

# THE USE OF CONSERVATION RESTRICTIONS ON HISTORIC PROPERTIES AS CHARITABLE DONATIONS FOR FEDERAL INCOME TAX PURPOSES

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## I. INTRODUCTION

The use of conservation restrictions as a legal device to protect historic structures and natural areas has grown considerably in the past two decades. The conservation restriction, also referred to as a conservation easement,<sup>1</sup> is a less-than-fee interest in land in possession of one other than the owner which limits or restricts the possessory rights of the owner and is enforceable at law.<sup>2</sup> It consists

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1. Under the terminology of Internal Revenue Code (I.R.C.) § 170(h)(4) (1980) [see Appendix] "conservation restriction" includes the concept of a preservation restriction and throughout this article, unless otherwise noted, the word "conservation" should be understood to cover "preservation." The broad expression "conservation restriction" was adopted in the new Code provisions in lieu of the older terms "conservation easement" or "preservation easement" to eliminate certain common law difficulties associated with the operation of "easements." See note 41 *infra*. Both expressions are currently in use and, for the purposes of this article, will be considered roughly synonymous.

2. For a thorough discussion of easements as well as other legal tools for restricting land use see Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540 (1979). One authority has stressed six factors that constitute an "easement:"

- 1) it is an interest in land which is in the possession of another;
- 2) the content of the interest as a "limited use or enjoyment of the land in which the interest exists";

of a legal document between the property owner and the holder of the easement and contains either "affirmative" or "negative" obligations binding on the owner, all future owners, and assigns.<sup>3</sup> In the context of historic preservation, this means that the owner of the property, while retaining the majority of his interests in the property, might be obligated to maintain his property in a certain manner or be restricted from developing it in some respect.<sup>4</sup>

The increased use of conservation restrictions, especially in the private sector, has been spurred on, in part, by a federal tax system that encourages the donation of such property interests in return for a charitable deduction. The tax law in this area, under Internal Revenue Code section 170, has changed considerably since the first Revenue Ruling on the deductibility of such interests was issued in 1964.<sup>5</sup> The Code has recently undergone another significant change with the enactment of the Tax Treatment Extension Act of 1980<sup>6</sup> resulting in a major revision in the law on conservation restrictions.<sup>7</sup>

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3) the availability of protection of the interest as against interference by third persons;

4) the absence of terminability at the will of the possessor of the land;

5) the fact that it is not a normal incident of a possessory land interest; and

6) the fact that it is "capable of creation by conveyance."

3 R. POWELL, *THE LAW OF REAL PROPERTY* § 409 (1979) summarizing RESTATEMENT OF PROPERTY (1944).

3. See Kinnamon, *Tax Incentives for Sensible Land Use Through Gifts and Conservation Easements*, 15 REAL PROP., PROB. & TR. J. 1, 2-3 (1980).

4. Other examples of how a conservation restriction might operate are discussed at notes 58-65 *infra* and accompanying text.

The definition of a conservation or preservation easement will vary from one jurisdiction to the next. The proposed *Uniform Conservation Easement Act* adopts the following definition:

"Conservation easement" means a non-possessory 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, or maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

National Conference of Commissioners on Uniform State Laws, *Uniform Conservation Easement Act* 1 (Draft, 1981).

Earlier versions of the Act provided for separate definitions of conservation and preservation easements. See, e.g., November 16, 1980 Draft. The various terms "preservation easement," "conservation easement," "open-space easement," or "scenic easement" are often used simply to categorize the easement and to indicate the type of interest protected.

5. Rev. Rul. 64-205, 1964-2 C.B. 62.

6. Pub. L. No. 96-541, 94 Stat. 3204 (1980), codified at I.R.C. § 170, reprinted in the Appendix.

7. There were two main bills, H.R. 4611, 96th Cong., 1st Sess. (1979), and H.R. 7318, 96th Cong., 2d Sess. (1980) as modified in committee markup that resulted in the passage of the new law. See discussion of legislative history, notes 53-57 *infra* and accompanying text.

The Act is effective for all transfers made after December 17, 1980, the date of enactment of the law. Tax Treatment Extension Act, 96-541, § 6(d), 94 Stat. 3204, 3208 (1980).

This article will analyze the use of conservation restrictions as charitable donations and their deductibility under the federal tax laws.<sup>8</sup> The article will first discuss the policy behind the allowance of charitable donations for conservation restrictions on historic properties and trace the legal developments leading to the latest changes in the law. The focus of this article will then shift to the use of such restrictions on historic properties<sup>9</sup> and whether deductions may be taken under section 170.<sup>10</sup> After completing the analysis of the new provisions, some of the unresolved problems in this area of law will be examined.

## II. HISTORIC PRESERVATION, THE TAX LAWS, AND SOCIAL POLICY

The United States tax laws are replete with the often contradictory purposes and aims of maintaining a fair and progressive income tax structure to raise revenues for the government and, at the same time, achieving specific societal or economic objectives by carving out exceptions in the basic tax code.<sup>11</sup> Every special purpose tax in-

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8. The principle sections discussed in this paper are those income tax laws codified in I.R.C. §§ 170(f), (h) (1980). It should be noted that the law on income tax deductions with respect to the above section is also applicable to the estate and gift tax sections under I.R.C. §§ 2055(e)(2), 2522(c)(2). On the local level there may be a reduction in *ad valorem* property taxes based on the reduction in market value due to diminished property rights. See Reynolds, *Preservation Easements*, 44 APPRAISAL J. 356, 357-58 (1976).

9. Restricting the article in this manner was a difficult choice to make but, because of space limitations, a necessary one. Preservation interests (the "built" environment) are still unique enough to be considered separately from conservation issues (the "natural" environment). Admittedly, in certain situations the two areas overlap, such as in applying protective measures to preserve an historic house (preservation) and the adjoining estate land (conservation). Where the areas do intersect, conservation issues will be examined.

In the past there has been some tension between preservationists and conservationists especially in the legislative arena. See generally, Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL EST. L. J. 301, 315-19 (1979). Yet at the same time, there has been a growth in joint conferences of preservationists and conservationists to discuss issues of mutual concern. See, e.g., THE FRENCH AND PICKERING CREEKS CONSERVATION TRUST, INC., PROCEEDINGS OF THE CONFERENCE ON VOLUNTARY PRESERVATION OF OPEN SPACE (1974) [hereinafter cited as PICKERING I]; THE FRENCH AND PICKERING CREEKS CONSERVATION TRUST, INC., PROCEEDINGS OF THE SECOND CONFERENCE ON VOLUNTARY PRESERVATION OF OPEN SPACE (1979) [hereinafter cited as PICKERING II]; FEDERAL TAX BENEFITS AND LAND CONSERVATION (K. Brown ed. 1979) (transcript of meeting sponsored by the Brandywine Conservancy on Sept. 29, 1979 at Chadds Ford, Pennsylvania) [hereinafter cited as Brandywine].

10. Until the Treasury promulgates interpretative regulations on the new revisions in the Code or the Service issues some Revenue Rulings, one can only speculate whether a conservation restriction in many situations will qualify as a valid deduction.

11. Caplin, *Federal Tax Policy as Incentive for Enhancement of the Built Environment* 7 in TAX INCENTIVES FOR HISTORIC PRESERVATION (G. Andrews ed. 1980). The principle that Congress has wide discretion in using the taxing power to further national objectives is no longer challenged. See, e.g., *Helvering v. Independent Life Insurance Company*, 292 U.S. 371 (1934);

centive represents an indirect government expenditure which must be borne by the average taxpayer.<sup>12</sup> Furthermore, as new tax breaks are introduced into the system, public confidence in the basic structure may diminish.<sup>13</sup>

Mortimer Caplin, former Commissioner of the Internal Revenue Service, has suggested that the tax system may be used to promote nonrevenue ends when two basic preconditions have been met. First, the objective should be of overriding importance to society. Second, the objective should be one that can be achieved most effectively and simply through the tax system.<sup>14</sup>

The benefit that historic preservation provides for American society is well-accepted.<sup>15</sup> From the federal perspective, the preservation of our nation's heritage is clearly a national goal. Congress, in the National Historic Preservation Act of 1966,<sup>16</sup> declared "that the spirit and direction of the Nation are founded upon and reflected in its historic past" and "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."<sup>17</sup> Across the country more than 600 cities and towns have adopted landmark or historic district ordinances.<sup>18</sup> Landmark preservation laws have been upheld by the Supreme Court in the important preservation case of *Penn Central Transportation Co. v.*

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New Colonial Ice Company v. Helvering, 292 U.S. 435 (1934); Welch v. Henry, 305 U.S. 134 (1938); Deputy v. du Pont, 308 U.S. 488 (1940).

12. *Federal Tax Policy*, *supra* note 11, at 10.

13. Theodore S. Sims, Attorney Advisor, Office of Tax Legislative Counsel of the Internal Revenue Service, has explained that when a change in the Internal Revenue Code is proposed, the Treasury will often look to three main factors in analyzing whether the change represents sound tax policy. First, the law must be neutral with respect to its impact on economic activity, *i.e.*, it should not have unintended economic consequences. Second, the burden of the tax must be distributed equitably among individuals. Third, the law must be simple to understand. Brandywine, *supra* note 9, at 8-9.

14. *Federal Tax Policy*, *supra* note 11, at 11.

15. *See, e.g.*, NATIONAL TRUST FOR HISTORIC PRESERVATION, PRESERVATION: TOWARD AN ETHIC IN THE 1980's (1980). *See also*, Fowler, *Historic Preservation and the Law Today*, 12 URB. LAW 3 (1980).

16. 16 U.S.C. §§ 470-470(t), *as amended by* National Historic Preservation Act, Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987.

17. *Id.* §§ 470(a) and (b). One of the important features of the Act was the creation of an inventory or compendium of historic places to be listed in a National Register, thus strengthening the federal government's ties with historic preservation. *Id.* § 470(a). Other acts, such as the National Environmental Policy Act of 1969 (NEPA) (Pub. L. No. 91-190, 83 Stat. 852) and Executive Order 11,593 (May 13, 1971) (Exec. Order No. 11,593, 3 C.F.R. 559 (1971)), provided for mandatory review of all federal undertakings affecting the National Register program.

18. NATIONAL TRUST FOR HISTORIC PRESERVATION, DIRECTORY OF LANDMARK AND HISTORIC DISTRICT COMMISSIONS (1976) and DIRECTORY REVISION (1978).

