

THE MUNIFICENT CONSERVATION EASEMENT*

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Every decade or so, an apparently benign and little-noticed tax statute gives rise to a frenzy of "planning opportunities." In the 1980s the charitable remainder trust, created by statute in 1969, was discovered by the insurance industry, and a previously demure retirement and estate planning vehicle became the darling of disposition strategists.¹ More recently, the so-called "conservation easement," the provenance of which also traces to the Tax Reform Act of 1969, was discovered to yield, after estate tax inducements enacted in 1997 and 1998, potential charitable contribution tax benefits exceeding the amount of the "gift."² Since then, business has been brisk for the approximately 1,200 private, nonprofit "land trusts" that feature the conservation easement as the centerpiece of their conservation programs.

Before turning to a quantification of tax inducements and a consideration of some of the more important strategic issues relevant to the creation of a conservation easement, a brief explication of the relevant terminology may be useful. A "conservation easement" finds its origins at the intersection of tax and property law. Statutes similar to the California Civil Code provisions enabling the perpetual creation of restrictions intended to preserve "natural, scenic, historical, agricultural, forested or open space conditions" have been enacted in all but two of the fifty states.³ Those statutes permit easement holders — governmental entities and private conservation organizations — to acquire "easements in gross in perpetuity"; i.e., easements which need not be supported by an appurtenant (or "dominant") estate. A conservation easement that meets the requirements of the state enabling statute will almost certainly meet two of the three conditions required to qualify for Federal income tax deductibility: (i) the transfer of a "qualified real property interest" (here, a "restriction (granted in perpetuity) on the use which may be made of the real property"), and (ii) conveyed to a "qualified organization" (a governmental entity or a publicly supported charitable organization).⁴ The third requirement for Federal *income* tax purposes — that the conveyance satisfy one or more "conservation purposes" — is somewhat less predictable and will be discussed below.

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¹ Internal Revenue Code §664 (hereinafter "IRC"). All "Code" references are to the Internal Revenue Code of 1986.

² "Gift" is used advisedly; the conservation easement is apt to be viewed, from the donee's perspective, as a liability.

³ California Civil Code §815.1.

⁴ IRC §170(h)(2) and (3).

Most donated conservation easements run to land trusts, which are typically small conservation organizations, local or regional in scope of operation, and sufficiently community-based as to meet the public-support requirements of section 170(b)(1)(A)(vi) of the Code. Government entities with dedicated tax revenues or bond proceeds usually acquire easements by purchase or bargain purchase; for example, Sonoma County's Agricultural Preservation and Open Space District funds its easement acquisitions with dedicated sales tax revenues. In a jurisdiction with government-purchase programs, outright donations of conservation easements are relatively unusual, and landowner competition for limited government funding often drives purchases at substantially less than "fair market value" (which in this context, nearly always means the diminution in the value of the property subject to the easement on account of the imposition of the perpetual restrictions).⁵

Quantifying The Tax Benefits

A relatively simple example will demonstrate the munificence of the tax law as it pertains to conservation easement donations. Suppose Jackie and Zane Sturdley, now in their full maturity and subject to maximum income and potential estate tax marginal rates (assumed here to be roughly 45% and 45%, respectively, with reference to estate tax rates applicable in 2007-9), own a 65-acre parcel in Napa County, site of a modest second home and with considerable development potential. That property was acquired by them in 1962 for \$150,000, and has recently been appraised at \$2.5 million. They propose to donate a conservation easement to the Napa County Land Trust, eliminating all potential commercial uses and restricting any residential improvements to a small, "building envelope" area. Their appraiser indicates that such a conveyance will reduce the value of the property by \$1.5 million; i.e., from the present "before" value of \$2.5 million to an "after" value of \$1 million. The income tax value of that deduction (limited in its utility to 30% of the Sturdleys' adjusted gross income for the year of the gift, with a five-year carryover) will be \$675,000 (45% of \$1.5 million, ignoring time-value considerations).

The second (and perhaps third) bite of the tax apple will occur at the death of the survivor of Jackie and Zane, when the easement-burdened property falls into the gross estate at its then value. Note that there will be no allowable *deduction* for estate tax purposes; the estate tax benefit comes through the devaluation effected by the inter vivos gift. (Note also that, if the easement's qualification is to be challenged by the Internal Revenue Service, the challenge must be mounted in respect of the income tax deduction, since there will be no subsequent assertion of any deduction under Code section 2055.) The eventual appraisal for estate tax purposes may not reflect the same ratio of easement-to-fee values as was established for income tax purposes, of course, but it is certainly appropriate to assume, at least in the near term, the same approximate relativities. Thus, ignoring possible appreciation — or assuming a relatively brief joint life expectancy, as it is perhaps not inappropriate to do with hypothetical taxpayers like Jackie and Zane — the estate tax benefit of \$675,000 (45% of \$1.5 million), when added to the income tax savings, newly makes the taxpayers whole, with aggregate income and estate tax savings of \$1,350,000.

