



Charitable Planning With Land—The Benefits of Conservation Easements

by Ben Spiess, Esq.

Few strategies in estate planning offer as many potential benefits as protecting land with a conservation easement: an income tax deduction; in many cases a reduction in property taxes; reduced estate taxes at death; an enduring environmental legacy and the multiple benefits of clean air, land and water. For owners of farmland, forestland or other undeveloped land who want to conserve their land and reduce taxes, a conservation easement may be an appropriate vehicle to achieve these goals.

In general, a conservation easement is a restriction a landowner places on its land that prevents or restricts development or preserves or protects natural resources, wildlife habitat, farmland, forestland or open space. The easement typically bars or restricts certain activities, such as development, subdivision, construction and most commercial uses, while allowing a landowner to continue other existing uses, such as farming, hunting, fishing or recreation. Except in rare circumstances, the restriction is permanent; most land under a conservation easement cannot be developed in the future.

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Washington Watch

by Cynthia Pantazis

HEALTH CARE REFORM LEGISLATION IMPACTS NONPROFITS

As Congress and the Obama administration move to enact comprehensive reform legislation, the core issues under consideration—namely rising costs, eliminating barriers to access and providing universal coverage—have elevated concern in the nonprofit community, which faces challenges on two fronts, as service providers and as employers. In response, advocacy efforts have been undertaken to ensure that the final bill will include provisions to address the need for affordable health care of the nearly 13 million employees working in nonprofit organizations and provide assistance for the uninsured or underinsured.

Members of Congress are being urged to include health care incentives that treat nonprofit and for-profit employers equally and include direct assistance for nonprofit employers so that they can provide health insurance to their employees. According to the sector, an essential element of continuing and expanding coverage is through the extension of credits or subsidies to small nonprofit employers that are equivalent to those available to small businesses.

The House passed comprehensive health care reform legislation (HR 3962) on Nov. 7. The bill

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Charitable Planning in a Challenging Economic Environment: The Charitable Lead Trust Can Benefit Family and Achieve Charitable Goals

The effects of the recent economic crisis—depressed asset values and a low interest rate environment—actually favor certain estate and charitable planning strategies. This is the case with the charitable lead trust, which can be used to continue a charitable giving program for clients with a clear commitment to ongoing charitable giving, while at the same time presenting the opportunity for gift and estate tax efficient planning for the family. We have written about this strategy in past Bingham Charitable Advisers newsletters, but a fresh look at this strategy in this economic climate is warranted, as it can be an effective estate and charitable planning strategy in the right situation.

As its name implies, with a charitable lead trust, giving to charity takes the lead—chronologically that is. With a charitable lead trust, a donor transfers assets to a trust that provides for an annual payment to charity either for a term of years or for the lifetime of a designated individual or individuals. At the end of this term, whatever remains in the trust can pass to or continue in trust for the beneficiaries of the donor's choice at a reduced, or even an eliminated, gift or estate tax. The donor's charitable goals have been fulfilled through the stream of payments to charity during the stated term, and the transfer of wealth to the donor's family at a reduced or eliminated transfer tax furthers the donor's family goals.

LIFETIME CHARITABLE LEAD TRUSTS

You can establish a charitable lead trust during your lifetime or at your death as a part of your estate plan. The stream of payments to charity can be defined as a percentage of the value of the assets that you initially contribute to the trust (charitable lead annuity trust) or as a percentage of the value of the trust determined each year (charitable lead unitrust).

A lifetime charitable lead trust offers you the ability to transfer wealth to your family during your lifetime without paying any gift tax even if you have already used your lifetime federal gift tax exclusion (currently \$1 million), while at the same time furthering your philanthropic goals.

Example: Sara has a strong commitment to ongoing charitable giving. She gives annually to her alma mater, the hospital where she receives medical care and to a variety of other community-based organizations. Her annual giving is in the \$50,000–\$100,000 range. Sara has used her lifetime gift tax exemption on transfers of interests in her business to a trust for her children,

which was accomplished in a very tax-advantaged manner. That trust now provides a level of cash flow to the children sufficient for their current needs. Sara is interested in exploring other tax-advantaged methods of transferring wealth to the next generation during her lifetime.