*New York City*<sup>19</sup> where the Court observed that "structures with special historic, cultural or architectural significance enhance the quality of life for all."<sup>20</sup>

Assuming that the objective of historic preservation is a well-accepted national goal, the next inquiry is whether this recognized societal objective can best be achieved through direct fiscal appropriations with government management or through activities by the private sector encouraged by tax adjustments.<sup>21</sup> Government at the federal, state, or local level has the power of eminent domain to condemn land or any lesser interest in it,<sup>22</sup> including easements or conservation restrictions.<sup>23</sup> However, with the increase in the price of land, the whole system of government land acquisition, including partial interests, has been challenged as being too costly.<sup>24</sup>

The argument that the private sector should undertake easement acquisition programs and that individuals should be encouraged to make charitable donations of easements on their property is based on a number of factors.<sup>25</sup> Proponents assert that private groups and charitable organizations have far more resources, time, and skills than the government in establishing and administering specific programs to meet the diverse needs of donors who hold various types of conservation restrictions. These organizations are often staffed by ardent supporters who are thought to be much more interested than

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19. 438 U.S. 104 (1978).

20. *Id.* at 108.

21. Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334, 334-36 (1976). A related question arises as to whether a governmental entity or a private charitable organization is better suited to manage the property. See National Trust for Historic Preservation, *Establishing an Easement Program to Protect Historic, Scenic and Natural Resources* 10 (Information Sheet No. 25, 1980).

22. The power of the government to acquire land of historic importance for use as a national park was upheld by the Supreme Court as far back as 1896 in *U.S. v. Gettysburg Electric Power Company*, 160 U.S. 668 (1896) where the government used its eminent domain powers to establish the Gettysburg National Military Reservation.

23. Note that the Treasury in its testimony on H.R. 7318 fully accepted the concept of federal acquisition of easements and was willing to allow charitable deductions for donative transfers in the private sector as long as the easement was clearly tied into a governmental program. See *Deductions for Contributions of Certain Interests in Property for Conservation Purposes: Hearings on H.R. 7318 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 168 (1980) (statement of Daniel I. Halperin, Assistant Secretary of the Treasury).

24. See COMPTROLLER OF THE UNITED STATES, *THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED* (1979). The Supreme Court in *Penn Central* recognized the problem that "public ownership of historic properties is neither feasible nor wise" as it "reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of buildings as museums and similar facilities, rather than as economically productive features of the urban scene." 438 U.S. at 109 n.6.

25. See generally discussion in Brandywine, *supra* note 9, at 22-50.

the government in seeing that the easement restrictions are carefully enforced. Furthermore, since such organizations are smaller than most government agencies, they remain more intimately connected with the programs and may be better able to manage them.<sup>26</sup>

These proponents also argue that such programs save the government considerable expense.<sup>27</sup> While this may be true, the government still must absorb some of the costs as indirect expenditures paid through the tax system. Additionally, the use of charitable deductions for conservation restriction donations may not be as carefully scrutinized or controlled as a direct expenditure program.<sup>28</sup>

The government has placed, perhaps by default the primary responsibility for historic preservation in the private sector. Even while doing so, however, the government has recognized that property owners are reluctant to part with an interest in their property to some charitable organization without receiving something in return. Without the encouragement of the federal tax system for the donation of such interests to charitable organizations many of these private programs might be severely curtailed or abandoned.<sup>29</sup>

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26. See Brandywine, *supra* note 9, at 49-50. There are some 6,000 organizations across the country active in historic preservation. See Holubowich, *New Laws Protect Landmarks*, 116 TR. & EST. 232, 234 (1977).

27. The maintenance and operation of the property still falls on the landowner. See *Hearings on H.R. 7318*, *supra* note 23 (testimony of the Brandywine Conservancy, the French and Pickering Creeks Conservation Trust, Inc., et al.). The benefit to the public of an easement acquisition program by a charitable organization may be the same as if the public owned the entire fee but for considerably less cost to the taxpayer. See PICKERING II, *supra* note 9, at 82.

28. See Brandywine, *supra* note 9, at 10-13. It is this fear of an abuse of the easement program, not the basic principle behind allowing deductions for the charitable donation of easements, that most bothers the Treasury. Conversation with Thomas A. Coughlin, III, Chief Counsel, Real Estate, National Trust for Historic Preservation, Washington, D.C., November 17, 1980 [hereinafter cited as Conversation with Thomas A. Coughlin, III]. See also *Miscellaneous Tax Bills: Charitable Deduction for Certain Contributions of Real Property for Conservation Purposes: Hearings on H.R. 4611 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 3-8, 11-13 (1979) (statement of Daniel I. Halperin); *Hearings on H.R. 7318*, *supra* note 23 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury). One problem inherent in a system which allows private property owners to make charitable donations of conservation restrictions is that individuals may render large amounts of property nearly inalienable as they impose their own ideas as to how their property should be managed in perpetuity. Landowners, by effectively preventing development in one area, may simply deflect development in another direction. Conversation with Thomas A. Coughlin, III.

29. This is not to suggest that some property owners would not attempt to protect their property without receiving any tax benefit, for there are always such individuals who are motivated to do certain altruistic acts even without a tax system which encourages them. However, the tax system certainly "reinforces" an individual's decision to make the donation. See also *Expiring Historic Tax Structures: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, Serial 96-130*, 96th Cong., 2d Sess. 404-07 (1980) (statement of Michael L. Ainslie, President of the National Trust for Historic Preservation).

*A. Pre-1980 Law*

The Internal Revenue Code encourages the donation of charitable contributions under section 170(a) by allowing a deduction against ordinary income equal to the full fair market value of the donation of a gift to or for the use of an organization described in section 170(c), payment of which is made during the taxable year.<sup>30</sup> Charitable contributions of gifts to publicly supported charities may be deducted in an amount up to 50 percent of a taxpayer's adjusted gross income.<sup>31</sup> If the gift is made of appreciated property, the amount that may be deducted is limited to 30 percent of the taxpayer's adjusted gross income for the year of the gift.<sup>32</sup> For federal estate and gift tax purposes, no percentage limitations are imposed on transfers of charitable donations.<sup>33</sup>

The advantage for the taxpayer in making the lifetime gift is two-fold. First, by making the donation, he will reduce the amount of his taxable income and might enter a lower tax bracket. Second, he will avoid the possibility of being taxed at a higher rate when he sells the property and the income from the sale is added to his other income.<sup>34</sup> Additionally, there may be other savings for state and local tax purposes.<sup>35</sup>

Until 1964 it had been uncertain whether conservation restrictions could be deducted as charitable donations under section 170.<sup>36</sup> In 1964 the Internal Revenue Service promulgated Revenue Ruling 64-205,<sup>37</sup> holding that an open space or scenic easement constituted a cognizable and valuable interest in real property under state law sufficient to support a deduction under section 170 of the Code. The position of the Service was reinforced the following year in an I.R.S. news release announcing the availability of income tax deductions

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30. I.R.C. § 170(e)(1)(A) (1980).

31. *Id.* § 170(b). The amount of contributions that cannot be used in the given taxable year may be carried over in the five succeeding taxable years. *Id.* § 170(d).

32. *Id.* § 170(b)(1)(C). The deductibility may be increased to 50 percent of the adjusted gross income if the value of the long-term capital gain property is reduced by 40 percent of its appreciated value prior to claiming the charitable deduction.

33. *Id.* §§ 2055, 2522.

34. See Lutz, *Federal Tax Reforms Affecting Historic Preservation*, 48 U.M.K.C.L. REV. 435, 455-56 (1979).

35. T. COUGHLIN, EASEMENTS AND OTHER LEGAL TECHNIQUES TO PROTECT HISTORIC HOUSES IN PRIVATE OWNERSHIP 11 (1981) [hereinafter cited as LEGAL TECHNIQUES].

36. One reported decision prior to 1964 that related to the issue was *Mattie Fair v. Commissioner*, 27 T.C. 866 (1957) where the Tax Court found that development rights above the existing building constituted an interest in property and had a determinable fair market value. The deduction of the gift of the development right was a valid charitable contribution.

37. 1964-2 C.B. 62.

for gifts of scenic easements for the purpose of fostering natural beauty.<sup>38</sup>

Just as these new concepts were beginning to enjoy increased application in the preservation and conservation communities, the Tax Reform Act of 1969<sup>39</sup> nearly halted the availability of deductions for donations of open space easements. A new provision, section 170(f)(3)(B)(ii), was added to the Code, disallowing deductions to charities of less than a taxpayer's entire interest in property for income, estate, or gift tax purposes unless it was "an undivided portion of the taxpayer's entire interest in property."<sup>40</sup> Because an easement is a divided interest in property, this provision, taken literally, would have precluded the deductions. Fortunately, a statement in the Conference Report inserted at the last moment by the Conferees of the bill, characterized a gift of "an open space easement in gross" as an "undivided interest in property," thus securing the deductibility of open space easements.<sup>41</sup> The Treasury Depart-

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38. I.R.S. News Release No. 785, Nov. 15, 1965. Scenic easements would serve to protect and preserve a scenic view.

39. Pub. L. No. 91-172, 83 Stat. 642 (1969).

40. Prior to this time, a taxpayer could receive a deduction for a charitable donation of a less-than-fee interest, such as a life estate or a remainder. The Tax Reform Act of 1969, which disallowed a charitable deduction of less than a taxpayer's entire interest, applied also for estate and gift tax purposes under I.R.C. §§ 2055(e)(2), 2533(c)(2) (1980). For the authoritative study on the Tax Reform Act of 1969 and the changes in the law as to partial interest donations, see Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 75 (1975). See also SUBCOMM. ON SELECT REVENUE MEASURES OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 2D SESS., SECTION-BY-SECTION SUMMARY, ANALYSIS AND JUSTIFICATION OF H.R. 7956, 14 (1980) [hereinafter cited as SUBCOMM. REPORT].

41. The sentence reads: "The Conferees on the part of both Houses intend that a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity." H.R. REP. NO. 782, 91st Cong., 1st Sess. 294 (1969). See also *Tax Benefits*, *supra* note 9, at 307-09.

The fact that a conservation easement has been classified as "in gross" has historically created a number of problems for practitioners. See generally *Sensible Land Use*, *supra* note 3, at 2-4; *Environmental Conservation*, *supra* note 2, at 545-50. When easements are classified by the physical location of the holder of the easement, they are said to be either "appurtenant" or "in gross." An "appurtenant easement" is specifically created for the benefit of the possessor of the land to which the easement is appurtenant, called the "dominant estate." In the "easement in gross" there is no dominant estate and the right created is a mere personal interest in or right to use another's land.

