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## Land Trusts: An Alternative Method of Preserving Open Space

*Randee Gorin Fenner\**

### I. INTRODUCTION

In recent years, land has become a focal point of an increasing national awareness of the need to conserve natural resources. The concept of land as a commodity to be exploited by private interests for personal advantage is gradually being replaced by a perception of land as a societal resource to be preserved for the benefit of all.<sup>1</sup> This philosophical shift has its roots both in the recognition of the fundamental importance of land in all human activity<sup>2</sup> and in the

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1. See generally C. LITTLE & R. BURNAP, *STEWARDSHIP* (1965); Caldwell, *Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy*, 15 *WM. & MARY L. REV.* 759 (1974); Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 *WIS. L. REV.* 1039 (1973); Madden, *Land as a National Resource*, in *THE GOOD EARTH OF AMERICA* 6 (1974).

2. This characteristic of land is described by J. Kuperberg, past President of the Trust for Public Land (TPL), a San Francisco based organization that continues to play an active role in the preservation of open space:

Land has been described as being the basis of community awareness. Land, and its treasures of soil, stored water and minerals, is [sic] the sovereign of mankind, and of other living things. Land is the common denominator in the mathematics of civilization; it is the basis of human wealth and one source of the tax monies which support government. All man made systems—cities, farms, and factories—depend on land. All of the complex interrelations between people, corporations, and government are related to land and the use of land.

The Trust for Public Land, Annual Report (1978) (copy on file with *Vanderbilt Law*

pragmatic realization that the supply of land is finite.<sup>3</sup>

Until recently, efforts to conserve land have concentrated on governmental regulation, often with unsatisfactory results. Zoning has been plagued by numerous administrative difficulties,<sup>4</sup> one of the most pernicious of which is the ready granting of variances when the political pressure to develop increases.<sup>5</sup> Moreover, when land is zoned for open space, the zoning regulations are subject to attack on multiple constitutional grounds including alleged violations of due process, equal protection, and the "taking" clause of the fifth amendment.<sup>6</sup>

Property tax incentive schemes, such as taxing certain open

*Review*).

For a slightly more technical accounting of the many uses of land, see K. DAVIS, *LAND USE* 21-33 (1976).

3. Within the rather narrow range of natural land accretion and land loss that geologically occurs over time, there is just so much land. Land is not reproducible . . .

The fact that the amount of land and land-based resources is essentially finite whereas the number and needs of people are not gives increasing importance to questions of who controls the land and how it is used.

K. DAVIS, *supra* note 2, at 12.

4. Among the deficiencies of zoning cited by R. BABCOCK, *THE ZONING GAME* (1966) are the lack of a centralized system of administration, *id.* at 12-13, and the absence of formal standards of procedure for administrative proceedings. *Id.* at 105-06, 135. Babcock sums up the situation as follows:

The running, ugly sore of zoning is the total failure of this system of law to develop a code of administrative ethics. Stripped of all planning jargon, zoning administration is exposed as a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused *ad hoc* injunctions of bewildered courts.

*Id.* at 154. See also Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 *ENV'TL AFF.* 419, 421-22 (1976).

5. See W. WHYTE, *SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS* 23-24 (URBAN LAND INSTITUTE TECH. BULL. No. 36 (1959)).

6. A property owner with land zoned for open space "conservancy" for wildlife protection might argue that the regulations violate due process and equal protection guarantees since similar areas are not regulated or because similar areas are purchased rather than regulated, . . . that the regulations violate due process guarantees because the allocation of private land to wildlife use for public benefit is an invalid regulatory objective, . . . that the regulations violate due process guarantees because the regulations are unreasonable in failing to promote the regulatory objective since the land cannot naturally sustain wildlife . . . and that the regulations so severely restrict the use of the property that they constitute a taking.

Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 *MINN. L. REV.* 1, 13 (1972) (footnotes omitted).

Although recent decisions have upheld open space zoning in the face of constitutional challenges, see, e.g., *Just v. Marinette County*, 56 *Wis. 2d* 7, 201 *N.W.2d* 761 (1972), the legal obstacles remain and are by no means academic in many jurisdictions. See, e.g., *Fred F. French Inv. Co. v. City of New York*, 39 *N.Y.2d* 587, 350 *N.E.2d* 381 (1976).

space land at a reduced rate,<sup>7</sup> have also faced several problems. Among these problems are (1) no guarantee of initial or continued participation exists because taxation is a consensual system of regulation;<sup>8</sup> (2) speculators may be encouraged to purchase preferentially assessed property and hold it off the market (while paying minimal taxes) until the time for development is ripe;<sup>9</sup> (3) local government tax revenues may be reduced;<sup>10</sup> (4) surrounding landowners' taxes may be increased;<sup>11</sup> and (5) urban sprawl may occur as a result of leapfrog development.<sup>12</sup>

The use of eminent domain has also encountered obstacles. Because "just compensation" is required before the government can condemn private property,<sup>13</sup> eminent domain is a costly process.<sup>14</sup> A dearth of financial resources, however, is not necessarily the primary problem.<sup>15</sup> More serious are the time delays involved in securing funding. The lack of ready funds may make it difficult to exploit unforeseen opportunities such as a "bust" in land prices or even natural disasters.<sup>16</sup> More importantly, these delays may re-

7. These programs are generally associated with agricultural land. See, e.g., FLA. STAT. ANN. § 193.461 (West 1971) as amended (Supp. 1979); OR. REV. STAT. §§ 308.345-403 (1977).

8. See Schroeder, *Preservation and Control of Open Space in Metropolitan Areas*, 5 IND. LEGAL F. 345, 359 (1972); Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622, 1642 (1962). While it is true that penalties are generally imposed when preferentially assessed property is sold into development, these penalties are "seldom more than a fraction of the profits realized on the sale for development." Roe, *supra* note 4, at 424.

9. See W. WHYTE, *THE LAST LANDSCAPE* 124-26 (Anchor Books ed. 1970). According to Whyte, so brazen are some speculators that after having platted and advertised property for subdivision, they demand preferential assessment until construction actually begins.

10. Henke, *Preferential Property Tax Treatment for Farmland*, 53 OR. L. REV. 117, 124-26 (1974); Roe, *supra* note 4, at 425.

11. Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559, 590 (1964); Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 292-93 (1966); Roe, *supra* note 4, at 425.

12. W. WHYTE, *supra* note 9, at 131-32; Roe, *supra* note 4, at 425.

13. U.S. CONST. amend. V.

14. Moore, *supra* note 11, at 279-80; Schroeder, *supra* note 8, at 355.

15. W. WHYTE, *supra* note 9, at 62-64; Eveleth, *supra* note 11, at 564; Moore, *supra* note 11, at 280-81.

16. W. WHYTE, *supra* note 9, at 69-70.

Hurricanes, for example. These ill winds occasionally do blow some good, for in ravaging coast lines, they often clear many stretches of beachfront that had been sealed to public access by low-grade shanty-type development. If officials could move in quickly, they could compensate the owners right away and secure the land at moderate cost. But they do not have any money for this. The legislature might well be disposed to give it to them, but the legislature probably will not be in session. By the time it does meet again, which could be two years off, real-estate people will already have snapped up the shorefront lots and put up a new strip of buildings.

*Id.* at 69.

sult in the appreciation of the target property's value to a figure that exceeds the amount budgeted for purchase.<sup>17</sup>

Given the numerous drawbacks and deficiencies of current governmental methods of land use control, it is evident that a need exists for an auxiliary, if not an alternative, device to conserve land for the public benefit. The purpose of this Article is to introduce the land trust as one nongovernmental mechanism for use in the specific area of open space preservation.<sup>18</sup>

A land trust is a private, charitable organization that acquires and holds interests in land for the purpose of conserving the land in perpetuity.<sup>19</sup> This concept is not new; at least one land trust has been operating in New England since the nineteenth century.<sup>20</sup> The interplay between federal and state tax laws, however, has given the land trust new vitality by allowing the acquisition of property that the land trust might otherwise be unable to purchase. On the one hand, the Internal Revenue Code allows a charitable deduction on the income tax return of a landowner who donates property to a charitable organization.<sup>21</sup> This deduction may mean that a gift to a land trust is the most advantageous disposition that the taxpayer can make of his property,<sup>22</sup> or it may greatly reduce the cost of a generous act that the landowner might otherwise be unable to afford. On the other hand, state property

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17. *Id.* at 65-69.

Back in 1952, to cite one example, the Forest Service was offered a piece of property for \$12,000. It wanted the property and the price was fair. It did not, however, have any appropriation for the purchase. Helplessly, it watched the property change hands over a period of ten years, gathering improvements with each successive owner. In 1962, the Forest Service finally obtained funds. It bought the property for \$198,000.

*Id.* at 69.

18. For purposes of this Article, "open space" is defined simply as undeveloped land. The value of open space is well recognized and may be summarized as follows: (1) ecological and environmental value, (2) recreational value, (3) amenity value, and (4) economic value. See generally C. LITTLE, CHALLENGE OF THE LAND 9-15, 79-92 (1968); J. SHOMON, OPEN LAND FOR URBAN AMERICA 21-40 (1971); Moore, *supra* note 11, at 276-79.

19. This definition of "land trust" is a composite taken from the literature prepared by many such organizations. Many land trusts (such as The Nature Conservancy) serve the additional function of acquiring property for eventual transfer to a governmental agency.

Land trusts may also be known as "conservancies" or "land conservation trusts." The "community land trust" is, however, a different breed of organization and is therefore not considered in this Article. For an explication of the community land trust, see R. SWANN & E. HANSCH, COMMUNITY LAND TRUST MANUAL (1972).

20. The Trustees of Reservations was "founded for conservation purposes in 1891 to preserve for the public, places of natural beauty and historic interest within the Commonwealth of Massachusetts." Annual Report (1977) (copy on file with *Vanderbilt Law Review*).

21. See text accompanying notes 195-352 *infra*.

22. See, e.g., Chigger Swamp discussion in text accompanying notes 24-30 *infra*.

tax exemptions provide that certain charitable organizations may own land without bearing the burden of property taxes.<sup>23</sup>

The effect of this interplay is that a group of citizens, even if short on financial resources, can arm itself with a knowledge of the tax laws, form a charitable organization, persuade an owner of environmentally significant land that it may be in his interest to donate the land to their organization rather than to sell it for development, and thereafter preserve the land for future generations at little cost. The following examples illustrate the land trust's considerable potential.

#### A. *The Nature Conservancy*

The Nature Conservancy (TNC) was incorporated in 1951 and is a national conservation organization "committed to preserving natural diversity by protecting lands containing the best examples of all components of our natural world."<sup>24</sup> To this end, TNC has successfully preserved over 1.5 million acres of land in forty-nine states, the Virgin Islands, Canada, and the Caribbean.<sup>25</sup>

One such preservation effort involved nearly 100,000 acres of swampland valued at ten million dollars in Louisiana's Chigger Swamp.<sup>26</sup> Chigger Swamp not only is the site of the famous battle of New Orleans fought by Andrew Jackson, but it also serves "as a huge sponge for much of the water runoff from the mid-America States."<sup>27</sup> For this reason, environmentalists were concerned when the owner, Timber, Inc., began an experimental process of converting the swampland to farmland—a process that involved clear-cutting, dyking, draining, and liming the property. Environmentalists feared that because of the critical function served by Chigger Swamp, the water quality of a large part of the Gulf section of the United States would be adversely affected by these agricultural operations.<sup>28</sup>

As environmental groups began to oppose the conversion of the swamp, Timber, Inc. approached TNC about the possibility of

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23. See text accompanying notes 184-93 *infra*.

24. The Nature Conservancy (TNC), Annual Report 1 (1976) (copy on file with *Vanderbilt Law Review*).

25. The Nature Conservancy (TNC), *More Than a Wish* (copy on file with *Vanderbilt Law Review*).

26. U.S. DEP'T OF THE INTERIOR & BUREAU OF OUTDOOR RECREATION, *PROTECTING NATURE'S ESTATE* 51-52 (1975) [hereinafter cited as *PROTECTING NATURE'S ESTATE*].

27. *Id.* at 52.

28. *Id.* at 51-52.

donating the land. Timber, Inc. was willing to make such a donation only if it would prove more profitable than conversion. After presenting the alternatives, TNC was able to persuade Timber, Inc. that the numerous risks of converting the swamp into agricultural land,<sup>29</sup> combined with the tax advantages of donation,<sup>30</sup> would make a gift to TNC considerably more remunerative than farming. This important swampland was thus safeguarded from development, satisfying not only the environmentalists but also the financial needs of its corporate owner.

### B. *The Brandywine Conservancy*

The Brandywine Conservancy is a two thousand-member organization formed in 1967<sup>31</sup> "to prevent the development of several poorly planned and environmentally objectionable commercial and industrial facilities in the flood plains and meadow marshlands of the scenic and historic Chadds Ford [Pennsylvania] area."<sup>32</sup> Rather than relying solely on governmental action, which was recognized to be slow and impermanent,<sup>33</sup> the members of the Conservancy have chosen to approach landowners directly for donations of conservation easements<sup>34</sup> to preserve the important environmental resources of the Brandywine Valley.<sup>35</sup> Specifically, the Conservancy has sought to protect flood plains, critical slopes, aquifers,

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29. TNC pointed out the following risks:

The State and Federal regulations that apply to the conversion of this type of property were still unclear and were presently being tested in the courts.

Financially, no one had yet been able to raise two crops in one year on the converted land, but it was generally felt that this could be done sometime in the future.

The technology for converting the land was far from perfected. The present machines used for dyking, digging and clearing the land were expensive, but not well suited to the job. A Japanese company was developing a new machine, but as yet, it had not gone into production.

The weather had already bankrupted two companies. One hurricane had literally washed away two operations.

Environmentalists were launching a major campaign to save the swamp, and the company was quite conscious of its public image since it was a retailer of many paper products.

*Id.*

30. See notes 183-354 *infra* and accompanying text.

31. The Brandywine Conservancy, the Brandywine Conservancy's Conservation Easement Program 1 [hereinafter cited as Brandywine CEP] (copy on file with *Vanderbilt Law Review*).

32. The Brandywine Conservancy's Environmental Management Center 1 [hereinafter cited as Brandywine EMC] (copy on file with *Vanderbilt Law Review*).

33. *Id.* at 2; Brandywine CEP, *supra* note 31, at 5.

34. See notes 154-82 *infra* and accompanying text.

35. Brandywine CEP, *supra* note 31, at 3.

aquifer recharge areas, and wood lots by acquiring the development rights to those portions of a landowner's property that are particularly sensitive.

According to the Conservancy, "[t]his strategy has been quite successful. Almost all of the critical floodplain land of the lower Brandywine was under easement by 1974 . . . ."<sup>36</sup> As a result, the quality and quantity of surface and ground water supplies have been greatly enhanced, thereby serving both the public and private interest in the efficient use of land and water resources.<sup>37</sup>

### C. *The Napa County Land Trust*

The Napa County Land Trust was founded in 1976 by a small group of concerned citizens who were seeking to forestall development and thereby preserve the scenic and ecological value of Napa County, California.<sup>38</sup> The Trust's first and only holding is Mount George Botanical Preserve, a two hundred-acre tract valued at \$100,000 that was donated to the Trust by its president.<sup>39</sup> Mount George is unique as the site of an unusual growth of brittleleaf manzanita and hollyleaf ceanothus, and is highly valued as a living laboratory for the study of these plant species.<sup>40</sup>

From the outset, the Trust's founders recognized that the key to the success of a small land trust is the charitable deduction, which the Trust will continue to present as an incentive for additional donations of property.<sup>41</sup> Meanwhile, the Mount George property will be maintained for serious study by professional and amateur botanists and valued by members of the nonscientific community as a continual reminder of the natural and rare beauty of Napa Valley.<sup>42</sup>

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36. Brandywine EMC, *supra* note 32, at 2.

37. Brandywine CEP, *supra* note 31, at 3.

38. St. Helena Star, Nov. 11, 1976 (copy on file with *Vanderbilt Law Review*).

39. Napa County Land Trust, Report to Members (Feb. 1978) (copy on file with *Vanderbilt Law Review*).

40. *Id.*

41. *See id.*; St. Helena Star, *supra* note 38.

42. The Chairman of the Napa County Board of Supervisors stated:  
Future generations of Napers will be grateful for the preservation of this unique parcel and its rare plant species.

I recently read descriptions of this beautiful valley and the impressions that it made on early settlers. . . . To think that in only 150 years the area has changed from a virtually untouched state to its present state of development, and then . . . [to realize that there are] pressures for even more drastic changes, makes me very appreciative of the efforts they [the donors and the Trust] have made for preservation.

Report, *supra* note 39.



The above examples demonstrate the land trust's utility as an open space preservation device. Until the legal and environmental communities become familiar with the land trust, however, its potential will remain largely unrealized. If the participants in the preservation efforts described above had faltered at the organizational stage, had been unfamiliar with the variety of interests in land that could be acquired, or had lacked an understanding of the tax consequences of a transfer, Chigger Swamp could today be growing crops, Brandywine Valley might be suffering from deteriorating water quality, and Mount George Botanical Preserve could instead be sporting new condominiums.

In an effort to provide the background necessary to maximize the land trust's potential, this Article undertakes a three-part analysis, focusing on (1) the steps necessary to organize the land trust; (2) the techniques that may be used to accomplish the transfer of property to the land trust; and (3) the tax consequences associated with the land trust's conservation activities—consequences that may dictate the form that the transfer will take and upon which the success or failure of the preservation effort may hinge.

## II. ORGANIZING THE LAND TRUST

### A. Charitable or Noncharitable?

As previously noted, land trusts are charitable entities.<sup>43</sup> Although no legal barrier exists to organizing a noncharitable land trust, there are significant advantages to the charitable classification. As will be discussed below, the primary value of being classified as a charity revolves around the tax treatment of the income and property of such entities and the tax advantages available to their donors.<sup>44</sup> Classification as a charitable organization may also be beneficial to a group that is attempting to avoid the imposition of the rule against perpetuities,<sup>45</sup> seeking a judicial modification of the terms of a disposition,<sup>46</sup> or endeavoring to raise the defense of tort immunity in those few jurisdictions that still recognize that

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43. See text accompanying note 19 *supra*.

