2020

Second Amici Curiae Brief of Law Professors et al., Pine Mountain Preserve, LLP v. Commissioner, filed in the U.S. Court of Appeals for the Eleventh Circuit

Nancy McLaughlin

No. 19-11795-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PINE MOUNTAIN PRESERVE, LLLP,
F.K.A. CHELSEA PRESERVE, LLLP,
AND EDDLEMAN PROPERTIES, LLC,
TAX MATTERS PARTNER,

Petitioner – Appellant/Cross-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee/Cross-Appellant.

On Appeal from United States Tax Court, Docket No. 8956-13
151 T.C. No. 14 (2018)
Judge Albert G. Lauber

SECOND AMICUS BRIEF OF K. KING BURNETT, ROGER COLINVAUX, JOHN ECHEVERRIA, JOHN LESHY, NANCY McLAUGHLIN, JANET MILNE, AND ANN TAYLOR SCHWING in Support of Respondent and in Support of Affirmance in Part and Reversal in Part

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ANN TAYLOR SCHWING
CA Bar No. 91914
BEST BEST & KRIEGER, L.L.P.
500 Capitol Mall, 17th Floor
Sacramento, California 95814
Telephone: (916) 325-4000
Facsimile: (916) 325-4010
Ann.Schwing@BBKlaw.com

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), the undersigned counsel of record hereby certifies that, to the best of her knowledge, information, and belief, the following persons and entities have an interest in the outcome of this appeal:

- Christensen, Jacob, attorney, Tax Division, U.S. Department of Justice;
- Cleverdon, Edwin B., Senior Attorney, Internal Revenue Service;
- Crump, Horace, Associate Area Counsel, Internal Revenue Service;
- Desmond, Michael J., Chief Counsel, Internal Revenue Service;
- Eddleman, Bill, Petitioner-Appellant;
- Eddleman, Douglas, Petitioner-Appellant;
- Eddleman Properties, LLC, Tax Matters Partner, Petitioner-Appellant;
- Kelley, Matthew R., Attorney, Internal Revenue Service;
- Land Trust Accreditation Commission;
- Land Trust Alliance, Inc., Amicus;
- Lauber, Albert G., Judge, United State Tax Court;
- Levin, Michelle Abroms, Attorney for Petitioner-Appellant;

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- Levin, Robert H., Attorney for Amicus Land Trust Alliance;
- Levitt, Ronald A., Attorney for Petitioner-Appellant;
- Morrison, Richard T., Judge, United States Tax Court;
- Pine Mountain Preserve, LLLP, Petitioner-Appellant;
- Rhodes, Gregory P., Attorney for Petitioner-Appellant;
- Rothenberg, Gilbert S., Chief, Appellate Section, Tax Division, Department of Justice;
- Ugolini, Francesca, Attorney, Tax Division, U.S. Department of Justice;
- Wooldridge, David M., Attorney for Petitioner-Appellant;
- Zuckerman, Richard E., Principal Deputy Assistant Attorney General, Tax Division, U.S. Department of Justice;
- Federal taxpayers subsidizing conservation easement acquisitions through deductions available to donors of perpetual conservation easements;
- Communities enjoying the benefits of deductible perpetual conservation easements;
- Past, present and future donors of deductible perpetual conservation easements;

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- Those owning or anticipating ownership of conservation easement-encumbered land who intend or hope to modify or abrogate all or part of the perpetual use restrictions;
- Approximately 1,300 land trusts and similar charitable organizations accepting conservation easements in the U.S., many of which have faced or will face requests to relax or release easements' perpetual use restrictions;
- Thousands of municipalities, districts, and other government entities holding conservation easements and facing requests to relax or release the easements' perpetual use restrictions.

Except as included in general terms above, I believe there are no identified corporations or publicly-traded companies having an interest in the outcome of this appeal within the meaning of the Eleventh Circuit Rule 26.1.

CONSENT TO FILE AND MOTION FOR LEAVE TO FILE

The Commissioner of Internal Revenue and the Department of Justice consented to the filing of this brief acting through Francesca Ugolini of the U.S. Department of Justice (Counsel for Commissioner of Internal Revenue). Pine Mountain Preserve, LLLP (PMP), following concurrent receipt of a draft of this brief, declined to consent in communications by David M. Wooldridge, acting for

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Ronald A. Levitt, Gregory P. Rhodes, and Michelle A. Levin of Sirote & Permutt, P.C. (Counsel for PMP). Under F.R.A.P. 29(a)(7), in a motion concurrently filed with this brief, Amici K. King Burnett, Roger Colinvaux, John Echeverria, John Leshy, Nancy Mclaughlin, Janet Milne, and Ann Taylor Schwing request the court's permission to file this brief.

RULE 29(a)(4)(E) STATEMENT

Amicus curiae certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than an amicus contributed money to fund this brief. Schwing authored this brief pro bono with suggestions from law professors, the land trust community, and easement donors. Her amicus briefs supporting perpetuity started with *Belk v. Commissioner,* 774 F.3d 221 (4th Cir.2014).

No person or party contributed funds for preparation or submission of this brief; incidental costs initially borne by Schwing's law firm will be reimbursed when appeal is complete.

/s/ Ann Taylor Schwing
Ann Taylor Schwing
Attorney of Record for Amici Curiae

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I. INTEREST OF AMICI

Amici are identified in the brief they filed in support of the Commissioner on October 7, 2019 (Schwing Br.). In light of the cross-appeal and the second amicus brief filed by Amicus Land Trust Alliance (LTA) in support of Pine Mountain Preserve, LLLP (PMP), Amici seek to respond to new arguments made, highlight issues that powerfully support the Commissioner, and bring broader legal and policy issues to the Court's attention.

II. STATEMENT OF ISSUE

Did PMP's easements violate I.R.C. §170(h)(5)(A)?

III. SUMMARY OF ARGUMENT

The trustworthiness of land trusts and post-donation IRS oversight of tax-exempt entities are irrelevant to this case. The sole question before this Court is whether PMP's easements complied with §170(h) requirements at the time of their donation. They did not.

Congress did not grant holders the discretion to site building areas or amend easements post-donation applying a "consistency-with-conservation-purposes" standard. Because of the partial interest nature of conservation easements and the significant potential for abuse, Congress mandated that deductible easements satisfy numerous requirements *at the time of their donation*, and the IRS must verify compliance with those requirements *at that time*.

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Amici previously explained that *Belk v. Commissioner*, 774 F.3d 221 (4th Cir.2014), and examples in the Treasury Regulations interpreting §170(h) (Regulations) make it clear that the IRS must verify compliance with Regulation §1.170A-14(e)(2)-(3)'s "no-inconsistent-use" requirement at the time of an easement's donation. Schwing Br. at 3-7, 22-28. Additional factors reinforce this conclusion. At the time the Regulations were being finalized, Treasury specifically rejected a recommendation to grant holders post-donation discretion under a consistency-with-conservation-purposes standard. Section IV.A.1. herein. The Regulations themselves indicate that, in determining compliance with the no-inconsistent-use requirement, the focus must be on *the terms of the easement*, not on post-donation activity. The legislative history also makes clear that Congress intended "the perpetual restrictions" in deductible easements to be enforced by holders against "all other parties in interest," and not that the restrictions would be modifiable post-donation at the request of landowners. S. Rep. No. 96-1007, at 13 (1980). PMP's movable-building-site and amendment clauses violate §170(h)(5)(A) because they make it impossible for the Commissioner (or a court) to verify compliance with the no-inconsistent-use requirement at the time of donation.

PMP's amendment clause also renders its easements nondeductible because the clause permits "trade-off" amendments, which authorize uses destructive of conservation interests (a clear violation of the no-inconsistent-use requirement) in

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exchange for the landowner providing purportedly offsetting conservation benefits. Schwing Br. at 8-11. Regulation §1.170A-14(e)(2)-(3) flatly precludes that kind of post-donation dealmaking. Trade-off amendments, if authorized, would also render Regulation §1.170A-14(g)(6)'s extinguishment requirements largely a nullity because trade-off amendments can be used in lieu of extinguishment to achieve the same ends.

Although §170(h) and the Regulations do not expressly address amendments, the various requirements therein do establish the parameters of permissible amendment discretion. A §170(h)-compliant amendment clause ensures continued protection of the conservation interests that were identified as worthy of protection at the time of an easement's donation. In contrast, under PMP's movable-building-area and amendment clauses, protection of those conservation interests is subject to the whim of post-donation negotiations.

Finally, the Uniform Conservation Easement Act specifically authorizes the creation of §170(h)-compliant easements, noncompliance with §170(h)(5)(A) is not a new argument, and *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012), does not prevent this Court from enforcing the law.

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IV. ARGUMENT

A. Holder Trustworthiness And IRS Oversight Of Tax-Exempt Organizations Are Irrelevant

PMP argues that §170(h) permits land trusts to site building areas and amend easements post-donation applying a consistency-with-conservation-purposes standard, and that post-donation IRS oversight of tax-exempt entities ensures that land trusts will "do their job." PMP's Reply Brief at 1-2, 7-9. That argument fails for one simple reason: Congress did not grant holders that discretion. Because of the partial interest nature of conservation easements and the significant potential for abuse, Congress mandated that deductible easements satisfy numerous requirements *at the time of donation*,[1] and the IRS must verify compliance with those requirements *at that time*. Holder trustworthiness and post-donation IRS oversight of tax-exempt entities are irrelevant to whether an easement is deductible under §170(h).

The sole question before this Court is whether PMP's easements complied with §170(h) requirements at the time of their donation. Amici previously explained that the answer to that question is no, in part because PMP's movable-building-site and amendment clauses make it impossible for the Commissioner (or a court) to verify compliance with Regulation §1.170A-14(e)(2)-(3)'s no-inconsistent-use

[1] Schwing, Ann Taylor, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 Harv. Envtl. L. Rev. 217, 221 (2013).

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requirement at the time of donation. Schwing Br. at 3-7, 22-28. The following additional factors reinforce that conclusion.

1. Post-Donation Discretion Argument Was Previously Rejected

Treasury published proposed regulations interpreting §170(h) in 1983 and invited public comment.[2] A group of land trusts submitted written comments, including comments on the no-inconsistent-use requirement and Example 4 in proposed regulation §1.170A-13(f). Small, Stephen J., The Federal Tax Law of Conservation Easements (4th ed. 1997), at 1-4—1-5 and Appendix D.[3]

Example 4 in proposed regulation §1.170A-13(f) provided in relevant part (emphasis added):

> Assume the same facts as in example (3) [900 acres on the crest of a mountain], 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 measurably impair the view*.... Accordingly, the donation qualifies for a deduction under this section.

In their comments, the land trusts recommended that the italicized sentence be deleted from the Example and that the easement deed not require cluster development or limit the total number of residences. Small at D-22—D-23, D-26. In

[2] Prop. Treas. Reg. §1.170A-13, 48 Fed. Reg. 22940, 22941 (May 23, 1983).
[3] Appendix D, the land trust comments, is included in the Addendum.

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other words, the land trusts recommended that the Example grant the donee the discretion to approve the amount, type, and location of residential development on the property post-donation, subject only to the requirements that the sites be "carefully selected" and "in areas generally not visible from the national park" to preserve the scenic view. *Id*. In effect, the land trusts recommended that donees be granted the right to exercise post-donation discretion regarding development under a consistency-with-conservation-purposes standard. That recommendation was rejected and the key factors in Example 4—the requirement of cluster development, the limit on the number of residences, and the fact that the donor and donee *have already identified* [at the time of donation] *sites where limited cluster development would not be visible from the park or would not measurably impair the view*—remain in the Example in the final Regulation, thus enabling the IRS to verify compliance with the no-inconsistent-use requirement at the time of the easement's donation. Regulation §1.170A-14(f), Example 4.[4]

The land trusts also recommended that the no-inconsistent-use regulation be modified to state: "No use the exercise of which is subject to prior approval of the donee shall be treated as an inconsistent use under this section." Small at D-25. That too was rejected.

