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Valerie M. Fogleman

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A Capital Tax System to Preserve America's Heritage: A Proposal Based on the British National Heritage Capital Tax System

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ABSTRACT

This Article looks to the British national heritage capital tax system as a model to propose provisions in the United States Internal Revenue Code to aid in preserving the United States cultural and natural heri-

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tage. After an overview of the capital tax systems in Britain and the United States, Ms. Fogleman examines features of the British tax system that promote preservation of the national heritage. The British system conditionally exempts the owners of national heritage assets from estate or gift tax liability on the transfer of those assets in exchange for permitting public access to and maintaining the assets; allows owners privately to sell national heritage assets to conservation or preservation bodies and receive a higher net price than that available on the open market; and permits owners to deed national heritage assets to the nation in lieu of estate or gift tax liability previously incurred.

Ms. Fogleman applauds the British system. She states that since the British incentives encourage taxpayers to keep the property in private ownership in exchange for providing maintenance and permitting public access to the property, they encourage the preservation of historic houses and other nationally significant property for the public benefit. At the same time, the system decreases the financial burden on the British Government and the taxpaying public, since the government does not have to buy the property outright in order to preserve it.

Ms. Fogleman argues that United States tax law should in like manner encourage private owners of nationally significant property such as historic houses, outstanding scenic land, and works of art to retain ownership by conditionally exempting the owner from capital tax liability incurred on the transfer of the property. In exchange, the owner would maintain the property in accordance with specified standards while permitting public access. Ms. Fogleman also argues that United States tax law should include provisions creating a favored market for the purchase of national heritage assets by conservation and preservation bodies, and should include provisions permitting owners of national heritage assets to deed those assets to the nation in lieu of estate or gift tax liability. Property owners, the United States Government, and the public would all benefit from such a system.

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I. INTRODUCTION

A movement has been growing in the United States to preserve the physical assets that embody the nation's cultural and natural heritage.

State historic preservation statutes have been enacted nationwide.¹ Land trusts proliferate.² Opposition to the potential degradation or destruction of nationally significant land or structures is usually immediate and vocal.³ In the wake of concern over the potential loss of parts of the United States heritage lies an equally strong conviction that federal acquisition of nationally significant property is not necessarily the best method of preservation. State and local governments and private parties, however, possess neither the funds nor the tools to implement fully a policy of national heritage preservation.

One way in which the federal government can encourage private initiative in owning and maintaining nationally significant property for the benefit of the nation is by granting tax relief to the property's owners. For example, the Internal Revenue Code (Tax Code or Code) encourages the renovation of historic buildings used for commercial purposes.⁴ The renovation and maintenance of historic property used for residential purposes, however, do not receive consideration in the Code despite the social interest in preserving historic houses for the benefit of the nation.

In contrast to United States tax laws, the structure of the British capital tax system promotes the preservation of nationally significant property. Some provisions of the British system,⁵ such as the exemption from capital taxes of the transfer of property to charitable organizations, have equivalents in the United States Tax Code. Others do not.

For example, except for limited provisions concerning conservation easements, the Tax Code has no provisions promoting the retention of nationally significant property in private ownership while concurrently encouraging public access to the property. There is no Tax Code provi-

1. See generally Beckwith, *Preservation Law 1976-1980: Faction, Property Rights, and Ideology*, 11 N.C. CENT. L.J. 276, 308-40 (1980) (listing state historic preservation statutes).

2. See, e.g., Freyfogle, *Land Trusts and the Decline of Mortgage Law*, 1988 U. ILL. L. REV. 67, 68 (discussing rise of state land trust law); Fenner, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039 (1980).

3. See, e.g., Cramer, *Not on this Hallowed Ground*, TIME, June 13, 1988, at 29 (describing action taken to prevent degradation of a civil war battlefield); Hamilton & Yeager, *Paradise Leased*, 71 SIERRA 38 (Mar./Apr. 1986) (advocating action to prevent loss of natural thermal features in Yellowstone National Park threatened by nearby oil and gas drilling).

4. I.R.C. § 48(a)(1)(E), (g) (1989).

5. This Article addresses the British capital tax system only as it is applied in England. Although the law in Scotland, Wales, and Northern Ireland is basically the same as that in England, differences exist. Rather than attempting to incorporate the differences, the author has chosen the simpler format of stating the law only as applied in England.

sion conditionally exempting the owner of a national heritage asset⁶ from estate or gift tax liability in exchange for permitting public access to, and maintaining, the asset. There is no Tax Code provision that fosters a relationship between the government and a national heritage asset holder by which the government owns the asset but permits the private party to hold, maintain, and permit public access to the asset.

The above provisions of the British capital tax system, which this Article will examine in depth, are summarized below together with the *douceur*, a nonstatutory system that creates a favored market for national heritage assets.

British law encourages owners of culturally or naturally significant property such as historic houses, outstanding scenic land, and works of art to retain ownership of the property. The British Government promotes retention of ownership by conditionally exempting the owner of the property from estate or gift tax liability incurred on the transfer of the property. In exchange, the owner agrees to maintain the property according to standards agreed to between the owner and the government, and to permit reasonable public access to the property.

The British Government further encourages the preservation of national heritage assets through the *douceur*. The *douceur* is a nonstatutory system that enables owners of national heritage assets to sell the assets privately to designated conservation or preservation bodies and to receive a higher net price than if the assets were sold on the open market. The preservation or conservation body subsequently holds the assets in perpetuity for the benefit of the nation.

The *douceur* system makes the designated conservation or preservation bodies a favored market for national heritage assets. The *douceur* operates by forgiving the owner of a national heritage asset the capital tax liability the owner would have incurred by selling the asset. In addition, the government pays the seller a portion of the notional tax as a further incentive for privately selling the asset to the conservation or preservation body rather than on the open market.

Finally, British law permits owners of outstanding land, historic buildings, or pre-eminent objects such as works of art to deed those assets to the nation in satisfaction of estate or gift tax liability. Although United States tax law permits taxpayers to transfer property to the government, the United States system is not structured to promote the preservation of national heritage assets. In Britain, not only may national heritage asset owners deed the property to the British Government to be

6. The term "national heritage asset" is used in this Article to describe real or personal property that has national significance.

held in perpetuity by a designated conservation or preservation body; but in certain cases the former owner may continue to enjoy the property in situ (that is, in its traditional location).

This Article examines the British national heritage capital tax system for the purpose of considering whether relevant parts of it could be incorporated into the United States estate and gift tax laws. Part II briefly reviews and compares the overall British and United States capital tax systems to place the national heritage provisions in context. Part III examines the structure and implementation of the British national heritage capital tax system. Part IV examines provisions in the Code designed to promote the preservation of the United States cultural and natural heritage. Part V makes recommendations for introducing into the Code modified portions of the British national heritage capital tax system. The Article concludes that narrowly drawn provisions would encourage the ownership of nationally significant property in a manner that would ensure continued maintenance of the property as well as public access to it. Because the provisions would encourage the private ownership of nationally significant property whenever possible, the system would provide an alternative to federal acquisition and maintenance of such property at taxpayers' expense.

II. OVERVIEW OF THE CAPITAL TAX SYSTEM IN BRITAIN AND THE UNITED STATES

The capital tax systems in Britain and the United States have many similarities, as well as several distinctions. This part provides an overview of both systems in order to place in context the subsequent examination of the tax provisions in Britain and the United States that promote the preservation of the respective state's cultural and natural heritage.

A. *The British Capital Tax System*

In Britain, a capital tax is a charge accruing when the capital is transferred from one party to another. Capital taxes have existed in several forms since their introduction in the late 19th century. Estate duty, introduced in Britain in 1894, was levied on property passing by death.⁷ In

7. Finance Act, 1894, 57 & 58 Vict. 53, ch. 30. In addition to property passing on death, property passing within a set time period before death was included in an individual's estate for tax purposes. *Id.* § 2. The period, which has varied over the years, is currently seven years for property on which capital transfer tax may be charged. Inheritance Tax Act, 1984, ch. 51, § 7(4) (formerly Capital Transfer Tax Act, 1984), *added*

1975 estate duty was replaced by capital transfer tax, which placed a charge on property passing by inter vivos gift as well as on death.⁸ In 1986 capital transfer tax became known as inheritance tax; charges on lifetime gifts between individuals were largely abolished as the system reverted to a structure that focused on taxing capital transferred at death.⁹

This Article will examine the British national heritage capital tax system as it existed prior to the 1986 changes, because the changes in the British system of taxing estates and gifts in 1986 added dissimilarities between the British and United States capital tax systems. The footnotes will point out provisions in British law that changed as a result of laws passed during and after 1986 that affect the taxation of gifts. Because this Article describes the taxation of gifts as well as estates, it will use the term "capital transfer tax" instead of the current term "inheritance tax."¹⁰

by Finance Act, 1986, ch. 41, §§ 101, 114; sched. 19, pt. I. The seven year period is subdivided, with a higher percentage of tax being levied on property passed closer to death. *Id.* The Capital Transfer Tax Act consolidated provisions of the capital transfer tax law contained in the annual Finance Acts. The Capital Transfer Tax Act became known as the Inheritance Tax Act in 1986. *See* Finance Act, 1986, ch. 41, § 100(1)(a).

Different types of estate taxes have existed in Britain since 1694. *See, e.g.*, Stamp Duty Act, 1780, 20 Geo. 3, ch. 28 (legacy duty); Succession Duty Act, 1853, 16 & 17 Vict., ch. 51 (succession duty); Customs and Inland Revenue Act, 1881, 44 & 45 Vict., ch. 12, § 38 (account duty); Customs and Inland Revenue Act, 1889, 52 & 53 Vict., ch. 7, §§ 5, 6 (temporary estate duty); Finance Act, 1894, 57 & 58 Vict., ch. 30, § 21 (settlement estate duty). *See generally* 1 R.K. JOHNS & R. GREENFIELD, *DYMOND'S DEATH DUTIES* 44-61 (15th ed. 1973) [hereinafter *DYMOND'S DEATH DUTIES*]; D. HAYTON & J. TILEY, *ELEMENTS OF CAPITAL TRANSFER TAX* 1-5 (1975).

8. Finance Act, 1975, ch. 7, pt. III.

9. Finance Act, 1986, ch. 41, pt. V.

10. The term "inheritance tax" is a misnomer. The current tax is levied on the value of a decedent's estate. *See* Inheritance Tax Act, 1984, ch. 51, § 7. A true inheritance tax "would take no account of the total value of an estate but would be charged on the amounts received by individual beneficiaries." CHANCELLOR OF THE EXCHEQUER, *TAXATION OF CAPITAL ON DEATH: A POSSIBLE INHERITANCE TAX IN PLACE OF ESTATE DUTY*, 1972, CMND. NO. 4930, at 1.

Inheritance tax has been described as a voluntary tax because a person can avoid capital tax liability on his property by giving it away at least seven years before his death. Bourke & Lever, *Inheritance Tax—Good and Bad News*, *Times* (London), Mar. 22, 1986, at 30, col. 2.

1. Capital Transfer Tax

Capital transfer tax is, as its name implies, a tax on the transfer of capital. Only value transferred by a chargeable transfer is taxed.¹¹ For purposes of the Inheritance Tax Act (formerly known as the Capital Transfer Tax Act), a chargeable transfer is any transfer of value made by an individual except for transfers specifically exempted by Parliament.¹²

Under pre-1986 law, when a person made a gift above a specified threshold,¹³ the gift was taxed on the value by which the transfer reduced the donor's estate.¹⁴ For purposes of computing the basis for tax liability, the donee received the net amount of the gift, that is, the amount of the gift less capital transfer tax.¹⁵ The donor was primarily liable for the tax; the donee was secondarily liable.¹⁶

Capital transfer tax was based on the position of the donor. The tax

11. Inheritance Tax Act, 1984, ch. 51, § 1. As in the United States, value is determined by the price property would receive if sold on the open market between a willing buyer and a willing seller. *Id.* § 160; *see* *Lynall v. Inland Revenue Commissioners*, 1972 App. Cas. 680, 694 (1971).

12. Inheritance Tax Act, 1984, ch. 51, § 2(1) (formerly Capital Transfer Tax Act, 1984). For the history of the Inheritance Tax Act, *see supra* note 7.

13. Inheritance Tax Act, 1984, ch. 51, § 19(1). The annual exemption of £3,000 may be carried forward one year. *Id.* § 19(2). A gift of £250 in one year to one individual is exempt, but may be subject to aggregation as a potentially exempt transfer if the donor makes other gifts to the same individual. *Id.* § 20(1).

14. *Id.* § 3(1). The Act defines a person's estate as "the aggregate of all the property to which he is beneficially entitled, except that the estate of a person immediately before death does not include excluded property." *Id.* § 5(1).

Under post-1986 law, an inter vivos gift is a potentially exempt transfer. If the donor survives seven years after the date on which the gift was made, the gift is exempt from inheritance tax. *Id.* § 3A(5)(a), *as added by* Finance Act, 1986, ch. 41, § 101; sched. 19, pt. I, para. 1, pt. II. If a donor fails to survive seven years, the rate of tax liability is tapered for periods exceeding three years before death. *Id.* § 7(4), *as substituted by* Finance Act, 1986, ch. 41, §§ 101, 114; sched. 19, pt. I, para. 2(4), pt. II; sched. 23, pt. X. The full estate tax rate is payable for gifts made within three years of death. *Id.*

15. *Id.* § 5(4). The Act reaches this result by looking to the value by which a transferor's estate is reduced immediately after a transfer of value. This value includes the liability for capital transfer tax, *id.*, but not for incidental expenses paid by the transferor. *See id.* § 164(a). The principle is known as "grossing up." *See* 1 R.R. GREENFIELD, *DYMOND'S CAPITAL TRANSFER TAX* § 3.602, at 1065 (1985) [hereinafter *DYMOND'S CAPITAL TRANSFER TAX*]. Grossing up does not apply when the transferee pays the tax. Inheritance Tax Act, 1984, ch. 51, § 164(b); *see* *DYMOND'S CAPITAL TRANSFER TAX, supra*, § 6.601, at 1711.

16. Inheritance Tax Act, 1984, ch. 51, §§ 199(1), 204(6). Persons having an interest in the property at any time after the transfer are also secondarily liable, as are any persons in whom the property subsequently vests. *Id.* § 199(1)(c)-(d).

was charged at progressive rates, each disposition of property representing a successive slice of the transferor's estate.¹⁷ The rate charged for gifts made prior to three years before the donor's death was half the rate charged on gifts made within three years of the donor's death and on property passing on death.¹⁸ Property passing on death represented the top slice of the transferor's estate, its value ascertained as if what remained of the decedent's estate on death was transferred immediately before death.¹⁹

Major exemptions to capital transfer tax include transfers between spouses,²⁰ gifts to charities,²¹ gifts to entities designated to hold property for national heritage purposes,²² and gifts of national heritage property.²³ Conditional exemption from capital taxation is available for certain transfers of nationally significant property.²⁴ The Inheritance Tax Act accords certain other property similar treatment by excluding its value from an individual's estate.²⁵ Capital transfer tax is traditionally payable in money, but the Board of Inland Revenue (Board) may accept certain nationally significant property in lieu of money.²⁶

17. *See id.* §§ 7(1). The current slices for inheritance tax are:

<i>Portion of Value (£)</i>		
Lower Limit	Upper Limit	<i>Tax Rate %</i>
0	90,000	Nil
90,000	140,000	30
140,000	220,000	40
220,000	330,000	50
330,000	—	60

Finance Act, 1987, ch. 16, § 57(2) (amending Inheritance Tax Act, 1984, ch. 51, sched. 1).

The gift tax system used a 10 year period in which to cumulate chargeable transfers. If a gift was made within 10 years of another gift, the amounts (including capital transfer tax liability) were cumulated to determine the percentage of tax owed. *Id.* § 7(1)(a) (amended 1986). If prior gifts were made at least 10 years before subsequent gifts, the former gifts were not cumulated. The current inheritance tax system uses the seven year period before death in which to cumulate potentially exempt transfers. *Id.* (as amended by Finance Act, 1986, ch. 41, § 7(1)(a); sched. 19, para. 2(1)(b)). The slices are indexed to allow for inflation. *Id.* § 8.

18. Inheritance Tax Act, 1984, ch. 51, §§ 7, 8; sched. 1.

19. *Id.* § 4(1).

20. *Id.* § 18.

21. *Id.* § 23(1).

22. *Id.* § 25.

23. *Id.* § 26.

24. *Id.* §§ 30, 31.

25. *Id.* § 6.

26. *Id.* § 230.

2. Capital Gains Tax

Capital gains tax was introduced in Britain in 1965.²⁷ The tax is assessed on the chargeable gains resulting from the disposal of property.²⁸ The disposal of property on death is not subject to capital gains tax.²⁹ The tax is assessed annually, permitting losses to offset gains.³⁰ A threshold amount of gain is set below which capital gains tax is not levied.³¹

Among the exemptions to capital gains tax are gains from gifts of property to national heritage entities.³² Also exempted are gains from the transfer of certain works of art and other objects of national, scientific, historic, or artistic interest, which the Board conditionally exempts from capital transfer tax or accepts in lieu of it.³³ Charities are exempt from capital gains tax liability for activities conducted for charitable purposes.³⁴

The basis of an asset includes its acquisition and disposition costs, plus costs expended in its enhancement.³⁵ The asset's cost at the time of its disposition is the amount received for it, or, if its disposition is not commercial, its market value on the date of disposition.³⁶ Cost indexing adjusts the basis for inflation.³⁷

B. *The United States Capital Tax System*

The United States capital tax system is similar to the British capital tax system, particularly as the British system existed prior to 1986. Both

27. Finance Act, 1965, ch. 25, pt. III.

28. Capital Gains Tax Act, 1979, ch. 14, § 1(1).

29. *Id.* § 49(1)(b).

30. *Id.* § 4(1)(a). Losses may not be applied retroactively to offset gains. *Id.* §§ 4(1)(b), 29(5).

31. The threshold for the annual personal exemption in 1988-1989 was £6,900. Capital Gains Tax (Annual Exempt Amount) Order, 1988 S.I. No. 506, § 2 (LEXIS, Enggen library, SI file); see Capital Gains Tax Act, 1979, ch. 14, § 5, as amended by Finance Act, 1980, ch. 48, § 77; sched. 1.

32. Capital Gains Tax Act, 1979, ch. 14, § 146(1)(b). National heritage entities for capital gains tax purposes are the same entities listed under the Inheritance Tax Act. *Id.*; see Inheritance Tax Act, 1984, ch. 51; sched. 3; see also text accompanying note 55 *infra*.