44. Tax consequences are discussed in text accompanying notes 183-354 *infra*.

45. See text accompanying notes 91-94 *infra*.

46. The doctrine of *cy pres* is discussed in text accompanying notes 115-17 *infra*. Although *cy pres* is discussed in the context of a transfer in trust for charitable purposes, it may also be applicable to a transfer to a charitable corporation. See, e.g., *Smith v. Livermore*, 298 Mass. 223, 10 N.E.2d 117 (1937); *In re Craig's Estate*, 356 Pa. 564, 52 A.2d 650 (1947). See generally 4 A. SCOTT, THE LAW OF TRUSTS § 348.1 (3d ed. 1967).

doctrine.<sup>47</sup>

To qualify as a common-law charity, the land trust must meet four requirements: (1) benefits must be administered via a trust, corporation, or unincorporated association; (2) the organization must be nonprofit; (3) it must operate for the benefit of indefinite persons; and (4) it must be beneficial to the community (created for a charitable purpose).<sup>48</sup>

### B. Choosing the Form of the Land Trust

In choosing the form of the land trust—trust, corporation, or unincorporated association—it is necessary to examine briefly the legal characteristics of each entity to determine which is the preferable organization. At the outset one should note that the land trust need not be organized, as its name suggests, as a legal trust. Indeed, the choice of the term “trust” by many groups is seemingly based upon the common, rather than the common-law, definition.<sup>49</sup>

#### 1. The Unincorporated Association

One may quickly eliminate the unincorporated association as a possible form for the land trust because of its inability in many jurisdictions to take title to real property<sup>50</sup> or to make contracts in its own name.<sup>51</sup> Given the nature of the land trust’s operations, these disabilities would make it difficult, if not impossible, for the

47. See generally E. FISCH, D. FREED & E. SCHACHTER, CHARITIES AND CHARITABLE FOUNDATIONS §§ 622-625 (1974). Additional advantages peculiar to the charitable versus the private trust include potentially infinite duration, G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 351-352 (1977), and the avoidance of the rule against accumulations. *Id.* at § 352.

48. E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 1.

49. Trust is defined as “reliance on the character, ability, strength or truth of someone or something.” But trust, in the sense which we use, is diminished by distance between land and its potential trustees. In urban society, a chasm is opened between the two as they are separated from each other by the erosive forces of regulation, vandalism, and fence building. Individuals begin to despair of their influence—and they lose trust. We who care and are concerned must bridge the chasm, and close the distance between land and trust.

Annual Report, *supra* note 2. Although TPL is not itself a land trust, it has facilitated the organization of many such groups. That TPL’s definition of “trust” is the one commonly used by land trusts is borne out by the fact that many land trusts are organized as corporations.

50. See, e.g., *Arnold v. Methodist Episcopal Church*, 281 Ala. 297, 202 So. 2d 83 (1967); *West v. State*, 169 Miss. 302, 152 So. 888 (1934). See generally H. OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS § 19 (1956); Fisch, *Choosing the Charitable Entity*, 114 Tr. & Est. 874 (1975).

51. Fisch, *supra* note 50. See, e.g., *Lamm v. Stoen*, 226 Iowa 622, 284 N.W. 465 (1939).

land trust to carry on its activities successfully.

## 2. The Charitable Trust

The charitable trust, on the other hand, may provide a suitable form for the land trust. Before this option is examined, it must be understood that there are at least two separate but related contexts in which a trust may be used. The first, which is discussed in this section of the Article, is the use of the trust as the form of the entire land trust organization. For purposes of this Article, it will be assumed that this use is accomplished in the following manner: a landowner transfers his property to trustees or declares himself to be the trustee of his property for charitable purposes.<sup>52</sup> In the same instrument that serves to place the particular property in trust, the landowner also provides that an organization is to be formed with trustee(s) empowered to accept additional parcels of property for the same charitable purposes. The landowner thus specifies not only how the initially transferred property will be used but also how subsequently received parcels will be managed. Under this scheme, all property acquired by the land trust will be held in a trust governed by the provisions of the original trust instrument.<sup>53</sup>

The second context in which the trust may be used is in transferring a particular parcel of property to an existing land trust organized as a charitable corporation. In this situation, the landowner transfers his property to the corporation as trustee.<sup>54</sup> A charitable trust is thereby created with respect to the particular property conveyed, as in the first context, with the landowner specifying how his property will be managed within the parameters of the organization's articles. Unlike the first situation, no *other* property is affected by this transfer and the organizational form of the land trust remains intact as a corporation.<sup>55</sup> The use of the

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52. The property placed in trust need not be land. This example is used for the purpose of simplification.

53. The trust agreements of two such organizations may be found in R. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* 104-19 (1967). Another example is provided by The Berkshire County Land Trust and Conservation Fund (a copy of this group's Agreement and Declaration of Trust is on file with *Vanderbilt Law Review*).

54. See generally G. BOGERT, *supra* note 47, at § 328, on the ability of a corporation to serve as the trustee of a charitable trust.

55. A third use of the trust is if a transfer of property is made in trust to a land trust that has been organized as a trust. This alternative is a possibility if the landowner desires restrictions in addition to those in the land trust's governing instrument. In this event, trust law will apply to the transferred property; however, as with the transfer of property in trust

trust in this second context will be discussed in a later section of this Article dealing with the techniques that may be used to transfer property to the land trust.<sup>56</sup>

The choice of the trust as the form of the land trust is particularly appropriate if the land trust's creator desires the potentially numerous protections that this device may furnish. In the first place, it is the landowner who, as settlor/creator, dictates the terms of the trust. In doing so, he may substantially restrict the trustees' powers or enlarge the trustees' duties as he chooses.<sup>57</sup> If the settlor does not explicitly or implicitly declare his intentions on a particular matter, restrictive rules exist to fill the blanks.<sup>58</sup> Exemplary of the protections provided by the trust device, charitable trustees may be held by statute to a strict standard of investment,<sup>59</sup> may not delegate their managerial responsibilities,<sup>60</sup> may not commingle funds,<sup>61</sup> may not engage in self-dealing,<sup>62</sup> may not mortgage real property,<sup>63</sup> may not dispose of real property without judicial approval,<sup>64</sup> and are personally liable for the trust's debts and obligations.<sup>65</sup> In addition to providing these protections, the trust form may be a necessity in those jurisdictions that limit the ability of the charitable corporation to hold real property.<sup>66</sup>

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to a charitable corporation, the additional restrictions will not affect the remainder of the land trust's holdings.

56. See text accompanying notes 110-17 *infra*.

57. See 2 A. SCOTT, *supra* note 46, at § 164.

58. *Id.*

59. See, e.g., IOWA CODE ANN. § 682.23 (West Supp. 1979).

60. See, e.g., *City of Boston v. Curley*, 276 Mass. 549, 177 N.E. 557 (1931). See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 512; 2 A. SCOTT, *supra* note 46, at § 379; 4 A. SCOTT, *supra* note 46, at § 171.

61. See, e.g., *Moore v. McKenzie*, 112 Me. 356, 92 A. 296 (1914). See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 518; 2 A. SCOTT, *supra* note 46, at § 179.2.

62. See, e.g., *Attorney General v. Flynn*, 331 Mass. 413, 120 N.E.2d 296 (1954); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 524 (1951). See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 513; 2 A. SCOTT, *supra* note 46, at §§ 170-170.25.

63. See, e.g., *Emmerglick v. Vogel*, 131 N.J. Eq. 257, 24 A.2d 861 (1942); *Shannonhouse v. Wolfe*, 191 N.C. 769, 133 S.E. 93 (1926). See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 460.

64. See, e.g., *Congregational Church Union v. Attorney General*, 290 Mass. 1, 194 N.E. 820 (1935); *Harvard College v. Weld*, 159 Mass. 114, 34 N.E. 175 (1893). See generally 3 A. SCOTT, *supra* note 46, at § 190.4.

65. See, e.g., *Goldwater v. Oltman*, 210 Cal. 408, 292 P. 624 (1930).

The trustee may, however, be entitled to indemnification, see generally 3 A. SCOTT, *supra* note 46, at §§ 261-63, and the trustee may prevent personal liability by the inclusion in the contract of a clause that provides he will not be liable. See, e.g., *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N.E. 250 (1927).

66. See, e.g., MISS. CODE ANN. § 91-5-31 (1972) (land validly devised to a charitable,

### 3. The Charitable Corporation

Because of the numerous restrictions that can be imposed on charitable trustees, the charitable corporation may emerge, in comparison, as the more flexible administrative entity. The managers of the charitable corporation are generally held only to a "prudent person" standard and therefore have great leeway in making investments.<sup>67</sup> They may delegate responsibility to officers and form financial, executive, and other committees to accomplish managerial tasks.<sup>68</sup> They may commingle funds to engage in more efficient investment practices.<sup>69</sup> They may self-deal to varying degrees as provided by statute,<sup>70</sup> and they are not personally liable for the corporation's debts or obligations.<sup>71</sup> Despite this flexibility, the transferor of property to the charitable corporation is protected. The managers of the charitable corporation have a duty to use property in accordance with the specific restrictions imposed by the transferor<sup>72</sup> and in accordance with the relevant statutes and the charitable purposes authorized by the articles of incorporation.<sup>73</sup>

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religious, educational, or civil institution may be held for ten years and is subject to tax "unless exempt by some specific statute"); NEV. REV. STAT. ch. 86.160 (1973) (religious, charitable, literary, scientific, and other associations: one block in the city, ten acres in the country). See generally G. BOGERT, *supra* note 47, at § 327.

67. See, e.g., *Lynch v. John M. Redfield Foundation*, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86 (1970).

It is a matter of interpretation as to whether a restrictive statute that applies to charitable trustees, e.g., IOWA CODE ANN. § 682.23 (West Supp. 1979), is also applicable to the managers of a charitable corporation. See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 517; 4 A. SCOTT, *supra* note 46, at § 389. The Restatement of Trusts takes the position that such statutes do not apply unless the terms of the gift so provide. RESTATEMENT (SECOND) OF TRUSTS § 389, comment b (1959).

68. See, e.g., CAL. CORP. CODE § 5210 (West Supp. 1979); IOWA CODE ANN. § 504A.21 (West Supp. 1979); WASH. REV. CODE ANN. § 24.44.040 (Supp. 1979).

69. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 512 (McKinney Supp. 1979); PA. STAT. ANN. tit. 15, §§ 7581-85 (Purdon Supp. 1979-80). This is the position taken in RESTATEMENT (SECOND) OF TRUSTS § 389, comment c (1959). See generally 4 A. SCOTT, *supra* note 46, at § 389.

70. See, e.g., *Samuel and Jessie Kenney Presbyterian Home v. State*, 174 Wash. 19, 24 P.2d 403 (1933); N.Y. NOT-FOR-PROFIT CORP. LAW § 715 (McKinney 1970) *as amended* (Supp. 1979).

71. See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 636.

72. See, e.g., *Nickols v. Commissioners of Middlesex County*, 341 Mass. 13, 166 N.E.2d 911 (1960); *St. Joseph's Hosp. v. Bennett*, 281 N.Y. 115, 22 N.E.2d 305 (1939). See generally 4 A. SCOTT, *supra* note 46, at § 348.1.

73. See, e.g., *Lynch v. Spilman*, 67 Cal. 2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) (*dicta*). See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 519.

Another factor that may make the charitable corporation the preferable form for the land trust is the inability of the charitable trust to qualify for real property tax exemption

The ultimate decision as to the organizational form of the land trust will necessarily depend upon the particular preferences of its creators and upon a consideration of the relevant state law. The combination of flexibility and protection offered by the charitable corporation will usually make it the more desirable choice. Of course, to the extent that the equitable duties and powers of the trustee are modified by the trust instrument to provide greater trustee flexibility, the desirability of the charitable trust and charitable corporation as forms for the land trust may be equalized.<sup>74</sup>

### C. The Charitable Purpose Requirement

After an appropriate organizational form has been selected, the land trust must satisfy the three remaining requirements to qualify as a charitable entity: nonprofit operation, indefinite beneficiaries, and charitable purpose.<sup>75</sup> "Nonprofit operation"<sup>76</sup> and "indefinite beneficiaries"<sup>77</sup> are relatively self-explanatory and should pose no problem to the land trust's organizers. The "charitable purpose" requirement, on the other hand, deserves explication.

Although the precise parameters of "charitable purpose" are not well-defined,<sup>78</sup> the limited amount of available authority supports the conclusion that the preservation of open space is a charitable endeavor. For example, in *Noice v. Schnell*,<sup>79</sup> the court held

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in certain states. See notes 192-93 *infra* and accompanying text.

74. The charitable corporation and trust may also be equalized by the fact that many courts treat transfers of property to a charitable corporation as transfers in trust, even when no trust language has been used by the transfer. See, e.g., *In re Los Angeles County Pioneer Soc'y*, 40 Cal. 2d 852, 257 P.2d 1 (1953), *cert. denied*, 346 U.S. 888 (1953), *reh. denied*, 346 U.S. 928 (1954). See generally G. BOGERT, *supra* note 47, at § 324, 4 A. SCOTT, *supra* note 46, at § 348.1.

75. See text accompanying notes 43-48 *supra*.

76. "[T]he administrative entity must not be operated for the personal gain or advantage of those controlling ownership . . ." E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 1. See generally *id.* at § 18.

77. "[T]he beneficiaries must at some time be unidentified and unknown . . ." *Id.* at § 1. See generally *id.* at § 19.

78. See generally G. BOGERT, *supra* note 47, at § 369; E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 256; 4 A. SCOTT, *supra* note 46, at § 368.

Two oft-quoted definitions of "charitable purpose" may be found in *Jackson v. Phillips*, 14 Allen 539, 556 (Mass. 1867), and *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844). The RESTATEMENT (SECOND) OF TRUSTS § 368 (1959) divides charitable purposes into six categories: (1) relief of poverty; (2) advancement of education; (3) advancement of religion; (4) promotion of health; (5) governmental or municipal purposes; and (6) other purposes beneficial to the community.

79. 101 N.J. Eq. 252, 137 A. 582, *cert. denied*, 276 U.S. 625 (1928). A later case involving the same trust is *City of Englewood v. Allison Land Co.*, 25 N.J.S. 466, 96 A.2d 702

that a testamentary trust organized "to maintain for the public at large the Palisades [along the Hudson River] and to preserve for such public their natural beauty" possessed a valid charitable purpose. Similarly, in *President and Fellows of Middlebury College v. Central Power Corp.*,<sup>80</sup> the court found that a devise of land to preserve a tract of virgin mountain forest had been dedicated to public (charitable) use. Other purposes that have been held to be charitable include promoting the permanent preservation of lands of beauty and historic interest,<sup>81</sup> beautifying a city by planting and maintaining shade trees,<sup>82</sup> developing and beautifying a park by clearing away dead wood and purchasing woodlands,<sup>83</sup> providing for a botanical garden,<sup>84</sup> and maintaining and improving a city's commons and parks.<sup>85</sup>

A recent Revenue Ruling<sup>86</sup> interpreting section 501(c)(3) of the Internal Revenue Code held that the acquisition of ecologically important land for the purpose of preserving the natural environment was charitable, despite the fact that public access to the land was sometimes limited and that educational and scientific study was allowed only if it would not disturb the particular ecosystem. This ruling, although involving the definition of "charitable purpose" under a specific statute, was based, in part, on many of the common-law decisions noted above.<sup>87</sup>

The preceding authority suggests that the preservation of land for park purposes, for scientific or educational study, or for its ecological significance constitutes a charitable purpose. Because one or more of these purposes will generally be included within the land trust's goal of preserving open space,<sup>88</sup> the land trust should meet

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(1953).

80. 101 Vt. 325, 143 A. 384 (1928).

81. *In re Verrall*, 1 Ch. 100 (1916).

82. *Cresson's Appeal*, 30 Pa. 437 (1858).

83. *In re Bartlett*, 163 Mass. 509, 40 N.E. 899 (1895).

84. *Richardson v. Essex Inst.*, 208 Mass. 311, 94 N.E. 262 (1911).

85. *Burr v. City of Boston*, 208 Mass. 537, 95 N.E. 262 (1911). See generally G. BOGERT, *supra* note 47, at § 378; R. BRENNEMAN, *supra* note 53, at 9-14; 4 A. SCOTT, *supra* note 46, at § 374.10.

86. Rev. Rul. 76-204, 1976-1 C.B. 152.

87. *Id.* at 153.

88. The creators of a land trust would be wise to delineate in its articles of organization the variety of purposes its activities will serve, rather than relying upon the anomalous "open space preservation" terminology. The New Canaan Land Conservation Trust's Articles of Association (June 26, 1977) (copy on file with *Vanderbilt Law Review*) provide:

Article Second: The nature of the activities to be conducted, or the purposes to be promoted or carried out, by the corporation are as follows, to wit:

A. To engage in and otherwise promote for the benefit of the general public the

all the requirements necessary to qualify under the common-law definition as a charitable entity<sup>89</sup> and thereby enjoy the benefits that accrue to such organizations under the common law.

### III. TRANSFERRING THE LAND

Once the land trust has been properly organized, it may begin to realize its goal of open space preservation. This section of the Article examines a variety of techniques by which property may be conveyed to the land trust, analyzing the desirability of each technique from the perspective of both the land trust and the landowner.<sup>90</sup> As a preliminary matter, this section discusses certain general restrictions on charitable dispositions, of which counsel for the land trust and the landowner should be aware. It must be borne in mind, however, that a successful land transfer depends upon a working knowledge of both the principles discussed herein and the tax consequences considered below.

#### A. General Restrictions on Charitable Dispositions

The first restriction on charitable giving that should be considered is the Rule Against Perpetuities (the Rule).<sup>91</sup> Although the Rule is in most instances inapplicable to charitable gifts, it may nevertheless invalidate a disposition in two situations.<sup>92</sup> The first situation arises when the vesting of the charitable gift is postponed by a condition that may not occur within the time frame of the Rule.<sup>93</sup> For example, a gift of land "to Land Trust, to vest when

preservation and conservation of natural resources of the Town of New Canaan, including water resources, swamps, woodland, and open spaces, and the plant and animal life therein, and unique scenic, natural sites and historic sites;

B. To engage in and otherwise promote the scientific study of local natural resources, including plants, animals, birds, and other wildlife;

C. To use all property held or controlled by the corporation and the net earnings thereof within the United States of America for the benefit of all the inhabitants of the Town of New Canaan and exclusively for the conservational, recreational, educational, scientific and historic purposes for which the corporation is formed . . . .

89. *But see* R. BRENNEMAN, *supra* note 53, at 13-14.

90. In this section, it is assumed that the land trust is the recipient of the transferred property. The land trust may, however, use the techniques presented to *transfer* property when deemed necessary or advisable. In that event, the land trust's concerns may be similar to those of the landowner's discussed herein.

91. "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 183 (1966).

92. *See generally* G. BOGERT, *supra* note 47, at §§ 343, 345; E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at §§ 112-13; 4 A. SCOTT, *supra* note 46, at §§ 401.7-8.

