

# TRANSFERS OF LAND TO THE STATE FOR CONSERVATION PURPOSES: METHODS, GUARANTEES, AND TAX ANALYSIS FOR PROSPECTIVE DONORS

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## I. INTRODUCTION

The preservation of natural wilderness and wildlife areas and other unique natural lands is of major concern to environmentally oriented, progressive-minded citizens in the State of Ohio and elsewhere throughout the nation. The ever-present encroachment of urbanization, land exploitation and indiscriminate commercialization and other such deleterious developments arising from the pressures of population growth have prompted this concern, which in turn has lead to the establishment of various local, state and national governmental agencies charged with the task of taking steps to implement and administer a variety of land acquisition methods to protect such areas.<sup>1</sup> In Ohio, the state agency which has been designated to admin-

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<sup>1</sup> A national organization established in 1951, The Nature Conservancy, incorporated in Washington, D.C., is such a non-governmental conservation organization whose efforts are solely directed to the preservation of natural land areas. It accomplishes this by acceptance of land donations, by purchase of lands with money obtained through public subscription and by advance acquisition of land, which it holds for federal, state or local governments. The Ohio Chapter was organized in 1958.

Over three hundred thousand acres of forests, prairies, marshes, beaches, mountains and islands throughout the United States have been rescued from destruction through Conservancy efforts. The Conservancy receives its support from the public and has been determined by the Internal Revenue Services to be a publicly supported non-profit corporation. Its national office is located in Arlington, Virginia.

It might be of value to mention at the outset that many private groups at the local level in addition to the legislatively created government agencies have taken it upon themselves to pursue vigorous conservation efforts to preserve natural areas. A few out-of-state organizations are listed as a sampling as an illustration of a few privately organized efforts toward conservation. The Charitable Law Foundation of New England, Inc., Boston, Massachusetts (a charitable corporation dedicated to the protection of the environment through law, dependent on tax deductible contributions and memberships). Western Pennsylvania Conservancy, Pittsburgh, Pennsylvania (a charitable corporation which provides a wide variety of services in the conservation area, including the publication of a newspaper-like bulletin "Conserve"). Connecticut Forest and Park Association, Inc., East Hartford, Connecticut (a charitable corporation with the broader aims of providing citizens with outdoor recreational opportunities as well as preserving the State's forest assets). Town Land Trusts, which are private land trusts which have been established in many towns throughout the country for the purpose of accepting and managing land rights from private owners. Lands in fee simple or easements conveying certain rights to land are acceptable donations. Grantors may include in the conveyance conditions limiting future use of property or may reserve life use of such property.

The first three charitable organizations listed above are full-fledged "50% charities," which

ister conservation measures is the Department of Natural Resources.<sup>2</sup> Over the years, the department has maintained a vigorous program of acquiring and preserving through a variety of land acquisition methods various wildlife and natural areas for its preserve and park programs.<sup>3</sup> Presently, a system of nature preserves is being developed through the Natural Areas Program, the object of which is to retain those landscape and topographical features which are particularly representative to the State of Ohio in their original forms, including certain forests, streams, lakes, swamps, marshes, open land, and unique and extraordinary geological formations and natural landmarks.<sup>4</sup> The Natural Areas Act,<sup>5</sup> which became effective August

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means that any cash contribution to them is fully deductible to the individual so contributing up to fifty per cent of his or her adjusted gross income. See note 19 *infra*.

OHIO REV. CODE ANN. §§ 1545.01-1545.30 (Page 1969) [hereinafter cited as OHIO REV. CODE] makes it possible for local communities to form autonomous park districts by application to the probate judge of the county within which the district is to be located. After an application is filed and proper notice is given, a hearing is held, as per OHIO REV. CODE § 1545.03, and the judge must appoint a park commission board. The board administers the affairs of the park district and can sue or be sued in its own right. It may acquire by gift, purchase or appropriation lands and waters within or without the park district. Such metropolitan park districts at the local level are often ideal recipients for land donations.

<sup>2</sup> The Department of Natural Resources was created in 1949 with the enactment of Amended Senate Bill No. 13. The purpose of the Department is described in Section I of the Act, 84 LAWS OF OHIO 123 (1949-1950):

It is the intent of the General Assembly that the Department of natural resources created by this act shall formulate and put into execution a long term comprehensive plan and program for the development and wise use of the natural resources of the state, to the end that the health, happiness and wholesome enjoyment of life of the people of Ohio may be further encouraged; that increased recreational opportunities and advantages be made available to the people of Ohio and her visitors; that industry, agriculture, employment, investment, and other economic interests may be assisted and encouraged. . . .

Other purposes enumerated for the creation of the Department were the education of youth in proper understanding of our natural resources, and the development of new uses of forest products, minerals and other natural resources for the benefit of agriculture and industry.

<sup>3</sup> From July 1, 1963, through July 1, 1974, the Department of Natural Resources acquired 48,475 acres for park and preserve purposes, according to the land inventory records on file in the Real Estate Division, Department of Natural Resources, 1930 Belcher Drive, Building D, Columbus, Ohio, 43224. Of this amount, 3,173 acres were acquired for the natural areas and scenic rivers program since its inception in 1970.

<sup>4</sup> The powers, duties and responsibilities of the director of the Department are delineated in OHIO REV. CODE § 1501.01. In addition, OHIO REV. CODE § 1501.04 created a Recreation and Resources Commission to act in an advisory capacity to the director. The Commission is composed of the respective chairmen of the Wildlife Council (OHIO REV. CODE § 1531.03), Parks and Recreation Council (OHIO REV. CODE § 1541.40), Technical Advisory Council on Oil and Gas (OHIO REV. CODE § 1509.38), Forestry Advisory Council (OHIO REV. CODE § 1503.40), Ohio Soil and Water Conservation Commission (OHIO REV. CODE § 1515.02), Ohio Natural Areas Council (OHIO REV. CODE § 1517.03), and five members appointed by the governor with the advice and consent of the senate, not more than three of whom can belong to the same political party. The director is an *ex officio* member, and is allowed to participate

31, 1970, gave authority for a broad range of activities. The Act authorized the creation of an eight member Ohio Natural Areas Council, an advisory body made up of citizens whose task is to recommend which particular lands are to become preserves, how each selected preserve should be used and what kinds of restrictions should be attached to each.<sup>6</sup> The director of the Department of Natural Resources serves as one of the eight members, but only in an ex-officio capacity without a vote;<sup>7</sup> the others are appointed by the governor, serve four-year terms and must include by law one representative each of universities, natural history museums, metropolitan park districts and outdoor education programs in primary and secondary schools. No more than four may belong to the same political party at one time.

The council has established a method of classification which is

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in the deliberations of the commission but without the power to vote.

The commission shall exercise no administrative function but may:

(A) Advise with and recommend to the director of natural resources as plans and programs for the management, development, utilization, and conservation of the natural resources of the state;

(B) Advise with and recommend to the director as to methods of co-ordinating the work of the divisions of the department;

(C) Consider and make recommendations upon any matter which the director may submit to it;

(D) Submit to the governor biennially recommendations for amendments to the conservation laws of the state.

OHIO REV. CODE § 1501.04.

<sup>5</sup> The Natural Areas Act, amended Senate Bill No. 113, enacted into law OHIO REV. CODE §§ 1517.01 to 1517.09, inclusive, and also OHIO REV. CODE § 1501.04 to include the chairman of the Natural Gas Areas Council as a member of the Recreation and Resources Commission. The specific authority for the establishment and operation of the Natural Areas Council is found in REV. CODE OHIO § 1517.03.

The establishment of the Natural Areas Act was the result of specific recommendations made to the legislature by the Ohio Legislative Services Commission, Report No. 89, Preservation of Natural Areas 3 (1969).

<sup>6</sup> OHIO REV. CODE § 1517.04 states that the Ohio Natural Areas Council shall:

(A) Review and make recommendations on department of natural resources' criteria for acquisition and dedication of nature preserves;

(B) Review and make recommendations regarding inventories and registries of natural areas and nature preserves;

(C) Review and make recommendations on departmental plans for the selection of particular natural areas for the state acquisition;

(D) Advise the director on policies, rules, and regulations governing the management, protection, and use of nature preserves;

(E) Recommend the extent and type of visitation and use to be permitted within each nature preserve;

(F) Advise and consult with the director and departmental employees on preservation matters.

<sup>7</sup> The director performs in similar ex officio capacity on the Recreation and Resources found in OHIO REV. CODE § 1517.03.

of use in the administration of the nature preserve programs.<sup>8</sup> The purpose of adopting this technique is to better implement the overall objectives of the act. In essence, areas are classified as either scientific, interpretive or scenic preserves.<sup>9</sup> Each type is subject to certain

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<sup>8</sup> The authority for the establishment of nature preserves is specified in OHIO REV. CODE §§ 1517.01 to 1517.09, inclusive. OHIO REV. CODE § 1517.01 defines a "natural area" as follows:

(A) "Natural area" means an area of land or water which either retains some degree of has re-established its natural character, although it need not be completely undisturbed, or has unusual flora, fauna, geological, archeological, scenic, or similar features of scientific or educational interest.

OHIO REV. CODE § 1517.05 lists the uses to which the nature preserves shall be put:

(A) For scientific research in such fields as ecology, taxonomy, genetics, forestry, pharmacology, agriculture, soil science, geology, paleontology, conservation, and similar fields;

(B) For the teaching of biology, natural history, ecology, geology, conservation and other subjects;

(C) As habitats for plant and animal species and communities and other natural objects;

(D) As reservoirs of natural materials;

(E) As places of natural interest and beauty;

(F) For visitation whereby persons may observe and experience natural biotic and environmental systems of the earth and their processes;

(G) To promote understanding and appreciation of the aesthetic, cultural, scientific and spiritual values of such areas by the people of the state;

(H) For the preservation and protection of nature preserves against modification or encroachment resulting from occupation, development or other use which would destroy their natural or aesthetic conditions.

<sup>9</sup> The council has established uses to be permitted within each nature preserve pursuant to authority granted it in OHIO REV. CODE § 1517.04(E). The classification of preserves into scientific, interpretive and scenic categories came about at a regular meeting of the Natural Areas Council held on November 19, 1970 at Hocking Hills State Park.

Subsequent to this meeting of the council, the Department of Natural Resources adopted a set of rules governing the nature preserve areas based on recommendations made by the Natural Areas Council. These rules were filed with the Secretary of State on October 8, 1971 and became effective on October 20, 1971. They deal with nature preserves and are designated NRnp-1-01 to NRnp-13-01, inclusive. Under NEnp-1-02, the following definitions of the types of preserves have been adopted by the department:

(D) "Scientific Nature Preserve" means an area which (1) represents as closely as possible the original natural features of the state, (2) is of the highest quality, (3) is designated for the preservation of a biological community, plant species, animal species, or geological feature, (4) is restricted to scientific research and study and, (5) is so designated in the Articles of Dedication.

(E) "Interpretive Nature Preserve" means an area which, (1) either represents an outstanding example of native plant and animal communities or other features of natural history, or is in an area which represents as closely as possible the original natural features of the state, (2) is restricted to educational purposes, and (3) is so designated in the Articles of Dedication.

(F) "Scenic Nature Preserve" means an area (1) of scenic excellence, (2) comparatively undisturbed, or in the process of returning to a natural or original condition, (3) is open for use by the general public, and (4) is so designated in the Articles of Dedication.

See THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH Chapter II (W. Reilly, ed. 1973).

criteria. The criteria within each group serve to define and, in effect, to freeze the level of development at the site in accordance with the rules set forth for that particular designation. The effect is to maintain the natural character of the area to the degree permitted by the criteria. The method employed to accomplish this is land-use restrictions applicable to each category, designed to control the area.

A complex dependency is formed by the inter-relationship between the environment and the myriad organisms in it. To destroy or unnecessarily disturb any one sector or critical component of this delicately balanced biological and ecological entity might possibly jeopardize the entire system. The Ohio Department of Natural Resources, as the state agency charged with responsibility for these matters, must be aware of the sensitivity of areas to upsets in the balance of nature in order to be able to take measures to protect the integrity of vital segments of remaining wild life habitats. Continued vigorous activities and efforts along these lines, having to do with acquisition and preservation, are essential if the state is to retain a habitat which is able to maintain and support a diversity of animal and plant life. The need is most crucial for the establishment of nature preserves to protect the habitat of rare and endangered species of animal and plants. Future generations will probably treasure these preserves as their most precious lands. The result of such conservation efforts will be an overall enhancement of the quality of life for citizens both living and yet unborn.<sup>10</sup>

The goal of protecting land in its natural state can be achieved not only by the acquisition of land through the work of various state agencies like the Natural Areas Council, but also with transfers of land by private individuals to the state. Gifts or transfers of land may be made to the Department of Natural Resources for park, recreation, preserve and wildlife purposes through a variety of methods.<sup>11</sup>

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<sup>10</sup> For a comprehensive and in-depth study of many aspects of land-use problems including urbanization and taking into account population redistributions and socio-economic changes since World War II, see M. CLAWSON, *SUBURBAN LAND CONVERSION IN THE UNITED STATES: AN ECONOMIC AND GOVERNMENTAL PROCESS* (1972).