33. Capital Gains Tax Act, 1979, ch. 14, § 147, as amended by Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8, para. 10.

34. *Id.* §§ 145, 146(1)(b).

35. *Id.* § 32.

36. *Id.* § 150.

37. *Id.* §§ 5(1A), 5(1B), as added by Finance Act, 1982, ch. 39, § 80(2).

systems are composed of estate, gift, and capital gains tax.

1. Estate and Gift Tax

In the United States, the government may levy on property passing at death.³⁸ It may levy gift tax on property transferred by lifetime donations.³⁹ In both cases, the donor is primarily liable for the tax; the donee is secondarily liable.⁴⁰

Not all gifts and estates incur tax liability. A taxpayer may donate \$10,000 per year to as many individuals as the taxpayer wishes without incurring gift tax liability.⁴¹ Once individual gifts exceed \$10,000, however, the donor must cumulate the annual total of gifts. Gift tax is payable annually.⁴²

Estate and gift tax is progressive and cumulative. Each taxpayer has a tax credit of \$192,800 for estate and gift tax purposes.⁴³ The tax credit is equivalent to a tax exemption of \$600,000.⁴⁴ Unless the total amount of a taxpayer's gifts (donated since 1976) and estate exceed the amount of this exemption, the taxpayer does not incur estate tax liability. If a taxpayer exceeds the tax credit, the rate of tax levied rises in proportion to the value of the estate (including gifts donated since 1976).⁴⁵

Only one rate schedule, known as the unified tax schedule, exists for estate and gift taxes. In reality, however, the estate and gift tax rates differ because estate tax is tax-inclusive and gift tax is tax-exclusive. That is, when a taxpayer incurs estate tax liability, the value of the taxable estate includes the tax liability. When a taxpayer donates property inter vivos, the tax liability incurred is in addition to the value of the gift received by the donee.⁴⁶

On death, a taxpayer's estate includes the value of all gifts taxed minus the gift tax paid.⁴⁷ The value of gifts made within three years of

38. I.R.C. § 2001(a) (1989).

39. *Id.* § 2501.

40. *Id.* § 6901(a)(1)(A).

41. *Id.* § 2503(b). A married couple may split a gift between them, thus permitting gifts of \$20,000 per couple to an individual. *Id.* § 2513. If one gift is split, all gifts made during that calendar year must be split. *Id.* § 2513(a)(2).

42. *Id.* § 6075(b).

43. *Id.* § 2010(a).

44. 1 Fed. Est. & Gift Tax Rep. (CCH) ¶5000 (1988).

45. I.R.C. § 2001(b) (1989).

46. See Stephan, *A Comment on Transfer Tax Reform*, 72 VA. L. REV. 1471, 1472-73 (1986).

47. I.R.C. §§ 2001(b)(1), 2012 (1989).

death is excluded from the value of the estate,⁴⁸ but the gift tax paid on these gifts is includable.⁴⁹ However, the gift tax paid on such gifts is available as a tax credit against estate tax liability.⁵⁰

A taxpayer does not incur gift tax liability on charitable gifts.⁵¹ Similarly, although the decedent's estate includes the value of charitable bequests the estate does not incur liability for the charitable bequests.⁵²

2. Capital Gains Tax

A taxpayer incurs capital gains tax liability on the gain realized in selling or otherwise disposing of appreciated property.⁵³ The tax is computed by determining the amount realized over the property's adjusted basis.⁵⁴ The basis of property acquired by gift is the basis that was used to determine the property's gain in the hands of the donor or the last preceding owner who acquired the property other than by gift.⁵⁵ The basis of property a person acquires by bequest is the fair market value of the property at the decedent's death.⁵⁶

A taxpayer does not incur capital gains tax liability when the taxpayer donates appreciated property to a charitable organization or when appreciated property passes at death. Therefore, the donation or bequest of appreciated property to a charitable organization does not result in a recognized gain.⁵⁷

48. *Id.* § 2035(d)(1). Gifts made within three years of death are includable in a decedent's gross estate for the limited purpose of determining an estate's qualification for special use valuation for family farms and businesses. *Id.* § 2035(d); *see also id.* § 2032A.

49. *Id.* § 2305(c). This procedure is known as "grossing-up."

50. *Id.* § 2012. State death taxes are another example of an estate tax credit. *Id.* § 2011.

51. *Id.* § 2522.

52. *Id.* §§ 2051, 2055.

53. *Id.* § 1001(a). There are two types of capital gains tax. Long-term capital gains tax is levied on certain property held more than six months; short-term capital gains tax is levied on certain property held less than six months. *Id.* § 1222(1), (3).

54. *Id.* § 1001(a). The amount realized is the "sum of any money received plus the fair market value of the property (other than money) received." *Id.* § 1001(b). Loss is computed by determining the excess of the adjusted basis over the amount realized. *Id.* § 1001(a).

55. *Id.* § 1015(a).

56. *Id.* § 1014.

57. *See* *Campbell v. Prothro*, 209 F.2d 331, 336 (5th Cir. 1954). Neither is loss recognized on the donation to a charitable organization of property that has depreciated in value. Rev. Rul. 55-410, 1955-1 C.B. 297.

C. *A Comparison of the Capital Tax Systems in Britain and the United States*

As the above descriptions demonstrate, capital tax systems in Britain and the United States share many similarities. Estate and gift tax in both systems is progressive and cumulative with a specified threshold.

In Britain, an exemption from capital transfer tax exists for gifts and bequests to charitable organizations. In the United States, estate and gift tax liability is not incurred on charitable gifts. The end result is the same in both countries; donative transfers to charitable organizations receive favored tax treatment.

There are also distinctions between the capital tax systems in Britain and the United States. A feature of the British tax system not present in the United States is the sharp line drawn between income and capital taxation. The British system, for example, treats a gift of property to a charity⁵⁸ or an entity holding national heritage assets for the benefit of the nation⁵⁹ as incurring neither gain nor loss. The United States practice of donating appreciated property to a charity and claiming a deduction against income tax liability⁶⁰ is thus not available in Britain; the capital tax system is distinct from the income tax system.⁶¹

The above provision of United States tax law thus provides a powerful incentive to United States taxpayers to donate appreciated property to a charitable organization, an incentive that does not exist in Britain. Although this provision encourages the donation of much appreciated property to qualifying charities such as museums, art galleries, and preservation bodies, the system is not designed to promote preservation of national heritage assets. The British system is more selective, encouraging the donation of national heritage assets to a qualifying heritage bod-

58. Capital Gains Tax Act, 1979, ch. 14, § 146(1)(a), (2)(a).

59. *Id.* § 146(1)(b), (2)(a).

60. See I.R.C. § 170(e)(1)(B) (1989). See generally 451 PARL. DEB. H.L. (5th ser.) 1352 (1984) (statement of Lord Fanshawe of Richmond); TAX POLICY AND PRIVATE SUPPORT FOR THE ARTS IN THE UNITED STATES, CANADA AND GREAT BRITAIN 81 (H. Sandison & J. Williams eds. 1981) [hereinafter H. Sandison & J. Williams] (statement of G. Harbottle). Charitable deductions are available in the United States for income tax, I.R.C. § 170(a) (1989); gift tax, *id.* § 2522(a); and estate tax, *id.* § 2055(a).

61. Deductions for donating money to charities are roughly equivalent in both countries, see H. Sandison & J. Williams, *supra* note 60, at 43-44, except that the English system is based on deeds of covenant rather than on charitable deductions. See generally Schuster, *Tax Incentives for Charitable Donations: Deeds of Covenant and Charitable Contribution Deductions*, 19 U.S.F. L. REV. 329 (1985). According to one account, covenants are far less effective in raising funds for charities than charitable deductions. *Praying for the Arts: The Silent Maecenas*, ECONOMIST, Nov. 17, 1984, at 3.

ies that will hold the assets in perpetuity for the nation.⁶²

The second major difference between tax law in Britain and the United States is more theoretical than real. In Britain, capital gains tax is a capital tax, whereas in the United States, capital gains tax is an income tax. In reality, however, the British and United States capital gains taxes have many similarities. Both are taxes on the realized gain from a transfer of property. In Britain, transfers to charitable organizations are exempt from capital gains tax liability. Such transfers do not incur capital tax liability in the United States. In both Britain and the United States, there is no realization of gain on appreciated property by disposition on death.

III. THE BRITISH NATIONAL HERITAGE CAPITAL TAX SYSTEM

The British national heritage capital tax system has a two-fold purpose: (1) to maintain adequately national heritage assets in Britain, preferably in traditional (that is, family) ownership; and (2) to provide reasonable public access to these assets. The system is a corollary of death duties, which were introduced in 1894 to redistribute wealth.⁶³ An unfortunate side effect of death duties was the pressure they placed on owners of national heritage assets such as works of art and ancient manuscripts to sell and disperse those assets. The assets, which are an integral part of British culture, do not produce income. Families who wished to continue owning these assets, therefore, had to find income from other sources to pay death duties on their transfer from generation to generation.

As death duties increased during the 20th century, owners of many national heritage assets were forced to sell or cease to maintain the assets. Libraries were sold,⁶⁴ collections of art were dispersed,⁶⁵ and historic houses fell into disrepair and ruin.⁶⁶ The government had the power to acquire nationally significant property,⁶⁷ but to do so meant incurring the initial acquisition cost followed by continuous maintenance

62. See *infra* notes 77-96 and accompanying text.

63. See Finance Act, 1894, 57 & 58 Vict. 53, ch. 30.

64. See Munby, *The Library*, in R. STRONG, M. BINNEY & J. HARRIS, *THE DESTRUCTION OF THE COUNTRY HOUSE 1875-1975*, at 106, 107-09 (1974) [hereinafter *COUNTRY HOUSE*].

65. See Millar, *The Picture Collection*, in *COUNTRY HOUSE*, *supra* note 64, at 103, 104-06.

66. See J. BUTLER, *THE ECONOMICS OF HISTORIC COUNTRY HOUSES 22-23* (1981).

67. See Land Compensation Act, 1961, 9 & 10 Eliz. 122, ch. 33.

costs at the taxpayers' expense.

The National Trust (a quasi-private nonprofit conservation organization)⁶⁸ aided in conserving the national heritage by its statutory ability to declare land inalienable⁶⁹ and its willingness to restore and maintain endangered heritage assets.⁷⁰ The cost of maintaining land is high, however, and maintenance costs for historic buildings are astronomical. Gradually the Trust began to accept only property with an attached endowment,⁷¹ foreclosing one solution for cash-poor owners of national heritage property to assure continued maintenance of the property.

One method Parliament used to mitigate the effect of the increasing estate—and later gift—taxes on national heritage assets was conditionally to exempt those assets from estate and gift tax liability. Enactment of tax relief measures was not easy. Constituents who faced a heavy tax burden or who could not afford decent housing did not welcome legislation designed to reduce the tax burden of wealthy landowners surrounded by beautiful paintings in country houses. Parliament, therefore, had to draw the legislation narrowly to protect the national heritage without creating tax shelters.

British capital tax legislation to protect the national heritage is nearly one hundred years old and is still evolving. Occasionally the impending

68. The National Trust was founded in 1895. The organization's "principal purposes are to promote the permanent preservation for the benefit of the nation of land and buildings of natural beauty or historic interest and to preserve the natural aspect, features, animal and plant life of its land." EXPENDITURE COMMITTEE (ENVIRONMENT SUB-COMMITTEE), THE NATIONAL LAND FUND, THIRD REPORT 1977-78, SESS. PAP. H.C. No. 280, at 23 [hereinafter THIRD REPORT] (memorandum submitted by the National Trust).

Parliament has granted the National Trust special powers, including authority to make by-laws to protect National Trust property, National Trust Act, 1971, ch. vi, § 24, reprinted at 32 HALSBURY'S STATUTES OF ENGLAND AND WALES 442, 457 (4th ed. 1987) [hereinafter HALSBURY'S STATUTES] amending National Trust Act, 1907, 7 Edw. 7, ch. cxxxvi, § 33, reprinted at 32 HALSBURY'S STATUTES 407, 418, and authority to declare its property inalienable. National Trust Act, 1907, 7 Edw. 7, ch. cxxxvi, § 21, reprinted at 32 HALSBURY'S STATUTES 414, as amended by National Trust Act, 1971, ch. vi, § 27, reprinted at 32 HALSBURY'S STATUTES 414. If the National Trust declares property inalienable, Parliament must pass an express act in order to override the declaration. National Trust Act, 1907, 7 Edw. 7, ch. cxxxvi, § 21, reprinted at 32 HALSBURY'S STATUTES 414; Acquisition of Land Act, 1981, ch. 67, § 18.

69. National Trust Act, 1907, 7 Edw. 7, ch. cxxxvi, § 21, reprinted at 32 HALSBURY'S STATUTES 414, as amended by National Trust Act, 1971, ch. 6, § 27, reprinted at 32 HALSBURY'S STATUTES 460.

70. See R. FEDDEN, THE CONTINUING PURPOSE 118-19 (1968) (country houses); *id.* at 125 (ancient monuments); *id.* at 126 (industrial monuments).

71. *Id.* at 120-22; see also J. BUTLER, *supra* note 66, at 26-27.

loss of some particularly significant property raises public concern and prompts questions in Parliament.⁷² The potential or actual loss of the property to the national heritage may even result in a change of law or policy.⁷³ The British system does not prevent the dispersal of all nationally significant property, but it does protect a substantial part of it.

The British national heritage capital tax system has four main components, which are described briefly below, followed by a more extensive description. The oldest component of the system, exempt transfers, exempts gifts and bequests to heritage bodies from capital taxes.⁷⁴ The heritage bodies, entities designated by Parliament to hold heritage assets in perpetuity for the benefit of the nation, include national art galleries, museums, universities, local governmental authorities, and the National Trust.⁷⁵

The second component, the conditional exemption from capital taxes of certain testamentary and inter vivos transfers of property, encourages the traditional ownership of national heritage assets. Once an asset is conditionally exempt, the exemption continues indefinitely as long as the owner does not materially breach the conditions for its exemption and as long as subsequent owners agree to abide by the conditions. Conditions include maintenance of the property and reasonable public access to it. If an owner no longer wishes to maintain an asset, or wishes to transfer it to a public body, a gift or bequest of the asset to a heritage body makes the conditional exemption absolute.

The third component addresses owners of national heritage assets who need to raise cash by selling the asset. To encourage the British public's continued access to the asset, the system provides an asset owner selling by private treaty to a heritage body a net price for the asset that is higher than the market price minus capital tax liability.

The final component of the system comes into play if the owner of an especially significant national heritage asset wishes to offer it to the Board in lieu of estate and gift tax liability already incurred on the

72. See, e.g., 380 PARL. DEB. H.L. (5th ser.) 1048-52 (1977) (debate on decision by government not to buy the historic house, Mentmore, and its contents for the nation).

73. See, e.g., Hewson, *Art Collector's Threat to Sell Pictures Abroad Forces Tax Rule Change*, Times (London), July 27, 1985, at 3, col. 1 (raising annual ceiling on acquisition of property in lieu of capital transfer tax because of threat by art collector to sell his entire collection overseas with proceeds to go to foreign institutions).

74. See 1 DYMOND'S CAPITAL TRANSFER TAX, *supra* note 15, § 12.400, at 3169 (referring to entities entitled to receive gifts for national purposes by their traditional name of heritage bodies).

75. Inheritance Tax Act, 1984, ch. 51, sched. 3. For the history of the Inheritance Tax Act, see *supra* note 7.

transfer of other property. If the Board finds the heritage asset acceptable, the asset's title vests in a heritage body. If a qualifying chattel is more appropriately held in situ (in its traditional location) rather than in an art gallery or museum, the heritage body may loan the chattel indefinitely to its former owner pending agreements on public access, maintenance, and security.

In addition to the four methods outlined above, charitable trusts are frequently created in Britain to protect national heritage assets from capital taxation.⁷⁶ This Article will not discuss this method, however, because it is not part of the British national heritage capital tax system.

A. *Exempt Transfers*

Exempt transfers have two forms: gifts for national purposes and gifts for public benefit.

1. Gifts for National Purposes

If the Board approves the transfer of property to a heritage body, the transfer is exempt from capital transfer tax.⁷⁷ To qualify for the exemption, the transfer to the heritage body must not be: defeasible;⁷⁸ limited;⁷⁹ subject to an interest reserved by the transferor;⁸⁰ postponed;⁸¹ or condi-

76. See e.g., Norman, *Keeping it in the Family*, Times (London), Apr. 16, 1985, at 12, col. 1 (describing two historic houses held by charitable trusts).

77. Inheritance Tax Act, 1984, ch. 51, § 25(1). The Act refers to this type of gift as a gift for national purposes. *Id.*

78. *Id.* §§ 23(2), 25(2). If the transfer has not been, and could not be, defeated 12 months after the date of the transfer, the transfer is not defeasible. *Id.* § 23(2).

79. *Id.* §§ 23(3), 25(2). "Limited" means either donated for a limited period, or that the interest donated in the property is less than the transferor's interest in it. The transferor's interest in the property is ascertained 12 months after the transfer. *Id.* § 23(3).

80. *Id.* §§ 23(4), 25(2), 56(1). If the property is a building or land, the transferor is treated as having reserved an interest if the transferor, his spouse, or connected persons are entitled to live in all or part of the property rent free or at a rent below one that would be agreed upon by unconnected persons dealing at arm's length. *Id.* § 23(4)(a). "Connected persons" includes relatives of the transferor or his spouse, and husbands and wives of relatives of the transferor or his spouse. *Id.* § 270; see Capital Gains Tax Act, 1979, ch. 14, § 63. "Relatives" includes brothers, sisters, uncles, aunts, nephews, nieces, ancestors, or lineal descendants. Inheritance Tax Act, 1984, ch. 51, § 270; Capital Gains Tax Act, 1979, ch. 14, § 63.

