

# **LEGAL PLANNING AND TAX CONSEQUENCES FOR REAL PROPERTY CONSERVATION**

by

Brandon Ayscue, J.D.

Allison Dowling, J.D.

Joe Fucile, J.D. candidate

Annie Griffenberg, Department of Landscape Architecture, M.L.A.

Kara Kahle, J.D.

Conservation Clinic

University of Florida

Levin College of Law

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Tom Ankersen, Director

**LEGAL INSTRUMENTS FOR REAL PROPERTY  
CONSERVATION**

**By**

**Allison Dowling, J.D.**

**and**

**Kara Kahle, J.D.**

**I. LEGAL PLANNING AND TAX CONSEQUENCES FOR REAL PROPERTY**

## CONSERVATION: General Analysis

### A. Legal Instruments for Real Property Conservation

When considering the methods of preserving property, the property owner might find it helpful to keep these questions in mind: **Is retaining title to the land important?** If so, he or she may wish to consider a *conservation easement* or a *mutual covenant*. If the property owner does not want to retain title to the property, then **is receipt of compensation significant?** If so, then the property owner should consider a *fair market value sale* or a *bargain sale*. However, if receiving compensation for the property is not a significant factor, **is the ability to continue to live on the land valued?** If so, a *donation by will*, or a *donation of a remainder interest* would be suitable options. If the property owner does not foresee living on the land as an option, then an *outright donation* should be considered.<sup>1</sup>

This section will first explain and then analyze the legal instruments and mechanisms that should be examined when pursuing conservation alternatives. These include: restrictive covenants; fee simple transfers; remainder interests; land trusts; and, conservation easements.

#### 1. Restrictive Covenants

##### a. Introduction

The first type of legal mechanism examined by the Clinic involved restrictive covenants. Restrictive covenants may be an option for a property owner who desires to retain some control over the property.<sup>2</sup> Generally, restrictions are instituted in order to control the free use of the owner's property for the benefit of others. Restrictive covenants may be utilized to control the uses to which the land may be put.<sup>3</sup> Restrictive covenants can either be public or private. Public restrictions are legislative in nature and are established to protect the public welfare.<sup>4</sup> A zoning ordinance is an example of a public restriction.<sup>5</sup> Private restrictions, on the other hand, are used predominately in residential subdivisions to limit land use and to prevent nuisances.<sup>6</sup> Frequently,

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<sup>1</sup> See also *Conservation Options*, 8 (Land Trust Alliance 1996) (1993).

<sup>2</sup> Itzhak E. Kornfeld, *Conserving Natural Resources and Open Spaces*, 23 ENVTL. L. 185, 191 (1993).

<sup>3</sup> See Florida Bar Continuing Legal Education, *Florida Real Property Sales Transactions* 289 (1978).

<sup>4</sup> See Florida Bar Continuing Legal Education, *Florida Real Property Sales Transactions* §9.15 (9-1).

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

private restrictions are found in homeowners' association documents where many individuals live in ordered communities containing common areas.<sup>7</sup> Other examples are residential restrictions that call only for single-family residences and building line restrictions which prohibit the erection of a building nearer than a specified distance from the lot lines.<sup>8</sup>

**b. Creation of Private Restrictions**

Private restrictive covenants are defined as “private promises or agreements creating negative easements or equitable servitudes which are enforceable as rights arising out of contract.”<sup>9</sup> In a private agreement, one party promises to limit the use of his or her property to benefit other parties.<sup>10</sup>

Covenants are easy to employ.<sup>11</sup> However, the property owner is the only person who can place restrictions upon the property.<sup>12</sup> The property owner simply includes the desired restrictions in a deed or in a separate written instrument.<sup>13</sup> The instrument containing the restrictions should always be executed with the formalities of a deed and recorded in order to give notice and bind the land and its future owners.<sup>14</sup> For example, a “grantor” of a conservation-minded covenant could convey 100 acres of land with ecologically threatened flora that would require the “grantee” to maintain the habitat in its natural state and limit the number of visitors per day.<sup>15</sup>

**c. Duration**

Depending on the intent of the parties, restrictive covenants may be valid and enforceable

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<sup>7</sup> *See id.*

<sup>8</sup> *See Florida Bar Continuing Legal Ed., supra note 3, at 292.*

<sup>9</sup> *See Dade County v. Matheson, 605 So. 2d 469, 474 (Fla. 3d DCA 1992).*

<sup>10</sup> *See Florida Bar Continuing Legal Ed., supra note 3, at 290. See also Florida Bar Continuing Legal Ed., supra note 4, at §9.16.*

<sup>11</sup> *See Kornfeld, supra note 2, at 194.*

<sup>12</sup> *See Florida Bar Continuing Legal Ed., supra note 3, at 290. See also Florida Bar Continuing Legal Ed., supra note 4, at §9.17.*

<sup>13</sup> *See Florida Bar Continuing Legal Ed., supra note 3, at 290.*

<sup>14</sup> *See Florida Bar Continuing Legal Ed., supra note 3, at 290. See also Florida Bar Continuing Legal Ed., supra note 4, at §9.17.*

<sup>15</sup> *See Kornfeld, supra note 2, at 191.*

for a definite or an indefinite period of time.<sup>16</sup> If no time period for the duration of restriction is stated, it will be construed to exist as long as the nature of the circumstances and the purpose of the restrictions dictate.<sup>17</sup>

Likewise, if the instrument imposing restrictions states a time period during which they are to exist, that stated period will be controlling.<sup>18</sup> Similarly, the duration of restrictive covenants may be subject to change by contractual terms or by subsequent agreement of the parties -- although they should continue to state the conditions and the period of time for which the restrictions are valid.<sup>19</sup> For example, a provision can be accompanied with the restriction that provides that it may be renewed for successive periods if the various owners involved consent.<sup>20</sup> Likewise, a restriction could be amended if the right to amend was expressly reserved and the amendment was found to be reasonable in nature.<sup>21</sup>

#### d. Enforcement

Restrictive covenants are usually enforced by an action for an injunction upon equitable principles seeking to enjoin behavior that violates the restrictions.<sup>22</sup> Because the restrictions are a covenant and their violation constitutes a breach, they may also be enforced by an action at law for damages.<sup>23</sup>

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<sup>16</sup> See Florida Bar Continuing Legal Ed., *supra* note 4, at §9.19.

<sup>17</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 290. While Florida Statutes §689.18. states that reverter or forfeiture provisions of unlimited duration are contrary to the public policy of the state, the statute expressly exempts restrictions contained in restrictive covenants or in reverter or forfeiture clauses in a deed. See Florida Bar Continuing Legal Ed., *supra* note 3, at 290; See also Florida Bar Continuing Legal Ed., *supra* note 4, at §9.19. Therefore, covenants are more strictly enforced by courts than defeasible fees. See Kornfeld, *supra* note 2, at 194. Also, these restrictions may be enforced by a court of competent jurisdiction. See FLA. STAT. §689.18(7).; See also Florida Bar Continuing Legal Ed., *supra* note 3, at 202.

<sup>18</sup> See also Florida Bar Continuing Legal Ed., *supra* note 4, at §9.19; See also Florida Bar Continuing Legal Ed., *supra* note 3, at 290.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*; See also Florida Bar Continuing Legal Ed., *supra* note 3, at 290.

<sup>21</sup> See Florida Bar Continuing Legal Ed., *supra* note 4, at §9.19.

<sup>22</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 291; See also Florida Bar Continuing Legal Ed., *supra* note 94, at §9.22.

<sup>23</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 291.

