APPENDIX A

Internal Revenue Code Provisions Governing Conservation Easements

Code Section 170(h): Internal Revenue Code Provisions Governing Conservation Easements

(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) Special rules with respect to buildings in registered historic districts.— In the case of any contribution of a qualified real property interest which is a restriction with respect to the exterior of a building described in subparagraph (C)(ii), such contribution shall not be considered to be exclusively for conservation purposes unless—

(i) such interest—

(I) includes a restriction which preserves the entire exterior of the building (including the front, sides, rear, and height of the building), and

(II) prohibits any change in the exterior of the building which is inconsistent with the historical character of such exterior,

(ii) the donor and donee enter into a written agreement certifying, under penalty of perjury, that the donee—

(I) is a qualified organization (as defined in paragraph (3)) with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and

(II) has the resources to manage and enforce the restriction and a commitment to do so, and

(iii) in the case of any contribution made in a taxable year beginning after the date of the enactment of this subparagraph, the taxpayer includes with the taxpayer's return for the taxable year of the contribution—

(I) a qualified appraisal (within the meaning of subsection (f)(11)(E)) of the qualified property interest,

(II) photographs of the entire exterior of the building, and

(III) a description of all restrictions on the development of the building.

(C) Certified historic structure.—For purposes of subparagraph (A)(iv), the term "certified historic structure" means—

(i) any building, structure, or land area which is listed in the National Register, or

(ii) any building which is located in a registered historic district (as defined in section 47(c)(3)(B)) 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.—

(i) In general.—Except as provided in clause (ii), 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.

(ii) Special rule.—With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

(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.

APPENDIX B

Income Tax Regulations for Conservation Easements

Regulations Section 1.170A-14: Income Tax Regulations for Conservation Easements

§ 1.170A-14 Qualified conservation contributions.

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

(b) Qualified real property interest—

(1) Entire interest of donor other than qualified mineral interest.

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

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

(2) Perpetual conservation restriction.

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

(c) Qualified organization—

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

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

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

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

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

(2) Transfers by donee. A deduction shall be allowed for a contribution under this section only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement (or, in the case of a remainder interest or the reservation of a qualified mineral interest, the property), whether or not for consideration,

unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee under paragraph (c)(1) of this section. When a later unexpected change in the conditions surrounding the property that is the subject of a donation under paragraph (b)(1), (2), or (3) of this section makes impossible or impractical the continued use of the property for conservation purposes, the requirement of this paragraph will be met if the property is sold or exchanged and any proceeds are used by the donee organization in a manner consistent with the conservation purposes of the original contribution. In the case of a donation under paragraph (b)(3) of this section to which the preceding sentence applies, see also paragraph (g)(5)(ii) of this section.

(d) Conservation purposes—

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

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

(ii) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, within the meaning of paragraph (d)(3) of this section,

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

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

(2) Recreation or education—

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

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

(3) Protection of environmental system—

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

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

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

(4) Preservation of open space—

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

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

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

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

(ii) Scenic enjoyment—

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

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

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

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

(4) Relief from urban closeness;

(5) The harmonious variety of shapes and textures;

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

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

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

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

(iii) Governmental conservation policy—

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

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

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

(iv) Significant public benefit—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Relationship of requirements—

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

(B) Scenic enjoyment and significant public benefit. With respect to the relationship between the requirements of "scenic enjoyment" and "significant public benefit," since the degrees of scenic enjoyment offered by a variety of open space easements are subjective and not as easily delineated as are increasingly specific levels of governmental policy, the significant public benefit of preserving a scenic view must be independently established in all cases.

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

(5) Historic preservation—

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

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

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

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

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

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

(A) Listed in the National Register, or

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

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

(iv) Access.

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

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

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

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

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

Example 2. B owns an unoccupied farmhouse built in the 1840's and located on a property that is adjacent to a Civil War battlefield. During the Civil War the farmhouse was used as quarters for Union troops. The battlefield is visited year round by the general public. The condition of the farmhouse is such that the safety of visitors will not be jeopardized and opening it to the public will not result in significant deterioration. The farmhouse is not visible from the battlefield or any public way. It is accessible only by way of a private road owned by B. B donates a conservation easement on the farmhouse to a qualified organization. The terms of the easement provide that the donee organization may open the property (via B's road) to the general public on four weekends each year from 8:30 a.m. to 4:00 p.m. The donation does not meet the public access requirement because the farmhouse is safe, unoccupied, and easily accessible to the general public who have come to the site to visit Civil War historic land areas (and related resources), but will only be open to the public on four weekends each year. However, the donation would meet the public access requirement if the terms of the easement permitted the donee organization to open the property to the public every other weekend during the year and the donor is not aware of any facts indicating that the donee organization will provide significantly less access than that permitted.