[4] The only change in Example 4 from the proposed to the final Regulation was to remove "measurably," thus making the cluster sites identified at the time of donation even more protective.

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Thus, PMP's fundamental argument—that Congress intended to trust land trusts to site building areas and otherwise verify compliance with §170(h) requirements post-donation under a consistency-with-conservation-purposes standard—was previously proposed and rejected by Treasury as inconsistent with congressional intent. There is no basis for this Court to now reinterpret §170(h) and the Regulations to adopt a long-rejected position.

2. Additional Relevant Regulations And Legislative History

In *PBBM-Rose Hill Limited v. Commissioner*, 900 F.3d 193, 201-203 (5th Cir.2018), the Fifth Circuit held that, in determining whether the public-access requirement is satisfied, the Regulations indicate that the focus should be on *the terms of the easement*, not on post-donation activity. Regulations addressing the no-inconsistent-use requirement similarly indicate that, in determining whether that requirement is satisfied, the focus must be on the terms of the easement. Regulation §1.170A-14(e)(2) provides (emphasis added):

> 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 … if *under the terms of the contribution* a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides ….

Regulation §1.170A-14(d)(4)(v) similarly provides (emphasis added):

> [a] deduction will not be allowed for the preservation of open space … if *the terms of the easement* permit a degree of intrusion or future development that

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> 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.

Tasking the IRS with determining, at the time of donation, whether an easement permits uses destructive of significant conservation interests or an unacceptable "degree of intrusion or future development" would have been senseless if the parties could site building areas and otherwise modify restrictions post-donation. The IRS must be able to verify compliance with these requirements by reviewing the terms of an easement at the time of its donation. Granting holders post-donation discretion to site building areas and otherwise modify restrictions puts taxpayers beyond the reach of the Commissioner in this regard. Schwing Br. at 24-25.

The Senate Finance Committee Report on the Tax Treatment Extension Act of 1980, which provides detailed guidance on what Congress intended when it adopted §170(h), further supports the conclusion that Congress did not intend to grant holders post-donation discretion to site building areas and otherwise modify restrictions. S. Rep. No. 96-1007 (1980) (Senate Report). For example, the Senate Report provides:

> By requiring that the conservation purpose be protected in perpetuity, the committee intends that *the perpetual restrictions must be enforceable by the donee organization (and successors in interest) against all other parties in interest (including successors in interest)*. *Id*. at 14 (emphasis added).

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The committee refers to "the perpetual restrictions," not to restrictions that may be modified post-donation. *Id*. Further, a direction to enforce perpetual restrictions against all other parties in interest is a far cry from a grant of discretion to modify restrictions at the request of landowners. It strains credulity to read this directive as a grant of discretion to donees to site building areas and otherwise modify restrictions post-donation.

The Senate Report also emphasizes that strict standards apply when determining both the type of property eligible for tax subsidies and the restrictions that must be imposed on its use. To ensure that only qualifying easements receive deductions, the committee expressed its expectation that taxpayers could obtain "prior administrative determination[s]" on whether their donations would qualify. *Id*. at 13. Such determinations are based on detailed analyses of both the subject properties' attributes and the easements' specific terms. E.g., IRS Priv. Ltr. Rul. 200208019. The committee also said it expected Treasury to make publication of regulations interpreting §170(h) a "highest priority." Senate Report at 13. These expressions of concern about the need to ensure that only easements protecting specific properties and containing specific terms receive tax subsidies would have been nonsensical if the committee contemplated that the parties could, after the initial donations, site building areas and otherwise modify restrictions under a consistency-with-conservation-purposes standard.

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In sum, nothing in the Code, Regulations, or legislative history suggests that Congress intended to grant developers multi-million dollar deductions for easement donations that allow them to engage on the subject properties in whatever uses in whatever locations that the holders might from time to time agree are consistent with broadly-stated conservation purposes.[5]

3. Reliance On Post-Donation Enforcement Tools Is Misguided

Apart from being contrary to §170(h) and the Regulations, the requirements of which must be satisfied *at the time of donation*, PMP's reliance on post-donation enforcement tools is misguided. On close inspection, the "commitment-and-resources" test of Regulation §1.170A-14(c)(1) simply restates the standard governing tax-exemption and thus does not provide the IRS an additional post-donation enforcement tool.[6] Further, if this Court were to authorize holders to agree to amendments and site building areas post-donation under a consistency-with-conservation-purposes standard, a holder's exercise of that discretion would not violate rules governing tax exemption, even if the holder agreed to trade-offs that permitted uses destructive of conservation interests on the originally-protected property. The rules governing tax exemption prohibit charities from providing

[5] Such open-ended discretion would also make accurate valuation of easements virtually impossible.

[6] Colinvaux, Roger, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 3 Utah L. Rev. 755, 759-760 (2013).

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economic benefits to private parties. They do not prohibit uses destructive of conservation interests on easement-encumbered properties—that is a §170(h) deduction requirement.[7]

Finally, the rules governing tax-exemption and Form 990 reporting requirements do not apply to an entire class of qualified holders—government entities. Congress and Treasury obviously could not have intended to rely on tax-exemption and Form 990 reporting rules to ensure compliance with §170(h) when many donees are not subject to those rules.

B. Additional Points On Amendments

1. The No-Inconsistent-Use Requirement Precludes Post-Donation Dealmaking

Pursuant to Regulation §1.170A-14(e)(2)-(3)'s no-inconsistent-use requirement, a deductible easement may not permit uses that are destructive of (impair, injure, or destroy) conservation interests on the subject property, subject to one very limited exception. Schwing Br. at 6-7. Although §170(h)(5)(A) establishes the general requirement that the *conservation purpose* of an easement be protected in perpetuity, the no-inconsistent-use requirement is intentionally more fine-grained—it focuses on protection of the subject property's specific *conservation interests*. *Id*.

[7] Colinvaux at 764, n.42.

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PMP's easements violate the no-inconsistent-use requirement because they include a clause that permits amendments authorizing uses destructive of conservation interests on the subject property (a clear violation of the no-inconsistent-use requirement) in exchange for the current landowner providing purportedly offsetting conservation benefits elsewhere ("trade-off" amendments). *Id*. at 8-11. The parties to an easement are not permitted to transgress the no-inconsistent-use requirement post-donation just because they deem the easement's conservation purposes to, on balance, continue to be protected. The no-inconsistent-use requirement flatly precludes that kind of post-donation dealmaking.

2. "Conservation Interests" Is Not Synonymous With "Conservation Purposes"

LTA attempts to dismiss PMP's clear violation of the no-inconsistent-use requirement by arguing that "conservation interests" in Regulation §1.170A-14(e)(2)-(3) is synonymous with "conservation purposes." LTA Second Amicus at 7. LTA would like this Court to reinterpret that Regulation to grant holders post-donation discretion that Congress specifically intended to deny, namely the discretion to engage in post-donation dealmaking under a consistency-with-conservation-purposes standard. LTA's argument is baseless.

Regulation §1.170A-14(e)(2)-(3)'s no-inconsistent-use requirement is based on a specific directive in the Senate Report, which uses the term "conservation

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interests" in a manner that clearly distinguishes it from "conservation purposes." Senate Report at 13. Regulation §1.170A-14(e)(2), which is drawn from the Senate Report, provides "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." *Id*. It then provides an example, also drawn from the Senate Report, of what that quoted sentence means: "the preservation of farmland pursuant to a State program for flood prevention and control would not qualify under paragraph (d)(4) of this section [the preservation of open space (including farmland) "*conservation purpose*"] if under the terms of the contribution a significant naturally occurring ecosystem [a "*conservation interest*"] could be injured or destroyed by the use of pesticides in the operation of the farm." Regulation §1.170A-14(e)(2); Senate Report at 13.

LTA's argument that the term "conservation interests" is undefined and likely to result in a "chaotic scramble" regarding its meaning is also without merit. LTA Second Amicus at 9. In most cases, a conservation easement states its general "conservation purposes" and then identifies the specific conservation features on the subject property worthy of permanent protection. For example, PMP's 2005 easement states its general "Conservation Purposes" as preservation of the subject property as relatively natural habitat and as open space, and then identifies the specific features of the property that have ecological and scenic significance,

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including the "Oak-Pine community," "a scenic woodland view from US Highway #280," "documented species of birds, Northern Flicker and Red-Headed Woodpecker," and "rare plant species … Georgia Aster and Yellow Honeysuckle" (defined as "Conservation Values"). 2005 Easement at 2. The term "conservation interests" used in the Senate Report and the Regulations is synonymous with PMP's term "Conservation Values"—both refer to the specific conservation features on the subject property, the permanent protection of which will carry out the general conservation purposes of the easement.

Furthermore, the "conservation purposes" enumerated in §170(h)(4)(A) are "*the preservation of*" open space, historic land or structures, or land areas for outdoor recreation or education, and "*the protection of*" a relatively natural habitat. It makes neither logical nor grammatical sense to speak of, for example, injuring or destroying "the preservation of" land areas for outdoor recreation. But it makes perfect sense to speak of injuring or destroying the "Oak-Pine community," the "scenic woodland view from US Highway #280," or the habitat for the Red-Headed Woodpecker.

That "conservation interest" does not appear in §170(h) is also irrelevant. Congress specifically delegated the task of publishing regulations to Treasury, and the Senate Report includes the passage on which the no-inconsistent-use Regulation is based and uses the term "conservation interests." Senate Report at 13. In addition,

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terms such as "extinguishment" and "mortgage subordination" also do not appear in §170(h) but Courts have not hesitated to enforce the extinguishment and mortgage subordination Regulations. *Belk v. Commissioner*, 774 F.3d 221 (4th Cir.2014); *Mitchell v. Commissioner*, 775 F.3d 1243 (10th Cir.2015).[8]

Finally, in their comments to Treasury on the proposed regulations, land trusts recommended that the term "conservation interests" in the first sentence of what is now Regulation §1.170A-14(e)(2) be changed to "conservation purposes." Small at D-21, D-24. That recommendation was rejected, making it absolutely clear that Treasury did not consider the terms to be synonymous and considered the proposed change contrary to congressional intent.

3. Trade-Off Amendments Would Render Extinguishment Requirements A Nullity

A conservation easement that authorizes trade-off amendments authorizes the parties to agree to develop part of the originally-protected property in exchange for a purported offsetting conservation benefit. Rather than having to extinguish the

[8] LTA argues that Regulation §1.170A-14(e)(2) "prohibits uses that are *inconsistent* with specific conservation purposes." LTA Second Amicus at 10 (emphasis in original). That is incorrect. The Regulation focuses on "destruction" of "significant conservation interests" and "inconsistent" appears only in the heading. Also, Treasury's reference to "enumerated conservation interests" in its comments on the proposed regulations is irrelevant. *Id.* at 9-10, n.12. Regulation §1.170A-14(e)(2)-(3) is the law, and the proposed and final Regulations and Senate Report use "significant conservation interests."

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easement on the part of the property to be developed (which would require satisfaction of the judicial proceeding, impossibility or impracticality, and proceeds requirements of Regulation §1.170A-14(g)(6)), the parties could instead agree to "amend" the easement to remove development restrictions on that part of the property in exchange for the landowner's agreement to add use restrictions elsewhere on the property or add nearby land to the easement, with the "net" effect purportedly being consistent with conservation purposes. Such dramatic changes to the perpetual easement restrictions would occur in a vacuum in which none of the deduction requirements or indirect policing that occurs in the IRS tax return review and audit process would apply. The amendment would also render the extinguishment requirements a nullity. The parties would not need to comply with the judicial proceeding or other important safeguards that Congress and Treasury imposed on extinguishment; they could simply amend the easement to achieve the same ends.

This is not a theoretical concern. The Path of the Pronghorn controversy, referenced in note 5 of Amici's first brief, provides an example of a proposed trade-off amendment. In that controversy, a land trust agreed to amend a deductible easement to allow residential development on 15-acres in the center of the Path of the Pronghorn, a federally-designated 5,800-year-old migration route (a clear violation of the no-inconsistent-use requirement), in exchange for the landowner's

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agreement to protect other land to the north. While the land trust argued that the trade-off would result in a "net" ecological gain, many, including scientists, disagreed. Moreover, by agreeing to the trade-off, the land trust could permit development of the 15 acres (and destruction of conservation interests there) without having to formally extinguish the easement. Although this amendment was never consummated, the controversy illustrates that trade-off amendments could be used in lieu of extinguishment to achieve the same ends.