<sup>11</sup> Under the authority of OHIO REV. CODE § 1501.01, "the director may accept and expand gifts, devises and bequests of money, lands and other properties on behalf of the department or any division thereof under the terms set forth in section 9.20 of the Revised Code." OHIO REV. CODE § 9.20 states as follows:

The state, a county, a township, or a cemetery association or the commissioners or trustees thereof, a municipal corporation or the legislative authority, a board, or other officers thereof; and a benevolent, educational, penal, or reformatory institution, wholly or in part under the control of the state, or the board of directors, trustees, or other officers thereof may receive by gift, devise, or bequest moneys, lands, or other properties, for their benefit or the benefit of any of those under their

Each method can be tailored to meet the particular circumstances and wishes of the donor. Gifts or sales of land may be made in fee simple or of any lesser estate and these may be subject to any reasonable restriction imposed upon them by the donor.<sup>12</sup> Gifts and donations of money, securities or other property to be applied for park or conservation purposes are also accepted. Unfortunately, the alternative methods by which a potential or prospective donor can give land to the state are not generally known to the public at large. Perhaps the various mechanisms of donation have not been adequately made known to the public so as to acquaint prospective donors with the many advantages inherent in giving gifts of land. Too often, such prospective donors are not aware that their particular desires and wishes as to many restrictions or reservations which they may want to place on donated land can be closely followed and that the law in this area is quite prepared to cope with and give expression to even rather complex arrangements. There are citizens who own highly desirable lands who can afford to donate them and, indeed, to whom it is advantageous to do so. Even though a great deal has been donated for park purposes to levels of government from federal to local, much more could be acquired in this manner. However, several factors contribute to a reluctance in giving land to the state. To some people, there is an inherent distrust of the government as a trustee and a fear that their land would be neglected by indifferent state employees or trampled by hordes of people. Also, many potential donors receive little encouragement and it is difficult for them to conceive of giving more to the government, which they feel is already getting too much in the way of taxes. Then there is the lack of interest within government agencies themselves, especially if the areas offered are not of high quality or do not fit the state's plan of acquisition.<sup>13</sup>

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charge, and hold and apply the same according to the terms of the gift, devise, or bequest. Such gifts or devises of real estate may be in fee simple or of any lesser estate and may be subject to any reasonable reservation. This section does not affect the statutory provisions as to devises or bequests for such purposes.

<sup>12</sup> OHIO REV. CODE § 9.20 states that "Such gifts or devises of real estate may be in fee simple or of any lesser estate and may be subject to *reasonable* reservation." (emphasis added).

<sup>13</sup> In order to better formulate a program for land donations, the Department of Natural Resources made inquiries by letters to conservation and environmental departments of a number of states other than Ohio to find out what programs and policies, if any, they might have with regard to land acquisition through donations. Only this aspect of conservation policy was investigated. The states contacted were Connecticut, Pennsylvania, Kentucky, Illinois, Massachusetts, New York, and Indiana. Of these, only Indiana and Connecticut could be said to have a defined state policy toward land acquisition through donations, implemented by use of adequate publicity and available services. The responses of the various states contacted was as follows:

Pennsylvania: The Department of Environmental Resources, Harrisburg, Pennsylvania,

Inadequate state-local coordination has resulted in valuable lands being lost because they were turned down as state acquisitions and no effort was made to find a suitable local agency to handle the acquisition. Finally, one of the strongest reasons for reluctance of donors has been the aforementioned lack of information on the actual mechanics of the process. Most landowners have little or no detailed

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did not have any materials to furnish regarding the benefits of land donations for public use. In most such instances, the practice has been on an individual and personal level; the subject was discussed in terms of possible tax benefits with landowners. The Nature Conservancy has been used as a source of help, as well as the active Western Pennsylvania Conservancy. (Letter, dated December 13, 1973, to (former) Director Nye from Maurice K. Goddard).

Kentucky: The Department for Natural Resources and Environmental Protection, Frankfort, Kentucky, accepts land through the Divisions of Forestry and Conservation by going through normal legal channels. Nothing has been done concerning advertising the benefits of donating land to the state. (Letter, dated December 21, 1973, to (former) Director Nye from John M. Dixon, Deputy Commissioner).

Illinois: The Illinois Nature Preserves Commission, Rockford, Illinois, has received gifts of land from time to time but thus far they have been due largely to the owner's interest and initiative rather than to a deliberate organized effort on the state's part. The Commission recognized that there exists "a very great potential in securing gifts through organized promotion." (Letter, dated November 30, to (former) Director Nye from George B. Fell, Executive Secretary).

Massachusetts: The Department of Natural Resources and the Division of Conservation Services, Boston, did not have any program from the state level. Some forest lands have been given to the state but it has been the landowners who have approached the state to determine if it wanted their properties. Since the local conservation commission is empowered to accept gifts of land, it has been left up to the local people to do whatever advertising they believe is necessary. (Letter to (former) Director Nye, dated November 30, 1973, from George S. Wislocki, Berkshire Natural Resources Council).

New York: The Department of Environmental Conservation, Albany, New York, has received several parcels in the past few years as a result of donations but all of these have been initiated by the owner without prior encouragement from the state. Although the state is receptive to lands being donated for conservation purposes, it had no materials, such as brochures or pamphlets to encourage this. (Letter, dated December 5, 1973 to (former) Director Nye from J. O. Preston, Director, Division of Lands and Forests).

Indiana: The Department of Natural Resources, Indianapolis, has developed methods used to advertise the benefits of donating land to state or local interests. The Nature Preserve Act of 1967 created the division within the Department of Natural Resources. It cooperates with the Nature Conservancy and Acres, Inc. However, lack of sufficient personnel within the division has encouraged the policy of referring persons interested in donating land to private or local preservation organizations, particularly where the land to be donated is in the vicinity of a university or local group. This is particularly true of natural areas that do not have state-wide significance. It is felt that an area can be better managed by another agency within close proximity. (Letter, dated November 30, 1973, to (former) Director Nye, from Joseph D. Cloud, Director, Indiana Department of Natural Resources).

Connecticut: The Department of Environmental Protection, Hartford, Connecticut has the most extensive advertising of the states polled. The Department recently published a booklet entitled "Land - The Most Enduring Gift," an attractive presentation of information directed toward the landowner who may be a potential donor. The state is also involved in a vigorous land trust program. (Letter, dated November 20, 1973 to William Mattox, from Hugo F. Thomas, Director, Connecticut Natural Resources Center).

information concerning conservation agencies and programs and the tax advantages available to them, should they decide to make gifts, and the procedural steps to be taken to initiate a donative transfer to a proper agency.

Since each parcel of land has features which are unique, the method of conveyance should be tailored to meet the donor's wishes. There is great flexibility as to the type and extent of interest that can be conveyed, the period of time allowable for completion, and the conditions which may accompany the transfer. Various alternatives may be used in combination, thus opening up even more possibilities. The donor should be advised to obtain legal counsel, in order to insure that the wishes of the donor are effectively and accurately carried out and properly set down in the accompanying legal documents. The gift should be so handled as to properly effectuate the ultimate wishes of the donor in a manner most advantageous to him. A great variety of legal techniques are available to transfer gifts of land to agencies and organizations, both public and private, and each method has different advantages and tax consequences to the donor.

A donor's grant of land is part of an individual's opportunity to aid in the formulation of plans for the development of parks, preserves, and open spaces. State controls must be supplemented by a greater awareness on the part of the private landowner before successful planning can be made a reality. Legal and administrative avenues are open to individuals to help protect natural resources. The choice of method of transferring land to the state is a complex problem. It requires consideration of the potential use of the land, the financial situation of the donor, the tax consequences for the donor, the donor's wishes, and the state's ability to accept the land through a method suitable to the donor. Because of the importance and complexity of the tax consequences of the transfer, the next section of this paper will discuss the tax aspects of a gift of land. This will provide a background for the next two sections, which will discuss the tax and other aspects of transactions involving sales and transactions involving inter vivos and testamentary gifts. The final section will discuss the types of guarantees that can be given to the donor to insure that the land transferred is used as intended.

## II. BASIC TAX ANALYSIS OF A GIFT

The Federal income, estate, and gift tax laws provide strong incentives for giving gifts of land to the state. The landowner is permitted a deduction against his ordinary income equal to the fair



market value of the land which he donates.<sup>14</sup> State agencies, such as the Department of Natural Resources, could help themselves and the potential donor as well by making him more aware of the tax advantages open to him. In addition, the department should be prepared to assist potential contributors to obtain maximum use of the benefits available under the applicable tax laws by giving professional assistance, if so requested, to help the donor choose the most advantageous mechanism for donating his land. One of the principle factors determining the income tax treatment of gifts to charitable organizations is the classification of the donee. The Department of Natural Resources is classified as a state political subdivision and is thus a "public charity."<sup>15</sup> The classification of a state agency as a "public charity" entitles the contributor to avail himself of maximum income tax advantages. Gifts to charities which are less than "public charities," such as to private foundations, entitle the donor to smaller tax deductions from his adjusted gross income.<sup>16</sup> A gift of land to the state will afford the landowner a greater tax savings than the same gift to a private foundation.

The characterization of the charitable donee as a fifty per cent

<sup>14</sup> INT. REV. CODE OF 1954 § 170 [hereinafter cited as CODE].

<sup>15</sup> CODE § 170 (c)(1) defines a "charitable contribution" as a gift to or for the use of

"(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes."

Furthermore, CODE § 170(b)(1)(A) states that:

"Any charitable contribution to

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(v) a governmental unit referred to in (c)(1), shall be allowed to the extent that the aggregate of such contributions does not exceed fifty percent of the taxpayer's contribution base from the taxable year." In this paper a charitable donee within this section shall be referred to as a "public charity." The contribution base is equal to the taxpayer's adjusted gross income, calculated without regard to any net loss carryback to the taxable year under CODE § 172. See CODE § 170 (b)(1)(F).

<sup>16</sup> CODE § 170 (b)(1)(B) states that a gift to a charitable organization other than one listed in CODE § 170 (b)(1)(A)(i)-(viii) shall be allowed to the extent that the aggregate of such contributions does not exceed twenty per cent of the donor's contribution base for the taxable year. A private foundation is defined in CODE § 509 (a) as an organization described in CODE § 501(c) other than those fifty per cent charities described in CODE § 170(b)(1)(A). Some examples of private foundations are organizations created and operated exclusively for educational purposes, societies testing for public safety, community fund groups, prevention of cruelty to children or animal associations, non-profit civil groups promoting social welfare, chambers of commerce, clubs organized for pleasure and recreation on a non-profitable basis, fraternal beneficiary societies and many others. While Congress expanded the list of categories of private foundations for post-1969 years used by the 1969 Act, by amendments to CODE § 170, it added restrictions to insure that qualifying gifts actually would be put to immediate charitable use. See J. CHOMMIE, *FEDERAL INCOME TAXATION* 147 (1968). See also CODE § 4942(e), (f), and (g) on minimum investment return and qualifying distributions.

or twenty per cent charitable organization as well as the tax status of the property in the hands of the donor will determine the allowable deduction. If the land to be donated would produce a long-term capital gain if sold, then there is an additional limit on the deduction for that property. If a donor gives to the state a gift of land which has not increased in value while he owned it, the allowable deduction for contribution to a "public charity" is limited to fifty per cent of his contribution base for any one year with a carryover of the excess up to five years.<sup>17</sup> On the other hand, if the land has increased in value while in the donor's hands, the allowable deduction on that item is limited to thirty per cent of his adjusted gross income for any one year with a carryover up to five years.<sup>18</sup> If the donee is classified as a private foundation, the allowable deduction is limited to twenty per cent of adjusted gross income. In a gift to a twenty per cent charity, the deduction is to be used in the year of contribution only and no carryover deduction into the succeeding five years is permitted,<sup>19</sup> as is the case with the public charity contribution.<sup>20</sup> Inter vivos gifts to

<sup>17</sup> CODE §§ 170(b)(1)(A), 170(d)(1).

<sup>18</sup> CODE § 170(b)(1)(D).

A landowner who has appreciated property which he wishes to donate may, as an alternative to taking the thirty per cent deduction, elect instead to take a deduction of fifty per cent for his appreciated land. CODE § 170(b)(1)(D)(iii). If he does, the allowable contribution must be reduced by fifty per cent of the amount of gain that would otherwise be long-term capital gain if the property were sold.

<sup>19</sup> A contribution made to a private foundation by an individual in an amount over nine-tenths per cent of the contribution base generally may not be carried over and is lost. CODE § 170(d)(1)(A) allows carryovers to charities described in CODE § 170(b)(1)(A), which are fifty per cent charities. There is no similar carryover for donations to twenty per cent charities.

