

# Saving Open Space in Suburbia: The Application of the Governmental Policy Test

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## TO QUALIFY FOR THE FEDERAL TAX DEDUCTION UNDER SECTION

170(h) of the Internal Revenue Code (the Code), the donation of a qualified real property interest—such as a conservation easement or a remainder interest for conservation purposes—must satisfy that Section's "conservation purposes" test.<sup>1</sup> Any

one of the following is a qualified conservation purpose:

1. the preservation of land areas for outdoor recreation by, or the education of, the general public;
2. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;
3. the preservation of open space (including farmland and forest land) where such preservation is –
  - a. for the scenic enjoyment of the general public, or
  - b. pursuant to a clearly delineated Federal, State or local governmental conservation policy, and will yield a significant public benefit, [emphasis added]** or
4. the preservation of an historically important land area or a certified historic structure.<sup>2</sup>

This article will explore the application in a suburban context of the "clearly delineated governmental policy" test under Section 170(h)(4)(A)(iii)(II) of the Code, reproduced above, in meeting the "conservation purposes" test of Code Section



*Community members tour the five-acre property along Popes Head Creek in the Town of Clifton (Fairfax County), Virginia, under easement with the Northern Virginia Conservation Trust. Fairfax County encourages the donation of conservation easements within its suburbanized areas.*

Shamus Ian Fatzinger/Times Community News

170(h)(1)(C). Understanding the governmental policy test may provide land trusts and their constituents the opportunity to protect open space lands in suburban areas that do not clearly qualify under the other categories of the conservation purposes test.

The application of the governmental policy test is particularly useful in the suburban context where competing land uses may have adversely impacted conservation values. Suburban properties that contain natural habitat, scenic views and historic resources are increasingly fragmented and at risk, and measured by their inherent characteristics alone, may fail to meet the conservation purposes test. Many of these at-risk properties, however, do make contributions to the environmental health, wildlife habitat and character of their particular communities, benefits that are recognized and highly valued by residents and their elected officials. The promulgation and implementation of governmental policy may, therefore, fill a significant void, and improve the ability of land trusts, governmental agencies and other land conservation organizations to protect lands threatened with development.

Under Section 170(h)(4)(A)(iii)(II) of the Code, the term "conservation purpose" includes the preservation of open space that is pursuant to clearly delineated federal, state or local governmental policy **and** the preservation will yield a significant public benefit. To understand how to qualify under

<sup>1</sup> I. R. C. Section 170(h)(1)(C).

<sup>2</sup> I. R. C. Section 170(h)(4).

this test, then, two questions must be addressed: (1) what constitutes a clearly delineated governmental policy, and (2) what constitutes significant public benefit. The first question is addressed by the Treasury Regulations in Section 1.170A-14(d)(iii). The intent behind the use of governmental policy as a measure for satisfying the conservation purposes test is “to protect property that representatives of the general public identify as worthy of protection.”<sup>3</sup> A broad declaration of conservation goals is not sufficient to meet the test. What is needed instead—is a declaration of policy that, among other things, either constitutes “a certification program that identifies particular lots or small parcels of individually owned property” or identifies a “specific, identified conservation project.”

The regulations provide examples of such “specific, identified conservation projects” including the “preservation of land within a state or local landmark district; the preservation of farmland pursuant to a state program for flood prevention and control; or the protection of the...character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites.”<sup>4</sup> The list of examples is not intended to be exhaustive. IRS rulings provide some additional guidance. The IRS has held that donations that further open space preservation goals of a county’s comprehensive plan<sup>5</sup> and that protect specific geographic sites, such as rivers,<sup>6</sup> qualified under the governmental policy test. Thus, by extension, other types of projects identified by a government agency as furthering a county’s conservation-related goals would also be valid. These might include projects to protect pockets of open space in residential neighborhoods to preserve community character, preserve scenic views, and moderate the negative effects of population or building density, among others.