4. The Sky Will Not Fall

LTA asserts: "Conservation easement holders have used amendment provisions similar to those in this case since the Regulations were first issued" and if this Court does not uphold PMP's amendment clause "thousands of conservation easements" will be disqualified. LTA Second Amicus at 28, 31. However, LTA provides no evidence for these assertions other than to point to a few land trust model easement forms, which are not intended to provide tax advice and are often modified by donors seeking tax benefits, and to its own publications, which are aimed at land trusts and also not intended to provide legal advice. *Id*. at 27-28.[9] Moreover, not all amendment provisions are the same, and each must be examined individually in the context of the entire easement to see if it complies with §170(h). Schwing Br. at 16-

[9] Byers, Elizabeth & Ponte, Karin Marchetti, The Conservation Easement Handbook 3 (2d ed. 2005) ("This handbook is not a substitute for legal counsel").

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18, 22. Finally, alleged widespread use of a noncompliant provision does not justify upholding its use—just the opposite is true—as recognized by the Fifth Circuit. *Id*. at 18, 29.

5. §170(h)-Compliant Amendment Clause

While §170(h) and the Regulations do not expressly address amendments, various requirements therein do establish the parameters of permissible amendment discretion. A §170(h)-compliant amendment clause may authorize the parties to agree to "protection-enhancing" amendments, but may not authorize the parties to agree to amendments that (i) remove land from the easement (a nonjudicial extinguishment violating Regulation §1.170A-14(g)(6)), (ii) permit uses destructive of conservation interests (e.g., trade-offs, which violate Regulation §1.170A-14(e)(2)-(3)'s no-inconsistent-use requirement), or (iii) relax or eliminate provisions included in the easement to comply with deduction requirements, including the restriction-on-transfer, judicial-extinguishment, and division-of-proceeds requirements (Regulation §§1.170A-14(c)(2), -14(g)(6)(i)-(ii)).

"Protection-enhancing" amendments are those that enhance protection of the subject property's conservation interests and the easement's conservation purposes but do not involve trade-offs. Examples include adding acreage or restrictions, eliminating reserved rights, or updating language. Protection-enhancing

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amendments may qualify as additional deductible gifts. *Strasburg v. Commissioner*, T.C. Memo. 2000-94.

If LTA's assertions are correct—that "amendment requests are rare" and "detrimental amendments" (presumably those that authorize uses destructive of conservation interests in violation of the no-inconsistent-use requirement) "are extremely rare" (LTA Second Amicus at 25)—then a §170(h)-compliant amendment clause provides ample discretion to holders to agree to post-donation amendments. The "extremely rare" amendment that exceeds the authority granted to the parties in §170(h)-compliant clause is either not permitted or requires judicial approval. Schwing Br. at 15.

LTA asserts that, if this Court finds that PMP's amendment provision violates §170(h), "easement donors and holders [will] simply avoid including … amendment clauses in their easements." LTA Second Amicus at 24. The more likely scenario is that donors and their counsel will draft §170(h)-compliant amendment clauses.

6. Balancing Conservation Purposes And Responding To Changed Conditions Without Violating The No-Inconsistent-Use Requirement

LTA asserts that land trusts need discretion to amend easements under a consistency-with-conservation-purposes standard (engage in trade-offs) because easements frequently serve more than one conservation purpose, such as the

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protection of farmland as open space and habitat. LTA Second Amicus at 10-11. However, not all easements serve more than one purpose and there are ways to balance purposes when they do without granting the parties discretion to agree to trade-offs.

For example, Regulation §1.170A-14(e)(3) provides that "[a] donor may continue a pre-existing use of the property that does not conflict with the conservation purposes of the gift." Example 2 of Regulation §1.170A-14(f) involves just such a case. Protection of the operating farm in that Example with an easement that allows normal agricultural uses (which may impair habitat) does not violate the no-inconsistent-use requirement because normal agricultural uses are pre-existing and do not conflict with the conservation purpose of the gift—protection of farmland as open space. Alternatively, if the property contained a wetland that constituted a significant naturally occurring ecosystem, the easement could include a second purpose of protecting habitat and restrictions to protect the wetland. But the landowner would not (and should not) be entitled to a deduction for the easement if it permitted destruction of the wetland through the use of pesticides. Regulation §1.170A-14(e)(2); Senate Report at 13.

LTA also asserts that holders need the discretion to amend easements under a consistency-with-conservation-purposes standard (engage in trade-offs) to respond to changing conditions. LTA Second Amicus at 12-13. LTA offers the example of

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an easement that prohibits timber harvesting and then posits various changed conditions. *Id*. None of the posited changed conditions necessitate granting the holder discretion to agree to trade-offs.

Relocation of an endangered species would not be a justification for amending the easement in a manner that would injure or destroy remaining significant conservation interests on the originally-protected property; rather, the holder should seek another easement on the property to which the species relocated. A clause permitting protection-enhancing amendments would enable the parties to modify terms to address harmful invasives, dying or diseased trees, or restoration of a forest destroyed by fire in a manner that does not injure or destroy conservation interests. Many issues involving changed conditions are also anticipated and addressed in the drafting of easements, obviating the need for post-donation amendments.

Finally, if the parties decide that a post-donation amendment authorizing uses destructive of conservation interests on the originally-protected property is necessary, they can seek court approval. Given the intense pressures placed on holders to acquiesce to owner demands, Congress wisely did not grant the parties discretion to make such fundamental changes in unregulated and unsupervised transactions.

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C. UCEA Authorizes Creation Of §170(h)-Compliant Easements

PMP posits that any conservation easement created under the Uniform Conservation Easement Act (UCEA) is freely modifiable or terminable by the parties. PMP's Reply Brief at 12-14. That is neither correct nor consistent with the UCEA drafter's intent. Moreover, PMP's interpretation would mean that drafting easements to comply with §170(h) requirements at the time of donation would be pointless in UCEA states because the parties would be free to change easement terms post-donation. Neither Congress nor the Uniform Law Commission (ULC) intended that the terms included in deductible easements to comply with §170(h) would be useless window-dressing. Rather, both understood that deductible easements constitute charitable grants and state courts and attorneys general have the power and the duty to enforce such grants. Schwing Br. at 12-13.[10]

PMP appears to argue that the ULC changed its position on this issue when it revised the UCEA Comments in 2007. PMP's Reply Brief at 13 n.11. That is incorrect. The original UCEA prefatory note explains that the act "enables the structuring of transactions so as to achieve tax benefits which may be available under

[10] That there have been no "federal court opinion[s]" involving detrimental amendments (LTA Second Brief at 29) is understandable. Challenges to enforce easements are brought in state courts by attorneys general and others with standing. McLaughlin, Nancy A., *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 Real Prop. Tr. & Est. L.J. 1, 28, 30, 36, 39 (2011) (Myrtle Grove controversy, Bjork v. Draper, Wal-Mart controversy, Salzburg v. Dowd).

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the Internal Revenue Code" but warns "parties intending to attain them must be mindful of the specific provisions of the … tax laws which are applicable." Uniform Conservation Easement Act 3-4 (1981).[11] The original comment to UCEA §3 further explains that the act "leaves intact" existing law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts and "independently of the Act, the Attorney General could have standing [to enforce an easement]." *Id*. §3 cmt.[12]

While §2(a) of the UCEA provides that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, [or] terminated ... in the same manner as other easements," King Burnett, who served on the UCEA drafting committee, notes that "[t]his refers to the formalities and requirements applicable to these actions, such as the size of the paper, notarization, and witness requirements."[13] Burnett explains: "The Act was not intended to affect other laws that might condition or limit a holder's ability to release, or to agree to modify or terminate a conservation

[11] Courts rely on comments in interpreting uniform acts. *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993).

[12] Charitable gifts or grants made for specific purposes are often referred to as charitable trusts because such gifts are enforceable under charitable trust principles. Restatement (Third) Trusts §28, cmt. a (2003).

[13] Burnett, K. King, The Uniform Conservation Easement Act: *Reflections of a Member of the Drafting Committee*, 2013 Utah L. Rev. 773, 780.

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easement, including the laws applicable to … organizations soliciting and accepting charitable gifts ….”[14]

Furthermore, the UCEA comments were amended in 2007, not because the ULC changed its position, but to (i) update the UCEA to reflect the Restatement (Third) Property: Servitudes (2000) and the Uniform Trust Code (2000), both of which call for the application of charitable principles to donated easements, and (ii) “prevent section 2(a) from being erroneously interpreted as authorizing holders and property owners to mutually agree to substantially modify and terminate conservation easements, regardless of the express terms of the easements or the circumstances of their creation.”[15]

Burnett also points out that conservation easements extinguishable by mutual agreement of the parties are not eligible for a §170(h) deduction and adds:

> If section 2(a)…were interpreted to authorize holders and property owners to mutually agree to modify and terminate conservation easements regardless of the terms of the easements or the manner of their creation, section 2(a) would preclude the creation of tax-deductible easements … [which] would be directly contrary to the intent of the Drafting Committee.[16]

Thus, contrary to PMP’s assertion in its Reply Brief (at 13), it is not the Commissioner’s position that imperils the deductibility of conservation easements, but PMP’s interpretation of the UCEA contrary to its drafters’ intent.

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[14] Burnett at 780.
[15] *Id*. at 781.
[16] *Id*. at 782.

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Against its own interest, PMP argues that Alabama's version of the UCEA allows the parties to mutually agree to modify or terminate a conservation easement regardless of its terms or manner of creation. PMP's Reply Brief at 12-13, n.11. However, no court in Alabama (or any state) has interpreted §2(a) of the UCEA to so provide,[17] and Alabama's version of the UCEA does not appear to abrogate existing state laws governing the enforceability of charitable grants.[18]

This Court need not address this state law issue and should not be distracted by it. Regardless of how Alabama law might be interpreted, PMP's easements are not eligible for a §170(h) deduction because they permit trade-off amendments and the siting of building areas post-donation in violation of the no-inconsistent-use requirement.

D. Noncompliance With §170(h)(5)(A) Is Not A New Argument

PMP asserts that the Commissioner never raised §170(h)(5)(A) as a separate issue in its post-trial briefs in Tax Court. PMP's Reply Brief at 31. That is incorrect.

In his opening brief in Tax Court, the Commissioner clearly asserted that PMP's easements violate *both* §170(h)(2)(C) and §170(h)(5)(A) and that these "are

[17] Only the law in North Dakota has been adjudged to preclude creation of deductible easements. *Wachter v. Commissioner*, 142 T.C. 140 (2014).

[18] Alabama Code §35-18-6 ("The provisions of this chapter … shall not be construed to repeal any law or part of law except for those in direct conflict herewith"); *id.* §19-3B-414(d) (excepting conservation easements from termination-of-uneconomic-trusts provision).

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separate and distinct requirements." Respondent's Opening Brief at 3, 59-60. Moreover, in his discussion of §170(h)(5)(A), the Commissioner specifically asserted that PMP's easements violated Regulation §1.170A-14(e)(2)'s no-inconsistent-use requirement. *Id*. at 65-66. In his answering brief in Tax Court, the Commissioner again asserted the §170(h)(5)(A) argument separately from the §170(h)(2)(C) argument, but did so in an abbreviated fashion "[b]ecause Respondent believe[d] his Opening Brief fully cover[ed] the issues in this case." Respondent's Answering Brief at 22-23.

That both the §170(h)(2)(C) and §170(h)(5)(A) arguments were raised as separate issues is also readily apparent from the Tax Court's opinion. Pine Mountain Preserve, LLP v. Commissioner, 151 T.C. 247, at 279-280, 285-286 (2018).