(e) Exclusively for conservation purposes—

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

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

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

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

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

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

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

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

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

(g) Enforceable in perpetuity—

(1) In general. In the case of any donation under this section, any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution.

(2) Protection of a conservation purpose in case of donation of property subject to a mortgage. In the case of conservation contributions made after February 13, 1986, no deduction will be permitted under this section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity. For conservation contributions made prior to February 14, 1986, the requirement of section 170 (h)(5)(A) is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.

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

(4) Retention of qualified mineral interest—

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

(ii) Exception for qualified conservation contributions after July 1984.

(A) A contribution made after July 18, 1984, of a qualified real property interest described in section 170(h)(2)(A) shall not be disqualified under the first sentence of paragraph (g)(4)(i) of this section if the following requirements are satisfied:

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

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

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

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

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

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

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

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

(5) Protection of conservation purpose where taxpayer reserves certain rights—

(i) Documentation. In the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift. Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. Such documentation may include:

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

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

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

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

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

(6) Extinguishment.

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

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

(h) Valuation—

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

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

(3) Perpetual conservation restriction—

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

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

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

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

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

Example 2. In 1984 B, who is 62, donates a remainder interest in Greenacre to a qualifying organization for conservation purposes. Greenacre is a tract of 200 acres of undeveloped woodland that is valued at $200,000 at its highest and best use. Under § 1.170A-12(b), the value of a remainder interest in real property following one life is determined under § 25.2512-5 of this chapter (Gift Tax Regulations). (See § 25.2512-5A of this chapter with respect to the valuation of annuities, interests for life or term of years, and remainder or reversionary interests transferred before May 1, 1999.) Accordingly, the value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is $55,996 ($200,000 ×

.27998).

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

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

Example 5. Assume the same facts as in Example 4, and assume that three years later, at age 65, B decides to donate a remainder interest in Greenacre to a qualifying organization for conservation purposes. Increasing real estate values in the area have raised the fair market value of Greenacre (subject to the easement) to $130,000. Accordingly, the value of the remainder interest, and thus the amount eligible for a deduction under section 170(f), is $41,639 ($130,000 × .32030).

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

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

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

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

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

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

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

(i) Substantiation requirement. If a taxpayer makes a qualified conservation contribution and claims a deduction, the taxpayer must maintain written records of the fair market value of the underlying property before and after the donation and the conservation purpose furthered by the donation and such information shall be stated in the taxpayer's income tax return if required by the return or its instructions. See also § 1.170A-13(c) (relating to substantiation requirements for deductions in excess of $5,000 for charitable contributions made after 1984), and section 6659 (relating to additions to tax in the case of valuation overstatements).

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

APPENDIX C
Uniform Conservation Easement Act

[Note that this is the act as proposed by the National Conference of Commissioners of Uniform State Laws. This appendix does not include comments from the commissioners, which might be useful in gaining a fuller understanding of their intent, if not the intent of states that have enacted the Act.]

Section

1. [DEFINITIONS].

As used in this Act, unless the context otherwise requires:

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

(2) "Holder" means:

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

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

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

2. [CREATION, CONVEYANCE, ACCEPTANCE AND DURATION].

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

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

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

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

3. [JUDICIAL ACTIONS].

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

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

(2) a holder of the easement;

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

(4) a person authorized by other law.

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

4. [VALIDITY].

A conservation easement is valid even though:

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

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

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

(4) it imposes a negative burden;

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

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

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

5. [APPLICABILITY].

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

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

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

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

APPENDIX D

IRS Notice 2004-41: Charitable Contributions and Conservation Easements

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Charitable contributions and conservation easements. This notice informs taxpayers that the Service will, in appropriate cases, reduce or disallow deductions claimed by taxpayers under section 170 of the Code for transfers in connection with conservation easements. This notice also informs participants in these transactions that they may be subject to other adverse tax consequences, including penalties, excise taxes, and loss of tax-exempt status, as appropriate.

The Internal Revenue Service is aware that taxpayers who (1) transfer an easement on real property to a charitable organization, or (2) make payments to a charitable organization in connection with a purchase of real property from the charitable organization, may be improperly claiming charitable contribution deductions under § 170 of the Internal Revenue Code. The purpose of this notice is to advise participants in these transactions that, in appropriate cases, the Service intends to disallow such deductions and may impose penalties and excise taxes. Furthermore, the Service may, in appropriate cases, challenge the tax-exempt status of a charitable organization that participates in these transactions. In addition, this notice advises promoters and appraisers that the Service intends to review promotions of transactions involving these improper deductions, and that the promoters and appraisers may be subject to penalties.