Sara transfers \$1 million to a charitable lead annuity trust. The trust provides for annual distributions to her named charitable beneficiaries totaling \$68,465 per year for 20 years. The charitable lead trust will therefore continue to accomplish Sara's charitable goals. If Sara wishes to retain some flexibility in the selection of the charitable recipients of distributions from the charitable lead trust over the years (rather than designating them by name in the trust itself), that can be accomplished through the trusteeship of the charitable lead trust or possibly through the use of a donor-advised fund.

At the end of the 20-year period, all remaining assets in the trust will be divided into separate trusts for her children, thus achieving Sara's family goals. During the 20-year period when charity is receiving payments from the charitable lead trust, Sara's children will be receiving distributions from the other trust she established for their benefit. At the end of the 20-year term of the charitable lead trust, the remaining assets in the charitable lead trust will be available to her children as well.

If the charitable lead trust were established in December 2009 and grew at 8 percent per year, at the end of the 20-year period \$1,527,864 would remain in the trust for Sara's children, while \$1,369,300 would have passed to charity during the 20-year term. For gift tax purposes, regardless of how much remains in the trust at the end of 20 years, when it is divided for Sara's children, the value of the gift for gift tax purposes is zero. This is clearly a win-win strategy.

How is it possible that you can pass more than \$1 million to your family and have the IRS value the gift at zero? The gift is valued by the IRS taking into account (a) that the family will not be entitled to the benefit of the gift until the end of the charitable term and (b) in valuing the gift, the IRS presumes that the trust assets are only going to grow by a designated federal interest rate, which would be 3.2 percent for charitable lead trusts funded in December 2009. To the extent that the assets in the charitable lead trust outperform that rate, that has no effect on the value of the gift for gift tax purposes, which is established in the year the charitable lead trust is funded.

Of course, if the assets in the charitable lead trust perform only at (or below) the applicable federal interest rate, there

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The Flexibility of Private Foundations—Summer Star Foundation for Nature, Art and Humanity

Private foundations can offer individuals, families and businesses great flexibility in achieving their philanthropic goals. One example of the variety of charitable undertakings possible with a charitable foundation is the Summer Star Foundation for Nature, Art and Humanity. At the helm of this foundation is Shalin Liu, whose charitable interests are broad—in terms of geography, subject matter and the ways in which the foundation reaches out to accomplish its charitable goals.

HELPING NONPROFITS TO ACHIEVE SOUND FINANCIAL FOOTING

When Shalin Liu read in a Boston newspaper that a charitable organization that works with inner-city high school students had lost a substantial portion of its funding due to a computer glitch that resulted in its application for federal funding not being considered, Shalin contacted the organization to discuss how she could help. Rather than just writing a check, Shalin wanted to understand how the organization found itself in the predicament it did, where its continued operation was threatened because of its substantial reliance on a single source of funding. What resulted was a grant from the Summer Star Foundation that not only bridged the gap in funding of operational expenses for the nonprofit, but also required the foundation to devote a portion of the grant to efforts to expand its donor base so that it could avoid in the future the funding crisis that had occurred.

GIVING BACK TO PLACES THAT HAVE BEEN IMPORTANT TO US

Shalin Liu traveled from her native Taiwan to study at Indiana University in Bloomington, Ind., where she received a Masters Degree in East Asian Studies. Shalin had many fond memories of her time in Bloomington. When Shalin and Barbara Freedman Wand, partner in Bingham's Estate Planning Group, started working together, they learned that they had a special link—Barbara, too, had studied at Indiana University in Bloomington, receiving her law degree there and then becoming a faculty member at the law school. Barbara and Shalin each gave birth to children at Bloomington Hospital and were in Bloomington during the same time period in the 1970s.