A conservation easement is usually classified as in gross because of the relationship between the donor and the holder of the easement. Unfortunately, because of the incorporeal nature of the easement in gross, a number of states have not recognized the easement in gross as a real property interest at law. In other states the easement in gross is recognized but it may not be assigned and thus may not bind future owners. Still another problem area results in those states which recognize only affirmative but not negative easements in gross. Many states have resolved these questions by statute, either by expressly providing for the enforceability of

ment in 1972 ratified the position taken by the Conferees of the bill and restated the 1964 Revenue Ruling under Treasury Regulation section 1.170(b)(1)(ii).<sup>42</sup> The phrase "open space easement in gross" received a rather broad interpretation in a number of Revenue Rulings, Letter Rulings, Revenue Procedures, and court decisions to include easements that granted affirmative rights for public outdoor recreation purposes<sup>43</sup> as well as easements that protected historic structures.<sup>44</sup>

While the "undivided interest" exception to section 170(f)(3)(B)(ii) appeared to embrace various types of conservation restrictions, there was a general feeling in preservation circles that another exception should be grafted onto section 170 expressly exempting conservation easements from the general rule denying deductions of less than a taxpayer's entire interest in property.<sup>45</sup> A new exception was thus proposed and incorporated into section 2124(e) of the Tax

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easements in gross or by carving out special exceptions for those easements in gross for conservation or preservation purposes. See 3 R. POWELL, THE LAW OF REAL PROPERTY § 404[2] (1979); *Environmental Conservation*, *supra* note 2, at 54 n.23. See also *Hearings on H.R. 4611*, *supra* note 28, at 3 (letter of Douglas P. Wheeler, Executive Vice President, National Trust for Historic Preservation); *Hearings on H.R. 7318*, *supra* note 23, at 215 (statement of Thomas A. Coughlin, III, Chief Counsel, Real Estate, National Trust for Historic Preservation).

42.

For purposes of this subparagraph a charitable contribution of an open space easement in gross in perpetuity shall be considered a contribution of an undivided portion of the donor's entire interest in property to which section 170(f)(3)(A) does not apply. For this purpose an easement in gross is a mere personal interest in, or right to use the land of another; it is not supported by a dominant estate but is attached to, and vested in, the person to whom it is granted. Thus, for example, a deduction is allowed under section 170 for the value of a restrictive easement gratuitously conveyed to the United States in perpetuity whereby the donor agrees to certain restrictions on the use of his property, such as, restrictions on the type and height of buildings that may be erected, the removal of trees, the erection of utility lines, the dumping of trash, the use of signs.

Treas. Reg. § 1.170A-7(b)(1)(ii) (1972).

43. Rev. Rul. 74-583, 1974-2 C.B. 80; Rev. Rul. 75-373, 1975-2 C.B. 77.

44. Rev. Rul. 75-358, 1975-2 C.B. 70. The easement here consisted of restrictions in a deed obligating the owner of a mansion listed as a state historic landmark not to "alter the property from the historically significant appearance as a single family residence or modify in any way the unique architectural characteristics of the property." The deed also prohibited the property owner from "subdividing the property and conducting mining operations on and in the property." See also *Thayer v. Commissioner*, 36 T.C.M. 370 (1977).

45. Dissatisfaction with the "undivided interest" exception centered around three general problem areas. First, it was believed that the foundation for the deductibility of conservation easements should be based on more solid grounds than an exception to the general rule denying deductions for less than entire interests of property. Second, the phrase, "open space easement" did not seem adequate to address the issues relating to historic preservation. Finally, there were many people who continued to be troubled by the "in gross" aspect of the "undivided interest" exception. See generally *Tax Benefits*, *supra* note 9, at 309-10; *Charitable Gifts*, *supra* note 40, at 75-79.

Reform Act of 1976,<sup>46</sup> allowing a donation of "a lease on, option to purchase, or easement with respect to real property of not less than 30 years' duration granted to an organization described in subsection (b)(1)(A) exclusively for conservation purposes."<sup>47</sup>

The thirty-year period was later replaced by a provision requiring the easement to be "granted in perpetuity." The new provision, section 170(f)(3)(B)(iii), was not made a permanent part of the Code; rather it was to expire in five years on June 14, 1981.<sup>48</sup> Presumably, the "sunset date" would give Congress the opportunity to assess the value of the section before deciding whether to make it a permanent part of the Code.

The 1976 Act, instead of clarifying the law on donation of conservation easements, brought forth a host of new problems mainly turning on the new "conservation purposes" criteria of section 170(f)(3)(C).<sup>49</sup> It appeared much harder for the potential easement donor to

46. Pub. L. No. 95-455, 90 Stat. 1520 (1976). The Tax Reform Act of 1976 brought about one of the most sweeping revisions of the Internal Revenue Code in recent years. The new requirements of I.R.C. § 170(f)(3)(B) were part of a larger package of historic preservation provisions contained in § 2124 of the Act. Two new I.R.C. sections (167(o) and 191) encouraged the property owner to preserve and rehabilitate an existing structure through the use of accelerated depreciation and rapid amortization, and two other I.R.C. sections (280B and 167(n)) sought to discourage the property owner from demolishing the structure by denying demolition costs and disallowing the use of accelerated depreciation on any new structure built on the site of the demolished building. The new easement provision was considerably broader than the other sections in its potential application, since all the other provisions were only applicable to properties listed on the National Register of Historic Places or located within a registered Historic District. See I.R.C. § 191(d). Thus, a property owner who could not take advantage of the new tax incentives for the rehabilitation of his property might still be able to make use of the new easement provision.

47. "Conservation purposes" was defined in I.R.C. § 170(f)(3)(C) (1980) as meeting one of three criteria—

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

48. The thirty-year period was replaced by a change in the Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 309(a), 91 Stat. 126. See also discussion in *Tax Benefits*, *supra* note 9, at 315-18; Brenneman & Andrews, *Preservation Easements and Their Tax Consequences* 147, 151-52 in *TAX INCENTIVES FOR HISTORIC PRESERVATION* (G. Andrews ed. 1980). Another section, 170(f)(3)(B)(iv) was also added in 1976 allowing a donation for "a remainder interest in real property which is granted to an organization described in subsection (b)(1)(A) exclusively for conservation purposes."

Originally the provision was only applicable for a one-year period but was later extended to five years in the Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 309(b), 91 Stat. 126, 154. For a detailed discussion, see *Tax Benefits*, *supra* note 9, at 314-15.

49. The Conference Report on the Tax Reduction and Simplification Act of 1977 stated that the term "conservation purposes" was to be "liberally construed with regard to the types of property with respect to which deductible conservation easements or remainder interests may be granted." At the same time though, the Conferees issued a number of caveats in meeting

meet the "conservation purposes" test under the new law than under the old nebulous "open space easement in gross" undivided interest exception contained in Treasury Regulation section 1.170(b)(1)(ii). In the absence of regulations interpreting the 1976 provision, doubt existed as to the meaning of "conservation purposes." To complicate matters, the Committee Reports of the 1976 and 1977 Acts failed to indicate that the new provisions superseded the old "undivided interest" exception.<sup>50</sup> A conservation easement might fall under the old provision as a gift of an open space easement in gross in perpetuity or under the new clause as an easement granted in perpetuity exclusively for conservation purposes.<sup>51</sup> Even after the adoption of the new Code section, the Treasury issued a number of private letter rulings upholding the deductibility of a conservation easement based on the old "undivided interest" exception.<sup>52</sup>

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the test. The contributions would only qualify for the deduction in those situations where the "conservation purposes of protecting or preserving the property [would] in practice be carried out." The conservation easement had to be "related to the purpose or function constituting the donee's purpose for exemption" and the donee had to be "able to enforce its rights as holder of the easement or remainder interest and protect the conservation purposes which the contribution is intended to advance." In practice this meant that specific organizations and local government bodies could hold only those interests for which they were organized, *e.g.*, a nature conservancy would hold an easement for preserving open space or an historic preservation group an easement for preservation purposes. H. CONF. REP. NO. 95-263, 95th Cong., 1st Sess. 30-31, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 185, 294-95.

50. The August, 1980 report of the Subcommittee on Select Revenue Measures of the Committee on Ways and Means on H.R. 7956 noted that it was "unclear whether Congress intended the statutory provisions enacted in 1976 and modified in 1977 to supersede the statements made in the 1969 Conference Report." SUBCOMM. REPORT, *supra* note 40, at 15.

51. The overlap between the provisions has puzzled practitioners. Russell Brennehan, a noted authority on the subject, has stated in a conference on easements that "it is a curious thing that despite the 1976 amendments to the Code, the Congress left in place the existing regulations under the 'undivided interest' rule." PICKERING II, *supra* note 9, at 40. *See also Hearings on H.R. 4611, supra* note 28, at 216 (statements of William J. Chandler, Legislative Representative and John R. Flicker, General Counsel, the Nature Conservancy).

52. In May of 1977 the Service allowed a conservation or open space easement under the easement in gross exception as defined in Treas. Reg. § 1.170A-7(b)(1)(ii) which, by implication, relied on I.R.C. § 170(f)(3)(B)(ii). I.R.S. Private Letter Ruling, No. 7,734,023 (May 24, 1977). In another private letter ruling in Dec., 1979, the Service upheld the deductibility of conservation easements directly based on I.R.C. § 170(f)(3)(B)(ii). I.R.S. Private Letter Ruling, No. 8,012,026 (Dec. 27, 1979). Finally, in an April, 1980 Technical Advice Memorandum, the Treasury accepted the argument that a deduction for a conservation easement donation based on the old undivided interest exception will be allowed even in a jurisdiction that has not explicitly recognized easements in gross either by statute or judicial decision where it can be shown that "restrictive covenants similar to easements in gross will be treated as a valuable property right, enforceable against subsequent purchasers, if the subsequent purchasers have notice of the restriction, the restriction is reasonable, and its enforcement would not be contrary to public policy." Internal Revenue Service, National Office Technical Advice Memorandum, Index No. 0170.16-02 (Apr. 14, 1980). Such rulings may not be relied on as precedent. *See* I.R.C. § 6110(j)(3).

As the "sunset date" for the 1976 easement provision loomed ever closer, conservation and preservation groups began to push for legislative action to clarify the matter. The first bill to address the problem was H.R. 4611 introduced by Congressmen John H. Dingell (D. Michigan) and Andy Jacobs (D. Indiana) on June 26, 1979. The bill would have established the exception for the donation of an easement under section 170(f)(3)(B)(iii) and the "conservation purposes" test as a permanent part of the Code by eliminating the sunset provisions contained in the 1976 Act.<sup>53</sup>

While H.R. 4611 received considerable attention in the preservation community, the opposition of the Treasury to perceived abuses of the "conservation purposes" criteria resulted in the bill being tabled. After substantial input by the Treasury, the House Ways and Means Committee, the Joint Committee on Taxation, the Nature Conservancy, the National Trust for Historic Preservation, and other groups, Congressman Dingell introduced another bill the following year on May 8, 1980—H.R. 7318. This bill dealt with Charitable Deductions for Certain Contributions of Real Property for Conservation Purposes.<sup>54</sup>

Unlike its predecessor H.R. 4611, this new bill went considerably beyond the mere elimination of the sunset provisions. H.R. 7318 expressly repealed sections 170(f)(3)(B)(iii) and 170(f)(3)(C) of the 1976 Amendments. As modified after hearings, the bill proposed an entirely new enlarged scheme for defining the partial interests which could qualify as exceptions to the general rule denying a deduction for charitable contributions of certain partial interests in property.