But some tax fruits of this transaction may remain to be plucked. If the easement qualifies under Section 2031(c), the exclusion provided by that subsection (40% of the value of

⁵ Treasury Regulation (hereinafter "Reg.") §1.170A-14(h)(3).

the land subject to the easement, but subject to a maximum of \$500,000), will produce another \$225,000 in tax savings. In this optimal case, then, for each dollar of conservation protection, the Sturdleys and the natural objects of their bounty have enjoyed about \$1.05 in tax savings. It is likely that we now have your full attention.

Qualification Issues

As noted above, it is rarely difficult to determine that the restrictions imposed by a conservation easement are perpetual in nature, nor is there any difficulty in ascertaining that the intended transferee is appropriately qualified under the tax statutes and local law.⁶ There may be considerably less certainty, however, as to the establishment of an appropriate "conservation purpose." The statute affords four avenues to satisfaction of the "conservation purpose" test: (1) recreation or education, (2) habitat protection, (3) open space protection, and (4) historic preservation.

Recreation or Education. This category inevitably requires public access; i.e., "the preservation of land areas for outdoor recreation by, or the education of, the general public."⁷ Those contemplated public uses must be "substantial and regular." If the prospective donor is willing to tolerate such public access, qualification will be virtually guaranteed. Most easement donors, however, will not only abjure the pursuit of such an opportunity, but will demand an explicit easement provision affirming the landowner's continuing right to deny all public access.⁸

Habitat Protection. The protection of a "relatively natural habitat of fish, wildlife or plants, or similar ecosystem" will satisfy the statute, and may in fact necessitate a complete ban on public access in order to protect an endangered species or a fragile ecosystem.⁹ The regulations provide little guidance as to the biological or ecological attributes which must be demonstrated in order to reach a reasonable level of assurance as to a particular property's qualification. Uniqueness and ecological health and viability are surely relevant; it is difficult to imagine an IRS challenge to an easement protective of the habitat of a rare or endangered species, nor to an easement designed to protect a pristine ecosystem under a land trust's "critical areas" program.

Open Space Protection. By far the greatest number of conservation easement transactions find their justification in the "open space" category. It is at once the most useful and the most nebulous of the conservation-purpose tests, however, requiring preservation either (i) "for the scenic enjoyment of the general public," or (ii) "pursuant to a clearly delineated Federal, State, or local governmental conservation policy."¹⁰ In either case, whether the easement protects scenic attributes or is policy-oriented, the conveyance must also "yield a significant public benefit." Although the framers of the regulations faced a significant challenge

⁶ IRC §170(h)(2)(C) and (3); California Civil Code §815.3.

⁷ IRC §170(h)(4)(A)(i).

⁸ Such a provision is permissible; Reg. §1.170A-14(d)(3)(iii) and (4)(iii)(C).

⁹ IRC §170(h)(4)(A)(ii).

¹⁰ IRC §170(h)(4)(A)(iii).

in interpreting the statutory standards, the approach of those regulations is a reasonable, balance-of-interests approach.

"Scenic enjoyment" requires significant public visual access — as from a "park, nature preserve, road, water body, trail, or historic structure or land area."¹¹ The entire protected property need not be visible, however, nor need the public access be as convenient as the view, for example, from an interstate highway.

From the advisor's properly conservative prospective, there are probably few situations where an easement should be presumed to satisfy the "scenic" requirements. National park in-holdings, riparian properties in scenic river corridors, and properties abutting and entirely viewable from well-traveled mountain roads are probably beyond serious challenge. But in a closer case, given the subjectivity of the standards, the comfort level will not be high, and the planner ought, therefore, to assess the possibilities, present or potential, of structuring the donation to advance well-defined public policy. Most of the IRS private letter rulings issued to date approving the deduction of conservation easements have relied upon the "clearly delineated governmental policy" standard. Not surprisingly, much useful long-range planning has involved land trusts in the development of governmental policies — through advocacy aimed at land-use issues — designed to facilitate the qualification of conservation easements. Such efforts might properly be viewed as building governmental platforms to support the voluntary down-zoning of properties in order to protect their natural attributes. In California, for example, there is considerable statutory support for the protection of agricultural productivity (such as in the property tax relief afforded by Williamson Act elections), and the adoption of county-level master plans complementing State policies will furnish considerable support for qualification of easements designed to protect farms and ranches.