## 1. **Standing:**

Because restrictive covenants are enforceable under contract law, parties to the covenant have standing to enforce their terms.<sup>24</sup> However, it is not always necessary to prove that there is privity of contract or of estate between the parties to the action.<sup>25</sup> It is necessary to prove that the restrictions were intended to be for the benefit of the party in order to have standing.<sup>26</sup> Thus, a restrictive covenant for the benefit of a third party, e.g. the public, may confer standing.

## 2. **Bars to Enforcement**

There are several grounds that may prevent a party from enforcing a restrictive covenant.<sup>27</sup> For example, a party can be estopped from enforcing a restriction if the person acquiesced in the continued breach or if the bound parties disregarded the restrictions for such a long time that they would be considered abandoned.<sup>28</sup> Also, a party may be estopped from enforcement if there was fraud or misrepresentation.<sup>29</sup> Moreover, covenants must run, touch and concern the land.<sup>30</sup> Examples of covenants that “touch and concern” the land would be a covenant not to build a subdivision or not to grow plants harmful to endangered species. However, a covenant to teach children to ride a horse that did not involve any obligations of the land would not satisfy this rule.<sup>31</sup> Finally, enforcement of the restriction could be viewed as oppressive or unreasonable if there was a drastic change in circumstances surrounding the creation of the covenant.<sup>32</sup> An example would be if the area surrounding the covenanted parcel underwent a substantial physical change that was inconsistent with the restrictions imposed.<sup>33</sup>

### e. **Mutual Covenants**

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<sup>24</sup> See Florida Bar Continuing Legal Ed., *supra* note 4, at §9.20.

<sup>25</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 291.

<sup>26</sup> See Florida Bar Continuing Legal Ed., *supra* note 4, at §9.20; See also Florida Bar Continuing Legal Ed., *supra* note 3, at 291.

<sup>27</sup> See Florida Bar Continuing Legal Ed., *supra* note 4, at §9.23.

<sup>28</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 291.

<sup>29</sup> See Florida Bar Continuing Legal Ed., *supra* note 4, at §9.23.

<sup>30</sup> See Kornfeld, *supra* note 2, at 195.

<sup>31</sup> See Kornfeld, *supra* note 2, at 193.

<sup>32</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 291.

<sup>33</sup> See Kornfeld, *supra* note 2, at 194.

If the property owner is considering dividing the property among several conservation-minded owners, then mutual covenants should be considered. Under this method of protecting property, a group of property owners could agree to restrictions on the use of the land by exchanging mutual covenants. This might be the best approach for protecting values that, while important to the owners, are not of a sufficient magnitude to warrant a conservation easement. However, the mutual covenant could be nullified by subsequent agreement of the owners, and there is no guarantee that heirs or successors would enforce it. Therefore, the mutual covenant is not necessarily permanent. Mutual covenants primarily benefit the group of property owners and do not provide tax advantages.<sup>34</sup>

## 2. **Fee Simple Transfers**

### a. **Estates in Fee Simple**

A second form of property instrument involves transfers of fee simple which could be utilized when donating or selling the property. These estates can be created either by deed or by will. There are four classifications of fee simple estates.<sup>35</sup>

#### 1. **Fee Simple Absolute**

An estate in fee simple is the longest possible estate in property because it is potentially infinite in duration.<sup>36</sup> It is both alienable and inheritable in whole or in part.<sup>37</sup> This is the maximum possible ownership interest known. A fee simple estate has no conditions attached to it that could possibly cause its termination before the maximum duration of the estate.<sup>38</sup>

#### 2. **Fee Simple Determinable**

A fee simple determinable (also called a “fee simple subject to a special limitation”) is a fee simple estate that terminates automatically upon the happening of a specified event.<sup>39</sup> Fee simple determinable estates are often created by language like “until,” “for so long as,” “during,” or

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<sup>34</sup> See Land Trust Alliance, *supra* note 1, at 20.

<sup>35</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 299.

<sup>36</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 299.

<sup>37</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 299.

<sup>38</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 301.

<sup>39</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 302.

“while” followed by a statement of the contingency.<sup>40</sup> An example of a fee simple determinable would be a situation where S owned land in fee simple absolute and conveyed it to B “to have and to hold to B and his heirs *so long* as the land is used for conservation purposes and when the land is no longer so used it shall revert to A and his heirs.” B has a fee simple determinable.<sup>41</sup> Because there is a possibility that the estate will be cut short by the occurrence of the special limitation, an outstanding interest in the property called a “possibility of reverter” exists.<sup>42</sup> If the land is used for non-conservation purposes, the estate conveyed to B automatically ends, and A will once again own an estate in fee simple absolute.<sup>43</sup>

### 3. Fee Simple Subject to a Condition Subsequent

The third type of fee simple estate is also an estate in fee simple that can be terminated by the grantor upon the occurrence of the specified event.<sup>44</sup> Traditional phrases like “provided that,” “but if,” or “on condition that” followed by a statement of the event or condition, indicate that a fee simple subject to a condition subsequent has been created. An example of a fee simple subject to a condition subsequent would be situation in which A conveyed to B and his heirs *on the express condition that* if the land shall not be used for conservation purposes A or his heirs shall have a right to re-enter and possess the land as of his former estate. B has a fee simple on condition subsequent.<sup>45</sup> The transferor’s right to enter and terminate the estate is called the “power of termination.”<sup>46</sup> The power of termination is limited to a duration of 21 years.<sup>47</sup>

### 4. Fee Simple Subject to an Executory Limitation

This final type of qualified fee simple exists when the fee simple is subject to divestment in

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<sup>40</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 302.

<sup>41</sup> See Cornelius J. Moynihan, *Introduction to the Law of Real Property* 33 (West Publishing 1998).

<sup>42</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 302.

<sup>43</sup> See Moynihan, *supra* note 41, at 33.

<sup>44</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 303.

<sup>45</sup> See Moynihan, *supra* note 41, at 33.

<sup>46</sup> See Florida Bar Continuing Legal Ed., *supra* note 3 at 303.

<sup>47</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 303. If there is a breach of the condition, then the grantor must take some overt action to exercise the right of possession – it is not terminated automatically by the happening of the condition. See Florida Bar Continuing Legal Ed., *supra* note 3, at 303; Moynihan, *supra* note 41, at 33.

favor of a person other than the conveyer upon the occurrence of the stated event.<sup>48</sup> Therefore, if A conveys “to B and his heirs but if B no longer maintains the conservation values of the property, then to C and his heirs.” In this situation, there is a breach of the stated condition, the estate is divested automatically and the future interest becomes possessory.<sup>49</sup> Here, if the terminating condition occurs, the succeeding party is someone other than the transferor.<sup>50</sup>

#### b. **Summary**

Under the appropriate circumstances, each of these types of transfers could be utilized when donating property for conservation. An outright land donation may involve an agency or a land trust that would own and protect the land. Donating land for conservation purposes may be the best strategy for a landowner who does not wish to pass the land on to heirs, owns property that is no longer being used, owns highly appreciated property, has substantial real estate holdings and wants to reduce estate tax burdens, or wants to be relieved of the responsibility of managing the property.<sup>51</sup>

Not only could the property owner donate the property during the owner’s lifetime, but donating land by will is another option.<sup>52</sup> Donating by will would allow the property owner to own and control the land while alive and still ensure its protection after death. Of course the property owner should designate a recipient that is willing and able to receive the land based on its conservation value.<sup>53</sup> Again, a land trust or agency would be possible donees that could protect the land.

