DNES's active program at the site. Upon cessation of active DNES use the parcel will be sold if feasible, and the proceeds will be used for DNES purposes, with final allocation to be determined by the DNES Board of Directors.

II. Gifts of Conservation Easements

Gifts of conservation easements on defined Delaware Natural Area parcels will be encouraged according to the guidelines below. No purchase of easements is planned.

A. Defined Natural Area Parcels

1. Geographic limitation - Parcels must be located in Delaware.
2. Acceptable restrictions - It is preferred that parcels not have prior restriction, but any restrictions existing will be reviewed for compatibility with natural area preservation principles on a case-by-case basis; incompatible restrictions are unacceptable.
3. Endowment - An endowment is not required but one will be sought.
4. Management or disposition - DNES will provide any desired management advice to landowners.

B. Other Land Parcels

Whether acceptance of conservation easements is compatible with DNES's long-range natural area preservation goals will be decided on a case-by-case basis.

III. Purchase of Land

When purchase of a defined Natural Area land parcel or parcel adjacent to a Delaware Nature Education Society nature center site is deemed by the DNES Board of Directors to be desirable or necessary, DNES will first attempt to assist another organization or agency to make the purchase. This organization or agency will then hold the title and manage the land. As a last resort, DNES will conduct a fund-raising campaign to purchase and manage a parcel in conformity with the guidelines below.

A. Defined Natural Area Parcels

1. Geographic limitation - Parcels must be located in Delaware.
2. Acceptable restrictions - It is preferred that the parcels be without restrictions, but appropriate deed restrictions or other conditions compatible with natural area preservation are acceptable.
3. Endowment - An endowment is required and will be incorporated into the land purchase; this is termed an endowment acquisition and the endowment is generally 30% of the purchase price.
4. Management or disposition - Parcels will be managed indefinitely or until a transfer to the state Office of Nature Preserves can be arranged.

B. Other Land Parcels

1. Geographic limitation - The parcels must be located in close proximity to Red Clay Reservation, the Abbotts Mill tract, or any other existing DNES nature center site.
2. Acceptable restrictions - It is preferred that the parcels be without restrictions, but appropriate deed restrictions or other conditions compatible with DNES goals are acceptable.
3. Endowment - An endowment is required to the extent that additional operating costs are incurred and will be incorporated into the land purchase.
4. Management or disposition - The parcel will be managed for the period of time corresponding to DNES's active program at the site. Upon cessation of active DNES use the parcel will be sold if feasible, and the proceeds will be used for DNES purposes with final allocation to be determined by the DNES Board of Directors.

Approved by DNES Board of Directors, March 12, 1984

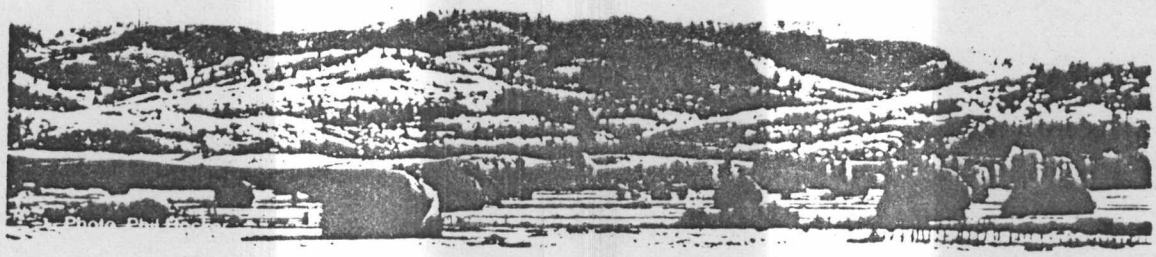
JACKSON HOLE LAND TRUST

CRITERIA FOR EVALUATING LAND PROTECTION PROPOSALS

The Jackson Hole Land Trust is organized to "protect the wildlife, scenery and traditional way of life of the extraordinary Jackson Hole Valley through the preservation and wise use of open land".

Because the Trust has been granted appropriate federal tax status, we can offer tax incentives to many people who protect open land. At the same time, we also have a legal and ethical obligation to be sure that our land protection programs result in real public benefits, and that the land protection obligations which the Trust assumes in perpetuity can be carried out. We therefore evaluate every potential project with great care.

