Conservation Easements: The Greening of America?

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Conservation Easements: The Greening of America?*

INTRODUCTION

Taxpayers across the country are currently taking advantage of a federal law¹ that permits a tax deduction for donations of

* C. REICH, THE GREENING OF AMERICA (1970). The author, a Yale law professor, predicted that the Sixties Generation would bring about a return in our society to more basic human values, including a new consciousness about the environment. These "flower children" were to accomplish a "greening of America." The author neither described nor discussed conservation easements.


(h) Qualified conservation contribution.

(1) In general. For purposes of subsection (f)(3)(B)(iii), the term "qualified conservation contribution" means a contribution—

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) Qualified real property interest. For purposes of this subsection, the term "qualified real property interest" means any of the following interests in real property:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) Qualified organization. For purposes of paragraph (1), the term "qualified organization" means an organization which—

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 501(c)(3) and—

(i) meets the requirements of section 509(a)(2), or

(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined.—

(A) In general. For purposes of this subsection, the term "conservation purpose" means—

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is—

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
“conservation easements.”

A conservation easement is an innovative property-use restriction whereby the landowner voluntarily limits his own use of the land to preserve its special character. Despite widespread legislative approval, conservation easements have not proven to be the veritable “greening of America” that many predicted, either in preserving America’s natural heritage or in lining the pockets of qualified contributors.

Two distinct sets of problems currently inhibit the use of conservation easements:

1. **The Preservation of a Certified Historic Structure:***

   
   (iv) the preservation of an historically important land area or a certified historic structure.
   
   (B) Certified historic structure. For purposes of subparagraph (A)(iv), the term “certified historic structure” means any building, structure, or land area which—
   
   (i) is listed in the National Register, or
   
   (ii) is located in a registered historic district (as defined in section 48(g)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.
   
   A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor’s return under this chapter for the taxable year in which the transfer is made.

2. **Exclusively for Conservation Purposes:***

   (A) Conservation purpose must be protected. A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity,
   
   (B) No surface mining permitted. In the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

3. **Qualified Mineral Interest:***

   (A) subsurface oil, gas, or other minerals, and
   
   (B) the right to access to such minerals.


2. *Conversations with Hugh Archer, attorney with The Nature Conservancy, Kentucky Chapter (August 1984).* Although no official figures exist indicating the number of conservation easement donations that have received the tax break, reliable sources such as The Nature Conservancy and The Land Trust Exchange indicate that thousands of conservation contributions, in all 50 states, have qualified for the deduction.

3. *I.R.C. § 170(h)(1)* defines a “qualified conservation contribution” as a donation:

   “(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes.”

4. Authorities indicate that while both conservationists and tax practitioners continue to be enthusiastic in their support of the concept, nagging problems involving the common law and the Internal Revenue Service (IRS) interpretation of the statute have
conservation easements: common law limits on the enforceability of such easements and a lack of clarity in the applicable federal tax law. This Comment examines these obstacles and then concludes by proposing adoption of a model statute that could further the use of conservation easements and foster preservation of Kentucky's forests, farmland and historic buildings.

I. DEFINITION OF CONSERVATION EASEMENTS

Easements are generally limited-use rights in another's property—most commonly, a right of way. Conservation easements are "negative" in that they restrict the landowner's use of the property. They are "in gross" because they transfer a property right to a person, corporate or natural, rather than to another parcel of land. With a conservation easement, the landowner voluntarily limits his own use of the land to preserve its special character, and the easement holder, usually a governmental entity or nonprofit organization, has the power to enforce those restrictions. The landowner still owns the land, may live on it, pays taxes on it and may give, sell or devise the encumbered property.
Generally, the common law refuses to enforce negative easements in gross.\(^1\) Consequently, the enforceability of conservation easements depends upon whether the state has enacted statutes specifically providing for this type of easement. More than forty-four states,\(^2\) including Kentucky, particularly if those intentions were expressed in the creating document. See also French v. Morris, 101 Mass. 68 (1869); Goodrich v. Burbank, 29 Mass. (12 Allen) 459 (1866); Salene v. Sherwood, 106 P. 18 (Or. 1910). But see Garrison v. Rudd, 19 Ill. 558 (1858); Ackroyd v. Smith, 138 Eng. Rep. 68 (C.P. 1850).