A fee simple ( leaseback) is another possible method of protecting the property. This would allow the property owner to donate or sell full title to the property. The land would be leased back to the previous owner or a third person subject to appropriate conservation restrictions.

Another option would be to pursue bargain sale of the property.<sup>54</sup> Here, the property owner would attempt to sell the land to a land trust or agency at a price that is below fair market value. Then the purchasing organization would be responsible for protecting the land.

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<sup>48</sup> See Moynihan, *supra* note 41, at 34.

<sup>49</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 304.

<sup>50</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 304.

<sup>51</sup> See Land Trust Alliance, *supra* note 1, at 21.

<sup>52</sup> See Land Trust Alliance, *supra* note 1, at 30.

<sup>53</sup> See Land Trust Alliance, *supra* note 1, at 30.

<sup>54</sup> See Land Trust Alliance, *supra* note 1, at 34.

### 3. Life Estates

A third type of legal mechanism involves donations of remainder interests. The right to live on the property until the person dies is called a “life estate” or a “life tenancy.”<sup>55</sup> A “life estate” is an interest in real property which is measured either by the grantee’s life or the life of someone other than the grantee. The life estate terminates upon the death of the measuring life.<sup>56</sup> The act of making the gift of the land now, to take effect at death, is called the gift of a “remainder interest.”<sup>57</sup> When a remainder interest is donated, the person decides to reserve the right to live on the land but upon death the property will then go to a conservation organization or other qualified entity.<sup>58</sup>

A life estate may have a special limitation, be subject to a condition subsequent, or executory limitation.<sup>59</sup> Because a gift of a remainder interest without any restrictions on the future use of the property would not necessarily promote conservation, the grantor should consider a gift of a remainder interest in land “for conservation purposes.”<sup>60</sup> The “conservation purposes” test that applies to the donation of conservation easements discussed in section “E” below, also applies here.<sup>61</sup> To satisfy the conservation purposes test, the contribution must truly add to the public conservation good; interpreted as contributing to the preservation of open space, significant wildlife habitat, threatened farmland or watershed, or historic property.<sup>62</sup> Of course, the property owner’s life estate could not destroy the conservation qualities to be protected by the gift.<sup>63</sup>

### 4. Land Trusts

#### a. Introduction

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<sup>55</sup> Stephen J. Small, PRESERVING FAMILY LANDS 31 (Landowner Planning Center 2d ed. 1992) (1988).

<sup>56</sup> See Florida Bar Continuing Legal Ed., *supra* note 3, at 306.

<sup>57</sup> See Small, *supra* note 55, at 31.

<sup>58</sup> See Small, *supra* note 55, at 31.

<sup>59</sup> See Moynihan, *supra* note 41, at 45.

<sup>60</sup> See Small, *supra* note 55, at 32.

<sup>61</sup> See Small, *supra* note 55, at 32.

<sup>62</sup> See Small, *supra* note 55, at 32.

<sup>63</sup> See Small, *supra* note 55, at 32.

Another alternative for conveying or acquiring title to real property for conservation purposes, the land trust, was established by the Florida legislature in 1963.<sup>64</sup> Since that time, land trusts have become a popular vehicle for conservation. A land trust is an arrangement whereby the “trustee,” retains both legal and equitable title to land for the benefit of another party, the “beneficiary.”<sup>65</sup>

When a deed or other recorded instrument naming the trustee as “grantee” sets forth the trustee's powers, a land trust is created.<sup>66</sup> Florida Statute §689.071 sets out elements of a land trust that must be met in order to be entitled to the benefits of the statute. The following conditions must be satisfied:

- The instrument must convey an interest in real property;
- The grantee in the instrument must be designated as a "trustee";
- The recorded instrument must confer on the trustee "the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property";
- The land trust agreement must be recorded.

If these conditions are satisfied, the trustee is vested with full ownership in the property, with full power and authority which was granted in the recorded instrument.

The distinctive features of a land trust include:

- Both the legal and equitable title to the property are vested in the trustee, and the beneficiary has no interest in either.
- The trustee has no duties or powers other than to convey, mortgage, or deal with the real property as directed by the beneficiaries or to sell or liquidate the property at the trust's termination.
- The rights of possession, management, control, and operation of the property, as well as the right to rents, issues, profits, and proceeds of sale or mortgage financing are vested in the beneficiary.
- The rights, privileges, and obligations of the beneficiaries are not interests in real estate but by the trust instrument are expressly

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<sup>64</sup> See FLA. STAT. §689.071 which was enacted on August 17, 1963.

<sup>65</sup> See Mark Warda, LAND TRUSTS IN FLORIDA 13 (Sphinx Publishing 4<sup>th</sup> ed. 1995) (1984).

<sup>66</sup> See *id.*; See also FLA. STAT. §689.071.

characterized as personal property.<sup>67</sup>

**b. Duties of the Trustee**

In land trusts, both legal and equitable title to the trust property are vested in the trustee.<sup>68</sup> Therefore, a land trust differs from a conventional trust under which the trustee holds legal title and the beneficiary holds equitable title.<sup>69</sup> The trustee holds the title and may sign documents affecting title when directed by the beneficiary or the terms of the trust.<sup>70</sup> The beneficiary retains all other rights and duties regarding the property -- collects rents, pays taxes, obtains insurance, and manages the property.<sup>71</sup> Also, the terms usually contain the duty to convey the property to the beneficiary at the termination of the trust.<sup>72</sup>

**c. Duties of the Beneficiary**

As previously noted, a land trust beneficiary retains a personal property interest, not a real property interest.<sup>73</sup> The beneficiary, which can be a person, corporation, partnership, limited liability corporation, or a combination,<sup>74</sup> has the duty to manage the property.<sup>75</sup> Because the duties, rights, and responsibilities of ownership reside with the beneficiary, the beneficiary also assumes the responsibility and liability for mismanagement.<sup>76</sup>

**d. Creation of a Land Trust**

A land trust may be created in two ways: A property owner can deed the property to a

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<sup>67</sup> See Bruce S. Goldstein, FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS 9-B-1, §9.56 (The Florida Bar 1997). (Quoting: KENO, KENO ON LAND TRUSTS I.C.[1.3] (1978)).

<sup>68</sup> See Warda, *supra* note 65, at 16.

<sup>69</sup> See 76 AMERICAN JURISPRUDENCE §12.

<sup>70</sup> See Warda, *supra* note 65, at 14.

<sup>71</sup> See *id.*, at 14.

<sup>72</sup> See *id.*, at 14.

<sup>73</sup> See *id.*, at 15.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*, at 17.