93. *See, e.g.*, *Malmquist v. Detar*, 123 Kan. 384, 255 P. 42 (1927); *State v. Holmes*, 115



Land Trust enrolls 500 members," is invalid since it is possible that Land Trust will not enroll the required membership within the time period specified by the Rule. The second situation in which a charitable disposition may violate the Rule arises when a contingent future interest in a charity is preceded by a present interest in a noncharity.<sup>94</sup> For example, if an owner devises property "to my daughter and her heirs, for as long as the land shall be used as a bird sanctuary, then to Land Trust," the executory interest in Land Trust violates the Rule since it again may not vest within the required period of time.

In addition to the restrictions imposed by the Rule Against Perpetuities, there are statutory prohibitions in some states directed specifically against *testamentary* charitable giving.<sup>95</sup> These statutes, while varying in the degree to which they limit charitable dispositions, are designed to prevent the testator from disinheriting his family members.<sup>96</sup> This goal is accomplished by restricting bequests or devises made by the testator within a certain time period before his death<sup>97</sup> and/or by restricting the amount of property that he may will to charity.<sup>98</sup> A typical statute of the first type provides in relevant part:

No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least one hundred twenty (120) days before the death of the testator . . . .<sup>99</sup>

Because the testator in such a state might die before the required period of time has elapsed, a land trust to which a testamentary gift is made faces the risk of having a disposition to it declared invalid.

Fortunately, the effects of these restrictive rules may be avoided. Careful drafting should be sufficient to protect against invalidation by the Rule Against Perpetuities.<sup>100</sup> Statutes that limit

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Mich. 456, 73 N.W. 548 (1898).

94. See, e.g., *Colorado Nat'l Bank v. McCabe*, 143 Colo. 21, 353 P.2d 385 (1960); *Talbot v. Riggs*, 287 Mass. 144, 191 N.E. 360 (1934).

95. See generally G. BOGERT, *supra* note 47, at § 326; E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at §§ 81-97; 4 A. SCOTT, *supra* note 46, at § 362.4.

96. See generally G. BOGERT, *supra* note 47, at § 326; E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at §§ 81-97; 4 A. SCOTT, *supra* note 46, at § 362.4.

97. See, e.g., FLA. STAT. ANN. § 732.803 (West 1976).

98. See, e.g., GA. CODE ANN. § 113.107 (1975); IOWA CODE ANN. § 633.266 (West 1964).

99. IDAHO CODE § 15-2-615 (1979).

100. In addition, in the case of a gift to charity that is postponed by a condition, courts have devised many methods for getting around the effects of the rule. See, e.g., *Curtis v. Maryland Baptist Union Ass'n*, 176 Md. 430, 5 A.2d 836 (1939); *First Camden Nat'l Bank*

testamentary dispositions may be most easily circumvented by the solicitation of an *inter vivos* transfer.<sup>101</sup> Alternatively, the testator might provide in his will for a "gift over" to a sympathetic third person should the disposition to the charity be invalidated.<sup>102</sup> This latter method may have one of two effects: the court may decide to invalidate the gift to charity, whereupon the sympathetic person will hopefully convey title to the intended charitable beneficiary;<sup>103</sup> or the court may decide to leave the gift to charity intact since the testator's relatives (those who are protected by these statutes) would not benefit from the invalidation of the disposition.<sup>104</sup>

With an awareness of the above limitations, the land trust, landowner, and their respective counsel may now proceed to consider the variety of forms that the transfer of land may take.

### B. *The Form of the Transfer*

#### 1. Unrestricted Estate in Fee Simple Absolute

The first available device is the transfer by the landowner of an unrestricted estate in fee simple absolute.<sup>105</sup> This estate is the largest that the owner can transfer; he gives up all his interest in the property with no restrictions attached.<sup>106</sup>

The advantages to the land trust of such a disposition are substantial. Within the limits imposed by its articles of organization (and by the rules governing organizational administration discussed above), the land trust may administer the property in whatever manner it chooses.<sup>107</sup> The importance of this flexibility is

& Trust Co. v. Collins, 110 N.J. Eq. 623, 160 A. 848 (1932). See generally G. BOGERT, *supra* note 47, at § 343; E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 112; 4 A. SCOTT, *supra* note 46, at § 401.8.

101. See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 96.

102. E.g., "To Land Trust, but if this gift shall be declared invalid, to John Muir."

103. See, e.g., Estate of Sanderson, 58 Cal. 2d 522, 375 P.2d 37 (1962); Flood v. Ryan, 220 Pa. 450, 69 A. 908 (1908).

104. See, e.g., Central Nat'l Bank v. Morris, 9 Ohio Misc. 167, 222 N.E.2d 674, *aff'd*, 10 Ohio App. 2d 225, 227 N.E.2d 418 (1967). For these and other avoidance techniques, see E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at §§ 92-97; 4 A. SCOTT, *supra* note 46, at § 362.4.

105. T. BERGIN & P. HASKELL, *supra* note 91, pt. 1, ch. 2, at § 3. For purposes of this Article, an "unrestricted" estate in fee simple absolute means one that is not burdened by covenants or other language restricting the use that may be made of the property.

106. *Id.*

107. See, e.g., Newhall v. Second Church & Soc'y, 349 Mass. 493, 209 N.E.2d 296 (1965); City of Paterson v. Paterson Gen. Hosp., 97 N.J. Super. 514, 235 A.2d 487 (1967); Lefkowitz v. Cornell Univ., 35 A.D.2d 166, 316 N.Y.S.2d 264 (1970), *aff'd*, 28 N.Y.2d 876, 271 N.E.2d 552, 322 N.Y.S.2d 717 (1971).

perhaps most visible in the ability of the land trust to respond to changed circumstances. Suppose, for example, that at the time of transfer the preserved parcel is located on the urban fringe in a pristine, wooded area. As the pressure for urban expansion increases, the wooded area is zoned for heavy industrial use. Soon the property is surrounded by polluting factories, which destroy its ecological, environmental, recreational, and aesthetic value, while the economic value of the property soars due to its development potential. The land trust holding an unrestricted estate in fee simple absolute could respond to this series of events by selling the property, realizing a healthy gain, and reinvesting in a parcel that would more effectively promote the preservation of open space.<sup>108</sup>

Similarly, assume that property is acquired by a land trust for the purpose of providing a habitat for a particular wildlife species. Subsequently, it is discovered that another parcel, which is available to the organization, is more suitable for this purpose. The land trust, holding an unrestricted estate in fee simple absolute, may once again respond to this situation in a manner not possible under a more restrictive transfer limiting the use of the property to a wildlife habitat. In this instance, for example, it might be desirable for the organization to alter the permitted use of the original piece of land from a sanctuary to a recreational site, and to focus its wildlife preservation efforts on the more appropriate parcel.

The consequence of granting great flexibility to the land trust is necessarily a concomitant lack of control by the landowner. As noted above, the landowner who transfers an unrestricted estate in fee simple absolute gives up everything. The advantage to the landowner of doing so arises from the ability of the land trust to be flexible in its management of the property. If the landowner has faith in the donee organization, he can be assured that his property will be used in a manner that is responsive to the unpredictable and that, in the long term, most effectively preserves open space.<sup>109</sup> If, however, the landowner is reluctant to give the organization complete freedom, the transfer of an unrestricted estate in fee simple absolute may be inappropriate, and he may wish instead to consider methods by which he can exercise a greater degree of control over the future use of the conveyed parcel.

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108. See cases cited in note 107 *supra*. See generally R. BRENNEMAN, *supra* note 53, at 5-6. See also E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 458, on the ability of the transferor to a charity to restrict the charity's ability to alienate the property.

109. See generally R. BRENNEMAN, *supra* note 53, at 4-6.

## 2. Transfer in Trust

In contrast to the transfer of an unrestricted estate in fee simple absolute is the transfer of property in trust.<sup>110</sup> As noted earlier, the settlor of a trust may, by the trust instrument or by the passive use of restrictive rules, place detailed limitations upon the trustee's ability to use the subject parcel.<sup>111</sup> The trust thus emerges as a useful device for the landowner who wishes to exercise particularized direction over the land trust's management of his property.

The difficulties that the land trust may encounter with such a transfer in trust depend upon the nature and extent of the particular restrictions. While it is therefore impossible to anticipate specific consequences, certain general problem areas may nonetheless be identified.

One problem that may arise is the inability of the land trust to deal flexibly with changed circumstances. For example, if the land trust is prohibited from alienating the trust property or altering its specified use, the organization's limited resources may be inappropriately allocated as conditions vary.<sup>112</sup> Fortunately, courts have provided that the trustee may deviate from the express or implied terms of the trust instrument when circumstances arise that were not contemplated by the settlor and that would defeat the trust purpose if strict compliance were required.<sup>113</sup> Complications may develop, however, if the trustee does not apply to the court for permission prior to deviation. Although the trustee is not technically required to make prior application, one who fails to do so runs the risk that the court will subsequently disapprove of his actions and hold him liable for any losses sustained as a result of the deviation.<sup>114</sup> For this reason, except in an emergency, application to the court for permission to deviate is a necessity.

Applying to the court for permission to deviate, however, raises certain problems. It may be difficult to prove *both* that the changed circumstances were unanticipated by the settlor and that

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110. See text accompanying notes 54-56 *supra*.

111. See text accompanying notes 57-64 *supra*.

112. See examples discussed in Section III(B)(1) of this Article.

113. See, e.g., *Curtiss v. Brown*, 29 Ill. 201, 230 (1862); *In re Pulitzer's Estate*, 139 Misc. 575, 249 N.Y.S. 87 (1931), *aff'd mem.*, 237 A.D. 808, 260 N.Y.S. 975 (1932). See generally 2 A. SCOTT, *supra* note 46, at § 167. Deviation may also be permitted in the event that the terms of the trust are illegal or impossible to carry out. See generally 2 A. SCOTT, *supra* note 46, at §§ 165-166.

114. See, e.g., *In re Sellers' Estate*, 31 Del. Ch. 153, 67 A.2d 860 (1949); *Schramm v. United States Nat'l Bank*, 151 Or. 693, 52 P.2d 181 (1935). See generally 2 A. SCOTT, *supra* note 46, at § 167.1.

the trust purpose would be defeated by strict compliance with the trust terms. Even when it is clear that deviation is appropriate, the process of applying to the court may be costly and time consuming. Thus, while deviation is theoretically available, its actual utility may be diminished by these factors.

A second problem that may arise in using the trust device is that the trust purpose may become impossible or impracticable to carry out regardless of whether the land trust is allowed to deviate from the terms of the trust. For example, suppose property is transferred to the land trust to be held in trust as a preserve for a rare type of plant. A further condition specifies that the land trust shall not be allowed to sell the parcel. Unfortunately, disease destroys the plant not only on the land trust's property, but also throughout the county where the land trust operates. In this situation, even if the land trust were allowed to deviate from the trust terms and sell the property, it could not carry out the purpose of preserving the rare plant.

In such a case, the question arises as to whether the land trust will be allowed to divert the property to another purpose compatible with its articles of organization in order to avoid failure of the trust. The doctrine of *cy pres* allows such a diversion if it can be determined that the settlor had a more general intention to devote the property to charitable purposes<sup>115</sup> such as preservation of natural areas. The application of *cy pres* is not, however, problem-free. First, it may be difficult to decide whether the specified purpose has indeed become impossible or impracticable to carry out. Second, it may be impossible to determine what use the settlor intended for the property if his purpose could not be carried out.<sup>116</sup> Finally, because *cy pres* is applied by the court,<sup>117</sup> the cost and delay of the judicial process are necessarily involved. Thus, while the application of *cy pres* is certainly preferable to the failure of the trust, it is by no means a substitute for the ready flexibility of an unrestricted transfer.

A final difficulty involved in using a trust is that the land trust may be subjected to repeated lawsuits challenging its interpretation of the trust instrument or its performance of fiduciary duties. Again, the costly and time consuming nature of the judicial process may cause a considerable drain on the land trust's resources and

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115. See generally 4 A. SCOTT, *supra* note 46, at § 399.

116. *Id.* at § 399.2.

117. *Id.*

ultimately hamper the overall effectiveness of its preservation efforts.

Many of the above problems can be avoided if the settlor is willing to relinquish some amount of control over his property by a liberal wording of the trustee's powers and duties in the trust instrument. In that event, a transfer in trust may be quite effective in providing both land trust flexibility and a degree of landowner control. If detailed control is not desired, however, the landowner may wish to consider other devices falling somewhere on the continuum between the extremes of unrestricted transfer and strict trust.

### 3. Defeasible Fees

Among the intermediate devices available to give the landowner some measure of control are the defeasible fees, including the fee simple determinable,<sup>118</sup> the fee simple subject to a condition subsequent,<sup>119</sup> and the fee simple subject to an executory interest.<sup>120</sup> Al-

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118. The fee simple determinable is created by transferring an estate in fee simple, followed by durational language such as "during," "while," or "so long as," followed by the desired restriction. For example, "to Land Trust, its successors, and assigns, so long as the property shall be used as a park." As a result of this transaction, Land Trust may hold the property indefinitely, with all the rights that the grantor possessed, except for those rights that are prohibited by the restriction. Should Land Trust or its successors fail to use the property as a park, title will revert automatically by operation of law to the grantor.

The future interest held by the grantor of a fee simple determinable is a possibility of reverter, which is alienable, devisable, and inheritable. *See generally* T. BERGIN & P. HASKELL, *supra* note 91, pt. 1, ch. 2, at § 7 & ch. 3, at § 3; 4 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 1871 (1979); 1 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 220 (3d ed. 1939).

119. The fee simple subject to a condition subsequent is created by transferring an estate in fee simple, followed by conditional language such as "provided that," or "upon condition that," followed by the desired restriction and a reentry provision. For example, "to Land Trust, its successors, and assigns, provided that if the property shall ever be used other than as a wildlife preserve, Grantor may enter and terminate the estate granted." As a result of this transaction, Land Trust may hold the property indefinitely, with all the rights that the grantor possessed, except for those rights which are prohibited by the restriction. Should Land Trust or its successors fail to use the property as a wildlife preserve, the grantor may elect to declare a forfeiture; the property does not revert automatically.

The future interest held by the grantor of a fee simple subject to a condition subsequent is a right of entry or power of termination, which is devisable and inheritable but not alienable at common law. *See generally* T. BERGIN & P. HASKELL, *supra* note 91, pt. 1, ch. 2, at § 7 & ch. 3, § 4; 4 G. THOMPSON, *supra* note 118, at §§ 1874-1892; 1 H. TIFFANY, *supra* note 118, at §§ 185-216.

120. The fee simple subject to an executory interest (or limitation) is created in the same manner as the other defeasible fees using either durational or conditional language followed by the desired restriction *and* a disposition to a third person (not the grantor) to take effect upon the happening of the specified event. For example, "to Land Trust, its successors, and assigns, but if the property shall ever be used other than as a bird sanctuary,

though the defeasible fees are potentially infinite in duration, the land trust may lose title to the property if it violates a deed restriction imposed by the grantor.<sup>121</sup> By dangling the forfeiture sword, the landowner is thus able to exercise a certain degree of control over the land trust's use of the subject parcel.

The chief advantage to the landowner of conveying a defeasible fee is that by the simple insertion of a deed restriction, he can theoretically create a powerful deterrent to any unpermitted use of the property.<sup>122</sup> While the defeasible fee is perhaps not as useful as the trust in providing detailed instructions regarding the management of the parcel, it is arguably a more potent control because of the forfeiture feature. Another possible advantage to the landowner of using this technique is its durability.<sup>123</sup> The land trust may not deviate from the terms of the deed due to changed circumstances,<sup>124</sup> and the restriction will bind and benefit the land trust's and landowner's successors in interest.<sup>125</sup>

There are, however, many disadvantages that may weigh against the use of the defeasible fees. From the perspective of the land trust, the inflexibility created by this device may be intolerable. Without the ability to deal with unexpected circumstances, the land trust may find itself committed to a use of the property that is contrary to the best interests of the community.<sup>126</sup> Further, such provisions may cause the land trust to be overly conservative in its

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then to the Girl Scouts of America." Again, Land Trust may hold the property indefinitely, with all rights save those prohibited. Should Land Trust fail to use the property as a bird sanctuary, title will pass automatically to the Girl Scouts.

The future interest held by the Girl Scouts is an executory interest (or limitation), which is alienable, devisable, and inheritable. *See generally* T. BERGIN & P. HASKELL, *supra* note 91, pt. 1, ch. 2, at § 7; R. POWELL, *POWELL ON REAL PROPERTY* ¶ 189, 279, 283 (abr. ed. 1968).

121. *See* notes 118-20 *supra*.

122. *See* R. BRENNEMAN, *supra* note 53, at 47.

123. *Id.* at 48.

124. The only cases that have been found to have allowed the owner of a defeasible fee to assert the defense of changed circumstances are cases dealing with racial restrictions. *See, e.g.,* *Letteau v. Ellis*, 122 Cal. App. 584, 587-89, 10 P.2d 496, 497 (1932). *See generally* R. BRENNEMAN, *supra* note 53, at 42; L. SIMES & V. SMITH, *FUTURE INTERESTS* § 1992 (2d ed. 1956); Note, *The Right of Entry and the Possibility of Reverter: Traditional Uses—Subdivisions—Mineral Leases*, 2 WILLAMETTE L.J. 479, 486 (1963).

125. *See generally* R. POWELL, *supra* note 120, at ¶ 190.

126. For example, suppose Landowner transfers property "to Land Trust, its successors and assigns, so long as the property is used as a nature conservatory for scientific study." At the time of the transfer, this site is the only such conservatory. Subsequently, however, the city condemns a much larger, more suitable site for the same purpose. At this point, Land Trust's property would better serve the community as a recreational facility. Unfortunately, Land Trust is locked into the terms of the transfer.

use of the property for fear of violating the restrictions and losing the land. For example, if a grant is for "natural use only" or "for purposes of preservation," can the land trust build a small nature house or a few trails? As with a transfer in trust, however, the land trust will not be held to the performance of impossible restrictions.<sup>127</sup> Thus, some relief is provided from the rigidity of this device.

From the landowner's viewpoint, the defeasible fees are so fraught with legal traps for the unwary that the successful use of this technique is dubious.<sup>128</sup> Because of their antagonism toward forfeitures, courts will interpret ambiguous language in a deed as creating a covenant, trust, or equitable charge rather than a defeasible fee.<sup>129</sup> Even when there is no question that a defeasible fee has been created, courts will strain to avoid finding that the restriction has been breached.<sup>130</sup> Where a breach is found, courts also favor construing a defeasible fee as a fee simple subject to a condition subsequent rather than as a fee simple determinable, so as to avoid the automatic loss of title.<sup>131</sup> In addition to this judicial hostility toward defeasible fees, some state legislatures have expressed a similar attitude in the enactment of statutes designed to frustrate the use of this device.<sup>132</sup>

Finally, assuming that the judicial and legislative obstacles can be overcome, there remains the problem of controlling the use of the land once the breach has occurred and the holder of the future interest has become entitled to possession. If the holder is not the original grantor,<sup>133</sup> the grantor has no guarantee that the

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127. See, e.g., *Burnham v. Burnham*, 79 Wis. 557, 48 N.W. 661 (1891). See generally 4 G. THOMPSON, *supra* note 118, at § 1891; 1 H. TIFFANY, *supra* note 118, at § 195.