\(^1\) See Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 173 P. 508, 511 (Wash. 1918) ("It is well settled law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant."); Reno, The Enforcement of Equitable Servitudes in Land: Part 1, 28 Va. L. Rev. 951, 959 (1942) (stating that at common law the only types of negative easements recognized are easements for either light, air, water or support).

ty, have adopted conservation easement statutes and are using them to save valuable farmland, preserve historically or architecturally significant sites, protect natural habitats for rare


See KRS §§ 65.410-.480 (1980). The following sections are illustrative:

65.410. Definitions.

(2) "Open space land" means any land in an area which is provided or preserved for park or recreational purposes; conservation of land or other natural resources; historic or scenic purposes; or community development purposes.

(3) "Public body" means any state agency or local legislative body.

(4) A "scenic easement" is an interest in land transferred by the owner thereof to the public, either in perpetuity or for a term of years. A scenic easement may be created by sale, gift, lease, bequest, or otherwise. An instrument which creates a scenic easement shall contain a covenant whereby the owner of the land promises neither to undertake nor to permit the construction of any improvements upon the land, except as the instrument provides and except for public service facilities installed for the benefit of the land subject to such covenant or public service facilities installed pursuant to an authorization by the governing body of the city, county, urban county, or the energy regulatory commission or utility regulatory commission. Any such reservation shall be consistent with the purposes of this chapter or with the findings of the county, city, or urban county pursuant to KRS 65.466 and shall not permit any action which will materially impair the open-space character of the land. (Enact. Acts 1972, ch. 312, § 1; 1976, ch. 123, § 1.)

65.420. Acquisition of easements, purposes. — Local legislative bodies may obtain scenic and recreation easements in the Commonwealth for the
or endangered plants and wildlife, and provide cities an affordable device for preserving "open space" or adding recreational areas.¹⁵

purposes of providing necessary land for park development, restoration or preservation of scenic beauty, restoration or preservation of areas of historical interest, community development purposes and similar public purposes. (Enact. Acts 1972, ch. 312, § 2.)

65.466. Requirements for acceptance. — A scenic easement shall not be accepted by a city, county, or urban county, unless the governing body, by resolution finds:

(1) That the preservation of the character of the land is consistent with the plan of the city, county, or urban county, where such plan exists; and

(2) That the preservation of the character of the land is in the best interest of the state, county, city, or urban county, is important to the public for the enjoyment of scenic beauty, and will serve the public interest in a manner recited in the resolution and consistent with the purposes of KRS 65.462 to 65.480.

(3) The local legislative body may consider these factors:

(a) It is likely that at some time the public may acquire the land for a park or other public use;

(b) The land is unimproved and has scenic value to the public as viewed from a public highway or from public or private buildings;

(c) The retention of the land as open space will add to the amenities of living in adjoining or neighboring urbanized areas;

(d) The land lies in an area which in the public interest should remain rural in character and the retention of the land as open space will help preserve the rural character of the area;

(e) It is in the public interest that the land remain in its natural state, including the trees and other natural growth, as a means of preventing floods or soil erosion or because of its value as watershed;

(f) The land lies within an established scenic highway corridor;

(g) The land is valuable to the public as a wildlife preserve or sanctuary and the instrument contains appropriate covenants to that end; or

(h) The land has historic significance or contains a building of either historic or architectural importance. (Enact. Acts 1976, ch. 123, § 4.)

¹⁵ "Qualified conservation purposes" are defined in I.R.C. § 170(h)(4)(A) as:

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is—

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.
II. FEDERAL TAX BENEFITS FOR CONSERVATION EASEMENTS

The Tax Treatment Extension Act of 1980\textsuperscript{16} allows qualified landowners to take an income tax deduction for giving up the right to develop their land through the donation of a conservation easement. The amount of the deduction is equal to the value of the rights relinquished,\textsuperscript{17} a fair trade that Congress hoped would encourage private land conservation.\textsuperscript{18} Despite Congress' endorsement of the conservation easement concept, a lack of Internal Revenue Service (IRS) guidelines has left potential donors plagued by uncertainty as to the deductibility of possible donations.