For property other than a building or land, the only interests allowed to be reserved or created by the transferor are "an interest created by him for full consideration in money or money's worth, or . . . an interest which does not substantially affect the enjoyment of the property by the person or body to whom it is given . . ." Inheritance Tax Act, 1984, ch. 51, § 23(4)(b)(i)-(ii). The transfer is reviewed 12 months after it is made to deter-

tional.⁸² The Inheritance Tax Act expressly states, however, that the exception includes the benefit of an agreement restricting the use of land.⁸³ Donors of gifts qualifying for the exemption are not liable for capital gains tax.⁸⁴ Bargain sales are treated for capital transfer and capital gains tax purposes as though the bargain sales were transfers for market value.⁸⁵

The current exemption was introduced in 1972 for property transferred by gift or bequest to heritage bodies⁸⁶ listed in the Act⁸⁷ together with other bodies approved by the Board.⁸⁸ The exemption operates by excluding the value of property donated under the exemption from an individual's estate. The exclusion thus reduces the value of an estate, resulting in a potentially lower rate of tax being charged on it.⁸⁹

2. Gifts for Public Benefit

One commentator has termed the capital transfer tax exemption provision for transfers of heritage property "a kind of poor elderly relation" of the exemption for transfers of property to heritage bodies.⁹⁰ The provision, known as gifts for public benefit, exempts from capital transfer tax:

- (a) land which in the opinion of the [Board] is of outstanding scenic or historic or scientific interest;
- (b) a building for the preservation of which special steps should in the opinion of the [Board] be taken by reason of its outstanding historic or architectural or aesthetic interest and the cost of preserving it;
- (c) land used as the grounds of a building within paragraph (b) above;

mine whether an interest has been reserved. *Id.* § 23(4)(b).

81. Inheritance Tax Act, 1984, ch. 51, §§ 24(4), 25(2). A transfer is postponed if the transfer of value is not effective until a prior interest or period has terminated. *Id.*

82. *Id.* §§ 23(2)(b), 25(2). A condition satisfied within 12 months of the transfer does not defeat this exemption. *Id.* § 23(2)(b).

83. *Id.* § 25(2).

84. Capital Gains Tax Act, 1979, ch. 14, § 146(1)(b), as amended by Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8, para. 9.

85. See BOARD OF THE INLAND REVENUE, CAPITAL TAXATION AND THE NATIONAL HERITAGE § 9.3, at 30 (Dec. 1986) [hereinafter CAPITAL TAXATION AND THE NATIONAL HERITAGE].

86. Finance Act, 1972, ch. 41, § 121(1)(a).

87. *Id.* sched. 25.

88. *Id.* § 121; see Treasury Press Notice (Apr. 11, 1972) cited in 1 DYMOND'S DEATH DUTIES, *supra* note 7, at 1034. Before 1985, the Treasury, not the Board, was responsible for this function. See Finance Act, 1985, ch. 54, § 95(1).

89. See 1 DYMOND'S DEATH DUTIES, *supra* note 7, at 1032.

90. 1 DYMOND'S CAPITAL TRANSFER TAX, *supra* note 15, § 12.500, at 3191.

(d) an object which at the time of the transfer is ordinarily kept in, and which is given with, a building within paragraph (b) above;

(e) property given as a source of income for the upkeep of property within any of the paragraphs of this subsection;

(f) a picture, print, book, manuscript, work of art or scientific collection which in the opinion of the [Board] is of national, scientific, historic or artistic interest.⁹¹

Remission of capital transfer tax for transfers under the provision is at the discretion of the Board, which has authority to condition the remission⁹² and to enforce its conditions by injunction.⁹³ Conditions the Board may impose include reasonable access, restrictions on use and disposal of the property, and agreements regarding preservation of the property or its character.⁹⁴ The transferor may provide an endowment for maintenance of the property. The endowment and income from the endowment will not be subject to capital transfer tax when held by a charity or heritage body. The charity or heritage body may use only the income, not the corpus of the endowment, to maintain the property.⁹⁵

3. Implementation

The above two provisions offer owners of national heritage and other property an exemption from capital tax liability for the donation of the property to heritage bodies. Because under British law the donation of property to a heritage body or charity does not result in a gain or loss, the donation does not result in a charitable deduction.⁹⁶ Thus, the United States tax advantages of donating appreciated property to a charity and claiming a charitable deduction do not exist in Britain.

91. Inheritance Tax Act, 1984, ch. 51, § 26(2). If the property is transferred partially to a nonprofit entity and partially to another party, the transfer is only partially exempt. *Id.* § 30. The transfer of property under this provision is exempt from capital gains tax liability. Capital Gains Tax Act, 1979, ch. 14, § 147(1), *as amended by* Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8.

92. Inheritance Tax Act, 1984, ch. 51, § 26(3)-(5). The Treasury formerly fulfilled this function. *See* Finance Act, 1985, ch. 54, § 95.

93. Inheritance Tax Act, 1984, ch. 51, § 26(6).

94. *Id.* § 26(4); *see* Finance Act, 1985, ch. 54, § 95.

95. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 9.5, at 31.

96. Capital Gains Tax Act, 1979, ch. 14, §§ 146(1)(a)-(b), 146(2)(a).

B. *Conditionally Exempt Transfers*

Parliament's purpose in conditionally exempting national heritage property from capital transfer tax is to encourage the property's preservation by private owners while concurrently providing public access to the property.⁹⁷ The Board may grant conditional exemption for:

(a) any pictures, prints, books, manuscripts, works of art, scientific collections or other things not yielding income which appear to the [Board] to be of national, scientific, historic or artistic interest;

(b) any land which in the opinion of the [Board] is of outstanding scenic or historic or scientific interest;

(c) any building for the preservation of which special steps should in the opinion of the [Board] be taken by reason of its outstanding historic or architectural interest;

(d) any area of land which in the opinion of the [Board] is essential for the protection of the character and amenities of such a building as is mentioned in paragraph (c) above;

(e) any object which in the opinion of the [Board] is historically associated with such a building as is mentioned in paragraph (c) above.⁹⁸

A taxpayer must claim conditional exemption when a chargeable event will occur or has occurred.⁹⁹ An individual wishing to claim conditional exemption for a proposed gift of heritage property must have been beneficially entitled to the property during the six year period immediately prior to the gift.¹⁰⁰ No time limit exists if property passes by death or if it has already passed by death and has previously been granted conditionally exempt status.¹⁰¹

Recommendations from appropriate government agencies aid the Board in making determinations of the national significance of potential heritage property.¹⁰² If, after recommendations from these agencies, the

97. See generally DYMOND'S CAPITAL TRANSFER TAX, *supra* note 15, § 15.100, at 3913.

98. Inheritance Tax Act, 1984, ch. 51, § 31(1), as amended by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 2, paras. 2(2)-(3). The Board is now responsible for conditionally exempt property. Finance Act, 1985, ch. 54, § 95. The Inheritance Tax Act and schedule 26 of the Finance Act, 1985, however, still refer to the Treasury.

99. Inheritance Tax Act, 1984, ch. 51, § 30(1)(a).

100. *Id.* § 30(3)(a). Under the Finance Act, 1986, ch. 41, gifts are potentially exempt transfers. If the donor dies within seven years of making the gift, the recipient incurs inheritance tax liability. Thus, the provisions for the conditional exemption of inheritance tax on gifts apply if the donor does not survive at least seven years after making the gift. See *supra* note 7.

101. Inheritance Tax Act, 1984, ch. 51, § 30(3)(b).

102. The government agencies for England include: the Nature Conservancy Council

Board determines that the property is of a sufficiently high quality to merit conditional exemption, the Board will formally designate the property¹⁰³ and enter into agreements with the owner concerning the property's maintenance, preservation, and access.¹⁰⁴

1. Chattels

Conditions for chattels such as works of art, scientific collections, or manuscripts must include an agreement that the property will remain in the United Kingdom except for purposes and periods approved by the Board.¹⁰⁵ When an owner makes a claim for conditional exemption for chattels, the Board usually consults with experts from the national museums or art galleries to determine if the object or collection of objects meets a sufficiently high standard.¹⁰⁶

The owner must give public access to the object¹⁰⁷ unless the Board

(for property of scientific interest); the Countryside Commission (for property of scenic interest); the Historic Buildings and Monuments Commission for England (for property of historic interest including historic buildings and monuments); the Forestry Commission (for property of arboricultural and silvicultural interest); and the Royal Botanic Gardens at Kew (for property of horticultural and botanical interest). CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, app. 8.

103. *Id.* § 3.3, at 6.

104. Inheritance Tax Act, 1984, ch. 51, § 31(2)-(4F), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 2(4).

105. *Id.* §31(2)(a); see *id.* §§ 31(2)(b), 31(4), as amended by Finance Act, 1985, ch. 54, § 94; sched. 26, paras. 2(2), 2(3) (Board and owner of property must agree on conditions). The Board may grant permission for temporary exhibition of an object overseas. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 4.4(i), at 11. If the object is over 50 years old, permission may also be required from the Department of Trade and Industry. *Id.* See, e.g., Written Answers, 119 PARL. DEB. H.C. (6th ser.) 249-50 (1987) (written answer by Mr. Luce, Minister for the Arts) (license for export of "Sunflowers" by Van Gogh (valued at over £25 million) deferred and subsequently granted).

106. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 4.1, at 11. The object(s) must be capable of being displayed in the public collection of a national or local governmental body, or a university. *Id.* Conditional exemption for chattels is geared toward individual objects rather than collections. For a collection to be eligible, most of the objects in it must meet the requisite standard. *Id.* § 4.2, at 11.

The requirement of holding objects for a six year period before obtaining conditional exemption for a gift applies to objects within a collection on an individual basis. The Board suggests lending the objects not meeting the six year requirement together with the other objects in the collection that are being donated. The loaned objects can be subjected to the same conditions as the donated objects and can be transferred upon termination of the six year period. *Id.* § 4.3, at 11.

107. *Id.* § 4.5, at 12. Generally, the Board will not grant conditional exemption to an object unless the owner assures public access to it. *Id.*

excepts the owner from this requirement on grounds of confidentiality.¹⁰⁸ Public access may take several forms. Owners may display objects in private houses or rooms after having appropriately publicized the dates and times during which the object will be displayed.¹⁰⁹ Second, owners may loan objects for long periods to public collections (national, local governmental, or university), or to a historic house, museum, or gallery operated by a charitable trust that permits public access.¹¹⁰ A third alternative is to loan the object to a special exhibition organized by a public collection.¹¹¹

2. Land

The Board interprets "land of outstanding scenic, historic, or scientific interest" to cover "botanical, horticultural, silvicultural, arboricultural, agricultural, archaeological [sic], physiographic and ecological features, [including] man-made landscapes."¹¹² Scenic land must be of national importance to be eligible for conditional exemption.¹¹³ Land located in a nationally designated area such as a national park¹¹⁴ or an area of outstanding natural beauty¹¹⁵ will probably, but not necessarily, meet the

108. Inheritance Tax Act, 1984, ch. 51, § 31(3); CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 4.11, at 13.

109. If the owner of the object has a suitable house or room in which to display the object, the Board may require display to be in that house or room. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 4.6, at 12.

The property's owner may charge a reasonable fee for access to the conditionally exempt property to the public if the object is exhibited in a private building. *Id.* § 4.9, at 13.

110. *Id.* § 4.7(a), at 12. The loan may be anonymous. *Id.*

111. *Id.* § 4.7(b), at 12. Objects need only be loaned for special exhibition purposes if they will not be subject to physical risk (including inadequate security). *Id.* Unless agreed to by an object's owner, the duration of the loan need not be in excess of six months per two year period, or an equivalent amount of time during a longer period. *Id.* If a local governmental body or a university holds the special exhibition, the Museum and Galleries Commission's National Security Adviser must approve the security arrangements. *Id.*

112. *Id.* § 5.1, at 14.

113. *Id.* § 5.4, at 14. To be eligible, the land must have "qualities well in excess of scenic land of its general type." *Id.* § 5.3, at 14.

114. National parks are mainly in private ownership. See NATIONAL PARKS TODAY, Winter 1987, at 3, cols. 2, 3. Individual park boards or committees under the Town and Country Planning Acts manage land use planning in the national parks. See, e.g., Local Government Act, 1972, ch. 70, § 184; sched. 17, pt. 1, paras. 1-3.

115. Areas of outstanding natural beauty comprise about one-ninth of England and Wales. Unlike the national parks, these areas are individually smaller and are generally in lowland regions. Planning control is exercised by local authorities. See Wildlife and

required standard.¹¹⁶

The Board consults with the Countryside Commission, a national advisory body on landscape conservation,¹¹⁷ to determine whether scenic land is eligible for conditional exemption. For land of outstanding scientific interest, the Board consults the Nature Conservancy Council, a national body charged with nature conservation.¹¹⁸

The Board and the Nature Conservancy Council judge scientific land by its fauna, flora (natural or cultivated), and physiographic or geologic features.¹¹⁹ Land within nationally designated areas such as national nature reserves¹²⁰ and sites of special scientific interest¹²¹ qualifies, but in-

Countryside Act, 1981, ch. 69, § 28; COUNTRYSIDE COMMISSION, FIFTEENTH REPORT, 1981-82, H.C. SESS. PAP. NO. 520, at 20 (1982).

116. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 5.3, at 14.

117. The Countryside Commission is a grant-aided public advisory body. Wildlife and Countryside Act, 1981, ch. 69, § 47; sched. 13, paras. 1-2. The Commission has a statutory duty to:

keep under review all matters relating to—

(a) the provision and improvement of facilities for the enjoyment of the countryside,

(b) the conservation and enhancement of the natural beauty and amenity of the countryside, and

(c) the need to secure public access to the countryside for the purposes of open-air recreation

The Countryside Act, 1968, ch. 41, § 2(2).

118. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 5.5, at 14-15; *see* Nature Conservancy Council Act, 1973, ch. 54. Land that is outstanding for its scenic qualities is often scientifically outstanding also. The distinction between the two is frequently arbitrary. *See* NATIONAL HERITAGE MEMORIAL FUND, FIFTH ANNUAL REPORT, 1984-85, at 16 (1985) [hereinafter FIFTH ANNUAL REPORT].

119. Although the definition of scientific land includes outstanding gardens, they are sometimes classified as land of outstanding scenic interest. *See* 975 PARL. DEB. H.C. (5th ser.) 120 (1979) (statement of Tam Dalyell).

120. National nature reserves are areas of national importance in which the flora, fauna, or geologic and physiographic features of the land are studied and preserved. National Parks and Access to the Countryside Act, 1949, ch. 97, § 15.

121. Sites of special scientific interest are also of national importance, but local planning authorities have more control over them than over national nature reserves. *See* Wildlife and Countryside Act, 1981, ch. 69, § 28, *as amended by* Wildlife and Countryside (Amendment) Act, 1985, ch. 31, § 2.

Geographic units are selected on the basis of diversity, size, naturalness, and typicality. *See* Moore, *What Parts of Britain's Countryside Must Be Conserved?*, 93 NEW SCIENTIST 147, 149 (1982). Over 4000 units had been designated by 1985, comprising a total of one and a half million acres. *See* 1 ENVIRONMENTAL COMMITTEE, OPERATION AND EFFECTIVENESS OF PART II OF THE WILDLIFE AND COUNTRYSIDE ACT, FIRST REPORT, 1985, H.C. No. 6-I, at xiv.

clusion in such areas is not a prerequisite to eligibility if the land is otherwise qualified. The conditional exemption may include buildings, trees, and underwood if they contribute to the land's scientific interest.¹²²

The final category of outstanding land is land of national or international historic significance. As with land of scientific interest, buildings, trees, and underwood contributing to the land's historic interest may also be included in the exemption.¹²³

If land qualifies for conditional exemption from capital transfer tax, the owner of the land must agree to a management consultation with appropriate authorities before changing the land's character. The owner must also permit reasonable public access, if appropriate, and monitoring.¹²⁴ Public access may be limited, however, for land of outstanding scientific interest.¹²⁵

3. Buildings

Buildings of outstanding historic or architectural interest are eligible for conditional exemption.¹²⁶ When an owner makes a claim for an eligible building in England, the Board consults the Historic Buildings and Monuments Commission for England to determine whether conditional exemption is appropriate.¹²⁷ If amenity land is needed to protect the character of the building, or the views from or to it, the Board may give conditional exemption for the land itself.¹²⁸ The amenity land need not adjoin the building to be eligible,¹²⁹ but the owner must give the Board

122. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 5.5, at 15. Ancient semi-natural woodlands are eligible for conditional exemption if they could be, or are, included in the Nature Conservancy Council's Register of Ancient Woodland. *Id.* § 5.10, at 16. Other woodlands are usually not eligible. *Id.*

123. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 5.6, at 15.

124. *Id.* § 5.7, at 15.

125. *Id.*

126. *Id.* § 6.1, at 17; see Town and Country Planning Act, 1971, ch. 78, § 54(1), as amended by National Heritage Act, 1983, ch. 47, § 33; sched. 4, paras. 16(2)-(3) (listing historic buildings); Ancient Monuments and Archaeological Areas Act, 1979, ch. 46, § 1 (scheduling monuments). The offer of a grant for a building by the Historic Buildings and Monuments Commission for England is prima facie evidence of the building's eligibility. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 6.1, at 17; see Historic Buildings and Ancient Monuments Act, 1953, 1 & 2 Eliz. 2, ch. 49, § 4.

127. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 6.1, at 17.

128. *Id.* § 6.2, at 17.

129. Inheritance Tax Act, 1984, ch. 51, § 31(1)(d), as amended by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 2; see CAPITAL TAXATION AND THE NATIONAL

“supportive undertakings” for the intervening land as well as for the conditionally exempt property.¹³⁰ “Essential amenity land” may be eligible in its own right because it secures public access to the outstanding building, or because of its contribution to the character and amenities of the outstanding building.¹³¹ As in the conditional exemption of chattels and land, the owner must undertake agreements for maintenance, conservation, and public access.¹³²

Objects with a close historical association to an outstanding building are eligible for conditional exemption in their own right.¹³³ However, the Board will give conditional exemption only if the objects continue to be associated with the building.¹³⁴

4. Disposal of Conditionally Exempt Property

Conditional exemption from capital transfer tax extends for as long as the person signing the agreement remains beneficially entitled to the property.¹³⁵ When this owner disposes of the property, the conditional

HERITAGE, *supra* note 85, § 6.3, at 17. The land must be “physically closely related” to the land being claimed as essential amenity lands or the outstanding building. *Id.* § 6.7(c), at 18.

130. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 6.7, at 18. If other parties own the intervening land, they must give supportive undertakings for the physically closely connected land. *Id.* §§ 6.7, 6.8, at 18. The burden is on the property owner to gain the supportive undertakings. *Id.* § 6.12, at 19.

131. *Id.* § 6.2, at 17; see Inheritance Tax Act, 1984, ch. 51, §§ 31(2)(b), (4), (4A)-(4D), as amended and added by Finance Act, 1985, ch. 54, § 94; sched. 26, paras. 2(3)-(4) (owners must agree to reasonable steps specified by Board for protection of building).

132. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 6.14, at 19. The Board has published the following guidelines for public access: interiors of small buildings—one day per week during spring and summer in addition to holiday weekends; interiors of large buildings—60-156 days per year depending on the capability of the building to attract visitors, etc.; amenity land—relevant factors taken into consideration include the character and use of the land. *Id.*

The Board expects appropriate publicity to be given in all cases involving public access. *Id.* § 6.14, at 19-20. If planning permission is required due to public access being commenced or extended, the property owner should consult with the local planning authority to gain such permission. See *id.* § 6.15, at 20.