After a favorable report by the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means, the bill was reported to the full committee, introduced in the House of Representatives, and passed on September 9, 1980.<sup>55</sup> The bill was then incorporated into another bill,<sup>56</sup> passed by the Senate on October 2, 1980, and approved again by the House of Representatives on December 1, 1980. Former President Carter signed the bill into law on December 17, 1980.<sup>57</sup>

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53. H.R. 4611, § 2, 96th Cong., 1st Sess. (1979). The first section of the bill allowed a landowner the right to make a charitable gift of land to a nonprofit or conservation organization while reserving subsurface mineral rights.

54. The bill was modified substantially in a committee markup before reaching its final form.

55. The bill actually passed was H.R. 7956, 96th Cong., 2d Sess. (1980). The provisions of H.R. 7310 were incorporated in and passed as § 103 of H.R. 7956.

56. The provisions of H.R. 7956 were included in H.R. 6975, 96th Cong., 2d Sess. (1980) and passed as the Tax Treatment Extension Act, Pub. L. No. 96-541, § 6, 94 Stat. 3204 (1980).

57. Pub. L. No. 96-541, 94 Stat. 3204 (1980).

*B. The 1980 Law—An Analysis of Section 170(h)*

1. Use of Conservation Restrictions

The conservation restriction or easement is an extremely versatile tool for providing protection for an historic property. The restriction may be tailored to meet the particular circumstances of each property and the specific needs and desires of an individual property owner.<sup>58</sup> For example, the conservation restriction might provide for the preservation of exterior features of an historic structure or insure that the facade will not be altered in any way. The restriction might protect against the development of the property around a building in a manner that would adversely affect the historic or architectural character of the property.<sup>59</sup> In this way, the owner ensures the preservation of the property long after it ceases to be his.<sup>60</sup> Similarly, in donating the conservation restriction, the property owner may be restricted in his use of the property and obligated to maintain it in conformance with the restrictions.<sup>61</sup> Nevertheless, even though the owner has surrendered certain rights, he still maintains close to full title to the property.<sup>62</sup>

The conservation restriction is usually created by a grant of an easement consisting of a recorded agreement between the property owner and the holder of the easement, typically, a governmental body or qualified charitable organization. The holder of the easement will have the capacity to compel the property owner to enforce the conditions of the restriction.<sup>63</sup>

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58. See generally LEGAL TECHNIQUES, *supra* note 35; Easement Program, *supra* note 21.

59. Some of the practical aspects of using easements in the preservation of historic sites are discussed in great detail in both PICKERING I, *supra* note 9 and PICKERING II, *supra* note 9. See also Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 133-45 (1976); Tondro, *An Historic Preservation Approach to Municipal Rehabilitation of Older Neighborhoods*, 8 CONN. L. REV. 248, 274-305 (1976).

60. Note that while the owner may be content to live with the restrictions, he is binding future generations and any subsequent purchasers. It is the marketplace which puts a value on the restriction. See discussion on valuation, text at notes 127-45 *infra*.

61. See generally LEGAL TECHNIQUES, *supra* note 35, at 6-7; Easement Program, *supra* note 21, at 18.

62. The flexibility of the conservation restriction allows the owner to grant such rights over his property as may be warranted in his particular situation. For example, the property owner might grant a series of conservation restrictions in stages while retaining some development rights. PICKERING II, *supra* note 9, at 48-49. Note, however, that this may lead to certain unexpected adverse valuation results since, under Rev. Rul. 76-376, 1976-2 C.B. 53, the "after" value of the land must be determined based on the entire tract of land, not just the portion encumbered by the restriction. See discussion on valuation, text at notes 127-45 *infra*.

63. See generally LEGAL TECHNIQUES, *supra* note 35, at 6-7; Easement Program, *supra* note 21, at 5.

The validity of the easement is governed by the law of the jurisdiction where the easement is to be applied.<sup>64</sup> Differences may exist between states as to which organizations are qualified to hold easements or as to whether the particular interest may in fact be transferred.<sup>65</sup>

## 2. New Code Analysis

To qualify as a charitable deduction under section 170 of the Code, a conservation restriction must be valid and enforceable under state law and must meet the specific criteria imposed by the federal tax law. The new Code provisions require that the restriction must come within the "qualified conservation contribution" exception of section 170(f)(3)(B)(iii) as defined and expanded upon in section 170(h).<sup>66</sup> Failure to meet the criteria of section 170(h) will not affect the validi-

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64. See generally Easement Program, *supra* note 21, at 4-6.

65. For a recent table of state legislation dealing with easements see Easement Program, *supra* note 21, at 37-39. See also *Environmental Conservation*, *supra* note 2 at 567-80; Nether-ton, *Restrictive Agreements for Historic Preservation*, 12 URB. LAW. 54, 62-68 (1980).

66. The adoption of the new "qualified conservation contribution" exception, while accepted by preservation and conservation groups as an improvement over the former law, has generated considerable concern in the same circles as to how much of the former body of law on open space easements is still applicable. The National Trust for Historic Preservation expressed concern that "in restructuring the Statutory authorization for charitable gifts of 'restrictions' for 'conservation purposes' . . . [the new provisions should] not nullify the substantial case law and practical experience gained from over 15 years of work by the Internal Revenue Service and affected preservation and conservation organizations." *Hearings on H.R. 7318*, *supra* note 23 at 215 (statement of Thomas A. Coughlin, III, Chief Counsel, Real Estate, National Trust for Historic Preservation).

Whether or not Congress intended to rescind the existing law is still an open question. The Committee Reports, in explaining the reasons for changes in the law, characterize the "numerous modifications" in terms of expanding the types of transfers which will qualify as deductible contributions in certain instances and restricting the types of transfers in other cases. H. R. REP. NO. 1278, 96th Cong., 2d Sess. (1980) [hereinafter cited as HOUSE REPORT]; S. REP. NO. 1007, 96th Cong., 2d Sess. 9-10 (1980) [hereinafter cited as SENATE REPORT]. Certain parts of the Committee Reports, such as the section dealing with the definition of contributions which are made "exclusively for conservation purposes," note that the present law is to be retained. HOUSE REPORT at 13-14, SENATE REPORT at 18-19. But in the section defining "conservation purposes," the reports note simply that the former definition has been revised. It is clear, however, that only I.R.C. § 170(f)(3)(B)(iii) (1980) presently applies to conservation restrictions. The Committee Reports specifically note: "[A] deduction for an open space easement in gross is not allowable under the undivided portion exception in Code Section 170(f)(3)(B)(ii)." HOUSE REPORT at 16-17, SENATE REPORT at 11. The fact that Congress chose to adopt new terminology and establish a new definitional framework for conservation purposes indicates a desire to break with the past confusion associated with "easements" and "open space easements in gross" and start again with a clean slate. While the former Internal Revenue Service Revenue Rulings and Letter Rulings may not be binding on future Service actions, they may still be illustrative of general principles, and trends in the developing law on conservation restrictions.

ty of the restriction under state law, but will result in a denial of the charitable deduction for tax purposes.

The "qualified conservation contribution" must meet three general requirements: the contribution must be of "a qualified real property interest;"<sup>67</sup> it must be made to "a qualified organization;"<sup>68</sup> and it must be made "exclusively for conservation purposes."<sup>69</sup> The first two requirements present few interpretative problems and will normally be met without much difficulty. The third requirement—that the contribution be made "exclusively for conservation purposes"—is substantially more ambiguous in its meaning and may present more problems in its application.

#### a. Qualified Real Property Interest

There are many "qualified real property interests" which may be donated in order to receive a charitable deduction.<sup>70</sup> The conservation restrictions or easements used in the historic preservation context fall under the property interest defined as "a restriction (granted in perpetuity) on the use which may be made of the real property."<sup>71</sup> The term "restriction" encompasses the broad range of interests in real property, such as easements, restrictive covenants, or other interests with similar attributes that are recognized under state property laws.<sup>72</sup> Note, however, that the flexibility which the Code allows in the creation of the real property interest is substantially limited by the constraint that the contribution meet specific "conservation purposes."<sup>73</sup>

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67. I.R.C. § 170(h)(1)(A) (1980).

68. *Id.*

69. *Id.* § 170(h)(1)(C).

70. *Id.* § 170(h)(2) provides that the term "qualified real property interest" means—

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

71. *Id.* § 170(h)(2)(C). The term easement was specifically dropped in the statute because of the confusion it had generated in the past, and the more general term "restriction" was adopted. The committee reports continued to use the term "easements" throughout their explanatory text even noting that the reason for the change in the law was to clarify "the treatment of open space easements." HOUSE REPORT, *supra* note 66, at 15; SENATE REPORT, *supra* note 66, at 10. Note that the restriction has to be perpetual to qualify for the deduction. If it is less than perpetual, the risk of termination has to be so remote as to be negligible. See Treas. Reg. § 1.170A-4(h)(7). See text at notes 147-56 *infra*.

72. Most states now recognize at least some type of property interest that might come under the classification of easement, restrictive covenant, conservation restriction, or the like. See Environmental Conservation, *supra* note 2, at 545-53.

73. I.R.C. § 170(h)(4) (1980). See text at notes 79-122 *infra*.

### b. Qualified Organizations

The qualified real property interest must be contributed to a "qualified organization" under section 170(h)(3). Such organizations include governmental units, publicly supported charities, and other specially qualifying organizations under section 509(a)(3).<sup>74</sup> While the Code allows considerable flexibility in providing who may receive and hold the conservation restriction,<sup>75</sup> two important considerations limit the donor's choice. First, many states restrict, in some manner, who may hold conservation restrictions.<sup>76</sup> Some confine conservation restrictions to governmental units, while others limit them to specified or approved organizations. Thus, state law may limit the donor in selecting the appropriate organization to hold the easement. Second, the Committee Reports note that the deduction will be allowed under the Code only in those cases where the conservation purposes will in practice be carried out.<sup>77</sup> Additionally, the contributions must "be made to organizations which have the commitment and the resources to enforce the perpetual restrictions and to protect the conservation purposes."<sup>78</sup>

### c. Conservation Purposes

The linchpin of the entire scheme for allowing charitable donations of conservation restrictions turns on fulfilling the third requirement,

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74. I.R.C. § 170(h)(3) provides:

QUALIFIED ORGANIZATION.—For purposes of paragraph (1), the term 'qualified organization' means an organization which—

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 509(c)(3) and—

(i) meets the requirements of section 509(a)(2), or

(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

75. For competing considerations in deciding whether a conservation restriction should be held by a private organization or governmental entity see note 21 *supra*.