The lag time on private letter rulings\textsuperscript{19} now exceeds twelve months,\textsuperscript{20} barring donors from taking deductions in the same tax year. Moreover, despite Congress' admonition that they be given the "highest priority," the Treasury Department has yet to issue final regulations.\textsuperscript{21} Taxpayers must rely instead on the draft regulations filed May 20, 1983.\textsuperscript{22} These proposed regulations, which seek to provide guidelines flexible enough to address an infinite variety of situations while protecting against abuse,\textsuperscript{23}

\begin{footnotes}
\textsuperscript{16} Qualified Conservation Contribution, I.R.C. § 170(h).
\textsuperscript{18} See id. at 9. It follows from the Committee's report that preservation of the nation's "natural resources and cultural heritage is important" and that conservation easements are a valuable tool for achieving that goal. Id.
\textsuperscript{19} Each private letter ruling is addressed solely to the taxpayer who requested it. I.R.C. § 6110(j)(3) (1984) provides that these rulings may not be used or cited as precedent.
\textsuperscript{20} See Memorandum to The Nature Conservancy (Kentucky Chapter) from Kingsbury Browne, Jr., tax attorney with Hill & Barlow, Boston, Mass., and author of numerous articles on the tax implications of conservation easements. Cf. Browne, Treasury and the Land Trusts: A Weakening Alliance for Conservation, 4 Am. Land F. Mag., Winter 1983, at 66, 71 (private letter rulings are costly, time consuming, and have no value as reliable precedent).
\textsuperscript{21} S. Rep. No. 1007, supra note 17, at 13. The relevant portion states: In view of the need of potential donors to be secure in their knowledge that a contemplated contribution will qualify for a deduction, the committee expects that taxpayers may obtain a prior administrative determination as to whether the contemplated contribution will be considered to have been made for a qualifying conservation purpose. In addition, the committee expects that regulations under this section will be classified among those regulation projects having the highest priority . . . .
\textsuperscript{23} I.R.C. § 170(h) is certainly not unique in this respect as it is the implied objective of the entire Internal Revenue Code.
\end{footnotes}
have inevitably given rise to controversy. The major areas of debate are valuation of the conservation easement donation and IRS interpretation of the open space contribution and the public access requirement.

A. Valuation of the Donation

The value of a conservation easement donation is generally the difference between the fair market values of the property before and after it is burdened by the easement.\(^2\) If the donor or members of his family own property that is separate from but adjacent to the land restricted by an easement, the "before and after" valuations must include these contiguous tracts in their entireties.\(^2\) The granting of a conservation easement effects a decrease in the underlying basis of the property.\(^2\) If the easement is over the donor's entire tract, the reduction in basis bears the same ratio to the total basis as the fair market value of the easement bears to the fair market value of the entire property before the easement was granted.\(^2\) When the donor


\(^{26}\) Proposed Treas. Reg. § 1.170A-13(h)(3)(i). For example, Developer buys 100 acres of land valued at $7,000 an acre before donating an easement on 20 acres to be used as a city park. If, after the easement is granted, the 20 acres are worth only $700 an acre, but the remaining 80 acres have appreciated to a fair-market value of $10,000 an acre, the value of the contribution for tax purposes is computed as follows:

- FMV of entire tract before easement ....................... $700,000
- FMV of land subject to the easement ...................... 14,000
- FMV of remainder ........................................ 800,000
- FMV of entire tract after easement ....................... 814,000
- Value of easement ...................................... -0-

Developer would not qualify for a charitable contribution deduction for this easement gift, but he has clearly profited, as has the community. See examples 10-11, 48 Fed. Reg. 22,948 (1983).


\(^{28}\) See Proposed Treas. Reg. § 1.170A-13(h)(3)(iii); Rev. Rul. 64-205, 1964-2 C.B. 62. For example, Landowner donates a conservation easement to City. She has a basis of $20,000 in land with a fair market value of $80,000. The fair market value of the easement is determined to be $60,000. The amount of basis allocated to the easement is $15,000 ($60,000/$80,000 = $15,000/$20,000); therefore, the basis of the entire property is reduced to $5,000 ($20,000 minus $15,000). See Proposed Treas. Reg. § 1.170A-13(h)(4)(example 10).
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...gives an easement over only a part of his property, the basis of the unencumbered portion is unaffected.29

Despite the seeming straightforwardness of a "before and after" valuation approach, IRS interpretations of the approach have been fraught with inconsistencies and have had a "chilling effect" on potential donors.30 In committee hearings, the IRS expressed fears that some donors would receive the tax break for giving up property rights they did not want in the first place—for example, the wealthy landowner who never planned to develop his summer retreat and the oil company that gave a conservation easement on the surface rights of its property.31 At first blush, the IRS objections seem reasonable, but the cases of the wealthy landowner and the oil company deserve a second look.