Generally, protecting scenic values in Jackson Hole means maintaining the haymeadows, pasture land and undeveloped relatively natural lands which form the foreground for the peaks of the Tetons and other mountain ranges, and which are visible from adjacent federally-protected lands. Wildlife conservation requires protection of habitat and migration routes for the diverse species which contribute to the ecosystem of Jackson Hole and the Greater Yellowstone Region. Continuation of the ranching way of life involves protecting productive hay and grazing land in sufficiently large blocks to encourage continued agricultural use. Finally, assuring the ability to carry out our obligations means that it must be reasonably likely that the restrictions on future land use will not be unduly difficult to enforce.



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A. Considerations which contribute to significant public benefit of land protection.

Conditions that tend to establish the significant public benefit of protecting a property include those listed below. Sometimes one factor alone is adequate, sometimes a combination is considered. Each proposal is evaluated on its own merits after careful investigation of the property and its resources.

1. The Property includes important wildlife habitat and/or known wildlife migration routes.

2. The Property buffers wildlife habitat, so that its protection from dense development would diminish impacts on wildlife from dogs, cars and concentrations of human activities.

3. The Property is in active ranching or other agricultural use.

4. Much of the Property is visible from major highways, from rivers used by the public for recreation, or from public use areas within Grand Teton National Park or the National Forest.

5. Much of the Property remains in a relatively natural undisturbed condition.

6. The Property shares a boundary with, or is in close proximity to, the Bridger-Teton National Forest, the National Elk Refuge, Grand Teton National Park, a Wyoming Game and Fish elk feedground, or other public preserve.

7. The Property is adjacent to or in close proximity to private land that is already permanently protected or that is likely to be protected in the forseeable future.

8. The Property is situated such that its development would obstruct or diminish scenic views, or would interfere with views across already protected open space.

9. The Property borders or affects the integrity of a significant river, stream or creek, including those designated as Class I waters by the Wyoming Environmental Quality Council.

10. The Property is of sufficient size that its conservation resources are likely to remain intact, even if adjacent properties are developed.

B. Considerations which may preclude Land Trust involvement.

The following circumstances may lead to the Board's decision not to pursue a proposed project. Such a decision is not a criticism of the proposal, since the Trust believes that almost all open space in Jackson Hole is valuable. Rather, it reflects the Board's conclusion that the proposal does not fall within the specific purposes of the Jackson Hole Land Trust.

1. The Property's values are primarily scenic, but the Property cannot be readily viewed by the general public.

2. The Property is small, and there is little likelihood of adjacent properties being protected.

3. Adjacent properties are being developed in a way that is likely to significantly diminish the conservation values of the Property in question.

4. The land lowner insists on provisions in a conservation easement which the Trust believes would seriously diminish the Property's primary conservation values.

5. There is reason to believe that an easement would be unusually difficult to enforce, for example, because of multiple or fractured ownerships, dog control problems, fencing restrictions, irregular configuration, etc.

6. The proposed open space is part of a development proposal which, overall, is likely to have significant adverse impacts on conservation resources and which the Trust can not therefore endorse.

C. Specific considerations for density bonus easements.

The Teton County Land Use Plan permits developers to receive density bonuses for subdivisions in which at least half of the land is left in dedicated open space. Usually the open space must be subject to a scenic easement given either to the County Scenic Preserve Trust or to a private organization like the Jackson Hole Land Trust. Although the Trust's criteria for accepting or rejecting such easements are based on the considerations above, the circumstances in which these easements are granted leads to the following three-tiered approach which the Trust applies specifically for evaluating density bonus easements:

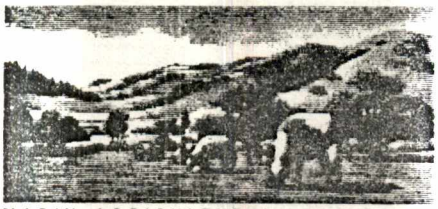
1. Would the easement meet the IRS criteria for deductibility, if it were not given in a density bonus situation?