CONTRIBUTIONS OF CONSERVATION EASEMENTS

Section 170(a)(1) allows as a deduction, subject to certain limitations and restrictions, any charitable contribution (as defined in § 170(c)) that is made within the taxable year. Generally, to be deductible as a charitable contribution under § 170, a transfer to a charitable organization must be a gift of money or property without receipt or expectation of receipt of adequate consideration, made with charitable intent. See U.S. v. American Bar Endowment, 477 U.S. 105, 117-18 (1986); Hernandez v. Commissioner, 490 U.S. 680, 690 (1989); see also § 1.170A-1(h)(1) and (2) of the Income Tax Regulations.

Section 170(f)(3) provides generally that no charitable contribution deduction is allowed for a transfer to a charitable organization of less than the taxpayer's entire interest in property. Section 170(f)(3)(B)(iii) provides an exception to this rule in the case of a qualified conservation contribution.

A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for certain conservation purposes. Section 170(h)(1), (2), (3), and (4); § 1.170A-14(a). A qualified real property interest includes a restriction (granted in perpetuity) on the use that may be made of the real property. Section 170(h)(2)(C); see also § 1.170A-14(b)(2). For purposes of this notice, qualified real property interests described in § 170(h)(2)(C) are referred to as conservation easements.

One of the permitted conservation purposes listed in § 170(h)(4) is the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem. Section 170(h)(4)(A)(ii); see also § 1.170A-14(d)(1)(ii) and (3). Another of the permitted conservation purposes is the preservation of open space ("open space easement"), including farmland and forest land, for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy. However, if the public benefit of an open space easement is not significant, the charitable contribution deduction will be disallowed. See § 170(h)(4)(A)(iii); see also § 1.170A-14(d)(1)(iii) and (4)(iv), (v), and (vi). Section 170(h) and § 1.170A-14 contain many other requirements that must be satisfied for a contribution of a conservation easement to be allowed as a deduction.

A charitable contribution is allowed as a deduction only if substantiated in accordance with regulations prescribed by the Secretary. Section 170(a)(1) and (f)(8). Under § 170(f)(8), a taxpayer must substantiate its contributions of $250 or more by obtaining from the charitable organization a statement that includes (1) a description of any return benefit provided by the charitable organization, and (2) a good faith estimate of the benefit's fair market value. See § 1.170A-13 for additional substantiation requirements. In appropriate cases, the Service will disallow deductions for conservation easement transfers if the taxpayer fails to comply with the substantiation requirements. The Service is considering changes to forms to facilitate compliance with and enforcement of the substantiation requirements.

If all requirements of § 170 are satisfied and a deduction is allowed, the amount of the deduction may not exceed the fair market value of the contributed property (in this case, the contributed easement) on the date of the contribution (reduced by the fair market value of any consideration received by the taxpayer). See § 1.170A-1(c)(1), (h)(1) and (2). Fair market value is the price at which the contributed property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and each having reasonable knowledge of relevant facts. Section 1.170A-1(c)(2). See § 1.170A-14(h)(3) and (4) for a discussion of valuation.

If the donor (or a related person) reasonably can expect to receive financial or economic benefits greater than those that will inure to the general public as a result of the donation of a conservation easement, no deduction is allowable. Section 1.170A-14(h)(3)(i). If the donation of a conservation easement has no material effect on the value of real property, or enhances rather than reduces the value of real property, no deduction is allowable. Section 1.170A-14(h)(3)(ii).

PURCHASES OF REAL PROPERTY FROM CHARITABLE ORGANIZATIONS

Some taxpayers are claiming inappropriate charitable contribution deductions under § 170 for cash payments or easement transfers to charitable organizations in connection with the taxpayers' purchases of real property.

In some of these questionable cases, the charitable organization purchases the property and places a conservation easement on the property. Then, the charitable organization sells the property subject to the easement to a buyer for a price that is substantially less than the price paid by the charitable organization for the property. As part of the sale, the buyer makes a second payment, designated as a "charitable contribution," to the charitable organization. The total of the payments from the buyer to the charitable organization fully reimburses the charitable organization for the cost of the property.

In appropriate cases, the Service will treat these transactions in accordance with their substance, rather than their form. Thus, the Service may treat the total of the buyer's payments to the charitable organization as the purchase price paid by the buyer for the property.

PENALTIES, EXCISE TAXES, AND TAX-EXEMPT STATUS

Taxpayers are advised that the Service intends to disallow all or part of any improper deductions and may impose penalties under § 6662.

The Service intends to assess excise taxes under § 4958 against any disqualified person who receives an excess benefit from a conservation easement transaction, and against any organization manager who knowingly participates in the transaction. In appropriate cases, the Service may challenge the tax-exempt status of the organization, based on the organization's operation for a substantial nonexempt purpose or impermissible private benefit.

In addition, the Service intends to review promotions of transactions involving improper deductions for conservation easements. Promoters, appraisers, and other persons involved in these transactions may be subject to penalties under § 6700, 6701, and 6694.

