

# Secure a Conservation Easement Now!

By Robert W. Wood

The recently enacted Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 eased the year-end concerns of millions over what tax rates we all will be paying in 2011 and 2012. The vaunted Bush-era tax cuts were extended for two years. That means a capital gain rate of 15 percent rather than 20 percent, and top marginal rates remain at 35 percent rather than reverting to 39.6 percent.

In addition to numerous other tax changes, this massive tax bill achieved some conservation goals too. Conservation easements have been in the law for decades, but the tax deduction was set to expire on Dec. 31, 2007. Congress then extended the benefit through the end of 2009. Now, Congress has retroactively extended the conservation easement income tax deduction all the way back to the beginning of 2010 and continuing through the end of 2011. That means there is still time to arrange a conservation easement and secure its unique tax benefits. But note this benefit does not apply for 2012.

Unlike many other easements, a conservation easement is not a right of passage over land. Instead, it is a legal right to enforce the preservation of the land. Putting a conservation easement on property restricts its future development.



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Giving this encumbrance to a charity that is qualified under Section 501(c)(3) of the Tax Code allows you to claim a deduction from your income taxes. In some cases, giving away a permanent restriction dramatically reduces the value of the land you keep. But as a practical matter in many others, you might not be able to do much with the property (with or without the easement).

Nevertheless, you may be able to claim a tax deduction for the value of the contribution. After all, when you place an easement on your land and transfer it to a charity you are giving something away. This is a partial interest in property, which qualifies for a charitable contribution tax deduction.

Subjects of conservation easements can include natural habitat as well as the historical façade of a building. In the latter case, instead of donating an easement to preserve land, you can donate (usually to a historical preservation society or similar charity) a permanent right to keep the outside of the building as it is. For example, you might chose to donate a façade easement to your historic office building or your historic personal residence to a local historical society, a tax exempt charity.

Note that given many local zoning and historic preservation laws, whether or not you give away an easement, you might not be able to do much to alter the historical character of the building even if you wanted to. Thus, one can argue that adding the easement as an overlay restricting your use of

the property may not impose significant additional restrictions. Nevertheless, you are entitled to an income tax deduction for the value of the easement.

There are many technical requirements for donee organizations and the type of property. The organization must be tax exempt. Furthermore, there is a list of permitted purposes, including preserving land for outdoor recreation or the education of the general public, protecting a natural habitat, preserving open space for the scenic enjoyment of the public or pursuant to government (federal, state, or local) policy, or historic preservation.

For a restriction on a building exterior to be considered exclusively for historic purposes, the donor and donee must agree in writing that the donee has the resources to manage and enforce the restriction and has made a commitment to do so. Also, such buildings must be certified as historic, or be in a certified historic district.

The rules are technical enough that you need professional help. Furthermore, in light of the way some organizations promote conservation easements, you would be well advised to have someone independent solely looking out for your interests.

One key to all of this is the appraisal process. It involves a before and after approach. One figure tells you what your property (land or historic building) is worth before the contribution of the easement. The second figure reveals what it is worth post-easement subject to the encumbrance.

The Internal Revenue Service has targeted inflated appraisals and has even discussed inflated valuations for building façades as an example of a potential tax scam. Regardless, many conservation easement tax deductions seem to hover around 10 percent of the value of the property, a figure that is often a reasonable one. So, if you have a \$10 million historic building and donate a façade easement to charity, you could take a \$1 million charitable contribution tax deduction.

Some taxpayers have claimed charitable contribution deductions as high as 40 percent to 50 percent of the value of the property. That seems excessive and likely to prompt IRS ire. Interestingly, although the IRS has taken on some of such claimed deductions, it has not done terribly well in court battles with taxpayers. As with so much else in the realm of charitable contributions, these disputes can come down to a battle of the appraisers.

If you make a donation, the limit on the amount of income your deduction can offset is 50 percent of your contribution base (which is adjusted gross income computed without regard to any net operating loss carryback). This is more generous than the normal 30 percent limit. Qualifying farmers and ranchers are entitled to an added tax benefit.

For years, the normal rule for conservation easements was that if you were not able to use all your deduction in one year, you could carry it over for up to five years. If you failed to use it up within that ensuing five years, any excess was lost. Fortunately, this five-year carryover was extended to 15 years. That gives you much more time to claim portions of the deduction, making it much more likely that your full charitable contribution deduction will offset income that would otherwise be taxed.

Conservation easements can provide nice societal benefits and attractive tax benefits to the donor. While there are details to be observed and overly rich appraisals can draw scrutiny, with a properly planned and documented donation, everyone wins. Although it is possible that they will once again be extended beyond the end of 2011, you should get them while you can.

*This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*