<sup>20</sup> EXAMPLE 1(a) (Fifty per cent limitation). A owns a parcel of land for which he paid \$10,000 two years ago and which has a fair market value of \$10,000 today. A donates the parcel to the state park system. His contribution base during the year of donation is \$25,000, and his taxable income is \$20,000. Under the fifty per cent limitation rule, A could deduct up to \$12,500. Here, A can deduct the full \$10,000, leaving a taxable income of \$10,000.

(b) Using the same factual situation as above except that A's land today is worth \$15,000, if A donates the land to the state park system, he can deduct only up to thirty percent of his contribution base in the year of the donation since the property which he has donated has appreciated in value while in his hands. Thus, A can deduct only up to \$6,000 in the year of the donation, leaving a taxable income of \$14,000. A may deduct up to thirty percent of his contribution base the following two years until the \$15,000 gift is fully deducted.

(c) Using the same factual pattern as in (a) above except that A donates the land to a private non-operating foundation, he may deduct only up to twenty percent of his contribution base in the year of the donation, with no carryovers permitted. Thus, his deduction would be \$5,000, leaving a taxable income of \$15,000.

EXAMPLE 2: A has a taxable income of \$50,000 and a contribution base of \$40,000 in 1973. He gives some land which he has owned for eight years and has appreciated in value to the Department of Natural Resources. The land is worth \$50,000 at the date of gift. He can deduct thirty per cent of \$40,000 in 1974 (since the property is appreciated property) or \$12,000, leaving him a taxable income of \$28,000 for the year. The remaining \$38,000 may be carried over for

the state will not be affected by the gift tax since they are fully deductible.<sup>21</sup> The landowner can obtain federal estate tax savings when he gives land to the state through his will. The full fair market value of the land may be deducted from the gross estate in determining the taxable estate.<sup>22</sup>

The amount allowable for deductions for gifts of land by corporations to both the state and to private foundations is five per cent of the corporation's taxable income.<sup>23</sup> For corporations no distinction is made between public and private charities concerning the permissible percentage of contribution base. However, any excess

the next five years subject to the same thirty per cent limitation each year. If his contribution base is \$40,000 in 1975, 1976, 1977 and 1978, he may deduct \$12,000 from his income for 1975, 1976 and 1977, respectively, leaving a taxable income of \$28,000 for each of those years. In 1978, he may deduct \$2,000, leaving a taxable income of \$38,000, since his entire \$50,000 amount would be used up.

	Total allowable deduction	\$50,000	
(Contribution Base)	30% used in 1974	\$12,000	Taxable income
\$40,000	.....		\$28,000
(Contribution Base)	30% used in 1975	\$12,000	Taxable income
\$40,000	.....		\$28,000
(Contribution Base)	30% used in 1976	\$12,000	Taxable income
\$40,000	.....		\$28,000
(Contribution Base)	30% used in 1977	\$12,000	Taxable income
\$40,000	.....		\$28,000
(Contribution Base)	Balance used in 1978	\$ 2,000	Taxable income
\$40,000	TOTAL	\$50,000	\$38,000

EXAMPLE 3: Mr. A paid \$40,000 for the land which is now worth \$50,000. He donates the land to the state and elects to have the fifty per cent limitation rather than the thirty per cent apply. QUESTION: How much is his deduction? ANSWER: The amount that otherwise would be long term capital gain is \$10,000 (\$50,000 - \$40,000 = \$10,000) and fifty per cent of this is \$5,000. Thus, the \$50,000 allowable deduction is reduced by \$5,000 to \$45,000. If his contribution base for 1974, 1975 and 1976 is \$40,000, he can deduct \$20,000 of the \$45,000 in 1974, \$20,000 in 1975 and the remaining \$5,000 in 1976.

	Total allowable deduction	\$45,000
(Contribution Base)	50% used in 1974	\$20,000
\$40,000	.....	
(Contribution Base)	50% used in 1975	\$20,000
\$40,000	.....	
(Contribution Base)	Balance used in 1976	\$5,000
\$40,000	TOTAL	\$45,000

For further examples of tax problems concerning limitations on charitable deductions by individuals, see Treas. Reg. § 1.170A-8 (1972), Examples 1-15.

<sup>21</sup> CODE § 2522(a).

<sup>22</sup> CODE § 2055(a). *But see* CODE § 2055(c). The charitable deduction will not be affected if the gift is included in the estate as a gift in contemplation of death, CODE § 2035.

However, the gift itself can be defeated by a mortmain statute. *See* OHIO REV. CODE § 2107.06.

<sup>23</sup> CODE § 170(b)(2).

over five per cent may be carried over for five years.<sup>24</sup>

If the donor desires to contribute land to the state for conservation purposes, a gift of appreciated property can be made at less net after tax cost than if the land were sold and the proceeds used to make the contribution.<sup>25</sup> Because of the deductions allowed for appreciated property when given to the state, the net out-of-pocket cost to the landowner of making such donations is further reduced.<sup>26</sup> In addition, as the taxable income of the donor increases, the cost of making a gift correspondingly declines.<sup>27</sup>

Thus if the landowner owns land which he has held for more than six months and which has appreciated in value, he is in a position to utilize the maximum tax benefits of an outright gift in fee simple to the state. The capital gain which such property would produce if sold is included in the deductible value of the land,<sup>28</sup> or in other words,

<sup>24</sup> CODE § 170(d)(2)(A).

<sup>25</sup> If the donor first sold the land and then contributed the proceeds of the sale to charity, he would first have to pay capital gains tax on the sale. The fact that he *subsequently* may donate the land to a public charity has no bearing on his capital gains tax obligation in the first place.

<sup>26</sup> The net out-of-pocket cost of giving is computed by subtracting the tax saving obtained through donation from the original cost of the land to the donor, *i.e.*, net out-of-pocket cost of giving equals original cost of land minus tax saving obtained through donation.

EXAMPLE 4: A, who is single, has a contribution base of \$50,000 and a taxable income of \$45,000. The land which he wishes to donate cost \$6,000 and is now worth \$10,000. If he does not make a gift of land to the state, his tax from the tax tables on unmarried individuals will be \$17,190. If he makes a gift of the land to the state for conservation purposes, his taxable income will be reduced by \$10,000 (the fair market value of the land) to \$35,000, on which he will pay a tax from the tax tables of \$11,790. This represents a tax savings of \$5,400 (\$17,190 - \$11,790 = \$5,400). The net out-of-pocket cost of giving is computed by subtracting the tax savings obtained by the gift of land from the original cost of the land to the donor. Thus, substituting in the formula, original cost minus tax saving obtained equals net out-of-pocket cost, \$6,000 - \$5,400 = \$600, the net out-of-pocket cost in making the gift would be \$600.

<sup>27</sup> The cost of giving should not be confused with the out-of-pocket cost. The cost of giving is computed by subtracting the saving in taxes obtained through a gift of land from the fair market value the donor would have realized on the land if sold. *I.e.*, Cost of giving equals *Fair market value* of the land minus tax saving obtained through donation. Compare this with the formula used to obtain out-of-pocket costs: Out of pocket costs equals *Original cost* minus tax saving obtained through donation. The distinction is that in the out-of-pocket computation, the tax savings obtained via gift is subtracted from the original cost of the land while in the cost of giving computation, the tax savings obtained via gift are subtracted from the present fair market value of the land. Thus, the cost of giving figure reflects the increased appreciated value of the property.

EXAMPLE 5: Assuming the same facts as in Example 4, note 26 *supra*, except that A sold his land, his total taxable income will be \$47,000 (\$45,000 plus \$2,000 taxable capital gain). His tax on this amount will be \$18,390. If he gave the land to the state instead of selling it, his tax bill of \$11,790 will be \$6,600 less (\$18,390 - \$11,790). Therefore, the cost of giving (to him) of his \$10,000 gift (including lost profit) is only \$3,400 (\$10,000 he would have realized on the sale less \$6,600 in taxes).

<sup>28</sup> If the donor bought the land for \$10,000 and it is worth \$20,000 at the time of making

the deduction allowed is the full amount of fair market value of the land at the time of the donation, subject to the thirty per cent limitation.<sup>29</sup> The amount of the deduction will not be lessened by the value of any intervening life estate or like interest reserved to the donor. Land is generally treated as a capital asset which means that, upon sale, the owner is taxed at the capital gains rate (one-half that of ordinary income). The land must be held by the owner for at least six months for the sale to qualify for capital gains treatment. If the land has been held less than six months, the deductible depreciation is limited to the donor's cost rather than the appreciated fair market value of the property.<sup>30</sup>

The State of Ohio levys an income tax on every individual and every estate residing in or receiving income in this state.<sup>31</sup> The State of Ohio defines adjusted gross income as that term is used in the Internal Revenue Code but, unlike the Internal Revenue Code, the Ohio income tax provisions provide for no deductions from the adjusted gross income for charitable contributions by the landowner to the State or other public or private charities.<sup>32</sup> However, the situation is otherwise with respect to estate tax provisions of the State of Ohio.<sup>33</sup> Estate tax provisions are favorable to the donor who leaves testamentary devises. As with federal tax, an estate tax is levied on the transfer of the taxable estate of every individual who at the time of his death was a resident of Ohio.<sup>34</sup> The value of the taxable estate is determined by deducting from the value of the gross estate the amount of all charitable devises or bequests which were irrevocably made during the life of the individual and were to pass to the state or other charity upon his death. The entire charitable contribution is

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the gift, the allowable deductible amount is \$20,000 and not \$10,000.

<sup>29</sup> CODE § 170(d)(1).

<sup>30</sup> If the donor bought the land for \$10,000, and it is worth \$20,000 at the time of making the gift, the allowable deductible amount is \$10,000 and not \$20,000 if the owner has held the land less than six months. CODE § 170(e)(1)(A).

<sup>31</sup> The 109th Ohio General Assembly enacted Sub. H.B. 475 imposing an income tax on individuals and estates. (The application of this law had some flaws with respect to estates and trusts and these defects have now been largely corrected by Sub. H.B. 971, which became effective Sept. 23, 1974.) See OHIO REV. CODE § 5747.02.

The levy of this state income tax does not prevent a municipal corporation from also levying a tax on income.

<sup>32</sup> Charitable contribution deductions are deducted from federal gross income, which is the beginning base for the Ohio tax, and there is no point to an express Ohio exclusion of amounts which are not taxable in the first place. See Butala, *Ohio Personal Income Tax As It Applies To Estates And Trusts*, 48 OHIO BAR 311 (1975). See also OHIO REV. CODE § 5747.01(A).

<sup>33</sup> See OHIO REV. CODE § 5731.01.

<sup>34</sup> See OHIO REV. CODE § 5731.02 for rates. See also § 5731.18.

deducted from the gross estate to arrive at the taxable estate. The eligible charities are the same as for the federal estate tax.<sup>35</sup> The Ohio tax provisions do not expressly provide for any disallowance of deductions in those cases where remainder interests in trust, which are required to be in the form of charitable remainder annuity trusts or unitrusts or pooled income funds, are not placed in these types of charitable remainder trusts. However, before claiming a deduction for such remainder interests, the potential donor should consult the Ohio Department of Taxation for a ruling on the advisability of so doing.

### III. TRANSFERS INVOLVING SALES

#### A. *Outright Sale*

An outright sale differs in its consequences from a gift for both the donor and the recipient. The disadvantages to the donor are severe; in addition to the tax disadvantages,<sup>36</sup> the owner gives up the right to have any voice in determining the future use of his land. However, this drawback is mitigated somewhat, in that a sale to a responsible body such as the Department of Natural Resources helps to insure that the land will be properly managed. In addition, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) provides for certain benefits and payments to persons displaced as a consequence of the sale of land to a government agency. The landowner may be eligible for reimbursement for moving expenses, replacement housing allowances and other relocation assistance services.<sup>37</sup> An outright sale might be advantageous to the state in some instances where the recipient agency desires ample flexibility in ways to use the land in the future. The agency might even want to resell the land to achieve other higher priority objectives and its hands would not be tied by any donor restrictions.

#### B. *Bargain Sale*

The prospect of obtaining land below fair market prices is appealing to state agencies and private conservation groups, especially where funding is a critical factor. The benefit is two-fold; the state agency gets the land at a bargain price but the owner has the satisfac-

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<sup>35</sup> See OHIO REV. CODE § 5731.17. For background on the Ohio tax laws, see *Charities and the Ohio Tax Laws*, 18 OHIO ST. L.J. 228 (1957).

<sup>36</sup> See text at note 25.