As for the former, the existence or absence of plans to develop property to a more profitable use does not obviate the fact that a conservation easement donation forecloses a landowner's option to change his mind. The landowner who forfeits the right to obtain the maximum profit from his property has foregone forever a valuable privilege of his fee ownership "bundle of rights."32 Placing a value on that forfeited right is no more speculative or inappropriate than valuing shares of a closely held corporation for which there is no current public market.33 Accordingly, Congress has indicated that the "before and after" valuation test should consider the property's potential value and the likelihood of its development.34 Unanswered is whether the higher "before" value should be used when the donor does not plan to develop his property, yet its potential development value is such that, absent the easement, the land likely would be useful.

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31 Id. at 332.
32 I.R.C. § 170(h)(2)(C) mandates that the conservation easement must be granted in perpetuity to be eligible for the charitable contribution deduction under the Code.
33 Hambrick, supra note 30, at 352.
34 S. REP. No. 1007, supra note 17, at 14-15.
developed after the donor's death. The IRS seems to favor a more mechanical application of the "before and after" test, focusing on how "immediate or remote the likelihood" is that the property would have been developed to its "potential highest and best use." By ignoring the reality that a purely profit-minded donor will generally fare much better in developing his property than in taking a limited tax deduction, this approach undermines congressional intent to encourage the granting of conservation easements.

Another valuation problem concerns IRS fears that mining companies will abuse the conservation easement deduction. Mineral exploration and development often occur in many of the very areas that the tax incentive was enacted to protect. Congress specifically provided that, so long as the conservation purposes of the surface easement were protected, the tax break

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35 For example, the South Carolina Nature Conservancy received a conservation easement donation in March, 1984, on a 4,680 acre, privately owned island near Hilton Head. The donor uses the island as a family retreat and wished to preserve its undeveloped character. The donor purchased the island in 1979 from a South Carolina businessman who had previously drawn up development and architectural plans to convert the island into a residential community. Although this property had considerable value in its undeveloped state, its potential value was enormous. The donor has forfeited that potential, but it is unclear whether the IRS will permit a deduction that reflects that value or will construe the donor's altruism as an indication that he never intended to develop the property and has, therefore, forfeited nothing. See South Carolina Nature Conservancy, Press Release (March 14, 1984).

36 See, e.g., Thayer v. Commissioner, 36 T.C.M. (CCH) 1504 (1977). The court determined that the value of an open space or scenic easement over a 60 acre estate near Gunston Hall outside Washington, D.C., was between appraisal valuations provided by appraiser for Virginia Division of Conservation and Economic Development (valuation used by petitioner) and appraiser for the IRS. The court noted with approval that both appraisers had used the "before and after approach" in determining the value of the easement, but emphasized the fact that the petitioner's appraiser did not "go through all of the detailed appraisal procedures" used by the IRS appraiser, and had "relied to some extent on his general knowledge of subject and surrounding properties in determining the highest and best use of Overlook Farm before and after the easement and the values to be assigned thereto." Id. at 1508.

37 I.R.C. § 170(b)(1)(C) limits the amount of the annual allowable deduction for charitable contributions of capital gain property for qualified conservation purposes to 30% of the taxpayer's adjusted gross income.

38 S. Rep. No. 1007, supra note 17, at 13. Two of the four qualified "conservation purposes" defined in the IRC are for the preservation of natural habitats or ecosystems and for the preservation of open space "including farmland and forest land." See I.R.C. § 170(h)(4)(A)(ii)-(iii).
would not be denied to donors who retained a mineral interest in their property.\textsuperscript{39} Surface mining is strictly proscribed,\textsuperscript{40} but other traditional mining methods will not defeat the contribution's deductibility where the impact is limited and remediable.\textsuperscript{41} The tax break was designed to provide economic incentives for coal companies to deep-mine rather than strip-mine and for oil companies to control brine discharges.\textsuperscript{42}

Despite this congressional effort to strike a fair balance between the competing national interests in energy independence and environmental protection, the IRS penalizes these donors.\textsuperscript{43} The value of their retained mineral interest is reduced because the mining restrictions imposed by the deduction increase the cost of recovery.\textsuperscript{44} Yet the IRS does not permit the donor to include this diminution in value in computing the amount of the conservation contribution.\textsuperscript{45} Nevertheless, when the donation of an easement enhances the value of adjacent land owned by the donor, the increased value must be included in the easement valuation.\textsuperscript{46} Heads I win, tails you lose.

