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An Agricultural Law Research Article

**Forever a Farm: The Agricultural
Conservation Easement in Pennsylvania**

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Forever a Farm: The Agricultural Conservation Easement in Pennsylvania

People must fully understand the irreplaceable value of prime farmlands, and the ominous meaning of the war between the bulldozer and the plow. When farmland goes, food goes. Asphalt is the land's last crop.¹

I. Introduction

This foreboding statement serves as a startling call to action and an appropriate point of entry into an analysis of the ability of the conservation easement to remedy the depletion of the United States' vital farmland reserves.² The pressure to convert prime agricultural land for residential, industrial, and other nonagricultural uses is severe in the northeastern corridor due to the sprawling expansion of the Boston-New York-Philadelphia-Washington, D.C. megalopolis.³ Annually, the Commonwealth of Pennsylvania experiences the loss of over 125,000 acres of farmland to these alternative uses.⁴ The Pennsylvania legislature, in response to this problem and a 1987 statewide ballot referendum,⁵ moved to amend the Agricultural Area Security Act⁶ to include a program for the purchasing of

1. Cutler, *The Peril of Vanishing Farmlands*, N.Y. Times, July 1, 1980, at A19, col. 5.

2. In the United States close to three million acres of agricultural land are converted into other uses on an annual basis. NATIONAL AGRICULTURAL LANDS STUDY (NALS), FINAL REPORT 35 (1981) [hereinafter NALS REPORT]. This agriculture land depletion represents an area almost three times the size of the state of Delaware. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 *ECOLOGY L.Q.* 401, 402 (1987).

3. This corridor consists of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey, Maryland, and Delaware. NALS REPORT, *supra* note 2, at 32.

4. SOIL CONSERVATION SERVICE, U.S. DEPT. OF AGRICULTURE, PENNSYLVANIA NATIONAL RESOURCES INVENTORY 2 (1980). Other estimates, however, have pinpointed this cropland depletion at 90,000 acres per year. *Farmland Preservation Favored by 2-1 Ratio of Voters Statewide*, Phila. Inquirer, Nov. 4, 1987, at A14, col. 3.

5. The Pennsylvania electorate voted on the referendum entitled "Agricultural Land Preservation Plan" on November 3, 1987. The specific question presented to the public was: "Do you favor the incurring of indebtedness by the Commonwealth of \$100 million for the purchase of agricultural conservation easements for the preservation of agricultural land either for a period of 25 years or in perpetuity?" LANCASTER COUNTY AGRICULTURAL PRESERVE BOARD AND FRIENDS OF AGRICULTURAL LAND PRESERVATION, 2 *FARMLAND PRESERVATION NEWS* 1 (Fall 1987); *Farms-Voters Back \$100 Million Bond Issue*, Harrisburg Patriot, Nov. 4, 1987, at A1, col. 6; *Farmland Preservation Favored by 2-1 Ratio of Voters Statewide*, Phila. Inquirer, Nov. 4, 1987, at A14, col. 3.

6. PA. STAT. ANN. tit. 3, §§ 901-915 (Purdon Supp. 1989).

conservation easements.⁷

This Comment addresses the issues relating to the viability of the conservation easement and its ability to protect America's farmland. Part II of this Comment outlines the various rationales for agricultural preservation. Part III offers a definition of an agricultural conservation easement and discusses its functions and advantages relative to other preservation tools. Since federal income tax relief is a major incentive for the donation of a conservation easement, Part IV of this Comment outlines the requirements necessary for obtaining a tax deduction. Part V addresses the unresolved issue of whether a donated conservation easement triggers the recapture of estate taxes under Internal Revenue Code (IRC) section 2032A. Finally, Part VI examines the recently adopted Pennsylvania legislation that amended the Agricultural Area Security Act to provide funding for the outright purchase of agricultural conservation easements.

This Comment suggests that the agricultural conservation easement presents an effective measure to curb the loss of America's prime croplands. This vehicle is attractive because of its initial flexibility and eventual stability. Furthermore, tax relief incentives add to the conservation easement's allure. The potential of this tool to engender farmland security is further supported by Pennsylvania's action to provide funding for the outright purchase of these easements.

The optimism that accompanies the agricultural preservation easement is dampened, however, by the unresolved issue of whether the donation of such an instrument triggers the recapture of estate taxes. If the Internal Revenue Service ignores the policy behind the operation of IRC section 2032A and relies on a literal interpretation of the section, the effectiveness of this preservation vehicle will be undermined. In the event that such a determination is made, it is imperative that the United States Congress respond swiftly to amend IRC section 2032A to ensure that the agricultural conservation easement remains an effective farmland preservation instrument.

II. The Need for Agricultural Preservation

Agriculture occupies a prominent position in American history.⁸

7. Act of December 14, 1988, Pub. L. No. 1988-149 (to be codified at PA. STAT. ANN. tit. 3, §§ 901-915).

8. See generally W. COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE (1979) (outlining the history of American farming).

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Our democratic roots are buried deep in the soil because many of the early settlers were small farmers, many of the founding fathers owned farms,⁹ and many Americans who fought in the Revolutionary War were also farmers.¹⁰ The desire to preserve our heritage is one rationale for support of the agricultural conservation movement.¹¹

A second concern that stimulates efforts to preserve agricultural production capabilities is the future demand for food in the United States. It is anticipated that by the year 2020 the population will exceed 300 million due to an increase in the birth rate and an influx of immigrants.¹²

A third reason for support of the farm preservation movement is implicit in the statement that we live in an increasingly interdependent world. The United States has assumed the role of a world leader in the production of agricultural products.¹³ As the earth's population increases, reliance on American foodstuffs will also increase.¹⁴ By the year 2020 there will be close to 8 billion mouths to feed¹⁵ from a dwindling agricultural land base.¹⁶

A fourth rationale for preservation of American agricultural capabilities is the expected rise in worldwide nutritional standards.¹⁷ As greater numbers of countries join the ranks of affluent nations, their populations will demand a higher quality diet.¹⁸ This fact will manifest itself in a greater demand for meat and dairy products.¹⁹

9. "[A]griculture [has been] one of the main supports of American democracy because it is an occupation embracing millions of freemen who own property and cultivate land on a somewhat equal basis" J. SCHAFER, *THE SOCIAL HISTORY OF AMERICAN AGRICULTURE* 289-90 (1936).

10. The fighting spirit has additionally surfaced throughout American history, most notably in the Shay's Rebellion of 1786 and the early twentieth century Populist movement. See generally C. TAYLOR, *THE FARMER'S MOVEMENT, 1620-1920* (1953).

11. "The ideal of the 'family farm' remains the goal of American agricultural policies in spite of pressures to alter the structure of modern agriculture." Note, *Taxation: Valuation of Farmland for Estate Tax Purposes, Qualifying for I.R.C. § 2032A Special Use Valuation*, 23 WASHBURN L.J. 638, 639 (1984).

12. *U.S. Population: Where We Are: Where We're Going*, 37 POPULATION BULL. 44-46 (1982).

13. NALS REPORT, *supra* note 2, at 37.

14. Over one-third of the United States' agriculture products are earmarked for export. Edwards, *A Future Tied to Exports*, FARMLINE, June 1986, at 4.

15. Brown, *World Food Resources and Population: The Narrowing Margin*, 36 POPULATION BULL., No. 3, at 28 (1981).

16. See *supra* note 2 and accompanying text.

17. Even when taking into account world population growth, living standards and diet are generally expected to rise for much of the world's population. WORLD AGRICULTURE OUTLOOK AND SITUATION REPORT NO. WAS-40, at 4-11 (June 1985).

18. It is a corollary that when living standards rise, especially in poorer nations, these populations will demand better quality and more complex foodstuffs. *Id.* at 7-11.

19. *Id.* at 14. Depending on the sophistication of agriculture in a given country it can

Fifth, the United States has strong economic interests in remaining a world agricultural leader.²⁰ As new markets emerge for our farm products and new consumers are born daily, the United States must be prepared to meet the resultant demands. This agricultural preparedness will be of vital importance as new players enter the market.²¹ A key element of sufficient preparedness is the existence of a significant amount of prime farmland.