<sup>37</sup> See OHIO REV. CODE §§ 163.51 - 163.62.

tion of retaining a voice in the ultimate use of the land. Before a bargain sale can be entered into, the land must first be appraised by a qualified professional. Then the owner must state his charitable intention in the contract of sale before any tax deductions will be permitted.<sup>38</sup> He receives as a charitable deduction the entire current fair market value of the land. However, even though he sells the land to the charity at its original cost to him, the donor is deemed to realize some gain on the transaction. The capital gain in such a bargain sale is based on an allocation between the amount given to the charity and the amount sold.<sup>39</sup>

Where the donated property is still subject to a mortgage or lien, a gift of the property may be treated by the donor as if the cost were equal to the mortgage liability involved. The transaction is then treated as a bargain sale.<sup>40</sup> While a bargain sale may result in a capital gain, it is still generally advantageous to the donor since the full current fair market value of the donated land is allowable as a deduction. Also, the property must have been held for at least six months, or the gain realized will be treated as ordinary income.

### C. Installment Buying

If the state is unable to spend a great deal of money in one lump sum and the landowner agrees to accept payments spaced out over a number of years, the acquisition may be paid for in installments. The landowner and the state can work out an agreement whereby the state buys a certain portion of his land each year, while the landowner continues to remain on the land and use it. The landowner has the advantage of spreading out his capital gains over a number of years and reducing his taxes on the sale. The state has the advantage of

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<sup>38</sup> Treas. Reg. § 1.170A-1(A) (1969).

<sup>39</sup> ;CODE § 1011(b); Treas. Reg. § 1.1011-2(6) (1969).

EXAMPLE 3: A owns property with a current fair market value of \$20,000, which originally cost him \$5,000. A "sells" it to the state for \$5,000 cash. A's allowable charitable contribution deduction is \$15,000, the difference between the current fair market value of the gift and the original cost to him. Since the amount which is taxable is allocated between the amount given to charity (\$15,000) and the amount sold (\$5,000) in their respective portions (3 to 1), the cost allocated to the portion sold is \$1,250 ( $\frac{1}{4}$  of \$5,000) and the gain allocated to the portion given is \$3,750 on the gift even though his overall deduction is still \$15,000.

<sup>40</sup> EXAMPLE 7: A owns property with a current fair market value of \$20,000 which originally cost him \$5,000. But instead of paying \$5,000 cash, A bought land with \$500 cash and gave a mortgage note for \$4,500 which he borrowed to pay for the land. If the state pays \$500 in cash and assumes the mortgage of \$4,500 the results will be same as in the previous example (see Note 46, *supra*). A will have a deduction of \$15,000 and a taxable long term capital gain of \$3,750. See Treas. Reg. § 1.1011-2(c) (1969) for further examples. See also Treas. Reg. § 1.170A-3 (1972).

being relieved of maintenance costs until the full payment is made.

If the landowner decides to use the installment method, he is obliged to report any gains on the sale of the property in those years in which the installment payments are actually received.<sup>41</sup> This enables him to avoid the progressive tax rate structure which would otherwise apply if the entire gain were recognized in the year of sale and permits him to spread the long-term capital gain out over a number of years. Also, he may avoid the ten per cent tax on preference items.<sup>42</sup> While the installment method carries advantages to the landowner by reducing the impact of capital gains rate structures, it does not give the owner any charitable deduction unless the bargain sale method is used, in which case an election to put the payments on an installment basis would result in even smaller capital gains taxation.<sup>43</sup> Of course, the advantage to the state in installment arrangements is that it can conserve some funds which might be limited and needed for other projects.

In order for the installment method to be used to spread out capital gains over a number of years, the payments received by the landowner when he sells his appreciated land to the state must not exceed thirty per cent of the total selling price in the year of sale.<sup>44</sup> The gain which he must report in the year of payment is in proportion to the payment received that year which the gross profit bears to the total contract price, with the total contract price being the selling price less the amount of any mortgage indebtedness, except to the extent that such indebtedness exceeds the basis of the land sold.

In the installment method, promissory notes and other evidences of indebtedness of the purchaser are not included for purposes of computing the size of the payment in the year of sale unless the instruments or documents are bonds or other notes payable upon demand; governmental obligations, whether in registered form or with interest coupons attached; or readily negotiable securities.<sup>45</sup> The state must provide in its payback simple interest in an amount of at least four per cent; otherwise, interest will be imputed at the rate of five per cent per annum. This unstated or imputed interest is technically not part of the sale price and is taxed as ordinary income to the

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<sup>41</sup> CODE § 453.

<sup>42</sup> CODE § 56(a) imposes a tax equal to ten percent of amount by which the sum of the tax preference items in excess of \$30,000 is greater than the sum of taxes (reduced by credits) and tax carryovers. CODE § 57(a) defines items of tax preference as excess investment interest, accelerated depreciation on real property and capital gains, among others.

<sup>43</sup> CODE § 1011(b).

<sup>44</sup> CODE § 453(b)(2)(A)(ii).

<sup>45</sup> CODE § 453(b)(3).



landowner seller.<sup>46</sup>

When the landowner intends to make a gift of part of his property to the state, the bargain sale method should be employed rather than an installment sale followed by a cancellation of the state's indebtedness by the donor.<sup>47</sup> If the installment method is used, the difference between the landowner's basis in his land and the amount of money realized through appreciation and not previously reported will be realized and be taxable in the year that the landowner decides to cancel the indebtedness and make a gift of the remainder of his property. The full realized value of this gift will be taxed to the landowner. However, if the bargain sale method is used, only that portion of the sale allotted to the portion of his land that was given through the cancellation of the indebtedness is taxed as gain.

#### D. *Purchase and Leaseback*

Another mechanism open to the prospective donor is to convey his land by sale or gift to the state and then lease it back, subject to new restrictions. In this way, the donor is paid for the land and has the purchase money immediately but still retains the use of it, subject only to the restrictions. This method may also be used by the state to obtain strategic acquisitions which it may not presently intend to develop but wants to reserve for some future project. The rights of the parties and the duties of each are spelled out in the terms of the lease. The maintenance costs are usually borne by the lessee.

A charitable deduction may be obtained when a landowner gives his land as a gift to the state and then leases it back. He obtains a current deduction for his contribution providing he pays a fair rental value for the leased property. However, if he pays less than a fair rental value, the Internal Revenue Service could disallow the deduction on the basis that the donor has in effect retained a partial interest or that he has retained a property right in leasing the land back at less than fair rental value and has thus donated less than an undivided portion of his entire interest.<sup>48</sup>

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<sup>46</sup> CODE § 483(a). EXAMPLE 8: A sells his land for \$6,000 in three \$2,000 installments, to be paid each year for three years. The present values of the three payments at five percent taken from the tables at Treas. Reg. § 1.483-1(g)(2) (1966) are \$1,904, \$1,812 and \$1,725 respectively, with a total of \$5,441. The amount of the total profit to the contract price, *i.e.*,  $\$2,000 \times 559/6000$ , or \$186. Therefore the seller pays tax on \$186 interest.

<sup>47</sup> If the installment method is used, the unreported gain, which is the difference between the donor's basis and the amount realized and not previously reported, will be realized in the year the gift is made and will be taxed to the donor. In the bargain sale method, only a part of such gain will be realized and taxed.

<sup>48</sup> CODE § 170(f)(3).

### E. *Purchase and Resale*

Under this approach, land purchased by the state is returned to the tax rolls, burdened with certain restrictions to preserve its natural resources. The land is bought by the state and subsequently resold for private use but with conservation restrictions written into the deed. The resale, with guarantees as to future use, can be accomplished either by including a reverter clause or by reserving an easement for the state. In case of breach, the land reverts to the state or to another designated party. The purchase and resale method is open not only to the state but also to private organizations which are interested in the preservation of natural areas.

### F. *Sale of Subdivided Realty*

A landowner can sell a part of his property to the state even if the entire property has been subdivided into lots. He will receive capital gains treatment if he follows certain conditions. The landowner must not (1) be a dealer in real estate<sup>49</sup> in the year the lot was sold to the state, (2) have held the lot sold for at least five years, unless he inherited the property, and (3) have previously held the tract or any lot in it as a dealer unless he has made no substantial improvements and has held the lots for at least five years. If the landowner meets these requirements, and has not made more than five sales of lots from a single tract through the end of the tax year, the entire proceeds sold to the state receive capital gains treatment. But all sales of lots made during or after the year in which the sixth lot from a single tract is sold are taxed as ordinary income to the extent of five per cent of the gain—the balance of the gain is taxed as capital gain. Selling expenses first offset the gain taxable as ordinary income and any excess offsets the capital gain. If no other sales are made from the same tract until at least five years later, the landowner can begin over again, counting the sales of the first five lots again before the five per cent rule goes into operation.<sup>50</sup>

### G. *Pre-emptive Buying*

In some circumstances, the purchase of land by the state may have important effects on other nearby land. Owners of wetlands are

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<sup>49</sup> The Internal Revenue Code make a distinction between occasional sellers of land and dealers in real estate. See CODE § 1237(a)(1).

<sup>50</sup> If the landowner sells only three lots one year and three lots the next, he must pay five percent of the selling price as ordinary income in the second year on income from all three lots sold in that year.

particularly susceptible to this possibility since a purchase by the state of a few portions may prevent the filling in of the whole wetland area and thus preserve natural nesting and breeding habitats for many species of animals and water fowl.<sup>51</sup> Preservation of part of the swamp on state-owned land will make draining and development of the adjacent land less likely. The state agency or private conservation group which has limited funds can use this method to advantage by buying a few strategically located parcels rather than an entire tract.

#### IV. TRANSFERS INVOLVING GIFTS

State agencies and other private conservation groups are more likely to accept gifts of land than to make purchases. If the landowner is in a position which enables him to donate land, he can obtain the tax benefits in the form of federal income tax deductions discussed previously, plus being relieved of the responsibility for maintenance and the obligation of paying real estate taxes. The donor also avoids federal and state estate and inheritance taxes by an outright gift, if he no longer retains a life interest in the land. Property given as a gift may be accepted by the state for permanent use for many specific purposes, including recreational uses, depending upon the explicit wishes of the donor. Property given to the state is exempt from federal gift taxes.<sup>52</sup> Another consideration is the possibility that donations of land for parks or recreation areas might under certain conditions qualify the donee or recipient agency for a matching grant-in-aid equal to the value of the gift from the Federal Bureau of Outdoor Recreation.<sup>53</sup> These matching funds can be used to buy more property or the money may be used to develop the gift property.<sup>54</sup> In

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<sup>51</sup> Many marshlands and swamps are ideal nesting grounds for many types of aquatic fowl. In a study conducted by Dr. Milton B. Trautman (of the Ohio State University) in 1960 for the Department of Natural Resources of the Middle Harbor area in Ottawa County at the East Harbor State Park Site, it was found that the area contained 226 species of birds and 28 species of ducks, geese and swan at the time. The area was ideal for a nature preserve and as a wildfowl sanctuary, with profuse beds of aquatic vegetation present in the area.

<sup>52</sup> CODE § 2522.

<sup>53</sup> Such transactions involving matching funds obtained from the Federal Bureau of Outdoor Recreation are doubly rewarding to both the donor and the state. For example, if the potential donor has 500 acres of land which he wishes to dispose of but is reluctant to sell because of the capital gains tax which he will have to pay, but does not want to donate all 500 acres, he could donate a portion to the state. If he were to donate 250 acres, the state in turn could use the 250 acres so donated to generate matching grant-in-aid funds with which to purchase the remaining 250 acres from the owner. Thus, the owner realizes a substantial tax savings in that he can deduct the value of the 250 acres as a charitable contribution from his contribution base and this will in turn serve to lower his tax bracket for the capital gains tax he will have to pay on the remaining 250 acres which the state buys from him.

<sup>54</sup> Before the State can obtain matching funds, it must meet the Bureau of Outdoor

effect, the donor can double his gift through such means if he is alerted to the opportunity. Gifts of land are a potentially important source of lands for conservation purposes, and many unique areas under protection today would have been obliterated were it not for the generosity and foresight of many landowners in the past.

### A. *Transfers in Trust*

An effective method of insuring that the donor's wishes will be followed is the conveyance or transfer of the land to a trust. In essence, the donor gives up legal title to the land, which then vests in the chosen trustee. The trustee's duty is to see that the land is utilized for the specific purposes intended by the donor and that the donees-beneficiaries are protected in their rights and privileges. Transfers made in trust can be molded to fit the highly individual requirements

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Recreation Guidelines, as set forth in 16 U.S.C. § 4601-4 (1965) as follows:

The purposes of sections 4601-4 to 4601-11 of this title are to assist in preserving, developing, and *assuring accessibility to all citizens* of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas. (emphasis added).

If the State meets the guidelines, then 16 U.S.C. § 4601-8(c) (1974) states the method of payment as follows:

Payments to any State shall cover not more than fifty per centum of the cost of planning, acquisition, or development projects that are undertaken by the State. The remaining share of the cost shall be borne by the State in a manner and with such funds or services as shall be satisfactory to the Secretary.