\subsection*{B. Open Space Easements}

The Internal Revenue Code (hereinafter the Code) states that a charitable contribution deduction will be allowed for the preservation of "open space," including forests and farmland, when the contribution will yield a "significant public benefit" \textit{and} (1) it is for the scenic enjoyment of the general public \textit{or} (2) it is pursuant to a "clearly delineated Federal, State, or local gov-

\begin{itemize}
\item \textsuperscript{39} See S. REP. No. 1007, supra note 17, at 13; Proposed Treas. Reg. § 1.170A-13(g)(3)(i).
\item \textsuperscript{40} See S. REP. No. 1007, supra note 17, at 13; Proposed Treas. Reg. § 1.170A-13(g)(3)(i).
\item \textsuperscript{41} See S. REP. No. 1007, supra note 17, at 13; Proposed Treas. Reg. § 10170A-13(g)(3)(i).
\item \textsuperscript{42} See S. REP. No. 1007, supra note 17, at 13.
\item \textsuperscript{43} See Proposed Treas. Reg. § 1.170A-13(h)(4)(example 1).
\item \textsuperscript{44} For example, if a coal company gave a conservation easement on the surface rights of its property, recovery of the coal would have to be done by deep mining as the IRC proscribes surface mining. Deep mining is more costly, as a rule, and if the coal seam ran near the surface, part of the deposit might be unrecoverable, further decreasing the value of the donor's interest.
\item \textsuperscript{45} See Proposed Treas. Reg. § 1.170A-13(h)(4)(example 1).
\item \textsuperscript{46} See Proposed Treas. Reg. § 1.170A-13(h)(3)(i).
\end{itemize}
ernmental conservation policy.” 47 Ironically, one of the priorities of the 1980 tax law was to clarify this section of the conservation easement provision. 48 But potential donors and donees continue to be as befuddled by the open space provision as ever, and the draft regulations have only served to muddy the waters further.49

Whether property is considered scenic or of significant benefit to the public depends upon the location of the property.50 While the IRS seems to recognize that the test is a subjective one, 51 the fact remains that the IRS must determine the deductibility of the donation in each case. Since there are natural resource experts currently working for conservation agencies in most states, it would be more appropriate for the IRS to use these agencies’ evaluations in making such determinations. 52

Another inconsistency occurs when the donee of an open space conservation easement is a state or local government. Although the IRS allows a presumption in these cases that the “clearly delineated governmental policy” criterion has been met, 53 it requires that the requisite “public benefit” be established separately. 54 As all public agencies are required to act in the best interest of the public, it is unclear what more is required.

C. Public Access

The draft regulations state that, as a general rule, public

48 See S. Rep. No. 1007, supra note 17, at 10 (“In addition, the committee decided that the treatment of open space easements should be clarified.”).
49 See, e.g., Select Comments, supra note 24.
50 For example, farmland which lies within a city’s designated “green belt” may well qualify for a conservation contribution whereas the same acreage elsewhere would not necessarily be of such significant benefit to the public.
51 See Proposed Treas. Reg. § 1.170A-13(d)(4)(ii)(A). “The application of a particular objective factor to help define a view as ‘scenic’ in one setting may in fact be entirely inappropriate in another setting. . . . Factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution.” Id.
52 For example, 33 states and the Tennessee Valley Authority have “Natural Heritage Programs,” whereby important natural areas are identified and documented by a standardized methodology. Kentucky has participated in the Natural Heritage Program since 1976 through the Kentucky Nature Preserves Commission. Conversations with Hugh Archer, Co-director of the Kentucky Nature Preserves Commission Authority (Sept. 1984).
54 See id.
access is necessary to meet the "exclusively for conservation purposes" test in the Code.\textsuperscript{55} While a specific exception is made to permit visual rather than physical access to scenic easements,\textsuperscript{56} the requirement itself should be the exception rather than the rule. Physical access is essential where the conservation contribution is for "the preservation of land areas for outdoor recreation by, or the education of, the general public."\textsuperscript{57} In all other instances, however, public access should not be a determining factor. For example, the protection of natural habitat is itself a desirable public goal.\textsuperscript{58} The same can be said for the preservation of threatened farmland. In most instances, this land is being preserved as a valuable natural resource for food supply rather than public access purposes.\textsuperscript{59} The requirement of public access contradicts the conservation easement concept as a resource protection tool.