Moreover, PMP itself makes arguments based on §170(h)(5)(A). In PMP's initial brief filed with this Court, PMP refers to §170(h)(5)(A) in several places and concludes, in part: "The Tax Court's interpretation runs contrary to congressional intent as to section 170(h)(2)(C) and 170(h)(5)(A)." PMP's Initial Brief at 52. In addition, one of PMP's primary arguments in its reply brief is that "Congress assigned to land trusts the role of … protecting the conservation purposes of the easement in perpetuity." PMP's Reply Brief at 1. That is a §170(h)(5)(A) protected-in-perpetuity argument.

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PMP also relies specifically (although, for reasons Amici have explained, incorrectly) on Regulation §1.170A-14(f)'s Example 4. PMP's Initial Brief at 9, 50-51; PMP's Reply Brief at 25-26. Example 4 in part illustrates the operation of §170(h)(5)(A)'s protected-in-perpetuity requirement and its component no-inconsistent-use requirement (Regulation §1.170A-14(e)(2)-(3)). PMP obviously cannot itself make arguments based on §170(h)(5)(A) and the no-inconsistent-use requirement and then claim the Commissioner cannot counter those arguments because §170(h)(5)(A) arguments are somehow "new."

In sum, this Court is not barred from considering arguments raised by both parties and acknowledged or addressed by the Tax Court simply because the Tax Court majority based its holding regarding the 2005 and 2006 easements on §170(h)(2)(C).

E. *Christopher* Does Not Authorize Noncompliance With the Law

PMP misreads *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). *Christopher* provides that interpretation of laws enforced by a government agency involves a two-step process. First, the court determines if the agency's interpretation is entitled to *Auer* deference. *Id*. at 153-159. Second, the court interprets and applies the law, giving the agency's interpretation "a measure of deference proportional to … its power to persuade." *Id*. at 159-161. If the court determines that an agency's interpretation is neither entitled to *Auer* deference nor persuasive in its own right,

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the court must employ traditional tools of interpretation, and may ultimately come to the same conclusion as the agency, as the dissent did in *Christopher*. *Id*. at 161, 170.

Christopher does not, as PMP implies, authorize a court to ignore or overrule a statute or regulation simply because it determines that an agency's interpretation is not entitled to *Auer* deference. All of the excerpts from *Christopher* in PMP's reply brief are drawn from the Supreme Court's analysis in the first (deference) step. PMP's Reply Brief at 2, 11, 30. PMP ignores the second step, in which the court actually interprets and applies the law.

Even if this Court were to determine that the IRS's interpretation of §170(h) is neither entitled to *Auer* deference nor persuasive in its own right,[19] this Court should not automatically accept PMP's flawed interpretation of law. Rather, under *Christopher*, this Court should employ traditional tools of interpretation, and, for the reasons discussed in this and Amici's first brief, this Court should ultimately come to the same conclusion as the IRS—that PMP's easements did not satisfy §170(h) requirements at the time of their donation.

[19] Amici are not suggesting that the IRS's interpretation is not entitled to deference or persuasive in its own right; the facts of this case are distinguishable from *Christopher*. In this case, the statute, Regulations, and legislative history provide notice; there is no evidence that use of PMP's movable-building-site and amendment clauses has been industry-wide practice; the IRS's interpretation is not flatly inconsistent with §170(h); and the IRS is asserting only that PMP's movable-building-site and amendment clauses violate §170(h), not a blanket rule.

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Furthermore, the IRS's failure to challenge allegedly similar clauses in previous cases also does not render §170(h) requirements unenforceable. Easements are highly complex, individualized documents, and apparent similarities in clauses often disappear upon a closer read of the entire document. In addition, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The obvious limits on the IRS's ability to act against each violation must also be viewed in light of the opportunity for taxpayers to obtain prior administrative determinations of compliance with §170(h) requirements.

Finally, Executive Order 13892 is inapplicable; PMP had prior notice of both IRS jurisdiction and the applicable legal standards.

V. CONCLUSION

PMP and LTA are asking this Court to grant holders more post-donation discretion than they were granted under §170(h). This is the wrong venue in which to make that argument. Policy arguments in favor of modifying §170(h) to grant holders more post-donation discretion should be made to Congress. Given the billions being invested in deductible easements and continued reports of abuse, it is

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unlikely Congress would revise §170(h) to grant holders greater discretion without also adding significant new safeguards.[20]

Moreover, if this Court were to hold that PMP's movable-building area and amendment clauses do not violate §170(h) requirements, *such clauses would become the norm*, and conservation protections would be subject to the whim of post-donation negotiations. Even land trusts reluctant to move building areas or agree to trade-offs would find it extremely difficult to hold the line in the face of intense pressure from landowners and the threat of expensive and time-consuming litigation for refusing to do so. The importance of this case lies in the fact that this Court's ruling will either arrest PMP's destructive, ill-advised line of thinking, or greatly accelerate its adoption and implementation.

For the foregoing reasons and those discussed in Amici's first brief, Amici urge the Court to affirm the Tax Court's disallowance of deductions for the 2005 and 2006 easements, reverse the Tax Court's allowance of the deduction for the 2007 easement, and rectify the mistakes the Tax Court made in its discussion of amendments.

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[20] U.S. Senate Committee on Finance, Newsroom, *Grassley, Wyden Launch Probe of Conservation Tax Benefit Abuse* (March 27, 2019); Looney, Adam, *Charitable Contributions of Conservation Easements* (Brookings Institution May 2017); Stephens, Joe & Ottaway, David B., *Developers Find Payoff in Preservation*, Wash. Post, Dec. 21, 2003, at A1.

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DATED: December 20, 2019

By: */s/ Ann Taylor Schwing*
Attorney and Amicus Curiae

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word limit of Federal Rules of Appellate Procedure Rule 29(a)(5) because, excluding parts of the document exempted by Federal Rules of Appellate Procedure Rule 32(f), this document contains 6,497 words. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: December 20, 2019

By: */s/ Ann Taylor Schwing*
Attorney and Amicus Curiae

Ann Taylor Schwing (SA0957)
BEST BEST & KRIEGER, L.L.P.
500 Capitol Mall, 17th Floor
Sacramento, California 95814
(707) 666-2747 fax (916) 325-4010
Ann.Schwing@BBKlaw.com

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CERTIFICATE OF SERVICE

This is to certify that on December 20, 2019, I electronically filed the foregoing Amicus Brief of K. KING BURNETT, ROGER COLINVAUX, JOHN ECHEVERRIA, JOHN LESHY, NANCY McLAUGHLIN, JANET MILNE, AND ANN TAYLOR SCHWING IN SUPPORT OF RESPONDENT AND IN SUPPORT OF AFFIRMANCE IN PART AND REVERSAL IN PART with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. In addition, I served the attorneys for the parties by email the same day, using the following email addresses:

David M. Wooldridge (dwooldridge@sirote.com)

Ronald Levitt (rlevitt@sirote.com)

Gregory P. Rhodes (grhodes@sirote.com)

Michelle A. Levin (mlevin@sirote.com)

Jacob Christensen (Jacob.E.Christensen@usdoj.gov)

Francesca Ugolini (francesca.ugolini@usdoj.gov)

Robert H. Levin (rob@roblevin.net)

DATED: December 20, 2019

By: *<u>/s/ Ann Taylor Schwing</u>*
Attorney and Amicus Curiae

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ADDENDUM

1. Proposed Treasury Regulation §1.170A-13, 48 Fed. Reg. 22941 (May 23, 1983)

2. Small, Stephen J., The Federal Tax Law of Conservation Easements (4th ed. 1997), Appendix D

3. Uniform Conservation Easement Act (1981)

4. Uniform Conservation Easement Act (2007)

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The last term of the rating factor expression includes the State's unobligated balance of funds received under 23 U.S.C. 144 at the time the State's application is received by FHWA, and the total funds received under 23 U.S.C. 144 for the last four fiscal years ending with the most recent fiscal year of the FHWA's annual call for discretionary bridge candidate submittals; (if unobligated HBRRP balance is less than $10 million, use zero balance);

TPC is Total Project Cost in millions of dollars;

HBRRP is Highway Bridge Replacement and Rehabilitation Program;

ADT' is ADT plus ADTT.

(c) In order to balance the relative importance of candidate bridges with very low (less than one) sufficiency ratings and very low ADT's against candidate bridges with high ADT's, the minimum sufficiency rating used will be 1.0. If the computed sufficiency rating for a candidate bridge is less than 1.0, use 1.0. in the rating factor formula.

(d) If the unobligated balance of HBRRP funds for the State is less than $10 million, the HBRRP modifier is 1.0. This will limit the effect of the modifier on those States with small apportionments or those who may be accumulating funds to finance a major bridge.

§ 650.709 Special considerations.

(a) The selection process for new discretionary bridge projects will be based upon the rating factor priority ranking. However, although not specifically included in the rating factor formula, special consideration will be given to bridges that are closed to all traffic or that have a load restriction of less than 10 tons. Consideration will also be given to bridges with other unique situations, and to bridge candidates in States which have not previously been allocated discretionary bridge funds.

(b) The need to administer the program from a balanced national perspective requires that the special cases set forth in paragraph (a) of this section and other unique situations be considered in the discretionary bridge candidate evaluation process.

(c) Priority consideration will be given to the continuation and completion of bridge projects previously begun with discretionary bridge funds.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 20, and 25

[LR-200-76]

Qualified Conservation Contribution; Proposed Rulemaking

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to contributions of partial interests in property for conservation purposes. Changes to the applicable tax law were made by section 6 of the Tax Treatment Extension Act of 1980. This document is intended to clearify the statutory rules in effect under that Act.

DATE: Written comments and requests for a public hearing must be delivered or mailed by July 22, 1983. The amendments are proposed to be applicable for contributions made on or after December 18, 1980, and are proposed to be effective the date final regulations are published in the **Federal Register.**

ADDRESS: Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Attention: CC:LR:T (LR-200-76).

FOR FURTHER INFORMATION CONTACT: John R. Harman of the Legislation & Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, Attention: CC:LR:T, 202-566-3287, not a toll-free call.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments proposed to conform the Income Tax Regulations (26 CFR Part 1) under section 170 of the Internal Revenue Code of 1954 (Code) relating to contributions not in trust of partial interests in property to section 6 of the Tax Treatment Extension Act of 1980.

The Tax Reform Act of 1969 and the regulations promulgated thereunder limited the deductibility of the donation of easements generally to charitable contributions of perpetual open space easements in gross, (section 170(f)(3)(B)(ii) of the Code and § 1.170A-7(b)(1)(ii) of the Income Tax Regulations). Although subsequent revenue rulings held that a variety of easements were deductible under the limitation of the 1969 Act (See, *e.g.*, Rev. Rul. 75-358, 1975-2 C.B. 76), Congress in 1976 added further legislative authority for the deductibility of easement donations.

Section 2124(e) of the Tax Reform Act of 1976 (Pub. L. 94-455, 90 Stat. 1919) provided, for the first time, specific statutory authority under section 170 of the Code for the deductibility of the donation to a qualified organization of easements, remainder interests, and certain other partial interests in property. The 1976 Act allowed the deduction for partial interests donated for a term of 30 years or more, but required that the donation be made "for conservation purposes." Conservation purposes was defined in section 170(f)(3)(C).

Section 309 of the Tax Reduction and Simplification Act of 1977 (Pub. L. 95-30, 91 Stat. 154) made two changes in the statutory language codified by the 1976 Act. The first change eliminated the deductibility of term easements for conservation purposes and required that such easements be perpetual in order to qualify for a deduction under section 170. The second change set the expiration date of these provisions at June 14, 1981.

Section 6 of the Tax Treatment Extension Act of 1980 made extensive changes in the existing statute, eliminated the expiration date, and incorporated the relevant language into a new section 170(h). The House and Senate Committee reports accompanying the legislation also provided, for the first time, an in-depth statement of congressional intent concerning the donation of partial interests for conservation purposes (H.R. Rep. No. 96-1278, S. Rep. No. 96-1007). The regulations reflect the major policy decisions made by the Congress and expressed in these committee reports.