The precise quantum of public benefit represented by any particular open-space easement is, of course, impossible to determine; the requirement of significance was undoubtedly intended as a backstop to the scenic and governmental-policy qualification rules. The relevant regulations sensibly interpret the necessity to prove public benefit to correlate inversely with those rules; i.e., the more breathtaking the scenic attributes, and the more people who enjoy them, the less concern about measuring the benefit. The most difficult cases will involve ordinary-looking properties, indistinguishable in terms of natural attributes from surrounding lands. But an ordinary property may be transformed by governmental necessities (for example, a flood-control program) or by a convincing demonstration that maintenance of that property in its present condition will advance an important public objective.

Historic Preservation. The fourth conservation-purpose category sanctions donations intended to preserve historically important land areas and/or certified historic structures.¹² Historically important land areas include those that meet the National Register criteria for evaluation (per federal regulations), land within a registered historic district that contributes to the significance of the district, and land adjacent to a property listed in the National Register of Historic Places. A "certified historic structure" means any building, structure, or land area which is listed in the National Register, or located in a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district. Façade easements on

¹¹ Reg. §1.170A-14(d)(4)(ii).

¹² IRC §170(h)(4)(A)(iv).

private residences are frequently the subject of conservation easement donations to preservation organizations.

Confronting the conservation-purpose requirements will often seem unpleasantly existential, and while there are no certain antidotes, there are several sources of partial comfort. First, working with an established land trust which has ordered its priorities should provide some measure of assurance that legitimate conservation-purpose objectives are being pursued. Second, the conservation-purpose test is relevant only for *income tax* purposes; in 1986, responding to concerns that well-meaning donors of easements that failed to meet the conservation-purpose test might find themselves liable for gift taxes, Congress "uncoupled" that test for gift and estate tax purposes. Many conservation easements are more emphatically driven by estate tax than by income tax objectives, so the present state of the law in this regard represents a strange anomaly — a landowner's most important tax objective may be satisfied by the conveyance of an easement without the need to demonstrate any meaningful protection of natural attributes.

Finally, despite the complexity of these qualification standards and the considerable efforts of land trusts and tax advisors to insure compliance, the IRS has shown almost no inclination to assert deficiencies based upon the failure to qualify. Challenges by the IRS — and there have been many — seem always to be directed at the taxpayer's appraisal. The IRS is a beleaguered and somewhat impoverished agency, required by Congress to make many evaluations it is ill-equipped to make, including perhaps the qualification of conservation easements under standards which may involve measurements of habitat quality, sufficiency of scenic resources, or the relative merits of local conservation policy. That having been said, it is still appropriate to worry about conservation purposes; no one wants to be the first case.

Strategic Planning Considerations

In the process of negotiating and drafting a conservation easement, the advisor will confront many issues relevant to the attainment of tax benefits, but not dealt with by statute. The regulations supply several categorical rules which have no statutory foundation; nonetheless, those regulations ought properly to be thought of as legislative, and compliance is essential. In addition, various procedural matters having mainly to do with the future relationship between land trust and landowner will need to be addressed — monitoring rights, enforcement procedures, and, as to a donated easement, the so-called "stewardship endowment" chief among them.

Mortgages, Deeds of Trust, Etc. Any encumbrance on property which is the subject of a conservation easement donation must be subordinated to the rights of the land trust to enforce the conservation objectives of the easement.¹³ That imperative obtains regardless of the remoteness of the possibility of foreclosure. As a practical matter, the holder of a deed of trust who is left with a comfortable buffer of equity (i.e., the excess of the value of the easement-encumbered land over the amount of the liability) *after* the donation of a conservation easement should have little concern about being asked to subordinate, but experience indicates, particularly as to unsophisticated creditors, that an agreement to subordinate may be a major hurdle. Since

¹³ Reg. §1.170A-14(g)(2).

subordination cannot be compelled, the creditor's refusal may necessitate an early retirement of the debt or a refinancing.