Thus, in the example cited in note 126 *supra*, if the parcel were destroyed by a natural disaster, the Land Trust would not be held to the deed restrictions.

128. See generally R. BRENNEMAN, *supra* note 53, at 36-49.

129. See, e.g., *Board of Pub. Educ. v. St. Patrick's Roman Catholic Church*, 15 Del. Ch. 286, 136 A. 833 (1927); *In re Sellers Chapel Methodist Church*, 139 Pa. 61, 21 A. 145 (1891). See generally G. BOGERT, *supra* note 47, at § 324; R. POWELL, *supra* note 120, at ¶ 187; 4 G. THOMPSON, *supra* note 118, §§ 1876, 1878; 1 H. TIFFANY, *supra* note 118, at § 192. At least one court has voided the defeasance as an impermissible restraint on alienation. *Falls City v. Missouri Pac. Ry.*, 453 F.2d 771 (8th Cir. 1972).

130. See, e.g., *Watrous v. Allen*, 57 Mich. 362, 24 N.W. 104 (1885); *Mills v. Evansville Seminary*, 58 Wis. 135, 15 N.W. 133 (1883). See generally 4 G. THOMPSON, *supra* note 118, at § 1886.

131. See, e.g., *Hardman v. Dahlonega-Lumpkin County Chamber of Commerce*, 238 Ga. 551, 233 S.E.2d 753 (1977); *Noyes v. St. Louis A. & T. H.R.R.*, 21 N.E. 487 (Ill. 1889). See generally R. POWELL, *supra* note 120, at ¶ 188.

132. See, e.g., MINN. STAT. ANN. § 500.20 (West 1947); OR. REV. STAT. § 105.770 (1977).

133. For example, the original grantor may have transferred his interest either *inter*



property will be used for the desired conservation purposes.<sup>134</sup> Furthermore, in the case of a fee subject to a condition subsequent, there is no assurance that the holder of the power of termination will choose to exercise it.<sup>135</sup> For these reasons, although the defeasible fees are in theory useful and uncomplicated control devices, in practice they may not produce the desired results.

#### 4. Covenants

The landowner who is wary of the defeasible fees may prefer instead to exercise control over the transferred property by including one or more covenants in the deed. A covenant is a promise by the land trust to the landowner "to do or to refrain from doing something."<sup>136</sup> For example, the landowner who transfers an environmentally sensitive piece of property may require the land trust to agree to maintain the natural character of the land and to limit the parcel's use to passive recreational activities.

If the original covenantee (the landowner) is seeking to enforce the covenant against the original covenantor (the land trust), the covenant may simply be viewed as a contractual obligation subject to the rules of contract law.<sup>137</sup> If, on the other hand, the covenant is sought to be enforced by the successor in interest of the original covenantee or against the successor in interest of the original covenantor, the rules relating to the running of covenants come into play.<sup>138</sup>

"Running covenants"<sup>139</sup> are divided into two categories: "real covenants" and "equitable servitudes." Real covenants are creatures of the common law<sup>140</sup> and are enforced via the common-law remedy of damages.<sup>141</sup> Injunctive relief in equity may also be avail-

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*vivos* or by will, or may have originally created a fee simple subject to an executory interest in a third person.

134. See R. BRENNEMAN, *supra* note 53, at 47-58.

135. The problems that may arise if the holder of the future interest is not the original grantor may possibly be avoided by the transfer or creation of the future interest in a "watchdog agency." See *id.* at 47-48.

136. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 864 (1977).

137. See generally 5 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 671 (1979); Stoebuck, *supra* note 136, at 864.

138. See generally Stoebuck, *supra* note 136, at 864.

139. This terminology is used by Stoebuck, *supra* note 136, referring to those covenants that can be enforced by or against the successors in interest to the originally covenanting parties.

140. See *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (K.B. 1583).

141. See, e.g., *Mueller v. Bankers' Trust Co.*, 262 Mich. 53, 247 N.W. 103 (1933);

able if the remedy at law is inadequate.<sup>142</sup> Equitable servitudes, on the other hand, are creatures of equity<sup>143</sup> and are enforced by the granting of injunctions.<sup>144</sup>

There are several advantages to the landowner in selecting covenants as a method of controlling the land trust's use of the subject parcel. Like the defeasible fees, covenants are relatively simple to employ—the desired promise must merely be included in the deed. Unlike the defeasible fees, however, covenants do not involve a forfeiture, and consequently courts are more inclined to enforce them.<sup>145</sup> Moreover, provided the requirements for running are met,<sup>146</sup> covenants, like the defeasible fees, may bind and benefit the successors in interest to the estates of the original covenanting parties<sup>147</sup> and thus provide long-term control over the conveyed property.

These benefits to the landowner are offset by at least three disadvantages. First, if an injunction is sought to enforce a covenant, the equitable defense of changed circumstances may be asserted by the land trust. This doctrine provides that an injunction will not be granted if the neighborhood surrounding the subject parcel has undergone such a substantial, physical change, inconsistent with the restrictions of the covenant, that the covenant's benefits have essentially been lost.<sup>148</sup> Of course, in view of the flexibility it offers, this defense makes the covenant far more desirable from the land trust's perspective than the defeasible fees. If the landowner seeks to enforce the covenant at law, however, this defense may be unavailable.<sup>149</sup>

The second disadvantage to the landowner involves the running of covenants. As noted above, rules have been developed to determine whether the burden of a covenant will run to the cove-

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*Farmers' High Line Canal & Reservoir Co. v. N.H. Real Estate Co.*, 40 Colo. 467, 92 P. 290 (1907).

142. See, e.g., *Parrott v. Atlantic & N.C.R.R.*, 165 N.C. 295, 81 S.E. 348 (1914).

143. See *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

144. See, e.g., *id.* See generally *Stoebuck*, *supra* note 136, at 905-07.

145. See generally 4 G. THOMPSON, *supra* note 118, at § 1878.

146. See note 150 *infra*.

147. See generally 3 H. TIFFANY, *supra* note 118, at chs. 17-18.

148. See, e.g., *Daniels v. Noter*, 389 Pa. 510, 133 A.2d 520 (1957). See generally 5 R. POWELL, *supra* note 137, at ¶ 684; 3 H. TIFFANY, *supra* note 118, at § 875. Other equitable defenses available to the land trust are delineated in 5 R. POWELL, *supra* note 137, at ¶¶ 683, 685.

149. See generally *Stoebuck*, *supra* note 136, at 884-85, and 5 R. POWELL, *supra* note 137, at ¶ 684, on whether the changed circumstances defense may be used to terminate the covenant at law.

nantor's successor in interest and whether the benefit of a covenant will run to the covenantee's successor in interest. Without a detailed analysis of these rather complex requirements,<sup>150</sup> it may be observed that their very existence raises an additional stumbling block to the effective use of this device. Of particular concern to the landowner is the requirement in some jurisdictions that in order for the benefit or the burden of either a real covenant or an equitable servitude to run, the *benefit* must "touch and concern" land held by the covenantee.<sup>151</sup> This requirement will create difficulties if the landowner, in transferring covenant-restricted land to the land trust, does not retain any neighboring property to be benefited by the covenant. In this event, the benefit does not "touch and concern" any of the covenantee's land<sup>152</sup> and therefore neither the benefit nor the burden of the covenant will run. Because the benefit does not run, the covenant cannot be enforced against the land trust by anyone to whom the landowner has attempted to transfer the benefit. For instance, if the landowner dies leaving all his property, real and personal, to his daughter, she will be unable to enforce the covenant in the event that the land trust breaches it. Furthermore, because the *burden* of the covenant does not run, the covenant will not be enforceable by anyone, including the original covenantor, against the land trust's successor in interest should the land trust decide to convey the property.

The third difficulty with covenants is that, as with defeasible fees, some legislatures have expressed hostility to their use.<sup>153</sup> Thus, in certain states covenants may be unavailable to achieve long-term control of the conveyed parcel.

## 5. Conservation Easements

A slightly different technique that is available to accomplish the preservation of open space is the transfer to the land trust of a conservation easement.<sup>154</sup> A conservation easement, like any other

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150. For an extensive discussion of these requirements, see generally 5 R. POWELL, *supra* note 137, at ¶¶ 672-75, 680-81; 3 H. TIFFANY, *supra* note 118, at chs. 17-18.

151. See, e.g., *Genung v. Harvey*, 79 N.J. Eq. 57, 80 A. 955 (1911) (benefit must "touch and concern" for burden to run); *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978) (benefit must "touch and concern" for benefit to run). See generally 5 R. POWELL, *supra* note 137, at ¶ 675; RESTATEMENT OF PROPERTY § 537 (for burden to run), § 543 (for benefit to run) (1936).

152. See, e.g., *Genung v. Harvey*, 79 N.J. Eq. 57, 80 A. 955 (1911).

153. See, e.g., MICH. STAT. ANN. § 26.1271 (1970); MINN. STAT. ANN. § 500.20 (West 1947).

154. See generally R. BRENNEMAN, *supra* note 53, at 20-33; W. WHYTE, *SECURING OPEN*

easement, involves the burdening of the landowner's property (the servient estate) either for the benefit of a parcel of land owned by the grantee (the dominant estate), or for the grantee's personal benefit. If the grantee's parcel of land is benefited, the easement is "appurtenant"; otherwise, it is "in gross."<sup>155</sup> An easement is affirmative if it gives the benefited party the right to engage in activity upon the servient estate; it is negative if, instead, the owner of the servient land agrees to restrict his activities thereon.<sup>156</sup> The easement may be limited in duration or it may be granted in perpetuity.<sup>157</sup> Unlike the other devices discussed thus far, the easement allows the landowner to retain title to and possession of his property.<sup>158</sup>

In transferring a conservation easement, the landowner generally agrees to refrain from developing his land (the servient estate), thereby creating a negative easement.<sup>159</sup> If, however, the land trust is granted permission to engage in limited activity upon the property, the easement is affirmative.<sup>160</sup> The conservation easement may be appurtenant or in gross, depending upon whether the land trust owns property in the neighborhood of the servient estate that will be benefited by the easement.

The advantages to the landowner of granting a conservation easement are many. Because title and possession of the property remain in the landowner, he may continue to engage in any activities upon the land as long as they are not prohibited by and do not interfere with the easement.<sup>161</sup> The landowner may also alienate or devise the property subject to the terms of the easement.<sup>162</sup> Furthermore, the landowner may realize a substantial reduction in real

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SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (URBAN LAND INSTITUTE TECH. BULL. No. 36, 1959); W. WHYTE, *supra* note 9, at 89-115; Eveleth, *supra* note 11, at 565-70; Moore, *supra* note 11, at 281-84; Roe, *supra* note 4, at 429-37; Note, *supra* note 8, at 1635-37.

155. See, e.g., *Hartford Nat'l Bank & Trust Co. v. City Redevelopment Agency*, 164 Conn. 337, 321 A.2d 469 (1973). See generally J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY*, pt. 4, ch. 1, at § 1 (1962); 3 H. TIFFANY, *supra* note 118, at § 758.

156. J. CRIBBET, *supra* note 155; 3 H. TIFFANY, *supra* note 118, at § 756.

157. 3 H. TIFFANY, *supra* note 118, at § 760.

158. See J. CRIBBET, *supra* note 155.

159. See MARYLAND ENVIRONMENTAL TRUST, *CONSERVATION EASEMENTS* 5 (rev. ed. 1977) (copy on file with *Vanderbilt Law Review*).

160. For example, in addition to prohibiting future development (such as housing construction) on the servient estate, the conservation easement may allow the land trust to construct and maintain trails on the servient estate.

161. See, e.g., *Skaggs v. Skaggs*, 257 S.W.2d 901 (Ky. 1953). See generally 2 G. THOMPSON, *supra* note 118, at § 427.

162. See generally 2 G. THOMPSON, *supra* note 118, at §§ 433-434.

property taxes.<sup>163</sup> The fair market value of the servient land will in theory be lower once development has been prohibited. Because the assessment of real property is based on fair market value, it follows that the assessment, and consequently the real property taxes of the servient owner, should be reduced.<sup>164</sup> A typical example of the utility of a conservation easement is the case of a farmer who wishes to continue farming but who is unable to do so in the face of escalating real property taxes. By transferring a conservation easement, he will be able to remain on his land, farm it, and pay taxes based on an assessment which does not reflect the development potential of the property.<sup>165</sup>

The use of a conservation easement also presents several advantages to the land trust. The land trust does not receive title to the property and therefore the acquisition cost of the conservation easement may be less than that of a restricted or unrestricted fee.<sup>166</sup> In addition, because the land trust does not receive possession of the property, its management responsibility will likely be less than with the other transfers discussed thus far.<sup>167</sup> A third advantage is that, unlike real covenants and equitable restrictions, the burden of a conservation easement will run with the servient estate to the landowner's successors in interest even though the benefit of the easement is in gross (does not touch and concern any land held by the land trust).<sup>168</sup> Finally, the use of a conservation easement leaves the property on the tax rolls, albeit at a reduced

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163. See generally W. WHYTE, *supra* note 154, at 38-41; Sicard, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENV'TL AFF. 481, 495-501 (1975); THE BANK OF CALIFORNIA (TRUST DEPT.), *TAX PLANNING FOR EVERYMAN'S FUTURE: THE CONSERVATION EASEMENT* (1972).

164. The amount of the reduction will, of course, depend upon the development potential of the property. A parcel of agricultural land which is several hundred miles from the nearest urban center will likely have less development potential than a parcel of similar agricultural land located on the urban fringe. For difficulties that may be encountered in realizing the reduction see authorities cited in note 163 *supra*. Property tax consequences for the recipient of the easement are discussed in text accompanying notes 169-77 *infra*.

165. See, e.g., *PROTECTING NATURE'S ESTATE*, *supra* note 26, at 57. Note that the use of conservation easements in this context is similar to the use of property tax incentives discussed in the text accompanying notes 7-12 *supra*.

166. See generally W. WHYTE, *supra* note 9, at 89-115. Of course, if the land has considerable development potential, the savings may be minimal. *Id.*

167. Cf. Eveleth, *supra* note 11, at 565 (referring to maintenance costs in the context of public acquisition of conservation easements).

168. See R. BRENNEMAN, *supra* note 53, at 30. Cf. 2 G. THOMPSON, *supra* note 118, at §§ 433, 434 (referring to the running of the burden of easements generally). Note that this running of the burden may be an advantage for the landowner as well, assuming that he wishes the restrictions to be passed to his successors.

assessment.<sup>169</sup> This factor may generate greater public support for the land trust's activities because the local tax revenues will not be depleted to the same extent as if the entire property were transferred.

There are, nevertheless, several potential difficulties for both the land trust and landowner associated with the use of this device. One problem is that novel negative easements may not be recognized.<sup>170</sup> The possibility exists that, because of its relatively recent popularity, the conservation easement may be categorized by a court as novel and therefore unenforceable.<sup>171</sup> This result is rendered less likely if the court recognizes that "[i]t is not the novelty of an interest which makes it objectionable. Rather it is the comparative inutility of the interest as contrasted with its power to render title unmarketable."<sup>172</sup> A persuasive argument can be made in favor of the comparative utility of the conservation easement based on the value to society of securing those benefits associated with the preservation of open space.<sup>173</sup> Moreover, the existence in many states of statutes authorizing the acquisition of conservation easements is conclusive evidence that the public has recognized the usefulness of this device.<sup>174</sup>

A second difficulty may arise if the land trust does not own any land in the neighborhood of the servient estate to be benefited by the easement. Although the burden of such an easement will be enforceable against the successor in interest to the servient land,<sup>175</sup> there is authority to support the proposition that the *benefit* of an easement in gross is not assignable.<sup>176</sup> Thus, if the land trust found

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

170. See generally R. BRENNEMAN, *supra* note 53, at 23-25; Eveleth, *supra* note 11, at 568. Both Brenneman and Eveleth note that this proposition is often not adhered to.

171. See authorities cited in note 170 *supra*.

172. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 72 (2d ed. 1947).

173. See note 18 *supra*.

174. See, e.g., MONT. REV. CODES ANN. § 76-101 (1978); OR. REV. STAT. § 271.710 (1977). See generally Note, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383 (1976); Note, *Easements to Preserve Open Space Land*, 1 ECOL. L.Q. 728 (1971) (Cal. law); Note, *The California Open-Space Easement Act: The Efficacy of Indirect Incentives*, 16 SANTA CLARA L. REV. 359 (1976); Note, *The Use of Easements to Preserve Oregon Open Space*, 12 WILLAMETTE L.J. 124 (1975). Some of the statutes authorizing the acquisition of conservation easements do not specifically authorize acquisition by private groups. See, e.g., OR. REV. STAT. § 271.710 (1977). A question may therefore be raised as to whether this omission is a legislative comment on the comparative inutility of nongovernmental conservation easement programs.

175. See note 168 *supra*.

176. See, e.g., *Rose Lawn Cemetery Ass'n v. Scott*, 229 Ark. 636, 317 S.W.2d 265

it necessary or advantageous to transfer its holdings, the conservation easement might be unenforceable by the land trust's successor in interest.

A final difficulty with the conservation easement is that it may possibly terminate. Although nonuse by the easement holder is insufficient to terminate an easement,<sup>177</sup> nonuse coupled with other actions may terminate it by estoppel,<sup>178</sup> abandonment,<sup>179</sup> or prescription.<sup>180</sup> Because nonuse is generally the essence of a conservation easement,<sup>181</sup> the land trust must be especially diligent in guarding against inadvertent termination.