In addition, environmental concerns trigger agricultural preservation efforts since the loss of prime cropland has a significant effect on the environment.²² This depletion impedes the production of oxygen,²³ the creation of vital nutrients needed for the growth of vegetation,²⁴ and the preservation of the food supply and habitat for animals.²⁵

A final point that may engender support for the preservation movement is an appreciation for the scenic beauty that farmland provides. Farm communities that are situated in close proximity to major urban centers may recognize the potential for expansion of tourist trades and experience the influx of retirees as city dwellers flock to enjoy a simpler way of life and take part in the bucolic beauty of rural America.²⁶

take between five and ten tons of grain to produce one ton of meat. As nations become more affluent, the demand for a better quality diet will manifest itself in higher demands for meat products, in turn producing an exponential rise in the demand for grain. Currently worldwide meat consumption exceeds 117 pounds per capita and may account for half of the world's grain. *Id.*

20. The United States currently provides approximately fifty percent of the world's grain trade. *Id.* at 10-11.

21. It is expected that the United States will face competition for agriculture buyers from Argentina, Australia, Canada, the European Economic Community, and other developing nations. Many of these grain producers are aided by significant government subsidies which intensify their competition. Sheevers, *U.S. Wheat Faces a World of Competition*, *FARMLINE*, June 1985, at 4.

22. See generally COUNCIL ON ENVIRONMENTAL QUALITY, *LAND USE, THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* (1979); Miner, *Agricultural Retention: An Emerging Issue in Environmental Comment*, *URB. LAND INST.* (May 1975). See also T. BARRETT & P. LIVERMORE, *THE CONSERVATION EASEMENT IN CALIFORNIA 1* (1983).

23. See generally Miner, *Agricultural Retention: An Emerging Issue in Environmental Comment*, *URB. LAND INST.* (May 1975).

24. *Id.* at 3.

25. *Id.* at 3.

26. The pressure to convert farmland to other uses is directly related to the land's proximity to urban settings. Land on the fringe of a major city averages 1800% more in value when utilized for development purposes than if used for cultivation or grazing. The buyers of this land are developers, investors, corporations, urbanites, and retirees. The investors and corporations realize that such land is a way to combat inflation as land prices tend to outperform the general price index and the market for common stock. Developers buy up this land because farmland tends to be in large parcels, free from vegetation and blessed with proper drainage. City dwellers and retirees seek out prime farmland to escape the hectic pace of city life and relax in suburban tranquility. Healy & Shurt, *New Forces in the Market for Rural Land*, 46

III. The Conservation Easement

In general, an easement is an "interest in land in possession of one other than the owner which limits or restricts the possessory rights of the owner and is enforceable at law."²⁷ The existence of an easement is documented in a written agreement between the landowner and the holder of the easement.²⁸ A conservation easement specifically prohibits the landowner from commercially developing the property;²⁹ it is "a transfer of development rights not for the purpose of using them elsewhere, but rather for the purpose of not using them at all."³⁰ An agricultural preservation organization obtains such an easement by negotiating a sale with the individual farmer, by accepting the donation of an easement, or by purchasing the farm outright, placing a restriction on the property, and then reselling the farm in the marketplace (the "purchase-resale option").³¹ The organization, upon acquiring the conservation easement, assumes the responsibility of annual inspection of the farm to ensure the grantor or subsequent owner's compliance with the restrictions.³² Throughout the term of the easement, fee simple title to the property remains with the farmer.³³

The promise of the conservation easement exceeds the limited successes of other agricultural preservation tools.³⁴ This vehicle holds such promise because at its creation the instrument is adaptable to the various desires of the landowner and is flexible to suit the conser-

APPRAISAL J. 185, 187-91 (1978). See also Comment, *Rural Zoning in Nebraska*, 44 NEB. L. REV. 151, 165 n.71 (1965).

27. Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVTL. AFF. L. REV. 513 (1981).

28. *Id.* at 513-14.

29. T. BARRETT & P. LIVERMORE, *THE CONSERVATION EASEMENT IN CALIFORNIA* 4 (1983).

30. *Id.* at 4.

31. See LANCASTER COUNTY AGRICULTURE PRESERVE BOARD, *CONSERVATION EASEMENT PROGRAM GUIDELINES* 7-18 (Dec. 1987).

32. T. BARRETT & P. LIVERMORE, *supra* note 29, at 28.

33. *Id.* at 4.

34. For a discussion of other agricultural preservation tools used in Pennsylvania, including: preferential property and inheritance tax relief, protection from local nuisance ordinances, beneficial sewer and water assessment standards for farmland, protection from certain state and local eminent domain activities, and local zoning measures, see Comment, *Agricultural Land Preservation: Can Pennsylvania Save the Family Farm?*, 87 DICK. L. REV. 595 (1982). For a discussion of the constitutionality of local zoning ordinances that limit the development of land based on its agricultural potential, see Buchanan, *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 59 TEMP. L.Q. 861 (1986). For an analysis of agriculture preservation attempts in other states, see Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401 (1987).

vation requirements of each individual property.³⁵ In addition, the conservation easement tends to be more permanent and more restrictive than zoning and land use regulations, which can shift with the political winds.³⁶ Conservation easements also benefit the government because they maintain private ownership and government taxation of property.³⁷ Furthermore, the easement represents a cost savings to the accepting organization.³⁸ Finally, a conservation easement offers many significant tax advantages that may prove vital to a farmer who is land rich but cash poor.³⁹

Despite these advantages, the conservation easement encourages agricultural preservation at the expense of other public policy goals. The conservation easement is a by-product of individual legislatures weighing the social policies of environmental protection, freedom of contract, and private initiative against the concerns of free alienability of land, "dead hand" control, and maximum flexibility in the determination of the best uses of societal land.⁴⁰ The overwhelming acceptance of this instrument⁴¹ reveals present societal recognition that

35. THE TRUST FOR PUBLIC LAND AND THE LAND TRUST EXCHANGE, THE CONSERVATION EASEMENT HANDBOOK 2 (1988) [hereinafter HANDBOOK].

36. See *id.* at 2. In addition, acquiring a conservation easement is much less complicated than obtaining a zoning ordinance for the same purpose through a local municipality. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540, 542 (1979).

37. HANDBOOK, *supra* note 35, at 2.

38. Purchasing a conservation easement is much less costly than acquiring title to the underlying fee itself. Netherton, *supra* note 36, at 542.

39. Such tax relief may come in the form of lower gift tax, property tax, or estate tax. HANDBOOK, *supra* note 35, at 55-57. The rationale behind the lower tax is that the value of the underlying land is lessened by the granting of the restriction. The value of the gift, estate, or property being assessed is therefore lessened resulting in lower tax rates. *Id.*

40. See generally Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984).

41. Conservation easements have been used in all but four states, by approximately 500 nonprofit organizations and public agencies. HANDBOOK, *supra* note 35, at 1. Various state statutes provide for the creation of these instruments. See, e.g., ARK. STAT. ANN. §§ 50-1201-1206 (Supp. 1983); CAL. CIV. CODE §§ 815-816 (West 1982); COLO. REV. STAT. §§ 38-30.5-101 to 110 (1982 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 47-42a to 42c (West 1986); DEL. CODE ANN. tit. 7, §§ 6901-6906 (Supp. 1984); FLA. STAT. ANN. § 704.06 (West 1988); GA. CODE ANN. §§ 85-1406 to -1410 (1988 & Supp. 1989); IDAHO CODE § 67-4613 (1989); ILL. ANN. STAT. ch. 30, para. 401-406 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 32-5-2.6-1 to -7 (Burns Supp. 1989); IOWA CODE ANN. §§ 111D.1-.5 (West 1984 & Supp. 1989); ME. REV. STAT. ANN. tit. 33, §§ 667-668 (1978 & Supp. 1984); MD. REAL PROP. CODE ANN. § 2-118 (1981); MASS. GEN. LAWS ANN. ch. 184, §§ 31-32 (West 1977 & Supp. 1985); MICH. COMP. LAWS ANN. §§ 399.251-257 (West Supp. 1985); MINN. STAT. ANN. §§ 84.64-.65 (West 1977); MONT. CODE ANN. §§ 70-17-101 to -102 (1983); NEV. REV. STAT. §§ 111.390-440 (1983); N.H. REV. STAT. ANN. §§ 477:45-.47 (1983); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West Supp. 1985); N.C. GEN. STAT. §§ 121-34 to -42 (1981); OHIO REV. CODE ANN. §§ 5301.67-.70 (Page 1981); R.I. GEN. LAWS §§ 34-39-1 to -5 (1984); TENN. CODE ANN. §§ 66-9-301 to -309 (1982); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (Vernon Supp. 1985); UTAH CODE ANN. §§ 63-18a-1 to -6 (1978); WIS. STAT. ANN. § 700.40 (West Supp. 1985).