Recital of Purposes. Most conservation easements begin with a paragraph reciting the conservation purposes of the transfer. Often these are relatively amorphous and unranked; for example, "It is the purpose of this Agreement to preserve the open space, natural, scenic, agricultural and historic attributes of the Property, and to prevent any use of the Property, other than the agricultural, residential, recreational, and other uses permitted hereunder, that will significantly degrade those attributes." Uses and activities expressly permitted and expressly prohibited will be delineated in another section of the easement, or by exhibits. The principal focus of the land trust will be upon identification of the essential conservation values of the subject property and the uses and activities which must be proscribed in order to protect those values. From the landowner's vantage, the challenge will be to anticipate all desired present and future uses, and expressly to provide for their continuation or future engagement. Not all potential future opportunities can be anticipated, of course, and thus the purposes clause serves as a sort of overriding statement of intent, intended to govern, in perpetuity, those issues beyond the reach of the parties' prescience.

Even though the easement cannot anticipate and proscribe all potential offending uses, nor endorse all conceivable conforming property rights, it should generally be possible for the particular conservation objectives of the transaction to be ranked. The typical clause quoted above fails to tell us whether agricultural uses are to be preferred over preservation of natural habitat, yet qualification of the easement may turn upon that determination. The regulations provide that the charitable contribution will be disallowed if the terms of the conveyance permit the injury or destruction of any significant conservation interest.¹⁴ A regulations example suggests that farmland protection pursuant to a State flood prevention and control program would fail to qualify if permitted pesticide use might cause the injury to or destruction of a significant ecosystem. Impairment of a secondary conservation value is permitted, however, where the *primary* purposes of the donation could not otherwise be achieved. The potential collision between agricultural practices and habitat preservation, as between scenic preservation and permitted timber production, can be readily anticipated, and the failure to do so, and to order the conservation purposes accordingly, will threaten the easement's qualification.

Frustration of Conservation Purposes. There are exceedingly interesting implications of the "perpetuity" requirement. The easement's perpetual duration is essential to meet the tax statutes (and the enabling statutes of most states as well). It can hardly escape notice, however, that the general statute of limitations for income, gift and estate tax purposes is three years; i.e., there is a dramatic disjuncture between the mandatory perpetuity clause and the power of the IRS to enforce that requirement.¹⁵ As a practical matter, once the statute has run for the year of the gift or bequest, the duration and quality of conservation protection will be a function of the concerns and capacities of the easement holder. (The State attorney general's office, pursuant to its mandate to oversee the operations of charitable organizations, may have a theoretical interest in the efficacy of conservation easement programs, but there is little evidence to date that such authority has actually been exercised.)

¹⁴ Reg. §1.170A-14(e)(2).

¹⁵ IRC §6501(a).

As to whether "perpetuity" means forever, the regulations acknowledge that an easement may be extinguished by judicial proceeding, in the event of an "unexpected change in the conditions surrounding the property" which make "impossible or impractical the continued use of the property for conservation purposes."¹⁶ In such a case, the land trust must be entitled to a portion of the proceeds of sale (or, presumably, to a payment by the owner in possession, if that owner desires to retain the property) equal to the undiminished value of the property times a fraction equal to the proportionate value of the conservation easement to the entire value of the property at the time of the donation. To illustrate, should the easement over the Sturdleys' Napa Valley property ultimately be determined to serve no further conservation purpose, and the property is then worth \$10,000,000, the land trust's formula share of that value would be \$6,000,000, since the value of the easement at the time of the gift represented 60% of the total property value. The "division-of-proceeds" clause must be part of the easement, although a moment's reflection will convince the drafter that the rule is mandated by an agency that has a window of enforcement of only three years' duration, and that the parties may choose to renegotiate their entitlements, subject to the constraints attributable to the land trust's exempt status.

Third-Party Mineral Rights. The donor must commit to exploit minerals only by subsurface extraction methods, and then only where such exploitation is not inconsistent with the conservation purposes of the donation.¹⁷ Where the landowner is not in possession of the mineral rights, or owns less than the total of those rights, that requirement may present a significant hurdle. In the western States, division of the ownership of the mineral and surface estates is common. As originally enacted in 1980, section 170(h)(5)(B) of the Code essentially required the owners of third-party mineral rights to subordinate their interests to the easement (i.e., to eliminate the surface-mining possibility), or, perhaps, to sell those rights to the owner of the surface estate to set the stage for the easement donation. Pursuant to amendments made in 1984 and 1997, the present statute permits the landowner to demonstrate the remoteness of the possibility of third-party exploitation by an inappropriate method. Thus, where a title search reveals the existence of such third-party rights, the landowner may, without locating or consulting those third parties, establish by geological report either that (i) there are no minerals susceptible of surface exploitation, or (ii) if there are such minerals, it would not be economically feasible to exploit them. Failing the establishment of either of those circumstances, the landowner will be obliged to locate and deal with the owners of those rights.