Shalin decided she wanted to give back to the community that had meant so much to her, and she and Barbara worked



Shalin Liu and Fairview Elementary School students after concert at Indiana University Musical Arts Center

together to identify possible charitable projects in Bloomington. What resulted were three wonderful programs to enrich the lives of children in the Bloomington area.

The Fairview Elementary School String Project

The Summer Star Foundation is partnering with the world-renowned Indiana University School of Music and the Bloomington public schools to sponsor the Fairview Elementary School String Project. This project provides all first graders at the Fairview Elementary School, located in an economically challenged part of Bloomington, with violin lessons as a part of an innovative first-grade music curriculum developed by the IU School of Music. Music education students and faculty from the IU School of Music assist the Fairview music teacher with the lessons. The children have performed both at Fairview and at the Musical Arts Center at Indiana University on a stage where world-class musicians have performed. The IU School of Music is undertaking research on the impact of the music lessons, not only on the development of musical skills, but also on the children's self-esteem and the development of their academic skills in other subject areas as well.

Scholarships to Attend Summer Recreational Programs Sponsored by the Bloomington Parks and Recreation Department

Providing opportunities to children who have experienced family challenges early in life has always been an interest of Shalin's. This past summer, the Summer Star Foundation offered the first Summer Star Scholarships to cover the required family "co-pay" portion of the tuition for children

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A conservation easement is simply an agreement between a landowner and a third party, usually a land or charitable trust or governmental authority, that defines how certain land will be used in the future. In Massachusetts, conservation easements are known as “conservation restrictions.” The terms of the easement must be carefully drafted to address the parties’ preservation and conservation goals. In order to qualify for certain tax benefits, the easement must be permanent and have a “conservation purpose”—a broad term covering recreation, hunting, fishing, wildlife habitat, agriculture, scenic enjoyment, education, or even logging and forestry. Land subject to such a restriction is still private property; a conservation easement does not open private land to public use unless the terms of the easement provide otherwise.

Because conserving land protects important public interests, such as promoting air and water quality or preserving wildlife habitat or farmland, the government offers powerful incentives through the tax code to encourage conservation easements. In particular, donating a conservation easement may offer savings on both income taxes and estate taxes.

Income Tax Benefits: To qualify for a federal income tax deduction, the conservation easement must be a “qualified conservation contribution” under Section 170(h) of the Internal Revenue Code. This code section requires that the easement be a permanent restriction on the land that is donated to a qualified organization, such as a land trust or government entity, and the donation must be for a conservation purpose such as the preservation of forestland, farms or open space for recreational, agricultural or forestry use.

Not surprisingly, a restriction on the land that bars development reduces the land’s value. The difference in value between the land subject to the restriction as compared to its value without the restriction determines the value of the gift made by the landowner for charitable deduction purposes. The value of the charitable deduction must be based on an appraisal performed by a qualified appraiser.

For federal income tax purposes, placing a conservation easement on land is treated as a charitable donation with limitations on the portion of deduction that may be taken in any one year. Under current law, at the federal level, a landowner can deduct an amount up to 50 percent of her “contribution base” (this is a concept similar to adjusted gross income) each year, with any excess being available for 15 additional years, and a farmer can deduct up to 100

percent of his contribution base. These deduction rules are scheduled to expire at the end of 2009; however, legislation is pending in Congress to extend them. If not extended, thereafter for land that has appreciated in value, the deduction will be limited to 30 percent of a contribution base, with any excess being available for deduction for five additional years.

Maximizing these federal income tax benefits requires careful advance planning. The income tax benefits of a conservation easement are only available if the easement is granted during the landowner’s lifetime. Property must be held for at least one year for a conservation easement to be eligible for the charitable income tax deduction. Deductions will have their maximum benefit if they count against ordinary income (taxed at up to 35 percent) and not capital gains income (taxed at 15 percent).