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permanent protection of our environment and agriculture is of vital importance.⁴² Alternative land use controls do not provide the certainty necessary to preserve farmland for future generations. Essentially, "there is never any certitude that a particular scheme of controls will remain unmodified over a period of time."⁴³

IV. Federal Income Tax Benefits

Seemingly permanent protection of endangered farmland is not the only advantage of the conservation easement. The instrument enjoys additional popularity because it offers several tax incentives.⁴⁴ These benefits are particularly attractive to a landowner who intends to donate a conservation easement or sell the restriction for less than fair market value to a public agency or other non-profit organization.⁴⁵ Provided that the landowner satisfies pertinent tax code provisions, he or she may declare a deduction on his or her federal income tax return.⁴⁶

Internal Revenue Code section 170 provides for tax deductible charitable gifts, and is applicable to conservation easements.⁴⁷ If qualified, a landowner is eligible to deduct an amount equal to thirty percent of his or her adjusted gross income each year, for the duration of six years, or until the value of the gift is exhausted.⁴⁸ The landowner may alternatively elect to deduct fifty percent of the adjusted gross income, but in that case, the value of the gift must be reduced.⁴⁹ The value of the gift is determined by reference to the

42. This recognition has also led to the drafting of the Uniform Conservation Easement Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1981. UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 61 (Supp. 1989).

43. Cosigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612, 614.

44. A 1985 survey by the Land Trust Exchange of easement holders revealed that tax benefits were the primary incentive for approximately one-fifth of all conservation easement donors, and the second impetus for about half. HANDBOOK, *supra* note 35, at 39-40.

45. The landowner who can use the full value of a federal income tax deduction may wish to donate the entire value of the easement to an agricultural preservation agency; however, not every farmer can use the total value of the deduction during the statutory period. Further, the farmer may want immediate cash. In these cases, the landowner can obtain the benefits of both incentives by selling the easement for a sum less than fair market value. The amount that is less than the fair market value of the easement can then be declared as a deduction. *See infra* notes 47-138 and accompanying text.

46. *See infra* notes 47-138 and accompanying text.

47. I.R.C. §§ 170(f)(3)(B), 170(h) (1989).

48. I.R.C. § 170(b)(1)(C)(i) (1989). *See* S. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 20-3 (1986).

49. I.R.C. § 170(b)(1)(C)(iii) (1989). In the case of long-term capital gain property the deduction can be reduced by 40% of the amount of long-term capital gain that would have been realized had the property been sold; the remaining amount is deductible up to 50% of the taxpayer's contribution base. "This 'step down' election is irrevocable and brings with it a

fair market value of the conservation easement.⁵⁰ The easement's fair market value is derived by subtracting the appraised value of the farmland with the easement from the fair market value of the land prior to the grant of the easement.⁵¹ Generally, this section of the Code restricts the deduction for contributions in trust to certain kinds of partial interests; however, the Code provides an exception for a qualified conservation contribution.⁵²

A. The Charitable Deduction Requirements

In order to qualify for a charitable deduction, a conservation easement must meet certain criteria. First, the conservation easement must be a "qualified real property interest," which can be satisfied by donating the land in perpetuity.⁵³ Second, the grant must be made to a "qualified organization."⁵⁴ Third, the instrument must be given "exclusively for conservation purposes."⁵⁵

1. *What Constitutes a Qualified Organization.*—An organization is "qualified" to accept the gift under the IRC if it is either a governmental unit,⁵⁶ a publicly supported charitable organization as defined in section 501(c)(3),⁵⁷ or a closely held satellite of a governmental unit or a publicly supported charitable organization.⁵⁸ In addition, the Code regulations point out that the donee organization must have the ability and resources to enforce the restrictions.⁵⁹ Since the easement is intended to be utilized in perpetuity, the duty

variety of related tax consequences. The decision whether to use the 30% rule or make the step-down election is one that will vary depending on each taxpayer's individual circumstances." S. SMALL, *supra* note 48, at 20-3.

50. Treas. Reg. § 1.170A-1(c)(1) (1989).

51. *Id.* Note that the regulations indicate that increases in the value of any property owned by the donor or a related person, not just contiguous property, resulting from the granting of a perpetual conservation easement must be taken into account in determining the amount of the deduction. Treas. Reg. § 1.170A-14(h)(3)(i) (1989).

52. I.R.C. § 170(f)(3)(B)(iii) (1989). See Priv. Ltr. Rul. 87-11-054 (Dec. 15, 1986).

53. I.R.C. § 170(h)(2) (1989) defines "qualified real property interest" as 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.

54. See *infra* notes 56-62 and accompanying text.

55. See *infra* notes 63-114 and accompanying text.

56. I.R.C. §§ 170(b)(1)(A)(v), 170(b)(1)(A)(vi) (1989).

57. This is a charitable organization described in I.R.C. § 501(c)(3) that in addition meets the public support test of I.R.C. § 509(a)(2).

58. This is an organization that is not publicly supported but is qualified as a public charity under I.R.C. § 509(a)(3) and is controlled by a government agency or publicly-supported charity.

59. Treas. Reg. § 1.170A-14(c)(1) (1989); I.R.C. § 170(h)(3) (1989). See S. REP. NO. 1007, 96th Cong. 2d Sess. 13 (1980).

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to annually inspect to determine compliance with the terms of the easement (especially by subsequent owners of the fee) may become costly.⁶⁰ The regulations also state that a qualified conservation easement can be transferred only to other qualified organizations.⁶¹ The availability of an alternative donee may also be relevant.⁶²

2. *What Constitutes Conservation Purposes.*—For a grant to satisfy the requirement that it be “donated exclusively for conservation purposes,” it must fall within one of seven categories provided by the Code.⁶³ A particular land gift, however, may satisfy the requisites for several of these classifications. Farmers may find it advantageous to aver qualification under as many of these categories as possible to strengthen claims that the donations are deductible. A conservation easement meets the conservation purposes requirement if it is given to preserve land for the outdoor recreation of the general public,⁶⁴ to preserve land for the education of the general public,⁶⁵ to protect a relatively natural habitat of fish, wildlife, plants, or other similar ecosystem,⁶⁶ to preserve open space for the scenic enjoyment of the general public, which will yield a “significant public benefit,”⁶⁷ to preserve open space pursuant to a clearly delineated federal, state, or local governmental conservation policy, which will yield a significant public benefit,⁶⁸ to preserve a historically important land area,⁶⁹ or to preserve a certified historic structure.⁷⁰ It is also imperative when claiming the deduction that the landowner show that surface mining is not permitted or, if surface and subsurface rights were separated before June 13, 1976, that the possibility of the use of such rights is so remote as to be negligible.⁷¹ This last requirement ensures that efforts to extract minerals will not impede conservation efforts.⁷²

(a) *Preservation of land for the recreation and education of the*

60. HANDBOOK, *supra* note 35, at 87-110. Accepting organizations also require or request that the grantor donate a sum for the cost of this monitoring obligation. *Id.* at 102.

61. Treas. Reg. § 1.170A-14(c)(2) (1989).

62. HANDBOOK, *supra* note 35, at 111-16.

63. I.R.C. § 170(h)(4) (1989). The regulations specifically recognize that a donation may satisfy the test for more than one classification in Treas. Reg. § 1.170A-14(d)(4)(vi)(C) (1989).

64. I.R.C. § 170(h)(4)(i) (1989).

65. *Id.*

66. I.R.C. § 170(h)(4)(ii) (1989).

67. *Id.* § 170(h)(4)(iii)(I).

68. *Id.* § 170(h)(4)(iii)(II).

69. *Id.* § 170(h)(4)(iv).

70. I.R.C. § 170(h)(4)(iv) (1989).

71. I.R.C. § 170(h)(5)(B) (1989); Treas. Reg. § 1.170A-14(g)(4) (1989).

72. S. SMALL, *supra* note 48, at 15-5.

public.—The Code regulations require that land donated under the first two categories of public recreation and education be made accessible to the general public on a regular basis.⁷³ This does not necessarily mean every day, but rather a substantial number of days per year.⁷⁴ In addition, it must possess some attribute that makes the public desire to utilize the property.⁷⁵ It must be either attractive or educational.⁷⁶ This category may apply to a farm that is on the fringes of a major urban center where the attraction is the mere open space, and where tourism promoting rural America is a significant industry.⁷⁷

(b) *Preservation of land for the conservation of a natural habitat.*—The Code regulations also contain qualifications for utilization of the significant natural habitat category.⁷⁸ First, the dedicated property must be in a relatively natural state.⁷⁹ Second, the land must contain either rare, endangered, or threatened species, must contribute to the ecological viability of a conservation area, or must otherwise represent a high quality native terrestrial or aquatic ecosystem.⁸⁰ The Internal Revenue Service has wide latitude in interpreting this language.⁸¹ If liberally interpreted, many farms may fit this classification.