2. If yes, is it part of a subdivision which the Land Trust is willing to endorse by association?

3. If yes, is it defensible and enforceable, with no extraordinary problems that can be anticipated because of its location in the subdivision (for example, those suggested in B.5., above)?

Adopted by the Board of Directors, 30 April 1984

M.A.L.T. NEWS



MARIN AGRICULTURAL LAND TRUST

Volume 1, Number 1

Spring 1985

Welcome . . .

THIS IS THE FIRST ISSUE of a quarterly newsletter that the Marin Agricultural Land Trust (MALT) will publish to keep in touch with its members and supporters, the Marin County agricultural community, and the interested public.

MALT, established four years ago, is the nation's first non-profit land trust formed solely to protect agricultural lands. It's goal is to support and advance the intent and policies of Marin's Countywide Plan by keeping its agricultural lands intact. One of the ways MALT seeks to accomplish this task is to remove the development potential on agricultural lands by acquiring conservation easements on land.

The idea for an agricultural land trust emerged as an outgrowth of many activities involving both the ranching and the environmental com-

continued on page 3

$2 Million Grants Fund Agricultural Preservation

IN DECEMBER the San Francisco Foundation made a $1,000,000 grant to MALT matching a $1,000,000 Coastal Conservancy grant made last August. Both grants are for development of a model Agricultural Land Preservation Program in Marin County, and require MALT to prepare a plan, including criteria for implementing the program.

MALT was one of three local land trusts chosen by the Conservancy to develop model programs to head off the conversion of agricultural land to non-agricultural uses and provide a mechanism for the permanent protection of the county's agricultural land base.

Marin's agricultural land, which represents about 40% of the county's land area, is used primarily for dairy, beef and sheep operations and represents some of the state's richest grazing land. Although maintaining the agricultural land base is a major priority of the county government, the county's agricultural zoning does not completely prohibit other uses. It merely limits the type and amount of non-agricultural development that is permitted on agriculturally zoned land.

Persistent Threats to Agriculture

Despite the fact that agriculture is an established and basically healthy industry in Marin and the fact that the county has strong policies favoring the maintenance of agricultural land, threats to individual parcels and, ultimately, to the industry as a whole, are persistent and increasing. The main threats are from governmental policies, market factors and land values.

The tool MALT uses is a conservation easement. By acquiring a conservation easement by gift or purchase, the land is maintained in private ownership for pro-

continued on page 2

Preservation

continued from page 1

ductive agricultural use while the threat of conversion is eliminated. The owner is compensated by either the price paid for the easement in the case of a purchase, or by the tax savings from the tax deduction in the case of a gift.

The focus of MALT's program is to meet threats to individual parcels by providing a conservation alternative that would not otherwise be available. For example, productive agricultural land may be for sale at a price too high for agricultural use. In the right circumstances, MALT would be able to purchase the development rights while the farmer or rancher purchases the land.

MALT Meets Specific Needs

Other examples include situations where a rancher wants to make capital improvements to his dairy or beef operation, to buy additional land for pasture or silage, or to buy out partners or co-owners who do not want to remain involved in the agricultural operation. The common thread is that MALT can tailor solutions that meet the needs and goals of individual landowners.

The criteria are organized in subgroups: agricultural attributes, resource and open space attributes, funding/cost factors, and program related criteria.

As between the agricultural and resource/open space attributes, the agricultural attributes of a property are of primary importance and resource/open space attributes are of secondary importance.

In all cases the land would be permanently protected by a recorded conservation easement.

A. Considerations which establish the agricultural characteristics of the Property:

1. The Property is in agricultural use or is of such productive capability that agricultural use is feasible.
2. The Property is zoned for agricultural use in Countywide or Local Coastal Plans.
3. The Property is "economically significant agricultural land" (intended to define the productivity of the Property, including use, size, soil and water quality, capital investment, condition of improvements, management, etc.).
4. The Property is of sufficient size that its agricultural integrity is likely to remain intact even if adjacent properties are developed.
5. The Property is situated such that its conversion to non-agricultural use would adversely affect adjacent or nearby properties in agricultural use.