16 U.S.C. § 4601-8(f) (1974) further states that:

No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

The wishes of the donors are incorporated into the "Articles of Dedication." However, the restrictions and conditions in the Articles of Dedication must not conflict with the overall purposes of the Bureau of Outdoor Recreation Act, as set forth in 16 U.S.C. §§ 4601-4 and 4601-8. The restrictions must permit accessibility to all citizens and the articles must be in harmony with the existing comprehensive statewide outdoor recreation plan.

The Department of Natural Resources limits the use of such areas in keeping with the guidelines and rules set down in NRnp 1-03 to NRnp1-06, inclusive and in NRnp3-01 to NRnp3-03. *Supra* at note 9.

of the donor and are of particular value when restrictions on the use of the land is of prime concern to the donor. A transfer in trust is also a good method of transferring an interest less than a fee simple to a charitable group or state agency since the trust instrument is readily adaptable to fit the particular interest conveyed. The donor can transfer the legal title to his land to the recipient agency, which acts in turn as trustee and sees to it that the donor's wishes as stipulated in the trust instrument are carried out. The degree of discretion to be permitted the trustee in acting with regard to the trust property may be specified. The owner may divest himself voluntarily of any further voice in the affairs of his land other than as stipulated in the trust instrument by making his transfer irrevocable, or he may retain some voice in the future management of the land by acting as one of the trustees or by making the transfer revocable.<sup>55</sup> Whichever method is chosen, there are corresponding federal and state tax consequences which are of prime concern in the establishment of such a trust for the transfer of land.

When a landowner desires to leave his land to his son or wife for life with the remainder interest to be put in trust, the trust established must be in the form of a charitable remainder unitrust, a charitable remainder annuity trust, or a pooled income fund<sup>56</sup> in order for a charitable contribution interest to be presently deductible. When the donor seeks to obtain an income tax deduction for the value of an income interest put in trust, with the remainder interest to go to the state, the annuity or unitrust form must be used before the creator of the trust can obtain a charitable deduction for the corpus thereby placed in trust. Of course, he must pay income tax on the income interest which he receives from the property in trust. However, these types of remainder trusts are normally used in those cases where the assets first transferred in trust are large enough to generate substantial income. These trusts are inappropriate for gifts of undeveloped land unless the land can be transferred in trust to a trustee who has the power to sell the land and then apply the proceeds to fund the charitable remainder trust for the benefit of the state conservation programs. In this situation, the settlor would be entitled to a charita-

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<sup>55</sup> The tax significance for purposes of estate and gift taxes in making a trust irrevocable or revocable are far-reaching. As a general rule-of-thumb, if the trust is irrevocable, the corpus is not taxed as part of the settlor's estate upon his death, and if the corpus is a gift, a gift tax is paid at the time of the creation of the trust. On the other hand, if the trust is revocable, it is taxed as if the corpus (all or a part of it, as the case may be) were part of the settlor's estate at his death and no gift tax is paid at time of creation of the trust.

<sup>56</sup> CODE § 2422(c)(2)(A). See § 664 (charitable remainder annuity or unitrust) and § 642(c)(5) (pooled income fund).

ble deduction for the current value of the remainder interest as a gift to the state.

The charitable remainder annuity trust requires that a set sum, not less than five per cent of the initial fair market value of the property so transferred in trust, be paid annually to the income beneficiary, in this case the state or private conservation group. With a charitable remainder unitrust, the amount paid annually to the charity is a fixed percentage, but not less than five per cent of the net fair market value of the trust's assets as valued annually. If the landowner has appreciated property, he will gain a number of tax advantages by setting up a charitable remainder trust. The principal value of the land or securities is kept intact for the production of income. The money which the donor receives from the trust as income for his own use is taxed as capital gains at capital gain rates, and any amount received by him in excess of these gains is nontaxable as a return of capital.

However, where land is put in trust by the landowner for the use of a charitable organization for a fixed number of years, with a remainder to the state for park and conservation purposes, the above requirements for the establishment of a charitable remainder unitrust or annuity trust with their mandatory annual distribution minimum amounts to be given to the charity are not applicable.

#### B. *Restricted Transfers of Land - Easements and Covenants*

An easement is one type of restricted land transfer which is well suited for preserving open space or preventing development, and still allows the landowner to retain possession of the land. The terms depend closely on the characteristics of the land in question. It is basically a right in land which is less than full ownership and includes such provisions as rights-of-way for crossing land or rights-of-way across land for hiking trails. The ownership of the land remains with the donor but certain rights are given to the recipient agency. Easements donated to the state or purchased by the state can be used in a positive manner to permit uses such as fishing or trails or can be used in a negative manner to prevent public access or any change in the topography. Even though the land burdened with the easement stays on the property tax rolls, taxes are reduced since the assessed value will be lowered to take into consideration the restrictions placed upon the land by the easement. The donor may keep his land and may at the same time personally benefit from the easement if it protects an open space or scenic view. Also, easements can be deducted as charitable contributions for tax purposes if they are given in perpetu-

ity.<sup>57</sup> The monetary value of an easement is computed as the difference in the value of the land before the easement and the value of the land as burdened with the easement.

Generally speaking, Ohio law recognizes the existence of two types of easements, appurtenant easements and easements in gross. If the easement is created for the benefit of property already owned by the donor, the easement is said to be appurtenant. If the donor does not own land which would benefit from the easement granted to him, the easement is said to be in gross and creates a new personal right in the donor. In Ohio, easements in gross are personal rights which cannot be assigned or passed by death.<sup>58</sup> Since easements in

<sup>57</sup> Rev. Rul. 64-205, 1964-2 CUM. BULL. 62, holds that the gratuitous charitable contribution of a restrictive easement in perpetuity results in a contribution deduction to the donor under CODE § 170, subject to the prescribed limitations, in the amount of the fair market value of the easement. Further, the basis of the property must be adjusted by elimination of that part of the total basis that is properly allocable to the restrictive covenant granted.

Rev. Rul. 73-339, 1973-2 CUM. BULL. 68, states as follows in its headnote:

A gratuitous contribution of an open space or scenic easement in perpetuity without expectation of economic benefit to the donor is a charitable contribution deductible under sections 170 and 2522 of the Code and, of not separately and distinctly valued, the value of the gift may be determinable according to the "before or after" approach.

However, a transfer of property to an organization described in CODE § 170(c), made with a reasonable expectation of an economic benefit to the taxpayer in his trade or business, is not a charitable contribution. *See* Larry G. Sutton and Marjory V. Sutton, 57 T.C. 239 (1971) and Jordon and Essie Perlmutter, 45 T.C. 31 (1965).

Rev. Rul. 73-339, 1973-2 CUM. BULL. 68 in illustrating the "before and after" approach to valuation gives the following example:

Ten acres of farm land that would have resulted in gain that would have been long-term capital gain if the property had been sold at its fair market value on the date of contribution are involved. Sales of similar land support a fair market value of \$2,000 per acre. Land in the general area restricted to farm use has a fair market value of \$1,500 per acre. A governmental body, in order to preserve open space on this particular tract, and preclude its development with a structure of any kind, secured from the owner of the land a contribution of an enforceable easement in perpetuity to preclude development but permit continued use as farm land. The valuation of this open space or scenic easement in perpetuity may be determined as follows:

Total FMV of entire tract	—10 acres at 2,000 = \$20,000
Total FMV of tract (Restricted to use as farm land)	—10 acres at \$1,500 = \$15,000
Difference—Value of easement	\$ 5,000

Thus, in this example, since the reduction provided in section 170(c) of the Code and section 1.170A-4(a) of the regulations does not apply, the amount of the charitable contribution deduction allowable under section 170 and the amount of the gift deductible under section 2522 in computing taxable gifts for the calendar quarter for this donation is \$5,000.

<sup>58</sup> A mere naked right to pass and repass over the land of another, a use which

gross have restrictions on their saleability and transferability, and appurtenant easements which run with the land are freely alienable, Ohio courts have presumed an easement to be appurtenant when there is doubt as to its type. Consequently, in Ohio, an instrument creating an easement in gross must specify that the easement is one in gross and that there are no appurtenant lands. The instrument must also stipulate that the easement objective is to preserve the servient land without any reference to other land held by the state. If the donor owns land adjacent to the land which is the subject of the easement, there is the possibility that the donor's property would be deemed appurtenant and that the burden will run to the grantor's successors and assigns. Whether an easement is deemed appurtenant or in gross affects the tax consequences due to the restrictions placed by the tax laws on deduction for gifts of partial interests in property. An appurtenant easement is usually treated as the transfer of a partial interest in land and would not be deductible because it is not the transfer of an undivided partial interest. An easement in gross, such as a scenic easement, is not considered to be transfer of a partial interest.<sup>59</sup> Thus, where the donor gives an undivided portion of his

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excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. . . . A right of way in gross is a right personal to the grantee, and cannot be assigned, even though it is granted to the grantee and his assigns.

Boatman v. Lasley, 23 Ohio St. 614, 618 (1873). Also see Warren v. Brenner, 89 Ohio App. 188, 101 N.E.2d 157 (1950).

"However, easements in gross, if of a commercial nature, have been considered alienable property interests." RESTATEMENT OF PROPERTY § 489 (1944) (emphasis added). Such easements in gross of a commercial nature which have been held alienable are railroad rights-of-way, gas pipe lines and power lines. See Junction R. Co. v. Ruggles, 7 Ohio St. 1 (1857); Geffine v. Thompson, 76 Ohio App. 64, 62 N.E.2d 590 (1945); Jolliff v. Hardin Cable Television Co., 26 Ohio St. 2d 103, 269 N.E.2d 588 (1971). Also, see *Annot.*, 130 A.L.R. 1253 (1938), and 18A O.JUR. 2d *Easements*, § 13 (1972).

<sup>59</sup> Rev. Rul. 73-339, 1973-2 CUM. BULL. 68 states that such easements are to be considered as a contribution of an undivided interest.

CODE § 170(f)(3)(A), applicable to contributions made after July 31, 1969, restricts income tax deductions for certain contributions of interests in property which consist of less than a taxpayer's entire interest in such property and CODE § 2522(c)(2) places a similar restriction on gift tax deductions. Under CODE sections 170(f)(3)(B)(ii) and 2522(c)(2), however, these restrictions do not apply to a contribution of an undivided portion of a taxpayer's entire interest in property.

Treas. Reg. § 1.170A-7(b)(1)(ii) (1972) states that a charitable contribution of an open space easement in gross in perpetuity is a contribution of an undivided interest in property to which § 170(f)(3)(A) of the CODE does not apply. For gift tax purposes an undivided portion of a donor's entire interest in property includes an open space easement in gross in perpetuity as defined in Treas. Reg. § 1.170A-7(b)(1)(ii) of the regulations:

For purposes of this subparagraph a charitable contribution of an open space easement in gross in perpetuity shall be considered a contribution of an undivided



land to the state and then gives an easement to the state of the rest of his property appurtenant to the land given to the state, the donor would not be permitted a further deduction for the easement granted.

Landowners are encouraged by the Ohio Department of Natural Resources to make a gift of the underlying servient estate of lands with easements in gross to the state. If the donor of such a servient estate wishes his wife to receive the servient property and the state to receive the property only after her death, he may put the property in his wife's name and then encourage her to make a will leaving the land to the state upon her death. The same result can be accomplished for the family if the husband devises a life estate to his wife with the remainder interest to the state upon her death; however, no charitable deduction will be permitted for the remainder interest unless the remainder interest is in the form of an annuity trust, unitrust or pooled income trust, as was the case for income tax purposes.<sup>60</sup> This technique is further restricted; the underlying servient estate must be the personal residence or farm of the testator-donor for the devise be made in such a manner.<sup>61</sup>

The deduction permitted for a gift of an easement is based upon the fair market value of such an easement. When an easement is granted by the donor-landowner, he can adjust the basis of his property by subtracting that part of the basis which was allocable to the easement granted. This adjustment will affect his taxable capital gains should he sell his appreciated property either outright or by the bargain sale method.<sup>62</sup>

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portion of the donor's entire interest in property to which section 170(f)(3)(A) does not apply. For this purpose an easement in gross is a mere personal interest, in, or right to use, the land of another; it is not supported by a dominant estate but is attached to, and vested in, the person to whom it is granted. Thus, for example, a deduction is allowed under section 170 for the value of a restrictive easement gratuitously conveyed to the United States in perpetuity whereby the donor agrees to certain restrictions on the use of his property, such as, restrictions on the type and height of buildings that may be erected, the removal of trees, the erection of utility lines, the dumping of trash and the use of signs.

<sup>60</sup> See CODE §§ 2522(c)(2)(A), 664(d)(1)(A), 664(d)(2)(A) and 642(c)(5)(A) - (F).

<sup>61</sup> CODE 2522(c) exempts personal residences and farms from the remainder interest trust requirements (see also note 68, *infra*).

