

# Conservation restrictions — A primer

by Daniel C. Perry

**T**he continued escalation in the value of buildable vacant land has pushed seemingly modest estates into high tax brackets and made the cost of preserving family lands prohibitive in many cases. This development has made the use of conservation restrictions an increasingly valuable and effective tool for the estate planner who counsels large landowners. A properly prepared and approved conservation restriction can result in three distinct benefits to the owner: (1) it provides an income tax deduction equal to the value lost by the restriction; (2) it lowers the valuation of the property for municipal assessment purposes; and (3) it lowers the value of the property for estate tax purposes. The restriction permits the owner to enjoy these benefits, to retain control of his property and to pass it on to her heirs (with considerable estate tax savings) with the satisfaction of knowing that it will remain forever in its natural state. This article will generally outline the procedures that need to be followed to achieve these benefits, and point out some concerns to which practitioners should be sensitive in drafting and securing approval of conservation restrictions.

In Massachusetts, the term "conservation restriction" usually refers to an agreement between a landowner and a governmental body or charitable organization, in which the landowner permanently restricts future use of his property, and that has been approved at state and local levels in accordance with the provisions of G.L.M c. 184, §32. A restriction on development is legally enforceable without the approvals contemplated by §32. However, §32 approval has two effects: it eliminates the numerous equitable defenses to a suit for enforcement by

injunction that are available under c. 184, §30 and it prevents application of c. 184, §§26-29, which provides for expiration of restrictions after 30 years unless notice thereof is rerecorded. This last provision is important because a gift of a restriction must be perpetual to be deductible for income tax purposes. Thus, approval under §32 is a prerequisite if federal income tax deduction is contemplated.

## Qualified holders

Either a governmental body or a charitable corporation or trust can hold an approved conservation restriction. Municipal conservation commissions have express statutory authority to receive gifts of conservation restrictions on land within city or town limits under c. 40, §8C. Local land trusts, as well as larger organizations such as the Trustees of Reservations or the Massachusetts Audubon Society, also frequently accept such gifts. An advantage of working with these larger organizations is that they are familiar with the tax considerations and approval requirements and can make the process easier. Private organizations usually do some review of such gifts to determine that the gift is suitable to their mission, and will characteristically require a cash contribution to fund their ongoing inspection and enforcement obligation.

## The form of the restriction

There are a number of technical requirements that must be satisfied for the restriction to qualify for the charitable deduction. A good form, drafted by R. Lisle Baker, Kingsbury Browne and Stephen I. Small for compliance with Massachusetts and federal tax law and contains helpful commentary, is found in the *Massachusetts Conservation Restriction*

*Handbook*. This handbook is published by the Division of Conservation Services and is available free. Another model with more extensive commentary is found in the *Conservation Easement Handbook* by Janet Diehi and Thomas S. Barrett which is available from the Land Trust Alliance. (Ordering information for both publications listed at the end of the article.) If you are working with larger land trusts, they generally have a specific form that they will want to work from.

The form of restriction is usually the subject of some negotiation between the donor and the holder, with discussions focusing on the reserved rights of the grantor. If the grantor intends to continue to reside on the property or construct a limited number of new structures, the holder will often assist on defined envelopes for future construction of structures, utilities and access roads. (In any case, where the grantor is restricting less than the entire parcel, he will most certainly want to do a field survey with monumentation of the boundaries of the restriction.)

Other issues that frequently come up are size, architecture, materials of any permitted improvements, the use of herbicides and insecticides on land that will continue to be used for agricultural purposes, standards for future cutting of trees or vegetation and frequency and purpose of access. The holder will often request a provision requiring notice and/or approval prior to significant activity affecting restricted property.

## Tax considerations

A gift of a qualified conservation

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contribution is an exception to the general rule that a taxpayer may not give a charity less than his entire interest in property and still qualify for a charitable deduction. Tax regulations (Reg. 1.170A-14) establish a number of requirements for qualification, the most important of which are that the gift be perpetual, and that the gift serve one of four specified public purposes. Those public purposes are (1) outdoor recreation by or education of the general public; (2) protection of a significant natural habitat of fish, wildlife or plants; (3) preservation of open space, but only if the land is preserved for the scenic enjoyment of the general public or if the gift is made pursuant to a clearly delineated governmental conservation policy and, in either such case, if the gift will yield a significant public benefit; or (4) preservation of an historically important area or a certified historic structure.