DRAFTING INFORMATION

The principal author of this notice is Patricia M. Zweibel of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Ms. Zweibel at (202) 622-5020 (not a toll-free call).

Notice 2004-41, 2004-28 I.R.B. 31, 2004 WL 1462264 (IRS NOT)

APPENDIX E
IRS Ruling Relating to S Corporations

[*Author's Note: Gains, losses and other deductions that accrue to an S corporation "pass through" to the corporation's shareholders. Where a pass through item is a deduction for a charitable contribution made by the corporation the law limits the shareholders' deduction for the contribution to the shareholders' adjusted basis in their stock in the corporation, plus the shareholders' pro-rata share of any corporate debt.*

In essence, what the following ruling says is that there are two components to a charitable contribution of appreciated property, including a conservation easement: the donor's adjusted basis in the contributed property and the value of the contribution in excess of that adjusted basis. Under the 2006 Pension Protection Act provisions (now expired) pertaining to charitable contributions of appreciated property by an S corporation, that portion of such a contribution that represents the value of the contributed property in excess of the S corporation's adjusted basis may be deducted by the corporation's shareholders without regard to the shareholders' adjusted basis in their stock and in their share of the corporation's debt.

However, shareholders' deductions for that portion of such contributions that represent the corporation's adjusted basis in the contributed property continue to be limited to the shareholders' adjusted basis in their stock plus any of their share of the corporation's debt. This Rule only pertains to contributions made by S corporations during calendar years 2006 and 2007.]

Rev. Rul. 2008-16

ISSUE

If an S corporation makes a charitable contribution of appreciated property in a taxable year beginning after December 31, 2005, and before January 1, 2008, what is the amount of the charitable contribution deduction that a shareholder may claim in circumstances where § 1366(d) of the Internal Revenue Code (Code) limits the shareholder's pro rata share of the S corporation's losses and deductions for the taxable year in which the property is contributed?

FACTS

Individual A is the sole shareholder of S Corporation X. At the beginning of X's 2007 taxable year, A has a basis of $50x in the X stock. During 2007, X makes a charitable contribution of unencumbered real property, with an adjusted basis of $100x and a fair market value of $190x, in a transaction that qualifies under § 170(c). The charitable contribution is not subject to the limitations of § 170(e)(1). In 2007, X has §1363 taxable income of $30x and a long-term capital loss of $25x.

LAW

Section 170(a) allows as a deduction any charitable contribution (as defined in § 170(c)) the payment of which is made during the taxable year. The deduction allowable by § 170(a) is subject to the limitations of § 170(b).

Section 1.170A-1(c)(1) of the Income Tax Regulations provides that if a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution reduced as provided in § 170(e)(1) and § 1.170A-4(a), or § 170(e)(3) and § 1.170A-4A(c).

Section 1363(b)(2) provides that the taxable income of an S corporation shall be computed in the same manner as in the case of an individual, except that the deductions referred to in § 703(a)(2), including the deduction for charitable contributions provided in § 170, shall not be allowed to the corporation.

Section 1366(a)(1)(A) provides that, in determining the tax of a shareholder, there shall be taken into account the shareholder's pro rata share of the corporation's items of income, loss, deduction, or credit the separate treatment of which could affect the liability for tax of any shareholder. Section 1366(a)(1) provides further that the items referred to in § 1366(a)(1)(A) include amounts described in § 702(a)(4).

Section 702(a)(4) refers to charitable contributions (as defined in § 170(c)).

Section 1366(a)(1)(B) provides that, in determining the tax of a shareholder, there shall be taken into account the shareholder's pro rata share of any nonseparately computed income or loss.

Section 1366(d)(1) provides that the aggregate amount of losses and deductions taken into account by a shareholder under § 1366(a) for any taxable year shall not exceed the sum of (A) the adjusted basis of the shareholder's stock in the S corporation, and (B) the shareholder's adjusted basis of any indebtedness of the S corporation to the shareholder.

Section 1366(d)(2)(A) generally provides that any loss or deduction which is disallowed for any taxable year by reason of § 1366(d)(1) shall be treated as incurred by the corporation in the succeeding taxable year with respect to that shareholder.

Section 1.1366-1(a)(2)(i) and (iii) provides that each S corporation shareholder must take into account separately the shareholder's pro rata share of the S corporation's gains and losses from sales or exchanges of capital assets and the corporation's charitable contributions.

Section 1.1366-1(a)(3) provides that each shareholder must take into account separately the shareholder's pro rata share of the nonseparately computed income or loss of the S corporation.

Section 1.1366-1(b)(1) provides, in part, that the character of any item of income, loss, deduction, or credit described in § 1366(a)(1)(A) or (B) is determined for the S corporation and retains that character in the hands of the shareholder.