76. See text at notes 64-65 *supra*.

77. HOUSE REPORT, *supra* note 66, at 19; SENATE REPORT, *supra* note 66, at 14.

78. *Id.* The Service does not have the time or resources to examine every transfer of a conservation restriction to insure that the organization has the bona fide intent and resources to fulfill its mandate of enforcing the conservation purposes. One way to minimize the potential for abuse would be to monitor closely those organizations which apply for tax exempt status before such status is granted. This would at least guarantee a certain level of responsibility on the part of those organizations.

The restrictions are, to a large extent, self-enforcing. As the deed of easement is a recorded instrument, potential developers are put on notice of the property's encumbrances. Furthermore, lenders will not lend money to develop land in violation of a recorded easement. LEGAL TECHNIQUES, *supra* note 35, at 6; *Hearings on H.R. 7318*, *supra* note 23, at 223 (statement of Thomas A. Coughlin, III, Chief Counsel, Real Estate, National Trust for Historic Preservation).

specifically, that the donation be made "exclusively for conservation purposes."<sup>79</sup> Whether a conservation restriction on any particular piece of property will meet the "conservation purposes" test depends on the nature of the specific property in question. By express statutory provision, there are certain properties which automatically meet the test. It is unclear, however, whether the "conservation purposes" test can be met by a large category of other properties. A variety of situations will be examined in order to determine the limits to which the "conservation purposes" test may be applied to a conservation restriction on an historic property.<sup>80</sup>

Throughout the following discussion, it should be noted that as the present statute was being revised, the Treasury Department, under former President Carter, expressed some concern about allowing deductions for conservation purposes in certain circumstances which might be subject to abuse.<sup>81</sup> The Treasury has not as yet interpreted the new Code section. Until the Treasury develops interpretative regulations or the Service issues some Revenue Rulings, a careful, but speculative analysis of section 170(h) is in order. We will therefore move cautiously from the "safe harbors" of deductions to the outer "uncharted" areas.

Section 170(h)(4) defines "conservation purposes" as furthering four principle objectives.<sup>82</sup> The Committee Reports note that "many contributions may satisfy more than one of those objectives" but that "it is only necessary for a contribution to further one of the

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79. I.R.C. §§ 170(h)(4), 170(h)(5) (1980).

80. It should be remembered that while the statutory provisions are written in broad terminology, this analysis is confined to the use of conservation restrictions as they apply in the historic preservation context.

81. See generally *Hearings on H.R. 4611*, *supra* note 28, at 11-13 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury); *Hearings on H.R. 7318*, *supra* note 23, at 168 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury) and discussion on valuation, text at notes 127-45 *infra*.

82. I.R.C. § 170(h)(4) (1980) reads:

CONSERVATION PURPOSE DEFINED.—

(A) In general.—For purposes of this subsection, the term 'conservation purpose' means—

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

four.”<sup>83</sup> Underlying all the definitions of “conservation purposes” is the fundamental policy that the deduction be allowed only in those circumstances when the public may be said to receive a clearly ascertainable benefit. In the context of historic preservation, the question of whether a conservation restriction on an historic property meets the “conservation purposes” test may depend on how the word “historic” is defined and interpreted. We must, therefore, consider initially what is meant by the word “historic.”<sup>84</sup>

In a very general sense, before a charitable deduction of a conservation restriction will be permitted, the building must be classified as “historic” in some manner. A number of factors may indicate whether or not the property is historic. For instance, is the structure included in a federal, state, or local “historic” listing? Is the building located within an “historic” district? Does the house, if located outside of an historic district, enhance the district? Can the building be seen by the public from a street or road? Does the structure contribute to a scenic panorama? These factors and others will determine the ease with which the “conservation purposes” test is met.

#### i. Certified Historic Structure

The optimal situation for meeting the “conservation purposes” test occurs when the structure is classified as a “certified historic structure.”<sup>85</sup> In its simplest form this means that the property is

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(B) CERTIFIED HISTORIC STRUCTURE.—For purposes of subparagraph (A)(iv), the term ‘certified historic structure’ means any building, structure, or land area which—

- (i) is listed in the National Register, or
- (ii) is located in a registered historic district (as defined in section 191(d)(2)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfied the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor’s return under this chapter for the taxable year in which the transfer is made.

83. HOUSE REPORT, *supra* note 66, at 16; SENATE REPORT, *supra* note 66, at 10. Note that the conservation purposes test is not met, if the charitable contribution accomplishes one of the enumerated conservation purposes at the expense of another conservation interest. HOUSE REPORT, *supra* note 66, at 18; SENATE REPORT, *supra* note 66, at 13.

84. No distinction is made between residential and non-residential structures in the Code. In fact, it is not necessary that people “use” the structure, as might be the case with an ancient monument or ruin. There is a deliberate attempt to erase the line between buildings and land areas, and to treat everything as part of the total environment.

85. I.R.C. §§ 170(h)(4)(A)(iv) and 170(h)(4)(B) (1980). This particular provision uses the same system as embodied in I.R.C. § 191(d)(1) dealing with the special tax incentives for the preservation and rehabilitation of certified historic structures. But unlike I.R.C. § 191(d)(1), which is

listed on the National Register of Historic Places.<sup>86</sup> The National Register is a federal listing of "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture."<sup>87</sup> Any building, structure, or land area<sup>88</sup> listed on the National Register automatically meets the "conservation purposes" test because preservation of any building, structure, or land area listed on the National Register is in the public interest.<sup>89</sup>

If the building or structure is eligible for listing on the National Register, but has not been so registered, the attorney seeking to qualify the donation should list the property.<sup>90</sup> In addition, any building, structure, or land area which is not specifically listed on the National Register, but which is located within the bounds of a National Register historic district, may also come within the definition of a "certified historic structure."<sup>91</sup> The listing in this instance is not automatic for the property owner must first obtain a certification from the Secretary of the Interior that the property is of historic significance to the district before it may qualify as a "certified historic structure."<sup>92</sup> If the property is not located in a National Register historic district, but is situated in a state or local historic district, the property owner may still be able to take advantage of

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only applicable to depreciable properties, this section has been broadened to apply to any structure, whether or not it is depreciable, including private residences.

86. 16 U.S.C. § 470(a)(9) (1976), *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987.

87. 16 U.S.C. § 470 (1976).

88. It is probable that the phrase "building, structure or land area" embraces the terms "sites" and "objects." "Districts" are dealt with separately in I.R.C. § 170(h)(4)(B)(ii) (1980). Note that if the building, structure, or land area complies with the certification requirements at the time of the transfer of the restriction or on the due date (including extensions) for filing the transferor's returns, the section is satisfied. *See id.* § 170(h)(4)(B).

89. 16 U.S.C. § 470 (1976).

90. *See* 36 C.F.R. § 1202.1-17 (1980) and the applicable state procedures available from the State Historic Preservation Officer. The National Register is only partially complete. Thus, many other structures may be eligible for listing but not yet listed. Note, however, that the process of nominating private properties to the National Register has been temporarily halted pending promulgation of regulations allowing citizens the opportunity to concur in or object to a National Register listing. *See* National Historic Preservation Act of 1966, 16 U.S.C. § 470(a), *as amended by* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 201(a), 94 Stat. 2987; Letter from Jerry L. Rogers, Acting Associate Director for Cultural Programs, Heritage Conservation and Recreation Service, United States Department of the Interior to State Historic Preservation Officers and Federal Representatives, Jan. 7, 1981.

91. I.R.C. §§ 170(h)(4)(B)(i), 191(d)(1) (1980).

92. 36 C.F.R. § 1208 (1980). The law is somewhat unclear in this area. Although the statute appears to mandate certification, the Committee Reports indicate a broader intention that land areas and buildings necessary to protect the integrity of historic districts will qualify. HOUSE REPORT, *supra* note 66, at 17; SENATE REPORT, *supra* note 66, at 12. *See* discussion, text at notes 96-103 *infra*.

the "certified historic structure" provision.<sup>93</sup> However, here the property owner must first obtain a certification from the Secretary of the Interior that the entire historic district meets substantially all the requirements for the listing of a National Register district. Then the owner must still obtain a certification for his own building.<sup>94</sup>

A conservation restriction on a building falling within the definition of "certified historic structure" will automatically qualify for a charitable deduction under the "conservation purposes" test. The statutory connection to the National Register program provides a clear and simple standard for the property owner. It is also the only real "safe harbor" in meeting the "conservation purposes" requirement. Unfortunately, the number of "certified historic structures" is not that extensive compared with the total number of historic properties in the country, so the opportunity to take advantage of this provision will be limited. Therefore, the property in question might have to be brought within one of the other definitions of "conservation purposes."

In contrast to the relatively simple "certified historic structure" requirement, these other definitions either lack the clear-cut relationship to a fixed set of criteria automatically qualifying the deduction or are burdened by other requirements. Thus, meeting one of these other definitions requires careful documentation with respect to why the property is of some historic value.<sup>95</sup> The Service will look for some clearly ascertainable benefit to the public, especially in those cases where the reasons for allowing the deduction are not immediately apparent.

## ii. Historically Important Land Area

Property located just outside or around a "certified historic structure" may meet the conservation purposes test as an "historically important land area."<sup>96</sup> The Committee Reports clearly reflect that the term "historically important land area" is intended to include historic sites and related land areas. Those sites and land areas would serve as a type of extended buffer zone with "physical or environmental features" that "contribute to the historic or cultural importance and continuing integrity of certified historic structures"

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93. I.R.C. § 170(h)(4)(B)(ii) (1980).

94. *Id.* § 191(d)(3); 36 C.F.R. §§ 1208, 1209 (1980).

95. This may mean gathering historical data, expert opinions, appraisal reports from realtors and architects, or anything else that would tend to verify the historic value of the property.