The regulations provide detailed guidelines for application of these standards. Even so, these criteria, particularly if the gift falls into the "open space category" which is the requirement of a significant public benefit, are disconcertingly imprecise. However, the practitioner can take comfort from the fact that the commonwealth's Division of Conservation Services, which reviews restrictions for approval by the secretary of Environmental Affairs, applies IRS criteria in determining if a gift is in the public interest. As a result, the director of conservation services reports that he is not aware of IRS disallowance of a charitable deduction for any gift approved by the secretary on the ground that it was not a "qualified conservation

contribution."

As a general rule, the amount of the deduction is equal to the difference between the fair market value of the restricted property before the gift and the fair market value of the property after the gift. (However, if other property of the grantor is made more valuable by the gift, that deduction is lowered by the amount of that increase.) If the deduction claimed is more than \$5,000, it must be supported by a qualified appraisal and an appraisal summary on IRS Form 8253, signed by both the appraiser and the donee, must be filed with the return. There are a number of technical requirements for a qualified appraisal detailed at Reg. 1.170A-13T(c). It is prudent to send a copy of these requirements to your appraiser if you are not certain if he is familiar with them.

There are annual limitations on the amount of a deduction that can be claimed for appreciated property, that is, property with an appraised value exceeding the taxpayer's cost basis. Generally, the taxpayer may deduct up to 30 percent of his adjusted gross income in the year of the gift. Contributions in excess of that ceiling may be carried forward and deducted in succeeding tax years for five years following the gift.

Practitioners should encourage clients to spend an amount on the appraisal that is proportionate to its value. The appraisal of a conservation restriction (which is really two appraisals) is usually a sophisticated exercise. For larger gifts involving significant development rights, the high quality product that the donor will want to stand up to the scrutiny of an audit may well cost \$5,000 or more. (That sum and reasonable attorneys' fees charged in connection with the gift are both deductible in the year of payment, independent of the 30 percent limitation.)

### Approval

G.L.M. c. 184, §32, requires municipal approval of all restrictions not held by the municipality or a

commission, agency or other instrumentality thereof in a city. The restriction must be approved by the mayor, or in cities with a city manager, both the city manager and the city council. In a town, approval can be secured either from the selectmen or from town meeting. Local procedures for approval vary, but usually involve little review.

All qualified conservation restrictions in Massachusetts must be approved by the secretary of environmental affairs, (currently, Trudy Coxe). The secretary's program is administered by its Division of Conservation Services, whose director is Joel A. Lerner. A request for approval is made on the division's application form, which requires detailed information calculated to determine the existence of a public benefit and also to document baseline data regarding the property, which is required by IRS regulation. Among other things, the form requires attachment of the form of the restriction, a USGS topographical map, photographs, a survey and, if available, aerial photographs and a natural resource inventory.

Approval by the secretary is not routine. It is important to prepare the application with an eye toward satisfying IRS criteria for a qualified conservation contribution. Thus, if the owner intends to rely on the wildlife habitat criterion, then she should check with the conservation commission for available wildlife resource inventories. It is particularly helpful to show that property includes areas of habitat for endangered and threatened species as shown on maps published by the department of fisheries and wildlife. If one intends to rely on the open space criterion, the municipality's master plan and open space plan and the preambles of the zoning bylaw and subdivision regulations may provide general statements of conservation purpose to evidence a clearly delineated governmental policy. It is also advisable to note the existence of nearby protected parcels

that will augment the gift. If the applicant intends to rely on the scenic vista criterion, the applicant should document the points of public access from which the property may be viewed (which may include bodies of water). Permitting limited public access (for example, by scientific or educational institutions) always supports a showing of public benefit.

Although the secretary's approval is the last step in the process before recording, it is advisable to consult the director of the division early. Often the director will give advance guidance on particular requirements for the form of the easement and baseline documentation necessary to secure approval. Allow adequate time to complete the process. In the author's experience, it usually takes about six months from start to finish. It can be accelerated somewhat, but a donor who starts thinking about a gift in November should be advised that he should not plan on a deduction until the following tax year.

*Massachusetts Conservation Restriction Handbook* is published by the Division of Conservation Services. The division's office is at 100 Cambridge Street, Boston, 02202 (617) 727-1552 ext.. 290. The handbook is free of charge and includes not only an excellent suggested form, but also detailed information concerning procedures for approval, approval criteria and policies of the secretary.

*Conservation Easement Handbook* is published by the Land Trust Alliance at 1319 F Street N.W., Suite 501, Washington, D.C. 20004-1106 (202) 638-4725, for \$35.00 plus \$5.00 for shipping and handling. ■

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