(c) *Preservation of open space for scenic enjoyment.*—The fourth and fifth categories, “open space for scenic enjoyment” and “open space pursuant to a clearly delineated governmental conservation policy,” are frequently utilized for justifying conservation easements.⁸² Although these two sections are broad, compliance with their requirements may be complicated.⁸³ The tests for compliance are that the property must be “scenic” and easily visible to the public,⁸⁴ and that the protection of the land must advance a “significant public benefit.”⁸⁵

73. Treas. Reg. § 1.170A-14(d)(2)(ii) (1984).

74. S. SMALL, *supra* note 48, at 5-4 (the amount of public access should depend on the characteristics of the property and the purpose of the donation).

75. HANDBOOK, *supra* note 35, at 14.

76. *Id.*

77. *Id.*

78. See *supra* note 66 and accompanying text.

79. Treas. Reg. 1.170A-14(d)(3)(i) (1989).

80. Treas. Reg. 1.170A-14(d)(3)(ii) (1989).

81. HANDBOOK, *supra* note 35, at 15; S. SMALL, *supra* note 48, at 5-5 to 5-6.

82. HANDBOOK, *supra* note 35, at 15.

83. *Id.* at 15.

84. I.R.C. § 170(h)(4)(A)(iii)(I) (1989); Treas. Reg. 1.170A-14(d)(4)(i)(B) (1989).

85. *Id.* Curiously, however, the statute does not speak to the preservation of farmland for farmland's sake specifically, rather than dealing with this preservation goal tangentially through the “scenic enjoyment” and “governmental conservation policy” rationales. For a dis-

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The Internal Revenue Service will determine that a conservation easement is for the "scenic enjoyment" of the general public if conversion of the land into other uses would inhibit the scenic character of the local landscape, or would impair the view enjoyed from a park, nature preserve, road, waterbody, trail, or historic structure or land area.⁸⁶ In addition, the area or roadway must be open or utilized by the public.⁸⁷ This determination is made after an examination of all the pertinent facts and circumstances germane to the donation.⁸⁸ Regional variations in topography, geology, biology, and cultural and economic conditions are also considered.⁸⁹ It is the taxpayer's burden to demonstrate the scenic characteristics of the easement when utilizing the regulations.⁹⁰

The regulations provide eight evaluative factors to examine when determining what constitutes scenic.⁹¹ These elements include: (1) the compatibility of the land use with other land in the vicinity; (2) the level of contrast and variety exhibited by the visual scene; (3) the openness of the land; (4) relief from urban sprawl; (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 government agency.⁹²

The regulations also describe what factors will satisfy a "significant public benefit" analysis. Factors to contemplate include: (1) the uniqueness of the property to the area; (2) the intensity of land development in the area, including both existing pressures and foreseeable developmental trends; (3) the consistency of the proposed open space use with governmental programs for conservation in the area; (4) the consistency of the donation with private conservation efforts in the vicinity; (5) the foreseeability that development of the property in question will lead to or contribute to the scenic, natural, or

cussion of this conspicuous silence see S. SMALL, *supra* note 48, at 6-4.

86. Treas. Reg. § 1.170A-14(d)(4)(ii)(A) (1989).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Treas. Reg. § 1.170A-14(d)(4)(ii)(A)1-8 (1989).

92. *Id.*

historic character of the community; (6) the opportunity for the general public to utilize the land or appreciate its scenic qualities; (7) the relation of the property to the local or regional efforts to preserve a landscape or resource that attracts tourism or commerce to the community; (8) the likelihood that the accepting organization will be able to obtain equally desirable substitute property or rights; (9) the cost to the accepting organization of enforcing the conservation easement's restrictions; (10) the population density in the area; and (11) the consistency of the grant with a legislatively mandated program identifying particular parcels of land for future protection.⁹³

(d) *Preservation of open space pursuant to governmental policy.*—The fifth category, like the “conservation of open space for scenic enjoyment” classification, requires close attention to the elements that define the deduction.⁹⁴ This category similarly sets forth a two-pronged test. First, the protection of the property must be attempted “pursuant to a clearly delineated federal, state or local government conservation policy.”⁹⁵ Second, the protection of the property must yield a “significant public benefit.”⁹⁶

It is clear that a general expression of conservation goals and purposes by an individual governmental official or legislative body will not satisfy the “clearly delineated government policy” requirement.⁹⁷ Such a test would be too easily satisfied. Nevertheless, the policy need not be a program that explicitly identifies properties for preservation.⁹⁸ The requirement is satisfied by easement grants that further a specific, identified, conservation project.⁹⁹ Funding of the program need not come from government coffers; however, the program must receive a significant commitment from the government.¹⁰⁰ Acceptance of the easement by a government agency tends to meet this requirement, but such acceptance is not dispositive.¹⁰¹ The more rigorous the evaluating process of the accepting organization, the greater the chances of satisfying this element.¹⁰²

State policies that tend to satisfy the “clearly delineated governmental policy” prong include: preferential ad valorem taxation of

93. Treas. Reg. § 1.170A-14(d)(4)(iv)(A)1-11 (1989).

94. HANDBOOK, *supra* note 35, at 18.

95. See *supra* note 68.

96. See *supra* note 68.

97. Treas. Reg. 1.170A-14(d)(4)(iii)(A) (1989).

98. *Id.*

99. *Id.*

100. *Id.*

101. Treas. Reg. 1.170A-14(d)(4)(iii)(B) (1989).

102. *Id.* See, e.g., Priv. Ltr. Rul. 82-47-024 (Aug. 18, 1982).

farmland, agricultural district legislation, policy legislation or governor's executive orders, and purchase of development rights legislation.¹⁰³ By contrast, local policies that satisfy this element typically implicate planning and zoning policies.¹⁰⁴ Such examples include: large minimum lot size, density-based allocation, exclusive agricultural zoning, and conditional use or performance zoning.¹⁰⁵ Whether or not state or local policies are cited as justification for the donation, it is imperative that the grant be "pursuant to" the policy. Although agricultural zoning has been implemented, the property will not meet the test if it is not within the zoned area.¹⁰⁶

The "significant public benefit" prong is satisfied in much the same way as the test for a conservation easement donated to preserve "open space for the scenic enjoyment of the general public."¹⁰⁷ Relevant to this analysis are references to land capability, relative size of the parcel, a stable agricultural infrastructure, absence of conflict, and governmental adoption of a specific conservation policy.¹⁰⁸ As noted previously, the Internal Revenue Service determines a "significant public benefit" from all the relevant factors, so that a deficiency in one area can be overcome by relative strength in another.¹⁰⁹

(e) *Preservation of historically important land areas or structures.*—It is rare that agricultural conservation easements qualify under one of these rationales. A farmland easement meets this criteria if it has independent historical value beyond its agricultural potential.¹¹⁰ A "historically important land area" must have signifi-

103. Thompson, *Easements and Agricultural Preservation*, in HANDBOOK, *supra* note 35, at 25-26.

104. *Id.* at 26.

105. *Id.* at 26-27.

106. *Id.* at 27.

107. *See supra* note 93 and accompanying text.

108. 1) "Land capability" is a term of art and refers to the seven soil classifications determined by the Soil Conservation Service. The higher the soil class the greater the public benefit from a given agricultural conservation easement donation. 2) The size of the parcel should be of at least average size for agricultural holdings in the community and should be large enough to be farmed by methods common in the area. 3) Regardless of a parcel's size and fertility, if there is no access to seed, fertilizer, or other necessary inputs a tract may not be worth preserving as farmland, although it might qualify as "open space" preservation. The existence of other farms, however, is strong evidence that there is a stable agricultural infrastructure in the community. 4) Commercial farming requires a lot of open space and it also is important to maintain a space buffer between farms and residential areas to avoid conflicts (like manure odors). There is little public benefit in preserving farms that are contiguous with too many backyards. 5) Local government adoption of a specific conservation policy is strong evidence that the community sees the protection of the farm as benefitting the immediate public. Thompson, *Easements and Agricultural Preservation*, in HANDBOOK, *supra* note 35, at 27-29.