B. Considerations which establish resource preservation and/or open space attributes or the Property:

1. Much of the Property is visible from public highways, navigable waters or publicly owned park land.
2. The Property is situated such that its development would obstruct or diminish scenic views.
3. The Property is contiguous to or close to public land which would be adversely affected by development of the Property.
4. The Property includes important wildlife habitat and/or wildlife migration routes, or buffers wildlife habitat so that its protection would significantly benefit the wildlife habitat.
5. The Property borders or affects the integrity of a significant bay, river, stream or creek.

C. Considerations that establish the urgency and cost effectiveness of the project for purposes of allocating funds:

1. The Property is threatened with conversion to non-agricultural use.
2. There is no other means of assuring permanent agricultural use of the Property.
3. The Property is situated such that its protection will significantly enhance the opportunity for protecting nearby agricultural land.
4. The cost per acre.
5. The potential for recouping or sharing costs.
6. The project will be completed sooner rather than later.

D. Program Related Criteria:

1. The project is consistent with applicable County, State Coastal Commission and BCDC policies and plans.
2. The project complies with the California Environmental Quality Act.

APPENDIX F

OTHER MATERIAL FROM JACKSON HOLE LAND TRUST

JACKSON HOLE LAND TRUST

EASEMENT MONITORING: POLICIES AND PROCEDURES

Policies

1. The Land Trust has both a legal and moral obligation to be certain that the easements it holds are enforced. This is done by periodic visits to the properties over which easements are held to ascertain whether the terms of the agreements are being carried out.

2. Equally important, the monitoring visits are opportunities for the Land Trust to renew and strengthen its relationship with the easement donor or subsequent property owner, to demonstrate its continuing interest in the protected property, to become more visible to the neighboring landowners, and generally to show itself as a responsible, concerned organization.

3. Monitoring is a responsiblity of the Land Trust and its staff. Outside consultants may be appropriate and necessary for some monitoring activities.

Procedures

1. Each property is visited by a Land Trust representative at least once a year.

2. The Vice President of the Board of Directors is responsible for overseeing monitoring activities. The Executive Director is responsible for coordinating visits and seeing that information is properly gathered.

3. Advance notice of visits will always be given to property owners. The owner or his representative should be present if at all possible.



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4. The visits are generally made by Board members and the Executive Director. When appropriate, monitoring may be done in two visits, as follows:

a. The first visit includes as many Board members as possible and is an informal discussion with the owner about the property, its special features, the owner's desires, any contemplated changes in use, any unusual sightings of wildlife or other observations the owner may wish to share.

b. The subsequent visit is by staff and/or consultant, for the purpose of recording written observations for the Land Trust's permanent records. A standard report form is completed, noting any significant changes in the property or its uses, including those which are not necessarily violations of the easement. Significant changes (new buildings, roads, fences, excavation, fill, extensive vegetation removal, etc.) are photographed or otherwise documented. Activities proposed or in progress on adjacent properties, which could affect the integrity of the easemnt, are also noted.

5. Any observable changes in the land are discussed with the owner. Blatant violations of the easement, if any, are brought to the attention of the full Board and its legal counsel, and enforcement procedures may be initiated, as spelled out in the easement document.

6. It is the responsibility of all Board members to visit all properties protected by the Land Trust sometime during their tenure. Board members are especially encouraged to participate in the first visit to a property, following the conveyance of an easement.

Adopted by the Board of Directors, 19 November 1982

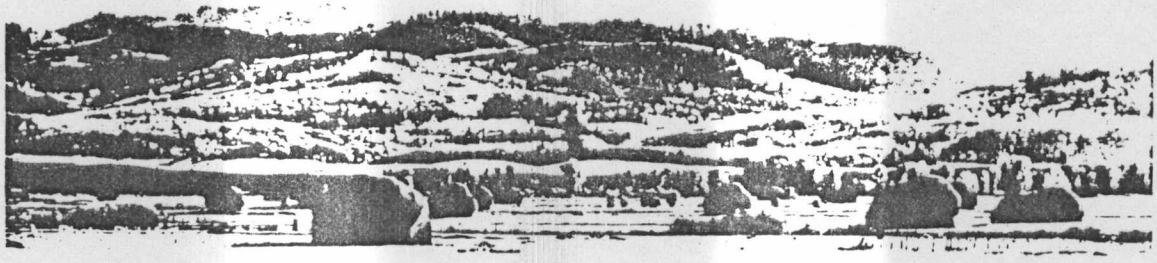
JACKSON HOLE LAND TRUST

THE STEWARDSHIP FUND

The donation of a conservation easement is a major commitment for any landowner. Although tax benefits may be a strong incentive for some, no property owner gives an easement without a real desire to see his land protected.

