

## **Easement Land Donation = Most Economically Valuable Charitable Tax Donation**

For most landowners, the decision to donate a conservation easement on their property starts and finishes from the desire to permanently protect the open spaces and scenic vistas, the undeveloped lake or river shore, the natural habitat for wildlife, or the sustainability of farm and forest land that they cherish. These landowners and their families plan to continue to use the land just as they always have, and the grant of the conservation easement that limits what they otherwise could do on the land – such as create a residential subdivision – doesn't matter to them, as they want to protect the land as it is.

At the same time, the donation of a conservation easement to an organization like the Ausbon Sargent Land Preservation Trust can provide the landowner / taxpayer with the most economically valuable charitable contribution tax deduction that the Internal Revenue Code provides! And until December 31, 2009, the tax code includes an enhanced income tax deduction that creates a further incentive for land owners to act to protect their property by a conservation easement.

Landowners have the potential for both income and estate tax savings by granting a conservation easement, and while the easement may have been inspired by a conservation ethic and the desire to assure that the character of the land will not be changed over time, these savings can help a family make the decision to go ahead with the project. This article will review the tax treatment for the donation of a conservation easement (or the sale of the easement for less than its appraised value – a “bargain sale”) that meets the requirements of the tax code.

**Income tax deduction:** Section 170(h) of the Internal Revenue Code authorizes a charitable contribution income tax deduction for gifts of conservation easements to “qualified organizations” (which includes ASLPT) made “exclusively for conservation purposes”. The amount of the gift is determined by a “qualified appraisal”, which first values the land that is subject to the easement without the easement in place (this is a fair market value appraisal, based on current zoning and market conditions), and then values the land with the easement in place. The difference in value – which is essentially the development rights that are extinguished by the easement – is the economic value of the easement.

The Code places a limitation on the amount that can be deducted in any one year – and this is where the current tax enhancements come into play. The traditional rule has been that a taxpayer could deduct only 30% of the Adjusted Gross Income (AGI) in any year, and could carry over any unused portion of the appraised value for up to five years after the year of the gift (for a total of six years). The enhanced income tax treatment allows a taxpayer to deduct up to 50% of the AGI, and carry the unused portion of the gift for an additional fifteen years! *[See the chart at the end of the article for an illustration of the difference affects the tax savings.]*

**Estate tax savings:** In 2009, there is an exclusion from estate taxation of \$3.5 million dollars for each taxpayer. (Under current law, the estate tax is scheduled to be repealed for decedents who die in 2010, but the exclusion is scheduled to revert to one million dollars in 2011. It is likely that Congress will address this anomaly before the tax is repealed.) The estate tax rate is 45% (and the highest rate is scheduled to be 55% in 2011 if the law is not changed).

For estate tax purposes, real estate is generally appraised at the highest and best use (i.e. fair market value, or what price a willing buyer would pay to a willing seller, and which therefore includes development potential) regardless of how the land is used. Land that is enrolled in "Current Use" for New Hampshire real property taxation is still valued at highest and best use for estate tax purposes. Thus, the estate tax is assessed on open fields or forestland, or undeveloped shorefront, as if it were to be developed or sold on the market for that purpose. As a conservation easement permanently restricts the potential economic uses of real estate, and limits or eliminates any development potential, the value of the property is lowered, and the estate tax assessed on that value is lowered. At a rate of 45 %, the tax savings on property that is subject to an easement valued at \$400,000 is \$180,000.

**Additional estate tax exclusion:** Since 1998, the tax code has provided a provision by which up to forty percent of the value of real estate that is subject to a conservation easement can be *excluded* from the value of the total estate that is taxed, leading to further tax savings. As with any tax provision, this is a complicated provision, and there are certain requirements to qualify for the exclusion, the primary one being that the easement itself was granted by the decedent or a family member.

Another important feature of this law is that the executor of a landowner's estate may grant conservation easement after the landowner dies and still qualify for reduced land valuation in the estate and the additional tax exclusion. For some families, the ability to grant this "post mortem" easement has meant the difference between selling all or part of the land to pay the tax that would otherwise be due, and keeping the land for future generations to own and enjoy.

The donation of a conservation easement is the only charitable gift which qualifies for the enhanced income tax treatment, which lowers the value of property subject to estate tax while still allowing the family to use and enjoy as it always has, and leads to the potential exclusion of value from estate tax. Importantly, it also provides a legacy of conservation and the protection of important scenic and natural resource values for generations to come, and important benefits to the public and community.

**NOTE:** *This article provides a simplified introduction to important tax concepts, is not intended to address anyone's individual circumstances. Please consult with an attorney familiar with these matters, and your own tax advisor, when considering or implementing any land conservation transaction, or engaging in estate planning when land is an important asset and planning consideration.*

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### ***Income Tax Incentives until December 31, 2009***

Easement value is \$300,000

Taxpayer has adjusted gross income of \$75,000

OLD rule:

30% of \$75,000 = \$22,500 available as deduction  
Year of gift + 5 year carryover = 6 x \$22,500 = \$135,000  
Less than one-half of easement value can be deducted

NEW rule:

50% of \$75,000 = \$37,500 available as deduction  
Year of gift + 15 year carryover = 16 x \$37,500 = 600,000  
8 years x \$37,500 per year = 8 years of deductions  
Entire value of easement gift utilized as deduction

Same easement value, but AGI = \$100,000

30 % of \$100,000 = \$30,000 available as deduction  
6 x \$30,000 = \$180,000

50 % of \$100,000 = \$50,000  
16 x \$50,000 = \$800,000  
6 years at \$50,000 per year = 6 years of deductions

AGI required to fully utilize \$300,000 easement value:

Old Rule:

Income required to fully utilize = \$166,666  
(30% of \$166,666 = \$50,000 deduction x 6 years available = \$300,000)

New Rule:

Income required to fully utilize = \$37,500  
(50% of \$37,500 = 18,750 deduction x 16 years available = \$300,000)