109. Treas. Reg. § 1.170A-14(d)(4)(vi)(A) (1989).

110. Treas. Reg. § 1.170A-14(d)(5)(i),(ii) and (iii) (1989).

cance in and of itself, contribute to a registered historic district, or be contiguous to a property listed in the National Register of Historic Places.¹¹¹ In addition, the physical or environmental features of the property must contribute to the historic or cultural integrity of the National Register property.¹¹²

An easement pertaining to a "certified historic structure" must be listed in the National Register of Historic Places or certified by the Secretary of the Interior as contributing to the historic character of the registered historic district in which it is located.¹¹³ Certification must issue at the time the easement is granted or by the time of filing of the grantor's income tax return for the taxable year in which the donation was made, including any extensions.¹¹⁴

B. *Conflicts with the Rights of Others*

A particular donation can satisfy the requisite elements of one or more of the factors outlined above yet fail to qualify for a charitable deduction if it does not account for the relative rights of others to the property.¹¹⁵ Such a deficiency is most clearly visible when dealing with mortgaged property and third party mineral rights to the land.¹¹⁶ An easement will not protect the property if a third person can act irrespective of the restrictions. For this reason, the regulations require that a mortgagee must subordinate its rights in the property to the qualified organization's right to enforce the conservation purposes of the grant in perpetuity for the donation to be deductible.¹¹⁷ This rule applies for donations made after February 13, 1986.¹¹⁸

Furthermore, the regulations set forth specific criteria for donation of land when the subsurface mineral rights have been separated from ownership of the rest of the property.¹¹⁹ For easement contributions made after July 18, 1984, a deduction is allowed if ownership of the surface estate was separated from ownership of the mineral rights before June 13, 1976, and remains so separated up to and including the time of the gift.¹²⁰ Also, the probability of surface min-

111. *Id.*

112. *Id.*

113. Treas. Reg. § 1.170A-14(d)(5)(iii)(B) (1989).

114. *Id.*

115. See *infra* notes 117-23 and accompanying text.

116. See *infra* notes 117-23 and accompanying text.

117. Treas. Reg. § 1.170A-14(g)(2) (1989).

118. *Id.*

119. Treas. Reg. § 1.170A-14(g)(4)(i) (1989).

120. *Id.*

ing occurring on the property must be "so remote as to be negligible."¹²¹ Such consideration is especially vital in the west where mineral rights are frequently owned by the federal government.¹²² Recent letter rulings reveal, however, that donations of this type of property can yield an income tax deduction.¹²³

C. Appraisals

It is highly probable that a donor who grants a conservation easement and claims a value in excess of \$5,000 will have his or her contribution scrutinized.¹²⁴ For this reason, compliance with appraisal requirements is imperative. There are three basic requirements for appraisal substantiation. First, the donor must obtain a "qualified appraisal."¹²⁵ Second, a "fully completed appraisal summary" must be attached to the taxpayer's return.¹²⁶ Finally, the donor must maintain certain specified records concerning the gift.¹²⁷

A "qualified appraisal" must be done by a "qualified appraiser."¹²⁸ A qualified appraiser is one who is "qualified to make appraisals of the type of property being valued" and cannot be a person whose relationship to the taxpayer or the accepting organization "would cause a reasonable person to question the independence of such an appraiser."¹²⁹ In this regard, the regulations specifically state that an appraiser who is regularly used by the organization and does not conduct a substantial amount of appraisals for other customers is not a qualified appraiser with respect to the property in question.¹³⁰ To satisfy the additional appraisal requirements, a

121. Treas. Reg. § 1.170A-14(g)(4)(ii) (1989).

122. HANDBOOK, *supra* note 35, at 22.

123. See, e.g., Priv. Ltr. Rul. 84-28-037 (April 6, 1984) (permitting subsurface mineral development provided that "no permanent destruction of any significant conservation interest will result therefrom"); Priv. Ltr. Rul. 83-02-085 (Oct. 14, 1982) ("any use or practice" carried on by the donor must be restricted so that "no permanent destruction of any significant conservation interest intended to be protected by the easement will occur"); and Priv. Ltr. Rul. 82-33-025 (May 18, 1982) (the easement permits no use of the retained interest "that will be destructive of any significant conservation interests"), as cited in S. SMALL, *supra* note 48, at 15-10.

124. HANDBOOK, *supra* note 35, at 53; see Treas. Reg. § 1.170A-13T(c)(2)(i)(A) (1982).

125. S. SMALL, *supra* note 48, at 19-2 (citing Temp. Treas. Reg. § 1.170A-13T(c)(1) (1982)).

126. *Id.*

127. *Id.*

128. *Id.* See generally THE NATIONAL TRUST FOR HISTORIC PRESERVATION AND THE LAND TRUST EXCHANGE (Oct. 1984), *Appraising Easements, Guidelines for Valuation of Historic Preservation and Land Conservation Easements*.

129. SMALL, *supra* note 48, at 19-2 to 19-3 (citing Temp. Treas. Reg. § 1.170A-13T(c)(1) (1982)).

130. *Id.* at 19-3.

"qualified appraisal" must include, among other things, a description of the property, the method of valuation used to determine the fair market value of the property, information about the appraiser and his or her qualifications, and a description of the fee charged for the appraisal.¹³¹

The "appraisal summary" must identify the accepting organization, the appraiser, and the property in question.¹³² In addition, the appraiser and the accepting organization must sign the summary.¹³³ The organization's signature "does not represent concurrence in the appraised value of the contributed property. Rather it represents acknowledgement of the receipt of the property."¹³⁴ The signature also shows that the organization understands the reporting requirements imposed by Internal Revenue Code section 6050L.¹³⁵

Failure to comply with the appraisal requirements and over-valuation of the easement by the taxpayer can result in stiff penalties.¹³⁶ If the valuation claimed is 150 percent or more of the value determined by the Internal Revenue Service, the taxpayer must pay the additional tax plus a penalty totalling thirty percent of the additional liability.¹³⁷ In addition, the Internal Revenue Service may penalize the appraiser.¹³⁸

Although these regulations are expansive, the requirements are quite manageable and the income tax deductions represent a significant inducement to the average farmer. In addition, these provisions are strong preservation tools in the hands of organizations that have limited funds to make outright purchases of agricultural conservation easements.

V. Recapture Provisions of the Internal Revenue Code

A cloud on the horizon of the agricultural conservation easement as a preservation tool is presented by the issue of how the granting of the easement interacts with the requirements for estate tax relief under Internal Revenue Code section 2032A.¹³⁹ Section

131. *Id.*

132. *Id.*

133. *Id.*

134. S. SMALL, *supra* note 48, at 19-3.

135. *Id.*

136. I.R.C. § 6659(f) (1989). *See also* S. SMALL, *supra* note 48, at 19-3.

137. I.R.C. § 6659(f) (1989).

138. *Id.* However, if the I.R.S. determines that conditions prove that a real effort was made to arrive at a correct value, it may waive the penalties. HANDBOOK, *supra* note 35, at 54.

139. *See* I.R.C. § 2032A (1954), which also allows an estate to elect special use valuation for small, closely held businesses.

2032A's purpose is to assist land rich but cash poor farmers to escape exorbitant estate tax assessments.¹⁴⁰ Under section 2032A, farmland is valued for estate tax purposes on the basis of its current agricultural value rather than on its fair market value, which would take into account the highest and best possible use.¹⁴¹ Farmland that is located near a large urban center would otherwise be valued at its residential or commercial development potential.¹⁴² Such valuation would require the payment of estate taxes so high that the average farmer would be forced to sell off a portion of the farm in order to pay the taxes.¹⁴³ Section 2032A's goal is to meet the needs of farmers faced with liquidity problems and to encourage preservation of prime farmland.¹⁴⁴

To ensure that only those who intended to continue the existing farming operations would utilize this estate tax relief, section 2032A imposes an additional estate tax or "recapture" when there has been a disqualifying disposition or cessation of qualified use during a ten

140. The House Ways and Means Committee recognized that valuing farm property on the basis of its highest and best possible usage rather than its actual usage, would impose an estate tax burden so high that the successful continuation of farming on that parcel would be thwarted, as the heirs would be forced to sell off at least part of the land to developers to pay the tax. H.R. REP. NO. 94-658, 94th Cong., 2d Sess. 22 (1976); Priv. Ltr. Rul. 80-41-016 (June 30, 1980).

141. The fair market value is the theoretical price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to enter into the agreement and both containing reasonable knowledge of all relevant facts. STAFF OF JOINT COMM. ON TAXATION, 94th Cong., 2d Sess., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 536 (Comm. Print 1976) [hereinafter JOINT COMM.]. One of the most important factors used in determining the fair market value is the highest and best possible use to which the property can be utilized. *Id.* Generally, there are three methods employed to determine the highest and best possible usage. They are: (1) the market data approach, arrived at by comparing recent sales of similar property in the area; (2) the capitalization of income approach, arrived at by referring to the interest rate and return necessary to retrieve the investment in the property; and (3) the cost of production or replacement, relied on when the property has a unique purpose. Kelley, *Farmland Values for Estate Tax Purposes*, 22 PRAC. LAW. 11 (1976).