Section 1.1366-2(a)(4) generally provides that if a shareholder's pro rata share of the aggregate amount of losses and deductions exceeds the sum of the adjusted basis of the shareholder's stock in the corporation and the adjusted basis of any indebtedness of the corporation to the shareholder, then the limitation on losses and deductions under § 1366(d)(1) must be allocated among the shareholder's pro rata share of each loss or deduction. The amount of the limitation allocated to any loss or deduction is an amount that bears the same ratio to the amount of the limitation as the loss or deduction bears to the total of the losses and deductions.

Section 1367(a)(1)(B) provides that the basis of each shareholder's stock in an S corporation is increased for any period by any nonseparately computed income determined under § 1366(a)(1)(B).

Section 1367(a)(2)(B) provides that the basis of each shareholder's stock in an S corporation is decreased for any period (but not below zero) by the items of loss and deduction described in § 1366(a)(1)(A).

Section 1.1367-1(f) provides that increases in an S corporation shareholder's stock basis that are attributable to income items described in § 1367(a)(1)(B) are made before decreases in such basis that are attributable to items of loss or deduction described in § 1367(a)(2)(B).

Section 1203(a) of the Pension Protection Act of 2006 (Pension Act), P.L. 109-280, 120 Stat. 780 (2006), amended Code § 1367(a)(2) to provide that the decrease in shareholder basis under § 1367(a)(2)(B) by reason of a charitable contribution (as defined in § 170(c)) of property shall be the amount equal to the shareholder's pro rata share of the adjusted basis of such property. The Technical Explanation of the Pension Act, Technical Explanation of H.R. 4, "The Pension Protection Act of 2006," JCX-38-06 page 271, provides the following illustration of § 1203:

> Thus, for example, assume an S corporation with one individual shareholder makes a charitable contribution of stock with a basis of $200 and a fair market value of $500. The shareholder will be treated as having made a $500 charitable contribution (or a lesser amount if the special rules of section 170(e) apply), and will reduce the basis of the S corporation stock by $200. (Footnote 306: This example assumes that basis of the S corporation stock (before reduction) is at least $200.)

Section 3(b) of the Tax Technical Corrections Act of 2007 (Technical

Corrections Act), P.L. 172, 121 Stat. 2473 (2007), added § 1366(d)(4), which concerns the application of the basis limitation rule of § 1366(d)(1) to charitable contributions of appreciated property by S corporations. Generally, under § 1366(d)(1), the amount of losses and deductions which a shareholder of an S corporation may take into account in any taxable year is limited to the shareholder's adjusted basis in his stock and indebtedness of the corporation. Section 1366(d)(4) provides that, in the case of a charitable contribution of property, § 1366(d)(1) shall not apply to the extent of the excess (if any) of (A) the shareholder's pro rata share of such contribution, over (B) the shareholder's pro rata share of the adjusted basis of such property. Thus, the basis limitation rule of § 1366(d)(1) does not apply to the amount of deductible appreciation in the contributed property. See Description of the Tax Technical Corrections Act of 2007, JCX-119-07, pages 2–3.

The Pension Act amendment to § 1367(a)(2) and the Technical Corrections Act amendment to § 1366(d) apply to charitable contributions made by S corporations in taxable years beginning after December 31, 2005, and before January 1, 2008. Charitable contributions made by S corporations in taxable years beginning after December 31, 2007, barring any statutory change, are subject to the law in existence prior to these amendments. The IRS and Treasury Department are considering issuing guidance on the treatment of charitable contributions made by S corporations in taxable years beginning after December 31, 2007.

ANALYSIS

Under the facts of this revenue ruling, X makes a charitable contribution of unencumbered real property with an adjusted basis of \$100x and a fair market value of \$190x in a transaction that qualifies under § 170(c). The charitable contribution is treated as a separately stated item of deduction that passes through to A and is deductible in computing A's individual tax liability. Section 1.1366-1(a)(2)(iii).

Pursuant to § 1.1367-1(f), A's \$50x basis in the X stock is first increased by \$30x under § 1367(a)(1)(B) to reflect A's share of X's taxable income. A's basis in the X stock is then decreased (but not below zero) by A's pro rata share of the sum of the adjusted basis of the contributed property (\$100x) pursuant to the flush language of § 1367(a)(2) and by A's pro rata share of X's long-term capital loss (\$25x) pursuant to § 1367(a)(2)(B). However, A's pro rata share of the aggregate amount of losses and deductions (\$125x) exceeds A's basis in the X stock of \$80x. Section 1366(d)(1), accordingly, will limit the allowable losses and deductions to A for X's 2007 tax year.