The above discussion has presented several alternatives that may be used to accomplish the conveyance of an interest in land to the land trust.<sup>182</sup> The choice of a technique in a given transaction will depend upon the parties' needs and the relevant state law. The final decision regarding the transfer cannot, however, be reached

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(1958); *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973). See generally R. BRENNEMAN, *supra* note 53, at 28-32; 2 G. THOMPSON, *supra* note 118, at § 325; 3 H. TIFFANY, *supra* note 118, at § 761; *Eveleth*, *supra* note 11, at 569-70; *Welsh*, *The Assignability of Easements in Gross*, 12 U. CHI. L. REV. 276 (1945). The RESTATEMENT OF PROPERTY §§ 489, 491 (1936) takes the position that commercial easements in gross are assignable and that noncommercial easements in gross may be assignable depending upon the manner or terms of their creation. See also R. POWELL, *supra* note 120, at ¶ 419. A related problem concerns the transferability of the benefit of an appurtenant easement. Although the benefit of an appurtenant easement is assignable, it can only be assigned in conjunction with the dominant estate. See, e.g., *Weber v. Johnston Fuel Liners, Inc.*, 519 P.2d 972 (Wyo. 1974). See generally 3 H. TIFFANY, *supra* note 118, at § 761. The land trust must thus be careful not to sever an appurtenant easement from the benefited property (as by assigning the property while retaining the easement), for in that event the easement will be unenforceable.

177. See, e.g., *Carman v. Hewitt*, 280 A.D. 866, 114 N.Y.S.2d 266 (1952), *aff'd*, 305 N.Y. 718, 112 N.E.2d 785 (1953).

178. "If the servient owner thinks this [nonuse] means abandonment and makes substantial improvements on his estate, to the knowledge of the holder of the easement, the latter may be estopped to assert his rights in the future." J. CRIBBET, *supra* note 142. See, e.g., *Trimble v. King*, 131 Ky. 1, 114 S.W. 317 (1908).

179. "There are many cases to the effect that an easement is extinguished by 'abandonment' thereof, by which is meant that a nonuser thereof, together with other circumstances, may, as showing an intention to make no further use of it, terminate the easement." 3 H. TIFFANY, *supra* note 118, at § 825. See, e.g., *Richardson v. Tumblebridge*, 111 Com. 90, 149 A. 241 (1930) (*dicta*).

180. "If nonuse by the holder [of the easement] is coupled with an inconsistent use of the servient land for the statutory period by the servient owner, the easement will be extinguished by prescription." J. CRIBBET, *supra* note 155. See, e.g., *Hoffman v. Dorris*, 83 Or. 625, 163 P. 972 (1917) (*dicta*).

181. See R. BRENNEMAN, *supra* note 53, at 27.

182. Other techniques that may suit the parties' needs include the transfer of (1) a lease, see R. BRENNEMAN, *supra* note 53, at 33-35; and (2) a future interest, if the landowner wishes to postpone the land trust's right to possession of the subject parcel. See generally T. BERGIN & P. HASKELL, *supra* note 91.

until both the land trust and the landowner have considered the tax consequences of their actions. The tax consequences will often determine not only the form of the transfer, but also whether any transfer will take place.

#### IV. TAX CONSEQUENCES

This section of the Article examines some of the tax consequences to the landowner and land trust of transferring and receiving property for conservation purposes. It specifically focuses upon the federal income tax charitable deduction available to the individual landowner and the state real property tax exemption available to the land trust. This section incidentally examines the federal income tax exemption available to the land trust.<sup>183</sup> These tax provisions are vitally important to the success of the land trust's preservation efforts. Without the charitable deduction, there might be no gift of land; without the property and income tax exemptions, the land trust might be financially unable to retain land that is given.

##### A. Real Property Tax Exemption

Some form of real property tax exemption for property held by charities exists today in most states.<sup>184</sup> The real property held by a land trust will qualify for such an exemption if it meets the particular requirements imposed by the constitutional or legislative provisions of the jurisdiction. Although it is beyond the scope of this Article to analyze each state's laws, certain general observations may nevertheless be made regarding the ability of the land trust to avoid the burden of real property taxes.

To qualify for the charitable tax exemption, the property in question must, as a general rule, be charitably used and/or owned.<sup>185</sup> In most states, what constitutes "charitable" is decided by reference to the common-law definition.<sup>186</sup> As noted previ-

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183. The federal estate and gift tax charitable deductions parallel closely the federal income tax charitable deduction. I.R.C. §§ 2055, 2522.

184. See, e.g., OKLA. STAT. ANN. tit. 68, § 2405 (West 1966); OR. REV. STAT. §§ 307.115, 307.130 (1977). See generally E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at §§ 786-797.

185. See, e.g., COLO. REV. STAT. § 39-3-101(1)(g) (1973) (charitably owned and used); MO. ANN. STAT. § 137.100 (Vernon 1979) (charitably used); OR. REV. STAT. §§ 307.115, .130 (1977) (charitably owned).

186. See, e.g., *Forman Schools v. Town of Litchfield*, 134 Conn. 1, 54 A.2d 710 (1947); *Y.W.C.A. v. Portsmouth*, 89 N.H. 40, 192 A. 617 (1937).



ously,<sup>187</sup> the land trust should have no difficulty satisfying this requirement.

Some states, however, use a definition of "charitable" that is somewhat narrower than that of the common law. Under this narrower definition, which is based on the so-called "governmental theory" of tax exemption, real property tax exemption is justified only if the property relieves the government of burdens that it would otherwise be required to bear.<sup>188</sup> Thus, if the property is not instrumental in the performance of a governmental function, it will not be exempt. This definition may make it difficult for the land trust's holdings to qualify for exemption. If, for instance, there is no official policy to preserve open space in the particular jurisdiction, the land trust may be unable to convince the taxing authority that it is relieving the government of a burden.<sup>189</sup> Similarly, even if such a governmental policy exists, the property in question may not qualify for exemption if it is outside the area designated for preservation.<sup>190</sup> There is thus no guarantee that the land trust's property will be exempted from real property taxes in states that subscribe to this restrictive view.

Even if the land trust can meet the charitable requirement, it may not qualify for tax exemption in those states that require that the property be charitably used, as opposed to charitably owned. The essence of open space preservation in some instances may be the nonuse of the property—for example, if the land involved provides habitat for an endangered species of flora. In that event, a very technical definition of "charitably used," requiring active or actual use of the property, might prevent the property from receiving exempt status.<sup>191</sup>

An additional difficulty may be encountered by those land trusts that are organized as charitable trusts. A few states extend tax exemption only to charitable institutions, societies, or charita-

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187. See text accompanying notes 75-89 *supra*.

188. See, e.g., *Camping and Educ. Foundation v. State*, 282 Minn. 245, 164 N.W.2d 369 (1969); *River Oaks Garden Club v. City of Houston*, 370 S.W.2d 851 (Tex. 1963).

189. Cf. R. BRENNEMAN, *supra* note 53, at 13-14 (discussing open space preservation as a charitable purpose generally).

190. *Id.*

191. Cf. *Y.W.C.A. v. Spencer*, 19 Ohio C.C. Dec. 249 (1907) (interpreting OHIO REV. CODE ANN. § 5709.12 (Page 1973), then § 2732, holding that a vacant lot, which was owned by a charitable organization, was purchased with exempt funds, and upon which an exempt building was to be built, was not exempt from property tax. "Indeed, it would require a very liberal construction of the statute to extend the exemption to unoccupied and unused lands." *Id.* at 250).

ble corporations.<sup>192</sup> In any of these jurisdictions, and particularly one that limits its exemption coverage to charitable corporations, the charitable trust may be unable to meet the definitional criteria.<sup>193</sup>

Apart from these problems, the land trust should have no difficulty in qualifying its property for tax exemption. An examination of the jurisdiction's relevant laws will be required; if these laws are unfavorable, it may be necessary to urge their modification.

### B. *The Federal Income Tax Charitable Deduction: Gifts of Land*

For both the land trust and landowner, the most important tax consideration may be the federal income tax charitable deduction. By providing an incentive for the landowner to donate, rather than sell, his property, section 170 of the Internal Revenue Code enables the land trust to acquire land that it might otherwise be unable to afford. The Nature Conservancy's acquisition of Chigger Swamp is a prime example of section 170's utility.<sup>194</sup> The charitable deduction thus emerges as a powerful tool at the land trust's disposal; its workings must therefore be carefully examined and well-understood.

The charitable deduction allows the donor of property to a charitable organization to deduct from his adjusted gross income (AGI) a percentage of the fair market value (FMV) of the property donated.<sup>195</sup> The donor may, however, take a charitable deduction only to the extent that it does not exceed a specified percentage of his AGI.<sup>196</sup> In other words, there is a deduction ceiling based on the donor's AGI.<sup>197</sup>

As discussed below, both the deductible percentage of the FMV of a piece of property and the donor's deduction ceiling are determined by reference to the character of the charitable organi-

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192. See, e.g., DEL. CODE ANN. tit. 9, § 8103 (1974) (charitable corporations); OR. REV. STAT. § 307.130 (1977) (charitable institutions).

193. See E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 797.

194. See text accompanying notes 24-30 *supra*.

195. See I.R.C. § 170.

196. I.R.C. § 170(b).

197. The deduction ceiling is actually based on the donor's AGI "computed without regard to any net operating loss carryback to the taxable year under section 172," I.R.C. § 170(b)(1)(E). The resulting figure is the donor's "contribution base" for purposes of § 170. *Id.*

zation and the type of property donated.<sup>198</sup> These variables can result in enormously differing financial effects that may determine whether the solicitation of a donation is successful. The following discussion will therefore center upon the steps that the land trust must take to ensure that its donors receive the maximum tax benefits while simultaneously burdening the land trust with a minimum number of restrictions.

## 1. The Character of the Organization

### (a) *Qualifying as Charitable*

In order for the donor to the land trust to receive a charitable deduction, the land trust must first qualify as a charitable organization under section 170(c)(2).<sup>199</sup> If the land trust can qualify under this section, it will also qualify for federal income tax exemption under section 501.<sup>200</sup>

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198. See notes 275-93 *infra* and accompanying text.

199. I.R.C. § 170(a)(1) provides that "[t]here shall be allowed as a deduction any charitable contribution (as defined in subsection (c)). . . ." I.R.C. § 170(c)(2) provides as follows:

(c) Charitable Contribution Defined—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

200. I.R.C. § 501 provides that certain organizations are exempt from federal income taxation. I.R.C. § 501(c) contains the list of exempt organizations. I.R.C. § 501(c)(3) describes essentially the same organizations as are described in § 170(c)(2). I.R.C. § 501(c)(3) provides as follows:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which

To qualify as a charitable organization under section 170(c)(2), the land trust must meet four criteria. First, the land trust must satisfy the four requirements of a common-law charity now embodied in the Code and Regulations.<sup>201</sup> As noted above, the land trust can easily satisfy the common-law requirements of organizational form, nonprofit operation, and indefinite beneficiaries.<sup>202</sup> Furthermore, the land trust should have no difficulty in qualifying its purpose as charitable since the Code (unlike the property tax exemption statutes of some states) uses the broad, common-law definition of charitable purpose.<sup>203</sup> This latter conclusion is supported not only by an analysis of the common law,<sup>204</sup> but also by several Revenue Rulings that have held preservation of the natural environment,<sup>205</sup> city beautification,<sup>206</sup> public park maintenance,<sup>207</sup> and the establishment of a wild bird and animal sanctuary<sup>208</sup> to

does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Unfortunately, there are no Regulations specifically dealing with I.R.C. § 170(c)(2). Because of the overlap between I.R.C. §§ 170(c)(2) and 501(c)(3), however, the Regulations dealing with the latter section presumably may be used to interpret the former. [1980] 2 STANDARD FED. TAX REP. (CCH) ¶ 1864.0122.

201. The four common-law requirements are (1) administration of benefits via a trust, corporation, or unincorporated association; (2) nonprofit operation; (3) indefinite beneficiaries; and (4) charitable purpose. See text accompanying note 48 *supra*. The Code's and Regulations' versions of these requirements are found in I.R.C. § 170(c)(2), I.R.C. § 170(c)(2)(C), Treas. Reg. § 1.501(c)(3)-1(d)(ii) ("it is necessary for the organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled directly or indirectly, by such private interests."), and I.R.C. § 170(c)(2)(B).

202. See text accompanying notes 49-74 *supra*.

203. "Charitable" is defined for purposes of I.R.C. § 501(c)(3), and presumably for purposes of I.R.C. § 170(c)(2) as well, as follows:

Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Treas. Reg. § 1.501(c)(3)-1(d)(2).

204. See notes 75-89 *supra* and accompanying text.

205. Rev. Rul. 76-204, 1976-1 C.B. 152.

206. Rev. Rul. 68-14, 1968-1 C.B. 243.

207. Rev. Rul. 78-85, 1978-1 C.B. 150.

208. Rev. Rul. 67-292, 1967-2 C.B. 184 (educational purpose).

constitute exempt purposes. The conclusion is further supported by section 170(f)(3), which provides for the deductibility of certain property interests donated for conservation purposes.<sup>209</sup>

Because of the liberal interpretation given to the charitable purpose requirement under the Code, however, there is a possibility that non bona fide organizations and donors may also qualify for favorable tax treatment. For example, suppose a wealthy landowner decides to organize a land trust with unlimited public membership in order to contribute a parcel of property, which has relatively little ecological or environmental value, to be held open to the public for use as a park. This particular piece of property, however, coincidentally serves as a buffer to the landowner's residence, and is virtually inaccessible to the general population because of its geographical location. For these reasons, its aesthetic value can be enjoyed only by the landowner and those few persons living in the immediate area. Despite the land's lack of practical utility, it would appear that under the broad definition of charitable purpose used by the Code, which clearly includes maintenance of a public park,<sup>210</sup> the organization and donor could qualify for the benefits provided by the tax laws.<sup>211</sup>

This potential misuse of the charitable deduction suggests the need for the development of more stringent criteria, based upon the recognized values of open space preservation,<sup>212</sup> to insure that only bona fide conservation efforts are rewarded. Otherwise, public acceptance and support of legitimate land trusts may be jeopardized by the use of this device to exact a private benefit without an accompanying contribution to the public.

Once the common-law requirements have been met, there are three additional criteria that the land trust must satisfy to qualify as a charitable organization for federal tax purposes: it must be

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209. See notes 324-38 *infra* and accompanying text.

210. See note 206 *supra*.

211. This result would not be reached if it were established that the organization was formed to benefit private interests. See note 201 *supra*. See also Rev. Rul. 75-286, 1975-2 C.B. 210 (holding that a non-profit organization with membership limited to the residents and business operators within a city block and formed to preserve and beautify public areas in the block was formed to benefit private interests and was therefore not a charitable organization under I.R.C. § 501(c)(3)). The fact that the land trust in this hypothetical situation intends to operate the parcel as a public park with unlimited public membership would seem to make it more likely that the organization would receive charitable status. It is doubtful, however, that it would qualify for the more favorable tax treatment discussed in the text accompanying notes 275-93 *infra*.

212. See note 18 *supra*.

organized exclusively for charitable purposes;<sup>213</sup> it must be operated exclusively for charitable purposes;<sup>214</sup> and its political activities must be limited.<sup>215</sup>

The "organized exclusively" requirement is met if the land trust's creating instrument limits the organization's purposes to charitable ones<sup>216</sup> and does not expressly empower the organization to engage in substantial activities not in furtherance of those purposes.<sup>217</sup> The land trust should therefore take care to include only charitable purposes in its articles of organization. Nevertheless, the Internal Revenue Service will occasionally look to the organization's activities to determine whether the "organized exclusively" requirement has been met,<sup>218</sup> even though the Regulations technically require that no evidence beyond the articles of organization be considered on this point.<sup>219</sup> The "organized exclusively" test also requires that the land trust's assets be dedicated to an exempt purpose.<sup>220</sup> This provision will be satisfied if the articles of organization provide that the land trust's assets will be distributed to other charitable organizations or to the government upon termination of the organization.<sup>221</sup>

To satisfy the "operated exclusively" test, the land trust's activities must be primarily in furtherance of its charitable purposes.<sup>222</sup> The organization is not, however, prohibited from engaging in a trade or business as a substantial part of its activities if it is in furtherance of the charitable purposes and if the organization is not organized or operated for the primary purpose of carrying on that trade or business.<sup>223</sup> Thus, a land trust that finds it necessary to finance its preservation activities in this manner can do so without losing its charitable status.<sup>224</sup>

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213. I.R.C. § 170(c)(2)(B).

214. *Id.*

215. I.R.C. § 170(c)(2)(D).

216. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(a).

217. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(b).

218. *See, e.g.*, Rev. Rul. 60-351, 1960-2 C.B. 169.

219. Treas. Reg. § 1.501(c)(3)-1(b)(1)(iv).

220. Treas. Reg. § 1.501(c)(3)-1(b)(4).

221. *Id.* For example, a small, local land trust might provide that its assets, upon termination, would go to a large national land conservation organization such as The Nature Conservancy. A final requirement of the "organized exclusively" test is that the land trust's articles of organization cannot empower it to engage in unpermitted political activity. Treas. Reg. § 1.501(c)(3)-1(b)(3). *See* text accompanying notes 225-28 *infra* for a discussion of the political activities limitation.

222. Treas. Reg. § 1.501(c)(3)-1(c)(1).

223. Treas. Reg. § 1.501(c)(3)-1(e).

224. Two other requirements of the "operated exclusively" test are (1) the organiza-

To satisfy the political activities limitation, the land trust must completely refrain from participating in political campaigns on behalf of a candidate for public office.<sup>225</sup> In addition, the land trust cannot devote a substantial part of its activities to attempting to influence legislation.<sup>226</sup> Unfortunately, there is no clear definition in the Code or Regulations of what constitutes "substantial"; rather, the decisions appear to be made on a case by case basis.<sup>227</sup> The land trust can, however, choose to use an alternative to the "substantial" test that sets a dollar limit on political expenditures.<sup>228</sup> The use of this alternative can remove much of the uncertainty for a land trust that finds it desirable or necessary to engage in some political activity.

(b) *Section 170(b)(1)(A) or Section 170(b)(1)(B)?*

After satisfying the criteria of section 170(c)(2) so as to qualify as a charitable organization, the land trust must be further classified as either a section 170(b)(1)(A) organization or a section 170(b)(1)(B) organization. This further classification is critical in that it will determine the extent of the deduction that the donors to the land trust will be allowed to claim.<sup>229</sup>

Classification of the land trust as a section 170(b)(1)(A) organization will entitle the donors to claim the maximum charitable de-

tion's net earnings must not inure to the benefit of private persons, § 1.501(c)(3)-1(c)(2); and (2) the organization cannot be an "action" organization (an organization that engages in unpermitted political activity). Treas. Reg. § 1.501(c)(3)-1(c)(3). See text accompanying notes 225-28 *infra* for a discussion of the political activities limitation.

225. I.R.C. §§ 170(c)(2)(D), 501(c)(3); Treas. Reg. §§ 1.501(c)(3)-1(b)(3)(ii), 1.501(c)(3)-1(c)(3)(iii).

226. I.R.C. §§ 170(c)(2)(D), 501(c)(3). Treas. Reg. §§ 1.501(c)(3)-1(h)(3)(i), 1.501(c)(3)-1(c)(3)(ii). "[A]n organization will be regarded as attempting to influence legislation if the organization (a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation." Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

Note also, that an organization cannot qualify under either I.R.C. § 170(c)(2) or I.R.C. § 501(c)(3) if it has the following two characteristics:

- (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and
- (h) it advocates or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public.

Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv).

227. E. FISCH, D. FREED & E. SCHACHTER, *supra* note 47, at § 905.

228. I.R.C. § 501(h). Note that this alternative applies only to certain organizations described in I.R.C. § 501(h)(4).

229. See I.R.C. §§ 170(b), 170(e); text accompanying notes 275-93 *infra*.

duction.<sup>230</sup> If, however, the land trust cannot qualify under this section, it will automatically be categorized as a section 170(b)(1)(B) organization,<sup>231</sup> which may limit the land trust's donors to a smaller charitable deduction<sup>232</sup> and place several restrictions on the land trust's operations.<sup>233</sup> Because qualification under section 170(b)(1)(A) is therefore far more beneficial, the following is a discussion of what the land trust must do to meet the requirements of that section.

#### (1) Section 170(b)(1)(A): Introduction

Section 170(b)(1)(A) offers several categories under which a charitable organization may qualify for the section's preferential tax treatment of donors to that organization. As will be discussed below, however, some of these categories may prove to be undesirable from the land trust's perspective.

Under section 170(b)(1)(A), the land trust may qualify as an organization described in either subsection (vi), (vii), or (viii).<sup>234</sup> Subsection (vi) includes those charitable organizations that normally receive a substantial part of their support from a governmental unit or from the general public ("publicly supported organizations").<sup>235</sup> Subsection (vii) includes those private foundations described in section 170(b)(1)(D). Of the section 170(b)(1)(D) organizations, the land trust may qualify as a "private operating foundation" described in section 170(b)(1)(D)(i).<sup>236</sup> Subsection (viii) of section 170(b)(1)(A) includes those charitable organizations described in sections 509(a)(2) and (3) of the Code. Of these two possibilities, the land trust may qualify under section 509(a)(2) as an organization that normally receives at least one-third of its support from certain permitted sources and normally does not receive more than one-third of its support from gross investment income ("broadly, publicly supported organizations").<sup>237</sup>

Of the various classifications available to the land trust under

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230. *Id.*

231. I.R.C. § 170(b)(1)(B).

232. See text accompanying notes 275-93 *infra*.

233. See text accompanying notes 238-39 *infra*.

234. I.R.C. § 170(b)(1)(A) also includes several subsections under which the land trust presumably could not qualify. These are subsection (i), churches; subsection (ii), certain educational organizations; subsection (iii), certain medical organizations; and subsection (iv), certain organizations which operate for the benefit of certain colleges and universities.

235. I.R.C. § 170(b)(1)(A)(vi).

236. The "private operating foundation" is defined in I.R.C. § 4942(j)(3).

237. I.R.C. § 509(a)(2).



section 170(b)(1)(A), classification as either a "private operating foundation" under subsection (vii) or a "broadly, publicly supported organization" under subsection (viii) is less desirable than classification as a "publicly supported organization" under subsection (vi). The disadvantages associated with classification as a "private operating foundation" relate to the additional burdens imposed upon all private foundations by sections 4940 through 4946.<sup>238</sup> These burdens include an excise tax on investment income<sup>239</sup> and restrictions on self-dealing between the foundation and substantial contributors.<sup>240</sup> The major disadvantage of classification as a "broadly, publicly supported organization" under subsection (viii) and section 509(a)(2), on the other hand, is that the land trust cannot count contributions from "substantial contributors" in meeting the one-third support requirement.<sup>241</sup> This rule is particularly onerous for the land trust because many of the land trust's donors would likely fall into the "substantial contributor" category.<sup>242</sup>

Because the "publicly supported organization" of subsection (vi) does not suffer from either of these drawbacks, it emerges as the most desirable categorization under section 170(b)(1)(A) for

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238. These additional burdens will also be imposed upon the land trust if it cannot qualify as a § 170(b)(1)(A) organization and must instead qualify as a § 170(b)(1)(B) organization. See I.R.C. § 509.

239. I.R.C. § 4940.

240. I.R.C. § 4941. See generally D. GRAY, *NONPRIVATE FOUNDATIONS* 13-14 (1978). In addition, the "private operating foundation" cannot take advantage of the alternative "substantial" test for the political activities limitation. See note 228 *supra*.

241. I.R.C. § 509(a)(2). "Substantial contributor" is defined in I.R.C. § 507(d)(2): [T]he term "substantial contributor" means any person who contributed or bequeathed an aggregate amount of more than \$5,000 to the private foundation, if such amount is more than 2 percent of the total contributions and bequests received by the foundation before the close of the taxable year of the foundation in which the contribution or bequest is received by the foundation from such person. In the case of a trust, the term "substantial contributor" also means the creator of the trust.

242. This result occurs because the land trust may receive only occasional, large gifts of land. See text accompanying notes 267-70 *infra*. The operation of this restriction may thus make it impossible for the land trust to qualify under § 509(a)(2). For example, suppose in the current tax year Land Trust receives two parcels of land, valued at \$6,000 each, from two different donors. Land Trust also manages to collect other support from the general public totalling \$2,000. Land Trust's total support is \$14,000. In order to qualify under I.R.C. § 509(a)(2), one-third of Land Trust's total support (approximately \$4,600) must come from the government and/or the public. In this example, however, Land Trust cannot count the two contributions of land in meeting this test because the donors are substantial contributors—they have donated over \$5,000 and the amount donated (\$6,000 each) is greater than 2% of Land Trust's total support (2% of \$14,000 = \$280). Therefore, Land Trust cannot meet the one-third support test since only \$2,000, and not \$4,600, have been received from the proper sources.

the land trust. The following discussion is therefore devoted to qualification under this category.

(2) The Requirements of Section 170(b)(1)(A)(vi)

As noted above, in order to qualify as a "publicly supported organization," the land trust must normally receive a substantial part of its support from a governmental unit and/or the general public. To meet this requirement, the land trust must satisfy either the "mechanical" test<sup>243</sup> or the "facts and circumstances" test.<sup>244</sup>

The "mechanical" test is met if the land trust (1) "normally" receives (2) at least one-third of its support from the government and/or the public.<sup>245</sup> The "normally" element of the mechanical test is satisfied for the current tax year and for the tax year immediately following the current year if, for the four tax years immediately preceding the current tax year, the land trust meets the one-third support test on an aggregate basis.<sup>246</sup> Slightly different normalcy periods are applied to newly created organizations<sup>247</sup> and organizations that have experienced a material change in their sources of support.<sup>248</sup>

In meeting the one-third government and/or public support requirement, the land trust must include in the denominator of the support fraction its total support for the normalcy period.<sup>249</sup> "Support" is defined under section 509(d) as follows:

- (1) gifts, grants, contributions, or membership fees;
- (2) [not applicable]
- (3) net income from unrelated business activities, whether or not such activities are carried on regularly as a trade or business;
- (4) gross investment income (as defined in subsection (e));
- (5) tax revenues levied for the benefit of an organization and either paid to or expended on behalf of such organization; and
- (6) the value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in section 170(c)(1) to an organization without charge.<sup>250</sup>

243. Treas. Reg. § 1.170A-9(e)(2). "Mechanical" is the term ascribed to this test by D. GRAY, *supra* note 240, at 59.

244. Treas. Reg. § 1.170A-9(e)(3).

245. Treas. Reg. § 1.170A-9(e)(2).

246. Treas. Reg. § 1.170A-9(e)(4).

247. Treas. Reg. § 1.170A-9(e)(4)(vi).

248. Treas. Reg. § 1.170A-9(e)(4)(v).

249. Treas. Reg. § 1.170A-9(e)(2).

250. I.R.C. § 509(d). I.R.C. § 509(d)(2), which is not applicable to § 170(b)(1)(A)(vi) organizations, includes as "support" gross receipts from related business activities. One of the additional respects in which a §§ 170(b)(1)(A)(viii)/509(a)(2) organization differs from a

In the numerator of the support fraction, some contributions may be counted fully, while other contributions may be counted only to a limited extent. The land trust may fully include any support, as defined above, received from a governmental unit or from another "publicly supported organization," unless these contributions represent amounts expressly or impliedly earmarked by the donor to the governmental unit or "publicly supported organization" as being for the benefit of the land trust that is attempting to satisfy the support requirement.<sup>251</sup> This latter category of earmarked contributions, as well as contributions from any individual, trust, or corporation, may be counted in the numerator only to the extent that the total contributions from any such contributor during the normalcy period do not exceed two percent (2%) of the land trust's total support for the same period.<sup>252</sup> The land trust need not, however, include "unusual grants" in either the numerator or denominator of the support fraction.<sup>253</sup>

If the land trust is unable to satisfy the "mechanical" test, it may nevertheless qualify as a "publicly supported organization" if it can meet the less rigorous "facts and circumstances" test.<sup>254</sup> This test has three requirements: (1) the land trust's governmental and/or public support must normally be ten percent (10%), as opposed

§ 170(b)(1)(A)(vi) organization is that receipts from related business activities are included in the support fraction of the former type of charitable organization.

251. Treas. Reg. § 1.170A-9(e)(6).

252. *Id.* Note that certain separate contributions will be considered as having been made by a single individual for purposes of the 2% limitation. Treas. Reg. § 1.170A-9(e)(6)(i).

253. Treas. Reg. § 1.170A-9(e)(6)(ii). "Unusual grants" are defined as follows:

The exclusion provided by this subdivision is generally intended to apply to substantial contributions or bequests from disinterested parties which contributions or bequests:

- (a) Are attracted by reason of the publicly supported nature of the organization;
- (b) Are unusual or unexpected with respect to the amount thereof; and
- (c) Would, by reason of their size, adversely affect the status of the organization

as normally being publicly supported . . . .

*Id.*

An example of a land trust that satisfies the "mechanical" test is as follows. Land Trust receives during the normalcy period four parcels of land valued at \$8,000, \$7,000, \$5,000, and \$2,000. Land Trust's remaining contributions (all of which are under \$500 each) for the same period of time are \$8,000. Land Trust's total support is \$30,000. To meet the one-third support test, \$10,000 must be contributed by the government and/or public; however, individual contributions may be counted only to the extent that they do not exceed \$600 (2% of Land Trust's total support of \$30,000). The contributions may be totalled as follows: \$8,000 (in contributions under \$500 each) plus \$2,400 (\$600 for each of the four parcels of land) equals \$10,400. Land Trust has thus met the "mechanical" test.

254. See note 244 *supra*.

to one-third, of its total support;<sup>255</sup> (2) the land trust must be organized and operated to attract new and additional public support on a continuous basis;<sup>256</sup> and (3) the facts and circumstances must indicate that the land trust is publicly supported.<sup>257</sup> The relevant facts and circumstances are as follows:<sup>258</sup>

- (1) percentage of public financial support;<sup>259</sup>
- (2) sources of support;<sup>260</sup>
- (3) representative governing body;<sup>261</sup>
- (4) availability of public facilities or services;<sup>262</sup> and
- (5) membership factors.<sup>263</sup>

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255. Treas. Reg. § 1.170A-9(e)(3)(i). The normalcy period and the support requirements, including the 2% limitation, of the "facts and circumstances" test are the same (except for the fact that only 10% of the organization's support must be from the government and/or public) as those of the "mechanical" test. See Treas. Reg. §§ 1.170A-9(e)(4), 1.170A-9(e)(6), and discussion in text accompanying notes 243-53 *supra*.

256. Treas. Reg. § 1.170A-9(e)(3)(ii) reads as follows:

An organization will be considered to meet this requirement if it maintains a continuous and bona fide program for solicitation of funds from the general public, community, or membership group involved, or if it carries on activities designed to attract support from governmental units or other organizations described in section 170(b)(1)(A)(i) through (vi). In determining whether an organization maintains a continuous and bona fide program for solicitation of funds from the general public or community, consideration will be given to whether the scope of its fund-raising activities is reasonable in light of its charitable activities. Consideration will also be given to the fact that an organization may, in its early years of existence, limit the scope of its solicitation to persons deemed most likely to provide seed money in an amount sufficient to enable it to commence its charitable activities and expand its solicitation program.

257. *Id.*

258. An organization is not generally required to satisfy all of these facts and circumstances. *Id.*

259. Treas. Reg. § 1.170A-9(e)(3)(iii). The higher that the percentage of public support is above 10%, the lesser is the burden of proving that the organization is publicly supported by the remaining factors. The closer that the percentage of public support is to 10%, the greater is the burden. *Id.*

260. Treas. Reg. § 1.170A-9(e)(3)(iv). The fact that the organization's public support is from the government or "a representative number of persons," rather than from members of a single family will be considered in determining if the organization is publicly supported. *Id.*

261. Treas. Reg. § 1.170A-9(e)(3)(v) reads as follows: "The fact that an organization has a governing body which represents the broad interests of the public, rather than the personal or private interests of a limited number of donors . . . will be taken into account in determining whether an organization is 'publicly supported.'"

262. Treas. Reg. § 1.170A-9(e)(3)(vi). Whether the organization provides public facilities or services, and whether the public participates in the organization's programs or policies will be considered in determining whether the organization is publicly supported.

263. Treas. Reg. § 1.170A-9(e)(3)(vii) (applicable to membership organizations only). Whether the organization is designed to attract many members in a community or in a particular field of interest will be considered in determining whether the organization is publicly supported. An example of a land trust that meets the "facts and circumstances" test is as follows. Land Trust's total support for the normalcy period is \$50,000, which is

Although the land trust is thus given two opportunities to qualify as a "publicly supported organization" for purposes of section 170(b)(1)(A)(vi), it may experience some difficulty in meeting even the less restrictive requirements of the "facts and circumstances" test. A memorandum from the Connecticut Land Trust Service Bureau to Connecticut Local Land Trusts<sup>264</sup> revealed that one Connecticut land trust had been informed by the Internal Revenue Service that it was going to be reclassified as a section 170(b)(1)(B) organization on the ground that it did not receive sufficient governmental and/or public support.<sup>265</sup> The author of the memo made the following observation:

[I]t appears that a number of land trusts will have a problem in meeting a "hard and fast" application of the ten percent support test. It may become increasingly difficult for land trusts in the future to meet the requirements of a . . . test which places a premium on the frequency of large gifts.<sup>266</sup>

The effects of the ten percent support requirement are thus dramatic and potentially catastrophic. A land trust that has received the appropriate balance of contributions during the normalcy period to meet the ten percent support test may suddenly be unable to satisfy the test if it accepts a large gift of land from an individual contributor.<sup>267</sup> The choices available to a land trust in this position are to try to qualify the gift as an "unusual grant,"<sup>268</sup> to accept an undivided interest in the property during that year and the

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comprised of a gift of land valued at \$46,000 and individual contributions, none of which exceeds \$1,000, valued at \$4,000. In determining whether Land Trust meets the 10% test, the \$4,000 can be counted *in toto*, due to the fact that no individual contribution is greater than 2% of Land Trust's total support (2% of \$50,000 = \$1,000). The gift of land can be counted to the extent that it does not exceed the 2% limit (it can be counted for \$1,000). The resulting figure of \$5,000 (\$4,000 + \$1,000) brings Land Trust within the 10% requirement (10% of \$50,000 = \$5,000). Assuming Land Trust is organized and operated to attract public support and satisfies the "facts and circumstances" factors during the normalcy period, it will qualify for classification under § 170(b)(1)(A)(vi).

264. Jack Gunther (August 16, 1978) (copy on file with *Vanderbilt Law Review*).

265. *Id.* at 1. The land trust involved is the Stamford Land Conservation Trust, Inc. The organization is contesting the reclassification. *Id.*

266. *Id.* at 3.

267. In the example in note 244 *supra*, Land Trust would not satisfy the 10% support test if it were to accept from an individual contributor an additional parcel valued at \$50,000. In that event, Land Trust's total support would be \$100,000. In determining whether Land Trust would meet the 10% support test, the individual contributions of \$4,000 (none of which exceeds \$1,000) may be counted *in toto*, however, each of the two gifts of land may only be counted for \$2,000 (2% of \$100,000). The \$8,000 total would be insufficient to meet the 10% support test since 10% of \$100,000 is \$10,000.

268. See note 253 *supra*. This solution is suggested by TPL, *Staying in Business as a Public Charity* (copy on file with *Vanderbilt Law Review*). It is uncertain whether such an effort would succeed.

following years,<sup>269</sup> to accept the property and solicit small contributions that may be added *in toto* to the numerator of the support fraction and thus offset the effect of the large gift,<sup>270</sup> to accept the land and lose the beneficial tax status, or to refuse to accept the property.

This situation suggests that the rigid governmental and/or public support percentages perhaps should be relaxed to allow the continuation of private open space preservation efforts.<sup>271</sup> If charitable status is granted only to bona fide land trusts, as suggested earlier,<sup>272</sup> and if the "facts and circumstances" indicate that the land trust is indeed publicly supported,<sup>273</sup> there is no policy objection to classifying the land trust as a "publicly supported organization" even if it is unable to meet the ten percent requirement. Indeed, given the stated support for conservation efforts expressed in the Internal Revenue Service rulings noted previously,<sup>274</sup> there is an affirmative basis for instituting measures that encourage the activities of these organizations.

## 2. Determining the Extent of the Charitable Deduction

Once the land trust has qualified as either a section 170(b)(1)(A) organization or a section 170(b)(1)(B) organization, the next step is to determine the extent of the charitable deduction to which its donors will be entitled.<sup>275</sup> This process must be divided into two parts: determination of the percentage of the fair market value of the donated property that may be deducted and determination of the donor's deduction ceiling. It is here that the critical difference between classification as a section 170(b)(1)(A)

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269. The value of these interests must be carefully calculated to avoid upsetting the 10% support balance. TPL, *supra* note 268. Note that this option requires considerable cooperation from the donor who may or may not be in a position to accommodate the land trust's needs.

270. See text accompanying notes 251-63 *supra*. Again, it is uncertain whether such an effort would succeed.

271. The alternative for the land trust that cannot meet the 10% support test is classification as a "private operating foundation" under I.R.C. § 170(b)(1)(A)(vii) or classification as a § 170(b)(1)(B) organization (the land trust's inability to meet the 10% support test most certainly means that it could not qualify as a "broadly, publicly supported organization" under I.R.C. § 170(b)(1)(A)(viii)). As noted earlier, these alternatives would impose onerous burdens upon the land trust. See text accompanying notes 234-42 *supra*.

272. See text accompanying notes 210-12 *supra*.

273. See text accompanying notes 257-63 *supra*.

274. See discussion in text accompanying notes 205-08 *supra*.

275. This section will deal with individual rather than corporate donors.

organization and a section 170(b)(1)(B) organization becomes apparent.