142. Comment, *Valuation of Farmland for Estate Tax Purposes: A Consideration of Section 2032A and the New Treasury Regulations*, 27 LOY. L. REV. 140, 142 (1981).

143. The joint committee summarizes its rationale for adoption of § 2032A as:
Valuation on the basis of highest and best use, rather than actual use, may result in the imposition of substantially higher estate taxes. In some cases, the greater estate tax burden makes the continuation of farming less feasible because the income potential from these activities is insufficient to service extended tax payments or loans obtained to pay the tax. Thus, the heirs may be forced to sell the land for development purposes. In addition, when the valuation of the land reflects speculation to such a degree that the price of the parcel does not bear a reasonable relationship to its earning capacity, the Congress determined that it was inappropriate to include this speculative value in the value of the land for estate tax purposes.

JOINT COMM., *supra* note 141, at 536-37.

144. *Id.*

year recapture period.¹⁴⁵ Basically, the recapture operates as a "look-back" scheme. By legislative grace, the farmer is able to utilize a special valuation of estate taxes; however, when the property ceases to be used for farming purposes within the statutory period, the farmer could receive a windfall by then selling the land for development. To prevent the occurrence of such inequity, the recapture scheme values the land on the basis of its potential highest and best use at the time that the special use valuation was made and collects the previously foregone estate tax. Disposition of "any interest" in the specially valued property during this statutory period to someone other than a member of the qualified heir's family will result in the initiation of a recapture tax.¹⁴⁶ "Disqualifying dispositions include gifts, sales, exchanges, sale-leasebacks, partitions, and severance of timber on qualified woodland."¹⁴⁷ Recapture will likewise be triggered when there is a cessation of the farm's qualified use.¹⁴⁸

A literal reading of the section leads to the conclusion that the gift of an agricultural conservation easement would trigger a recapture tax. Such a result, however, is inconsistent with the rationale underlying section 2032A. Congress' intent in enacting the statute was "to encourage the continued use of property for farming and other small business purposes."¹⁴⁹ The donation of an agricultural conservation easement ensures that the property will continue to be used as a farm well beyond the ten year statutory period.¹⁵⁰ Furthermore, an additional tax would impede the granting of easements and directly undermine the policy of encouraging the continuation of farming operations.¹⁵¹ Although Congress did not expressly consider the obvious relationship between sections 170(h) and 2032A, the Internal Revenue Service has the authority to consider their correlation in light of overall tax policy.¹⁵² A literal interpretation of section

145. I.R.C. § 2032A(c) (1954).

146. I.R.C. § 2032A(c)(1)(A) (1954).

147. I.R.C. § 2032A(c)(2)(E) (1954).

148. The Code recognizes that a qualified heir may not be able to take over the farming operation immediately upon the decedent's death. It allows a two-year grace during which the recapture tax will not be triggered. I.R.C. § 2032A(h)(2)(C)(i) (1954). Cessation can occur when the farmland is converted to other, nonagricultural related uses. In addition, cessation can take place when there was no material involvement by the decedent or a member of the decedent's family in the farming operation in the predeath period, or by the qualified heir or members of the heir's family in the post-death period. The relevant time spans for such analyses are aggregates of more than three years for any eight-year period ending after the date of the decedent's death. I.R.C. § 2032A(c)(6)(A) (1954).

149. See *supra* notes 140-43 and accompanying text.

150. See *supra* notes 27-43 and accompanying text.

151. See *supra* notes 140-43 and accompanying text.

152. The Internal Revenue Service considered the complimentary purposes of two over-

2032A, without recognizing the policy behind its promulgation, would be especially onerous if the Service determines that a recapture tax is justified but the farmer has already granted an easement to a preservation organization. The land would be worth less due to the easement grant but the recapture tax would be assessed based on the pre-grant, "best use" value. Application of these overlapping sections in this way would punish the farmer twice, as the land would be taxed for a use that is prevented by the easement while at the same time the value of the land would be reduced by the easement grant. Such a scenario would require the farmer to sell off an even greater portion of his land to pay the recapture tax. This result would be in direct contravention of the intent of section 2032A.

Arguably, an agricultural conservation easement is analogous to a Conservation Reserve Program (CRP) contract, which does not trigger 2032A recapture.¹⁵³ Such a contract prohibits the farmer from growing certain crops on highly erodible land for a ten year period.¹⁵⁴ The Internal Revenue Service previously ruled that allowing land to lie fallow was not a cessation of the qualified farming use of the property for the purposes of special use valuation.¹⁵⁵ Unfortunately, the Service did not discuss the accompanying issue of whether enrolling the land in the CRP was a "disposition" of an interest in the property.¹⁵⁶ Perhaps implicit in that decision, however, is the position that enrollment in the CRP is not a disposition by qualified heirs for 2032A purposes.¹⁵⁷ If the CRP enrollment is not a disposition, it follows that the granting of an easement should be viewed similarly. Neither instrument conveys any right to use the property to a third party; instead, both tools serve to issue rights to

lapping Code sections when the issue was whether the conveyance of a conservation easement restricting changes to the facade of a historic building would trigger the recapture of a rehabilitation tax credit under I.R.C. § 48(g). The Service determined that the easement was not a disposition of an interest in the property for purposes of I.R.C. § 48(g). In that ruling the Service stated, "It seems unlikely that Congress intended to penalize taxpayers when they engage in both activities to achieve the same preservation goal." Priv. Ltr. Rul. 87-36-003 (May 12, 1987). Such a recognition of complementary purposes would seem directly analogous to the overlapping rationales of I.R.C. §§ 2032A and 170(h).

153. The Service determined that a farm that had previously been afforded special use valuation under I.R.C. § 2032A did not require the imposition of recapture tax when that farm was later enrolled in the Federal farmland set-aside program, the Conservation Reserve Program (CRP). The Service reasoned that the signing of this contract, which prohibited the farmer from growing certain crops on highly erodible land for a ten year period, was not a cessation of the qualified farming usage that would trigger recapture. Priv. Ltr. Rul. 87-29-037 (Apr. 21, 1987).

154. *Id.*

155. *Id.*

156. *Id.*

157. - See *id.*

enforce limitations on property use.¹⁵⁸ The ownership of the land in both fact situations remains with the taxpayer.¹⁵⁹

A third argument against a determination that an easement donation triggers recapture under 2032A arises from references to previous attempts by the Internal Revenue Service to define the term "any interest." In private letter rulings, the Service interpreted the term to mean the property that the qualified heir has received.¹⁶⁰ With the simple donation of an agricultural conservation easement, the heir does retain the interest received, that of fee simple absolute. Under this definition, such a grant would trigger recapture because, even if a disposition was made, it was not of an interest inherited. Rather, the rights being restricted by the easement, which are the development rights for non-farm use, were not even in existence at the time the property was valued at its special use.

The determination of this issue is critical to the continued use of the agricultural conservation easement as a powerful preservation tool. If the Internal Revenue Service rules that such a donation is a disposition of a qualified interest, that ruling would trigger recapture. As a result, efforts to clarify the statute are imperative.

VI. Pennsylvania's Utilization of the Conservation Easement

Recently the Pennsylvania legislature enacted legislation to fund the acquisition of conservation easements within the Commonwealth.¹⁶¹ Such action was mandated by the passage of a statewide ballot referendum.¹⁶² The referendum, entitled "Agricultural Land Preservation Plan," specifically asked the electorate: "Do you favor the incurring of indebtedness by the Commonwealth of \$100 million for the purchase of agricultural conservation easements for the preservation of agricultural land either for a period of 25 years or in perpetuity?"¹⁶³ Recognizing that not every farm owner will be induced to grant easements based on income tax deductions alone, the Pennsylvania voters approved the passage of this referendum.¹⁶⁴

158. *Id.* See *supra* notes 27-43 and accompanying text.

159. Priv. Ltr. Rul. 87-29-037 (Apr. 21, 1987). See *supra* notes 27-43 and accompanying text.

160. Priv. Ltr. Rul. 83-08-004 (Oct. 19, 1982). In the usual fact scenario the qualified heir receives a fee simple absolute interest in the property. After the donation of an agricultural conservation easement the heir continues to retain that fee simple absolute interest. See *supra* notes 27-43 and accompanying text.