Pursuant to § 1366(d)(4), the basis limitation rule in § 1366(d)(1) does not apply to a contribution of appreciated property to the extent the shareholder's pro rata share of the contribution exceeds the shareholder's pro rata share of the adjusted basis of the contributed property. Accordingly, the basis limitation rule of § 1366(d)(1) does not apply to A's pro rata share of the amount of deductible appreciation in the contributed property (\$90x).

Under § 1.1366-2(a)(4), when a shareholder has losses or deductions in excess of the sum of the shareholder's basis in the stock plus indebtedness of the S corporation to the shareholder, the limitation on losses must be allocated pro rata to each item of loss or deduction. In the case of a charitable contribution deduction, the limitation amount allocable to such deduction is determined by reference to the shareholder's pro rata share of the contributed property's adjusted basis pursuant to § 1366(d)(4).

In applying § 1.1366-2(a)(4), the amount of the limitation allocable to a charitable contribution deduction is an amount that bears the same ratio to the § 1366(d) limitation as the shareholder's pro rata share of the contributed property's adjusted basis bears to the total of the shareholder's pro rata share of the corporation's losses and deductions (excluding the charitable contribution deduction attributable to the shareholder's pro rata share of the fair market value of the contributed property over the contributed property's tax basis).

Accordingly, the amount of the limitation allocable to A's share of X's charitable contribution deduction is determined by multiplying A's basis in the X stock ($80x) by a fraction, the numerator of which is $100x (the contributed property's adjusted basis) and the denominator of which is $125x (the total of the capital loss and the contributed property's adjusted basis). Thus, $64x is allocated to the charitable contribution deduction. The remaining $16x is allocated to the capital loss.

Accordingly, in 2007, the amount of the charitable contribution deduction that A may claim is $154x. This amount is comprised of A's pro rata share of the property's appreciation ($90x) plus the amount of the loss limitation allocated to A's pro rata share of the contributed property's adjusted basis ($64x). Under § 1367(a)(2)(B), A's basis in the X stock is reduced to 0 to reflect the $16x reduction in basis attributable to the capital loss and the $64x reduction in basis attributable to the charitable contribution deduction. Pursuant to § 1366(d)(2), the disallowed portion of the charitable contribution deduction ($36x) and the capital loss ($9x) shall be treated as incurred by X in the succeeding taxable year with respect to A.

HOLDING

If an S corporation makes a charitable contribution of appreciated property during a taxable year beginning after December 31, 2005, and before January 1, 2008, the amount of the charitable contribution deduction the shareholder may claim may not exceed the sum of (i) the shareholder's pro rata share of the fair market value of the contributed property over the contributed property's adjusted tax basis, and (ii) the amount of the § 1366(d) loss limitation amount that is allocable to the contributed property's adjusted basis under § 1.1366-2(a)(4). Any disallowed portion of the charitable contribution retains its character and is treated as incurred by the corporation in the corporation's first succeeding taxable year, and subsequent taxable years, with respect to the shareholder.

DRAFTING INFORMATION

The principal author of this revenue ruling is Cynthia D. Morton of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, contact Cynthia D. Morton at (202) 622-3060 (not a tollfree call).

Glossary

Arm's-length transaction: A transaction in which the parties are not motivated by a personal relationship with each other, or influence other than the profit motive. For example, a transaction structured primarily to reduce one's tax liability is not an arm's-length transaction.

Assessed value: The percentage of the fair market value of land to which a tax rate is applied to determine the amount of real property tax.

Bargain sale: A bargain sale is the sale of property to a governmental agency or public charity for less than its fair market value, with the intent that the difference between the sales price and the fair market value be a charitable contribution. Sections 1011(b) and 170 of the *Internal Revenue Code* govern bargain sales.

Conveyance: The transfer of title to real property by gift, sale, contribution, exchange, or otherwise.

Fair market value: The value at which a piece of property would sell in an arm's-length transaction, in which the seller is under no compulsion to sell and the buyer is under no compulsion to buy.

Fee simple: A phrase from English law describing outright ownership of real property, as opposed to the ownership of an interest, such as a right-of-way, or easement, in real property. The "fee simple absolute" is ownership of all of the interests in real property (e.g., surface, subsurface, water, timber, air) without exception.

Form 990: The information return required by federal law to be filed by every public charity that is not "government affiliated." This form is required to be filed by all private land trusts.

Land trust: A publicly supported charity, one of whose purposes is land conservation.

Public agency: A federal, state, or local government agency or the federal government; a state or local government itself. All public agencies are qualified to hold deductible conservation easements.

Public charity: A nonprofit organization (including corporations, trusts, community foundations, etc.) that is qualified as an "exempt organization" under section 501(c)(3) of the *Internal Revenue Code* and that meets the "public support test."

Quid pro quo transaction: As applied to conservation easements, a transaction in which the donor of a conservation easement receives a financial or regulatory benefit in exchange for contributing the easement that precludes the "charitable intent" necessary for allowance of any tax benefits.