Only a minority of states allow state income tax deductions for donations of conservation easements. Massachusetts currently does not.

Estate Tax Benefits: There are two key estate tax benefits to a conservation easement. First, a conservation easement reduces the value of the property that is includable in the taxable estate of the landowner. At a current federal estate tax rate of 45 percent, the reduction in value of the real estate can result in considerable estate tax savings. In states such as Massachusetts that have an independent state estate tax, total federal and state estate tax savings can exceed 53 percent of the reduction in value of the land attributable to the conservation easement.

In addition to the reduction in the value of the property includable in the taxable estate, there is another opportunity for estate tax savings with respect to property that is the subject of a conservation easement. The estate can exclude an additional amount equal to the lesser of \$500,000 or up to 40 percent of the land’s value (with the exact percentage of the available exclusion already being determined by the level of the reduction in value of the real estate attributable to the conservation easement).

To take advantage of the estate tax exclusion, a conservation easement must meet additional requirements to those described above. Some of the more important additional requirements are: the decedent or his or her family member must have owned the land for at least three years before death, the land must be located in the United States, and the easement must prohibit more than a de minimis use for a

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Direct IRA Charitable Rollovers—A Valuable Opportunity for 2009 Tax-Advantaged Gifts to Charity

Unless Congress acts, 2009 marks the last year in which certain taxpayers can take advantage of the direct IRA charitable rollover. This strategy permits individuals who are at least 70½ to transfer funds directly from their regular IRAs to charities in a tax-advantaged manner. In the right circumstance, using this vehicle to make a charitable gift can save significant income taxes and benefit charity at the same time.

The direct charitable IRA rollover may be used in the following circumstances:

- Where the IRA owner has reached age 70½
- Where the intended charitable recipient is a public charity other than a supporting organization or donor-advised fund. Private foundations are not permissible recipients of direct charitable IRA rollovers.
- Where the gift to charity is made directly by the IRA custodian to the charity
- Where nothing is received by the donor in exchange for the charitable donation

- For charitable donations that, when combined, do not exceed \$100,000 per year

This strategy for making charitable gifts from IRAs may eliminate state income taxes that may otherwise be payable when IRA distributions are made to the IRA owner and then are donated to charity. It can also preserve other tax benefits for the IRA owner that might be adversely affected by the inflation of taxable income that may occur when the distribution is taken by the IRA owner and then donated to charity. While the direct charitable IRA rollover can be used to satisfy the annual required minimum distribution requirement for the IRA owner up to a \$100,000 annual limit, Congress has suspended the required minimum distribution requirement for 2009 in response to the economic crisis that affected the balances in many IRAs.

In the right circumstance, the direct charitable IRA rollover can save income taxes and preserve other tax benefits while at the same time accomplish the IRA owner's charitable giving goals. IRA owners should contact their legal and tax advisers to explore this possibility in more detail. <

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commercial recreational activity. In addition, the exclusion does not apply to the value of any development right retained by the decedent at the time the conservation easement was granted (unless the development right is timely extinguished after the decedent's death by those who inherit the land) nor does the exclusion apply to the extent there is outstanding debt at the time of the death of the decedent which was incurred by the decedent during his or her lifetime to acquire the property subject to the conservation easement.

An additional feature of the laws relating to conservation easements that can be attractive to families facing significant estate taxes relating to developable land is that a conservation easement can be granted after death, pursuant to the will or by the beneficiaries. For such post-death granted conservation easements, if made before a timely filing of the decedent's estate tax return, a choice must be made between either taking an estate tax charitable deduction or an income tax deduction for the value of the conservation easement granted, as only one of the two deductions is allowed.

Property Tax Benefits: In addition to the income tax and estate tax benefits of conservation easements, the restrictions on the use of real estate contained in the easement may also support a reduction in local property taxes. Both state statutes and local assessment laws should be reviewed in light of the easement restrictions to determine if property tax benefits are available in a particular case.