161. Act of December 14, 1988, Pub. L. No. 1988-149 (to be codified at PA. STAT. ANN. tit. 3, §§ 901-915 (Purdon Supp. 1989) [hereinafter SECURITY ACT]).

162. See *supra* note 5 and accompanying text.

163. See *supra* note 5 and accompanying text.

164. See *supra* note 5 and accompanying text.

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Armed with this mandate, the legislature addressed this concern by amending the Agricultural Areas Security Act.¹⁶⁵ The amendment's purpose is to provide much needed revenue to county agricultural preservation boards for conservation easement purchases.¹⁶⁶

Section 14 of the Agricultural Areas Security Act, which outlines the program, sets up the Agricultural Land Preservation Board, a seventeen member board that will operate in conjunction with the Pennsylvania Department of Agriculture to oversee the administration of the program.¹⁶⁷ The Act enumerates thirteen specific powers of the Board that will equip it to supervise the implementation of this program.¹⁶⁸

165. SECURITY ACT, *supra* note 161.

166. SECURITY ACT, *supra* note 161, at § 2. This Act is promulgated as an amendment to PA. STAT. ANN. tit. 3, §§ 901-915 (Purdon Supp. 1989). The stated purpose of the Act is "to provide [a] means by which agricultural land may be protected and enhanced as a viable segment of the Commonwealth's economy and as an economic and environmental resource of major importance. SECURITY ACT, *supra* note 161, at § 2. In addition to this purpose, the amendment articulates several further goals. It is the intent of the amendment to: (1) utilize financial incentives to encourage landowners to make a long-term commitment to agriculture; (2) to protect farms in designated agricultural security areas from incompatible nonfarm land uses; (3) to assure permanent protection of prime farmland in order to protect the farm economy of the Commonwealth; (4) to provide compensation to landowners to induce the relinquishment of the right to develop their property; and (5) to leverage state agricultural easement purchase funds and protect the investment of taxpayers in agricultural conservation easements. *Id.*

167. SECURITY ACT, *supra* note 161, at § 14.1(a)(1). The composition of the Board consists of eight *ex officio* members, five members appointed by the governor, and four members selected by the party leaders in both House and Senate. SECURITY ACT, *supra* note 161, at § 14.1(a)(1)(i). The *ex officio* members are: the Secretary of Agriculture (who will be the Board Chairman); the Secretary of Community Affairs or designee; the Secretary of Environmental Resources or designee; the Chairman and Minority Chairmen of the House and Senate Agriculture and Rural Affairs Committee or their designees; and the Dean of the College of Agriculture of the Pennsylvania State University. SECURITY ACT, *supra* note 161, at § 14.1(a)(1)(i). The five members appointed by the Governor must consist of: a current member of the governing body of a county; someone with expertise in agricultural fiscal and financial matters; an active Pennsylvania resident farmer; a residential, commercial, or industrial building contractor; and a current member of a governing body. SECURITY ACT, *supra* note 161, at § 14.1(a)(1)(ii). After shortened initial terms, instituted to stagger terms, these members will serve four year terms. SECURITY ACT, *supra* note 161, at § 14.1(a)(1)(ii). The remaining four positions on the Board will be selected one each by the Speaker of the House, the Minority Leader of the House, the President Pro Tempore of the Senate, and the Minority Leader of the Senate. SECURITY ACT, *supra* note 161, at § 14.1(a)(1)(iii). Each of these members must be owners and operators of at least one farm within the state. *Id.* In addition, as with the Governor's appointees, the initial terms are staggered as to duration but the eventual term of office will be for four years. *Id.*

168. SECURITY ACT, *supra* note 161, at § 14.1(a)(3)(i)-(xiii). This grant of authority includes: (1) the power to adopt rules and regulations for the administration of the statewide program; (2) the power to adopt rules of procedure and bylaws for the governing of the operations of the Board and to conduct of meetings; (3) the power to review and accept or reject the recommendation made by a county board for the purchase of an agricultural conservation easement by the Commonwealth; (4) the power to execute agreements for the purchase of agricultural conservation easements by the Commonwealth; (5) the power to purchase agricultural conservation easements for the Commonwealth; (6) the power to purchase these ease-

Furthermore, the amendment establishes criteria for the creation of county agricultural conservation boards.¹⁶⁹ These local boards operate in conjunction with the State Board. As with the provisions that outline the formation of the State Board, the Act articulates fourteen powers or duties that the county boards are authorized to employ.¹⁷⁰

The heart of the amendment is the criteria established for the purchase of easements. The State Board and the local county conservation boards have discretionary power to obtain these easements in light of the established guidelines.¹⁷¹ The amendment states that

ments jointly with a county; (7) the power to allocate state monies among the counties for local purchase of these agricultural conservation easements; (8) the power to establish and maintain a central repository of records for agricultural conservation easements purchased by the counties and the Commonwealth; (9) the duty to record these purchases in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located; (10) the power to establish and publish standards, criteria, and requirements necessary for State Board approval of county programs for the purchase of these easements; (11) the power to review and certify and approve or disapprove these county programs; (12) other discretionary powers that may be necessary and appropriate for the performance of Board responsibilities; (13) and the power to determine an annual easement purchase threshold. *Id.*

169. SECURITY ACT, *supra* note 161, at § 14.1(b). The composition of the county boards will consist of: farmers, who will make up one less than a majority of the board; a member who is a current member of the governing body of a township or borough located within the county; a member who is a commercial, residential, or industrial building contractor; and other members selected at the pleasure of the county governing body. These members, like those of the State Board, begin their terms with a staggered duration so that not all members' terms expire simultaneously. Thereafter the terms will extend for three years. SECURITY ACT, *supra* note 161, at § 14.1(b)(1).

170. SECURITY ACT, *supra* note 161, at § 14.1(b)(2)(i)-(xiii) & 14.1(b)(3). These five, seven, or nine member boards are empowered to: (1) adopt rules and regulations for the administration of countywide programs for the purchase of agricultural conservation easements within recognized "agricultural security areas"; (2) adopt rules of procedure and bylaws governing the operation of the county board and the conduct of meetings; (3) execute agreements to purchase agricultural conservation easements; (4) purchase these easements within agricultural security areas; (5) use monies appropriated by the county governing body from the general fund to hire staff and administer the countywide program; (6) use monies appropriated by the county governing body from the county general fund or from the proceeds of indebtedness incurred by the county to purchase easements; (7) establish and maintain a repository of records of farmlands that are subject to agricultural conservation easements within the county; (8) record these easements in the office of the recorder of deeds of the county and to submit to the State Board a certified copy of the easement within 30 days after this recording; (9) submit to the State Board for review the initial county agricultural conservation easement program and any subsequent revisions; (10) recommend to the State Board the purchase by the Commonwealth agricultural conservation easements within an agricultural security area in the county; (11) recommend joint state and county easement purchases; (12) purchase agricultural conservation easements jointly with the Commonwealth; (13) exercise other powers that are necessary and appropriate for the performance of its responsibilities under the Act; and (14) incur debt for the purchase of agricultural conservation easements.

171. The provision that empowers the Board to allocate state monies among the counties for local easement purchases represents a significant departure from earlier drafts of this legislation. H.R. 442, Printer's No. 3574, 171st Gen. Ass., 1st Sess. (1987). This provision grants to the State Board the discretion to allocate monies between the counties, while prior versions of this legislation articulated elaborate guidelines for disbursements between counties. *Id.* The earlier drafts contemplated a scheme whereby fifty percent of the monies would be allocated to

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conservation easements may only be purchased in perpetuity or for a term of twenty-five years or greater.¹⁷² In addition, it sets up other guidelines, restrictions, and limitations on purchasing agricultural conservation easements. During the initial 25 year period of an easement's term, the easement cannot be sold, conveyed, extinguished, leased, encumbered, or restricted in whole or in part.¹⁷³ Subsequent to that initial 25 year period, the Commonwealth can sell or otherwise alter the effect of the easement when the land is no longer viable agricultural land and the State Board or county board approves such action.¹⁷⁴ Furthermore, the Act requires State Board or county board approval of the actual instrument of purchase prior to execution and delivery of the easement.¹⁷⁵ The Act also requires proper releases from any mortgage or lien holders on the land before an easement will be approved.¹⁷⁶ This precaution ensures the purchase of easements free and clear of any encumbrances.¹⁷⁷ These restrictions do not, however, circumvent the power of eminent domain used to condemn land subject to an agricultural conservation easement.

the counties who had certified agricultural easement purchase programs as outright grants. The remaining fifty percent would be disbursed as matching funds. *Id.* For counties whose agricultural production measured by dollar volume of sales equalled or exceeded two percent of the total annual agricultural production in the Commonwealth, the matching fund ratio would be one dollar for every eight dollars that the state contributed. Other eligible counties would receive matching funds in a one dollar to four dollar proportion. This scheme was proposed to target the monies to the counties that needed agricultural preservation efforts the most. *Id.* Furthermore, any state funds that remained in a county's restricted account after completion of the second year following issuance would be returned to the state for redistribution to the neediest counties. *Id.* It is assumed that the Board will utilize its discretion to target monies to the counties in greatest need of cropland protection in much the same fashion as the earlier proposals.