Real property: Land and improvements on land.

Regulatory benefit: In the context of conservation easements, a benefit to a landowner in the form of governmental approval or permission for one or more uses of land.

Tax basis: Essentially, the amount one pays for real property. This amount may be adjusted up or down, resulting in an "adjusted basis" to reflect improvements, depreciation, charitable contributions, etc. Basis is used to determine the amount of tax the owner of real property must pay when he sells the property. Tax is imposed on the "gain on sale," which is the difference between sales price less costs of sale, and the basis, or adjusted basis if applicable. Basis also limits the amount of deduction allowed for the contribution of a conservation easement made during the first year the donor owns the property placed under easement.

Tax benefit: Any reduction in income, estate, or real property taxes resulting from either a tax deduction, a tax credit, or, in the case of real property taxes, a reduced assessment.

Tax credit: The reduction of a taxpayer's liability in an amount equal to some statutorily recognized payment or contribution. A credit directly reduces the amount of tax on a dollar-for-dollar basis, which makes it a much more powerful benefit than a tax deduction.

Tax deduction: The reduction of a taxpayer's income in an amount equal to some statutorily recognized payment or contribution. A deduction directly reduces the amount of a taxpayer's income against which tax is imposed.

Resources

The following is a very short list of the resources available to those interested in pursuing further some aspect of the material covered in this book. While there are few books on this material, there are many articles, particularly law review articles, many of which are excellent.

STATUTES

26 *United States Code* section 170—covers charitable contributions in general.

26 *United States Code* section 170(b)—covers limitations on charitable deductions.

26 *United States Code* section 170(b)(1)(A)(vi)—covers publicly supported exempt organizations.

26 *United States Code* section 170(b)(1)(E)—covers special limitations for qualified conservation contributions.

26 *United States Code* section 170(c)—defines charitable contributions.

26 *United States Code* section 170(d)—covers carryovers of excess contributions.

26 *United States Code* section 170(e)—covers limitations to basis for certain contributions.

26 *United States Code* section 170(f)(8)—covers substantiation and acknowledgment of contributions.

26 *United States Code* section 170(f)(11)(E)—new law; covers qualified appraisers and appraisals.

26 *United States Code* section 170(h)—covers contributions of conservation easements.

26 *United States Code* section 501—covers exempt organizations.

26 *United States Code* section 509—covers private foundations.

26 *United States Code* sections 641–685—cover trusts, estates, and beneficiaries.

26 *United States Code* sections 701–761—cover tax treatment of partners and partnerships.

26 *United States Code* section 1011(b)—covers bargain sales.

26 *United States Code* sections 1366–1368—cover tax treatment of S corporation shareholders.

26 *United States Code* sections 2001–2058- contain the federal estate tax provisions.

26 *United States Code* section 2031(c)—provides a partial exclusion from federal estate tax for land subject to a conservation easement.

26 *United States Code* section 2032A—provides for the special valuation of farms and ranches for estate tax purposes.

26 *United States Code* sections 2501–2524—contain the federal gift tax provisions.

26 *United States Code* section 2522(d)—provides a deduction from the federal gift tax for contribution of a conservation easement.

26 *United States Code* section 4958—covers excise taxes on excess benefit transactions.

26 *United States Code* section 6695A—provides a new penalty for overvaluation by appraisers.

REGULATIONS

26 *Code of Federal Regulations* section 1.170A-1—covers charitable contribution deductions in general.

26 *Code of Federal Regulations* section 1.170A-4—covers the limitation to basis for contributions of appreciated property held for one year or less.

26 *Code of Federal Regulations* section 1.170A-7—covers the prohibition against deductions for the contribution of "partial interests."

26 *Code of Federal Regulations* section 1.170A-8—covers limitations on the deduction of charitable contributions.

26 *Code of Federal Regulations* section 1.170A-9(e)—defines *publicly supported organizations* and the one-third public support test.

26 *Code of Federal Regulations* section 1.170A-11—covers limitations and carryover of charitable deductions by corporations.

26 *Code of Federal Regulations* section 1.170A-13—covers record keeping and return requirements for charitable deductions.

26 *Code of Federal Regulations* section 1.170A-14—covers conservation easements.

26 *Code of Federal Regulations* sections 53.4958-0–53.4958-8—cover excess benefit transactions and related excise taxes.

26 *Code of Federal Regulations* section 1.1366-2(a)(1)—covers the allocation of tax items between S corporation shareholders.

IRS ADMINISTRATIVE MATERIALS

Rev. Rul. 67-246—covers deductibility of a ticket to a charity ball.

Rev. Rul. 68-432—covers dual-purpose contributions.

Technical Advice Memorandum 9239002, 1992—covers quid pro quo transactions.