96. I.R.C. § 170(A)(iv) (1980).

and which may be needed to protect such structures.<sup>97</sup> In practice, conservation restrictions on private land surrounding "certified historic structures such as Mt. Vernon, or historic districts, such as Waterford, Virginia, or Harper's Ferry, West Virginia," would come within the definition of an "historically important land area."<sup>98</sup> The concept appears broad enough to embrace a small lot in an urban setting next to a National Register site as well as an extensive number of acres near a National Register historic district.<sup>99</sup>

In a sense, the "historically important land area" concept may be understood as the Committees' acceptance of the notion that the land surrounding a certified historic structure may be as important as the structure itself. But unlike the situation involving certified historic structures directly, it may be necessary to prove that conservation restrictions are critical for the preservation of those physical or environmental features of the land area which enhance the certified historic structure.<sup>100</sup>

If the property in question is not located anywhere near a "certified historic structure," could it still qualify as an "historically important land area?" The answer appears to be "yes" if the Committee Reports are interpreted literally.<sup>101</sup> The Reports indicate that an "historically important land area" includes an "independently significant land area," such as a Civil War battlefield.<sup>102</sup> The Committee Reports do not develop this concept any further; therefore, it is inadvisable to rely solely on that particular definition of "independently significant land area" to establish that the property meets the "conservation purposes" test. The concept of "independently significant land area" may gain more strength when used in conjunction with other portions of the statute.<sup>103</sup>

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97. HOUSE REPORT, *supra* note 66, at 17; SENATE REPORT, *supra* note 66, at 12. "Certified historic structure" includes individual buildings as well as historic districts. See text at notes 85-92 *supra*.

98. HOUSE REPORT, *supra* note 66, at 17; SENATE REPORT, *supra* note 66, at 12.

99. There is no explicit provision that the historically important land area must be contiguous to a certified historic structure. For instance, a situation could arise where the land area in question was separated from an historic district by a highway or river, yet development of the property would still be adverse to the certified historic structure.

100. Conceivably, this might not be a difficult proposition since the continuing integrity of a certified historic structure might be jeopardized from a purely aesthetic perspective by a suburban tract development.

101. HOUSE REPORT, *supra* note 66, at 17; SENATE REPORT, *supra* note 66, at 12.

102. *Id.*

103. If all "independently significant land areas" met the "conservation purposes" test without any clear guidelines, then some of the other sections discussed below would be rendered irrelevant.

### iii. Preservation of Open Space

What if an individual owns property which is considered to be a scenic or a picturesque part of the community, or which is considered historic under some governmental program but which does not come within any of the above definitions? In such instances, to qualify for the deduction, the property or land must come under the definition of "preservation of open space" and meet other aspects of the "conservation purposes" test.<sup>104</sup>

Congress used "open space" as a type of catchall provision that could include essentially anything that exists in the natural or built environment. However, the "preservation of open space" will qualify as a conservation purpose only when the conservation restriction meets one of two conditions and at the same time yields a "significant public benefit."<sup>105</sup> It must either be "for the scenic enjoyment of the general public"<sup>106</sup> or be made "pursuant to a clearly delineated Federal, State, or local governmental conservation policy."<sup>107</sup> The Committee Reports fail to define the term "open space" beyond these requirements. The Reports are unclear as to whether the old revenue rulings on open space apply to conservation restrictions.<sup>108</sup> Under the present Code, a deduction for a conservation restriction for the "preservation of open space" is allowed only under section 170(h)(4)(B) and is not permitted under the "undivided interest" exception in former Code section 170(f)(3)(B)(ii).<sup>109</sup> The new requirements of the "preservation of open space" section, while allowing a charitable deduction for this type of conservation restriction, are intended to "insure that deductions are permitted only for open space easements that provide significant benefits to the public."<sup>110</sup>

The first condition that the preservation of open space must be "for the scenic enjoyment of the general public" is an amorphous provision. It could be interpreted as permitting conservation restrictions on many properties which could not qualify as "certified historic structures" or "historically important land areas."<sup>111</sup> The idea is purely an aesthetic one—namely, the use of conservation

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104. I.R.C. § 170(h)(4)(A) (1980).

105. *Id.*

106. *Id.* § 170(h)(4)(A)(iii)(I).

107. *Id.* § 170(h)(4)(A)(iii)(II).

108. HOUSE REPORT, *supra* note 66, at 16; SENATE REPORT, *supra* note 66, at 10. See discussion note 66 *supra*.

109. HOUSE REPORT, *supra* note 66, at 16-17; SENATE REPORT, *supra* note 66, at 11.

110. HOUSE REPORT, *supra* note 66, at 16; SENATE REPORT, *supra* note 66, at 11.

111. HOUSE REPORT, *supra* note 66, at 17; SENATE REPORT, *supra* note 66, at 11.

restrictions to prevent the type of development which would interfere with a scenic panorama or view of some property. Central to the idea of "scenic enjoyment" is the simple requirement that the property can be "seen" or "viewed" by the general public.<sup>112</sup> This scenic panorama "can be enjoyed from a park, nature preserve, road, waterbody, trail, historic structure or land area" as long as the "area or transportation way [providing the viewpoint] is open to or utilized by the public."<sup>113</sup>

Although the "significant public benefit" requirement considerably circumscribed the "scenic enjoyment" provision, the potential exists for unique and individual applications of this particular conservation purpose. In a rural environment the estate lands surrounding an historic structure might qualify. In an urban setting a conservation restriction might protect the air rights above an existing building. Conceivably, the restriction might limit the property owner's right to develop his property to a maximum height and density level above a structure or group of buildings in an historic district in order to protect the "scenic enjoyment" of the view.<sup>114</sup>

Property which cannot be seen by the general public may still qualify as the "preservation of open space" under the second provision that the preservation be "pursuant to a clearly delineated Federal, State, or local governmental conservation policy."<sup>115</sup> The Reports note: "This provision is intended to protect the types of property identified by representatives of the general public as worthy of preservation or conservation."<sup>116</sup> Thus, a charitable deduction might be possible for a conservation restriction donated pursuant to any one of the 600 local or state preservation programs across the country.<sup>117</sup>

In addition to meeting either the "scenic enjoyment" or the "clearly delineated federal, state, or local governmental conservation policy" provisions, a conservation restriction must yield a "significant public benefit."<sup>118</sup> What actually constitutes a "public benefit" will be determined on an individual basis. The Senate Committee

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112. It is important to note that the reports distinctly define "scenic enjoyment" as a type of visual, not physical, access by the general public to the property. *Id.*

113. *Id.*

114. "Scenic enjoyment" under the visual access standard would not encompass a preservation easement restricting the right to alter the interior of a structure. However, it might be potentially applicable in those historic structures which are open to the public on a regular schedule.

115. *Id.*

116. *Id.*

117. See note 18 *supra*.

118. I.R.C. § 170(h)(4)(A) (1980).

observed that "factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution."<sup>119</sup> Some of the suggested factors include:

- 1) the uniqueness of the property;
- 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 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; and
- 4) the opportunity for the general public to enjoy the use of the property or to appreciate its scenic values.<sup>120</sup>

The list is not meant to be exclusive, but at present it is the best guide to the definition of "public benefit" pending the issuance of regulations or revenue rulings. The public benefit of a conservation restriction based on the "scenic enjoyment" provision might arise directly from the public's opportunity to "enjoy the use of the property, or to appreciate its scenic values" as noted in the fourth enumerated factor. Conservation restriction for open space made pursuant to "a clearly delineated Federal, State, or local governmental conservation policy" would be considered a public benefit under the third enumerated factor. Since historic districts and landmark designations are per se for the benefit of the public,<sup>121</sup> protection of any property within an historic district or of a designated landmark through conservation restrictions is also within the public interest.<sup>122</sup>

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119. SENATE REPORT, *supra* note 66, at 12.

120. HOUSE REPORT, *supra* note 66, at 17; SENATE REPORT, *supra* note 66, at 12.

121. Since the Supreme Court of the United States has upheld the constitutionality of landmark designation programs in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), as well as urban renewal in *Berman v. Parker*, 348 U.S. 26 (1954) as a valid use of the police power, there is no question as to the "public benefit" which accrues from the protection of a property located within an historic district or of a designated landmark. Of course, if the property falls within the definition of a certified historic structure, no public benefit need be demonstrated as the deductibility of an easement under those circumstances is provided for separately in I.R.C. § 170(h)(4)(A)(iv) (1980).

122. I.R.C. § 170(h)(4)(A)(i) (1980).

## III. POLICY CONSIDERATIONS

The revision of the Code sections for the donation of charitable contributions of conservation restrictions reflected, to a certain extent, the attempt to reconcile the views endorsed by the Treasury and those advocated by various conservation and preservation groups.<sup>123</sup> The latter groups had advocated an expanded use of conservation restrictions while the Treasury, in the Carter Administration, sought their confinement to more limited circumstances.<sup>124</sup> The underlying fear on the Treasury's part was that the allowance of charitable deductions for contributions of conservation restrictions was subject to abuse unless they directly provided some ascertainable public benefit.<sup>125</sup> The adoption of the "conservation purposes" scheme along with the accompanying language in the Committee Reports served to allay the Treasury's fears and provide the flexibility that conservation and preservation groups needed to meet different circumstances.<sup>126</sup>

Yet, even as the new Act clarifies many of the old questions relating to the deductibility of conservation restrictions, a number of problem areas remain to be resolved. Chief among them are issues of valuation of the conservation restriction, termination of the interest, and policy considerations in determining whether a conservation restriction meets the "conservation purposes" test.

## A. Valuation

The value of a partial interest in property is determined by the fair market value of that partial interest.<sup>127</sup> Fair market value is defined under the Code as the price at which the property would change hands between a willing buyer and willing seller, both having a

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123. See generally *Hearings on H.R. 7318*, *supra* note 23, at 168 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury); see, e.g., *id.* at 212 (statement of Thomas A. Coughlin, III, National Trust for Historic Preservation); *id.* at 216 (statement of William J. Chandler, the Nature Conservancy); *id.* at 218 (statement of Jennie Gerard, Trust for Public Land); Conversation with Thomas A. Coughlin, III, *supra* note 28.

124. One of the Treasury's suggestions was to allow donations of conservation restrictions only in those circumstances where they were tied directly into a defined governmental program. *Hearings on H.R. 7318*, *supra* note 23, at 168 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury).

125. *Id.* at 17-20 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury).

126. *Id.* at 168 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury); Conversation with Thomas A. Coughlin, III, *supra* note 28.