172. SECURITY ACT, *supra* note 161, at § 14.1(c)(1). It is relevant to point out that a landowner could potentially utilize both the Pennsylvania purchasing of agricultural conservation easements scheme and the benefits of a deduction under I.R.C. § 170(h) to donate an easement to the agricultural preserve board. Although the Pennsylvania scheme allows for the granting of a conservation easement for twenty-five years, in order to qualify for both programs the grant must be made in perpetuity. Utilizing the benefits of both programs would be an option when a landowner would agree to sell to the agricultural preservation board the conservation easement at a price lower than fair market value. The difference between the sale price and the fair market value of the easement would then be the foundation for a federal income tax deduction under I.R.C. § 170(h). *See supra* notes 50-138 and accompanying text. Such an option would be attractive to the landowner who could not use the entire value of a deduction or who needed a certain amount of instant compensation but still desired a deduction.

173. SECURITY ACT, *supra* note 161, at § 14.1(c)(2).

174. SECURITY ACT, *supra* note 161, at § 14.1(c)(3).

175. SECURITY ACT, *supra* note 161, at § 14.1(c)(4).

176. *Id.* For the landowner who desires to utilize both the Pennsylvania purchasing scheme and the federal income tax deduction program under I.R.C. § 170(h) the Code contains requirements pertaining to conservation easements granted on mortgaged property and the need to obtain releases from the entity holding the mortgage. *See supra* notes 115-18 and accompanying text.

177. SECURITY ACT, *supra* note 161, at § 14.1(c)(4).

The Act merely requires just compensation to the owner of the land in fee and to the owner of the easement.¹⁷⁸ Likewise, the Act does not prevent the exploration and development of coal mining and oil and gas production,¹⁷⁹ the granting of rights-of-way for the installation and use of utility lines,¹⁸⁰ the construction and use of structures necessary for agricultural production,¹⁸¹ the construction of housing for seasonal or full-time employees,¹⁸² and other incidental and minor enterprises and activities provided for in the county program.¹⁸³

In addition to providing mandatory guidelines, the Act articulates factors that counties should consider when establishing local programs. These factors include: the quality of the farmlands in question (including soil classifications and productivity);¹⁸⁴ the likelihood that the farmlands would be converted to nonagricultural uses (with priority given to those farmlands most likely to be converted);¹⁸⁵ utilization of conservation and land management practices;¹⁸⁶ and use of fair, equitable, objective, and nondiscriminatory procedures for the determination of purchasing priorities.¹⁸⁷

The Act also provides guidelines for State Board rejection of county recommendations for the purchase of a particular agricultural conservation easement,¹⁸⁸ the valuation methods of an easement,¹⁸⁹ and the allocation of state monies among the counties.¹⁹⁰ In addition, the Act dictates that payment be made in a lump sum of cash, or in installment payments with interest, provided that the final payment shall not be more than five years from the date the easement purchase agreement was executed.¹⁹¹

The Act subsequently authorizes the incurring of a 100 million dollar indebtedness to fund this program and purchase agricultural conservation easements.¹⁹² Bonds and notes cannot issue, with the

178. SECURITY ACT, *supra* note 161, at § 14.1(c)(5)(i-ii).

179. SECURITY ACT, *supra* note 161, at § 14.1(c)(6)(i).

180. SECURITY ACT, *supra* note 161, at § 14.1(c)(6)(ii).

181. SECURITY ACT, *supra* note 161, at § 14.1(c)(6)(iii).

182. SECURITY ACT, *supra* note 161, at § 14.1(c)(6)(iv). This permitted construction must be limited, however, to one such structure per two acre area of the subject land during the term of the agricultural conservation easement. *Id.*

183. SECURITY ACT, *supra* note 161, at § 14.1(c)(6)(v).

184. SECURITY ACT, *supra* note 161, at § 14.1(d)(1)(i).

185. SECURITY ACT, *supra* note 161, at § 14.1(d)(1)(ii).

186. SECURITY ACT, *supra* note 161, at § 14.1(d)(1)(iii).

187. SECURITY ACT, *supra* note 161, at § 14.1(d)(1)(iv).

188. SECURITY ACT, *supra* note 161, at § 14.1(e)(1)(i-v).

189. SECURITY ACT, *supra* note 161, at § 14.1(f).

190. SECURITY ACT, *supra* note 161, at § 14.1(h)(1-9). Counties of the first class are excepted from the program.

191. SECURITY ACT, *supra* note 161, at § 14.1(g).

192. SECURITY ACT, *supra* note 161, at § 14.2.

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exception of refunding bonds and replacement notes, which, in the aggregate, total more than \$20,000,000 during any one State fiscal year.¹⁹³ The State Treasurer periodically pays the proceeds from the bond issues to those departments, agencies, or authorities authorized to expend the funds and in such amounts as are necessary to satisfy the funding needs of that entity.¹⁹⁴ The Act also contemplates that funds can be reinvested by the Treasurer with any resulting profits returned to the fund.¹⁹⁵

The last provision of the Act requires that the State Board submit to the General Assembly an annual report, due no later than May 1 of each year, which informs the legislature of the progress this program has made in preserving prime croplands.¹⁹⁶ This section outlines thirteen areas upon which the report should comment.¹⁹⁷ This list is not intended to be exhaustive.

The Agricultural Areas Security Act is both comprehensive and progressive. It provides guidelines for efficient allocation of State funds for the purchase of agricultural conservation easements while permitting the proper exercise of discretion by the county and State boards. It is this guided flexibility and the security of a \$100,000,000 bond issue that ensures that the Pennsylvania conservation easement plan will be an effective preservation vehicle.

VII. Conclusion

The combination of this program to buy conservation easements along with incentives to promote their donation serves to make agricultural easements a viable approach to curbing the conversion of prime farmland in Pennsylvania. For the farmer who desires tax relief and wishes to preserve the farm for future generations, a federal income tax deduction under Internal Revenue Code section 170(h) serves as a significant inducement. On the other hand, for the farmer who either does not want a deduction or cannot utilize one, the Pennsylvania scheme for the purchase of such an easement provides

193. SECURITY ACT, *supra* note 161, at § 14.3(e).

194. SECURITY ACT, *supra* note 161, at § 14.2(b)(5).

195. SECURITY ACT, *supra* note 161, at § 14.2(b)(6).

196. SECURITY ACT, *supra* note 161, at § 14.4.

197. SECURITY ACT, *supra* note 161, at § 14.4(1-13). The recommended reporting list includes the location and number of Pennsylvania farmlands subject to agricultural conservation easements, the number of acres within agricultural security areas, the number and value of easements purchased by the Commonwealth, individual counties or purchased jointly, the quality of farmlands subject to easements, the nature scope of development pressure within a given county, and the total number of county recommendations for Commonwealth easement purchase and the disposition of those requests.

an alternative incentive. These two programs offer the farmer who already supports farmland preservation an additional economic motive to assist in the battle to protect prime croplands.

The unresolved issue of the relation of a donated easement to the recapture tax of section 2032A remains, however, a cloud on the effectiveness of this tool. It will either take a favorable ruling from the Internal Revenue Service that is consistent with the policy behind the statute or subsequent and swift action by Congress to amend Internal Revenue Code section 2032A. In either event, action is mandated because the future of agriculture in Pennsylvania represents a piece of the future of America. The battle between the "bulldozer and the plow" is being waged across our nation and its outcome affects more than just the viability of farming. The loss of prime cropland represents a forfeiture of a portion of our agricultural heritage, a threat to the United States' ability to feed future generations both in this country and abroad, an inhibitor to economic growth, a blight on a healthy environment, and a sacrifice of the scenic beauty of bucolic and verdant farmland. The agricultural conservation easement represents the most effective protection of that future. This preservation tool is adaptable to the individual needs of each landowner while providing permanent protection from the threat of overdevelopment. Combine these traits with the incentives that a tax deduction and the Pennsylvania purchasing scheme provides and the agricultural conservation easement ensures that sufficient farming capabilities will be available for future generations.

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