In accepting an easement, the Land Trust assumes the legal obligation to carry out the donor's desires by upholding the terms of the easement--forever. So although the easement donor has given something of great significance, the Land Trust has in a sense assumed a perpetual liability. The donor is not likely to violate his own easement, of course, but eventually others will own the property. Someone who wants to put condominiums on the hay meadow or dredge the spawning stream may try to violate the easement. The Trust must be prepared to monitor and defend all its easements, including taking on legal battles when necessary. It will happen and it will be costly. It's only good business to plan for it now.

The Stewardship Fund has been established for that very purpose. The Fund is set aside solely to cover the costs of monitoring and defending our conservation easements. It enables us to make annual visits to each property and to gather current information about the land. Most important, as the Fund builds, it will insure our ability to take whatever actions are necessary to uphold the terms of every easement.



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The initial cost to the Trust for taking an easement can also be considerable. In order to be sure the easement is legally sound and suitable for the property, we must spend money for such things as baseline studies, title searches, aerial photos, maps, legal fees and staff time. Although these expenses vary, the average cost of accepting an easement is about $1,500.

Because the Land Trust must operate on a business-like basis, the Board has established a policy of endowing each easement at the time it is accepted, both to cover initial costs and to increase the Stewardship Fund for future costs. Thus, when circumstances permit, we ask each easement donor to also make a cash contribution for these purposes. This contribution is in no way a condition of our accepting an easement, and we know that it may not always be possible. However, we do ask every easement donor to review the following guidelines.

1. Please consider a minimum donation of $3,000. Of this, $1,500 will be credited to the general operating fund to cover initial costs; the remaining $1,500 will go to the Stewardship Fund.

2. If $3,000 is not possible, please give what you can. Half will go to the operating fund and half to the Stewardship Fund.

3. If you can, please give more. A contribution can be spread out over two or more years, if that is desirable. In determining what is possible and fair, consider not only your own resources, but the size and complexity of the easement, its fair market value and the amount of tax saving resulting from the easement donation. Of larger gifts, $1,500 will go to the operating fund and the remainder to the Stewardship Fund.

We invite questions and comments about these policies and guidelines, and hope you will feel free to discuss them with us.

Adopted by the Board of Directors, 19 November 1982

From Teton County Comprehensive Land Use Plan

SCENIC PRESERVATION ELEMENT

The term "scenic resources" should be understood to encompass all attributes of the landscape from which visually defined values arise, including topography, rock outcrops, vegetation, lakes and streams, and wildlife. Regulations to protect life and property and to avoid environmental hazards to some extent may have the incidental effect of preserving scenic resources, but this is not always the case.

It fairly can be said that all portions of the County are rich in scenic resources and should be preserved from inharmonious development. While there is ample statutory law and judicial precedent to regulate land use and development in order to protect the public health, safety, and welfare, to prevent property loss, and to minimize environmental degradation, there are fewer legal bases for limitations that aim solely to preserve scenic values. Such regulations may be constitutional where their purpose is based primarily on tourism. However, in the absence of clear legal authority, the Comprehensive Plan is based on the premise that to preserve scenic resources it will be necessary to compensate property owners who otherwise would be permitted to develop their lands.

This can be done by purchase of scenic easements. While not as high as the cost of acquiring fee title, the cost of scenic easements represents a substantial share of total property value. Their value is equal to the difference between the worth of the land for development that otherwise would be permissible and its worth subject to the restrictions of the scenic easement which typically limits its use to agriculture, dude ranches, outdoor recreation, and similar low-intensity uses.