<sup>62</sup> If the donor sells his appreciated property, his taxable capital gain amount may be increased by the value of the easement given. Thus, if the cost of his land was \$10,000 and the appreciated value at time of the gift of the easement is \$20,000, his normal capital gains if he sold the land without the easement would be \$10,000. If the land is sold burdened with the easement and the land as such is valued at \$17,000 instead of \$20,000, then the \$3,000 difference between the value of the land before the easement and after the easement shall be subtracted from his cost of \$10,000 and his new basis would then be \$7,000, in which case his capital gains shall still be \$10,000. But if the land appreciated *after* the easement was given, the capital gain would reflect that increase.

Examples of some of the restrictions which could be included in an easement given to the state would be the prohibition of billboards, buildings, and other structures; prohibition of excavating and changing the topography; and prohibition of the killing of animals or cutting of trees. The donor would be wise to give the state the right to enter upon his land for the purpose of maintenance with regard to any aspect of the granted easement. This would work to the advantage of the donor in relieving him of maintenance responsibilities.<sup>63</sup>

Conservation easements are created when the landowner gives up his rights to develop the land, but retains a right to use his land for purposes which are in keeping with its wild and natural character. More particularly, a conservation restriction merely serves to prevent development or some other activity injurious to the land. Those landowners who want to keep their property in an undeveloped state and do not wish to sell it outright to the public but want to continue living on the land without intrusions should be alerted to the conservation easement as a useful alternative to an outright grant or a life estate.<sup>64</sup>

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<sup>63</sup> "Wherever practicable, the director shall assign responsibilities for management of a preserve to the division of forest and preserves." OHIO REV. CODE § 1517.05.

<sup>64</sup> In Connecticut, two laws, Public Act 73 and 173, were enacted in 1971 that strengthened the status of conservation easements. Public Act 73 states that a landowner who conveys "a less than fee easement (such as conservation easement) to any municipality shall be entitled to a revaluation of the property which he has encumbered thereby."

The comparable law in Ohio is more limited; section 5709.08 of the Revised Code states that "[R]eal or personal property belonging to the state or United States used exclusively for a public purpose, and public property used exclusively for a public purpose, shall be exempt from taxation." OHIO REV. CODE § 5709.08. This exemption was permitted by an amendment to Section 2, Article XII of the Ohio Constitution adopted April 2, 1970 and taking effect on January 1, 1971. As to whether or not this exemption applies to an interest which is less than a fee interest, OHIO REV. CODE § 5709.09 states that "[R]eal property or any estate, interest, or right therein dedicated in accordance with section 1517.05 of the Revised Code is exempt from taxation." Therefore, a conservation easement given or sold to the state and dedicated as provided for in OHIO REV. CODE § 1517.05 is exempt from taxation and it would seem that the value that this exempt interest represents would be deducted from the assessable tax base of the land. This conclusion is based on reading OHIO REV. CODE §§ 5709.08 and 5709.09 *in pari materia*. OHIO REV. CODE § 5709.09 specifically requires that the interest be dedicated in accordance with the procedures set forth for dedication in OHIO REV. CODE 1517.05 for an exemption; if an easement is given without these formalities (filing and recording), the owner may not be able to obtain a reduction in real estate taxes.

For a further expansion of the phrase "public property for a public purpose" as a condition for exemption from taxation, in different contexts, see *Denison University v. Board of Tax Appeals*, 2 Ohio St. 2d 17, 205 N.E.2d 896 (1965); *Muskingum Watershed Conservancy District v. Walton*, 21 Ohio St. 2d 240, 257 N.E.2d 312 (1970); *Kenyon College v. Schebley*, 12 Ohio C.C.R. (n.s.), *aff'd mem.* 81 Ohio St. 514, 91 N.E. 1138 (1909); *Western Reserve Academy v. Board of Tax Appeals*, 153 Ohio St. 133, 91 N.E.2d 497 (1950); *City of Cleveland v. Board of Tax Appeals*, 167 Ohio St. 263, 147 N.E.2d 663 (1958).

OHIO REV. CODE § 1517.05 contains the following provisions for dedicating an interest of a fee:

Restrictive covenants can also achieve the results of preserving open spaces and preventing development; however, as covenants are contracts rather than gifts, they have no favorable tax consequences for the landowner. Restrictive covenants are essentially private contracts between neighboring landowners to regulate and control the use of parcels of land. The covenant is binding on subsequent owners. These covenants are in the form of documents which each landowner must accept and sign as a supplement to his property deed and are therefore legally enforceable by other members of the covenant. The donor at the local level can use restrictive covenants in cooperation with his neighbors to achieve conservation goals without the participation of state agencies, particularly in those matters where state agencies show no interest or inclination to take steps toward purchase or acquisition.<sup>65</sup>

A reverter clause is a stipulation included in a donation or sale which seeks to insure that the conditions placed upon the transfer by the grantor will be carried out. Such a clause provides for the automatic transfer of the land or easement back to the donor or to another designated individual or organization if the recipient donee does

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A nature preserve is established when articles of dedication have been filed by or at the direction of the owner of land, or a governmental agency having ownership or control thereof, in the office of the county recorder of the county in which the land is located.

Articles of dedication shall be executed by the owner of the land in the same manner and with the same effect as a conveyance of an interest in land and shall be irrevocable except as provided in this section. The county recorder may not accept articles of dedication for recording unless they have been accepted by the director of natural resources. The director may not accept the articles of dedication unless they contain terms restricting the use of the land which adequately provide for its preservation and protection . . . .

Articles of dedication may contain provisions for the management, custody, and transfer of land, provisions defining the rights of the owner or operating agency, and the department, and such other provisions as may be necessary or advisable to carry out the uses and purposes for which the land is dedicated. They may contain conditions under which the owner and the director of natural resources may agree to rescind the articles.

The attorney general, upon request of the director of natural resources, may bring an action for injunction in any court of competent jurisdiction to enforce the terms of articles of dedication.

The department may make or accept amendments of any articles of dedication upon terms and conditions that will not destroy the natural or aesthetic conditions of a preserve. If the fee simple interest in the area is not held by the state, no amendments shall be made without the written consent of the owner. Each amendment shall be recorded in the same manner as the articles of dedication.

<sup>65</sup> Any town, city or municipality may establish a conservation commission or trust to handle gifts or open areas by the vote of its legislative body. Also, neighbors may get together and form a private conservation trust to effectuate similar purposes.

not honor the conditions agreed upon. Land might be given to the State of Ohio for use as a nature preserve with the condition that if it ceases to be used in a manner consistent with that purpose, it would revert to the Nature Conservancy, a national charitable private conservation agency. By causing the land or easement to revert to a public charitable organization rather than back to the donor, the income tax deduction is not lost to the donor should the original donee fail to fulfill the conservation conditions.<sup>66</sup> The reversion is automatic and the donor need not enter upon the premises or commence legal proceedings to take back the property as is required in the situation where the reversion is based on the happening of a condition subsequent. A reverter clause represents yet another method by which a donor of land can attach a condition to his gift.

Restrictive covenants are not gifts which qualify for charitable deductions. However, for gift tax purposes, if an individual transfers land to another member of his family and the land so transferred is subject to a restrictive covenant for conservation purposes, the value of the fee simple interest thus transferred is lessened by reason of the restrictive covenant and the diminished value of the gift would result in a smaller gift tax to the donor when he gives the land.<sup>67</sup>

### C. *Life Estates*

The reservation of a life estate has long been used as a substitute for disposition by will. This method permits the owner to live on his property for the rest of his life, although he still must pay current real estate tax payments. If the property consists of a personal residence or a farm, the donor may obtain the federal income tax deduction at the time of transfer and gain eventual estate tax advantages.<sup>68</sup> The

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<sup>66</sup> CODE § 170(f)(3)(A) states that a deduction "shall be allowed [in case of an interest in property of less than the taxpayer's entire interest] only to the extent that the value of the interest contributed would be allowable as a deduction . . . if such interest had been transferred in trust."

CODE § 170(f) (2)(A) states that:

In the case of property transferred in trust, no deduction shall be allowed under this section for the value of a contribution of a remainder interest unless the trust is a charitable remainder annuity trust or a charitable remainder unitrust (described in section 644), or a pooled income fund (described in section 642(c)(5)).

The donor, by causing the land to revert back to himself or his heirs, also has the land taxed as part of his estate when he dies if the reversionary interest exceeded five per cent of the value of such land. See CODE § 2037(a)(2).

<sup>67</sup> The gift tax rates are found in CODE § 2502(a). Also, see Treas. Reg. § 1.170-2(d).

<sup>68</sup> CODE § 2055(e)(2) states that a remainder interest in a personal residence or a farm are exceptions to the disallowance for deductions. Treas. Reg. §§ 1.170A-7(b)(3) and (4) state that the remainder interests must be irrevocable. In addition, the regulations define a "personal residence" as "any property used by the taxpayer as his personal residence even though it is

probate of an estate is also made simpler by the present gift of a life estate because the transfer is already effective and eliminates any potential threat to the gift from a will contest. Also, a gift of a life estate can be used to increase the marital deduction available to the surviving spouse. Where the donor is elderly and has a relatively large estate, the donated property in which the elderly donor has a life estate reserved goes back into his estate at the time of his death, enlarging his estate. Since the donor's gross estate is then enlarged by the potentially significant value of the retained life estate, the half of the donor's estate which goes tax free to the donor's surviving spouse as a marital deduction will be increased to this extent, and the donor's taxable estate will be correspondingly reduced. Thus, to a wealthy landowner, the gift of land with a life estate reserved in the residence or farm, for instance, could result in tax savings which might be greater than the savings resulting from an outright gift.<sup>69</sup>

With regard to gifts of appreciated property made during a lifetime, the tax laws place no ceiling upon the amount of the estate tax or gift tax deduction permitted, in contrast to the limitations on deductions permitted by the income tax laws.<sup>70</sup> However, as mentioned earlier, where the interest given is partial and other than a remainder interest in a personal residence or farm, no deduction is permitted for estate or gift tax purposes unless the interest is put in the proper annuity or unitrust form.<sup>71</sup> Gifts transferred by will (testamentary gifts) are subject to the same taxation rules generally applicable to transfers of partial interests in the case of lifetime gifts, and the remainder trusts must be according to the prescribed forms.<sup>72</sup>

#### D. Contributions of Partial Interests

The general rule for tax deductions is that the owner must give his entire interest to the state before a deduction is allowed. Deduc-

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not used as his principal residence." For example, the taxpayer's vacation home may be a personal residence for purposes of this subparagraph. Treas. Reg. § 1.170A-7(b)(3). The term "farm" is defined as "any land used by the taxpayer or his tenant for the production of crops, fruits, or other agricultural products or for the sustenance of livestock." Treas. Reg. § 1.170A-7(b)(4). See also CODE § 170(f)(3)(B)(i).

<sup>69</sup> CODE § 2056(a), states that:

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

<sup>70</sup> CODE § 170(b)(1)(A); CODE § 170(b)(1)(B).

<sup>71</sup> CODE § 2522(c)(2)(A), *supra*, note 61.

<sup>72</sup> See CODE §§ 2055(e)(2)(A), 2522(c)(2).

tions are permitted therefore for a partial interest if the donation consists of the donor's entire interest.<sup>73</sup> Examples of a partial interest in land are found when the donor owns only the right to income from the land or will get the land only upon the death of the present owner, *i.e.*, a remainder interest. If the donor owns only an income interest or a remainder interest in the land, a deduction will be permitted if he donates this interest to the state. In the case of the remainder, a charitable deduction will be permitted for the present worth of the remainder interest. Where the interest given by the donor is subject to a possibility of reverter upon the happening of some event that is so remote as to be negligible, the gift may be regarded for tax purposes as being a gift of an entire interest.

Where the donor purposely divides his fee simple interest to circumvent the general rule barring deductibility of partial interests, the Internal Revenue Service may not honor the claimed deduction. Thus, if the donor who owns an entire fee interest in land gives a remainder interest to his son, reserving an income interest for a term of years and then upon expiration of this term transfers the income interest to the state, the deduction for the value of the contributed income interest to the state may be questioned. However, deductions will be allowed for partial interests where the partial interests in the

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<sup>73</sup> CODE § 170(f)(3) provides as follows:

(A) In general—In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

(B) Exceptions—Subparagraph (A) shall not apply to a contribution of —  
(i) a remainder interest in a personal residence or farm, or  
(ii) an undivided portion of the taxpayer's entire interest in property.