Additional Information

Generally, the donation of an easement to preserve open space is deductible under section 170(h)(4)(A)(iii) if such preservation will yield a significant public benefit and is either for the scenic enjoyment of the general public or its pursuant to a clearly delineated governmental policy. The most difficult problem posed in this regulation was how to provide a workable framework for donors, donees, and the Internal Revenue Service to judge the deductibility of open space easements.

Defining "Significant public benefit" with any degree of precision is impossible. Any attempt to reduce the test to a mathematical formula would be arbitrary. The factors included at § 1.170A-13(d)(4)(iv) are not intended to be exclusive; however, a longer list of

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factors would always fall short of being all-inclusive. The same statements can be made concerning the list of factors proposed under § 1.170A–13(d)(4)(ii) with respect to "scenic enjoyment."

It is believed, however, that the "sliding scale" approach proposed in §1.170A–13(d)(4)(vi) that establishes a relationship between the requirements of "significant public benefit" and "clearly delineated governmental policy" will eliminate much of the uncertainty that surrounds this part of the statute. Additionally, by including prior state and local governmental determinations of specific resources to be protected as a criteria for meeting the "significant public benefit" and "scenic enjoyment" tests, a degree of certainty will be available to taxpayers in jurisdictions that have carefully articulated preservation policies. In the end, of course, some exercise of judgment and of responsibility is ultimately required by both donors and donees.

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably seven copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register.**

Executive Order 12291 and Regulatory Flexibility Act

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291. Accordingly, a Regulatory Impact Analysis is not required. The Internal Revenue Service has concluded that although this document is a notice of proposed rulemaking that solicits public comments, the regulations proposed herein are interpretative and the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, no Regulatory Flexibility Analysis is required for this rule.

Drafting Information

The principal authors of this regulation are John R. Harman and Stephen J. Small 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 regulation, 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.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Parts 1, 20, and 25 are as follows:

PART 1—[AMENDED]

§ 1.167(a)–5 [Amended]

Paragraph 1. 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–13(h)(3)(iii)."

Par. 2. Paragraph (a)(2)(ii) of § 1.170A–1 is amended by adding at the end thereof the following new paragraph:

§ 1.170A–1 Charitable, etc., contributions and gifts; allowance of deduction.

(a) *In general.* * * *

(2) *Information required in support of deductions.* * * *

(ii) *Contribution by individual of property other than money.* * * *

(*j*) In the case of a "qualified conservation contribution" under section 170(h), see § 1.170A–13(i).

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

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

b. Paragraph (b)(1)(ii) is revised by adding at the end the following new sentence: "For the deductibility of a qualified conservation contribution, see § 1.170A–13.".

c. Paragraph (b)(3) is revised by adding at the end the following new sentence: "For the deductibility of the donation of a remainder interest in real property exclusively for conservation purposes, see § 1.170A–13.".

d. Paragraph (b)(4) is revised by adding at the end the following new sentence: "For the deductibility of the donation of a remainder interest in real property exclusively for conservation purposes, see § 1.170A–13.".

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

f. The first sentence of paragraph (c) is revised to begin with the phrase "Except as provided in § 1.170A–13,".

g. 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–13.

* * * * *

(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. 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–13 is added after § 1.170A–12 to read as set forth below.

§ 1.170A–13 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.* The entire interest of the donor other than a qualified mineral interest is a qualified real property interest. A qualified mineral interest is the taxpayer's interest in subsurface oil, gas, or other

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minerals and the right of access to such minerals. A property interest shall not be treated as a qualified real property interest by reason of section 170(h)(2)(A) or this paragraph (b)(1), if any time over the entire term of the taxpayer's interest in such property the taxpayer transferred any portion of that interest (except in the case of a donation of a perpetual conservation restriction under paragraph (b)(3) of this section) to any other person (except for minor interests, such as rights-of-way, that will not interfere with the conservation purposes of the donation).

(2) *Remainder interest in real property.* A remainder interest in real property is a qualified real property interest. A property interest shall not be treated as a qualified real property interest by reason of section 170(h)(2)(B) or this paragraph (b)(2), if at any time over the entire term of the taxpayer's interest in such property the taxpayer transferred any portion of that interest (except in the case of a donation under paragraph (b)(3) of this section) to any other person (except for minor interests, such as rights-of-way, that will not interfere with the conservation purposes of the donation).

(3) *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 convenant 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.*, paragraphs (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 have the resources to enforce the restrictions and must be able to demonstrate a commitment to protect the conservation purposes of the donation. An established group organized exclusively for conservation purposes, for example, would meet this test. A qualified organization need not set aside funds, however, 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) as described in 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) *Public use.* 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 or the community.

(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 include 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.

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

(A) Pursuant to a clearly delineated Federal, state, or local governmental polic 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 this section in order to be deductible under section 170. See § 1.170A–7(b)(1)(ii).

(ii) *Scenic enjoyment* —(A) *Factors.* A contribution made for the preservation of open space may be for the scenic enjoyment of the general 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 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 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 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 agency.

(B) *Preservation of a view.* 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. This, 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.

(C) *Visible to public.* 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 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. 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 preservaton 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 declaration (in the form of, for example, a 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.

(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.

(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–13(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

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(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 enjoyment would yield a significant public benefit. For example, the preservation of a vacant 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 Federal 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.

(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 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-13(h)(3)(ii).

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

(A) An independently significant land area (for example, an archaeological site or a Civil War battlefield) that substantially meets the National Register Criteria for Evaluation in 36 CFR 60.4 (Pub. L. 89-665, 80 Stat. 915);

(B) Any building or land area within a registered historic district (except buildings that cannot reasonably be considered as contributing to the significance of the district); and

(C) Any land area 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 structure.

(iii) *Certified Historic structure*—(A) *Definition.* The term "certified historic structure," for purposes of this section, generally has the same meaning as in section 191(d)(1) (as it existed prior to the Economic Recovery Tax Act of 1981, relating to 5-year amortization of expenditures incurred in the rehabilitation of certified historic structures). However, 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.

(B) *Interior and exterior easements.* A deduction under this section will not be allowed for the donation of an interior or exterior easement prohibiting destruction or alteration of architectural characteristics inside or on the outside of a certified historic structure unless there is substantial and regular opportunity for the general public to view the architectural characteristics that are the subject of the easement.

(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)(5)(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) *Access.* Any limitation on public access to property that is the subject of a donation under this section shall not render the donation nondeductible if such limitation is necessary for protection of the conservation interests that are the basis of the deduction. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under paragraph (d)(3) of this section would be appropriate if such

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restriction were necessary for the survival of the species.

(3) *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. A donor is not required to demonstrate that all possible conservation interests associated with the property will be protected; rather, the terms of the donation must not permit destruction of significant conservation interests.

(4) *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 track 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, thereby maintaining public access to the parcel according to the custom of the State. J's parcel is regarded by the local community as providing 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 90-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 measurably impair the view. Owners of homes in the clusters will not have any rights which 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). State S has experienced a marked decline in open acreage well suited for agricultural use. In the parts of the State where land is highly productive in agricultural use, substantially all active farms are small, family-owned enterprises under increasing development pressures. In response to those pressures, the legislature of State S passed a statute authorizing the purchase of "agricultural land development rights" from farm owners and the placement of "agricultural preservation restrictions" on their land, in order to preserve the State's 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. K desires to preserve his farm for agricultural purposes in perpetuity. Rather than selling the development rights to State S, K grants to a qualifying conservation 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. K's farm is located in one of the more agriculturally productive areas within State S. Accordingly, a deduction is allowed under this section.

(g) *Enforceable in perpetuity* —(1) *In general.* In the case of any donation under this section, the interest in the property retained by the donor (and the donor's successors 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 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 contributions.

(2) *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.

(3) *Retention of qualified mineral interest* —(i) *In general.* 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 of a qualified mineral interest if at any time there may be extractions or removal of minerals by

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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–13(e)(3). 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) *Examples.* The provisions of paragraph (g)(3)(i) 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 in purifying rivers. K donates to a qualifying conservation organization all his 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 K does not own the mineral rights (or the right of access to those minerals) on the 5,000 acres and can not ensure that the mining and drilling will not interfere with the overrall conservation purpose. Accordingly, a deduction for the donation of the easement would not be allowable under this section. The same rule would apply to disallow a deduction by K for the donation of a remainder interest in the land for conservation purposes. A different result would follow if under applicable State law the qualifying organization had sufficient rights to protect the conservation purpose of the gift. Additionally, a donation of K's entire interest in the 5,000 acres to an eligible organization would qualify for a deduction under section 170(f)(3)(A) without regard to this section.

Example (3). Assume the same facts as in example (1), except that K sell the mineral rights to an unrelated party 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, K donates an easement for conservation purposes to a qualifying organization to protect the bottomland hardwood ecosystem. Since K can ensure in the easement that the mining of minerals on the property will not interfere with the conservation purposes of the gift, the donation qualifies for a deduction under this section.

(4) *Protection of conservation purpose where taxpayer reserves certain rights.* (i) *Documentation.* In the case of a donation made after (the date final regulations are published in the **Federal Register)** of any qualified real property interest when the donor reserves rights the exercise of which may have an adverse impact on 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 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 near 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)(4)(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 property. The terms of the donation must provide a right of the donee to enter the property at reasonable times for the purpose of inspecting 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.

(5) *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)(5)(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 (the date final regulations are published in the **Federal Register),** 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 a minimum ascertainable proportion of the fair market value to the entire property. See § 1.170A–13(h)(3)(iii). For purposes of this paragraph (g)(5)(ii), that original minimum proportionate value ot 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)(5)(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 the original proportionate value of the perpetual

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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 § 1.170A–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 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 land it encumbers before the granting of the restriction and the fair market value of the encumbered land 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 land owned by a taxpayer and the taxpayer's family (see section 267(c)(4)) is the difference between the fair market value of the entire contiguous tract before and after the granting of the restriction. Accordingly, in the case of the donation of a perpetual conservation restriction in all or a portion of the contiguous land owned by a taxpayer and the taxpayer's family (see section 267(c)(4)), if the donor or the donor's family 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 transferor 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 transferor. (See *example (11)* 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 market value of the property after contribution of the restriction must take into account the effect of the development. 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–13(c)(2).

(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 Goldacre, a property adjacent to a state park. A wants to donate Goldacre 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 Goldacre 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). Assume the same facts as in *example (1),* except that A would like to retain a life estate in Goldacre. A donates a remainder interest in Goldacre to the county government to use Goldacre as a park after A's death, but reserves the mineral rights in Goldacre (with restrictions on extraction similar to those in *example (1)).* A's gift does not meet the requirements of § 1.170A–7, with respect to contributions not in trust of partial interests in property, of § 1.170A–13(b)(1), with respect to qualified mineral interests, or of § 1.170A–13(b)(2), with respect to remainder interests in real property. Accordingly, no income tax deduction is allowable under this section.

Example (3). In 1982, B, who is 62, donates a remainder interest in Greenacre to a qualifying organization for conservation purposes. Greenacre is a tract of 200 acres

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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 § 25.2512–9 of the Gift Tax Regulations. Accordingly, the value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is $95,358 ($200,000×.47679).

Example (4). Assume the same facts as in *example (3),* 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 § 170(f)(3(E)(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 sections 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 (5). Assume the same facts as in *example (3),* 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 (6). Assume the same facts as in *example (5),* 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 $67,324 ($130,000×.51788).

Example (7). Assume the same facts as in *example (3),* 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 $47,679 ($100,000×.47679).

Example (8). 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 Greenacre 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 (9). Assume the same facts as in example (8) 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 (10). D owns property with a basis of $20,000 and a fair market value of $80,000. 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 (11). 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 ($8\times\$1,000=\$8,000$). However, because the easement only covered a portion of the taxpayer's contiguous land, the amount 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 (12). Assume the same facts as in *example (11).* 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 (13). F owns and uses as professional offices a two-story 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 an 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–13(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.

(j) *Effective date.* This section applies only to contributions made on or after December 18, 1980.