This is the section that we had the Co-Commission adopt

Compensation for scenic preservation may also come from the reduced federal income and/or estate taxes resulting from the donation of a perpetual scenic or conservation easement to a qualified body, as well as from the satisfaction of knowing that the land will be permanently protected. Scenic or conservation easements are recognized as effective tools for preserving the scenic and wildlife resources of Teton County wherever they may occur on private lands.

Therefore, voluntary donations of perpetual conservation or scenic easements, either to the County Scenic Preserve Trust or to a private, non-profit land conservation organization, are specifically recognized and endorsed as an appropriate means of implementing the local conservation and scenic preservation policies delineated in this Scenic Preservation Element, and elsewhere in the Teton County Comprehensive Plan and Implementation Program.

Because there are not likely to be sufficient federal, state, or local funds available to purchase scenic easements that would fully protect all private lands that comprise the settings of the National Park and the National Forests, the Scenic Preservation Element assumes that it will be necessary to establish priorities among areas according to the degree of impact that inharmonious development would create. Priorities for purchase of easements were set on the basis of the sensitivity of various locations, the degree of control necessary to achieve the aims of the program, and the apparently best timing strategy. The ratings should not be interpreted strictly to mean that lands (or scenic easements) in the lower priority groups should not be

acquired until the higher priority classifications have been exhausted. There are bound to be occasions where interests in lower priority lands should be purchased early in order to prevent an inharmonious development or to take advantage of an attractive sale offer.

The highest priority was given to private lands in the Snake River flood plain and the Gros Ventre River flood plain because of the environmental sensitivity of these areas, because of their importance as wildlife habitats and migration routes, and because they constitute a vital part of the visitor's experience (fishing, float trips, nature walks).

Because they are threatened by seriously inharmonious commercial strip development, and already have been degraded to some extent, protection of the highway approach corridors was assigned an equally high priority. The term "corridors" means lands within approximately a quarter mile on either side of the highways. The routes that would be affected are U.S. 26/89/191, the major north/south highway traversing the County, U.S. 189/191 which parallels the Hoback River, U.S. 26/187 which parallels the Buffalo Fork, and State Route 22, the Teton Pass highway. It is not proposed that scenic easements be acquired in Jackson or other urban areas.

Second priority was assigned to lowland areas close to the south boundary of the National Park that are particularly vulnerable to early development. Some of these lands now are used for ranching and consequently received a high rating for preservation. Included in the second priority classification are the lands immediately south of the Park east of the Snake River as far south as its confluence with the Gros Ventre River, the lands in Spring Gulch (between East and West Gros Ventre Buttes), and the lands between West Gros Ventre Butte and the Snake.

Of almost equal importance are the lands on East Gros Ventre Butte and West Gros Ventre Butte which are important winter range for deer. However, these lands were given third priority because they are not suitable for ranching, because their rough terrain cannot sustain as intensive development as the lowlands, and because a limited amount of carefully sited development, if served by inconspicuous access roads, would be less visually damaging than lowland development.

Lands in South Park and lands west of the Snake River, both north and south of Route 22, were assigned fourth priority primarily because of their great extent and because they are less closely associated with visits to the National Park. However, all of these areas are vital elements of the scenic beauty of Jackson Hole and are closely related to National Forest lands. The importance of their preservation should not be underestimated.

VITA

Robert Badgett Allen was born in Maryville, Tennessee, on November 8, 1949. He attended elementary school and junior high in that city and graduated from Maryville High School in June 1967. The following September he entered the University of Tennessee where he majored in Public Administration until 1970.

After a tour of duty with the United States Air Force, he returned to the University of Tennessee in 1974. He received a Bachelor of Arts degree with a major in Human Services in June 1977. From April 1978 to August 1980, he worked as a Junior Eligibility Counselor with the Tennessee Department of Human Services.

In September 1980, he entered the University of Tennessee Graduate School of Planning. He worked as a Land Use Specialist with the Land Management Branch of the Tennessee Valley Authority from June 1983 to August 1984. In September 1984 he accepted a position as a Field Representative with the Trust for Public Land. In March 1986, he left that position to reenter the University of Tennessee in order to complete his thesis.