Notice 2004-41—covers conservation buyer transactions.

Notice 2006-96—provides guidance for appraisals of noncash charitable contributions under the new rules of the Pension Protection Act of 2006.

IRS AM (Chief Counsel Attorney Memorandum) 2007-002—covers federal tax treatment of state tax credits for conservation easement contributions.

UNIFORM LAWS

Uniform Conservation Easement Act

Uniform Trust Code

BOOKS

Appraising Easements: Guidelines for Valuation of Land Conservation and Historic Preservation Easements, 3rd ed., published by the Land Trust Alliance and the National Trust for Historic Preservation (1999).

The Conservation Easement Handbook, 2nd ed., Elizabeth Byers and Karin Marchetti Ponte, published by the Land Trust Alliance and the Trust for Public Land (2005).

The Federal Tax Law of Conservation Easements, Stephen J. Small, published by the Land Trust Alliance (1985, 2000). Details the history and status of federal tax law relating to conservation easements.

Field Guide to Conservation Finance, Story Clark, published by Island Press (2007).

The Law of Easements and Interests in Land, James W. Ely Jr. and Jon W. Bruce, published by Thomson/West (2007). Provides a general overview of all types of easements.

The Law of Trusts and Trustees, 3rd ed., George Gleason Bogert and Amy Morris Hess, published by Thomson/West (2005). Section 433, chapter 22, "The Cy Pres Power," Ronald Chester, George Gleason Bogert, and George Taylor Bogert, provides a description of the cy pres doctrine.

Preserving Family Lands, 3 vols., Steven J. Small, published by the Landowner Planning Center: vol. 1 (1998), vol. 2 (1997), and vol. 3 (2002). Covers the role of conservation easements in estate planning for family lands.

Standards and Practices, published by the Land Trust Alliance (2004).

Tax Benefits and Appraisals of Conservation Projects, Larry Kueter and Mark Weston, published by the Land Trust Alliance (2007). Part of the Land Trust Alliance's Standards and Practices curriculum.

Williston on Contracts, 4th ed., Richard A. Lord, published by Thomson/West (1990). Vol. 10, section 27:14, provides a discussion of the doctrine of "promissory estoppel."

ARTICLES

Blackie, Jeffrey A., "Conservation Easements and the Doctrine of Changed Conditions," *Hastings Law Journal* 40 (1989): 1187. Provides an analysis of the legal nature and development of conservation easements and the modification and termination of easements.

"Clay, Sand, or Gravel As 'Minerals' within Deed, Lease, or License," 95 ALR 2d 843 originally published by *American Law Reports* in 1984. Provides an extensive compilation of state law regarding the definition of the term *mineral*.

Dana, Andrew C., "Conservation Easement Terminations, Property Rights, and the Public Interest," draft prepared for Advanced Legal Roundtable on Extinguishment of Conservation Easements sponsored by the Land Trust Alliance (2005). Discusses the appropriateness of the application of the charitable trust doctrine to conservation easements.

Daniels, Tom, "The Purchase of Development Rights, Agricultural Preservation and other Land Use Policy Tools: The Pennsylvania Experience," *Journal of the American Planning Association* (1998), published by the State University of New York at Albany. Describes the use of the purchase of development rights in Pennsylvania by the former administrator of the Lancaster County purchase of development rights program.

Engel, J. Breting, "The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States," *Urban Lawyer* 39 (2007): 19, 33. Covers the history of conservation easements.

Greene, Duncan M., "Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation," *Seattle University Law Review* 28 (2005): 883, 891. Explores the issue of permanent land conservation.

Hanly-Forde, Jason, George Homsy, Katherine Lieberknecht, and Remington Stone, "Transfer of Development Rights Programs," published online by Cornell University (2007); http://government.cce.cornell.edu/doc/html/Transfer%20of%20Development%20Rights%20Programs.htm. Describes how transferable development rights programs work.

Hutton, William T. "Easements as Public Support: The 'Zero-Value' Approach," chapter 12 of *The Conservation Easement Handbook* (2005), published by the Land Trust Alliance and the Trust for Public Land.

King, Mary Ann, and Sally K. Fairfax, "Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates," *Natural Resources Journal* 46, no. 1 (2006): 65. Provides a history of the development of the Uniform Conservation Easement Act and commentary on the obligations of land trusts to manage easements.

Korngold, Gerald, "Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements," *Texas Law Review* 63, no. 3 (1984): 433. Provides an analysis of the legal nature and development of conservation easements and the tension between permanent protection of land and economic imperatives.

Lindstrom, C. Timothy, "*Hicks v. Dowd*: The End of Perpetuity?" 8 Wyo. L. Rev., 25 (2008). Covers the charitable trust doctrine and its applicability to conservation easement terminations and amendments.

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