133. *Id.* § 6.5, at 17. The object or collection of objects need not belong to the same historical era as the building to qualify for exemption, nor need the object(s) be of British origin. However, the object(s) “must have a close association with a particular building and make a significant contribution, whether individually or as part of a collection or a scheme of decoration, to the appreciation of that building or its history.” *Id.*

134. *Id.* § 6.6, at 18.

135. See Inheritance Tax Act, 1984, ch. 51, § 31(2).

exemption may become absolute, be preserved, or be lost.¹³⁶

If the owner gives, bequeaths, or sells the property by private treaty to a heritage body, or the Board accepts the property in lieu of capital transfer tax, the conditional exemption becomes absolute.¹³⁷ The individual who claimed the conditional exemption may make the gift, bequest, or private treaty sale.¹³⁸ If the person who claimed the exemption dies, and the claimant's personal representative (or trustee or the individual subsequently entitled to the property if it is held in trust) gives or sells the property to a heritage body by private treaty within three years of the original claimant's death, the exemption also becomes absolute.¹³⁹

The conditional exemption is preserved if the new owner of the property renews the agreements entered into by the previous owner.¹⁴⁰ Loss of conditionally exempt status occurs if a material breach of the conditions occurs,¹⁴¹ if the property is sold (other than by private treaty to a heritage body),¹⁴² if the beneficial owner dies and the new beneficial owner does not renew the undertaking,¹⁴³ or if the property is otherwise disposed of without renewal of the undertaking.¹⁴⁴

If "associated property" is involved, the law is more complex. Associ-

136. See *id.* §§ 31(1)-(2); 32(2), (4), (5); see *id.* sched. 3 (list of heritage bodies). A material breach of the conditions is a chargeable event. *Id.* § 32(2).

137. *Id.* § 32(4); see *id.* § 230.

138. *Id.* § 32(3).

139. *Id.* § 32(4).

140. *Id.* § 32(5)(b). The purpose of this section is to allow the beneficial owner of the conditionally exempt property to transfer it by gift before it has been held for six years, or to transfer it to his spouse. DYMOND'S CAPITAL TRANSFER TAX, *supra* note 15, § 15.507, at 4004.

141. Inheritance Tax Act, 1984, ch. 51, § 32(2). In practice, the Board notifies the property's owner, and provides the owner with an opportunity to remedy the breach before withdrawing the exemption. See DYMOND'S CAPITAL TRANSFER TAX, *supra* note 15, § 15.500(i), at 4003.

If heritage property is stolen, lost, or damaged due to inadequate safety measures, the Board may determine that a condition has been breached. If the Board finds a breach, capital transfer tax is charged regardless of whether the owner receives insurance proceeds. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 7.12, at 23. Capital gains tax may be due if the insurance proceeds paid to the owner on the disposal of the heritage asset (whether disposal is by theft, vandalism, or fire) result in a gain. The Board may agree not to charge capital gains tax if the owner makes a request for deferment of payment, and the insurance money is spent to acquire a "comparable replacement," *id.* § 7.13, at 23, or if the insurance money is used to restore the property. *Id.* § 7.14, at 24.

142. Inheritance Tax Act, 1984, ch. 51, § 32(3)(b), (4)(b).

143. *Id.* § 32(3)(a); see *id.* § 32(5)(b).

144. *Id.* § 32(3)(b); see *id.* § 32(5)(b).

ated property consists of buildings of "outstanding historic or architectural interest,"¹⁴⁵ essential amenity land,¹⁴⁶ and objects historically associated with an outstanding building.¹⁴⁷ The general rule is that disposal of any associated property severs the heritage entity, resulting in a chargeable event occurring to all associated properties.¹⁴⁸ In addition to equivalents for provisions previously discussed,¹⁴⁹ the following additional provisions apply to associated property. If an owner sells associated property by private treaty sale to a heritage body, or gives it in lieu of capital tax liability, the agreement with the Board must be renewed "by such person as the [Board may] think appropriate in the circumstances of the case," or a chargeable event as to all associated properties will have occurred.¹⁵⁰ The appropriate person will usually be a heritage body.¹⁵¹

If an owner sells associated property other than by private treaty to a heritage body, and the purchaser renews the conditional exemption agreement, a chargeable event occurs only as to the property being sold.¹⁵² If the owner disposes of associated property without the forma-

145. *Id.* ch. 51, § 31(1)(c).

146. *See id.* § 31(1)(d), as amended by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 2(2).

147. *Id.* § 32A(1), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4; *see id.* § 31(1).

148. *See CAPITAL TAXATION AND THE NATIONAL HERITAGE, supra* note 85, § 7.3, at 21. A chargeable event on all associated properties may be triggered by a charge on any property subject to an undertaking with the Board. *Id.* § 7.4, at 22.

149. Inheritance Tax Act, 1984, ch. 51, § 32A(5), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4 (equivalent of *id.* § 32(4)) (disposal of property to heritage bodies within three years of deceased's death, or to Board in lieu of tax is not a chargeable event); *id.* § 32A(7), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4 (rough equivalent of *id.* § 32(4)) (disposal of heritage property is not a chargeable event unless transfer to heritage body occurred after disposal); *id.* § 32A(8), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4 (equivalent of *id.* § 32(5)) (no chargeable event occurs if new owner receiving property by gift or bequest renews undertaking as to conditionally exempt property, or transfer of property by gift or bequest is itself a conditionally exempt transfer).

150. *Id.* § 32A(6), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4; *see* Finance Act, 1985, ch. 54, § 95 (changing heritage functions of Treasury to Board). Heritage bodies sometimes sell heritage assets. *See DYMOND'S CAPITAL TRANSFER TAX, supra* note 15, § 15.506, at 4004.

151. *See DYMOND'S CAPITAL TRANSFER TAX, supra* note 15, § 15.509A, at 4005. The heritage body must renew the agreement. *Id.*

152. Inheritance Tax Act, 1984, ch. 54, § 32A(9), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4. Prior to March 19, 1985, the sale of any associated property triggered a chargeable event to all associated properties. *See id.* § 32(6)-(7), repealed by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 3.

tion of a new agreement, or materially breaches the conditions regarding the property, the chargeable event extends to all associated properties. The Board may, at its discretion, limit the event to the involved property.¹⁵³

The loss of conditional exempt status triggers recapture provisions. The value of the property on the date of the chargeable event determines the amount of tax liability.¹⁵⁴ The applicable rates are those for gifts or bequests¹⁵⁵ in effect at the time.¹⁵⁶ The rate on death is computed as if the value of the property were added to the value transferred on death, and formed the highest part of the estate.¹⁵⁷ The effect of the loss of conditional exemption, therefore, could place an estate in a higher tax bracket, thus raising the estate's tax liability. Loss of conditionally exempt status also triggers recapture provisions for capital gains tax.¹⁵⁸

If the property is transferred by gift or sale, the person who makes the transfer, or for whose benefit the transfer is made, is liable for the tax.¹⁵⁹

153. *Id.* § 32A(10), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 4. In considering if the heritage entity has been materially affected, the Board consults relevant governmental agencies and examines factors such as the viability of the heritage entity as a unit after the associated property's disposal and the number of objects disposed. "[S]ale of one or two items is unlikely to be considered to have materially affected the entity." CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 7.7, at 22.

154. Inheritance Tax Act, 1984, ch. 51, § 33(1)(a); see Capital Gains Tax Act, 1979, ch. 14, § 147(7), as amended by Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8.

If the property is sold at arm's length between unconnected persons, its value is the proceeds received for it. Inheritance Tax Act, 1984, ch. 51, § 33(3). If the sale is not conducted at arm's length between unconnected persons but is transacted as though it were, the value is still the proceeds of the sale. *Id.* The proceeds received by the transferor are the net proceeds after deduction of expenditures connected with the sale. *Tyser v. Attorney General*, 1938 Ch. 426, 427, 1938 W.N. 110.

155. Inheritance Tax Act, 1984, ch. 51, § 33(1)(b); see *id.* sched. 1.

156. *Id.* § 33(1)(b); sched. 2, para. 5. Before 1986, the cumulative total for a gift was based on all gifts made within 10 years of the chargeable event plus the charge for the loss of the conditional exemption. *Id.* § 7 (amended 1986). Currently, gift tax is payable only on inter vivos transfers of property within seven years of the transferor's death. *Id.* § 7(1)(a), as amended by Finance Act, 1986, ch. 41, § 101(1)(f); sched. 19, para. 2(b). Before the death of the donor, the gifts are potentially exempt transfers. *Id.* § 3A(5)(a), as added by Finance Act, 1986, ch. 41, § 101; sched. 19, pt. I, para. 1, pt. II.

157. *Id.* §§ 33(1)(b)(ii), 33(2), 78(4).

158. Capital Gains Tax Act, 1979, ch. 14, § 147(5), as amended by Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8.

159. Inheritance Tax Act, 1984, ch. 51, § 207(2); see also *id.* § 207(2B), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 10 (associated property). The person making the last conditionally exempt transfer is liable if no other conditionally exempt

If the owner breaches an undertaking to the Board, or if the owner's heirs fail to renew an undertaking, the person who would have received the proceeds of the property's sale if it were sold when the conditional exemption was lost is the person liable for the tax.¹⁶⁰

5. Maintenance Funds

Maintenance funds for historic buildings, historically associated objects, essential amenity land, and outstanding land qualify for tax relief if the fund is in a trust and if the Board grants a claim for relief.¹⁶¹ Property transferred to a maintenance fund must produce income.¹⁶² During the life of the fund, the trust must provide that the income will be used only for: (1) the preservation, maintenance, or repair of the property benefitted by the fund or of the property in the fund (including the latter's reasonable improvement); (2) the provision of public access to

transfer was made within the 30 year period ending with the chargeable event. *Id.* § 33(5)(b). If two or more conditionally exempt transfers were made within the 30 year period ending with the chargeable event, the Board has discretion to hold any transferor within that period liable. *Id.* § 33(5)(c). This provision was probably written to cover the ruse of settling property on a relative or friend with no assets to pay tax. *See* DYMOND'S CAPITAL TRANSFER TAX, *supra* note 15, § 15.608, at 4029. The Board levies the tax against the person who made the transfer with the highest tax liability. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, app. 2, para. 5, at 41.

If a chargeable event occurs in the chain of ownership of the conditionally exempt property, the effect is to lift the potential tax liability on all owners before that event. Inheritance Tax Act, 1984, ch. 51, § 78(3); *see id.* § 33(6).

160. Inheritance Tax Act, 1984, ch. 51, § 207(1); *see also id.* § 207(2A), as added by Finance Act, 1985, ch. 54, § 94; sched. 26, para. 10 (associated property). The loss of conditional exemption under the circumstances described can thus result in tax being charged to the person whose actions caused the chargeable event as well as certain persons who transferred the property before the event. The tax paid by the person responsible for the chargeable event will reduce the charge to the latter party. *Id.* § 33(7)(a).

161. *See* Inheritance Tax Act, 1984, ch. 51; sched. 4, para. 2(1); CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 8.5(a), at 26. The Board requires an annual accounting of maintenance funds. Inheritance Tax Act, 1984, ch. 51, sched. 4, para. 6; *see id.* § 58(1)(c). If, in the Board's opinion, a maintenance fund is not being adequately managed, the Board has authority to enforce, *id.* sched. 4, para. 7, or disapprove the fund, *id.* sched. 4, para. 5. The Board usually permits the trustees to remedy the situation before withdrawing approval of the fund. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 8.17(ii), at 29.

162. *See* Cornforth, *Costs and Contents: Historic Houses and the Budget—II*, 168 COUNTRY LIFE 39, 39 (1980) [hereinafter *Costs and Contents*]; *see also* Cornforth, *The Chance of a Future: Historic Houses and the Budget*, 167 COUNTRY LIFE 1515, 1517 (1980) (profits from opening historic houses to the public rarely amount to costs of keeping the houses repaired).

the benefitted property; and (3) the defrayal of trustees' expenses.¹⁶³

6. Implementation

The conditional exemption's public access requirement has resulted in the public's gaining reasonable access to many buildings that were formerly inaccessible to the public.¹⁶⁴ Because profits from granting public access to conditionally exempt property are often negligible, prior to the conditional exemption provisions many owners did not open their property to the public.¹⁶⁵

If the owner of nationally significant property decides to claim conditional exemption for the property from the Board, the Board consults with the appropriate government agency. For example, if a claim for outstanding scenic land is made, the Board consults with the Countryside Commission. The Commission's National Heritage Adviser and a member of the Commission's regional staff generally visit the land to examine and assess its special qualities, especially its recent management.¹⁶⁶ Buildings adding character to the landscape may be included in the conditional exemption for the landscape, or they may be conditionally exempted in their own right.¹⁶⁷

163. The property must be conditionally exempt in order for a maintenance fund established for it to gain tax relief. *CAPITAL TAXATION AND THE NATIONAL HERITAGE*, *supra* note 85, § 8.3, at 25; *see also* Income and Corporation Taxes Act, 1988, ch. 1, § 691 (granting income tax relief for certain income from maintenance funds).

164. *See, e.g.,* Aslet, *New Houses to Visit*, 165 *COUNTRY LIFE* 1720, 1721 (1979) (describing opening of Hagley Hall to public as condition of conditional exemption).

165. Inheritance Tax Act, 1984, ch. 51, sched. 4, para. 3(1). The corpus and the income of the trust may, at any time, be transferred to a charity or heritage body. *Id.* para. 3(1)(a)(ii); *see id.* para. 3(4). The Board must approve the trustees before they can be appointed to the fund. *Id.* para. 2(2)(b)(i).

166. *COUNTRYSIDE COMMISSION, CAPITAL TAX RELIEF FOR OUTSTANDING SCENIC LAND* (1986) (pamphlet). Factors examined in assessing a landscape for conditional exemption "include diversity of land form and feature, relative relief, vegetation cover including trees and woods, presence of water, land use and man-made features, or the contribution which the land makes to its wider setting, all assessed by national and not regional or local standards." *CAPITAL TAXATION AND THE NATIONAL HERITAGE*, *supra* note 85, § 5.4, at 14.

If the land being offered has areas that would not be subject to the undertaking, the land's eligibility is harmed due to the lack of control over development of excluded areas. Conversation with Muriel Laverack, National Heritage Adviser, Countryside Commission (Aug. 19, 1985).

167. *CAPITAL TAXATION AND THE NATIONAL HERITAGE*, *supra* note 85, § 5.1, at 14. If a building is included in the exemption, not because of its own qualities but because it contributes to the landscape, public access to the building's interior is not normally required. *Id.* § 5.7, at 15.

If the Countryside Commission determines that the land is eligible for conditional exemption, the Commission and the owner generally draw up a heritage landscape management plan to identify the land's essential characteristics and to specify conservation measures.¹⁶⁸ The Commission submits to the Board its recommendations and the management plan signed by the owner. The Board then makes a decision on whether to grant conditional exemption.¹⁶⁹ If more than one government agency is involved, for example, if an historic house with adjoining woodland, amenity land, and a nearby but severed park is considered for conditional exemption, one agency takes the lead and prepares a "national heritage tax package" instead of the single-agency plan.¹⁷⁰

The Board makes a formal designation of whether conditional exemption will be granted only if a transfer has occurred or if evidence exists that a transfer will occur immediately upon designation of conditional exemption.¹⁷¹ The Board may seek advice from the government body advising it,¹⁷² but such advice is only informal and does not bind the Board.¹⁷³

Unfortunately, the above provisions often deter the owner of a heritage asset from seeking conditional exemption for that asset when trans-

168. COUNTRYSIDE COMMISSION, *supra* note 166. The Countryside Commission uses guidelines to aid in drawing up plans. The guidelines suggest that agreements cover an undertaking by the landowner to consult with relevant bodies such as planning authorities; to conserve the landscape (not to remove stonewalls, trees, or hedges, or to plow up moorland without consultation); to assure limited public access (usually on existing or new rights-of-way); and to allow monitoring by the Commission. COUNTRYSIDE COMMISSION, GUIDELINES FOR THE GENERAL UNDERTAKINGS USUALLY REQUIRED FOR OUTSTANDING SCENIC LAND RECOMMENDED FOR CONDITIONAL EXEMPTION FROM CAPITAL TRANSFER TAX (1984). The Countryside Commission has also published a guide on preparing management plans for land of outstanding scenic interest. COUNTRYSIDE COMMISSION, HERITAGE LANDSCAPES MANAGEMENT PLANS (1986) (CCP 205).

169. COUNTRYSIDE COMMISSION, *supra* note 166. The agreement between the Board and the property owner must contain detailed steps specified for conservation of the property. Inheritance Tax Act, 1984, ch. 51, § 31(2)(b), *as amended by* Finance Act, 1985, ch. 54, § 94; sched. 26, para. 2(3).

170. *See* Laverack, *National Heritage . . . A Taxing Matter!*, COUNTRYSIDE COMM'N NEWS, Nov. 1983, at 4, cols. 1, 4.

171. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, app. 1, para. 2, at 39.

172. *Id.* The advisory bodies are not bound to offer advice, and do so only if staff time permits. *Id.* The Countryside Commission and the Nature Conservancy Council may make on-site inspections. The Historic Buildings and Monuments Commission for England offers advice based on photographs and a written description of the property being offered. *Id.*

173. *Id.*

fer of the asset has not occurred. Thus, the owners of assets that could be claimed under the system may seek other methods to ensure the asset's retention instead of taking advantage of the conditional exemption provisions.¹⁷⁴

C. *Douceur and Private Treaty Sales*

1. Procedure

The *douceur* (sweetener) arrangement is a nonstatutory incentive to owners of nationally significant assets, including conditionally exempt assets, to sell the assets privately to heritage bodies if owners have made a decision to sell. Under the scheme, the owner of a nationally significant asset may approach any heritage body to negotiate the asset's sale. After determination of the asset's market value (with the aid of advisers if desired), the seller's capital gains and capital transfer tax liability for selling the asset is calculated. The Capital Taxes Office must be consulted as to this amount, but either the heritage body or the asset's owner may do the consulting.¹⁷⁵ The Board's guidelines recommend that if the heritage asset is a chattel, the amount of tax liability for the sale should be subtracted from the market value of the chattel, and one fourth (the *douceur*) should be added back. However, the percentage may be raised or lowered at the discretion of the heritage body buying the asset.¹⁷⁶

If the heritage asset is land or buildings of national significance, the method of negotiation is the same as above except that the District Valuer values the property at the request of the Capital Taxes Office, and the Board recommends that the *douceur* offered should be ten percent rather than twenty-five percent. The reason for the difference in percentage is that buildings and land are not subject to the same exportation pressures as chattels, thus alleviating the possibility that they will be lost to the national heritage. As in the case of chattels, the percentage may be raised or lowered at the discretion of the heritage body.¹⁷⁷ The Board advises only heritage bodies that do not derive most or all of their fund-

174. 405 PARL. DEB. H.L. (5th ser.) 59 (1980) (statement of the Duke of Norfolk).

175. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 10.4, at 32. If the heritage body contacts the Capital Taxes Office, it must obtain the seller's permission to discuss the seller's tax history. Because of the confidential nature of the information, sellers often consult with the Capital Taxes Office instead of the heritage body. See P. Longman & H. Wilson, Tax Incentives—Can Museums Benefit?, 9 (July 16, 1985) (notes compiled for Museums Association Conference, Birmingham, England).

176. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 10.4, at 32. The 25% figure is a general guideline set by the Board. *Id.*

177. *Id.* § 10.11, at 33.

ing directly from the government to enter into private treaty sales for land.¹⁷⁸

If negotiations succeed for either chattels, land, or buildings, the heritage body pays the seller the after-tax price plus the *douceur*.¹⁷⁹ The Capital Taxes Office, which does not intervene and which does not have to approve the sale, does not levy any tax upon being informed of the sale.¹⁸⁰

A private treaty sale is advantageous to the owner of a conditionally exempt asset in that the owner receives a higher net price for the asset than its market value minus tax liability. The *douceur* arrangement is designed to encourage owners of nationally significant works of art and other objects who no longer wish to own these assets to sell them to heritage bodies. Ownership by such entities greatly increases the probability that the assets will remain in Britain as part of the nation's heritage.¹⁸¹ Transfer of the asset to a heritage body must be by private treaty sale in order to be eligible for the *douceur*. If an owner sells a conditionally exempt asset to a heritage body on the open market (for example, by public auction), the owner incurs capital tax liability.¹⁸²

2. Implementation

The *douceur* enables museums, art galleries, and other heritage bodies to acquire exhibits for an amount lower than the exhibit's market price. The British public benefits from the system by being assured that the exhibit will remain in Britain and be publicly accessible. Although the system works well, two closely related factors have caused problems in recent times. Because the value of certain national heritage assets such as

178. *Id.* § 11.9, at 35.

179. *Id.* § 10.4, at 32. Dealers' commissions are paid out of the amount received by the seller. *Id.* The heritage body must bear any costs it incurs. P. Longman & H. Wilson, *supra* note 175, at 7.

Parliament annually grants public collections money with which to purchase exhibits. *E.g.*, 451 PARL. DEB. H.L. (5th ser.) 1369 (1984) (statement of Lord Cottesloe) (purchase grant to National Gallery in 1984 was £3½ million).

180. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 10.4, at 32; see Capital Gains Tax Act, 1979, ch. 14, § 147(2)(a), as amended by Inheritance Tax Act, 1984, ch. 51, § 274; sched. 8 (private treaty sales to national heritage bodies are exempt from capital gains tax).

181. See Jones, *Current Tax Intelligence*, 1973 BRITISH TAX REV. 395, 440 (Works of Art: Private Owner and Public Collections).

182. The owner of a conditionally exempt object must notify the Museums and Galleries Commission three months prior to a public sale of the object in order to permit public collections to arrange for a private treaty sale if the parties can agree upon terms. See P. Longman & H. Wilson, *supra* note 175.

works of art has escalated rapidly,¹⁸³ heritage bodies are finding it increasingly difficult to purchase such works of art on their limited budgets. In turn, owners of unique works of art are reluctant to sell to a heritage body by private treaty because they believe that the true value of the work of art can only be decided by placing the work on the open market.¹⁸⁴

Some critics have suggested that the Board change its guidelines for the *douceur* to fifty or seventy-five percent instead of twenty-five percent.¹⁸⁵ They argue that this increase would induce more owners of heritage assets to sell by private treaty to heritage bodies. Heritage bodies could buy objects they seek for a lower amount by using the *douceur* than if they acquired the objects on the open market.¹⁸⁶ An increase in the percentage of the *douceur*, however, would necessarily raise the amount the heritage body would have to pay for assets offered by private treaty, thus raising the amount they spend on such sales.¹⁸⁷ To date, the government has rejected the suggestions to raise the percentage.¹⁸⁸

183. See Hughes, *Of Vincent and Eanum Pig*, TIME, Apr. 13, 1987, at 80-81.

184. EDUCATION, SCIENCE AND ARTS COMMITTEE OF THE HOUSE OF COMMONS, PUBLIC AND PRIVATE FUNDING OF THE ARTS, INTERIM REPORT ON WORKS OF ART, THEIR RETENTION IN BRITAIN AND THEIR ACQUISITION BY PUBLIC BODIES, THIRD REPORT, 1981-82, H.C. SESS. PAP. NO. 275, at xiv [hereinafter INTERIM REPORT] (letter from L.M.M. Saunders Watson, Deputy President, Historic Houses Association, to Committee Clerk (Feb. 6, 1981)).

Heritage bodies sometimes afford works of art and other heritage assets offered to them in a private treaty sale by requesting the sellers to accept delayed or split payments. 2 EDUCATION, SCIENCE AND ARTS COMMITTEE OF THE HOUSE OF COMMONS, PUBLIC AND PRIVATE FUNDING OF THE ARTS, EIGHTH REPORT, 1981-82, H.C. SESS. PAP. NO. 49, at 551 [hereinafter EIGHTH REPORT] (memorandum submitted by Michael Levey, Director, National Gallery). This solution is not always feasible, however, especially when one nationally significant work of art may cost the heritage body a substantial part of its annual appropriation. For example, in 1985 the Tate Gallery bought a painting using the *douceur* system. The painting cost the Tate more than £1,000,000; more than one-half its annual appropriation. See Norman, *Gallery Pays £-1m for "Free Offer" Masterpiece*, Times (London), Apr. 2, 1985, at 32, col. 1.

To stagger the payments for a painting such as this would have limited the Tate's ability to purchase unique works of art offered during the next year.

185. See 451 PARL. DEB. H.L. (5th ser.) 1393 (1984) (statement by the Earl of Gowrie); see also INTERIM REPORT, *supra* note 184, at ix.

186. See 451 PARL. DEB. H.L. (5th ser.) 1364 (1984) (statement of Lord Charteris of Amisfield, Chairman, National Heritage Memorial Fund).

187. *Id.* at 1372 (statement of Lord Annan).

188. EDUCATION, SCIENCE AND ARTS COMMITTEE, RETENTION OF WORKS OF ART IN BRITAIN AND THEIR ACQUISITION FOR THE NATION: OBSERVATIONS BY THE GOVERNMENT ON THE THIRD REPORT, 1981, CMND. NO. 8538, at 5-6 [hereinafter GOVERNMENT OBSERVATIONS]; see 451 PARL. DEB. H.L. (5th ser.) 1393 (1984) (state-

In addition to heritage bodies, an alternative body is available in Britain to acquire nationally significant assets in danger of dispersal. The National Heritage Memorial Fund is a fund created by Parliament with the power to acquire nationally significant property for the nation.¹⁸⁹ The Fund acts as a "safety net" to protect heritage assets from destruction or exportation.¹⁹⁰

The Fund aids in preserving Britain's national heritage in many ways. For example, it assists heritage bodies in purchasing nationally significant property.¹⁹¹ In addition, the Fund's trustees occasionally grant endowments to heritage bodies¹⁹² and to others¹⁹³ to assist in the maintenance of nationally significant lands and buildings.

Like the national heritage capital tax system, the Fund stresses public access to the nationally significant property it aids in preserving. For example, in one case in which the Fund aided a heritage body in acquiring works of art, the Fund requested the return of its grant because the heritage body still had not displayed the works of art five years after their acquisition.¹⁹⁴

The Fund is successful in preserving many heritage assets for the nation. The amount of money the government appropriates to the Fund, however, limits the money that the trustees of the Fund may grant to preserve heritage assets.¹⁹⁵ Therefore, because heritage assets do not be-

ment of the Earl of Gowrie).

189. National Heritage Act, 1980, ch. 17, §§ 1-3. For a history of the Heritage Memorial Fund since its beginnings in the mid-1940s as the National Land Fund, see THIRD REPORT, *supra* note 68, at xiii-xvii.

190. 451 PARL. DEB. H.L. (5th ser.) 1362 (1984) (statement of Lord Charteris of Amisfield, Chairman, National Heritage Memorial Fund); see 975 PARL. DEB. H.C. (5th ser.) 157 (1979) (statement of Hector Monro, Under-Secretary of State for the Environment).

191. See 985 PARL. DEB. H.C. (5th ser.) 134-35 (1980); e.g., FIFTH ANNUAL REPORT, *supra* note 118, at 16 (describing grants to national park planning authorities, nature conservation trusts, the National Trust, etc.).

192. See 71 Written Answers, 71 PARL. DEB. H.C. (6th ser.) 202-03 (1985) (written answer by Mr. Macfarlane, Secretary of State for the Environment, listing endowments granted by Fund).

193. See Geddes-Brown, *How to Save Stately Homes on the Cheap*, Times (London), Jan. 15, 1984, at 7, col. 1 (describing grant from Fund to enable endowment to be established for medieval castle maintained by an individual charitable trust).

194. See *Frozen Assets*, 179 COUNTRY LIFE 236 (1986).

195. The government's appropriation to the Fund in 1985-1986 was £3,000,000. See Written Answers, 74 PARL. DEB. H.C. (6th ser.) 363 (1985) (written answer by William Waldegrave, Minister of State for the Environment (Countryside and Local Government)). In 1985 the government made a special grant to the Fund of £25 million to cover large properties that were offered that year. See *id.*

come available for purchase at a steady rate, the Fund is sometimes unable to prevent the destruction or exportation of nationally significant property.¹⁹⁶ In addition, because of the rapidly escalating value of works of art, the Fund occasionally rejects an offer that turns out to be much lower than the amount realized for the property at a subsequent auction. For example, the Duke of Devonshire offered drawings to the Fund for five and one-half million pounds. After rejection by the Fund's trustees because the price was too high, the drawings were sold at auction for twenty-one million pounds.¹⁹⁷

D. *Acceptance of Property in Lieu of Taxation*

Property of national significance may, at the discretion of the Board and with the agreement of the Secretary of State for the Environment and the Minister for the Arts, be accepted in whole or part satisfaction of capital transfer tax.¹⁹⁸ Eligible property includes buildings and any objects formerly or presently kept in them¹⁹⁹ and:

196. 975 PARL. DEB. H.C. (5th ser.) 110-11 (1979) (statement of Clement Freud).

197. See Norman, *One More Bungle Denting Britain's Heritage*, Times (London), July 5, 1984, at 12, col. 2.

198. Inheritance Tax Act, 1984, ch. 51, § 230(1); National Heritage Act, 1980, ch. 17, § 12(2); see Transfer of Functions (Arts, Libraries and National Heritage), Order S.I. 1983, No. 879, art. 10, sched. 2. The acceptance in lieu scheme may only be used to pay capital transfer tax liability, not capital gains tax liability. Acceptance may be in lieu of all or part of the liability. Inheritance Tax Act, 1984, ch. 51, § 230(1). The Capital Taxes Office may also accept property for interest that has accrued on capital transfer tax liability. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.1, at 34.

199. Inheritance Tax Act, 1984, ch. 51, § 230(3). The Board lists the following types of property as eligible for consideration as acceptance in lieu property:

(a) Land (which includes buildings and any other structures and land covered by water).

(b) Any objects which are or have been in any building if:

(i) the building is being or has been accepted in lieu of tax;

(ii) the building or any interest in it belongs to the Crown or a Government department;

(iii) the building is under the guardianship of the Secretary of State for the Environment, Scotland or Wales or of the Department of the Environment for Northern Ireland; or

(iv) the building belongs to a [heritage] body . . . and it appears to the Ministers desirable for the objects to remain associated with the building.

(c) Any object or collection or group of objects which the Ministers are satisfied is pre-eminent for its national, scientific, historic or artistic interest. "National interest" includes interest within any part of the United Kingdom, and in determining whether an object or collection . . . is pre-eminent, regard shall be had to any

(a) any picture, print, book, manuscript, work of art, scientific object or other thing which the Ministers are satisfied is pre-eminent for its national, scientific, historic or artistic interest, and

(b) any collection or group of pictures, prints, books, manuscripts, works of art, scientific objects or other things if the Ministers are satisfied that the collection or group, taken as a whole, is pre-eminent for its national, scientific, historic or artistic interest.²⁰⁰

The test applied is "very much higher than that applicable for conditional exemption"²⁰¹ Therefore, property qualifying for acceptance in lieu automatically qualifies for conditional exemption.²⁰² An owner may make an offer for acceptance in lieu and a claim for conditional exemption concurrently.²⁰³

When an owner makes an offer for acceptance in lieu, the Capital Taxes Office consults with the appropriate government agencies with responsibilities for the national heritage. It then consults expert advisers. In turn, the advisers refer to relevant experts to determine the value and quality of the proffered property. After the property has been evaluated, a process usually taking several months,²⁰⁴ the Board consults the relevant Ministers for their opinion on whether to accept the property in lieu of tax.²⁰⁵

If the Ministers determine that the property should not be accepted in lieu, they instruct the Board to reject the offer.²⁰⁶ On the other hand, if they agree to accept the property, the Ministers decide on a maximum amount up to which the Board may negotiate with the owner. They calculate the amount by the same method as that used for private treaty sales with the *douceur*. For chattels, the Ministers determine the market price, subtract tax liability, and add one-fourth of the notional tax (that is, the tax that would be due but for the in lieu procedure) to the net amount. For land, the procedure is the same except that the *douceur* is

significant association it has with a particular place.

CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.3, at 34.

200. Inheritance Tax Act, 1984, ch. 51, § 230(4).

201. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.4, at 34.

202. *Id.*

203. *Id.* § 11.5, at 35.

204. OFFICE OF ARTS AND LIBRARIES, WORKS OF ART IN SITU: GUIDELINES ON IN SITU OFFERS IN LIEU OF CAPITAL TAXATION (Apr. 1984) [hereinafter GUIDELINES ON IN SITU OFFERS].

205. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.6, at 35.

206. *Id.* § 11.13, at 37.

one-tenth of the notional tax. The figure arrived at is the tentative amount of tax liability for which the property will be accepted.²⁰⁷ A taxpayer does not incur capital gains tax liability upon the donation of property in lieu of capital transfer tax.²⁰⁸

At the Board's discretion, it transmits the provisional offer of acceptance to the property owner, and negotiations on an amount commence.²⁰⁹ If the Board accepts the property, the Ministers may reimburse the Inland Revenue for the forgone capital transfer tax.²¹⁰ The Board does not hold accepted property indefinitely; rather title to the property passes to a heritage body. Title to the accepted property may, at the discretion of either Minister, vest directly in the heritage body selected to own the property instead of vesting initially in the Board.²¹¹

1. Chattels

The test for acceptance in lieu for chattels (such as works of art, prints, pictures, manuscripts, books, and scientific objects) is whether an object "will constitute a pre-eminent addition to a national, local authority or university collection or [is] pre-eminent in association with a particular building."²¹² To make a finding on pre-eminence, expert advisers

207. *Id.* § 11.14, at 37.

208. Capital Gains Tax Act, 1979, ch. 14, § 147(2)(b), as amended by Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8, para. 10.

209. GUIDELINES ON IN SITU OFFERS, *supra* note 204.

210. National Heritage Act, 1980, ch. 17, § 8(1), as amended by Inheritance Tax Act, 1984, ch. 51, § 276; sched. 8, para. 13.

211. *Id.* § 9(3)-(4).

212. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.12, at 36.

The Board recognizes four categories of objects:

(1) Objects having "an especially close association with [British] history and national life." *Id.* § 11.2(i), at 36. Foreign objects may be included in this category if they were donated by foreign monarchs or governments or if they were "acquired abroad in circumstances closely associated with [British] history." *Id.* Domestic objects include those closely associated with the development of British industry and institutions, or with the history of a locality in Britain. *Id.*

(2) Objects "of especial artistic or art-historical interest." *Id.* § 11.2(ii), at 37. Nationally significant objects are included in this category as well as objects that would be pre-eminent in local governmental or university museums or galleries. *Id.*

(3) Objects "of especial importance for the study of some particular form of art, learning or history." *Id.* § 11.2(iii), at 37. Objects covered by this category are those that are important to historical collections or to the development of a scientific discipline. *Id.*

(4) Objects that "have an especially close association with a particular historic setting." *Id.* § 11.2(iv), at 37. Objects, such as paintings, manuscripts, or furniture that were commissioned for, or are part of the history of a particular house or location are

selected from appropriate national museums and art galleries consult with other experts, especially in cases concerning the local significance of an object.²¹³

An object's acceptance is not contingent on a recipient's being chosen before the acceptance. Accepted objects with no recipient are advertised,²¹⁴ and the Minister of Arts selects a recipient from eligible applicants.²¹⁵ Recipients must enter into an agreement with the Minister regarding the object's maintenance, inalienability, and public accessibility.²¹⁶ Alternatively, an applicant for acceptance in lieu may offer an object on condition that the Minister select a specified recipient or location, or that an object remain in situ.²¹⁷

If the Board accepts an object and agrees that it may remain in situ, the object's ownership passes to a heritage body that then lends the object to the former owner/applicant,²¹⁸ subject to removal after notice for short periods of time for exhibition, study, or conservation work.²¹⁹ Before acceptance, the heritage body and the offeror must agree to condi-

included in this category. Pre-eminence is judged by the "specific contribution [an object] make[s] to the understanding of an outstanding historic building" or location. *Id.*

The Board recognizes that some objects are covered by more than one category. *Id.* § 11.12, at 36 n.*.

213. *Id.* § 11.12, at 36. Before 1972, only nationally pre-eminent chattels were accepted in lieu. See Written Answers, 839 PARL. DEB. H.C. (5th ser.) 59-60 (1972) (written answer of Mr. Nott, Chancellor of the Exchequer).

214. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.16, at 38. Works of art are advertised in the Museums' Bulletin. Manuscripts and books are advertised in the Times Literary Supplement. *Id.*

215. *Id.* Eligible applicants are the National Arts Collection Fund, Friends of the National Libraries, "any other person who is willing to accept [the object]," *id.*, or

(a) any museum, art gallery, library or other similar institution having as its purpose or one of its purposes the preservation for the public benefit of a collection of historic, artistic or scientific interest;

(b) any body having as its purpose or one of its purposes the provision, improvement or preservation of amenities enjoyed or to be enjoyed by the public or the acquisition of land to be used by the public;

(c) any body having nature conservation as its purpose or one of its purposes. National Heritage Act, 1980, ch. 17, § 3(6)(a)-(c). The Minister requests the advice of the Museums and Galleries Commission or the Royal Commission on Historic Manuscripts as appropriate regarding a recipient's suitability. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.17, at 38.

216. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.17, at 38.

217. *Id.*

218. *Id.*

219. GUIDELINES ON IN SITU OFFERS, *supra* note 204.

tions regarding the object's conservation,²²⁰ environmental control,²²¹ security,²²² public access,²²³ and insurance.²²⁴ The Ministerial direction transferring the property's ownership to the heritage body specifies the conditions.²²⁵

2. Land

Land must either be "of outstanding scenic, scientific or historic interest[, or have] a high amenity value, such as a nature park, or land which has a close link with an historic building" to qualify for acceptance in lieu.²²⁶ The procedure followed for offers in lieu is similar to that for claims of conditional exemption. That is, the Board seeks the advice of experts, and requires appropriate undertakings for management of the land and public access.²²⁷ In order to avoid management problems,²²⁸ the Board generally does not accept land before a suitable recipient is chosen.²²⁹

220. The heritage body is usually responsible for indefinite conservation of the object. *Id.*

221. The person in possession of the object will usually be responsible for its environmental control. *Id.*

222. Security and its cost will usually be the responsibility of the person in possession of the object. Although the standard of security measures to be taken is not expected to equal that of a public institution, the heritage body may require additional measures to be taken if the National Museums Security Adviser deems them necessary. *Id.*

223. The private house in which the object is to be kept is expected to be open about 30 days per year to the public for display of the object. Public access by appointment is usually considered inadequate. *Id.*

224. The heritage body is responsible for insuring the object. *Id.*

225. *Id.*

226. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.7, at 35.

227. *Id.* § 11.8, at 35. The District Valuer's opinion on the land's value is also sought. *Id.*

228. See ENVIRONMENT SUB-COMMITTEE, EXPENDITURE COMMITTEE, A NATIONAL HERITAGE FUND, THIRD SPECIAL REPORT, 1978-79, H.C. SESS. PAP. NO. 350, at 28 [hereinafter THIRD SPECIAL REPORT] (memorandum by Her Majesty's Treasury).

229. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, § 11.9, at 35. Suitable recipients include national park authorities, charitable entities such as local nature conservation trusts, the National Trust, and local authorities. *Id.*

3. Buildings and Chattels Associated with Buildings

Buildings accepted in lieu of capital transfer tax must be "of architectural or historic interest" ²³⁰ The procedure to be followed tracks that of outstanding land in that a suitable recipient must generally be found before the Board accepts a building. ²³¹ Objects associated with a building will be accepted if it is deemed desirable for them to remain in the building. Qualifying objects may be associated with a building that has been accepted in lieu, that is owned by a heritage body, or that is in public ownership. ²³²

4. Implementation

Acceptance in lieu allows people such as executors of estates to offer nationally significant property to the Board in lieu of capital transfer tax. ²³³ If the Board decides to accept property in lieu, the system benefits heritage bodies because in lieu property transferred to them is "free" in that the Board does not require reimbursement from the heritage bodies of forgone tax revenues. ²³⁴ To aid heritage bodies in maintaining historic houses or outstanding land transferred to them, the Board occasionally accepts high quality income-producing property connected with the house or land to be used as an endowment. ²³⁵

For many years the government set an annual monetary limit on property to be accepted in lieu in order to control closely the amount of tax revenues the government would forgo. ²³⁶ The limit, however, which was two million pounds in 1985-1986, ²³⁷ unrealistically presupposed that property would be offered in a steady stream. Occasionally, works of art had to be rejected even though they were pre-eminent and sought after by heritage bodies. ²³⁸ To attempt to acquire the works of art after

230. *Id.* § 11.10, at 35.

231. *Id.* The Board seeks the advice of the relevant government agencies and the Historic Buildings and Monuments Commission for England. *Id.*

232. *Id.* § 11.11, at 36. The Board seeks advice on the potential acceptance of associated objects and their value from relevant governmental agencies and advisers from the national museums and galleries. *Id.*

233. *See* 975 PARL. DEB. H.C. (5th ser.) 60 (1979) (statement of Norman St. John-Stevas).

234. THIRD SPECIAL REPORT, *supra* note 228, at 24 (memorandum from Her Majesty's Treasury); *see id.* at 6-12 (listing property accepted in lieu).

235. *See id.* at 210 (replies to written questions by Her Majesty's Treasury).

236. *See* P. Longman & H. Wilson, *supra* note 175.

237. *See* Written Answers, 74 PARL. DEB. H.C. (6th ser.) 363 (1985) (written answer of William Waldegrave, Minister of State for the Environment).

238. *See, e.g.*, 462 PARL. DEB. H.L. (5th ser.) 1205 (1985) (statement of Lord

they had been rejected as acceptance in lieu property, the heritage bodies had to raise the purchase price through annual appropriations and public appeals.²³⁹ In 1985 the government changed its policy. It designates an amount each year for the acceptance in lieu of relatively less costly items, but it has removed the ceiling from the acceptance in lieu of more costly items.²⁴⁰ Because of this policy change, the government was able to acquire the Constable painting, "Stratford Mill" for ten million pounds in 1987—the most expensive property ever accepted in lieu.²⁴¹

Problems with the acceptance in lieu system occasionally arise. For example, a formal determination on acceptance is made only after capital transfer tax liability has been incurred.²⁴² The governmental bodies advising the Ministers in formal determinations may give informal advice, but such advice is available only if staff time permits,²⁴³ and it is not binding on the Ministers or the Board.²⁴⁴ The Board may also reject the offer of property in lieu, even after a heritage body has determined it outstanding or pre-eminent.²⁴⁵ Thus, even though an owner of pre-eminent or outstanding property may specify by will which heritage body the owner wishes to receive the property if it is accepted in lieu, the

Strabolgi) (describing rejection of work of art because of monetary ceiling even though work of art was pre-eminent, had been in National Gallery for many years, and was sought after by another heritage body).

239. See, e.g., Norman, *supra* note 184, at 32, col. 1 (Tate Gallery bought painting by de Chirico after rejection by government of acceptance in lieu of painting).

240. See Hewson, *Art Collector's Threat to Sell Pictures Abroad Forces Tax Rule Change*, Times (London), July 27, 1985, at 3, col. 1.

241. See Written Answers, 114 PARL. DEB. H.C. (6th ser.) 166-67 (1987) (written answer by Mr. Luce, Minister for the Arts).

Acceptance in lieu of the Constable painting for £10 million was subsequently criticized as too expensive despite the escalating value of major works of art. The £10 million value placed on the painting by the Board with the advice of experts was more than twice the amount previously paid for a Constable painting. See 488 PARL. DEB. H.L. (5th ser.) 1381-82 (1987) (statement of Baroness Birk).

242. CAPITAL TAXATION AND THE NATIONAL HERITAGE, *supra* note 85, app. 1, § 2, at 39.

243. *Id.* As in the case of conditional exemption, the Countryside Commission and the Nature Conservancy Council may make on-site visits if staff time permits. The Historic Buildings and Monuments Commission for England gives informal advice based on photographs and written descriptions of property. *Id.*

244. *Id.* Neither is an independent determination of pre-eminence binding on the Board. See THIRD SPECIAL REPORT, *supra* note 228, at 17 (statement of Timothy Sainsbury, committee member).

245. See e.g., EIGHTH REPORT, *supra* note 184, at 16-17 (statement by Michael Levey, Director, National Gallery, describing rejection by Treasury of offer of work of art determined to be pre-eminent by National Gallery).

Board is not bound to accept the property.²⁴⁶ This situation creates uncertainty, especially if the offer of the property is conditioned on its acceptance by a particular heritage body. The problem may be partly mitigated by a testator conditioning the offer of acceptance in lieu on locating the property according to the testator's will. Such conditions are frequent, as is the expression of wishes regarding the location of an object.²⁴⁷

Several suggestions have come forth for making the acceptance in lieu system more popular. For example, the Board could change its policy and permit a formal determination of acceptance in lieu of an asset before the owner's death, thereby permitting a testator to be certain the Board would accept the property.²⁴⁸ Another suggestion, offered by the trustees of the National Heritage Memorial Fund²⁴⁹ and the Education, Science and Arts Committee of the House of Commons²⁵⁰ is for the Board to offer tax credits for in lieu property it accepts. The owner of these credits could use them subsequently to offset future capital tax liability.²⁵¹ The Board could also offer tax credits if a proffered object were valued at more than the amount of capital transfer tax that was owing. Under the current system, the Board retains the excess amount.²⁵² To date, however, the government has rejected the introduction of tax credits for in lieu property because of the practical difficulties that it states would be involved.²⁵³

The in situ provision of the acceptance in lieu system was first suggested in the mid-1970s.²⁵⁴ The provision, which allows former owners

246. See P. Longman & H. Wilson, *supra* note 175, at 5.

247. See Written Answers, 119 PARL. DEB. H.C. (6th ser.) 248-50 (1987) (written answer by Mr. Luce, Minister for the Arts).

248. See EIGHTH REPORT, *supra* note 184, at 38-39 (memorandum submitted by the National Art Collections Fund).

249. See DEPT. OF THE ENVIRONMENT, OFFICE OF ARTS AND LIBRARIES, NATIONAL HERITAGE MEMORIAL FUND, FIRST ANNUAL REPORT, 1980-81, H.C. SESS. PAP. NO. 394 (1981), cited in Bennett & Brand, *Conservation, Control and Heritage—Public Law and Portable Antiquities*, 12 ANGLO-AM. L. REV. 141, 162 (1983).

250. INTERIM REPORT, *supra* note 184, at vii. The Committee also suggested that the government consider the possibility of accepting property in satisfaction of income tax liability. EIGHTH REPORT, *supra* note 184, at xlv.

251. INTERIM REPORT, *supra* note 184, at vii.

252. *Id.* at xiii (memorandum submitted by the Association of District Councils).

253. GOVERNMENT OBSERVATIONS, *supra* note 188, at 7; see also 483 PARL. DEB. H.L. (5th ser.) 1539 (1987) (written answer by Lord Belstead, Minister of State, Ministry of Agriculture, Fisheries and Food) (reiterating government's earlier rejection of tax credits.).

254. Cornforth, *Saving a Reynolds Portrait*, 159 COUNTRY LIFE 162, 164 (1976);

to continue to possess nationally significant chattels, obviously benefits those former owners by permitting them to enjoy public property in their homes. By granting this benefit, the in situ provision offers an added inducement to a person owing substantial capital taxes to choose the in lieu system rather than to sell a pre-eminent asset privately to a heritage body under the *douceur* system and subsequently to meet his tax liability with the proceeds of the sale.

The public also gains, however, from the in situ provision. The heritage object remains in an historical setting that may have been designed for it, thus enhancing the object's quality and historical significance.²⁵⁵ The former owner bears part of the maintenance costs of the object rather than the heritage body's assuming all the costs upon acquisition. In addition, the public may gain access to heritage property that was formerly inaccessible to the public. If the object is in a building to which the public already has access, the system allows the historical contents of that building to remain intact. The ability of the building and the region to continue to attract tourists is thus not impaired. The probable alternative would be to remove the object and add it to the art galleries or museums of major cities that already attract large numbers of tourists.²⁵⁶

IV. INTERNAL REVENUE CODE PROVISIONS THAT AID IN PRESERVING THE UNITED STATES CULTURAL AND NATURAL HERITAGE

A. *Charitable Deductions*

A major distinction between British and United States tax law is the Code provision permitting United States taxpayers to claim charitable deductions against income tax liability up to set limits for property donated to certain charitable organizations.²⁵⁷ The Code also permits

see THIRD REPORT, *supra* note 68, at xxxv.

255. See, e.g., Cornforth, *supra* note 254, at 162 (removal of early eighteenth century portrait by Reynolds from Doddington Hall's Long Gallery would destroy the unity of the gallery; portrait had been in same location since at least 1786); *Costs and Contents*, *supra* note 162, at 40 (portraits owned by the National Portrait Gallery under the acceptance in lieu system were allowed to remain in situ at Arundel Castle).

256. 977 PARL. DEB. H.C. (5th ser.) 1375-76 (1980) (statement of Tam Dalyell); see also THIRD REPORT, *supra* note 68, at 300 (memorandum submitted by the National Galleries of Scotland).

257. A taxpayer may deduct the fair market value of property donated to a public charity. I.R.C. § 170(e)(1)(B) (1989). For property donated to a private foundation, the taxpayer may deduct the fair market value minus long term capital gains. *Id.* § 170(e)(1). Entities may qualify as public charities or private foundations under sections 501(c)(3), 509(a)(1) and 170(b)(1)(A)(vi), or 509(a)(2) of the Code.

taxpayers to claim charitable deductions against estate and gift tax liability without limitation.²⁵⁸

In a somewhat similar situation, a taxpayer may receive part cash and part charitable deduction for a sale of appreciated property below its fair market value. A typical bargain sale, as this transaction is known, often results in the donor's receiving a cash price equal to the adjusted basis in the property. The donor thus recovers the initial cost while deducting the appreciated value of the property from income, estate, or gift tax liability.²⁵⁹

In general, the Code's limitations on charitable deductions for real and personal property are based on similar or identical principles. For example, the IRS does not permit a taxpayer to take a deduction when the taxpayer retains a lifetime interest in donated real or personal property. In order for the deduction to qualify for tax relief, all the donor's rights in the property must have been relinquished or have expired.²⁶⁰

A taxpayer may, however, donate partial interests in property in order to avoid this restriction. Such a donation may take the form of a conservation easement,²⁶¹ a method described in part IV(C) of this Article.²⁶² A taxpayer may also donate partial interest in personal property as an undivided fractional interest. This interest, often referred to as a timeshare arrangement,²⁶³ usually consists of a "loan" of personal property for a set period of time each year.²⁶⁴

Under a timeshare arrangement, a donor donates a percentage interest in personal property to a charitable organization. For example, donation of a one-sixth interest in a work of art would permit the donor to retain the work of art in his possession for ten months each year and allow the

Corporations may also claim charitable deductions up to one-tenth of taxable income. *Id.* § 170(a), (b)(2).

258. *Id.* §§ 2055(a), 2522(a). Charitable organizations must meet differing criteria depending on whether they receive property resulting in income, estate, or gift tax deductions to donors. *See id.* §§ 170(c), 2055(a), 2522(a).

259. *See* Wittenbach & Milani, *Charting the Current Rules on Charitable Contributions*, 63 TAXES 541, 548 (1985). For a discussion of the tax effects of a bargain sale, see ARTHUR ANDERSEN & CO., *TAX ECONOMICS OF CHARITABLE GIVING* 54-63 (9th ed. 1985).

260. I.R.C. §§ 170(a)(3), 2055(e)(2), 2522(c)(2) (1989).

261. *See id.* §§ 170(f)(3)(B)(iii), (h)(1), 2055(a), 2055(e)(2), 2522(a), 2522(c)(2).

262. *See infra* notes 297-338 and accompanying text.

263. *See* ARTHUR ANDERSEN & CO., *supra* note 259, at 134.

264. *See* Beckwith, *Estate and Gift Tax Charitable Deductions*, 251-2d Tax Mgmt. (BNA) A-15 (1984); *see, e.g.*, Priv. Ltr. Rule 81-45-085 (Aug. 13, 1981) (charitable deduction allowed for contribution of one-tenth interest in paintings to a § 501(c)(3) charity).

charitable organization to display the work of art for the remaining two months. The taxpayer receives the deduction at the time of giving the undivided fractional interest, at which time the charitable organization and donor become tenants-in-common of the work of art.²⁶⁵

The timeshare arrangement permits a taxpayer to continue to enjoy the property throughout the taxpayer's lifetime. In one instance, the IRS permitted a deduction for a timeshare arrangement even when the donor retained in his home a donated collection of paintings. The museum, to which the undivided fractional interest had been donated, would eventually acquire complete ownership of the paintings. Until that time, however, the museum did not have adequate space for the collection. The IRS permitted the donor to keep the collection on display at the donor's home near the museum, allowing public access to the collection on specified days each year. On the days the collection was to be viewed by the public, the museum provided the donor with guard service.²⁶⁶

A major reason for the favorable tax treatment accorded to taxpayers who donate appreciated property to charitable organizations is the nature of the property donated and the nature of donee organizations. For example, the deduction encourages the donation of a wide variety of works of art to museums and art galleries.²⁶⁷ Indeed, museums acquire about eighty percent of their exhibits through donations.²⁶⁸

Congress appropriately did not attempt to favor specific artistic tastes when it created the charitable deduction; the choice of whether to accept a work of art or other exhibit rests with the charitable organization. If the charitable organization qualifies for favorable tax treatment, the IRS allows taxpayers donating property to the organization to take a charitable deduction for the donation as long as the donee organization uses the property for a charitable purpose.²⁶⁹

The application of the charitable deduction to many varieties of property means that the United States Government subsidizes the donation of almost any property to a charitable organization that will use the prop-

265. Cf. Vencel & Whitman, *Giving Art to Museums: Special Considerations for the Estate Planner*, 122 TR. & EST., Sept. 1983, at 35, 39-40.

266. See Priv. Ltr. Rul. 83-33-019 (May 12, 1983).

267. See Comment, *The Implications of Changing the Current Law on Charitable Deductions—Maintaining Incentives for Donating Art to Museums*, 47 OHIO ST. L.J. 773, 776 (1986).

268. See Comment, *Changing I.R.C. § 170(e)(1)(A): For Art's Sake*, 37 CASE W. RES. L. REV. 536, 547 (1987) (citing *Generosity Will Cost More, I.R.S. Tells Donors*, ARTNEWS, Mar. 1985, at 25).

269. I.R.C. § 170(c) (1989).

erty for charitable purposes.²⁷⁰ Taxpayers may claim deductions for any exhibits accepted by a qualified charitable organization; there is no requirement that a museum or art gallery place an exhibit on public display.

The generosity of the charitable deduction has led to abuses. As one survey noted, a donor is always able to find a donee for an art object. Even prestigious museums often accept inferior works from important donors in the hope that the donors will subsequently donate superior works.²⁷¹ Many donated exhibits end up in museum basements, enjoyed by no one.²⁷² The public, however, subsidizes their acquisition just the same.