(a) *Percentage of the Fair Market Value*

The fair market value (FMV) of a piece of property is the price at which the property would change hands between a willing buyer and a willing seller.<sup>276</sup> The general rule is that the donor may take 100% of the FMV of the donated property as a charitable deduction.<sup>277</sup> Under section 170(e), however, there are certain exceptions to this rule based upon the classification of the donee organization and the type of property being donated. These exceptions make the general rule inapplicable in many situations.

This Article considers the donation of real estate that may be categorized either as long-term capital gain property (held for more than a year)<sup>278</sup> or as short-term capital gain property (held for less than a year).<sup>279</sup> If long-term capital gain property is transferred to a section 170(b)(1)(B) private organization, section 170(e) provides that to determine the amount deductible, the property's FMV must be reduced by 40% of that portion of the FMV that would be gain if the property were sold.<sup>280</sup> In other words, the donor can only deduct his basis in the property plus 60% of the would-be gain. If, however, the same property is donated to a section 170(b)(1)(A) organization, the donor may deduct 100% of the FMV, which includes the basis plus 100% of the would-be gain.<sup>281</sup> In the case of all donations of short-term capital gain property, section 170(e) provides that the property's FMV must be reduced by 100% of that portion of the FMV that would he gain if the

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276. Treas. Reg. § 1.170A-1(c). Treas. Reg. § 1.170A-1(a)(2)(ii) delineates the information that the taxpayer must attach to his income tax return when making a charitable contribution of property other than money.

277. See I.R.C. § 170(a)(1).

278. I.R.C. §§ 1221, 1222.

279. *Id.* For purposes of I.R.C. § 170, short-term capital gain property is referred to as ordinary income property. See Treas. Reg. § 1.170A-4(b)(1). Other types of property that this Article will not directly consider and that the donor might contribute to the land trust include ordinary income property described in I.R.C. § 64 (such as art created by the donor), money, real estate held by a dealer, real estate used in a trade or business, etc. See Treas. Reg. § 1.170A-4(b)(1). This Article will not deal with recapture.

280. I.R.C. § 170(e)(1)(B). For example, if Owner gives long-term capital gain property with a FMV of \$100,000 and a basis of \$60,000 to a § 170(b)(1)(B) organization, the FMV is reduced by 40% of the would-be gain. The would-be gain is equal to the FMV less the basis (\$100,000 - \$60,000 = \$40,000). Forty percent of \$40,000 is \$16,000. When this amount (\$16,000) is subtracted from the property's FMV (\$100,000), the resulting figure (\$84,000) is the amount deductible (without regard to the deduction ceiling).

281. See I.R.C. §§ 170(a)(1), 170(e).

property were sold to determine the amount deductible.<sup>282</sup> In other words, the donor may deduct only his basis in the property and no portion of the would-be gain, regardless of the charity's classification.<sup>283</sup>

(b) *Deduction Ceiling*

The deduction ceiling limits the amount that the donor may claim as a charitable deduction to a percentage of the donor's adjusted gross income (AGI).<sup>284</sup> This percentage also varies depending upon the classification of the charity and the type of property involved.

There are three rules used to determine the amount of the donor's deduction ceiling. The first rule applies to the donation of property, other than long-term capital gain property, to a section 170(b)(1)(A) organization. In this event, the donor's deduction is limited to 50% of his AGI.<sup>285</sup>

The second rule applies to the donation of long-term capital gain property to a section 170(b)(1)(A) organization. In this event, the donor's deduction is limited to 30% of his AGI.<sup>286</sup> There is, however, an alternative ceiling that the donor may elect to use in this situation. Under section 170(b)(1)(C), the donor can raise the ceiling to 50% if the percentage of the FMV of the property that he deducts is lowered from 100% to his basis plus 60% of the would-be gain.<sup>287</sup>

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282. I.R.C. § 170(e)(1)(A). For example, if, in the hypothetical of note 280 *supra*, the property were short-term capital gain property, the FMV of \$100,000 would be reduced by 100% of the would-be gain of \$40,000 and the resulting deduction would be \$60,000 (without regard to the deduction ceiling).

283. Ordinary income property described in I.R.C. § 64, *see* note 279 *supra*, must also be reduced by 100% of the would-be gain, regardless of the donee-charity's classification. I.R.C. § 170(e)(1)(A). Money, on the other hand, is fully deductible, regardless of the donee-charity's classification. *See* I.R.C. § 170(a)(1).

284. I.R.C. § 170(b). *See* note 197 *supra* for a more precise definition of the deduction ceiling.

285. I.R.C. § 170(b)(1)(A). For example, Owner, with an AGI of \$60,000, donates long-term capital gain property worth \$40,000 to Land Trust, a § 170(b)(1)(A) organization. Because the FMV of the property need not be reduced under § 170(e), *see* text accompanying note 281 *supra*, the amount deductible (without regard to the deduction ceiling) is \$40,000. Owner's deduction ceiling, however, limits his deduction to 50% of his AGI of \$60,000, or \$30,000. Thus, Owner can only deduct \$30,000 in the current tax year.

286. I.R.C. § 170(b)(1)(C)(i). The lower 30% ceiling applies only if the property has, in fact, appreciated. Treas. Reg. § 1.170A-8(d)(3). In referring to long-term capital gain property, this Article assumes appreciation.

287. I.R.C. § 170(b)(1)(C)(iii). The alternative is useful if the gift is several times greater than the donor's AGI. For example, Owner, with an AGI of \$50,000, donates land



The third rule applies to all donations of property to a section 170(b)(1)(B) organization. In this event, the donor's deduction is limited to the lesser of (1) 20% of the donor's AGI or (2) the excess of 50% of the donor's AGI over the amount of charitable deductions allowable to section 170(b)(1)(A) organizations in the current tax year.<sup>288</sup>

Because of the deduction ceilings, the donor may be unable to claim the full amount of the deduction to which he is otherwise entitled. For example, Owner, with an AGI of \$50,000, gives long-term capital gain property, with a FMV of \$30,000, to Land Trust, a section 170(b)(1)(A) organization. Without regard to the deduction ceilings, Owner can deduct 100% of the FMV of the property or \$30,000;<sup>289</sup> however, the deduction ceiling limits Owner to 30%

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(which is long-term capital gain property) worth \$150,000 (with a basis of \$70,000) to Land Trust, a § 170(b)(1)(A) organization. Using the 30% ceiling, Owner could only deduct 30% of his AGI (30% of \$50,000), or \$15,000 in the current tax year. Taking advantage of the carry forward provisions, see text accompanying notes 291-93 *infra*, (and assuming Owner's AGI remains the same), Owner can also deduct \$15,000 in each of the five years following the year of the deduction. Owner's total deduction using the 30% ceiling is thus \$90,000 (\$15,000 x 6 years).

Using the alternative method, Owner must first reduce the FMV of the property under § 170(e) by 40% of the would-be gain. The would-be gain is \$80,000 (\$150,000 FMV less \$70,000 basis). Forty percent of \$80,000 is \$32,000. This amount, \$32,000, is then subtracted from the FMV of \$150,000 to reach the maximum amount deductible of \$118,000. Applying the alternative deduction ceiling, Owner may deduct 50% of his AGI of \$50,000, or \$25,000 in the current tax year. Taking advantage of the carry forward provisions, Owner can deduct this same amount (\$25,000) in each of the five following years, giving him a ceiling of \$150,000 (\$25,000 x 6 years). The maximum amount deductible of \$118,000 may thus be claimed by Owner using the 50% alternative.

288. I.R.C. § 170(b)(1)(B). This ceiling operates to ensure that the donor of multiple charitable gifts does not realize total deductions in the current tax year greater than 50% of his AGI. For example, Owner, with an AGI of \$10,000, gives long-term capital gain property worth \$4,000 to Church, a § 170(b)(1)(A) organization. He also gives short-term capital gain property worth \$3,000 (with a basis of \$2,000) to Land Trust, a § 170(b)(1)(B) organization. The amount deductible for the gift to Church is \$4,000. The FMV need not be reduced by § 170(e), see text accompanying notes 280-81 *supra*, and the deduction ceiling (50% of Owner's AGI = \$5,000) will not prevent Owner from realizing the full amount in the current tax year.

To determine the amount of the deduction for the gift to Land Trust, the property's FMV must first be reduced, according to § 170(e), by 100% of the would-be gain. See text accompanying notes 282-83 *supra*. Thus, the maximum amount of the deduction for this property is \$2,000 (\$3,000 FMV - \$1,000 gain). The deduction ceiling is then applied. Owner may deduct the lesser of (1) 20% of his AGI (20% of \$10,000 = \$2,000) or (2) the excess of 50% of Owner's AGI (\$5,000) over the amount of charitable deductions allowable to § 170(b)(1)(A) organizations in the current tax year (\$4,000 to Church), or \$1,000. Thus, Owner may only deduct the lesser amount of \$1,000 for the property donated to Land Trust, and Owner's total deduction (\$4,000 to Church + \$1,000 to Land Trust = \$5,000) does not exceed 50% of his AGI.

289. Long-term capital gain property donated to a § 170(b)(1)(A) organization need

of his AGI or \$15,000.<sup>290</sup> Thus, Owner is unable to deduct the full \$30,000 in the current tax year. Owner can, however, take advantage of the carry-forward provisions. These provisions allow the donor to a section 170(b)(1)(A) organization to claim the excess portion of his donation during the five years following the year in which the donation was made.<sup>291</sup> Thus, Owner in the above example will be able to take a \$15,000 deduction in the following tax year.<sup>292</sup> If, however, Owner had donated his property to a section 170(b)(1)(B) organization, his deduction ceiling would be lowered to 20% of his AGI, or \$10,000, and no carry-forward would be permitted.<sup>293</sup> Thus, Owner would lose \$20,000 in charitable deductions (the amount by which the FMV of his donation would exceed his deduction ceiling) with no possibility of claiming this amount in future tax years.

The above discussion underlines the importance of the land trust's gaining classification as a section 170(b)(1)(A) organization. By being so classified, the land trust entitles its prospective donors to the maximum tax benefits and thereby creates a significant incentive for donation. The land trust should take care, however, to qualify further under subsection (vi) of section 170(b)(1)(A) as a "publicly supported organization." As noted above, this step will enable the land trust to avoid the many difficulties associated with classification under the remaining subsections.

### C. *The Federal Income Tax Charitable Deduction: Bargain Sales of Land*

The discussion of the federal income tax charitable deduction has thus far assumed that the landowner desires to make an outright donation of his property. It is possible, however, that he will be financially unable to make such a complete donation. In this event, the landowner may be induced to make a partial gift by selling his property to the land trust at a price below its FMV. Such a transaction is known in tax terminology as a "bargain sale";<sup>294</sup> the landowner in effect sells a portion of the property and gives a por-

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not be reduced by § 170(e). See text accompanying notes 280-81 *supra*.

290. This percentage is the deduction ceiling (without regard to the alternative ceiling) for long-term capital gain property donated to a § 170(b)(1)(A) organization. See text accompanying note 286 *supra*.

291. I.R.C. § 170(d).

292. This result assumes that Owner's AGI remains the same in the following years.

293. See I.R.C. § 170(d).

294. See I.R.C. §§ 170(e)(2), 1011(b).

tion of the property.<sup>295</sup> The value of the sale portion is the amount of consideration received. The value of the gift portion is the difference between the FMV and the sale price.<sup>296</sup>

The federal income tax consequences of a bargain sale are two-fold. First, the "donor" may be liable for taxes if he realizes a gain on the sale portion of the property.<sup>297</sup> Second, the donor may be entitled to a charitable deduction based upon the value of the gift portion of the property.<sup>298</sup> Because the bargain sale may enable the land trust to acquire environmentally significant property at a greatly reduced price, it is an important option worthy of serious consideration.

In determining whether the donor will be entitled to a charitable deduction, whether he will realize gain, and what the amount of such deduction and gain will be, a three-step process must be followed. First, it must be determined whether any charitable deduction is allowable under section 170 without regard to the Code section governing bargain sales.<sup>299</sup> If such a deduction is allowable, the second step is reached: the property's basis and gain are allocated between the sale and gift portions of the property.<sup>300</sup> The final step involves determining the amount of the charitable deduction based upon the allocations made in step two of the process.<sup>301</sup>

#### 1. Step One: Determining Whether Any Charitable Deduction Is Allowable

To determine whether any charitable deduction is allowable, the value of the gift portion is reduced, if necessary, according to the provisions of section 170(e) discussed above, and the appropriate deduction ceiling is applied.<sup>302</sup> If the figure reached is "0," no charitable deduction is allowed and the process is halted, except for determining the gain. If the figure reached is greater than "0," the process continues to steps two and three.<sup>303</sup> The following ex-

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295. Treas. Reg. § 1.170A-4(c)(2)(iii).

296. See I.R.C. §§ 170(e)(2), 1011(b); Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2.

297. See I.R.C. § 1001. Note, however, that the amount of taxes for which the "donor" will be liable is not necessarily equal to 100% of the gain realized. See I.R.C. § 1202.

298. See I.R.C. §§ 170, 1011(b); Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2.

299. Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2. The Code section dealing with bargain sales to charity is I.R.C. § 1011(b).

300. Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2.

301. *Id.*

302. *Id.*

303. *Id.*

amples are illustrative of this determination.

*Example 1:*<sup>304</sup> Owner, with an AGI of \$50,000, sells to Land Trust (a section 170(b)(1)(A) organization) for \$4,000 certain *short-term* capital gain property with a FMV of \$10,000 and a basis of \$4,000. If the property were sold at FMV, the gain would be \$6,000 (FMV less basis). The value of the gift is \$6,000 (FMV less sale price). For reference, the relevant figures are:

FMV:	\$10,000
Sale Price:	4,000
Basis:	4,000
Value of Gift:	6,000
Gain if sold at FMV:	6,000

To determine whether any charitable deduction is allowable, the value of the gift (\$6,000) is reduced, if necessary, according to the provisions of section 170(e). As previously noted, that section provides that the FMV of short-term capital gain property must be reduced by 100% of that portion of the FMV which represents would-be gain.<sup>305</sup> In this case, that portion of the property's FMV that represents would-be gain is \$6,000. When this amount is subtracted from the value of the gift, the number reached is "0" (\$6,000-\$6,000), and the donor will therefore be entitled to no charitable deduction.

The gain in this case is also "0." It is determined by subtracting the basis of the property (\$4,000) from the sale price (\$4,000).<sup>306</sup> Owner will therefore incur no tax liability as a result of the transaction.

*Example 2:* Owner, with an AGI of \$50,000, sells to Land Trust (a section 170(b)(1)(A) organization) certain *long-term* capital gain property with a FMV of \$10,000 and a basis of \$4,000. If the property were sold at FMV, the gain would be \$6,000. The value of the gift is \$6,000. For reference, the relevant figures are:

FMV:	\$10,000
Sale Price:	4,000
Basis:	4,000
Value of Gift:	6,000
Gain if sold at FMV:	6,000

Once again, the value of the gift (\$6,000) is reduced, if necessary, by section 170(e). As previously noted, that section provides that no reduction is required in the case of *long-term* capital gain property donated to a section 170(b)(1)(A) organization.<sup>307</sup> The relevant deduction ceiling is then applied. In this situation (long-term

304. This example is taken from Treas. Reg. § 1.1011-2(c), example (5).

305. See text accompanying note 282 *supra*.

306. See Treas. Reg. § 1.1011-2.

307. See text accompanying note 281 *supra*.

capital gain property donated to a section 170(b)(1)(A) organization), the deduction ceiling is 30% of the donor's AGI (30% of \$50,000 = \$15,000).<sup>308</sup> Because the ceiling of \$15,000 will not prevent a \$6,000 deduction, the figure that results from this determination is greater than "0." A charitable deduction is therefore allowable and the next step in the process may be considered.

## 2. Step Two: Allocating Basis and Determining Gain

Allocating basis involves apportioning the property's entire basis between the sale and gift portions of the land.<sup>309</sup> To do this, the percentage of the land "sold" and the percentage of the land "given" must first be determined.<sup>310</sup> The percentage of the land sold is found by dividing the sale price by the property's FMV.<sup>311</sup> In example (2) above, dividing the sale price (\$4,000) by the FMV (\$10,000) results in the figure of 40% sold. The gift portion is therefore equal to 60% of the property. These percentages are then applied to the property's basis in order to allocate the basis between the sale and gift portions.<sup>312</sup> In example (2), 40% of the \$4,000 basis, or \$1,600, is allocable to the sale portion; 60% of the \$4,000 basis, or \$2,400, is allocable to the gift portion.

The gain can now be determined for both the sale and gift portions of the property. The gain from the sale portion will be taxable.<sup>313</sup> The gain attributable to the gift portion may reduce the amount of the charitable deduction, if necessary, under section 170(e).<sup>314</sup>

The gain attributable to the sale portion is reached by subtracting the basis allocated to the sale portion from the sale price.<sup>315</sup> In example (2), \$1,600 (allocated basis) subtracted from \$4,000 (sale price) yields \$2,400, which is the amount of the gain that may be taxable.

The gain attributable to the gift portion is determined by subtracting the allocated basis of the gift portion from the value of the gift.<sup>316</sup> In example (2), \$2,400 (allocated basis) subtracted from

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308. See text accompanying note 286 *supra*.

309. See Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2.

310. See Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2(b).

311. See Treas. Reg. § 1.1011-2(b).

312. See Treas. Reg. §§ 1.170A-4(c)(2), 1.1011-2(b).

313. See note 297 *supra*.

314. Treas. Reg. § 1.170A-4.

315. See I.R.C. § 1001; Treas. Reg. § 1.1011-2.

316. See I.R.C. § 1001; Treas. Reg. § 1.170A-4(c)(2).

\$6,000 (value of gift), yields \$3,600. This figure represents the amount of the gain that will be used to reduce the value of the gift, if necessary, under section 170(e).