In effect, the arbiter of the determination as to whether or not governmental policy is clearly delineated will be the governmental entity formulating and enacting the policy. This proposition is perhaps given support by the safe harbor language of Treas. Reg. Section 1.170A-14(d)(4)(iii)(A): “[T]he donation of a perpetual conservation restriction to a qualified organization pursuant to a formal resolution or certification by a local governmental agency...specifically identifying the subject property as worthy of protection for conservation purposes **will meet the requirement of this paragraph**” [emphasis added]. Provided the governmental entity establishes and defines policy that includes well-articulated descriptions of the policy’s goals and the types of property it is intended to protect, then those donations of conservation easements justified by, and in satisfaction of such policy will likely be

“good” gifts under the Code and its regulations. Particularly when such policy is supplemented with a “rigorous” governmental review of easements before their acceptance by a governmental agency as sole or co-grantee in accordance with Treas. Reg. Section 1.170A-14(d)(4)(iii)(B), then the likelihood that an easement gift would not qualify for a deduction is difficult to imagine. As noted succinctly in the regulations: “The more rigorous the review process by the governmental agency, the more the acceptance of the easement tends to establish the requisite clearly delineated governmental policy.”<sup>7</sup>

As noted above, the second question in understanding the governmental policy test requires an examination of significant public benefit.<sup>8</sup> The public benefit determination involves the application of the facts and circumstances test set out at Treas. Reg. Section 1.170A-14(d)(iv) which states: “Public benefit will be evaluated by considering all pertinent facts and circumstances germane to the contribution.” No one factor is determinative. Indeed, while the Senate Finance Committee in its report interpreting the intention behind the governmental policy test stated that, while the preservation of an “ordinary” tract of land would not, in and of itself, yield a “significant public benefit,” the committee did note that the presence of other factors may elevate such land to the requisite standard.<sup>9</sup> An illustrative (again, not exhaustive) list of factors is set out in the regulations. Note the following examples taken from the list:

1. The uniqueness of the property to the area;
2. The intensity of land development in the vicinity of the property...;
3. The consistency of the proposed open space use with public programs...; including programs for outdoor recreation,...water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection...;
- ...
5. The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;
- ...
7. The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
- ...
10. The population density in the area of the property;
11. The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.<sup>10</sup>

3 S. Rep. No. 96-1007, 1980-2 C. B. 599; PLR 8422064; see also Treas. Reg. Section 1.170A-14(d)(iii)(A).

4 Treas. Reg. Section 1.170A-14(d)(iii)(A).

5 PLR 8243125; PLR 8450065.

6 PLR 8630056; PLR 8247024.

7 Treas. Reg. Section 1.170A-14(d)(iii)(B).

8 Treas. Reg. Section 1.170A-14(d)(4)(iv), (v).

9 S. Rep. No. 96-1007, 1980-2 C. B. 599; see also Treas. Reg. Section 1.170A-14(d)(iv)(B).

10 Treas. Reg. Section 1.170A-14(d)(iv)(A).

The inclusion of these factors indicates that discretion is involved in determining the degree of public benefit conferred by a particular conservation project—discretion that may be exercised by a governmental entity in the formulation of conservation policy, taking into account needs and goals in the area. If the governmental entity—particularly a legislative body—determines, for example, that the control of “intensity of land development,” “population density” or “relief from density” serves important conservation-related purposes and the governmental entity articulates the policy with some specificity,<sup>11</sup> then an easement donation that fulfills those goals will likely be deemed to have conferred significant public benefit.

Operation of these principles can be seen in the policies adopted by the county government in Fairfax County, Virginia, to encourage the donation of conservation easements within its suburbanized areas. Located next to the nation's capital, Fairfax County has experienced rapid population growth over the last several decades—at a rate sometimes two or three times the regional growth rate. Since World War II, the 339-square-mile county has transformed from agricultural producer to sleepy bedroom community to a region supporting not only residential suburban areas, but also its own extensive and urbanizing mixed-use employment and retail centers. According to U.S. Census Bureau statistics, the population had grown to almost a million people by 2000, and the county is now the most populous jurisdiction in the Washington Metropolitan Region.