Nonprofit conservation groups have found that most donors would not donate a conservation easement if public access were mandatory.\textsuperscript{60} The owners of an architecturally significant home might be understandably reluctant, for example, to have the general public trooping through the living room of their house. Further, required public access could result in the donee organization being forced to bear additional expenses of day-to-day land management and liability.\textsuperscript{61}

\textsuperscript{55} Proposed Treas. Reg. § 1.170A-13(e)(1)-(2).
\textsuperscript{56} See Proposed Treas. Reg. § 1.170A-13(d)(4)(ii)(B). The proposed regulations further state that "the entire property need not be visible to the public for a donation to qualify under this section." § 1.170A-13(d)(4)(ii)(C). § 1.170A-13(d)(4)(ii)(B) also allows an exception to the access requirement when access would defeat the conservation purposes as in the case of the preservation of a natural habitat.
\textsuperscript{57} I.R.C. § 170(h)(4)(A)(i).
\textsuperscript{58} See S. REP. No. 1007, supra note 17, at 11. ("The committee intends that contributions for this purpose [the protection of a relatively natural fish, wildlife or plant habitat] will protect and preserve significant natural habitats and ecosystems in the United States.").
\textsuperscript{59} See Private Letter Ruling 0170.05-00, May 1984. Although conservation easement donations on farmland previously had been allowed, this was the first time the IRS had issued a private letter ruling on the subject. This donation of a conservation easement on a Virginia farm couple's land was made solely to protect the food-producing capacity of the farm. AMERICAN FarmLand, Vol. 4, No. 2, June 1984, at 1, col. 1.
\textsuperscript{60} Conversations with Hugh Archer, attorney with The Nature Conservancy, Kentucky Chapter (Aug. 1984).
\textsuperscript{61} According to The Nature Conservancy's Kentucky Chapter, the cost associated with a publicly-visited nature preserve would include: the creation and maintenance of
III. STATE STATUTORY AUTHORITY FOR CONSERVATION EASEMENTS

The validity of conservation easements depends upon statutory authority at the state level to remove the common law impediments to their perpetuity. Kentucky's Local Scenic Easement Law (LSEL), originally enacted in 1972, was amended and expanded to its present form in 1976. The LSEL was adopted to allow Kentuckians to take advantage of the emerging federal tax deductions that were the predecessors to section 170(h) of the Code.

In 1981, the National Conference of Commissioners on Uniform State Laws drafted a model statute—the Uniform Conservation Easement Act (UCEA)—in direct response to the 1980 Tax Treatment Extension Act. The 1984 Kentucky General Assembly considered, but failed to approve, the UCEA. In-
stead, Kentuckians must continue to rely on the LSEL, a statute enacted four years before the current federal tax law.

When the LSEL and the UCEA are compared, the weaknesses of the Kentucky statute are readily apparent. Foremost is simply that the LSEL does not adequately define or describe the legal attributes of conservation easements. This failing well could prove fatal to an easement donation, forcing litigants to look to the very common law axioms that the state statute was designed to overcome. Conversely, the primary focus of the UCEA is the removal of all common law barriers to conservation easements. Where the LSEL only implies that the agreements are binding against successors in interest, the UCEA comprehensively lists, and unequivocally negates, all potential common law limitations on enforceability.

Another weakness in the LSEL, as noted above, is that it mirrors much of the now-defunct Tax Reform Act of 1976. Although the language of the LSEL might be construed to encompass the wider variety of "conservation purposes" recog-

including Hugh Archer of The Nature Conservancy and Mike Green of The Land and Nature Trust of the Bluegrass have indicated that the bill was killed by the "coal interests" in the General Assembly. Conversations with Hugh Archer, Co-director of the Kentucky Nature Preserves Commission (Sept. 1984).