PART 20—[AMENDED]

Par. 5. 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 eighth 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), a (e)(2)(vi) are redesignated (e)(2)(v), (e)(2)(vi), and (e)(2)(vii), respectively.

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THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS

INCLUDING 1986-1988 SUPPLEMENT AND 1988-1995 SUPPLEMENT

by
Stephen J. Small, Esq.
Powers & Hall, P.C.
Boston, Massachusetts
Member, Massachusetts and District of Columbia Bars

Land Trust Alliance
1319 F Street NW, Suite 501
Washington, DC 20004-1106
202-638-4725

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APPENDIX D

Feathered Pipe Comments

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QUALIFIED CONSERVATION CONTRIBUTIONS:
FEATHERED PIPE CONFERENCE SUGGESTED
REVISIONS OF PROPOSED REGULATIONS
SECTION 170A-13

The attached memorandum contains a consensus of suggestions by representatives of some 17 national and regional conservation organizations and governmental agencies, who met at Feathered Pipe Ranch near Helena, Montana, on November 10-11, 1983. The following organizations participated in the formulation of these suggestions and subsequently reviewed drafts of memoranda proposing specific language changes:

American Farmland Trust

Brandywine Conservancy

Colorado Open Lands

Jackson Hole Land Trust

Maine Coast Heritage Trust

Maryland Environmental Trust

Massachusetts Department of Food & Agriculture

Montana Department of Fish, Wildlife & Parks

Montana Land Reliance

Napa County Land Trust

National Parks and Conservation Association

The Nature Conservancy

Ohio Conservation Foundation

Sonoma County Land Trust

Trust for Public Land

Western Pennsylvania Conservancy

Wyoming Game & Fish Department

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The statutory authority and proposed regulations establish standards and criteria for conservation easements donated to conserve open space. The standards -- scenic enjoyment; clearly delineated government policy; significant public benefit -- are by their nature judgmental. This presents great difficulties for qualified organizations because donors foresee the possibility of one judgment being reached when the conservation easement is evaluated and accepted by the qualified organization and another judgment being reached when the donation is examined some years later.

The purpose of a procedural safe harbor is to provide a means by which to reach a determination, prior to the donation, that a particular donation meets the standards for the conservation of open space established by the law and regulations. The procedural safe harbors suggested below are based upon strict adherence to these standards, but seek to give recognition to the application of these standards by the process of easement evaluation and acceptance by qualified organizations.

1. Governmental declaration. The proposed regulations recognize that conformance to a clearly delineated governmental policy can be evidenced by a formal declaration by a unit of government identifying a particular property as

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worthy of protection. Section 1.170A-13(d)(4)(iii)(A) Since the proposed regulations establish a "sliding-scale" approach for the significant public benefit test dependent upon the degree of specificity of the governmental policy, it would appear that a declaration by a unit of government would meet the significant public benefit test as well. In order to clarify this, it is proposed to add the following sentence to Section 1.170A-13(d)(4)(iv)(A):

> When a formal declaration by a governmental agency specifically identifies the subject property as worthy of protection for conservation purposes, the significant public benefit requirement will be deemed to be satisfied.

2. Donation to a Unit of Government. The regulations recognize that a donation to a unit of government tends to establish consistency with governmental policy, but propose a test dependent upon the degree of rigor of the review process. This test is vague and lends itself to different interpretations. It is suggested that a requirement that the donation be accepted "pursuant to established procedures" would insure that the act of acceptance by the governmental agency is in fact a deliberate action which evidences a governmental policy. Since a wide variety of

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governmental organizations exists, each with its own statutory authority and adopted procedures, it is not thought appropriate to mandate the particular form of the established procedures. The following language is substituted for Section 1.170A-13(d)(4)(iii)(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) pursuant to established procedures (see, for example, the procedures for certification by qualified organizations in §1.170A-13(d)(4)(vii) establishes both the requisite clearly delineated governmental policy and significant public benefit under subparagraph (d)(4)(iv) below.

3. Certification by qualified organizations. When a qualified organization accepts a conservation easement, it normally conducts a detailed review and analysis of the property to determine whether the donation would further a conservation purpose. The safe harbor suggested here provides a means for qualified organizations to apply the

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standards of the law and regulations to certify that a particular donation meets those standards. This is not an absolute safe-harbor, in that a "substantial basis" condition is proposed as a limitation on the effect of the certification. It is intended, however, to provide fairly conclusive effect to the reasonable judgments made by qualified organizations, but to nullify the effect of the certification where no substantial basis exists for it. The proposal is to add the following language to paragraph (d)(4), as new subparagraph (vii):

> (vii) Certification by qualified organization. An organization described in paragraph (c)(1)(ii) or (iii) may certify that the donation of an easement to preserve open space meets the standards of section 170(h)(4)(iii) and paragraph (d)(4)(i) of this section of these regulations. A certification shall consist of the following elements:
>
> (A) An identification of the qualified organization and evidence that the certification has been adopted by its governing body;

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(B) A location map showing the easement site, and the boundaries of the easement;

(C) A copy of the recorded easement document indicating the place in which it is recorded;

(D) A concise summary of the restrictions which the easement places upon the property;

(E) If the certification is made on the basis of the scenic enjoyment of the general public and significant public benefit, a concise description of how the property qualifies under the standards contained in paragraph (d)(4)(ii) and (iv) of this section, together with photographic evidence to support that determination; and

(F) If the certification is made on the basis of a Federal, state, or local governmental policy and significant public benefit, a description of how the property qualifies under the standards contained in paragraph

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(d)(4)(iii) and (iv) of this section. The description shall contain a citation to the particular governmental policy and a copy of the policy shall be attached.

Such certification will establish that the donation of a qualified real property interest to preserve open space satisfies the conservation purpose test pursuant to paragraph (d)(4) of this section. The existence of the certification shall not preclude the Internal Revenue Service from determining whether a substantial basis exists for the conclusions reached by the certification.

THE PRIOR TRANSFER RULE

The prior transfer rule of the regulations as proposed has the effect of disallowing deductions for charitable gifts of certain partial interests created with tax avoidance in mind. It is embodied in paragraphs (1) and (2) of §1.170A-13(b) of the proposed regulations. Changes are recommended in both subsections as indicated below and for the reasons stated:

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Section 1.170A-13(b) - Qualified real property interest -- (1) Entire interest of donor other than qualified mineral interest.

The entire interest of the donor other than a qualified mineral interest is a qualified real property interest. A qualified mineral interest is the taxpayer's interest in subsurface oil, gas, or other minerals and the right of access to such minerals. Thus, if land is held by A for life, with remainder over to B, and A makes a charitable contribution of his life estate to an organization described in section 170(c), reserving a qualified mineral interest, a deduction is allowed under section 170 for the value of A's donation. If, however, the property in which such partial interest exists was divided in order to create such interest and thus avoid section 170(f)(3)(A), the deduction will not be allowed. Assume, for example, that a taxpayer desires to contribute to a charitable organization a life estate in land held by him, and to reserve a qualified mineral interest. If the taxpayer transfers the remainder interest in such property to his son and immediately thereafter contributes the life estate to a charitable organization, reserving a qualified mineral interest, no deduction shall be allowed under section 170 for the contribution of the taxpayer's interest. The prior transfer of any interest in the property which was allowed as a charitable contribution under section 170 and the existence of security interests in the property created by the taxpayer, or to which the property was subject upon the tax payer's acquisition, shall be disregarded in applying this limitation. If the partial interest donated to an organization described in section 170(c) constitutes the taxpayer's entire interest but at the same time is described elsewhere in section 170(h)(2),

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the limitations of this paragraph shall not apply.

Reasons for Proposed Change

The effect of the so-called prior transfer rule in §1.170A-13(b)(1) of the proposed regulations is to disqualify otherwise deductible charitable contributions. A charitable contribution must meet the qualified real property interest test. Gifts of most partial interests do not meet that test, but an exception is made if the donated partial interest represents the taxpayer's entire interest, save for the reserved mineral interest. Under the regulations as proposed, however, the gift of such a partial interest will not fall within the entire-interest exception if the interest came into being as a result of a prior transfer by the taxpayer of another interest in the same underlying property. Thus, if the taxpayer has ever conveyed a remainder interest in land to a child, under the proposed regulations any subsequent charitable contribution of the retained life estate, subject to a qualified mineral interest, will not be deductible notwithstanding the transfer to charity of the taxpayer's entire interest.

The position taken in the proposed regulations is far stricter than the parallel rule of regulations

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§1.170A-7(a)(2)(i), which sets forth a prior transfer limitation that applies only if the prior transfer was made "in order" to invoke the exception. As a guide to the application of that rule, the regulation speaks of a charitable transfer "immediately after" an intrafamily gift.

The proposed rule also goes beyond the need to address transactions principally involving tax avoidance. It would render nondeductible all charitable gifts of otherwise qualifying interests in land from which other interests (mineral, timber, an undivided interest, or a remainder) had been severed even decades ago. Neither the statute nor sound policy justifies such a limitation.

Nor should the prior transfer rule extend to prior transfers that themselves constituted deductible charitable contributions when made. The proposed regulations recognize this result but the statement of the principle should be expanded. The prior transfer rule should not reach situations where the deductibility of the donated partial interest involves some exception other than the entire interest exception. It should not, for example, apply to a charitable gift of an undivided interest where such an interest in the underlying property had previously been transferred to an individual. Finally, the deductibility of charitable gifts of property should not be adversely affected

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by outstanding security interests. No tax avoidance is involved in any of these situations.

Second Proposed Change

§1.170A-13(b)(2). Remainder interest in real property. A remainder interest in real property is a qualified real property interest. [Remainder of paragraph deleted.]

Reasons for Proposed Change

In §1.170A-13(b)(2) of the proposed regulations the prior transfer rule is inappropriate. Charitable gifts of remainder interests in real property are deductible in their own right; the entire-interest exception is irrelevant.

FARMLAND PROVISIONS

Discussion of Reasons for Proposed Changes

1. The failure of the proposed regulations expressly to recognize the conservation of farmland for agricultural uses will tend to mislead practitioners and revenue agents into the belief that farmland will not qualify unless it is flood plain or rural scenery.

2. The tax statute itself expressly recognizes farmland as a category of open space that may qualify.

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3. The tax statute does not limit the conservation purposes for which farmland or other open space may qualify. All references in the committee reports to farmland as flood plain or scenery are prefaced by terms that indicate they were intended as examples, not limitations.

4. The fact that Congress saw fit to limit deductions through the clearly delineated policy and significant public benefit tests further evinces an intent to encourage a broad range of conservation purposes so long as the tests are met.

5. Congress has recognized the importance of conserving farmland for agricultural uses by enacting the Farmland Protection Policy Act of 1981, P.L. 97-98, 7 U.S.C. 4201, et seq. (N.B. Although this statute is not specific enough, in our view, to meet the clearly delineated policy test, it nevertheless represents an expression of congressional sentiment that colors the interpretation of the previously-enacted I.R.C. §170(h).)

6. Recognition of farmland conservation would not grant carte blanche for preservation of all land used for agriculture. State and local farmland preservation policies are generally limited to preserving the most productive farmlands as distinguished from "ordinary" lands by

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scientific soil classification, a universal system developed by the USDA.

7. Recognition of farmland conservation will not result in significant revenue loss. Most farmland is located in remote areas where there are no economic uses for land other than agriculture; thus, easements will carry very low values, and a direct relationship between revenue foregone and public benefit will be maintained as a function of valuation. Further, most farmers -- up to 90 percent according to one estimate -- do not ordinarily pay income taxes because their earnings are low and their debt service is high; thus, even where easement values are significant, very few farmers have an incentive to make contributions in anticipation of an income tax deduction.

Suggested Amendments

Section 1.170A-13(d)(4)(iii)(A) (Governmental conservation policy) should be modified to read, in relevant part:

> (A) In general. The requirement that . . . 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 . . .; the preservation of

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farmland pursuant to a state or local program for flood prevention and control, or pursuant to a state or local program for conserving the food and fiber production capability of specifically identified productive agricultural lands; or the protection of the scenic . . . .