The fast pace of development in Fairfax County has been accompanied by a dwindling supply of open space resources. It is commonly cited that only 11 percent of the county remains as open space.<sup>12</sup> Other than the existing public parks, large tracts of unfragmented natural habitat are nearly extinct. As development and redevelopment pressure continues to grow, the county has recognized that preservation of remaining open space, even in small pockets within urban landscapes and mature suburbs, is critical to many of its resource protection goals, ranging from improving water quality to conservation and restoration of tree cover. The following passage is representative of others like it in Fairfax County's Comprehensive Plan:

The opportunities and limitations on what may be achieved through environmental planning are affected by past actions and by the County's function as a home and employment center to a large number of people. Because thousands of acres of forest and agricultural land

have been converted to urban and suburban development since the 1950s, the ability to achieve environmental protection goals simply by limiting future development no longer exists. The current scarcity of certain environmental amenities focuses current and future environmental planning efforts on the conservation of remaining resources and the rehabilitation of degraded environments.<sup>13</sup>

In this context the county government and its residents view voluntary conservation easements as a potentially powerful tool for protecting privately held land in areas where the remaining open space is being lost to new development and redevelopment. The county government has entered into a public-private partnership with a regional private land trust, the Northern Virginia Conservation Trust, to help the trust step up its conservation efforts in the jurisdiction.

Despite the enthusiastic support of the county government for easements protecting open space resources in fragmented environments like older wooded suburbs, the determination of whether such easements meet the conservation purposes test can be highly subjective under the Treasury Regulations. This uncertainty proved to be a frustration and deterrent to both potential easement donors and the land trust, despite the county government's enthusiastic support and encouragement of many such easements.

The Fairfax County Board of Supervisors addressed this problem by amending the Policy Plan component of its Comprehensive Plan and thereby establishing a “clearly delineated governmental policy” on the use of conservation easements. The amendments were designed to enable landowners and land trusts (and ultimately the IRS) to evaluate easements under the “clearly delineated governmental policy” test of Code Section 170(h)(4)(A)(iii)(II). The amendments added a new objective entitled “Land Conservation,” which describes the purpose of its Open Space/Historic Preservation Easements Program and its public-private partnership with the Northern Virginia Conservation Trust.<sup>14</sup> The objective also states that the county should use—and the Board of Supervisors as a matter of policy encourages the use of—conservation easements to implement the county's goals and objectives for the preservation of natural and heritage resources in accord with its Comprehensive Plan.

More important was the addition of new policies under specific Policy Plan objectives. To address the federal requirement, discussed above, that government policy identify a “specific, identified conservation project,” the county identified which of its plan objectives would be furthered through

11 Treas. Reg. Section 1.170A-14(d)(vi)(A) states that “[t]he more specific the governmental policy...the more likely the governmental decision, by itself, will tend to establish the significant public benefit...”

12 Fairfax County Department of Systems Management for Human Services, Table: Acres of Land by Land Use Category by Planning District, Fairfax County (2002) <http://fairfaxcounty.gov/comm/demogrph/demrpts/nlupd.xls> (calculation of percentage of land categorized as “Vacant Land” or “Vacant Land w/ Dilapidated Structure”).

13 Policy Plan: The Countywide Element of The Comprehensive Plan for Fairfax County, Virginia (2002 Edition, amended through 8-5-2002), Environment section, at 1. The Policy Plan is available online at [www.co.fairfax.va.us/gov/ocp/comprehensiveplan/policyplan/default.htm](http://www.co.fairfax.va.us/gov/ocp/comprehensiveplan/policyplan/default.htm).

14 The description of the county's Open Space/Historic Preservation Easements Program and its public-private partnership provides evidence of the county's significant commitment to its conservation policies, favored by Treas. Reg. Section 1.170A-14(d)(4)(iii)(A).