68 KRS § 65.410(4) defines a scenic easement as "an interest in land transferred by the owner thereof to the public, either in perpetuity or for a term of years." While this language may reach the essence of a conservation easement agreement, the statute never directly addresses the common law obstacles to these negative easements in gross. Because the statute is silent on these issues, a court would be forced to rely on the common law in resolving any potential litigation by the donor's heirs or assigns.

69 See id.


71 See authority cited supra note 68.

72 See Unif. Conservation Easement Act § 4, 12 U.L.A. at 56 which states:

A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;
(2) it can be or has been assigned to another holder;
(3) it is not of a character that has been recognized traditionally at common law;
(4) it imposes a negative burden;
(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
(6) the benefit does not touch or concern real property; or
(7) there is no privity of estate or of contract.

73 See note 64 supra and accompanying text.
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nounized by the Code.74 Kentucky’s statute refers explicitly only to “scenic easements.” This seeming limitation is reinforced further by the LSEL’s requirements for acceptance, which have all the features of the federal open space-scenic easement contribution.75 In short, the specificity of the LSEL could unnecessarily limit its application. In contrast, the model statute is focused more on the property law issues of conservation easements.76 Although the UCEA was drafted on the heels of the current federal tax law, it does not track that statute or any of its predecessors. Because it is more general in scope, the model statute would not have to be amended with every tax law change or new Treasury Department regulation. The UCEA merely legitimizes the conservation easement transaction—donors interested in the federal tax deduction are free to structure their agreements according to the federal tax guidelines.77

74 See I.R.C. § 170(h)(4)(A). The text of this provision is quoted supra note 15.
75 Compare KRS § 65.466:
Requirements for acceptance.
A scenic easement shall not be accepted by a city, county, or urban county, unless the governing body, by resolution finds:
(1) That the preservation of the character of the land is consistent with the plan of the city, county, or urban county, where such plan exists; and
(2) That the preservation of the character of the land is in the best interest of the state, county, city, or urban county, is important to the public for the enjoyment of scenic beauty, and will serve the public interest. . . .
with I.R.C. § 170(h)(4)(A)(iii):
[A conservation contribution deduction will be allowed for] the preservation of open space (including farmland and forest land) where such preservation is—
(I) for the scenic enjoyment of the general public, or
(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit. . . .

76 See UNIF. CONSERVATION EASEMENT ACT § 2(a), 12 U.L.A. at 54. The model act simply states: “Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” Id.
77 The Commissioners’ Prefatory Note to the UCEA suggests that the model act permits donors to structure their agreements so that they may qualify for any federal tax benefits, but that these donors should look to the Internal Revenue Code for the specific guidelines for deductibility. See UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. at 52.
An additional disadvantage of Kentucky's LSEL is that it covers only conservation easement donations to governmental entities. This limitation unduly burdens local governments and narrows the donors' options. The LSEL also requires that proposed easement donations undergo a review by the local planning commission prior to consideration by the city, county or urban county government. This extra layer of bureaucratic complexity undoubtedly has inhibited some would-be donors from getting involved in the process. Moreover, state and local governments—particularly small communities—generally lack the resources and the incentive to actively solicit for conservation donations or to enforce significant numbers of conservation easements. On the other hand, the UCEA, like the current federal tax law, recognizes donations to charitable organizations as well as to governmental agencies. National nonprofit organizations such as The Nature Conservancy, The Land Trust Exchange, and The American Farmland Trust have dominated the conservation easement movement. These groups and others like them offer legal expertise and anonymity generally unavailable in the local governmental setting. Inclusion of private-sector donees would increase public awareness of conservation easements and promote their use in remote areas of the state where local governments do not wish to take on the responsibility of policing the conservation contribution.