Section 1.17A-13(d)(4)(iv)(A)(3) and (5) (Significant public benefit -- factors considered) should be modified to read, in relevant part:

(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, retention of farmland in agricultural use, shoreline protection, and

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

Section 1.17A-13(d)(4)(iv)(B) (Significant public benefit) should be modified to read, in relevant part:

(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 . . . 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, or pursuant to a state or local program for conserving the food and fiber production capability of specifically identified productive agricultural lands; the preservation of a unique natural . . . .

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Two additional examples, (6) and (7), should be added to Section 1.170A-13(f):

Example (6). State M has passed legislation incorporating a policy "to preserve productive agricultural land for food and fiber production." This legislation authorizes the establishment of "agricultural preservation districts" by voluntary consent of private landowners and with the approval of local governments having jurisdiction over the land in question. Land must satisfy criteria relating to a minimum level of soil productivity to qualify for inclusion in a district. Land included within districts enjoys statutory protections against urban encroachments caused by or contributed to by state or local governmental action. The district's program is administered by the state department of agriculture. F owns a farm in County B in State M, raising corn and soybeans. F grants to a qualified conservation organization a perpetual agricultural conservation easement that prohibits the construction of permanent buildings,

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except those related to agricultural production, and proscribes other uses inconsistent with the preservation of the agricultural production capability of the property. By the date F files his tax return on which he claims a deduction for a qualified conservation contribution, County B approves the inclusion of F's farm within an agricultural preservation district, finding that it meets the generally applicable soil productivity criteria. Accordingly, a deduction is allowed.

Example (7). County J has enacted a zoning ordinance pursuant to its official comprehensive master land use plan. The plan states that one of its goals is "to preserve productive agricultural land for food and fiber production." The zoning ordinance limits residential and commercial development of land within the "A-1 (agriculture)" zone to a density which reflects a degree of nonagricultural use identified in the master plan as compatible with food and fiber production. D owns a dairy farm in

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County J, raising feed for his herd. D's farm is identified on the zoning map that accompanies the text of the ordinance as located within the A-1 zone. D grants to a qualified conservation organization a perpetual agricultural conservation easement with terms substantially similar to those in Example (6), above. Accordingly, a deduction is allowed.

INCONSISTENT USE RULE

A. The suggested changes in the "inconsistent use rule" address §1.170A-13(e)(3) and (4) of the proposed regulations. There are three changes that should be explained.

1. As revised, the rule clarifies that to be an inconsistent use, the use must be inconsistent with those conservation purposes expressed in the statute and the regulations. As drafted, the Notice of Proposed Rule Making (NPRM) was not specific about the kinds of conservation interests covered by the inconsistent use rule; and the revised

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rule, as submitted herein, has been redrafted to reflect that concern in a manner consistent with the statute.

2. The revised rule, as submitted herein, attempts to clarify the uncertain parameters of the pesticide rule. The Service most likely recognizes that a complete prohibition on the use of pesticides is unrealistic. In an attempt to be consistent with the legislative history, as well as with a previously articulated Service position, the suggested changes to the rule recognize that conservation purposes must be paramount wherever any use of pesticides or herbicides is permitted by the terms of the deed of easement. As was recognized in Letter Ruling 8247024, the use of pesticides must not be permitted to have a "demonstrable detrimental effect upon the wildlife, fish, or the natural, open space, or ecological features of the (property)."

3. The suggested revision also strengthens the importance of the veto power given to the donee organization over the exercise of any rights reserved by the donee. This revision requires little explanation, except to note that the significance of the existence of the veto power in the donee organization has already been recognized in the NPRM.

B. The proposed revisions to the inconsistent use rule also combine Examples (3) and (4) of §1.170A-13(f)

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into one example. The revision generally relies on the examples as proposed with certain exceptions.

1. First, the example submitted herein deletes the reference to 90-acre subdivision as permissible. The language of the example is purely subjective and provides no guidance either to the Service or to the donee organization ("Random building on the property . . . would destroy the scenic character of the view"). Depending on the circumstances, "random building" on any size tract of land would destroy a scenic view, so this proposed rule is not helpful.

2. The revised example deletes the language in Example (4) of §1.170A-13(f) that states that the land owners in the cluster development will have no greater rights in the surrounding land than outsiders. The Service's concern here may have stemmed from the well-known approach of developers to try to generate a deduction by creating parkland in the middle of a large suburban development. We suggest the rule is just plain wrong. If, given the general outline of facts in the example, one landowner bought the entire parcel of land, put one house on it, encumbered the rest with a "forever wild" easement, and kept the general public out, we suggest the donation would be a good one because the conservation purpose to be served is the

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preservation of the scenic view from the national park. The rule should be no different if 15 or 20 landowners end up on the large parcel. The conservation purpose remains the protection of the scenic view, and nothing in the implicit framework of the rule should require that in this scenic easement these landowners surrender any rights associated with the property to the general public.

Proposed Revision of Inconsistent Use Rule of Section 1.170A-13(e)

(3) 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 conservation purposes enumerated in §1.170A-13(d) but would permit activities that would be destructive of other such conservation purposes. For example, a contribution would not qualify for a deduction under this section if the terms of the contribution permitted the use of pesticides or herbicides to control insects, weeds, or pests on the property, unless the terms of the contribution also so restricted such use as to prevent any demonstrable detrimental effect

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upon the wildlife or fish or the natural ecological features of the property. A donor is not required to demonstrate that all possible conservation interests associated with the property will be protected; rather, the terms of the donation must not permit activities which would cause destruction of significant conservation interests enumerated in §1.170A-13(d).

(4) Inconsistent Use Permitted. No use the exercise of which is subject to the prior approval of the donee shall be treated as an inconsistent use under this section. A use that is destructive of conservation interests enumerated in §1.170A-13(d) will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution. . . . [Remainder of paragraph unchanged.]

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Suggested New Example in Lieu of Example 3 and Example 4 of the Current Regulations Section 1.170A-13(f)

Example (3). H owns Greenacre, a 900-acre parcel of woodland, rolling pasture, and orchards on the crest of a mountain. Large portions of Greenacre are clearly visible from a nearby national park, and random building on the property would destroy the scenic character of the view. H wishes to donate a scenic easement on Greenacre to a qualifying conservation organization. H proposes that the deed of easement allow for carefully selected residential siting, including the possibility of limited cluster development, in areas generally not visible from the national park, subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park. Accordingly, the donation qualifies for a deduction under this section.

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Section 1.170A-13(e)(2) is deleted and the following paragraph is substituted in lieu thereof:

(2) Access. Except as provided in paragraphs (d)(2)(ii), (d)(4)(ii)(B), and (d)(5)(iii)(B) of this section, public access to property that is the subject of a donation under this section is not required.

THIRD-PARTY MINERAL RIGHTS

Reason for Proposed Amendments

If a taxpayer donates a conservation easement over land with respect to which another person owns the mineral rights, a deduction for that contribution may be disallowed because the donor is unable to guarantee that the mineral rights will not be exercised in a manner inconsistent with the conservation purpose sought to be protected. Prop. Reg. §1.170A-13(g)(3) example (2). It would appear, however, that such a contribution would still qualify if the donor could demonstrate that the possibility that the mineral rights owner would exercise his rights in a manner

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inconsistent with the conservation purpose is so remote as to be negligible. See §1.170A-13(g)(2).

Without the reasonable application of a "remoteness" test, many significant properties, deserving of protection for their scenic, ecological, historical or agricultural attributes and otherwise qualified under the statute, will apparently be denied such protection. Particularly in the Western states, where mineral rights over vast areas derive from, or continue to be held by, the Federal government, an inflexible approach will vitiate the conservation policies of section 170(h). Clearly, the recognition of a balance of interests should be reflected in the regulations.

Proposed Amendments

The following proposed language revises P.Reg. Section 1.170A-13(g)(2) and (3):

> (2) 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

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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. Similarly, the possibility of third-party mineral extraction shall not cause a conservation purpose to be deemed unprotected under section 170(h)(5)(A) when the possibility of extraction is so remote as to be negligible on the date of the gift. See paragraph (g)(3)(ii).

(3) Retention of Qualified Mineral Interest --

(i) In general. 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 of a qualified mineral interest 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 retention, the

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requirement that the conservation purpose 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. 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 restoration to its original state will occur upon cessation of production.

(ii) Third-party mineral interests. No deduction shall be allowed under section 170(f)(3)(B) when mineral rights are owned by, or subject to lease to, a person other than the

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taxpayer, unless the taxpayer demonstrates that mining will not significantly interfere with the conservation purposes of the gift or that exploitation of the third party's mineral interest is a possibility so remote as to be negligible.

(A) Compatible mining activities. Third-Party mining activities shall be treated as not significantly interfering with the purposes of the gift when limited, by a recorded prohibition binding the owner or lessee of the mineral rights and his successors in interest in perpetuity, to such activities as could be carried on by the taxpayer were such mineral rights owned by the taxpayer and retained as a qualified mineral interest. Such a prohibition must bar extraction of minerals by any surface mining method, and subsurface access may be permitted only

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when the particular conservation purposes of the taxpayer's contribution will not be significantly jeopardized.

(b) Remoteness. If the possibility of significant jeopardy to the conservation purposes of the taxpayer's gift through third-party extraction of minerals is so remote as to be negligible, a deduction shall not be disallowed under section 170(f)(3)(B)(iii) and this section. The possibility of incompatible third-party mineral activities shall be deemed so remote as to be negligible if--

(1) Geological data (such as drill hole log data or trace mineral surveying) fails to indicate the presence of minerals which could be subject to profitable exploitation using current mining technologies;

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(2) The third-party mineral interests lack ascertainable fair market value (for this purpose, if during the 10-year period preceding the taxpayer's donation there have been no sales or exchanges or other commercial activity involving the third-party mineral interests, it shall be presumed, in the absence of contrary proof, that such rights lack ascertainable fair market value) or

(3) Known minerals would not constitute valuable mineral deposits within the meaning of 30 U.S.C. section 22 if owned by the United States (whether or not so owned); or

(4) The mineral interests are owned by the United States.

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Where none of the foregoing factors is satisfied, the taxpayer may nonetheless demonstrate that exploitation of third-party mineral interests, although not so remote a possibility as to be negligible, is not in compatible with the conservation purpose of the gift. If, for example, the donation is pursuant to a clearly delineated governmental policy favoring preservation of certain open-space lands for flood control, recreational, or scenic purposes, and the governmental entity which has adopted such policy certifies that mineral extraction would not significantly jeopardize the conservation purpose of the gift, the deduction will ordinarily be allowed.

(iii) Examples. The provisions of paragraphs (g)(3)(i) and (ii) of this section may be illustrated by the following examples:

Example (1). (NO CHANGE)

Example (2). Assume the same facts as in Example (1), except that K does not own the mineral rights (or the right

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of access to those minerals) on the 5,000 acres and cannot insure that the mining and drilling will not interfere with the overall conservation purpose. Accordingly, a deduction for the donation of the easement would not be allowable under this section unless it can be demonstrated that the possibility of frustration of the conservation purpose of the gift is so remote as to be negligible. The same rules would apply in connection with the donation of a remainder interest in the land for conservation purposes. A different result would follow if under applicable State law the qualifying organization had sufficient rights to protect the conservation purpose of the gift. Additionally, a donation of K's entire interest in the 5,000 acres to an eligible organization would qualify for a deduction under section 170(f)(3)(A) without regard to this section.

Example (3). (NO CHANGE)

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Example (4). K owns 5,000 acres of mixed timber and ranchland that the fish and wildlife agency of State M has identified as critical elk winter range. K owns none of the mineral rights on that property. Through the years, a number of mineral claims have been located on the land, but geological data fails to indicate minerals which could be subject to profitable exploitation, nor has there been any substantial mining activity on any located claim. A deduction for a donation of a perpetual conservation easement would be allowed, since available geological data and past experience indicate that jeopardy to the conservation purposes of the gift through third-party extraction of minerals is so remote as to be negligible.

Example (5). Assume the same facts as in Example (4), except that the claims which have been located have resulted in some mineral discoveries.