### 3. Step Three: Determining the Amount of the Charitable Deduction

The amount of the charitable deduction available to Owner can now be determined. Owner is entitled to deduct the entire value of the gift, unless that amount must be reduced by section 170(e) using the allocations made in Step Two.<sup>317</sup> The deduction ceiling is then applied to determine the maximum deduction that can be claimed in the current tax year.<sup>318</sup>

In example (2), the value of the gift (\$6,000) need not be reduced by section 170(e) because long-term capital gain property is being donated to a section 170(b)(1)(A) organization.<sup>319</sup> Similarly, the deduction ceiling (30% of Owner's AGI of \$50,000 = \$15,000) will not prevent Owner from claiming the entire deduction in the current tax year.<sup>320</sup> A slight alteration of the facts will, however, change this result. If the land trust in example (2) were a section 170(b)(1)(B) organization, the value of the gift (\$6,000) would be reduced, according to section 170(e), by 40% of the would-be gain.<sup>321</sup> Using the allocated gain figure from Step Two (\$3,600), the gift would be reduced by 40% of \$3,600, or \$1,440. The amount of the charitable deduction (\$6,000 - \$1,440) would thus total \$4,560. The deduction ceiling (20% of Owner's AGI of \$50,000 = \$10,000) would not prevent Owner from claiming this amount in the current tax year.<sup>322</sup>

From the above discussion, it can be seen that a working knowledge of the mechanics of the bargain sale is a valuable asset. With this knowledge, the land trust adds an important device to the techniques available for open space preservation.<sup>323</sup>

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317. See I.R.C. §§ 170(a)(1), 170(e); Treas. Reg. § 1.170A-4(c)(2).

318. See text accompanying notes 284-93 *supra*.

319. See text accompanying note 281 *supra*.

320. See text accompanying note 286 *supra*.

321. See text accompanying note 280 *supra*.

322. See text accompanying note 288 *supra*.

323. The Nature Conservancy (TNC) has successfully used the bargain sale device in preserving the Virginia barrier islands. These islands were endangered when a development company planned to create a "sprawling, luxurious retirement and recreation community" on three of the islands. Noonan, *The Virginia Coast Reserve: Acquisition Strategies for Coastal Zone Preservation*, 3 COASTAL ZONE MANAGEMENT J. 405, 408 (1977). The value of these islands was not minimal:

D. *The Federal Income Tax Charitable Deduction: Gifts of Partial Interests in Property*

1. Section 170(f)(3)

If the landowner does not wish to transfer the entire interest in his property to the land trust (either by gift or by bargain sale), he may nonetheless be interested in making a gift of a partial interest. The tax consequences of such gifts are governed by Code section 170(f)(3). With certain enumerated exceptions, that section disallows deductions for contributions of less than the donor's entire interest in property.<sup>324</sup>

The exceptions to section 170(f)(3) under which a gift of a partial interest can qualify for a charitable deduction are (1) transfers that would be deductible under section 170(f)(2) if made in trust;<sup>325</sup> (2) transfers of a remainder interest in a personal residence or farm;<sup>326</sup> (3) transfers of an undivided portion of the taxpayer's entire interest in property;<sup>327</sup> and (4) transfers of a lease, option to purchase, perpetual easement, or remainder in real prop-

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The low, wilderness islands provide a natural breakwater against the Atlantic, protecting the bays and salt marshes behind them. These waters are a spawning ground for an incredible variety of wildfowl, fish, mollusks and crustaceans and are of inestimable value to sportsmen and commercial fishermen. The development intended for this sandy wilderness included a causeway to the mainland, countless residential lots—each with its own outlet to the ocean—yacht basins, hotels, private clubs, shopping malls, convention centers, business and professional buildings, an airport and a seaplane facility.

Wood, *Business-suited Saviors of Nation's Vanishing Wilds*, SMITHSONIAN, Dec. 1978, at 77, 79.

By use of the bargain sale, TNC first acquired Godwin Island (north of the three islands targeted for development), to establish a foothold in the area. Then, after intensive negotiations and pressure from conservation groups, the development company agreed to abandon its plans and to bargain sell to TNC the original three islands. These four islands now form part of the Virginia Coast Reserve which contains, in all, eighteen barrier islands. *See id.*; Noonan, *supra* this note.

324. I.R.C. § 170(f)(3). Note that a "deduction is allowed . . . for a contribution of a partial interest in property if such interest is the taxpayer's entire interest in the property . . ." provided that the property in which such interest exists was not divided in order to create such interest and thus to avoid § 170(f)(3). Treas. Reg. § 1.170A-7(a)(2)(i). A deduction is also allowed if all of the donor's interest in the property is transferred in partial interests to multiple charitable organizations. *See* Treas. Reg. § 1.170A-7(a)(2)(ii).

325. I.R.C. § 170(f)(3)(A). Under I.R.C. § 170(f)(2), contributions in trust of less than the donor's entire interest in the property are deductible only if the transfer meets the requirements of that section. *See* Treas. Reg. § 1.170A-6 for an explanation of these requirements. Note, however, that as long as all of the donor's interest in the property is transferred in partial interests in trust to multiple charitable organizations, the restrictions of § 170(f)(2) do not apply. I.R.C. § 170(f)(2)(D).

326. I.R.C. § 170(f)(3)(B)(i).

327. I.R.C. § 170(f)(3)(B)(ii).

erty granted to a section 170(b)(1)(A) organization for conservation purposes.<sup>328</sup> "Conservation purposes" are defined as follows:

- (i) the preservation of land areas for public outdoor recreation, or education or scenic enjoyment;
- (ii) the preservation of historically important land areas or structures; or
- (iii) the protection of natural environmental systems.<sup>329</sup>

Given these broad exceptions (especially the exception for transfers for conservation purposes), the landowner who donates less than his entire interest in property to a land trust should have little difficulty in qualifying for a deduction.<sup>330</sup> Nevertheless, problems may arise under this section for the donor of a restricted fee, such as a defeasible fee or a fee restricted by covenants.<sup>331</sup>

Technically, the transfer of a restricted fee does not constitute a transfer of the donor's entire interest in the property.<sup>332</sup> In the case of a defeasible fee, the donor retains the possibility of possessing the property in the future;<sup>333</sup> in the case of a fee restricted by covenants, he retains the right to enforce the particular restriction.<sup>334</sup> Because transfers of these restricted fees do not fit clearly within one of the exceptions to section 170(f)(3), a question may be raised regarding their qualification for a charitable deduction.

Fortunately, the Regulations have partially resolved this potential problem. In discussing the charitable deduction generally, the Regulations provide:

If an interest in property passes to, or is vested in, charity on the date of the gift and the interest would be defeated by the subsequent performance of some act or the happening of some event, the possibility of occurrence of which appears on the date of the gift to be so *remote as to be negligible*, the deduction is allowable. For example, A transfers land to a city government for as long as the land is used by the city for a public park. If on the date of the gift the city does plan to use the land for a park and the possibility that the city will not use the land for a public park is so remote as to be negligible, A is entitled to a deduction under section 170 for his charitable contribution.<sup>335</sup>

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328. I.R.C. § 170(f)(3)(B)(iii), (iv). These sections at present apply only until June 14, 1981.

329. I.R.C. § 170(f)(3)(C).

330. This statement, of course, assumes that the land trust can qualify as a § 170(b)(1)(A) organization. See text accompanying notes 234-74 *supra*.

331. For a discussion of defeasible fees and covenants see text accompanying notes 118-53 *supra*.

332. See Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69, 82 (1975); Young, *Donor Restricted Charitable Gifts*, TAXES, Jan. 1977, at 54, 57.

333. See text accompanying note 121 *supra*.

334. See text accompanying notes 136-47 *supra*.

335. Treas. Reg. § 1.170A-1(e) (emphasis added).



This same provision is included in the Regulations to section 170(f)(3).<sup>336</sup>

It therefore appears that, at least in the case of a defeasible fee, the deduction will be allowed as long as the possibility of defeasance is "negligible." Although it is not specifically mentioned, there would seem to be an even stronger basis for allowing a deduction in the case of the transfer of a fee restricted by covenants. Since the breach of the covenant cannot result in a forfeiture,<sup>337</sup> as in the case of a defeasible fee, it would make little sense to allow a deduction for the transfer of a defeasible fee and not allow a deduction for the covenant-restricted fee, at least where the chance of breach is slight. Nevertheless, the donor of a restricted fee (either defeasible or covenant-restricted) must be cautious, because there is no clear standard of what constitutes a "negligible" chance of the condition being broken.<sup>338</sup>

## 2. Valuation of the Partial Interest; Amount of Deduction

Once it is determined that the transfer of the partial interest will entitle the donor to a deduction, the partial interest must be valued and the amount of the deduction determined. This section of the Article focuses upon the valuation and determination of the amount of the deduction for one of the most popular devices for the transfer of a partial interest, the conservation easement.<sup>339</sup>

The method for valuation of a conservation easement for purposes of the charitable deduction is well-established and is known as the "before and after" test.<sup>340</sup> The FMV of the property with the conservation easement attached (the "after" value) is subtracted from the FMV of the property without the conservation easement attached (the "before" value). The difference is the value of the conservation easement.<sup>341</sup>

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336. Treas. Reg. § 1.170A-7(a)(3).

337. See text accompanying note 145 *supra*.

338. To avoid this uncertainty, "[t]he safer course in the first instance would be to reserve the enforcement rights [or the future interest, in the case of a defeasible fee] in favor of one or more other charitable organizations and not in favor of the donor." Browne, *supra* note 332, at 82. In this way the donor will certainly be able to claim a deduction based on the rule cited in note 324 *supra* (a deduction is allowed if all of the donor's interest in the property is transferred in partial interests to multiple charitable organizations).

339. See text accompanying notes 154-81 *supra*. See generally Browne, *supra* note 332, at 86. For the valuation of other partial interests see Treas. Reg. § 1.170A-12 (remainder interests) and Young, *supra* note 332, at 54 (restricted fees).

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

341. *Id.* If the donor of the conservation easement owns a parcel of land ("A") adjacent to the easement-restricted property ("B"), it is possible that the FMV of parcel "A"

In order to determine the amount of the charitable deduction for the transfer of a conservation easement, it is necessary to allocate basis and gain in much the same way as with a bargain sale.<sup>342</sup> The following example illustrates this process:

Donor, with an AGI of \$50,000, gives Land Trust, a section 170(b)(1)(B) organization, a conservation easement valued at \$6,000. The FMV of the property (which is long-term capital gain property) without the easement is \$10,000. The basis of the property is \$5,000. The relevant figures are:

FMV of property without easement:	\$10,000
FMV of easement:	6,000
Basis:	5,000
Gain on total property if sold (FMV of property less basis):	5,000

The amount of basis allocated to the easement corresponds to the percentage of the FMV of the entire property that can be attributed to the easement.<sup>343</sup> In this case, the easement constitutes 60% of the FMV of the property

( $\frac{\text{FMV of easement}}{\text{FMV of property}} = \frac{\$6,000}{\$10,000} = 60\%$ ). Thus, 60% of the basis, or \$3,000, is allocated to the easement. The remainder of the basis (\$2,000) is allocated to the underlying fee.

There are two uses of the allocated basis figures. First, the basis allocated to the underlying fee will be used to determine gain if the fee is sold at some point in the future.<sup>344</sup> In the above example, if the fee is sold for \$4,000, the amount of gain is equal to the sale price minus the allocated basis (\$4,000 - \$2,000), or \$2,000, which is the taxable amount.<sup>345</sup>

The second and, for the land trust's purposes, more important use of the allocated basis is in the determination of the amount of the charitable deduction.<sup>346</sup> As related above, in the case of all charitable donations the amount of the gift is reduced, if necessary, by section 170(e).<sup>347</sup> If the above example involved the gift of a conservation easement (on long-term capital gain property) to a

may be increased due to the restrictions imposed by the conservation easement upon parcel "B." Whether the amount by which the FMV of parcel "A" is increased should be subtracted from the value of the conservation easement for charitable deduction purposes is discussed by Browne, *supra* note 332, at 86-88.

342. See Treas. Reg. § 1.170A-4(c)(1). See generally Browne, *supra* note 332 at 88. For a discussion of the bargain sale process, see text accompanying notes 309-16 *supra*.

343. See Treas. Reg. § 1.170A-4(c)(1).

344. See I.R.C. § 1001.

345. *Id.*

346. See Treas. Reg. § 1.170A-4(c)(1).

347. See text accompanying notes 276-83 *supra*. See also Treas. Reg. § 1.170A-4.

section 170(b)(1)(A) organization, no reduction would be necessary; the donor could deduct the full value of the easement.<sup>348</sup> In the above example, however, the FMV of the gift (\$6,000) must be reduced by 40% of that portion of the FMV that would be gain if the easement were sold, since the easement was given to a section 170(b)(1)(B) organization.<sup>349</sup> The amount that would be gain if the easement were sold is equal to the FMV of the easement (\$6,000) minus the allocated basis (\$3,000), or \$3,000.<sup>350</sup> Forty percent of \$3,000 equals \$1,200. This amount (\$1,200) is then subtracted from the FMV of the easement (\$6,000) to reach the amount of the charitable deduction (\$6,000 - \$1,200 = \$4,800). When the relevant deduction ceiling is applied (20% of the donor's AGI of \$50,000 = \$10,000),<sup>351</sup> the gift is found to be fully deductible in the current year.

The gift of a partial interest in property provides the land trust and landowner with an additional open space preservation technique. Because the tax consequences of using this device and the other devices previously discussed are of central importance, they have been examined in detail.<sup>352</sup> The following case study<sup>353</sup> demonstrates that familiarity with the tax laws greatly enhances the ability of the land trust and landowner to reach a mutually advantageous decision regarding the disposition of the property in question.

*H* owned a 1,000-acre parcel of property, which together with the adjacent 2,000 acres owned by the California Fish and Game Department formed an entire watershed flowing directly to the Pacific Ocean. Although The Nature Conservancy (TNC) had been interested in the land for several years, it was not until 1965 that *H* agreed to sell the property to TNC for its fair market value of

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348. See text accompanying note 281 *supra*. If an easement on short-term capital gain property were donated to either a § 170(b)(1)(A) or a § 170(b)(1)(B) land trust, the value of the gift would be reduced by 100% of the would-be gain. See text accompanying note 282 *supra*.

349. See text accompanying note 280 *supra* for the rule relating to the donation of long-term capital gain property to a § 170(b)(1)(B) organization.

350. See I.R.C. § 1001.

351. See text accompanying note 288 *supra*. It is also possible to bargain sell a conservation easement. For a discussion of this rather complicated process (which involves a double allocation of basis and gain), see Browne, *supra* note 332, at 92-93.

352. For other tax consequences of transferring property for conservation purposes, see Thomas, *Transfers of Land to the State for Conservation Purposes: Methods, Guarantees, and Tax Analysis for Prospective Donors*, 36 OHIO ST. L.J. 545 (1975).

353. This case study is fully described in PROTECTING NATURE'S ESTATE, *supra* note 26, at 59-60.

\$250,000.

TNC was able to raise only \$200,000 and asked *H* if he would be willing to bargain sell the land for that price. *H* wanted to preserve the property but was not sure whether, given his small income, he could benefit from a \$50,000 donation. TNC explained that if he sold the land for fair market value on the open market, he would have a large capital gains tax since his basis was only \$10,000; this would both lower his net return on the sale and place him in a higher tax bracket so that he would pay more taxes on his ordinary income.

Indeed, the calculations revealed that *H*'s net return after taxes with a \$200,000 bargain sale would be \$160,500, whereas his net return after taxes with a \$250,000 sale on the open market would be only \$139,000.<sup>354</sup> Upon seeing these figures, *H* immediately decided to bargain sell his land to TNC. Moreover, pleased with the transaction, he gave TNC an extra \$10,000 donation at the closing.

## V. CONCLUSION

A . . . consideration which has persisted throughout the evolution of the law of real property involves the contrast of the transiency of man in time and space against the relative permanence of land . . . . Since real property cannot be separated from its environment and since successive generations will depend upon it for sustenance, the integrity of the land and its ecosystems demands that the arbitrary personal use of any part of it be subject to social interposition if the acts of an owner pose a threat to the continuing welfare of the community.

From this consideration follows the principle of stewardship, under which ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present.<sup>355</sup>

The land trust offers a method of preserving open space that is harmonious with the evolving concept of land as a societal resource. By removing land from individual ownership to charitable ownership, the land trust acts as a steward of that land for the benefit of the community in which it operates.

Additionally, the land trust avoids many of the difficulties associated with governmental techniques of open space preservation. Unlike zoning, the land trust does not suffer from administrative and constitutional problems and is not subject to the political

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354. Because of changes in the tax laws that have occurred since this transaction, it is less likely today that a landowner's net return after taxes would be greater after such a bargain sale than after an open market sale.

355. Caldwell, *supra* note 1, at 756.

pressures that foster the wholesale granting of variances. Unlike property tax incentive schemes, the land trust does not encourage speculation by allowing participating landowners to withdraw their property for development. Unlike the government in its use of eminent domain, the land trust can act quickly to take advantage of unexpected opportunities and to acquire property before it significantly appreciates.

The land trust, of course, cannot solve all of the problems of governmental land use planning. For example, when the land trust acquires property, there is apparently no way to prevent the depletion of local property tax rolls, the increase in surrounding landowners' property taxes, or the possibility of leapfrog development. Furthermore, the land trust's preservation efforts may actually conflict with governmental attempts to regulate growth. For instance, if the land trust acquires property that has been zoned industrial, it may force industrial development into an environmentally less appropriate area.<sup>356</sup>

Despite these possible drawbacks, the land trust possesses one characteristic that, from the perspective of many, makes it the superior method of open space preservation—it is nongovernmental.<sup>357</sup> The following observation regarding The Nature Conservancy is applicable to land trusts in general and indicates that even those who oppose government regulation may find the land trust to be a desirable alternative:

The program of one national conservation organization suggests an answer to the ever-intensifying conflict between environmentalists and developers, anti- and pro-growtbers. The group is Nature Conservancy. . . .

That organization is supported by people who, according to its president, believe that direct purchase is a better way to preserve unique natural areas than depending on government regulation or purchase with the "uncertainties of politics" . . . .

Hence, instead of using their funds to fight and limit development, environmentalists can use them to purchase land for open space. They would not have to seek government coercion over others who want to use and enjoy their own property or have different interests. It is a solution most consistent with a free society.<sup>358</sup>

To ensure the land trust's continued vitality, federal and state tax structures must be supportive. As outlined above, land trusts

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356. This danger underlines the need for cooperation between the land trust and government officials. Indeed, many land trusts, such as the Brandywine Conservancy, make it a policy to coordinate their efforts with those of the local governments. See note 31 *supra*, at 4.

357. See Eveleth, *supra* note 11, at 564-65.

358. B. SIEGAN, *OTHER PEOPLE'S PROPERTY* 112-13 (1976).

depend upon the many available tax advantages to conserve their financial resources and thereby increase their preservation activities. This Article has advocated certain changes in the tax laws, especially the relaxation of the ten percent support requirement to allow the land trust to qualify more easily as a section 170(b)(1)(A)(vi) charitable organization.<sup>359</sup> Implementation of this and the other suggestions presented<sup>360</sup> should facilitate land trusts' efforts to preserve important natural resources for both present and future generations.

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359. See text accompanying notes 264-74 *supra*.

360. See text following note 193 *supra*; text accompanying note 212 *supra*.