Treas. Reg. § 1.170A-7(b)(1)(i) defines an undivided portion of a donor's entire interest as consisting of "a fraction or percentage of each and every substantial interest or right owned by the donor in such property and must extend over the entire term of the donor's interest in such property and in other property into which such property is converted." For example, if a taxpayer owns 100 acres of land and makes a contribution of 50 acres to a charitable organization, the charitable contribution is allowed as a deduction under CODE § 170. The donor is thus a tenant-in-common with the charity, and Treas. Reg. § 1.170A-(7)(b)(1)(i) states that:

(A) deduction is allowed under section 170 for a contribution of property to a charitable organization whereby such organization is given the right, as a tenant in common with the donor, to possession, dominion, and control of the property for a portion of each year appropriate to its interest in such property . . . . However, for purposes of this subparagraph a charitable contribution in perpetuity of an interest in property not in trust where the donor transfers some specific rights and retains other substantial rights shall not be considered a contribution of an undivided portion of the donor's entire interest in property to which section 170(f)(3)(A) does not apply.

property are given to several different charitable groups, thus disposing of the donor's entire interest.<sup>74</sup>

Where the donor contributes an undivided portion of his entire interest in the land, it is allowable as a charitable deduction. Thus, if the landowner is the sole owner of the land, he can give one-half of it to the state and he will thereafter own the land with the state as a tenant in common. This would permit him to remain on the land and use the land as a joint owner. He may leave his half interest to his wife who will continue as tenant in common.<sup>75</sup> Also, to obtain the maximum tax advantages, a donor of an undivided partial interest may spread his donation over a number of years. For example, the owner of a remainder interest may transfer a one-fourth interest in 1973, a one-fourth interest in 1976, a one-fourth interest in 1980 and a one-fourth interest in 1983, and obtain a deduction in each of these years for the present value remainder interest transferred at that time, subject to the thirty per cent limitation. Where the remainder interests are donated by will, and the remainders are subject to the carryover provisions, the donor should stipulate in his will that portions of his remainder interest not yet contributed to the state be devised to the state. This is to preclude the possibility that any overlooked remainder or accession might work to characterize the transfer as that of a partial interest.

Another example of a transfer of a partial interest is the contribution of a specific tract which is a fractional part of the landowner's fee simple. If he owns fifty acres, he could transfer a tract consisting of five acres in 1974 and contribute the balance of forty-five acres over a period of years spaced to prevent any loss of deductions due to the five year limitation to carryovers of amounts in excess of the thirty per cent limitation. Thus, where the donor has a residence on his farm, it may be advantageous to donate tracts piecemeal, obtaining a deduction for the current value and then separately donating a remainder interest with a life estate reserved in the residence, particularly when it is not clear that all of the outlying acreage would be considered by the Internal Revenue Service as part of the personal residence entitled to the special deduction rules of residences.<sup>76</sup> The residence structures must also be donated if the donor is to receive a deduction for the land upon which his residence is situated.

Care must be taken by the donor in reserving easements in

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<sup>74</sup> See Treas. Reg. § 1.170A-7(d) for illustrations distinguishing between a partial and an undivided interest.

<sup>75</sup> See note 73 *supra*.

<sup>76</sup> CODE § 170(f)(3)(B)(i).

connection with the transferred land. If he reserves an easement in favor of the dominant estate, this easement might be treated by the Internal Revenue Service as an interest in land, converting the gift of the tract into a contribution of a partial interest.

A personal residence may be a summer or vacation home and is not limited exclusively to property used by the landowner as his main residence.<sup>77</sup> When the landowner, who wishes to retain the use of his house for his and his wife's lifetime, would like the property ultimately to go to the state for conservation purposes, he can obtain the benefit of a current deduction for a charitable contribution even though the transfer is to take place sometime in the future upon his or his wife's death, but the donation of the remainder interest must be irrevocable.<sup>78</sup>

The irrevocable remainder interest in a farm can also be allowed as a current charitable deduction. As above, the donor can retain a life estate for himself and his wife and give the remainder interest to the state. For the land to qualify as a farm and thus be eligible for this provision, some portion of the acreage must be used by the landowner or his tenant for the raising of crops or fruits, or for the feeding of live stock.<sup>79</sup>

As discussed previously, when a landowner wishes to donate land subject to an easement appurtenant to the property retained by the donor, problems may arise if it represents a retention of such a substantial property interest that the transfer is ineligible for tax benefits.<sup>80</sup> Such a transfer would not be a contribution of an undivided portion of the landowner's entire property and therefore would not be deductible. The donor can circumvent this difficulty by contributing all of land to the state, except for a road or other part which he wants to retain. Another way to avoid the problem is to give the state a right of first refusal when the donor decides to sell the land, and then devise by will the remaining land not sold to the state. The road or other retained part would then pass with the remaining property which had not been previously contributed.

### E. *Testamentary Transfers*

Land may be left to the State of Ohio by will, using any one or more of the alternatives discussed in the preceding sections, such as

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<sup>77</sup> Treas. Reg. § 1.170A-7(b)(3).

<sup>78</sup> Treas. Reg. §§ 1.170A-7(b)(3), (4).

<sup>79</sup> *Id.*

<sup>80</sup> See note 73 *supra*.



conveyance of a lesser interest, conveyance of a fee simple, reservation of a life estate for one or more survivors, or a devise of a power of appointment.<sup>81</sup> Of considerable importance in testamentary transfer arrangements are the estate tax advantages that can be achieved. If any interest in land less than a fee simple, such as a conservation easement, is devised by will to the state or other organization dedicated to land preservation, the gift may reduce estate taxes so the heirs can afford to pay the taxes and keep the property. Also, the donor may leave land by will in trust for his heirs for their lives, and then to the state. Trust instruments are often used in conjunction with wills. The trust instrument is incorporated into the will by reference.<sup>82</sup>

#### F. *Endowments*

Often, when a gift of land to the state carries with it the responsibility of high maintenance costs, as when the land donated has buildings on it, the state may refuse acceptance unless a fund is established to help defray the cost of upkeep and maintenance of the donated property.<sup>83</sup> This endowment can be in the form of cash, stocks, bonds or other securities. If it is large enough, the interest alone may be used to maintain the property without touching the principal. Potential donors are alerted to the double tax advantages to such an arrangement. If the corpus of the endowment appreciates in value, the increase is not taxed.

#### G. *Dedication*

A nature preserve can be established by the filing of articles of dedication<sup>84</sup> by the owner in the office of the county recorder of the county in which the land is located. However, the state is not obligated to accept any transfer which would entail a costly upkeep or

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<sup>81</sup> For powers of appointment as part of the gross estate, see CODE § 2041(a)(2).

<sup>82</sup> OHIO REV. CODE § 2107.05. Incorporation by reference is also permitted under the Uniform Probate Code. See Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio*, 34 OHIO ST. L.J. 114 (1973).

A better alternative may be a "pour-over" will. R. LYNN, AN INTRODUCTION TO ESTATE PLANNING, 133-38 (1975).

<sup>83</sup> If the maintenance costs of such a property are substantial, there might be difficulty in obtaining the necessary funding on a long term basis. Section 22 of Article II of the Ohio Constitution states that "[N]o money shall be drawn from the Treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years." If a gift of property is accepted by the state in which the maintenance costs would be substantial and long term, this would in effect constitute a pledge by the present legislature to commit future legislatures for expenditures not incurred by them and such an action might be unconstitutional, in light of section 22 above.

<sup>84</sup> See note 64 *supra*.

which otherwise would not be desirable.<sup>85</sup> The articles contain provisions defining the rights of the parties and such other terms as may be necessary or advisable to carry out the uses and purposes for which the land is dedicated. There may even be certain conditions stipulated in the articles under which the owner and the director of the Department of Natural Resources may agree to rescind the articles.

Articles of dedication are executed by the owner in the same manner and with the same effect as a conveyance of an interest in land. The Director of Natural Resources accepts the natural areas upon the advice and concurrence of the Ohio Natural Areas Council,<sup>86</sup> and may acquire natural areas for the purpose of dedication as nature preserves by gift, devise, purchase or exchange.

#### H. *Other Alternatives*

A land owner can give his land to an established conservation land trust, which is a private, non-profit entity with characteristics of a public trust in that its lands are held for the benefit of the entire community. The conservation land trust can obtain land that overlaps town boundaries, and can act quickly to obtain options until a gift or purchase can be arranged. A donor may protect his gift with a reverter clause or any of the other alternatives to further ensure that the land which is donated for conservation purposes is used in the specified manner.<sup>87</sup>

The community land trust is formed by individuals in the community and is also a non-governmental institution, most often a non-profit corporation rather than a legal trust. The corporation leases the land to the users with the appropriate conservation restrictions attached. Only the land and its natural resources are held in trust, not the homes, stores, farms or industries. It is in essence a sharing of the land as a community resource.

Some areas have a land bank program where the community itself has control over the setting of standards. Land bank programs are administered by bodies which are usually regional in scope, and are advantageous to the community in that subsequent increased land values, which are the result of systematic public program conservation planning, inure to the benefit of the surrounding home owners instead of going into the pockets of land speculators. Town forests can also be set up to acquire by gift or by tax deed a forest for the

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<sup>85</sup> See note 83, *supra*.

<sup>86</sup> See note 6 *supra*.

<sup>87</sup> See note 64 *supra*.

town, and present an excellent opportunity for the landowner to improve the natural resource value of the area in which he lives. State agencies such as the Ohio Department of Natural Resources are willing to provide assistance to conservation commissions and town forest committees.

A typical example of a private conservation arrangement is the land conservation trust. Such arrangements are relatively simple and highly effective ways for a community to perpetuate a natural asset, especially relatively small parcels within towns, villages and cities. Such trusts are private, non-profit, and operated on a local basis without state interference. Some donors prefer to give land to such private organizations, rather than to the state. The procedure to be followed in such an arrangement, in order to obtain tax-exempt status for such a land trust, is to request a ruling from the District Director on the status of the land trust as a charitable organization. If the ruling is favorable, a donor can deduct up to twenty per cent of his adjusted gross income.<sup>88</sup> Usually, a copy of the ruling from the Internal Revenue Service must be filed with the tax assessor of the town. The land trust is then in a position to make its initial general appeal to the public at large for funds on a tax-deductible basis. If it is able to obtain wide public support, the trust can apply for a ruling to obtain the maximum thirty and fifty per cent income tax deduction benefits for its contributors.<sup>89</sup>

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<sup>88</sup> The charitable organization is treated as a CODE § 170(b)(1)(B)(i) organization for all intents and purposes, with the twenty percent deduction limitation, rather than a CODE § 170(b)(1)(A)(vi) organization, which permits a fifty percent deduction limitation. The reason for this is that it cannot be assumed that the charitable organization meets the public criteria set forth in Treas. Reg. §§ 1.170A-9(e)(2) and 1.170A-9(e)(3). A CODE § 170(b)(1)(A)(vi) organization is an organization, referred to in CODE § 170(c)(2) which normally receives a substantial part of its support (exclusive of income received in the exercise of performance by such organization of its charitable, education, or other purpose or function constituting the basis for its exemption under CODE § 501(a)) from a governmental unit referred to in CODE § 170(c)(1) or from direct or indirect contributions from the general public (emphasis added).

A CODE § 170(b)(1)(B)(i) organization is a private non-operating foundation, for example.

<sup>89</sup> Treas. Reg. § 1.170A-9(e)(5) states that:

A ruling or determination letter that an organization is described in section 170(b)(1)(A)(i) will not be issued to a newly created organization prior to the close of its first taxable year consisting of at least 8 months. However, such organization may request a ruling or determination letter that it will be treated as a section 170(b)(1)(A)(vi) organization for its first 2 taxable years (or its first 3 taxable years, if its first taxable year consists of less than 8 months). For purposes of this section, such 2- or 3-year period, whichever is applicable, shall be referred to as the advance ruling period. Such an advance ruling or determination letter may be issued if the organization can reasonably be expected to meet the requirements of subparagraph (2) or (3) of this paragraph during the advance ruling period. The issuance of a ruling or determination letter will be discretionary with the Commissioner.

Subparagraph (2) referred to above states that:

An overlooked source of donations for public conservation charities are certain private non-operating foundations.<sup>90</sup> Whether the private foundation can be a source for obtaining gifts of funds and lands is really unknown, but the changes in the tax laws brought about by the Tax Reform Act of 1969 have increased the flow of private foundation monies to public charities. Private non-operating foundations are now under restrictions in their operations as to minimum payout requirements and expenditures. A private non-operating foundation, in order to keep its status, must make annual qualifying distributions of amounts equal to the greater of its adjusted net income or its minimum investment return.<sup>91</sup> A distribution to the state of land or money for conservation purposes is a qualifying distribution.<sup>92</sup> The minimum investment return is the amount of money which is equal to a specified percentage of the working assets or corpus of the foundation. If the private foundation distributes income to a private non-operating foundation instead of to the state, the money so distributed must be expended by the recipient foundation by the

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[A]n organization will be treated as a "publicly" supported organization if the total amount of support which the organization "normally" (as defined in subparagraph (4) of this paragraph) receives from governmental units referred to in section 170(c)(1), from contributions made directly or indirectly by the general public, or from a combination of these sources, equals at least 33 1/3 per cent of the total support "normally" received by the organization.

Treas. Reg. § 1.170A-9(c)(3)(i) referred to above states:

The percentage of support "normally" (as defined in subparagraph (4) of this paragraph), received by an organization from governmental units, from contributions made directly or indirectly by the general public, or from a combination of these sources, must be "substantial." For purposes of this subparagraph, an organization will not be treated as "normally" receiving a "substantial" amount of governmental or public support unless the total amount of governmental or public support "normally" received equals at least 10 percent of the total support "normally" received by such organization.