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The active claims are small-scale and cover limited acreage. In addition, K has entered into surface use agreements with the mineral claimants that control disturbance of the surface sufficiently to avoid interference with the use of the area by elk as winter range. Furthermore, mining activity does not take place during the winter months when the range is used by the elk. A deduction would be allowed since the third party mineral interests are not incompatible with the conservation purposes of the gift.

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UNIFORM CONSERVATION EASEMENT ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETIETH YEAR
IN NEW ORLEANS, LOUISIANA
JULY 31 – AUGUST 7, 1981

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Chicago, Illinois, January 26, 1982

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UNIFORM CONSERVATION EASEMENT ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Conservation Easement Act was as follows:

RUPERT R. BULLIVANT, 1000 Wilamette Center, 121 Southwest Salmon Street, Portland, OR 97204, *Chairman*
K. KING BURNETT, P.O. Box 910, Salisbury, MD 21801
ROBERT H. CORNELL, 25th Floor, 50 California Street, San Francisco, CA 94111
CHARLES M. HAAR, Harvard Law School, Cambridge, MA 02138
CHARLES G. KEPLER, P.O. Box 490, Cody, WY 82414
BROCKENBROUGH LAMB, JR., 1200 Mutual Building, Richmond, VA 23219
ANN REED, P.O. Box 629, Raleigh, NC 27602
ALLAN G. RODGERS, 2 Park Square, Boston, MA 02116
WILLIAM G. THOMAS, P.O. Box 820, Alexandria, VA 22313
ALLLAN D. VESTAL, University of Iowa, College of Law, Iowa City, IA 52242
RUSSELL L. BRENNEMAN, 101 Pearl Street, Hartford, CT 06103, *Reporter*
JOHN J. COSTONIS, New York University, School of Law, Room 307, Vanderbilt Hall, 40 Washington Square, South, New York, NY 10012, *Reporter*
JOHN C. DEACON, P.O. Box 1245, Jonesboro, AR 72401, *President: 1979-81 (Member Ex Officio)*
GEORGE C. KEELY, 1600 Colorado National Building, 950 Seventeenth Street, Denver, CO 80202, *President: 1977-79 (Member Ex Officio)*
M. KING HILL, JR., Sixth Floor, 100 Light Street, Baltimore, MD 21202, *Chairman, Executive Committee (Member Ex Officio)*
WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director*
EDWARD F. LOWREY, JR., Suite 1650, 3300 North Central Avenue, Phoenix, AZ 85012, *Chairman, Division B (Member Ex Officio)*

Review Committee

DON J. McCLENAHAN, 310 Simplot Building, Boise, ID 83702, *Chairman*
ALLISON DUNHAM, University of Chicago, School of Law, 1111 East 60th Street, Chicago, IL 60637
EUGENE A. SCOLES, University of Oregon, School of Law, Eugene, OR 97403
R. BRUCE TOWNSEND, Indianapolis Law School, 735 West New York Street, Indianapolis, IN 46202

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Advisors to Special Committee on
Uniform Conservation Easement Act

JOHN M. FOWLER, Advisory Council on Historic Preservation
JOHN R. LINTON, National Association of Realtors
NORMAN MARCUS, New York, NY
ROSS B. NETHERTON, American Bar Association, Section of Real Property, Probate and Trust Law
ROBERT E. STIPE, Chapel Hill, NC
GLENN T. TIEDT, U.S. Department of the Interior, National Park Service
WALTER G. VAN DORN, American Bar Association, Section of Taxation
ALBERT B. WOLFF, American Bar Association

Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611

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UNIFORM CONSERVATION EASEMENT ACT

Commissioners' Prefatory Note

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of that right is also a governmental unit or charity (Section 1(3)).

The interested protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first

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removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easements serving the public interest. Other types of easements, real

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covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organization, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the

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income, estate and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

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UNIFORM CONSERVATION EASEMENT ACT
1981 ACT

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

Section

§ 1. [Definitions]. As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

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Comment

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1(2) and (3), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

§ 2. [Creation, Conveyance, Acceptance and Duration].

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

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(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

Comment

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the easement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate it in states whose case or statute law accords their courts that power in the case of easement. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes and may be held only by certain "holders." These limitations find their place comfortably within similar limitations applicable to charitable trusts, whose duration may also have no limit. Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

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Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

§ 3. [Judicial Actions].

(a) An action affecting a conservation easement may be brought by:

(1) an owner of an interest in the real property burdened by the easement;

(2) a holder of the easement;

(3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

Comment

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines,

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including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

§ 4. [Validity]. A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

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Comment

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements" – those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem – the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the

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easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

§ 5. [Applicability].

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

Comment

There are four classes of interests to which the Act might be made applicable: (1) those created after its passage which comply with it in form and

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purpose; (2) those created before the Act's passage which comply with the Act and which would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly validated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or after the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those created before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-Act statutory or case law.

It is the purpose of Section 5 to establish or confirm the validity of the first three classes of interests. Subsection (a) establishes the validity of the first class of interests, whether or not they are designated as conservation or preservation easements. Subsection (b) establishes the validity under the Act of the second class. Subsection (c) confirms the validity of the third class independently of the Act by disavowing the intent to invalidate any interest that does comply with other applicable law.

Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the fourth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just compensation were that interest subsequently validated by the Act. Subsection (b) addresses this difficulty by precluding retroactive application of the Act if such application "would contravene the constitution or laws of (the) State or of the United States." That determination, of course, would have to be made by a court.

§ 6. [Uniformity of Application and Construction]. This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

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UNIFORM CONSERVATION EASEMENT ACT

(Last Revised or Amended in 2007)

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETIETH YEAR
IN NEW ORLEANS, LOUISIANA

July 31 – August 7, 1981

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Chicago, Illinois, January 26, 1982

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UNIFORM CONSERVATION EASEMENT ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Conservation Easement Act was as follows:

RUPERT R. BULLIVANT, 1000 Willamette Center, 121 Southwest Salmon Street, Portland, OR 97204, *Chairman*
K. KING BURNETT, P.O. Box 910, Salisbury, MD 21801
ROBERT H. CORNELL, 25th Floor, 50 California Street, San Francisco, CA 94111
CHARLES M. HAAR, Harvard Law School, Cambridge, MA 02138
CHARLES G. KEPLER, P.O. Box 490, Cody, WY 82414
BROCKENBROUGH LAMB, JR., 1200 Mutual Building, Richmond, VA 23219
ANN REED, P.O. Box 629, Raleigh, NC 27602
ALLAN G. RODGERS, 2 Park Square, Boston, MA 02116
WILLIAM G. THOMAS, P.O. Box 820, Alexandria, VA 22313
ALLAN D. VESTAL, University of Iowa, College of Law, Iowa City, IA 52242
RUSSELL L. BRENNEMAN, 101 Pearl Street, Hartford, CT 06103, *Reporter*
JOHN J. COSTONIS, New York University, School of Law, Room 307, Vanderbilt Hall, 40 Washington Square, South, New York, NY 10012, *Reporter*
JOHN C. DEACON, P.O. Box 1245, Jonesboro, AR 72401, *President: 1979-1981 (Member Ex Officio)*
GEORGE C. KEELY, 1600 Colorado National Building, 950 Seventeenth Street, Denver, CO 80202, *President: 1977-1979 (Member Ex Officio)*
M. KING HILL, JR., Sixth Floor, 100 Light Street, Baltimore, MD 21202, *Chairman, Executive Committee (Member Ex Officio)*
WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director*
EDWARD F. LOWRY, JR., Suite 1650, 3300 North Central Avenue, Phoenix, AZ 85012, *Chairman, Division B (Member Ex Officio)*

Review Committee

DON J. McCLENAHAN, 310 Simplot Building, Boise, ID 83702
ALLISON DUNHAM, University of Chicago, School of Law, 1111 East 60th Street, Chicago, IL 60637
EUGENE F. SCOLES, University of Oregon, School of Law, Eugene, OR 97403
R. BRUCE TOWNSEND, Indianapolis Law School, 735 West New York Street, Indianapolis, IN 46202

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Advisors to Special Committee on Uniform Conservation Easement Act

JOHN M. FOWLER, Advisory Council on Historic Preservation
JOHN R. LINTON, National Association of Realtors
NORMAN MARCUS, New York, NY
ROSS B. NETHERTON, American Bar Association, Section of Real Property, Probate and Trust Law
ROBERT E. STIPE, Chapel Hill, NC
GLENN F. TIEDT, U.S. Department of the Interior, National Park Service
WALTER G. VAN DORN, American Bar Association, Section of Taxation
ALBERT B. WOLFE, American Bar Association

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

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UNIFORM CONSERVATION EASEMENT ACT

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UNIFORM CONSERVATION EASEMENT ACT

Prefatory Note

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of that right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts

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are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easements serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organization, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

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The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable.

The Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes. For the reasons noted in the comment to Section 3, the Act does not directly address the application of charitable trust principles to conservation easements. The Act leaves intact the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts. Such law may create standing to enforce a conservation easement in the Attorney General or other person empowered to supervise charitable trusts (Section 3(4)).

Amendment to Prefatory Note approved by Executive Committee on February 3, 2007.

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UNIFORM CONSERVATION EASEMENT ACT

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

Section
1. Definitions.
2. Creation, Conveyance, Acceptance and Duration.
3. Judicial Actions.
4. Validity.
5. Applicability.
6. Uniformity of Application and Construction.

SECTION 1. DEFINITIONS. As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real

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property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

Comment

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1(2) and (3), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

SECTION 2. CREATION, CONVEYANCE, ACCEPTANCE AND DURATION.

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

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(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

Comment

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the easement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate the easement in accordance with the principles of law and equity. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes intended to serve the public interest and may be held only by certain "holders." These limitations find their place comfortably within the limitations applicable to charitable trusts, which may be created to last in perpetuity, subject to the power of a court to modify or terminate the trust pursuant to the doctrine of *cy pres*. See comment to Section 3. Allowing the parties to create such easements also enables them to fit

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within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

Amendment to comment approved by Executive Committee on February 3, 2007

SECTION 3. JUDICIAL ACTIONS.

(a) An action affecting a conservation easement may be brought by:

(1) an owner of an interest in the real property burdened by the easement;

(2) a holder of the easement;

(3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

Comment

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*,

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have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries.

Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

In 2000, the American Law Institute published the Restatement (Third) Property: Servitudes, which recommends that, in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of conservation easements held by governmental bodies or charitable organizations be governed by a special set of rules modeled on the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explained that:

> *"[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes…"*

The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements. This was recognized by the drafters of the Uniform Trust Code, approved by the National Conference of Commissioners on Uniform State Laws in 2000, who explained in their comment to §414:

> *Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.*

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may

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prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts. Thus, while Section 2(a) provides that a conservation easement may be modified or terminated "in the same manner as other easements," the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.

For a discussion of the application of charitable trust principles to conservation easements, see Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy,* 40 U Rich. L. Rev. 1031 (2006); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements,* 29 Harv. Envtl. L. Rev. 421 (2005).

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SECTION 4. VALIDITY. A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

Comment

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

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Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements"-those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem-the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labeled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real

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covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

SECTION 5. APPLICABILITY.

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

Comment

There are four classes of interests to which the Act might be made applicable: (1) those created after its passage which comply with it in form and purpose; (2) those created before the Act's passage which comply with the Act and which would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly validated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or after the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those created before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-Act statutory or case law.

It is the purpose of Section 5 to establish or confirm the validity of the first three classes of interests. Subsection (a) establishes the validity of the first class of interests, whether or not they are designated as conservation or preservation easements. Subsection (b) establishes the validity under the Act of the second class. Subsection (c) confirms the validity of the third class independently of the Act by disavowing the intent to invalidate any interest that does comply with other applicable law.

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Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the fourth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just compensation were that interest subsequently validated by the Act. Subsection (b) addresses this difficulty by precluding retroactive application of the Act if such application "would contravene the constitution or laws of (the) State or of the United States." That determination, of course, would have to be made by a court.

SECTION 6. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

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