127. Treas. Reg. § 1.170A-7(C).

reasonable knowledge of relevant facts in the transaction.<sup>128</sup> A conservation restriction may prevent the property from being developed to its "highest and best use" and, consequently, may decrease the property's fair market value. The amount of the decrease in value is what the owner may deduct for the charitable donation of the conservation restriction. Since the value of the conservation restriction will determine the amount of the taxpayer's charitable deduction, it is essential that the valuation be done accurately.<sup>129</sup> Accuracy of valuation of conservation restrictions may possibly be the single most important issue in the entire conservation restriction scheme.<sup>130</sup>

Although the Revenue Procedures spell out basic methods for appraising property,<sup>131</sup> there are no specific regulations as to the valuation of conservation restrictions. In 1973 the Treasury approved of a valuation method referred to as the "before and after" approach. Under this method, the fair market value of the easement is ascertained by taking "the difference between the fair market value of the total property before the granting of the easement and the fair market value of the property after the grant."<sup>132</sup> This method was further defined in a later revenue ruling<sup>133</sup> when a property owner sought a deduction for a conservation restriction over a portion of his property. In assessing the value of an easement over a portion of the property, the taxpayer must take the difference between the fair market value of the entire property before and after the easement was granted, not simply the before-and-after values of that portion encumbered by the easement.<sup>134</sup> Presumably, a gift of an easement

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128. Treas. Reg. § 1.170A-1(C)(2). Since there is no "real market" for conservation restrictions or easements, it is often difficult to determine their value. Of course, in assigning a value to easements, it might be possible, in certain circumstances, to see what the value was of an easement which the federal or state government had taken by condemnation. There the record exists and it would be possible to determine what had been paid under those circumstances. See PICKERING II, *supra* note 9, at 87 (presentation of Susan Julia Ross at Appendix I).

129. See HOUSE REPORT, *supra* note 66, at 20; SENATE REPORT, *supra* note 66, at 15.

130. The Treasury, in testifying on the changes in the Code, expressed concern over what it classified the "aggressive and abusive valuation" of partial interests and claimed that easements were "for both practical and conceptual reasons . . . difficult to value." *Hearings on H.R. 7318*, *supra* note 23, at 21 (statement of Daniel I. Halperin, Assistant Secretary of the Treasury). Valuation will undoubtedly be a source of contention between the taxpayer and the Service until current appraisal standards are recognized as valid. In a roughly analogous situation, the impracticality of the Service's attempt to deal with valuation in the art world is discussed in Speilley, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUMBIA L. REV. 214, 234-38 (1980).

131. Rev. Proc. 66-49, 1966-2 C.B. 1257.

132. Rev. Rul. 73-339, 1973-2 C.B. 68.

133. Rev. Rul. 76-376, 1976-2 C.B. 53. See *Thayer v. Commissioner*, 36 T.C.M. 370 (1977).

134. Rev. Rul. 76-376, 1976-2 C.B. 53.

over another portion of the property would follow the same formula and would relate back to the original total tract for valuation purposes.

There are, however, inherent problems with the valuation of conservation restrictions not adequately resolved by this formula. The Committee Reports note that the valuation test "should not be applied mechanically"<sup>135</sup> and that the appraiser should base the valuation not merely on the current use of the property but should take into account "how immediate or remote the likelihood is that the property, absent the restriction, would be developed."<sup>136</sup> This does not require ascertaining the subjective intent of the owner. It does require the appraiser to take into account external factors such as "zoning, conservation, or historic preservation laws that would restrict the development of the property" as well as other "restrictions on adjacent pieces of property."<sup>137</sup> Thus, a conservation restriction preserving a building in an urban setting where development pressures are high would be far more valuable than a restriction applied to a comparable structure in a rural setting where the pressures for development are far less intense.<sup>138</sup> Similarly, a conservation restriction protecting a parcel of property located in a local historic district, where changes to a facade are strictly monitored, might have less value than a restriction over a similar structure located outside of an historic district where no such controls exist.<sup>139</sup>

The actual amount which the taxpayer can deduct will be dependent on the value of the property. Once the transfer has been made, the donor's basis in the property will be reduced by a percentage equal to the value of the interest over the fair market value of the entire property.<sup>140</sup> Gain recognized upon a sale will be increased because of the reduction in the owner's adjusted basis.<sup>141</sup>

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135. HOUSE REPORT, *supra* note 66, at 19-20; SENATE REPORT, *supra* note 66, at 15.

136. HOUSE REPORT, *supra* note 66, at 20; SENATE REPORT, *supra* note 66, at 15.

137. *Id.*

138. LEGAL TECHNIQUES, *supra* note 35, at 9.

139. A determination would have to be made in the appraisal as to how stringent the controls actually were in the historic district as well as how easy it would be to exempt any properties from the historic district laws. See National Trust for Historic Preservation, Conservation Easements: The Urban Setting: A Workshop to Discuss Charitable Donations of Easements for Conservation Purposes 16 (1980) (unpublished summary of meeting) (discussion of J. Reynolds, MAI, Reynolds & Reynolds, Inc., Washington, D.C.).

140. Rev. Rul. 64-205, 1964-2 C.B. 62. Essentially the taxpayer's basis is allocated between the value of the property retained and the value of the interest given up. See LEGAL TECHNIQUES, *supra* note 35, at 11.

141. I.R.C. §§ 167, 1011, 1016 (1980). Note that where the basis of the property is relatively high and the taxpayer may still take long depreciation deductions, a transfer of a conservation

In certain circumstances a conservation restriction may actually increase the value of the property. For example, a restriction which obligates the owner to preserve and maintain valuable features of the facade of the property may make the property more attractive to potential buyers and, thereby, increase its fair market value.<sup>142</sup> If the restriction increases the property value, a charitable contribution might not be allowable.<sup>143</sup>

The Committee Reports contemplate that as the use of conservation restrictions increase, appraisers will undertake more complex valuation methods. Such procedures might "take into account the selling price" in arms-length transactions of other properties burdened with comparable restrictions.<sup>144</sup> Valuation will undoubtedly become a much more refined process in the future.<sup>145</sup>

### *B. Termination*

The allowance of the deduction for the charitable donation of the conservation restriction is premised on the notion that the owner has agreed to accept a perpetual restriction on the use of his property. The requirement that the contribution be made "exclusively for conservation purposes" is only satisfied if the purpose of the restriction is protected in perpetuity.<sup>146</sup> If it later became necessary to transfer

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restriction which reduces the basis will not be an attractive option. But where the property has already been depreciated over a number of years and the basis is quite low or at zero, the deduction for a transfer of a conservation restriction would be desirable. *See* Urban Setting, *supra* note 139, at 27 (discussion of R. Roddewig, Real Estate Analyst associated with Shlaes & Company, Chicago, Illinois).

142. HOUSE REPORT, *supra* note 66, at 20; SENATE REPORT, *supra* note 66, at 15. *See* Thayer v. Commissioner, 36 T.C.M. 370 (1977); Urban Setting, *supra* note 139, at 16 (discussion of J. Reynolds); *id.* at 18 (discussion of J. Shlaes, MAI, CRE, President, Shlaes & Company, Chicago, Illinois).

143. *See* Lutz, *Federal Tax Reforms*, *supra* note 34, at 463-64.

144. HOUSE REPORT, *supra* note 66, at 20; SENATE REPORT, *supra* note 66, at 15. While appraisal techniques in many areas are sophisticated, few appraisers understand the potential complexities in valuing conservation restrictions. Conversation with J. Reynolds, MAI, Reynolds & Reynolds, Washington, D.C., Apr. 28, 1981.

One technique in valuing conservation restrictions is to use the comparable or market data appraisal technique for valuing the property before imposition of the easement and then using the income approach (capitalized value of net operating income) after the restriction has been applied to determine the fairest value of the restriction. For further discussion *see* Urban Setting, *supra* note 139, at 27 (discussion of R. Roddewig).

145. One commentator has suggested the establishment of a system to be used by the I.R.S. which establishes clearly defined standards for determining the value of losses for certain types of conservation restrictions as applied to specific classes of structures. *See* Urban Setting, *supra* note 139, at 18 (discussion of J. Shlaes).

146. I.R.C. § 170(h)(5) (1980) reads:

EXCLUSIVELY FOR CONSERVATION PURPOSES.—For purposes of this subsection—

the interest, the donee organization could transfer it only to another qualified organization that would also hold the perpetual restriction on the property exclusively for conservation purposes.<sup>147</sup>

Even though both the donor and donee may have had a bona fide good faith intent that the conservation restriction be enforced in perpetuity, the restriction may be terminated in an involuntary or voluntary manner. An involuntary termination would result from an act beyond the control of the donor or the holder of the restriction. For example, the total destruction of an historic building with a conservation restriction on the facade would result in the termination of the easement.<sup>148</sup> A voluntary termination would occur when the owner ignores the easement restriction and begins to develop the property in some manner contrary to the terms of the restriction. The charitable organization then has the right and the responsibility to enforce the restriction. If the owner of the property refuses to abide by the restrictions in the easement, the donee is entitled to legal and equitable relief.<sup>149</sup>

Termination of the conservation restriction either involuntarily or voluntarily may result in detrimental tax consequences for the donor.<sup>150</sup> Since the conservation restriction reduces the value of the property below its fair market value, once the restriction is wholly or partially extinguished, the property may return to the full fair market value.<sup>151</sup> The donor will once again have full use of his property as the property interest he had previously donated (the conservation restriction) is returned to him. The return of a charitable gift

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(A) CONSERVATION PURPOSE MUST BE PROTECTED.—A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

147. HOUSE REPORT, *supra* note 66, at 18-19; SENATE REPORT, *supra* note 66, at 13-14. The first donee organization cannot transfer the property interest for money, other property, or services. See also H. CONF. REP. NO. 95-263, 95th Cong., 1st Sess. 30-31, *reprinted in* U.S. CODE CONG. & AD. NEWS 185, 294-95.

148. Many grants of easements contain provisions providing for the termination of the easements upon the happening of such an event. See, e.g., sample easements in LEGAL TECHNIQUES, *supra* note 35, at 14; Easement Program, *supra* note 21, at 32. Courts generally embrace the common law "change of circumstances" doctrine that once the purpose for which the easement had been made is defeated or destroyed, the easement is extinguished. See *Hearings on H.R. 7318*, *supra* note 23, at 223. See also *Sensible Land Use*, *supra* note 3, at 9-11.

149. See sample easements in LEGAL TECHNIQUES, *supra* note 35, at 14, and Easement Program, *supra* note 21, at 32. See also *Sensible Land Use*, *supra* note 3, at 9-11.

150. The legislative history contains only a limited discussion on this subject. *Hearings on H.R. 7318*, *supra* note 23, at 223.