Thus, if the charitable organization can meet these criteria of "public support" and others, as further expanded in Treas. Reg. § 1.170A-9(e)(3)(i)-(vii), then donors can expect to receive the maximum fifty percent (or thirty percent) charitable deduction limitation when they contribute funds or property to such private conservation groups.

<sup>90</sup> See note 88 *supra*.

<sup>91</sup> See CODE § 4942(f) for the definition of "adjusted net income." Also, see CODE § 4942(e) for the definition of "minimum investment return."

<sup>92</sup> CODE § 4942(g) defines a qualifying distribution as "any amount paid to accomplish one or more purposes described in section 170(c)(2)(B)." These include religious, charitable, scientific, literary, or educational purposes, and the prevention of cruelty to children or animals." CODE § 170(c)(2)(B). See also CODE § 4941(a), pertaining to taxes imposed on self-dealing between a disqualified person and a private foundation. Treas. Reg. § 1.170A-9(g)(1)(i) requires distribution by the private non-operating foundation of an amount equal in value to 100 percent of all such contributions received in that year. Should the foundation make a payment to a "non-qualifying organization," such a contribution becomes a "taxable expenditure," as defined in CODE § 4945.

end of the year following the year of receipt; otherwise, the distributed money will not qualify as a distribution.

As to restrictions on expenditures imposed by the 1969 Reform Act, distributions by a private foundation to an organization other than the state or other public charity become taxable expenditures unless certain tax procedures are followed which show that the distributing foundation is exercising expenditure responsibility.<sup>93</sup> If the distribution is made to the state, no demonstration of expenditure responsibility is necessary, and the contributing foundation is relieved of liability for any failure to comply with these requirements. Since the Department of Natural Resources qualifies as a public charity, potential private foundation donors can make grants to it in the same manner as contributions to any other public charity are made.

Since it is no longer practical in many instances to continue the operation of private foundations which hold assets that are moderate in value or relatively unproductive,<sup>94</sup> the 1969 Act provides two methods whereby a private foundation can terminate its private foundation status. The first is to transfer all of the foundation's net assets to a public charity which has been in existence for sixty calendar months prior to the date of transfer.<sup>95</sup> Of course, the State of Ohio or any of its subdivisions is a permissible distributee under the statute.<sup>96</sup> If the holders of the private foundation so desire, they can terminate the foundation by giving real property to the state and the securities to a church, hospital or college, provided that all distributees have been public charities in existence for at least five years. The private charity must transfer all of its rights and interest in the property, and may not impose restrictions which would prevent the state or other public charity from using the land or money for exempt purposes. However, the private foundation transferor may impose conditions on the transferee to see to it that the charitable purposes of the transferor are actually carried out, as for example when a private foundation gives a nature preserve which is to be used and protected by the state as a refuge for the benefit of the community. On the other hand, if a private foundation gives a building in an urban

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<sup>93</sup> Since a payment to a private foundation might be a "taxable expenditure" if the foundation serves the purposes set forth in CODE § 4945(d), the payment can be exempted from taxation if, as stated in § 4945(d)(4), the procedures in accordance with § 4945(h) are carried out to show that the foundation is exercising expenditure responsibility.

<sup>94</sup> These foundations are now subject to prohibitions against self-dealing (CODE § 4941), restrictions on expenditures (CODE § 4945), and minimum payout requirements (CODE § 4942), among others.

<sup>95</sup> See CODE § 507(b)(1)(A).

<sup>96</sup> The State of Ohio is a CODE § 509(a)(1) organization, as called for in § 507(b)(1)(A).

area to the state, the gift would have to be free from any conditions; otherwise, the private foundation would not have completed the termination its private foundation status. The state should be able to dispose of the office building.<sup>97</sup>

When a private foundation terminates its existence by transferring its land and other assets to the state or other public charity, it need not file nor obtain a ruling from the Internal Revenue Service. All it need do is comply with the filing and reporting requirements for the short taxable year ending on the date of transfer and file a form 966-E under Section 6043(b) within thirty days after the adoption of a plan of liquidation or the happening of any substantial contraction in operations.<sup>98</sup> No publication of the notice of availability of its annual report is required.<sup>99</sup>

In certain situations, an individual donor or a private foundation may not want to give its property to the state without retaining some voice in the use of the property. The second termination method is designed for this situation. The private charity may convert into a supporting organization, which is connected with another public charity.<sup>100</sup>

Before a private foundation can terminate its existence by converting to a supporting organization for the benefit of the state, it must notify the Internal Revenue Service of its intent to terminate over a five year period. The notice must be given before the start of the termination proceeding. The organization has to meet the requirements of a public charity continuously and not intermittently during these five years; at the end of this period, it must demonstrate to the Internal Revenue Service that it has complied with all of the public charity requirements during the entire five years.<sup>101</sup> If the foundation has converted to a supporting organization by amending its articles or its trust agreement, it can more easily establish compliance with

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<sup>97</sup> If the foundation made the gift subject to a condition, it would not be terminating its status as a private foundation as called for in CODE § 507(b)(1)(A).

<sup>98</sup> See Treas. Reg. § 1.507-2(a)(6)(i).

<sup>99</sup> See CODE § 6104(d) and Treas. Reg. § 1.507-2(a)(6)(ii).

<sup>100</sup> CODE § 507(b)(1)(B). CODE § 509(a) (3)(H) defines a supporting organization as one which is "organized and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2)," one of which is an organization described in CODE § 170(b)(1)(A)(vi), *i.e.*, the state.

<sup>101</sup> If the supporting organization is new, it must file an exemption application (Form 1023) in order to obtain a public charity status. If an existing private foundation seeks to convert to a supporting status, it must apply for an advance ruling from the Internal Revenue Service to allow donors to contribute to it as a public charity.

the public charity status requirements.<sup>102</sup>

## V. GUARANTEES TO THE DONORS

There is often some fear in a potential donor's mind that any land which he might donate to the state may be diverted to uses contrary to his wishes. Part of the problem has been in making donors cognizant of the many ways in which their original wishes and intentions will be carried out without failure on the part of the state agency. Potential donors must be made more aware of the built-in guarantees that are part of the donation process. Ohio has legislation which permits donors to dedicate their land as a nature preserve under certain conditions.<sup>103</sup> These areas are subject to stringent legal safeguards. Also, land donated through an intermediate organization such as the Nature Conservancy, rather than directly to the state, can be protected by a clause in the deed which stipulates that the property will revert to the intermediate organization if used by the state recipient for purposes other than those specified by the donor. Another way to protect the donor is to give the intermediate organization title and give the state a long-term lease for a nominal consideration.

The landowner may personally see to it that the purposes of his gift are carried out by merely giving an easement. An easement, such as a scenic easement, does not prevent the owner from using his land and his presence there and the possible presence of his descendants will assure that the property will remain in its natural state and that the trees and streams and natural contours will be protected.<sup>104</sup>

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<sup>102</sup> It was thought worthwhile to include this discussion of private foundations in the context of a possible mechanism for donation, since the tightening up of the tax laws with respect to distributions of contributions to such organizations for charity purposes has made donations to charitable organizations more attractive. A public conservation charity is an ideal recipient for such contributions, both as a tax advantage and as a worthwhile public policy objective.

<sup>103</sup> Also, a conservation minded park chief or director, by dedicating areas under his jurisdiction, could assure continued protection even if, with a change in political administration, a more developmental minded director or chief were subsequently appointed. See *Comment, Ohio's Park Systems: An Appraisal*, 32 OHIO ST. L.J. 818 (1971).

<sup>104</sup> OHIO REV. CODE § 1517.06 states that nature preserves are to be held in trust for the benefit of the people of the state and for the present and future generations. In addition, such preserves:

shall not be taken for any other use except another public use after a finding by the department of the existence of an imperative and unavoidable public necessity for such other public use and with the approval of the governor. Except as may otherwise be provided in the articles of dedication, the department may grant, upon such terms and conditions as it may determine, an estate, interest or right in, or dispose of, a nature preserve, but only after a finding by the department of the existence of an imperative and unavoidable public necessity for such grant or disposition and with the approval of the governor.

Of course, when a landowner sells his land outright to the state, he loses all rights in the land and forfeits any voice in the future management of the realty. In a bargain sale,<sup>105</sup> the landowner can ask for and be given protection as a condition to the bargain sale, and since there are tax consequences to this type of transaction in the form of a deduction to the donor, there is an incentive on both sides to preserve the charitable nature of the transaction in order to avoid tax difficulties.

Various other legal devices can be used to secure protection for the potential land donor. These devices are known as restricted transfers of land, which include restrictive covenants and reverter clauses as well as easements. For example, a condition may be included in the deed or will which stipulates that if the property donated is not converted to a use which conforms to the wishes of the donor, then title to the land or any lesser interest, such as an easement, will revert to the donor or to a specified third party.<sup>106</sup>

The potential land donor is also afforded statutory protection by the laws of the State of Ohio which govern the activities of the various state agencies such as the Department of Natural Resources, and their dealings with prospective donors and sellers. Also, the Natural Areas Act of 1970 gives the Ohio Department of Natural Resources authority to acquire land for nature preserves and to effect its purposes within the framework set down by the Act, which is designed to protect the potential donor. Under § 1501.01 of the Ohio Revised Code, the director may accept and expend gifts of land and money on behalf of the department. Under § 9.20, he is in effect required to hold and apply the gift of money according to the terms of the gift. Such gifts may be subject to any reasonable reservation on the part of the donor.<sup>107</sup>

The federal government, through the provisions of the Internal Revenue Code, in effect encourages donations to public charities and non-profit organizations such as the Nature Conservancy through the tax exempt status provisions, found in §§ 170, 2055, and 2522. The

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OHIO REV. CODE § 1517.051 states that:

No person shall violate any terms or conditions . of the articles of dedication of a nature preserve accepted by the director and filed with the county recorder. The director may order any person to cease and desist from any such violation. No person shall violate any such order.

A penalty for violation of the provisions of OHIO REV. CODE § 1517.051 is provided for in § 1517.99.

<sup>105</sup> See note 38 *supra*.

<sup>106</sup> See note 66 *supra*.

<sup>107</sup> See notes 11, 12 *supra*.



Internal Revenue Service indirectly enforces the proper use of donations through a denial of tax exempt status. The tax laws as to allowable deductions in many instances would be affected if the lands were not put to the proper uses, and the uniform application and enforcement of these tax laws pertaining to charitable deductions would be disrupted.

Whenever a trust instrument is used to transfer land, the appointed trustees who act as stewards or overseers for the protection of the donated land and the designated purposes as defined by the settlor have a fiduciary duty enforceable by legal means to carry out the specific intentions of the donor. The availability of legal means to the landowner who gives land in a charitable trust to see to it that his purposes are carried out, and the fact that in such charitable contributions the Attorney General must be notified of the contribution so as to see to its proper enforcement, should further assure the potential donor of proper handling of his donation.<sup>108</sup> Also, the rapid development of professionalism in many of these areas within State agencies such as the Department of Natural Resources should be encouraging to the donor.

Finally, the most significant aspect of giving land as a gift to the state rather than selling it remains in the fact that the land will be preserved for generations to come according to the wishes of the donor. The ultimate reward is the inner satisfaction which public donations for conservation purposes give to such donors, in the knowledge that generation after generation of descendants will enjoy

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<sup>108</sup> OHIO REV. CODE § 109.24 states that with respect to private trusts, "[t]he attorney general shall institute and prosecute a proper action to enforce the performance of any charitable trust, and to restrain the abuse thereof whenever he deems such action advisable or if directed to do so by the Governor, the supreme court, the general assembly, or either house thereof."

In addition, OHIO REV. CODE § 109.25 states that:

The attorney general shall intervene in any proceeding affecting a charitable trust when requested to do so by the court having jurisdiction of the proceedings, and may intervene in any proceeding affecting a charitable trust when he determines that the public interest should be protected in such proceeding. No compromise, settlement agreement, contract, or judgment agreed to by any or all parties having or claiming to have an interest in any charitable trust is valid if the compromise, settlement agreement, contract, or judgment modifies or terminates a charitable trust unless the attorney general was made a party to all such proceedings and joined in said compromise settlement agreement, contract, or judgment; provided, that the attorney general is expressly authorized to enter into such compromise, settlement agreements, contracts, or judgments as may be in the best interests of the public.

Thus, as with the guarantees enumerated in OHIO REV. CODE § 1517.06 with respect to the obligations of the state, there is an enforceable proceeding with respect to private trusts. For a discussion of state machinery for trust supervision, see Taylor, *Accountability of Charitable Trusts*, 18 OHIO ST. L.J. 157 (1957).

the natural scenic beauty and wonder of nature, and its many species of animal and plant life. The reward to the donor lies in the knowledge that he has made a significant contribution toward preserving a priceless heritage.