Evaluation of the fair market value of property has caused continuing friction between the IRS and taxpayers. When taxpayers claim a deduction against income, estate, or gift tax, they normally prefer to evaluate the donated property at the highest fair market value attainable. When taxpayers estimate the fair market value of property for the purpose of evaluating an estate or a gift, however, they normally prefer to use the lowest evaluation possible.²⁷³ Thus there is continuing disagreement regarding the correct value of property, especially when determination of the fair market value cannot be based on an established market for the property.

The volatility of the art market²⁷⁴ exacerbates the evaluation problem. Thus, the IRS must consider the effect of rapidly rising prices on the value of a work of art or historic object.²⁷⁵ When particularly valuable works of art must be evaluated, a market rarely exists on which to base the evaluation. In addition, a taxpayer's appraisers may be so reputable and knowledgeable that the IRS may hesitate to second guess them.²⁷⁶

270. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 232 & n.69 (1980).

271. *Id.* at 232.

272. H. Sandison & J. Williams, *supra* note 60, at 54. One way in which taxpayers can influence a museum's acceptance of their gifts, and thus ensure a charitable deduction, is to join the museum's board. *See Paying for the Arts: The Silent Maecenas*, ECONOMIST, Nov. 17, 1984 at 1, 2; *see also* H. Sandison & J. Williams, *supra* note 60, at 37.

273. *See* Comment, *supra* note 267, at 782.

274. *See generally Art's Big Top*, ECONOMIST, Dec. 3, 1988, at 86.

275. *See, e.g., Furstenberg v. United States*, 595 F.2d 603, 607 (Ct. Cl. 1979) (value of figure painting by Carot increased due to rapid rise in art prices during 1960s); *Blaffer v. Phinney*, 67-1 U.S. Tax. Cas. (CCH) ¶ 9326 (W.D. Tex. Feb. 16, 1967) (fair market value of fifteenth century altar triptych increased from \$300,000 to \$425,000 the following year).

276. *See* Speiller, *supra* note 270, at 239 n.97.

Congress and the IRS have attempted to reduce the problem of exaggerated evaluations. The Code requires a donor of an item or a group of similar items with a total value of more than \$5000 to obtain a qualified appraisal from an independent appraiser.²⁷⁷ Other sections of the Code impose stiff penalties for overvaluing property.²⁷⁸ The IRS's Art Advisory Panel, created in 1968 to address inflated evaluations, reviews and evaluates property appraisals submitted by taxpayers.²⁷⁹ The potential for abuse is still massive, however, and it is estimated that half the people claiming charitable deductions over-value their donations.²⁸⁰

B. *Rehabilitation Investment Tax Credits*

Rehabilitation tax credits are available to taxpayers who substantially rehabilitate qualifying buildings²⁸¹ while retaining in place most of the original structure.²⁸² Qualifying buildings include buildings placed in use before 1936 and certified historic structures.²⁸³ Certified historic structures are buildings that are either listed in the National Register of Historic Places or are certified by the Secretary of the Interior as being of historic significance to the registered historic district in which they are located.²⁸⁴ In order for a certified historic structure to be eligible for a tax credit, the Secretary of the Interior must certify that the planned rehabilitation is consistent with the historic character of the property or the district in which it is located.²⁸⁵

277. I.R.C. § 6050L (1989); Temp. Treas. Reg. § 1.170A-13T(b), (c), 49 Fed. Reg. 50,657, 50,659-60 (1984). A summary of the appraisal must be submitted to the IRS with the tax return for the year in which the taxpayer claims the deduction.

278. See, e.g., I.R.C. § 6659 (1989).

279. *IRS Art Advisory Panel: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 3 (1986).

280. *Id.* at 23.

281. I.R.C. § 48(g)(1)(C)(i) (1989). Substantial rehabilitation is rehabilitation that exceeds \$5000 or the adjusted basis of the building during the 24 months in which a taxpayer claims the credit. *Id.*

Rehabilitation includes renovation, reconstruction, or restoration. Prop. Treas. Reg. § 1.48-12(b)(2)(iv), 53 Fed. Reg. 39,594 (1988).

282. I.R.C. § 48(g)(1)(A)(iii) (1989). At least 50% of the existing external walls must be retained as external walls; at least 75% of the existing external walls must be retained as external or internal walls; and at least 75% of the existing internal structural framework must be retained in place. *Id.*

283. *Id.* §§ 38(a), (b)(1), 48(g)(1)(B); see *id.* § 46(a)(3). The tax credit for certified historic structures is 20% of the basis attributable to qualified rehabilitation expenditures. For other qualifying property, it is 10%. *Id.* §§ 46(b)(4)(A)(i), (ii).

284. *Id.* § 48(g)(3).

285. *Id.* § 48(g)(2)(C); see 55 Fed. Reg. 6771-81 (1990) (to be codified at 36 C.F.R.

The rehabilitation tax credit is not designed to encourage the preservation of all historic buildings.²⁸⁶ The credit applies only to historic buildings used as commercial property, including residential rental property.²⁸⁷ Thus, credit is not available to taxpayers who rehabilitate historic buildings that are their private residences.

Rehabilitation tax credits provide a tax shelter, especially for taxpayers entering into limited partnerships with companies specializing in historic rehabilitations.²⁸⁸ The credit has been successful, having provided the incentive for the investment of about \$9.5 billion in 13,000 historic buildings between 1982 and 1986.²⁸⁹ Restriction of the credit by Congress in 1986,²⁹⁰ however, resulted in a thirty-five percent reduction in certified projects between 1986 and 1987.²⁹¹

The rehabilitation tax credit has a major disadvantage. Because of its limitation to commercial buildings, the tax credit applies to only about fifteen percent of the buildings on the National Register.²⁹² Thus, most buildings on the National Register would qualify only if their use were changed to commercial. The Code does include provisions, however, discouraging the substantial alteration or demolition of certified historic structures.²⁹³

pt. 67).

286. See S. REP. NO. 144, 97th Cong., 1st Sess. 72, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 105, 177. The rehabilitation tax credit was increased in 1981 to aid in revitalizing older locations and preventing their deterioration and decay. *Id.*

287. See I.R.C. § 48(g)(2)(A)(i) (1989). A taxpayer may receive a rehabilitation tax credit for a certified historic structure that is used commercially for residential purposes. See HOUSE CONF. REP. NO. 215, *supra* note 286, at 69, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 285, 311-12. Noncommercial residential buildings do not qualify for the tax credit. S. REP. NO. 144, *supra* note 286, at 69, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS at 174; see I.R.C. § 167(j)(2)(B) (1989).

288. See *How You Can Invest*, 39 HISTORIC PRESERVATION 36 (May/June 1987); see also Opsata, *How Pros Play The Rehab Game*, 39 HISTORIC PRESERVATION 34, 34-36 (May/June 1987).

289. See Rypkema & Spatz, A "Body Blow" to Rehab: Tax Reform's Passive-Activity Rules Curb Use of Credits, PRESERVATION NEWS, Nov. 1987, at 7; see also GENERAL GOV'T DIV., GENERAL ACCT. OFF., TAX POLICY AND ADMINISTRATION: HISTORIC PRESERVATION AND TAX INCENTIVES, PUB. NO. GAO/GGD-86-112FS (1986) (analyzing statistics on qualified rehabilitation expenditures for tax years 1982 and 1983).

290. Tax Reform Act, Pub. L. No. 99-514, § 251, 100 Stat. 2085, 2183 (1986).

291. See *Park Service Confirms Drop in Use of Rehab Credits*, PRESERVATION NEWS, Feb. 1988, at 2; see also Rypkema & Spatz, *supra* note 289, at 7 (describing effect of congressional modification).

292. See *Preservation Budgeting Continues*, PRESERVATION NEWS, Apr. 1987, at 2.

293. I.R.C. § 280B (1989).

Another limitation is the requirement that the cost of rehabilitation exceed \$5000 or the property's adjusted basis.²⁹⁴ Thus, minor rehabilitation may not qualify for the credit. If rehabilitation does not qualify because of this requirement, however, the taxpayer may reduce the property's basis by donating a conservation easement to a holding organization.²⁹⁵ Conservation easements are discussed in the following section of this Article.

The rehabilitation tax credit encourages the rehabilitation of buildings, many of which may otherwise have continued to decay or been destroyed. It may also result in the adaptive use of buildings that are ill-suited to their new use as offices, restaurants, or boutiques.²⁹⁶ Arguably, preserving a building for an ill-suited adaptive use is preferable to losing the building to decay. However, a preferable alternative would be to make it worthwhile for a taxpayer to preserve an historic structure pursuant to its original use for the public benefit.

C. Conservation Easements

Conservation easements have been described as the "middle ground" between zoning or other regulations and land ownership.²⁹⁷ They include easements, restrictive covenants, and equitable servitudes.²⁹⁸ Their creation is enabled by common law or state statutes,²⁹⁹ many of which enable imposition of both negative and affirmative restrictions.³⁰⁰ Thus, conservation easements vary depending on the state in which they are created.

The Code encourages the creation of conservation easements by permitting taxpayers who donate the easements to certain organizations to deduct the fair market value of the easements against income, estate, or gift tax liability.³⁰¹ Conservation easements, which must be granted in

294. *Id.* § 48(g)(1)(C)(i).

295. See Kiefer, *Creating Additional Tax Benefits from Qualified Conservation Easements*, 15 REAL EST. L.J. 136, 154 (1986).

296. See Gleye, *Viewpoint: It's Time to Rehab the Tax Credits*, PRESERVATION NEWS, Mar. 1987, at 5.

297. *What is a Conservation Easement?*, 4 LAND TRUSTS' EXCHANGE 4 (1985); see R. DUNFORD, AN OVERVIEW OF FEDERAL TAX POLICIES ENCOURAGING DONATIONS OF CONSERVATION EASEMENTS TO PRESERVE NATURAL AREAS 2 (Cong. Res. Service Rep. No. 84-48 ENR, Feb. 29, 1984).

298. Treas. Reg. § 1.170A-14(b)(2) (1986).

299. See generally Comment, *Conservation Easements: The Greening of America?*, 73 Ky. L.J. 255, 258 n.13 (1984) (listing state conservation easement statutes).

300. See generally Kiefer, *supra* note 295, at 146.

301. I.R.C. §§ 170(h)(1), 2055(a), 2055(e)(2), 2522(a), 2522(c)(2) (1989).

perpetuity to be eligible for the deduction,³⁰² may be donated for several specified purposes, including the preservation and conservation of the United States cultural and natural heritage.³⁰³

In order for conservation easements in historic structures to qualify for the deduction, the structures must be certified and listed in the National Register, or they must be located in a restricted historic district and certified by the Secretary of the Interior as being of historic significance to the district.³⁰⁴ Land must be "historically important."³⁰⁵ That is, it must either (1) be adjacent to property listed individually in the National Register and contribute to the historic or cultural integrity of the property; (2) be within a registered historic district; or (3) be independently significant, that is, it must meet the National Register's evaluation criteria.³⁰⁶

The Code requires public access to property covered by a conservation easement. Visual public access is sufficient for structures for which an owner donates an exterior easement. Thus, if a conservation easement has been granted for the exterior of a structure that is visible from a public way, no further public access is required. If the property is not visible from a public way or if an easement has been donated for the interior of an historic structure, the property owner must provide the owner visual access to the property.³⁰⁷

The IRS requirements for public access vary considerably depending on the nature of a structure and whether it is occupied. For example, if a family lives in a certified historic structure with interior and exterior conservation easements, the owners satisfy the public access requirement by admitting the general public for a fee on two days per year, permitting scheduled scholarly study of the structure's significant characteristics, and permitting publication of photographs showing those characteristics.³⁰⁸ On the other hand, if an easement is granted on an unoccupied historic structure near an historic land area visited year-round by tourists, access to the structure must be provided more frequently. The Treasury regulations provide the example of a barn used by troops in a Civil War battle. If visual access to the barn is not available to the public who visit the battlefield on a year-round basis, public access to the barn must

302. *Id.* § 170(h)(5)(A).

303. *Id.* § 170(h)(4)(A)(iv). Other purposes include the donation of conservation easements providing open space for scenic enjoyment, or land areas for outdoor recreation or education. *Id.* § 170(h)(4)(A)(i), (iii).

304. *Id.* § 170(h)(4)(B).

305. Treas. Reg. § 1.170A-14(d)(5)(ii) (1989).

306. *Id.* § 1.170A-14(d)(5)(ii).

307. *Id.* § 1.170A-14(d)(5)(iv).

308. *Id.* § 1.170A-14(d)(5)(v), example (1).

be available every other weekend.³⁰⁹

Whereas the IRS definition of historic structures eligible for the charitable deduction for donation of a conservation easement is relatively clear cut, its interpretation of qualifying natural areas is less clearly defined. The Code permits charitable deductions for the donation of conservation easements for the habitats of rare, endangered, or threatened species, or for undeveloped or natural areas that are in, or contribute to, "the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area."³¹⁰ This latter description permits the donation of easements for areas of local significance as well as areas of national and state significance. Public access to natural areas may be limited depending on the purpose of the conservation easement.³¹¹

The IRS designates entities permitted to hold conservation easements donated by taxpayers claiming a charitable deduction.³¹² Public entities such as federal agencies, states, and their subdivisions qualify,³¹³ as do certain private entities, including those qualifying as charities under section 501(c)(3) of the Code.³¹⁴ The IRS, not the individual holding entities, determines whether donation of conservation easements qualifies for a tax deduction.³¹⁵

Holding entities may acquire conservation easements only if they intend to hold the easements exclusively for conservation purposes.³¹⁶ All qualifying entities must have sufficient resources to enforce restrictions specified in the conservation easements.³¹⁷ If a holding entity disposes of an easement within two years of the easement's receipt, the entity must provide the IRS with documentation of the disposal.³¹⁸ The terms of the conservation easement must restrict subsequent transfers to qualified holding entities.³¹⁹

309. *Id.*, example (2).

310. *Id.* § 1.170A-14(d)(3)(ii).

311. *Id.* § 1.170A-14(d)(3)(iii).

312. *Id.* § 1.170A-14(c).

313. *Id.*; see I.R.C. § 170(c)(1) (1989).

314. Treas. Reg. § 1.170A-14(c)(iv) (1989).

315. The IRS retained the authority to approve the donation of conservation easements despite a move to persuade it to delegate the approval authority to holding organizations. See *Conservation Organizations May Not Approve Easement Contributions Under Final IRS Rules*, 16 *Env't Rep. (BNA)* 1798, 1798 (Jan. 24, 1986).

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

317. *Id.* § 1.170A-14(c)(1).

318. I.R.C. § 6050L(a) (1989).

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

Over five hundred conservation organizations and governmental entities hold conservation easements. This number includes federal, state, and local agencies, towns, land trusts, and nature conservancies.³²⁰ Donation of an easement to a private entity has the advantage of making the interest less susceptible to future political pressures.³²¹

Holding entities differ according to the type of conservation easements they hold. Entities holding conservation easements in historic buildings are usually located in urban areas, whereas entities holding conservation easements in natural areas are usually located in rural areas. In addition, the different expertise required to evaluate the properties and to monitor observance of the preservation or conservation programs specified in the easements creates a distinction among the holding entities.³²²

The types of conservation easements also vary. Conservation easements range from scenic easements over land adjacent to an historic building to preserve the view of the historic building to facade easements designed to protect the exteriors of historic buildings from alteration.³²³ Conservation easements of the latter type are generally referred to as historic preservation easements.

The popularity of conservation easements has developed slowly. The IRS first permitted charitable deductions for conservation easements in 1964.³²⁴ The easements did not become popular until the mid-1980s, however, due partially to the restrictive attitude of the IRS.³²⁵ For example, in 1984 the IRS denied deductions for all conservation easement donors in its Mid-Atlantic Region and audited the returns of many donors.³²⁶ Not until 1986 did the Treasury Department issue final regula-

320. *Government Agencies and Non-Profit Organizations Holding Land Conservation Easements*, 4 LAND TRUSTS' EXCHANGE 26, 26-29 (1985).

321. See Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROBS. 416, 417 (1971); Fenner, *supra* note 2, at 1040.

322. *What is a Conservation Easement?*, 4 LAND TRUSTS' EXCHANGE 4 (1985).

323. Katz, *Conserving the Nation's Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 369, 375 & n.25, 376 (1986).

324. Rev. Rul. 64-205, 1964-2 C.B. 62. For a discussion of the history of conservation easements, see R. DUNFORD, *supra* note 297, at 7-20; Comment, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. J. ENVTL. AFFAIRS 105, 125-37 (1983).

325. Congress was also hesitant about permitting the use of charitable deductions for conservation easements because of feared abuses of the deduction. See S. REP. NO. 552, 91st Cong., 1st Sess. 83, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 2027, 2113. See generally Willbanks, *Qualified Conservation Contributions: Analysis of Proposed Regulations*, 3 VA. TAX REV. 323, 326 (1984).

326. Roddewig, *Preservation Easement Law: An Overview of Recent Developments*, 18 URB. LAW. 229, 230-33 (1986).

tions to offer donors detailed instructions on the type of conservation easements that would be approved for a charitable deduction.³²⁷

One of the main concerns of the IRS was the potential for abuse that existed in the deductions. The concern was twofold: the IRS did not want to permit a charitable deduction when the taxpayer's action in obtaining the deduction did not affect the taxpayer's enjoyment of the property;³²⁸ second, the IRS suspected that some charitable deductions for conservation easements were fictional.³²⁹

Despite this concern of the IRS, the conservation easement mechanism does permit charitable deductions when the taxpayer's enjoyment of property is not likely to be affected. For example, local law frequently restricts alteration of buildings located in historic districts. A taxpayer who owns such a building, therefore, may donate a conservation easement in a building's facade when he was not even permitted by local law to alter the facade.³³⁰ On the other hand, taxpayers owning historic buildings may be motivated to list the buildings on the National Register in order to facilitate receiving a charitable deduction for a conservation easement. Because buildings listed on the National Register are less susceptible to loss, the incentive offered by the charitable deduction protects property that may not otherwise have been protected.³³¹ The Tax Court has stated that even if a landowner does not intend to develop property on which he has donated a conservation easement, he is still entitled to a charitable deduction for the value by which the easement reduces the fair market value of the land.³³²

Evaluation of that reduction in value has resulted in substantial variations between individual taxpayers' figures and figures calculated by the IRS. In one case, a difference of \$772,000 existed between the taxpayer's appraisal, the IRS appraisal, and the Tax Court's figure for a conserva-

327. Treas. Reg. §§ 1.167(a)-5, 1.170A-7, 1.170A-14, 20.2055-2, 25.2522(c)-3 (1989); see 51 Fed. Reg. 1496, 1496-1507 (1986).