151. The assumption here is that the property is worth more without the conservation restriction than with it.

for which a deduction had been taken may result in income to the owner under the "tax benefit rule."<sup>152</sup>

The return or recovery of the property,<sup>153</sup> formerly deducted as a charitable donation, will be treated as ordinary income in the year of recovery and taxed at the rates effective in that year.<sup>154</sup> If the property has appreciated in value, the amount of tax will be limited to the value of the property at the time when it was originally contributed.<sup>155</sup>

### *C. Meeting the Conservation Purposes Test*

The types of conservation restrictions which may be created are virtually unlimited. But, as discussed above, the restriction must meet the "conservation purposes" test to be deductible under section 170. With the exception of the "certified historic structure" provision, the Code provides inadequate guidance for the property owner in determining whether a particular donation will qualify as a valid transfer or will be termed abusive by the Service and disallowed. Questions as to whether the conservation restriction fulfills a valid conservation purpose will remain unresolved until the Service promulgates revenue rulings and procedures or the Treasury issues regulations.<sup>156</sup>

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152. The tax benefit rule is stated in J. MERTENS, *LAW OF FEDERAL TAXATION* § 7.34 (rev. ed. 1969): "[If] amount deducted from gross income in one taxable year is recovered in a later year, the recovery is income in the later year." See also the leading case of *Alice Phelan Sullivan Corporation v. United States*, 381 F.2d 399 (Ct. Cl. 1967). It is irrelevant for the application of the rule that the property was not used for the charitable purpose for which it was given. *Rosen v. Commissioner*, 611 F.2d 942 (1st Cir. 1980).

Alternatively, it can be argued that only upon sale would income be recognized and taxed at capital gains rates. See *Hearings on H.R. 7318*, *supra* note 23, at 223.

153. The principle holding a return of property recoverable as income under the tax benefit rule should also apply to lesser interests in property.

154. The recovery is taxable only to the extent that the item was previously deducted and a tax benefit received. Thus, if the property was returned before the end of the same taxable year there would have been no deduction in the first place. I.R.C. § 111, Treas. Reg. § 1.111-1 (1980). See Rev. Rul. 54-566, 1954-2 C.B. 96; Rev. Rul. 76-150, 1976-1 C.B. 38; *Alice Phelan Sullivan v. United States*, 381 F.2d 399, 403 (Ct. Cl. 1967).

155. Rev. Rul. 59-141, 1959-1 C.B. 17. Note also that the basis will return to what it was at the time the gift was made.

156. The Committee Reports contemplate that the regulations under these new provisions will be given the "highest priority" among the Treasury's regulation projects. HOUSE REPORT, *supra* note 66, at 18; SENATE REPORT, *supra* note 66, at 13. Until that time, the Committee Reports suggest that the "taxpayer may obtain a prior administrative determination as to whether the contemplated contribution will be considered to have been made for a qualifying conservation purpose." *Id.* Note, however, that I.R.S. administrative practice precludes issuance of advisory opinions prior to the issuance of regulations except in the case of hardship and where there are questionable areas of law for interpretation. Conversation with Thomas

Future Treasury regulations might attempt to resolve the ambiguities in the Code in a variety of ways. One method would be to provide examples of transfers of conservation restrictions which would not qualify as valid conservation purposes. A conservation restriction preventing development of a backyard of a home in a suburban tract where there were no legitimate conservation or scenic purposes to be served would not qualify. Similarly, a restriction on altering the facade of a structure which was not characterized as historic under any governmental program, was not located in or near an historic district, and which could not be seen by the public, would also not qualify. The problem with this approach is that for every example of a supposedly abusive situation there may exist a legitimate exception. Such prohibitory regulations might exclude a number of valid conservation donations.

A second method would be to establish a clearly delineated system of regulations defining all terms and concepts with specificity. Under this approach an "independently significant land area" which helps to protect a "certified historic structure" might be measured in precise, geographic terms. A nebulous concept, such as "development pressures around an historic structure," might be defined in particular economic or market terms. While such standards would insure the deductibility of the donations under specific conditions, they run the risk of unnecessarily narrowing the range in which conservation restrictions could operate.

A third method might be to leave the language of the regulations purposely vague as to what types of conservation purposes are allowed or disallowed. This would give the Service wide latitude in allowing deductions of conservation restrictions<sup>157</sup> whenever it could be ascertained that the public would benefit in some manner.<sup>158</sup> This benefit might range from the per se benefit of preserving a certified

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A. Coughlin, III, *supra* note 28. It has been suggested that one of the principal reasons the 1976 provisions never took hold was the failure of the Treasury to issue any interpretative regulations. Conversation with Thomas A. Coughlin, III, *supra* note 28. The present uncertain state of the law on the deductibility of charitable donations for conservation purposes has forced some charities to stop accepting conservation restrictions for fear that the donation will not qualify. Conversation with Caroline Seely, Esq., Covington & Burling, Washington, D.C., Apr. 20, 1981.

157. In effect, the broad, expansive 1972 Treasury regulation on open space easements would be brought back under the regulations for the new provisions. See text at notes 42-44 *supra*.

158. The concept of a "public benefit" as discussed here is broader than that specifically incorporated in I.R.C. § 170(h)(4)(A)(iii) (1980) but relates to all the conservation purposes of § 170(h)(4). The Treasury had always sought to identify a "public benefit" in any of the transfers. See discussion, text at notes 123-26 *supra*. While a "public benefit" requirement is

historic structure to the more tenuous benefits of the "preservation of open space." Once the benefit to the public is determined to exist and all other aspects of the Code have been complied with, then the deduction should be allowed.

Of course, all three methods might be combined in the regulations—situations where the deduction would be disallowed, cases where it would be allowed, and a large middle ground where the public benefit would have to be demonstrated before the deduction would be allowed. Deciding which conservation restrictions meet the "conservation purposes" test is inherently a balancing process which will never be free of perceived abuses.<sup>159</sup> The process of developing meaningful regulations that interpret the provisions of the Code may take some time, but, done correctly, all parties—the government, taxpayer, and public—will benefit in the end.<sup>160</sup>

#### IV. CONCLUSION

The new Code section on charitable donations of conservation restrictions has the potential for greatly aiding and advancing private initiatives in historic preservation through the use of the federal tax laws. The development of the tax law in this area has always been an evolutionary one and undoubtedly it will continue to develop at a slow but steady rate. New concepts with meanings not easily understood or definable have been grafted onto the Code. The challenge now exists to use them wisely.

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expressly identified with the "preservation of open space," it is implicit in the other "conservation purposes."

159. An effective regulation will ease the administration of the Code provisions and diminish the need for Revenue Rulings.

160. Until it is clear what the Treasury will allow in various circumstances, the taxpayer should thoroughly document why and how the transfer of the conservation restriction serves to benefit the public. It is likely that many of the first returns deducting transfers of conservation restrictions will be audited.

## APPENDIX

TEMPORARY TAX PROVISIONS,  
EXTENSION

94 STAT. 3204

PUBLIC LAW 96-541—DEC. 17, 1980

Public Law 96-541  
96th Congress

An Act

Dec. 17, 1980[H.R. 6975]

To extend certain temporary tax provisions, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the  
United States of America in Congress assembled,***SEC. 6. REVISING AND MAKING PERMANENT RULES  
ALLOWING DEDUCTION FOR CONTRIBUTIONS FOR  
CONSERVATION PURPOSES.**

(a) IN GENERAL.—Paragraph (3) of section 170(f) of the Internal Revenue Code of 1954 (relating to denial of deduction in case of certain contributions of partial interests in property) is amended by striking out subparagraphs (B) and (C) thereof and inserting in lieu thereof the following new subparagraph:

“(B) EXCEPTIONS.—Subparagraph (A) shall not apply to—

“(i) a contribution of a remainder interest in a personal residence or farm,

“(ii) a contribution of an undivided portion of the taxpayer’s entire interest in property, and

“(iii) a qualified conservation contribution.”

(b) QUALIFIED CONSERVATION CONTRIBUTION DEFINED.—Section 170 of such Code is amended by redesignating subsections (h) and (i) as subsections (i) and (j), respectively, and by inserting after subsection (g) the following new subsection:

“(h) QUALIFIED CONSERVATION CONTRIBUTION.—

“(1) IN GENERAL.—For purposes of subsection (f)(3)(B)(iii), the term ‘qualified conservation contribution’ means a contribution—

“(A) of a qualified real property interest,

“(B) to a qualified organization,

“(C) exclusively for conservation purposes.

“(2) QUALIFIED REAL PROPERTY INTEREST.—For purposes of this subsection, the term ‘qualified real property interest’ means any of the following interests in real property:

“(A) the entire interest of the donor other than a qualified mineral interest,

“(B) a remainder interest, and

“(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

“(3) QUALIFIED ORGANIZATION.—For purposes of paragraph (1), the term ‘qualified organization’ means an organization which—

“(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

“(B) is described in section 501(c)(3) and—

“(i) meets the requirements of section 509(a)(2), or

“(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

“(4) CONSERVATION PURPOSE DEFINED.—

“(A) IN GENERAL.—For purposes of this subsection, the term ‘conservation purpose’ means—

“(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

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

“(iii) the preservation of open space (including farmland and forest land) where such preservation is—

“(I) for the scenic enjoyment of the general public, or

“(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

“(iv) the preservation of an historically important land area or a certified historic structure.

“(B) CERTIFIED HISTORIC STRUCTURE.—For purposes of subparagraph (A)(iv), the term ‘certified historic structure’ means any building, structure, or land area which—

“(i) is listed in the National Register, or

“(ii) is located in a registered historic district (as defined in section 191(d)(2) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor’s return under this chapter for the taxable year in which the transfer is made.

“(5) EXCLUSIVELY FOR CONSERVATION PURPOSES.—For purposes of this subsection—

“(A) CONSERVATION PURPOSE MUST BE PROTECTED.—A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

“(B) NO SURFACE MINING PERMITTED.—In the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

“(6) QUALIFIED MINERAL INTEREST.—For purposes of this subsection, the term ‘qualified mineral interest’ means—

“(A) subsurface oil, gas, or other minerals, and

“(B) the right to access to such minerals.”

(c) DEDUCTION FOR CONTRIBUTIONS FOR CONSERVATION PURPOSES MADE PERMANENT.—Section 309(b)(1) of the Tax Reduction and Simplification Act of 1977 and section 2124(e)(4) of the Tax Reform Act of 1976 are each amended by striking out “, and before June 14, 1981.”

(d) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall apply to transfers made after the date of the enactment of this Act in taxable years ending after such date.

Approved December 17, 1980.

Author's Note—The Economic Recovery Tax Act of 1981, § 212, Pub. L. No. 97-34, \_\_ Stat. \_\_, repealed I.R.C. §§ 191 (relating to the amortization of certain rehabilitation expenditures for certified historic structures) and 167(n) and (o) (relating to depreciation). The references to certified historic structures formerly found at § 191(d)(1) and (2) have been transferred to § 48(g)(3)(A) and (B) respectively.