*A backyard of a suburban property in Fairfax Co. protected by Northern Virginia Conservation Trust since the new provisions were adopted.*

conservation easements and set forth policies under each of these objectives describing the types of land and purposes for which the use of conservation easements is appropriate and encouraged. Several examples are provided below.

- Land Use section, Objective 16 (on land conservation), Policy c.: “Use easements to enhance buffering and screening between uses, such as between a developed area and a park or historic site.”
- Land Use section, Objective 16 (on land conservation), Policy d.: “Use easements to help preserve small areas of open space in already developed areas to shape the character of the community; to protect trees and other environmental resources; to provide visual relief; to preserve wildlife habitat; to provide buffering and screening; and to otherwise ensure that suburban and urban neighborhoods may retain open space.”<sup>15</sup>
- Environment section, Objective 10 (on tree cover), Policy c.: “Use open space/conservation easements as appropriate to preserve woodlands, monarch trees, and/or rare or otherwise significant stands of trees, as identified by the County.”
- Environment section, Objective 11 (on preserving environmental resources), Policy a.: “Use open space/conservation easements for the preservation of Environmental Quality Corridors, Resource Protection Areas, and other environmentally sensitive areas such as land along the Potomac and Occoquan Rivers.”
- Environment section, Objective 11 (on preserving environmental resources), Policy b.: “Use open space/conservation easements to preserve open space in already developed areas in order to provide natural areas, protect

environmentally sensitive resources and preserve wildlife habitat in an urban or suburban context.”<sup>16</sup>

These and other policy statements provide additional guidance for donors and donee organizations in making their determination regarding whether an easement for the preservation of open space is pursuant to clearly delineated governmental policy as described in Code Section 170(h)(4)(iii)(II) and Treas. Reg. Section 1.170A-14(d)(4)(iii)(A).

In cases where the donor and/or the donee organization seek further guidance or assurance, the Policy Plan provides an opportunity for the parties to submit the proposed easement to the county as a possible co-grantee. The Policy Plan requires that for all proposed easements to be co-held by the county, the county must evaluate the extent to which the easement donation yields a significant public benefit.<sup>17</sup> Standard Operating Procedure guidelines (SOP) list the factors to be considered in the county’s public benefit review. The factors are based on the criteria set forth in Treas. Reg. Section 1.170A-14(d)(4)(iv) and also incorporate the criteria regarding scenic enjoyment set forth in Treas. Reg. Section 1.170A-14(d)(4)(ii)(A).

The SOP requires the county to share the results of its review with the potential easement donor for consideration before the donor decides whether to make the donation. If the donor decides to make the donation, the review and the easement are considered by the Board of Supervisors in a public hearing, and then the board must vote on whether to accept the easement. The rigorous review of the easement by county staff, followed by consideration and formal acceptance of the easement by the local government further establishes the requisite clearly delineated policy, pursuant to Treas. Reg. Section 1.170A-14(d)(4)(iii)(B).

In conclusion, the application of the “clearly delineated governmental policy” test can provide the necessary justification for the donation of “good” conservation easements, particularly in those contexts in which satisfaction of the other conservation purposes tests is problematic. It will, however, be necessary to carefully promulgate the necessary policy to meet the requirements of Code Section 170(h) and its regulations. 🌿

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<sup>15</sup> Policy Plan: The Countywide Policy Element of The Comprehensive Plan for Fairfax County, Virginia (2002 Edition, as amended through 9-9-2002), Land Use section, at 11-12.

<sup>16</sup> Policy Plan: The Countywide Policy Element of The Comprehensive Plan for Fairfax County, Virginia (2002 Edition, as amended through 8-5-2002), Environment section, at 15.

<sup>17</sup> Policy Plan: The Countywide Policy Element of The Comprehensive Plan for Fairfax County, Virginia (2002 Edition, as amended through 9-9-2002), Land Use section, Objective 16, Policy b, at 11.