Allocation of Basis. Donation of a conservation easement requires an allocation of basis by way of a simple proration based upon the relativity of the value of the easement to the value of the total property at the time of the transfer. To return again to the Sturdleys' situation, since the easement carried 60% of the total property value, the Sturdleys' \$150,000 basis would be reduced by that percentage, to \$60,000.

That rule is at odds with the basis-recovery method permitted as to easement *sales*. In 1977 the IRS ruled, in connection with a governmental program in Suffolk County, New York established to purchase easements protective of agricultural properties, that the easement seller

¹⁶ Reg. §1.170A-14(g)(6).

¹⁷ IRC §170(h)(5)(B); Reg. §1.170A-14(g)(4)(i).

would be entitled to a complete recovery of basis prior to reporting gain on the transaction.¹⁸ That ruling has never been revoked or modified, and thus is reliable guidance for easement sellers. It leaves in considerable doubt, however, the proper treatment of an easement *bargain sale*, as to which several different approaches are arguably acceptable. The technically inclined may wish to ponder the various possibilities; my own view is that the IRS would properly require an initial allocation between the easement and the retained interest, as per the regulations, and a secondary allocation, under Code section 1011(b), of the basis attributable to the easement, between the bargain and sale elements of the transaction.

Baseline Data. The regulations require that the landowner furnish the land trust, prior to the easement contribution, data sufficient to enable the land trust effectively to monitor future uses of the property.¹⁹ Depending upon the nature of the property and the attributes sought to be protected, such an inventory might include photographs, soil analyses, evidence of water purity and stream flow, wildlife or botanical surveys, and so forth. The relationship between the baseline data and the hierarchy of purposes sought to be advanced is obvious, as is the need for the stated purposes and the monitoring thereof to be realistically within the capacity of the land trust. Although the regulations frame the baseline-data requirement as an obligation of the landowner, as a practical matter the land trust, being considerably more experienced in the preparation of such a survey (and having perhaps the greater interest in the quality of the data produced) will usually conduct the survey at the landowner's expense.

Monitoring and Enforcement. The frequency and intensity of the land trust's monitoring activities correlate directly with the ambitions of the easement. Where the easement is intended primarily to effect the protection of open space for the scenic enjoyment of the public, an annual visit of modest duration, or a photographic fly-over mission, may suffice. The monitoring of limited commercial timber harvests, soil and water quality, or the welfare of particular natural habitat may be considerably more demanding and time-consuming. Many agricultural and ranch easements require rotational grazing programs, and frequent land trust visits to measure residual dry matter at the end of grazing cycles may be necessary. The extent of monitoring entitlements, the requirements of advance notice thereof, and the means by which a landowner may be certified as in compliance with the easement are all proper, and sometimes difficult, topics for negotiation. Experience dictates that, once an easement is in place, the landowner will realize that the land trust has no institutional interest in excessive monitoring, and that the relationship between the parties will become comfortably predictable.

In the event of a violation or threatened violation of the terms of the easement, the land trust will have remedies at law and in equity. A judicial resolution may be avoided, provided that the landowner agrees to suspend the allegedly violating use or activity while the parties pursue mediation or arbitration. Many easements provide explicitly for mediation and/or arbitration, and even in the absence of such provisions, the parties could presumably agree to attempt to resolve their differences without litigation. Easement violation cases have been few in number, as might be expected with a device of such recent vintage, but as easement-protected properties change hands over the next few decades (on their way to perpetuity), it is inevitable

¹⁸ Revenue Ruling 77-414, 1977-2 C.B. 299.

¹⁹ Reg. §1.170A-14(h)(5)(i).

that challenges will multiply, and that stewardship and enforcement will become increasingly important, and potentially costly, aspects of a land trust's program.

Amendments. Some years ago it was widely believed that perpetuity implied immutability, and that easements were, therefore, not subject to amendment. The better, and now widely held view, is that easements may indeed be amended, although some land trusts decline to include provisions specifically acknowledging that possibility in the belief that reference to amendments may encourage landowners to seek renegotiation. When a land trust agrees to revisit the provisions of an easement in light of changed conditions, it must be highly sensitive to both legal and public-relations constraints. Were the proscriptions of the easement to be relaxed to the advantage of the landowner without additional and offsetting conservation protections, the land trust's tax-exempt status could be endangered for violation of either the "inurement" or "private benefit" proscriptions of Code section 501(c)(3). Since the public perception of the land trust is that of an eternal guardian of its easement-protected properties, it is unlikely to accede to any amendment unless the net result is a demonstrable amplification of conservation objectives attained.