<sup>76</sup> See *id.*; See also 76 AMERICAN JURISPRUDENCE §12.

trustee, or a buyer can direct a seller to convey property to a trustee.<sup>77</sup> Two instruments typically are involved in the creation of land trusts. First, a “land trust agreement” states in detail the duties and responsibilities of the trustee. The agreement may also refer to the relationship among the beneficiaries when dealing with decision-making or profit-sharing. The second instrument, the deed, conveys title to the trustee. The deed will usually contain language that “the trustee is granted full power and authority to protect, conserve, and sell, lease, encumber, or otherwise manage the property described in the deed.”<sup>78</sup>

**e. Advantages of a Land Trust:**

A land trust utilized as a vehicle for owning real property offers a number of benefits. Advantages of land trusts include:

- Because the interest of a beneficiary of a land trust is personal property rather than real property, a properly recorded judgment against a beneficiary does not constitute a lien against the real estate held by the land trust. It should be noted, however, that the filing of a RICO lien notice creates a lien in favor of Florida on the beneficial interest in land situated in the county in which the notice is filed.<sup>79</sup> A judgment creditor also could perfect a lien against the personal property interest of a beneficiary by following the necessary procedures for levying on personal property.
- The incompetency, death, bankruptcy, or divorce of one of several owners of a parcel of real estate can create problems in selling, mortgaging, or otherwise dealing with the property. If the property is held by a land trust, these circumstances affect only the beneficial interests of the persons involved and not the real estate. Thus, with appropriate authority granted by the land trust instrument, the trustee can effectively mortgage, convey title to, or otherwise deal with the property despite the existence of any of these circumstances.
- As noted [in §9.57], the personal liability of the trustee is limited under Florida Statutes §737.306(1)(a), which states that unless otherwise provided in the contract, a trustee is not personally liable on contracts, except contracts for attorneys' fees, properly entered into in the trustee's fiduciary capacity in the course of administration of the trust estate, unless the trustee fails to reveal his or her representative

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<sup>77</sup> See Warda, *supra* note 65, at 29.

<sup>78</sup> See *id.*, at 41.

<sup>79</sup> See FLA. STAT. §895.07 (1998).

capacity and identify the trust estate in the contract.<sup>80</sup>

- Because the land trust agreement is not recorded, the identity of the beneficial owners remains confidential.<sup>81</sup>

#### f. **Disadvantages of a Land Trust**

There are some down sides to setting up a land trust. First, there is a cost incurred when setting up a land trust and also with maintaining it.<sup>82</sup> Moreover, finding a trustee that can be trusted may prove to be difficult -- especially when considering that a trustee has full power to sell the property.<sup>83</sup> The sale cannot be taken back, but the act could constitute criminal fraud.<sup>84</sup>

### 5. **The Conservation Easement**

#### a. **Introduction**

A conservation easement is a partial interest in property transferred from a property owner to an appropriate non-profit or governmental entity either by gift or purchase. Conservation easements were authorized by statute in Florida in 1976.<sup>85</sup> A conservation easement usually restricts the type and amount of development that may take place on the property.<sup>86</sup> The easement “runs with the land”, so that as ownership changes, the land remains subject to the easement.<sup>87</sup>

The easement's seller/donor (owner) may receive several benefits, including estate, property, and income tax deductions and retention of certain rights to develop if specified in the easement instrument. In addition, the easement is drafted to specifically address the particular property's needs and owner's goals. Its flexibility makes the conservation easement a useful

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<sup>80</sup> See FLA. STAT. §689.071(5).

<sup>81</sup> Goldstein, *supra* note 67, at §9.62.

<sup>82</sup> One example would be attorney's fees. See Warda, *supra* note 155, at 73.

<sup>83</sup> See Warda, *supra* note 65, at 73-74.

<sup>84</sup> See Warda, *supra* note 65, at 74.

<sup>85</sup> The conservation easement statute was amended in 1986 and 1993.

<sup>86</sup> See David Downes, *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209, 212 (Spring 1998).

<sup>87</sup> See FLA. STAT. § 704.06(4)(1997).

instrument for attaining specific conservation goals.<sup>88</sup>

The easement's buyer/donee (holder) takes upon themselves the duty of monitoring and enforcing the restrictions of the easement. The holder of the easement should have the time and monetary resources to properly monitor the property and enforce restrictions. If these duties are not performed properly the easement may be vulnerable to an attack on its validity for lack of enforcement.

#### **b. Easement Purposes and Restriction**

The Florida conservation easement law defines a conservation easement as a right or interest in real property which is appropriate to fulfill any of the following purposes:

- retaining land or water areas predominately in their natural, scenic, open, agricultural, or wooded condition;
- retaining such areas as suitable habitat for fish, plants, or wildlife;
- retaining the strict integrity or physical appearance of sites or property of historic, architectural, archaeological, or cultural significance; or
- maintaining existing land uses

and which prohibits or limits any or all of the following:

- construction or placing of building, road, signs, billboards or other advertising, utilities, or other structures on or above the ground.
- dumping or placing of soil or other substances or material as landfill or dumping or placing of trash, wastes, or unsightly or offensive material.
- removal or destruction of trees, scrubs, or other vegetation.
- excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface.
- surface use except for purposes that permit the land or water area to remain predominately in its natural condition.
- activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation.
- acts or uses detrimental to such retention of land or water areas.
- acts or uses detrimental to the preservation of the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance.<sup>89</sup>

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<sup>88</sup> See Cheryl A. Denton, *Conservation Easements in Florida: Do Unsubordinated Mortgages Pose a Threat?*, 70 FLA. BAR JOURNAL 50, 50 (1996).

<sup>89</sup> FLA. STAT. §7 04.06(1) (1998).

The purpose and restrictions in the easement should be drafted to reflect these objectives. The restrictions should be strict enough to protect the significant values of the property. Easements may be designed, however, that permit limited construction, such as that of a single family house, in the future.<sup>90</sup>

**c. Easement Donor or Seller**

Any party that owns real property in fee simple may donate or sell interests in the property. If the property is subject to any mortgages or liens those lenders must agree to subordinate their rights in the property to the rights of the easement holder. Subordination is an IRS requirement to qualify for some tax deductions, as well as sound policy to preserve the easement.<sup>91</sup> While no cases in Florida have determined the issue of whether pre-existing, unsubordinated mortgages could terminate a conservation easement created pursuant to the conservation easement statute, other types of easements have been terminated due to such prior unsubordinated interests.<sup>92</sup> Thus, in absence of case law, it is prudent to subordinate the interests in order to preserve the easement from any possible attacks. The property owner may also want to determine if any mining or timber rights would affect his or her property and subordinate those interests.<sup>93</sup>

**d. Easement Holder**

Under Florida law, the holder of the easement must be either:

- a governmental body or agency or
- a charitable corporation or trust
- whose purposes include:
  - (i) protecting natural, scenic, or open space values of real property,
  - (ii) assuring available land for agriculture, forestry, recreation, or open spaces use,
  - (iii) protecting of natural resources,
  - (iv) maintaining or enhancing air or water quality, or

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<sup>90</sup> See JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK, 5 (1988).

<sup>91</sup> See Treas. Reg. §1.170A-154(g)(2) (1998).

<sup>92</sup> See Denton, *supra* note 88, at 50 -54. Applying the principle of first in time, first in right, a Florida court terminated an easement (a non-statutorily created easement) upon foreclosure of a superior mortgage on the property. See *United States v. Roberts*, 788 F.Supp. 555 (S.D. Fla. 1991).

<sup>93</sup> See DIEHL, *supra* note 90, at 22.

- (v) preserving sites or property of historical, architectural, archaeological, or cultural significance.<sup>94</sup>

It is also possible to have co-holders of the easement, allowing two qualified organizations to hold the easement. This arrangement brings together the strengths, abilities, and resources of the two stewardship organizations. The co-holders may share responsibility jointly or an individual organization can accept primary responsibility for enforcement of different restrictions.<sup>95</sup>

#### e. **Easement Holder's Duties**

The easement holder must enter the land in a reasonable manner and reasonable time to assure compliance with the easement's restrictions.<sup>96</sup> To accomplish these tasks the holder should monitor the property through inspections and maintain accurate records of the conditions of the property. Such monitoring serves several purposes including building rapport with the owners, catching violations, providing a record for court action, and satisfying the IRS requirements for tax-deductions for easements.<sup>97</sup>

##### 1. **Monitoring Process**

The holder of the easement should accompany the owner or a representative of the owner on monitoring visits. These visits can be yearly or more frequent, based on the demands put upon the property from encroachment and use. During the visit, the parties should review the baseline data of the property,<sup>98</sup> review the main restrictions on the property,<sup>99</sup> walk around the boundary and interior of the property, and document and discuss with owner any changes in the property.<sup>100</sup>

##### 2. **Monitoring Documentation**

It is very important to document any changes in the property to maintain a record for further enforcement actions. Thus, it is helpful to take photos, maps, and a summary of the deed restrictions to the monitoring session and document any changes with photos, map corrections, and written descriptions. Documentation should be made of current conditions of the property

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<sup>94</sup> FLA. STAT. § 704.06(3) (1997).