A conservation easement may be an attractive strategy to achieve your income and estate tax planning goals while furthering conservation and environmental protection values. If you are considering a conservation easement, you should contact your estate planning lawyer to help guide you through the easement process and the applicable tax regulations. <

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and teens to attend summer recreational programs offered by the Bloomington Parks and Recreation Department. The inability to provide this required co-payment had prevented many of those children who could most benefit from this summer program from participating. The gift agreement for the scholarship program identified the recruitment progress for potential scholarship recipients so as to reach, to the extent possible, those children who had experienced the most severe challenges in their families and who could best benefit from the wonderful array of summer programs. In the report that was submitted to the foundation at the end of the summer, the scholarship recipients shared their thoughts about their experience and the counselors evaluated how the camp experience had benefited each child. In the words of one counselor: "Susie tends to mistrust others, so it's good for her to be around peers and adults who can help build that trust back."



Summer Star Nature Club tending Chinese vegetables at Land's Sake Farm

Monroe County Public Schools' Nature Days

Shalin's deep interest in and appreciation of nature led her to fund a project through the Bloomington Parks and Recreation Department and the Monroe County Public Schools to expand the experiential environmental education opportunities for children in Bloomington. As a result of a grant from the Summer Star Foundation, a pilot program is underway to provide fourth-grade students in Bloomington with a Nature Day trip to a local park, where a specially developed environmental curriculum will allow them to learn by doing. After an evaluation of the pilot project, broader funding of this effort will be considered.

MAKING CONNECTIONS: BRINGING NONPROFITS TOGETHER IN NEW WAYS

One of Shalin's greatest talents is in recognizing how nonprofits might collaborate in new ways. One example of this is the Summer Star Nature Club, a program that brings together the New England Chinese Youth Summer Camp, a program of the Greater Boston Chinese Cultural Association, and Land's Sake, a local nonprofit educational farm that focuses on experiential environmental education and land management. Shalin brought these two nonprofits together through the Summer Star Nature Club, which provides the campers at the Chinese Youth Summer Camp with a week of activities at the Land's Sake Farm, focusing on sustainable agriculture. For this program, Land's Sake established a special garden of Chinese vegetables, which is tended by the campers. Produce from this garden is, in part, donated to the local Asian food pantry for distribution to those in need.

INTERNATIONAL GRANTMAKING: CONTRIBUTING TO WORTHWHILE PROGRAMS ABROAD

Private foundations can engage in international grantmaking so long as they comply with the specific regulatory requirements applicable to such grants. Shalin learned about a wonderful program at the National Pingtung University of Science and Technology in Taiwan in the area of wildlife conservation. The university had established a Rescue Center for Endangered Wild Animals to provide rehabilitation, relocation and conservation breeding of wildlife that had been the subject of illegal trade and possession and that had either been abandoned or confiscated. Part of the work of the center was to educate the public about wildlife conservation. The Summer Star Foundation provided funding for the construction of an education center, the Shalin Life Center, to be used in the educational efforts of the Rescue Center. Shalin was privileged to be present at the opening of the Life Center and to see the fruits of the work of the foundation first hand.

As the activities of the Summer Star Foundation for Nature, Art and Humanity demonstrate, a private foundation can provide the springboard for active and creative philanthropy. The charitable activities of a foundation can range from small grants to large, locally, nationally and internationally, for people and programs, buildings and collaborations. Shalin Liu brings the same passion and commitment to each of the charitable activities of the Summer Star Foundation. In Shalin's words: "We cannot do great things, we can only do small things with great love." <

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contains a small business tax credit that would assist businesses—with less than 25 employees—in providing health insurance. The majority of tax-exempt organizations would not be able to use the credit that applies only to income taxes owed by the business. The House bill now moves to the Senate.

The Senate comprehensive reform bill unveiled on Nov. 18 contains a small business tax credit to assist employers with 25 or fewer employees in extending health insurance to their workforce. The provision would allow 501(c) tax-exempt organizations to use the credit.