Stewardship Endowment. The donation of an easement is nearly always conditioned upon a simultaneous cash gift sufficient to cover the generally predictable costs of the land trust's monitoring responsibilities and the contingent and unpredictable costs of future enforcement proceedings. There is no particular formula of universal application to determine the appropriate amount of such an endowment; it may be determined with reference to the value of the tax benefits attained, as a capitalization of the income required to sustain the annual monitoring costs with a contingent element to provide for the possibility of future litigation, or simply based upon the land trust's seat-of-the-pants estimate of the landowner's financial capabilities. However determined, the request for a stewardship endowment should certainly be expected. Although many land trusts meet a substantial portion, or all, of their annual operating budget from non-stewardship donations, prudent management requires that, insofar as is possible, the obligations attendant upon each acquired conservation easement be provided for at the time of acquisition.

Section 2031(c): Icing on the Cake

The premises of Code section 2031(c), added in 1997 to provide an exclusion from the gross estate for certain qualifying easement-protected properties, are peculiar in several respects. First, that statute leverages a single easement into a double estate-tax benefit: the reduction in value of the protected property in the measurement of the gross estate, and a further exclusion of value for attributes of ownership *not* reduced in value by the easement. (As noted above, the double-dip will be limited to the lesser of 40% of the value of the easement-protected property or \$500,000.

Second, it permits post-mortem conveyances both to attain the exclusionary benefit of section 2031(c) and, more important, to achieve easement deductibility under section 2055 for estate tax purposes. As originally enacted, the post-mortem opportunity pertained only to the exclusion; by "technical amendment" in 1998 the statute was expanded to sanction the estate tax conservation easement deduction as well. Finally — and this is perhaps not so much a premise as a congressional blind spot — the largesse of the statute may extend to easements created long before the enactment of section 2031(c). It is effective as to estates of decedents dying after December 31, 1997, but, assuming the easement happens to meet the various special

requirements of that statute, the exclusionary benefit will obtain even though the easement may have been created many years earlier.

In addition to the requirements discussed above for conservation easements generally, the section 2031(c) exclusion requires ownership by the decedent or a member of the decedent's family during the three-year period ending on the date of the decedent's death, and conveyance *by an individual* (the decedent, a member of the decedent's family, the decedent's executor, or the trustee of a trust which includes the land subject to the easement).²⁰ In addition, the retention of the ability to engage in commercial recreational activities on more than a "de minimus" basis will disqualify the easement. The value of retained development rights, defined as a "right retained for any commercial purpose which is not subordinate to and directly supportive of the use of (the) land as a farm for farming purposes" — may not be subject to the exclusionary calculation, but, owing to a misguided "ratchet-down" rule, the retention of development rights may actually enhance the exclusionary benefit.²¹

Some of the peculiarities of section 2031(c) and its inadequate technical requirements may be improved by regulation or subsequent technical amendment. In the meantime, the best that can be said of this ill-conceived statute is that it has called attention to its considerably more justifiable and useful progenitor.

²⁰ At the date of death of the decedent, the subject property may be owned by a partnership, corporation, or trust, provided that at least 30% of that entity is owned (directly or indirectly) "by the decedent" (sic). IRC §2031(c)(10). Yet the *conveyance* of the easement must be made by an individual, per §2031(c)(8)(A)(iii). Thus, in order literally to satisfy the statute as to land held in a family partnership, the partnership would have to be dissolved so that the *individual* owners could make the grant.

²¹ The "ratchet-down" formula of IRC §2031(c)(2), which is applied with respect to the values of the easement and the unencumbered land as of the date the easement is created, was evidently intended to insure that the conservation easement effects at least a significant reduction in property value; i.e., that the conservation achieved is substantial. But the statutory translation of that objective, wherein retained development rights are left out of the measure of substantiality, is severely flawed. Consider, for example, a \$5 million ranch, as to which an exceedingly permissive easement is created, reducing the ranch value to \$4.5 million, with the donor retaining development rights worth \$3.5 million and personal residential/recreational rights worth \$1 million. Under the statute's faulty formula, the maximum \$500,000 exclusion of value will be achieved.