<sup>95</sup> See DIEHL, *supra* note 90, at 77.

<sup>96</sup> See FLA. STAT. § 704.06(4) (1997).

<sup>97</sup> See BRENDA LIND, A CONSERVATION EASEMENT STEWARDSHIP GUIDE 31 (1991).

<sup>98</sup> See DEIHL, *supra* note 90, at 80 - 82; LIND, *supra* note 97, at 88.

<sup>99</sup> See DEIHL, *supra* note 90, at 81-82.

<sup>100</sup> See DEIHL, *supra* note 90, at 94-99; LIND, *supra* note 97, at 92-93.

and any violations. The property owner and the easement holder should each sign and receive a copy of an inspection form.<sup>101</sup>

f. **Easement Provisions**

1. **Instrument**

A conservation easement may be created by any restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the property.<sup>102</sup> In Florida, in order for the conservation easement to be enforceable, it must comply with all sections of Florida Statute § 704.06. Included within the statutory requirements is the condition that the easement must be publicly recorded.<sup>103</sup>

2. **Duration**

A conservation easement is defined in § 704.06(2) as a “perpetual”, undivided interest in property. Therefore, the easement must be drafted as a perpetual easement.

3. **Public Access**

Public access may be granted in a conservation easement, and is required for some income tax deductions.<sup>104</sup>

4. **Baseline Data**

Baseline data on the condition of the property at the time of transfer of the conservation easement must be recorded and incorporated by reference into the easement to provide evidence of conservation resource value and to satisfy certain IRS requirements.<sup>105</sup> It is best to compile the information for the baseline report prior to the transfer, so that it can be easily incorporated into

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<sup>101</sup> See *id.* at 98.

<sup>102</sup> See FLA. STAT. § 704.06(2) (1997).

<sup>103</sup> See also *Brian Realty Corp. v DeKalb County*, 493 S.E. 2d 595 (Ct. App. Ga. 1997)(construing a similar Georgia conservation easement statute requirement to preclude reassessment of taxes until the easement was recorded properly).

<sup>104</sup> See DIEHL, *supra* note 90, at 8. See also *infra* Section I (B) (discussing landowner liability) and Section I (C) (discussing tax consequences of conservation easements).

<sup>105</sup> It also provides the information necessary for a summary report for the easement holder to utilize in monitoring the property.

the easement. The baseline data should include<sup>106</sup> :

- documentation of conservation values which could include a survey map from the U.S. Geological Survey, map of the area to scale, aerial photographs, on-site photographs, a qualified appraisal, and any other pertinent information
- acknowledgment statement referencing the baseline data file and attesting to the accuracy of the report at the time of transfer, signed by the holder and owner of the land (example: "This natural resources inventory is an accurate representation of [property protected] at the time of the [conveyance of the easement].")
- cover sheet outlining the contents of the file
- directions to the property
- easement summary including a statement of purpose, list of restrictions and reserved rights, ownership information, and recording information (See Sample Summary Form, Appendix 5), and
- legal information including title report, record of the easement document, and any information concerning any other encumbrances on the property such as rights of ways, water rights, or subordinated interests.<sup>107</sup>

**g. Back-up Grantee**

Since the non-profit organizations can cease to exist and government agencies can change directives, it may be necessary to select a back-up grantee to ensure enforcement of the easement in perpetuity. This can be accomplished by including a back-up provision in the easement for either:

- A Preferred Transferee: Identifies a specific organization to whom the easement transfers if the primary holder ceases to exist or ceases to be a qualified organization  
Or
- An Executory Interest: Gives another organization the power to terminate the primary holder's interest in the easement if it fails to enforce the terms. The provision can allow a back-up to take title by simply recording notice in the deed registration or require court approval to substitute holders after a finding that the primary easement holder failed to enforce the easement.<sup>108</sup>

**h. Enforcement Actions**

The easement holder has the right to enforce the easement provisions at law, in equity, or

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<sup>107</sup> See DIEHL, *supra* note 90, at 76; LIND, *supra* note 97, at 18.

<sup>108</sup> See LIND, *supra* note 97, at 77. See also *infra* Section I(A)(1-4).

through injunctions.<sup>109</sup> Another means by which to secure the enforcement of the easement in perpetuity is to create provisions giving third parties the right to sue.<sup>110</sup> For example, an easement conveyed to a local government could provide third party conservation organizations the right to challenge the local governments management. Under Florida law, an action affecting a conservation easement may be brought by an owner of an interest in the real property burdened by the easement, a holder of the easement, a person having third-party right of enforcement as provided in the easement, or a person authorized by another law.<sup>111</sup>

## I. **Recording and Indexing the Easement**

The easement must be recorded and indexed in the same manner as any other instrument affecting real property in order to enjoy the protection of the statute. This also serves to notify the property appraiser and tax collector of the conveyance.<sup>112</sup>

### j. **Amending Easements**

As circumstances change over time the holder of the easement may want the easement amended. Serious consideration should be given prior to amending the easement because if the amendments change the conditions significantly, the amendments might invalidate the easement or have significant tax consequences. If one decides to amend the easement, the amendment should strengthen the conservation restrictions or have neutral consequences on the conservation restrictions. Types of amendments that have withstood challenges include clarification of terms, boundary adjustments, site change of permitted activities, easing of conflicts with local zoning, and increasing restrictions. If the parties anticipate the possibility of amending the easement in the future, a provision that allows for amendment should be included in the original easement.<sup>113</sup>

### k. **Terminating the Easement**

Easements are subject to several legal doctrines that might cause the termination of the easement, including:

#### 1. **Eminent Domain Actions**

The government can use its police powers to condemn the property for a public purpose serving the health, safety, or welfare of its citizens. While the government must pay the owner of

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<sup>109</sup> See FLA. STAT. § 704.06(4) (1997).

<sup>110</sup> See FLA. STAT. § 704.06(8) (1997).

<sup>111</sup> See FLA. STAT. § 704.06(9) (1997).

<sup>112</sup> See FLA. STAT. § 704.06(5) & (7) (1997).

<sup>113</sup> See DIEHL, *supra* note 90, at 123.

the property just compensation, the government is not subject the easement restrictions.<sup>114</sup> Thus, to protect oneself from such action two approaches are recommended. First, the higher level of government to which one donates or sells the easement the less likely condemnation can be pursued. For instance, if the state owns the property, the property is only subject to federal eminent domain actions. However, if the property is owned by local governments, it remains subject to state and federal eminent domain actions. Property held by private citizens is subject to all levels of governmental eminent domain.<sup>115</sup> Thus, conveying the easement to the federal government would protect the property from condemnation actions by state or local governments. Second, a provision in the easement for settling out of court gives the owner room to negotiate with the government for alternatives to condemnation.<sup>116</sup>

## 2. Doctrine of Changed Conditions

This doctrine states that if the surrounding areas of the property change so much that easement can no longer fulfill its original purposes, then the easement terminates.<sup>117</sup> The test for whether conditions have changed is whether “conditions have changed since the making of the promise as to make it impossible to secure in a substantial degree the benefits intended to be secured by the promise”.<sup>118</sup>

## 3. Release

The holder of the easement may voluntarily release the restrictions, subject to restrictions by state law forbidding such release. Florida Statutes permits the holder of the easement to release the easement to the holder of the fee simple title even though the fee holder is not a governmental or non-profit entity.<sup>119</sup> Typically, release of the restrictions by a non-profit or

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<sup>114</sup> See U.S. CONST. art. V, § 23 (authorizing federal condemnation actions provided just compensation is provided).