While the Senate and House bills differ on the treatment of tax-exempt organizations, more broadly, the Senate and House bills have differences on taxes and a public insurance plan.

The Senate will consider its bill in December with debate expected to last for several weeks. If the bill passes the Senate, it will then need to be reconciled with the House passed bill. The final bill will have to pass the Congress before being sent to President Obama for his signature.

LEGISLATION PENDING TO EXTEND AND EXPAND IRA CHARITABLE ROLLOVER

The IRA Charitable Rollover is due to expire on Dec. 31, 2009, unless Congress acts. The provision allows individuals aged 70½ and older to donate up to \$100,000 from their Individual Retirement Accounts (IRAs) and Roth IRAs to public charities without having to treat the distributions as taxable income.

Legislation has been introduced in both houses that would make the IRA Rollover permanent, remove the current dollar limit on annual donations, make all charities eligible to receive donations and provide IRA owners with a planned giving option starting at age 59½. In the House, Rep. Earl Pomeroy (D-ND) introduced the Public Good IRA Rollover Act of 2009 (HR 1250) in March. Sen. Byron Dorgan (D-ND) introduced the Senate companion bill (S. 864) in April.

Congress will likely consider and extend the IRA Rollover in December as part of a package of tax provisions that would be extended for more than one year. A permanent extension or expansion of the provision is unlikely. <

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will be nothing left for the children at the end of the 20-year term. This result, however, would not be different than if Sara had kept the \$1 million in her own account and continued to use it for her annual gifts to charity. At the end of 20 years, that \$1 million and the growth on it would have been consumed by the gifts to charity.

TESTAMENTARY CHARITABLE LEAD TRUSTS

Testamentary charitable lead trusts can provide similar benefits to those achievable through lifetime charitable lead trusts—namely, a stream of payments to the charitable causes of your choice after your death, with reduced or eliminated estate taxes with respect to the remaining trust assets that pass to the non-charitable beneficiaries of your choice at the end of the charitable term.

The fact that the non-charitable beneficiaries of a testamentary charitable lead trust must wait a number of years before becoming entitled to any distributions from the trust fits in very well in many estate plans. Often a very important and

difficult decision for clients is determining how much wealth should pass to children and when they should have access to it. An estate plan that provides for a certain portion of the estate to pass at once to or for the benefit of the family can be coupled with a testamentary charitable lead trust for another portion of the estate. In that way (or through the lifetime funding of trusts for the benefit of the family), the family can be provided for during the charitable term of the charitable lead trust.

IS A CHARITABLE LEAD TRUST RIGHT FOR YOU?

This article is meant to give you the “bird’s eye view” of how a charitable lead trust can accomplish both charitable and family goals. As with other aspects of your estate, gift and charitable planning, you should work with your estate and charitable planning lawyer to determine what strategies are best suited to accomplishing your goals. The charitable lead trust provides great opportunities to help you “multi-task” by accomplishing your charitable and family goals in an efficient and effective manner. <

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Bingham Charitable Advisers offers a comprehensive array of services to individuals, families, private foundations, charitable organizations and businesses to help them develop and implement their philanthropic goals.

Individuals and Families

- Work with parents to decide whether, how and when to transfer wealth to children and to charitable organizations
- Help children understand how to deal with wealth responsibly, often through participation in family charitable activities
- Assist clients with developing charitable goals and designing the vehicles that will best accomplish those goals, whether through a foundation, other charitable trust or a donor-advised fund

Charitable Organizations

- Conduct due diligence of mission, governance, operations and finances
- Provide consulting services to improve capacity to achieve results
- Develop and assist with the operation of planned giving programs

Private Foundations

- Provide ongoing guidance on governance, regulatory and administrative issues
- Review and evaluate grant proposals
- Maintain financial records and provide tax advice

Businesses

- Help create philanthropic strategies to support business goals
- Design and implement foundations and other vehicles for corporate philanthropy
- Advise on forming partnerships with charitable organizations

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