The LSEL also lacks the UCEA's "third-party right of enforcement" provision. This innovation would allow donees to delegate the task of enforcing the easement restriction, a feature that could encourage both governmental and charitable organi-

78 See KRS § 65.420 ("Local legislative bodies may obtain scenic and recreational easements. . . .").
79 See KRS § 65.468 ("The local legislative body shall not acquire a scenic easement until the matter has been referred to its planning department or planning commission, where such planning body exists, and report thereon has been received from the planning commission. . . ."). Interestingly, the report is advisory only and has no binding effect upon the local legislative body's decision. Id.
81 The experience of The Nature Conservancy, for example, involves approximately two million acres of land acquired in all 50 states. See Stewart & Noonan, Legacies to Preserve the Environment, 120 TR. & EST. 21, 22 (Dec. 1981).
82 See UNIF. CONSERVATION EASEMENT ACT § 1(3), 12 U.L.A. at 53.
izations to accept more donations. The UCEA requires that the enforcement designee be an organization or governmental entity that would qualify as an easement holder under the statute.\(^3\) Easement donees would continue to handle administrative chores such as recordation, while designated third parties would ensure that the easement's conservation or preservation purposes are met.\(^4\)

**CONCLUSION**

In spite of Congress' strong endorsement of the conservation easement concept, this valuable resource-saving tool shows few signs of wear in Kentucky.\(^5\) One reason it has not been used more widely is a lack of firm guidelines from the federal government. Nearly five years have passed since the current federal tax incentive was enacted in 1980. Yet, the IRS has not issued final regulations for determining the deductibility of conservation contributions. The draft regulations, released in mid-1983, are vague or ambiguous in part. The regulations also suggest inequities that would defeat the intent of Congress.\(^6\) Despite these difficulties, taxpayers across the country are making con-

\(^3\) See id.

\(^4\) The Commissioners' Comment to the UCEA emphasizes that the easement donor, donee and designated "third party" would all have standing to sue should there be any breach of the conservation easement agreement. Additionally, a state's attorney general "could have standing in his capacity as supervisor of charitable trusts, either by statute or common law." UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. at 55, commissioners' comments.

\(^5\) Information from Hugh Archer, Co-director of the Kentucky Chapter of The Nature Conservancy, and other reliable sources indicate that only six conservation easement donations have been made in Kentucky, two of which involved donations on portions of the same tract of land. The most interesting feature of these transactions is that despite their small number, there have been conservation donations in each of the four federal "qualified conservation purposes" categories—preservation of an area for the education of the general public, preservation of a natural habitat, preservation of open space (a horse farm), and the preservation of several certified historic structures. Worthy of note, also, is that all of these conservation easements are located in the Lexington and Louisville areas, the state's most populous areas. Conversations with Hugh Archer, Co-director of the Kentucky Nature Preserves Commission (Sept. 1984).

These donors have received the federal tax deduction, although all are still subject to audit by the IRS. Further, all of these donors are still living, so that the durability of their donations under the LSEL has not yet been tested.

\(^6\) See notes 30-46 supra and accompanying text.
Conservation easement donations and receiving tax breaks for doing so. Hopefully, the IRS will quickly release its final regulations so that would-be donors can proceed with more assurance that federal guidelines are being met.

In the meantime, Kentucky needs to get its own house in order by adopting the Uniform Conservation Easement Act. The present state statute fails to adequately describe the legal attributes of a conservation easement. Unless state law disposes of the common law barriers to these agreements, they are not enforceable against successors in interest and are ineligible for the federal tax break. The UCEA directly addresses these common law problems. The model act would ensure the legality of conservation easements and enable donors to win access to federal tax deductions. Unlike the LSEL, which on its face refers only to scenic easements, the UCEA defines conservation easements flexibly enough to withstand the ever-changing tax code without the need for constant revision. Further, the UCEA, like the federal statute, permits donations of conservation easements to charitable organizations and governmental entities, while Kentucky’s LSEL only permits donations to the latter. Finally, the model statute contains an innovative “third-party right of enforcement” provision that could encourage donees, knowing that they could delegate some of their responsibility, to accept more conservation contributions.

Congress has provided a valuable tool that could initiate a veritable “greening of America.” Adoption of the UCEA by the Kentucky General Assembly would guarantee that this affordable—and often profitable—tool can be used in Kentucky to accelerate efforts to preserve the state’s scenic beauty and rich historical heritage.

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See note 68 supra.
8 See notes 12 and 68 supra.
9 See note 72 supra.
10 See note 77 supra.
91 See notes 73-75 supra and accompanying text.
92 See I.R.C. § 170(h)(3).
93 See UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. at 53.
94 See KRS § 65.420.
95 See UNIF. CONSERVATION EASEMENT ACT § 1(3), 12 U.L.A. at 53.