<sup>115</sup> See FLA. STAT. § 704.06(11) (1997).

<sup>116</sup> See DIEHL, *supra* note 90, at 131; See also FLA. STAT. § 704.06(7) (1997).

<sup>117</sup> See *id.* at 133. This doctrine, however, is usually not applicable to conservation easements because surrounding areas typically experience increased development, increasing the value of the easement's purpose, not contravening its purpose. See generally Jeffery A. Blackie, *conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (August, 1989).

<sup>118</sup> Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 484 (1984).

<sup>119</sup> See FLA. STAT. § 704.06(4) (1997).

governmental entity would violate state law or jeopardize the non-profits' tax exemption.<sup>120</sup>

#### 4. **Inaction**

If no action is taken on a conservation easement for a specified period of time by the holder, then the easement may be extinguished due to the lack of enforcement.<sup>121</sup>

#### 5. **Merger**

If an easement holder becomes the owner in fee simple of the land on which the easement runs, then the right to enforce the restrictions merge with the rights of ownership and extinguishes the easement.<sup>122</sup>

#### 1. **Drafting Suggestions**

In drafting the easement the drafter should clearly state the purpose of the easement and identify all the boundaries of the property. The standards for the restrictions should be measurable standards so that they are easy to enforce and the drafter should avoid unenforceable restrictions. For instance, a purpose of the easement is to keep people from driving on pristine dunes, then the easement's restrictions should require fencing or posting of notices not to trespass, rather than provisions restricting entrance by third parties. The posting or fencing requirement is easier to enforce against the owner of the property than is attempting to monitor the entrance of third parties.<sup>123</sup> For a good example of a model easement and explanations of each provision see Janet Diehl and Thomas S. Barrett's *Conservation Easement Handbook*.<sup>124</sup> The conservation easement is a flexible alternative to outright donations of land and offers the convenience to the property owner of another entity enforcing the conservation restrictions. The disadvantages include the monetary expense of monitoring the land, as well as decreased property value and decreased owner control.

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<sup>120</sup> See DIEHL, *supra* note 90, at 133.

<sup>121</sup> See *id.* at 133..

<sup>122</sup> See DIEHL, *supra* note 90, at 133..

<sup>123</sup> See LIND, *supra* note 97, at 15.

<sup>124</sup> See DEIHL, *supra* note 90, at 156-164.

**LANDOWNER LIABILITY FOR PUBLIC USE OF  
CONSERVATION LANDS**

**By**

**Kara Kahle, J.D.**

## **B. Landowner Liability for Public Use of Conservation Lands**

Private landowners also need to be concerned with potential liability if they chose to make their property accessible to the public for conservation or recreation purposes. Fortunately, Florida Statute §375.251 provides some protection from liability. The statute was enacted to encourage persons to make land, water areas, and park areas available to the public for outdoor recreation. Owners who make certain areas available to the public for recreational purposes are not presumed to extend any assurance that the land is safe for any purpose, do not incur any duty of care toward a person who enters the land, and are not liable for any injury to persons or property caused by an act or omission of a person who enters the land. This protection also applies if the owner leases the land to the state. However, the protection provided by the statute will not apply if there is any charge for using the land or if any profit is derived from the patronage of the general public. Additionally, an owner is not relieved of liability if there was a deliberate, willful, or malicious injury to persons or property.<sup>125</sup>

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<sup>125</sup> See FLA. STAT. §375.251 (1997).

**TAX CONSEQUENCES OF CONSERVATION CONVEYANCES**

**By**

**Brandon Ayscue, J.D.**

## C. Tax Consequences of Conservation Conveyances

The conservation of real property generates a number of opportunities to lower an individual's tax burden. Benefits may accrue through conservation conveyances in the areas of federal income taxes, estate taxes, gift taxes, capital gains taxes, and ad valorem taxes.<sup>126</sup>

### 1. Federal Income Taxes

The Internal Revenue Service recognizes a "qualified conservation contribution" (such as a conservation easement)<sup>127</sup> as a charitable contribution under Section 170 of the Internal Revenue Code (Code).<sup>128</sup> Yet, it places restrictions on what may qualify as a conservation contribution.

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<sup>126</sup> For further reading about conservation and tax incentives, see Bowles, Downes, Clark, and Guerin-McManus, *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL L. AND POL'Y F. 209. See also SMALL, *supra* note 55 (additional explanations of the principles discussed below).

<sup>127</sup> See *infra* Section I (A)(5).

<sup>128</sup> See I.R.C. § 170 (1999). I.R.C. § 170(h) states:

8. Qualified Conservation Contribution.--
1. In General. -- For purposes of subsection (f)(3)(B)(iii), the term "qualified conservation contribution" means a contribution--
    - A. of a qualified real property interest,
    - B. to a qualified organization,
    - C. exclusively for conservation purposes.
  2. Qualified Real Property Interest.--For purposes of paragraph (1), the term "qualified real property interest" means any of the following interests in real property:
    - A. the entire interest of the donor other than a qualified mineral interest,
    - B. a remainder interest, and
    - C. a restriction (granted in perpetuity) on the use which may be made of the real property.
  3. Qualified Organization.--For purposes of paragraph (1), the term "qualified organization" means an organization which --
    - A. is described in clause (v) or (vi) of subsection (b)(1)(A), or
    - B. is described in section 501(c)(3) and--
      - I. meets the requirements of section 509(a)(2), or

The Code outlines a three-prong test to determine if a qualified conservation contribution exists.<sup>129</sup> Such a contribution must be (1) a qualifying real property interest, (2) to a qualified organization, (3) exclusively for conservation purposes.<sup>130</sup>

It is required that the contribution qualify as a real estate interest.<sup>131</sup> The Code defines a “qualifying real property interest” as having any one of three characteristics.<sup>132</sup> First, the owner may donate their entire interest in the property (other than mineral rights).<sup>133</sup> Second, the donor may give a remainder interest in their property.<sup>134</sup> This would be an interest in the property that would pass after the expiration of an intervening interest. For example, the owner may elect to donate the property upon death to a conservation trust. One method of achieving this result would be to place the property in a life estate for the duration of the life of the owner and grant

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- ii. meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (I) of this subparagraph.
4. Conservation Purpose Defined.--
- A. In General.-- For purposes of this subsection, the term “conservation purpose” means –
    - I. the preservation of land areas for outdoor recreation by, or the education of, the general public,
    - ii. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
    - iii. the preservation of open space (including farmland and forest land) where such preservation is –
      - I. for the scenic enjoyment of the general public, or
      - II. pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
    - iv. the preservation of an historically important land area or a certified historic structure. . . .
5. Exclusively for Conservation Purposes. – For purposes of this subsection –
- A. A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity. . . . *Id*

<sup>129</sup> See I.R.C. § 170(h)(1) (1999).

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See I.R.C. § 170(h)(2) (1999).

