

Conservation Purpose

Prepared by:

William R. Sylvester, Esq. and Timothy Wagner
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC



LORMAN[®]

Published on www.lorman.com - May 2022

Conservation Purpose, ©2022 Lorman Education Services. All Rights Reserved.



Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

Conservation Easement Transactions From A to Z

Conservation Purpose

1. The **qualified real property interest** contributed to a Land Trust by the Donor must be made **exclusively** for at least one of the four (4) conservation purposes enumerated in Code Section 170(h)(4). Legislative history illustrates the importance of conservation purpose. Turning once again to Report 96-1007, it is stated that “provisions allowing [federal charitable] deductions for conservation easement [donations] should be directed at the preservation of **unique** or otherwise **significant** land areas or structures.”

2. The first conservation purpose is “the preservation of land areas for outdoor **recreation** by, or the education of, the **general public**.” Code Section 170(h)(4)(A)(i). Such recreation or education must be “for the **substantial** and **regular** use of the general public.” Treasury Regulation Section 1.170A-14(d)(2)(ii). Recreation on the conserved property by the general public is **not** inconsistent with the exaction of reasonable use fees charged. See for example PLR 8713018. However, land within a gated community need to satisfy one of the other conservation purposes. PLR 8713018 will be featured in our **CASE STUDIES**.

3. The second conservation purpose is the “protection of a relatively natural **habitat** of fish, wildlife, or plants, or similar

ecosystem.” Code Section 170(h)(4)(A)(ii). The Treasury Regulations provide that the habitat or ecosystem protected by this conservation purpose must be a “**significant**” habitat or ecosystem. This can lend a subjective note to inquiry concerning the “habitat” conservation purpose. See, for example, *Atkinson* and *Champions Retreat* both discussed in our **CASE STUDIES**. Public access is **not** required for the **habitat** conservation purpose, and in fact, this type of Conservation Easement may limit or prohibit public access to the Restricted Property. Treasury Regulation Section 1.170A-14(d)(3)(iii).

4. The third conservation purpose is the preservation of **open space** (including farmland and forest land) where such preservation is for either: (a) the scenic enjoyment of the general public; or (b) pursuant to a clearly delineated governmental policy. In either case, a Conservation Easement with an open space purpose must yield a **significant public benefit**. Code Section 170(h)(4)(A)(iii). In the 1980 legislative history the Senate Finance Committee stated: “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 a significant public benefit or the preservation of a unique land area would yield a significant 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”. To illustrate current concerns with

open space easements, consider **EXHIBIT III**, which graphically depicts a housing density census for the State of Georgia, showing actual measures for 1940, 1950, 1960, 1970, 1980, 1990, and 2000, with projected data for 2010, 2020, and 2030.

5. A Conservation Easement may be made for the scenic enjoyment of the general public if development of the Restricted Property would impair the scenic character of the local landscape (whether urban or rural) **or** would interfere with the scenic panorama that can be enjoyed from a park, nature preserve, road, waterway, trail, historic structure or historic land area open to (or utilized by) the general public. The determination of whether a Conservation Easement contributes to “scenic enjoyment” is inherently subjective. The Treasury Regulations provide that the determination should be made by evaluating all germane “pertinent facts and circumstances.” The Treasury Regulations provide a non-exclusive list of factors to be considered in this inquiry. Treasury Regulation 1.170A-14(d)(4)(ii)(A).

6. Visual (as opposed to physical) access to or across the property is necessary to support a “scenic enjoyment” Conservation Easement. However, visual access of the **entire** Restricted Property is not necessary. To the extent that only a very small portion of the Restricted Property is visible, the IRS could maintain that the public benefit is insufficient to qualify for a Conservation Easement deduction. Treasury Regulation Section

1.170A-14(d)(4)(ii)(B). A Conservation Easement to preserve open space under Code Section 170(h)(4)(A)(iii), whether for the scenic enjoyment of the public, or pursuant to a clearly delineated governmental policy, must yield a significant public benefit. Treasury Regulation 1.170A-14(d)(4)(iv).

7. The final conservation purpose is for the “preservation of a historically important land area or a certified historic structure.” Code Section 170(h)(4)(A)(iv). So called “façade easements” are in effect a subset of Conservation Easements which are supported by this conservation purpose. Physical public access is not required for a “land area/structure” Conservation Easement. Some visual public access to the Restricted Property is required. **Historically important land areas** include: (a) an independently significant area of the National Register of Historic Places; (b) an area within a registered historic district which can reasonably be considered to contribute to the significance of the district; and (c) an area adjacent to property listed in the National Register of Historic Places. Treasury Regulation Section 1.170A-14(d)(5)(ii). A façade easement, **Whitehouse House**, is covered in the **CASE STUDIES** portion of our presentation.

8. In order to satisfy the requirement that the Conservation Easement be **exclusively for conservation purposes** the conservation purpose or purposes underlying the easement must be protected in perpetuity. Code Sections 170(h)(2)(A) and 170(h)(5)(A). The **perpetuity** requirement is an essential attribute of all allowable Conservation Easements. Report 96-

1007 is once again instructive. A Conservation Easement “must involve legally enforceable restrictions on the interest in the property retained by the donor that would prevent uses of [that] retained interest inconsistent with the conservation purposes” of the easement. For example, any mortgage holder must subordinate its interest to the rights of the Land Trust to enforce the Conservation Easement in perpetuity. Treasury Regulation 1.170A-14(g)(2). Similarly, if the surface and mineral interests have been severed and there is **no** joinder in the Conservation Easement by the mineral interest owner, the Donor must show that the “**probability**” of extraction or removal of minerals by surface mining is “so remote as to be negligible.” Treasury Regulation Section 1.170A-14(g)(4)(ii). The latest case law concerning perpetuity will be addressed under **CASE STUDIES** with ***Oakbrook Landings*** and ***Hewitt*** which present a conflict between the Court of Appeals for the 11th and 6th Circuits.

9. For **any** of the four (4) conservation purposes, a deduction will generally **not** be allowed if the Conservation Easement would accomplish one of the goals, while impeding another significant conservation interest. However, a use necessary for the protection of the conservation interests that are fulfilled by a Conservation Easement may be permitted, even though such use is destructive of other conservation values. Treasury Regulations Section 1.170A-14(e). 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 archeological

practices may impair a scenic view of which the land is a part.”
Treasury Regulation Section 1.170A-14(e)(3).



LORMAN[®]

📍 2510 Alpine Road Eau Claire, WI 54703

💻 www.lorman.com ☎ 866-352-9539 ✉ customerservice@lorman.com



The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.