328. See *Hearings on H.R. 7318 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 151, 156 (1980) (statement of Daniel Halperin, Deputy Assistant Secretary of the Treasury) (cited in Comment, *supra* note 324, at 140).

329. Roddewig, *supra* note 326, at 231.

330. See Willbanks, *supra* note 325, at 340. The Treasury regulations would reduce the value of the conservation easement. Treas. Reg. § 1.170A-14(h)(3)(ii) (1989); see also *Hilborn v. Commissioner*, 85 T.C. 677, 698-99 (1985) (evaluating difference in value between government regulations on property and additional restrictions contained in the conservation easement).

331. Boasberg, *Appendix to the Tax Treatment of the Donation of Easements in Scenic and Historic Property*, 9 *Envtl. L. Rep. (Envtl. L. Inst.)* 50,015 (1979).

332. *Akers v. Commissioner*, 48 T.C.M. (CCH) 1113, 1120 (1984).

tion easement limiting part of the property's subdivision density.³³³ In another case, the taxpayer's and IRS appraisal of a facade easement for two three-story buildings in the Vieux Carrie historic district of New Orleans differed by \$69,500.³³⁴ This wide variation may be a symptom of the novelty of the conservation easement marketplace. As the market in easements develops and a fair market value can be determined more easily, the valuation problem should diminish.³³⁵

Perhaps the greatest long-term problem with conservation easements is their enforcement. Because conservation easements are created pursuant to state law, many differences in their form and enforceability exist.³³⁶ Conservation easements containing affirmative provisions may be especially difficult to enforce by subsequent owners of the easement or of the property.³³⁷ To date, violations have not been a serious problem.³³⁸

V. RECOMMENDATIONS

Congress has endorsed the desirability of conserving the United States cultural and natural heritage³³⁹ but has been slow to structure the federal tax laws to encourage private ownership of national heritage assets. For example, the requirement in United States tax law that property in an estate be evaluated at fair market value or at its highest and best use often compels the sale of large historic estates to developers.³⁴⁰ Likewise, the necessity of raising cash to satisfy estate tax liability may compel the sale of historic property.³⁴¹ The creation of a tax system to encourage the preservation of the United States cultural and natural heritage is overdue.

The preferential tax treatment for owners of national heritage assets could be narrowly drawn to achieve its purposes while limiting its potential for abuse. A review of the British system shows that a similar United States system could aid both the Treasury and the public. The British

333. *Id.* at 1118.

334. *Hilborn v. Commissioner*, 85 T.C. 677, 685 (1985).

335. *See generally* Kiefer, *supra* note 295, at 149-50.

336. *See* Comment, *supra* note 299, at 257-60.

337. *See* Comment, *Affirmative Obligations in Historic-Preservation Agreements*, 51 GEO. WASH. L. REV. 746, 749-50 (1983).

338. *Reliability of the Grantees as Easement Managers*, 4 LAND TRUSTS' EXCHANGE 13, 14 (Dec. 1985).

339. *See, e.g.*, National Historic Preservation Act, 16 U.S.C. §§ 470-470w (1988).

340. ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL TAX LAW AND HISTORIC PRESERVATION: A REPORT TO THE PRESIDENT AND THE CONGRESS 13 (1983) [hereinafter REPORT].

341. *See* REPORT, *supra* note 340, at 13.

system saves the Exchequer money by encouraging taxpayers to maintain historic buildings and nationally significant land rather than encouraging the central government to acquire and perpetually maintain the buildings or land. The British public has, perhaps, benefitted the most from the British system. Public access is available to an increasing number of historic buildings, works of art, and other property of national significance; more historic property is maintained rather than left to fall into disrepair and decay; and works of art and other chattels that may have been exported remain in situ or in British art galleries and museums.

The following hypotheticals illustrate the advantages of adopting a modified version of the British national heritage capital tax system in the United States.

A. *Hypothetical A*

A taxpayer owns a certified historic house as a private residence. Much of the antique furniture and other contents of the house complement the house's interior, having been acquired by the taxpayer because they recall the historic era reflected by the house's design. The house is surrounded by parkland that protects views to and from the house. The taxpayer also owns farmland that produces income used to help maintain the house and the surrounding parkland.

1. The Certified Historic House

Current United States tax law offers the taxpayer two methods by which to gain preferential tax treatment for owning a certified historic house. First, the taxpayer may donate an historic preservation easement on the house's facade or interior to a holding organization. Typical historic preservation easements prevent alteration of the house's structure. The donation would result in the taxpayer's gaining a charitable deduction. Second, the taxpayer may qualify for a rehabilitation tax credit by converting the house into commercial property such as apartments or offices.

If the taxpayer does not donate an historic preservation easement and continues to use the house as a private residence, the taxpayer does not qualify for preferential tax treatment even though maintenance of the house preserves a national heritage asset for the benefit of the public as well as for the taxpayer.³⁴² A preferable approach would be to encourage

342. Although this hypothetical involves a certified historic house, the preferential tax treatment should also be available for certain other historically or architecturally

taxpayers to maintain national heritage assets and permit limited public access in exchange for preferential tax treatment. This system would recognize the value to the public of the taxpayer's maintenance of the national heritage asset. If Congress were conditionally to exempt the donation or bequest of national heritage assets from gift or estate tax liability, taxpayers would be encouraged to own historic houses such as the house in this hypothetical.

A conditional exemption provision would not be entirely new to United States tax law. For example, the special use valuation provision permits family farms and small businesses to be valued at their existing use rather than at their highest and best use as is customary for estate tax purposes.³⁴³ Persons interested in the property must enter into an agreement with the IRS that restricts the use of the property.³⁴⁴ If the agreement is breached, the conditionally exempted estate tax is subject to recapture.³⁴⁵

If the IRS directly entered into conditional exemption agreements with taxpayers, it would retain control over the taxpayers' compliance with the provisions of the agreements. In order to ensure that national heritage assets would continue to be enjoyed by the public and maintained by the taxpayers, conditional exemption agreements should provide for limited public access, maintenance of the property, and an agreement that the property be donated, bequeathed, or sold only to a person who would renew the agreement with the IRS. The public access provisions outlined by the IRS in the conservation easement regulations³⁴⁶ provide a basis for public access standards for conditional exemption agreements.

In order to provide uniformity, standard provisions in conditional exemption agreements should follow specified IRS standards. In addition, conditional exemption agreements should contain site-specific provisions. Because of the possibly confidential nature of site-specific provisions, individual agreements with national heritage asset owners should remain

significant buildings. Congress could delegate criteria for determining eligibility to an agency with expertise in this area.

343. See I.R.C. § 2032A (1989). See generally T. COUGHLIN, FEDERAL TAXATION AND THE PRESERVATION OF AMERICA'S HERITAGE xxiii, II-5 (Apr. 1983) (describing potential applicability of special valuation provision to historic property in an estate). When Congress enacted the special valuation provision, a provision in the House bill that would have included properties on the National Register was deleted. See *id.* at II-5.

344. I.R.C. § 2032A(d) (1989).

345. *Id.* § 2032A(c).

346. See Treas. Reg. §1.170A-14(d)(4)(ii) (1986) (relating to "scenic enjoyment" by the public).

confidential.

Recapture would take place when a taxpayer materially breached the conditional exemption agreement or sold, donated, or bequeathed the property to a person who did not enter into an agreement with the IRS. As in the British system, the amount of tax due on recapture would be the tax liability incurred by the event triggering the recapture. The tax rate applicable to the recapture would be the tax rate in effect when the current agreement with the IRS was signed. Because a major purpose of the conditional exemption provision would be to permit public enjoyment of privately owned historic property while allowing owners of such property preferential tax treatment for maintenance of the property in a non-income-producing context, the deduction for the transfer of capital should be limited to capital tax liability, not income tax liability.

The adoption of the modified conditional exemption system would aid taxpayers, the IRS, and the public. Taxpayers, such as the taxpayer in this hypothetical, would be conditionally exempt from estate and gift tax for property enjoyed by the public as well as themselves. The IRS would have the power to recapture conditionally exempt taxes if the taxpayer materially breached an agreement providing for the property's maintenance and limited access by the public. The IRS would thus have more control over the preservation of national heritage assets than it has over national heritage assets covered by conservation easements. The public would gain because as more taxpayers entered into conditional exemption agreements, more historic property would be preserved with public access to it assured.

2. The Historic House's Contents

Chattels characterized as contents of an historic house for conditional exemption purposes could include furniture purchased especially for the house during its history or acquired because of its authenticity, works of art commissioned for permanent display in the house, and objects closely associated with the house or its history. For example, the owner of an historic house may have gradually accumulated furniture of the house's historic period or purchased furniture that was designed for the house but was subsequently sold to various purchasers.

By including the contents of the house in a conditional exemption agreement, the IRS would encourage owners of historic houses to acquire period furnishings for their houses. The public would gain by being able to view the interior of the house as it existed during the house's history.

3. The Surrounding Land

If land surrounding an historic house is essential to the house, that is, if the land protects the house's historic or architectural character or views from or to the house, the land should be included in a conditional exemption granted to the house. As in the British system, the land's owner and the IRS should enter into conditions pertaining to public access and maintenance of the surrounding land.

4. The Farmland

Farmland would probably not be conditionally exempt unless it was essential to protect the character of an historic house or a view to or from the house. However, the farmland could produce income used to maintain the historic house. Farmland used exclusively for maintenance purposes could be placed in a maintenance fund that was exempt from income tax. To qualify for this exemption, the taxpayer would have to enter into an appropriate undertaking with the IRS. The British system provides a model for such agreements.

B. *Hypothetical B*

A taxpayer owns outstanding scenic land adjacent to a national park.³⁴⁷

Under current United States tax law, the taxpayer may donate a conservation easement in the land to a holding organization. In exchange, the IRS grants the taxpayer a deduction against income, estate, or gift tax liability. Alternatively, the taxpayer may donate the land to a charitable organization in exchange for a deduction of the fair market value of the land against income, estate, or gift tax liability. Finally, the taxpayer may either sell the land, thereby incurring capital gains tax liability, or donate or bequeath the land, thus incurring gift or estate tax liability.

Similar to the first hypothetical, adoption of the conditional exemption system would permit a taxpayer to enjoy conditional exemption of capi-

347. Although this hypothetical involves outstanding scenic land adjacent to a national park, the preferential tax treatment described should be available to land determined to be of national significance for its scenic, scientific, historic, or archaeological qualities. As is presently the case with regard to historic property, the IRS could allow other government agencies to make, or to aid in making, the determination of national significance.

One source for qualifying sites could be the National Registry of National Landmarks. The National Park Service designates sites for the Registry if the sites meet specified criteria. See 36 C.F.R. §§ 62.1-62.9 (1989).

tal tax liability for the land if the taxpayer permitted limited public access to the land (unless the taxpayer reached an agreement to the contrary with the IRS because the land was scientifically outstanding), maintained the land, and agreed to transfer the land only to someone who would renew the conditional exemption agreement with the IRS. The IRS would have more control over the landowner's adherence to the conditions of the agreement than it does over whether the perpetual nature of a conservation easement is enforced by holding organizations and adhered to by subsequent landowners. The public would gain access to land surrounding the national park, thus relieving tourist pressure on the national park.

The following methods of providing preferential tax treatment for owners of national heritage assets are less advantageous for the Treasury in some instances because they may involve the acquisition and maintenance of the assets by governmental entities. The methods are valuable, however, because they aid in preserving national heritage assets when the assets might otherwise be jeopardized or acquired under circumstances that would deny the public access to them.

If the landowner decided to sell the land and found a willing buyer in the National Park Service or a charitable organization recognized by the IRS, statutory adoption of the British *douceur* arrangement would encourage the taxpayer to sell the land to these entities by private treaty sale. The *douceur* would aid charitable organizations in acquiring property for preservation by offering the landowner a higher net price than possible by private sale to an entity other than a charitable organization, or by public sale.

Finally, if the land met an especially high standard of national significance (to be determined by the IRS with the advice of an agency with expertise, or by the expert agency) the land could qualify for a United States equivalent of the British acceptance in lieu system. That is, the taxpayer could transfer ownership of the land to a governmental entity or charitable organization in lieu of estate or gift tax liability if the IRS or an expert agency determined that the land was of particular national significance either because of its scenic, scientific, historic, or archaeological characteristics.

C. *Hypothetical C*

A taxpayer owns a nationally significant work of art by a United States artist.³⁴⁸

348. Although the hypothetical involves a work of art by an American artist, the

To continue to own the work of art while concurrently obtaining preferential tax treatment under present United States tax law, the taxpayer has one option. The taxpayer may donate a percentage of rights in the work of art to a charitable organization in exchange for a one-time deduction against income, estate, or gift tax liability. Adoption of the conditional exemption and its concomitant conditions of maintenance and public access would encourage private owners to permit public access to their nationally significant works of art and other chattels. As in conditional exemption agreements for historic houses and outstanding land, taxpayers would enter into the agreements directly with the IRS. The agreements could have standard as well as specific provisions.

Public access could be provided by permitting access to the work of art at its traditional location on specified days. This arrangement would be feasible for taxpayers who owned conditionally exempt historic houses, and thus permitted access to the houses' interiors on specified days. In cases in which a work of art was ordinarily in a location without public access, the work of art could be displayed periodically at a museum or art gallery for a specified time agreed to by the taxpayer, the IRS, and the museum or art gallery.

In addition to encouraging the ownership of nationally significant works of art, adoption of the conditional exemption provision would encourage retention of the works of art in the United States. Although the export of nationally significant works of art and other chattels from the United States is not a major problem at this time, it may become a problem in the not-too-distant future.

If the taxpayer needed to raise cash, statutory adoption of a United States equivalent of the *douceur* would encourage the taxpayer to sell the work of art by private treaty sale to a governmental entity or charitable organization in exchange for a higher net price than the taxpayer would receive by selling it to an entity other than a charitable organization or in the open market.

If the taxpayer owned a work of art recognized as meeting the standards for acceptance in lieu property and needed to satisfy estate or gift tax liability already incurred, the taxpayer could transfer the work of art

preferential tax treatment described should also be available to the owner of any chattel that is of national significance. Criteria for determining national significance should include regional significance. For example, a painting's significance should not be judged solely by whether it is comparable to paintings in a national art gallery such as the Chicago Art Institute. Chattels to be included under this category should not be limited to works of art but should include scientific objects, books, and other chattels that are significant to the history and culture of the United States.

to a governmental entity or charitable organization in lieu of the tax liability. At the charitable organization's discretion, the work of art could remain in situ so long as its maintenance and security were ensured and the taxpayer guaranteed limited public access to it.

Although the in situ provision obviously benefits the taxpayer, the provision also benefits the public. First, it decentralizes the accumulation of works of art and other nationally significant chattels otherwise gathered in the art galleries and museums of the large cities, thus encouraging tourism in other areas. Second, it ensures that nationally significant chattels associated with an historic house or a certain location continue to enhance that location.

VI. CONCLUSION

The traditional federal approach to preserving the United States cultural and natural heritage has been either to acquire and preserve a heritage asset, or to encourage states and local governments to preserve national, state, and local heritage assets. Both approaches have been successful. The federal acquisition program has preserved many natural and historic areas. For example, the national park system maintains large expanses of nationally significant property.³⁴⁹ In addition, Congress has established a framework by which the states aid in preserving historic properties.³⁵⁰

In recent years, however, the federal acquisition of culturally and naturally significant property has slowed. When the federal government acquires property for preservation, it also assumes perpetual maintenance costs. Indeed, Congress recognized the burden of these costs in 1980 when it permitted federal agencies to lease historic properties that the agencies could not afford to restore or maintain.³⁵¹ Accompanying the

349. 16 U.S.C. §§ 21-410qq-4 (1989) (establishment of national parks); see also *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 682-84 (1896) (upholding United States Government's eminent domain power in acquiring the Gettysburg battlefield).

350. See National Historic Preservation Act, 16 U.S.C. § 470a(b), (c) (1989); Land and Water Conservation Fund Act, 16 U.S.C. § 460l-8(a) (1982). For good descriptions of the National Historic Preservation Act, see Bell, *Protecting the Built Environment: An Overview of Federal Historic Preservation Law*, 15 *Envtl. L. Rep.* (Envtl. L. Inst. 1985) 10,354, 10,354-64; Rose, *Historic Preservation Law: A New Hybrid Statute With New Legal Problems*, 15 *REAL. EST. L.J.* 195, 202-05 (1987). For a good description of the Land and Water Conservation Fund Act, see Glicksman & Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 *COLUM. J. ENVTL. L.* 125, 138-62 (1984).

351. 16 U.S.C. § 470h-3 (1989). See generally *National Park Service Begins Leasing Historic Properties*, 4 *Preservation L. Rep.* 1029 (1985).

reduction in the federal acquisition program has been a significant decline in federal funding to state governments for historic preservation.³⁵² Thus, federal tax provisions to encourage the preservation of national heritage assets have become especially critical to a successful national effort to preserve the United States cultural and natural heritage.

The major federal tax tools for encouraging the preservation of national heritage assets are charitable deductions, donation of conservation easements, and rehabilitation tax credits. As discussed in part IV, these tools effectively preserve some national heritage assets. The tax tools are limited, however, because they are not part of a purposeful plan to encourage the preservation of national heritage assets. Indeed, the tools may sometimes achieve undesirable results. For example, the rehabilitation tax credit may encourage a taxpayer to adapt historic residential property to a commercial use for which it is ill-suited.

The hypotheticals discussed in part V show that adoption by Congress of modified versions of the British national heritage capital tax system would greatly expand the options available to taxpayers in the United States. Provisions for conditional exemption, the *douceur*, and acceptance in lieu should be added to the Code. The addition of these provisions would serve taxpayers, the public, and the Treasury. National heritage asset owners would not incur estate or gift tax liability on national heritage assets as long as they entered into agreements with the IRS to maintain the assets and to permit public access to them. They would thus have more funds to aid in maintaining the assets. The public would have the opportunity, not only to know that national heritage assets were being maintained for future generations of United States citizens, but also to visit and view the assets. The IRS would forgo some revenues to the Treasury, but the Treasury would ultimately gain because private citizens, rather than the federal government, would pay the perpetual maintenance costs of the national heritage assets.

Congress has declared that preservation of "important historic, cultural, and natural aspects of our national heritage" is a national policy.³⁵³ To aid in implementing this declared policy, Congress should adopt a modified version of the British national heritage capital tax system.

352. See Rose, *supra* note 350, at 207.

353. National Environmental Policy Act, 42 U.S.C. § 4331 (b)(4) (1988).