<sup>133</sup> See I.R.C. § 170(h)(2)(A) (1999).

<sup>134</sup> See I.R.C. § 170(h)(2)(B) (1999).

the remainder interest to the conservation trust.<sup>135</sup> Upon death, the remainder would pass to the trust. The creation of such a remainder interest would qualify as a real estate interest under the three prong test above. Third and finally, a restriction placed on the use of the real property will serve as a qualified real property interest (i.e. a conservation easement), provided the restriction is placed in perpetuity.<sup>136</sup> This option would allow the owner to retain ownership benefits of the property subject to the easement restrictions.<sup>137</sup> The restrictions would serve to preserve and protect the land from any future development because such a restriction must be granted in perpetuity.<sup>138</sup>

In addition to qualifying as a real estate interest, the interest must be donated to a “qualified organization.”<sup>139</sup> Such an organization may be a governmental unit such as the state or federal government, or any of their respective agencies.<sup>140</sup> Alternatively, an organization formed under the Internal Revenue Code § 501(c)(3) as a tax-exempt charitable organization may also qualify.<sup>141</sup>

Finally, the gift must be made “exclusively for a conservation purpose.”<sup>142</sup> The Code lists four criteria that may qualify as a conservation purpose.<sup>143</sup> First, the preservation of land for outdoor recreation by, or the education of, the general public qualifies as a conservation

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<sup>135</sup> See *infra* Section I (A)(3).

<sup>136</sup> See I.R.C. § 170(h)(2)(B) (1999).

<sup>137</sup> See *infra* Section I (A)(5).

<sup>138</sup> The federal government places restrictions on donations before they allow tax deductions. See Reg. Sec. 1.170A-14(g)(2). The “first in time, first in right” principle threatens easements when a superior right to the property exists such as a mortgage. For a discussion of conservation easements and the subordination of mortgages and foreclosures, see Cheryl Denton, *Conservation Easements in Florida: Do Unsubordinated Mortgages Pose a Threat?*, 70 FLA. B. J. 50 (April 1996). In general, “[A]ny interest in the property retained by the donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.” Reg. Sec. 1.170A-14(g)(1).

<sup>139</sup> See I.R.C. § 170(h)(1) (1999).

<sup>140</sup> See I.R.C. § 170(h)(3)(A) (1999).

<sup>141</sup> See I.R.C. § 170(h)(3)(B) (1999).

<sup>142</sup> See I.R.C. § 170(h)(1) (1999).

<sup>143</sup> See I.R.C. § 170(h)(4) (1999).

purpose.<sup>144</sup> Second, a conservation purpose may be found if the interest was given for the protection of a relatively natural<sup>145</sup> habitat of fish, wildlife, or plants.<sup>146</sup> Third, the preservation of open space may qualify as a conservation purpose.<sup>147</sup> To qualify however, the open space must be for the scenic enjoyment of the general public (or, pursuant to another delineated governmental conservation policy) that will yield a significant public benefit.<sup>148</sup> Such open space may include farmland and forest land.<sup>149</sup> Finally, the preservation of a historically important land or structure may qualify as a conservation purpose.<sup>150</sup> The exclusivity requirement of this prong mandates that these conservation purposes be protected in perpetuity.<sup>151</sup>

Once it has been determined that a qualifying conservation contribution has been made, the taxpayer must determine the value of the donation.<sup>152</sup> In the event that the property owner donates property, this is simply the fair market value of the property. However, the value of any easement donation would be more difficult to ascertain. An appraiser must determine both the fair market value of the property *with* and *without* the easement.<sup>153</sup> The difference between these figures would yield the value of the easement.<sup>154</sup> Such values must be determined through a

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<sup>144</sup> See I.R.C. § 170(h)(4)(A)(I) (1999).

<sup>145</sup> Attempting to explain a “relatively natural” state with regard to a Michigan statute (the Recreational Land Use Act), the Court states: “The focus is on the use of the land and whether it remains in a relatively natural state or has been developed and changed in a manner incompatible with the intention of the act. . . . The central issue in this case is the *character* of the land.” *Wilson v. McNamara, Inc.*, 173 N.W. 2d 851, 854 (Mich. Ct. App. 1988)(emphasis added).

<sup>146</sup> See I.R.C. § 170(h)(4)(A)(ii) (1999).

<sup>147</sup> See I.R.C. § 170(h)(4)(A)(iii) (1999).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See I.R.C. § 170(h)(4)(A)(iv) (1999).

<sup>151</sup> See I.R.C. § 170(h)(5)(A) (1999). See Reg. Sec. 1.170A-14(g) (discussing the requirements of the donor to protect the property in perpetuity).

<sup>152</sup> See STEPHEN S. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS*, 17-1 (1990).

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

“qualified appraisal” with appropriate documentation to verify the amount of the deductions.<sup>155</sup>

After the value of the easement has been ascertained, the taxpayer may determine the extent of any deductions. According to the Code, the taxpayer may be eligible to deduct an amount equal to thirty percent (30%) of the taxpayers adjusted gross income, up to the value of the easement.<sup>156</sup> The donor may take this deduction no more than six years and the deduction must cease once the value of the easement has been deducted.<sup>157</sup>

The following example may help one develop a better understanding of the Code regulations. Assume that a property has an appraised fair market value of \$100,000. The landowner donates a conservation easement to a qualifying organization such as a land trust. The easement restrictions reduce the value of the property to \$64,000. Thus, the value of the easement (and the landowner’s gift) would be \$36,000. Assuming that the landowner has an adjusted gross income of \$60,000, they may deduct \$18,000 ( $\$60,000 \times 30\% = \$18,000$ ). This deduction may be taken the following year as well (assuming the adjusted gross income is constant) until the value of the easement donation has been deducted (up to a maximum of six years). In this example, the landowner may take two years of the full deduction before the amount of the donation has been reached.<sup>158</sup>

## 2. Estate Taxes

Estate taxes are imposed on the right to transfer property by death.<sup>159</sup> The highest effective federal estate tax rate is fifty five percent (55%). Such rates underscore the importance

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<sup>155</sup> See THE LAND TRUST ALLIANCE, APPRAISING EASEMENTS, 5 (1990).

<sup>156</sup> See I.R.C. § (b)(1)(C) (1999). Alternatively, the Code offers an election that may offer greater tax savings. In many situations however, it will offer no greater benefit. With the election, “a taxpayer who makes a charitable gift of appreciated property can choose to reduce the amount of the deduction to the cost or bases of the property, and one important new rule will follow: the value of the gift (a reduced to basis) will be deductible up to 50% of the taxpayer’s income, compared to the 30% ceiling without the election. The decision to use the new rule is made by making an ‘election’ to reduce the value of the gift to basis, and to increase the deduction to 50% of income.” STEPHEN SMALL, PRESERVING FAMILY LANDS: ESSENTIAL TAX STRATEGIES FOR THE LANDOWNER, at 93. See I.R.C. section (b).

<sup>157</sup> See *id.*

<sup>158</sup> See FLORIDA LAND TRUST ASSOCIATION, PRESERVATION FOR FLORIDIANS, 26-27 (1991). See generally SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS, at 20.

<sup>159</sup> See HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY, (5<sup>th</sup> ed. 1990). The tax is levied on the decedent’s estate and not on the heir receiving the property. See *id.* A tax levied on the heir receiving the property would be an inheritance tax. *Id.*

of sound estate planning.<sup>160</sup> A conservation conveyance may be used to dramatically reduce estate taxes.<sup>161</sup>

The “highest and best use” of a property dictates the value of the property for purposes of estate taxes.<sup>162</sup> This amount is typically not what the existing use of the property may be, but the development potential of the parcel.<sup>163</sup> Thus for example, a desirable piece of farmland would be valued at the price developers would be willing to pay for it (for subdivision of the property) rather than the value of the parcel as farmland. The heirs of the property would be required to satisfy the estate taxes due on the fair market value of the property at its highest and best use, in addition to any other assets that the heirs may have inherited.<sup>164</sup> With the estate taxes due within nine months, heirs are often forced to sell the inherited land just to meet the estate taxes due.<sup>165</sup>

The use of a conservation easement or other conveyance may reduce the estate taxes.<sup>166</sup> By donating a conservation easement, the property owner is reducing the tax base of the property.<sup>167</sup> Such a restriction on the property would serve to lower the “highest and best use.”<sup>168</sup> Thus, the development potential of the property would be significantly diminished. Such a reduction would be reflected in the amount of estate taxes paid by the heirs of the estate.<sup>169</sup>

Such a conservation easement may be made during the life of the owner or upon death.<sup>170</sup> If the easement is made during the lifetime of the owner, the conveyance would immediately

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<sup>160</sup> See JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK, 55-56 (1988).

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 55.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 56.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

depreciate the value of the property.<sup>171</sup> Such a depreciation would be reflected in the estate taxes at the death of the property owner.<sup>172</sup> In addition, the owner would be able to capitalize on the benefits of an income tax deduction discussed above.<sup>173</sup>

An owner may choose not to limit their rights in the property during the owner's lifetime.<sup>174</sup> Should the owner choose, they may elect to donate a conservation easement upon their death. Such a devise would similarly reduce the taxable value of the estate as the conveyance during the lifetime of the owner.<sup>175</sup> However, the conveyance of the easement would not occur until death of the owner. At that time, the easement would pass and the heirs would realize the tax consequences of the estate with the easement.<sup>176</sup> Of course, the income tax benefits would not be realized by the property owner if the easement passed at death.

### 3. Gift Taxes

Gift taxes are imposed on a donor (the person making the donation) for the transfer of property.<sup>177</sup> This tax is based on the fair market value of the property at the time of the gift<sup>178</sup>. Similar to estate taxes, such a grant would serve to reduce gift taxes on gifts of property made during the lifetime of the owner.<sup>179</sup> By donating the easement before the gift is made, the property owner reduces the value of the property that would be subject to gift taxes.<sup>180</sup> By reducing the value of the property, the owner reduces the level of taxes that he or she will face due to the transfer.<sup>181</sup> If for example, the gift is made to the owner's children (spouses benefit from an

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<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See infra* Section I (D)(1).

<sup>174</sup> *See* JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK, 56.

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

<sup>177</sup> *See* HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY, (6<sup>th</sup> ed. 1990).

<sup>178</sup> *See id.*

<sup>179</sup> *See* JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK, at 57.

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

exemption), the donor would benefit from the reduced gift taxes owed on the transfer.<sup>182</sup>

#### 4. Capital Gains Taxes

When one donates an interest in the land, such a donation will ultimately serve to reduce any capital gains taxes on the property should the owner decide to sell their interest. As applied to real property, capital gains are basically the increase in value of the property while in the owner's possession. Capital gains realized when one transfers property are treated as income for purposes of taxation. The granting of an easement would reduce the amount of the property's appreciation from the time of acquisition.<sup>183</sup> Thus, the gain of the property would be proportionately reduced by the value of the easement.<sup>184</sup>

#### 5. Ad Valorem Taxes

In Florida, ad valorem taxes are proportional to the assessed value of the property.<sup>185</sup> Donating a conservation easement should reduce the assessed value of the interest retained in the property.<sup>186</sup> Thus, the limitations of development on the property will reduce the appraised value, decreasing the amount of ad valorem taxes owed by the taxpayer.<sup>187</sup> Since the charitable contribution of the Code requires that a "qualified appraisal"<sup>188</sup> of the property be produced,<sup>189</sup> the

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<sup>182</sup> *See id.*

<sup>183</sup> *See* STEPHEN SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS, 17-14.

<sup>184</sup> *See generally id.* at 17-14 to 15.

<sup>185</sup> FLA. CONST. art. VII (1997).

<sup>186</sup> *See* JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK at 56. Note however, in instances where the donor maintains an unencumbered interest in surrounding property, the assessed values in surrounding property may increase due to the added amenity of a conservation easement. *See* STEPHEN SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS, at 18.

<sup>187</sup> *See id.*

<sup>188</sup> The Code requires that a qualified appraisal "include, among other things, a description of the property, the method of valuation used to determine the fair market value of the property, certain information about the appraiser and his or her qualifications, and a description of the fee arrangements between the donor and the appraiser." STEPHEN SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS, at 19-3. The appraisal must be performed by a qualified appraiser which is "one qualified to make appraisals of the type of property being valued and cannot be a person whose relationship to the taxpayer or the donee organization would cause a

property owner may use this as evidence of the reduced value of the property to the County Property Appraiser. Therefore, the owner would realize a reduced tax burden of their annual ad valorem taxes.<sup>190</sup>

An alternative method of reducing the owner's ad valorem taxes would be to downgrade the zoning of the property.<sup>191</sup> For example, an owner could seek to re-zone the property to open space. Since a change in zoning would not be permanent, the owner could later petition to re-upgrade the zoning classification.<sup>192</sup> Though this probably would not reduce taxes as much as a conservation easement, it may provide some tax relief for the taxpayer.<sup>193</sup>

Applying for greenbelt status may also reduce the tax burden.<sup>194</sup> Greenbelt's give the owner an agricultural exemption on the ad valorem taxes of the property.<sup>195</sup> To qualify however for greenbelt status, the property must be used for a bonafide commercial agricultural use.<sup>196</sup>

## 6. Conclusion

The land donations can provide several tax benefits to the donor of the interest. Such a gift enables the donor to take a deduction as a charitable gift on their federal income taxes. Upon death of the owner, the conveyance reduces the tax burden upon the estate before the property

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reasonable person to question the independence of such appraiser." *See id.* at 19-2 to 3..

<sup>189</sup> *See* THE LAND TRUST ALLIANCE, APPRAISING EASEMENTS, 5.

<sup>190</sup> *See* JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK at 56.

<sup>191</sup> Telephone Interview with Robin Tardiff, Property Appraiser (Land Section) for the Manatee County Property Appraiser (Feb. 10, 1999).

<sup>192</sup> *See id.*

<sup>193</sup> Assessed property should reflect the just value of the property. FLA. CONST. art. VII s.4(c)(2)(1997). A downgrade in zoning may have a negative effect on the just value of the property. Florida Statutes state that the county property appraiser shall consider "[T]he highest and best use to which the property can be expected to be put in the immediate future and the present use of the property, taking into consideration . . . local and state land use regulation . . . ." FLA. STAT. § 193.011(2)(1997).

<sup>194</sup> Telephone Interview with Robin Tardiff, Property Appraiser (Land Section) for the Manatee County Property Appraiser (Feb. 10, 1999).

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

passes to heirs. The owner of the property may donate more property that has been encumbered with a conservation easement before subjecting themselves to gift taxes. Should the owner decide to sell the property, they will realize proportionately reduced capital gains after granting a conservation easement. Finally, the owner receives an immediate benefit with a reduction in their annual ad valorem taxes. Such benefits may amount to substantial savings to the taxpayer who donates the real property or a conservation easement.