

# Tax Deductibility of Conservation Easement Donations



*Some donations of conservation easements qualify for a federal income tax deduction; others do not.*

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## Introduction

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Taxpayers who itemize deductions on their federal income tax return may deduct contributions to charities recognized as tax exempt under §501(c)(3) of the Internal Revenue Code. Among these charitable contributions are gifts of land ownership and, subject to compliance with §170(h) of the Code and accompanying regulations (collectively, the “Code”), donations of conservation easements.

The value of the donated easement for purposes of claiming a federal income tax deduction is calculated as the difference between the fair value of the eased property before the easement is granted *minus* the value of the eased property after the easement is

granted. The claimed value must be supported by a qualified appraisal.<sup>1</sup>

This guide is intended as a basic reference tool for landowners and land trusts. Users are cautioned to consult with their tax advisors for up-to-date information about potential tax benefits of easement donations and the application of the Code to their circumstances.

Land trust representatives do not (and ethically cannot) advise donating owners on tax matters. That constraint does not mean land trusts are insensible to the impact that tax benefits may have on the affordability and feasibility of easement contributions. Land trusts try, whenever possible, to work with donating owners (and their tax advisors) to prepare and document an easement qualifying for deductibility under the Code.

This guide references two model documents published by the Pennsylvania Land Trust Association and points to provisions within those models that may support a finding of deductibility. The [\*Model Conservation Easement Donation Agreement\*](#) addresses typical issues arising in the course of pre-donation easement planning and preparation. The [\*Model Grant of Conservation Easement and Declaration of Covenants\*](#) (the *Model Grant*) is the legal instrument that puts the conservation easement in place on the property and provides the terms of long-term management of the easement. These documents or whatever alternative forms are used in an easement transaction are important in documenting deductibility.

The baseline documentation report (BDR), a detailed report of the conservation values of the eased property developed during easement planning and preparation, is a third document important for supporting tax deductibility.

## Must Be a Qualified Conservation Contribution to Be Deductible

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A transfer of the donor's *entire* interest in real property to a 501(c)(3) charity is deductible following the same rules as apply to any other charitable contribution. A conservation easement donation is a transfer of a *partial* interest, which is not deductible but for an exception in §170(h) of the Code for a **qualified conservation contribution**<sup>2</sup> defined as follows:

*A qualified conservation contribution is the **contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. The conservation purpose must be protected in perpetuity.***

Each element of the definition must be satisfied to qualify for deductibility. The remainder of this guide discusses the elements (identified by bold type) in the order they appear in the definition and offers suggestions on evidentiary support that may help establish that an element is satisfied. Where appropriate, the guide alerts readers to situations that require special attention, although in-depth discussion of these situations is beyond the scope of this guide.

## Must Be Voluntary

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Payments of cash or other property transfers may or may not qualify as contributions. The determination depends on whether the payment or transfer was a *voluntary choice* of the donor.

The voluntariness issue has come into question in several instances pertaining to conservation easement donations:

- whether donation agreements impair voluntariness
- whether a land trust's performance of tasks in furtherance of the donation impairs voluntariness
- whether an easement donated to preserve open space as a condition of municipal approval is voluntary
- whether an easement donated to satisfy a condition of a sales agreement is voluntary

## Donation Agreements Do Not Impair Voluntariness

Planning, preparing, and documenting an easement contribution takes time and money. The receiving organization and the donating owners must decide who will provide—and pay for—each task before finalizing the easement. They must also determine the amount of cash to be contributed to the land trust to fund long-term stewardship of the easement.

Court decisions<sup>3</sup> have confirmed that *so long as donating owners voluntarily chose to enter into a donation agreement with the donee*, the existence of a pre-closing commitment does not itself impair the character of the donation as voluntary. The same principle applies to payment of a cash contribution as a condition of easement acceptance.

## Reimbursement for Easement Tasks Does Not Impair Voluntariness

Contributions made by the donating owners to defray expenses incurred by the land trust during easement planning and preparation do not impair voluntariness.

However, sometimes a transfer of cash from the donating owners to the land trust is a payment rather than a contribution. There is no deductible contribution if the donating owners received services of substantial value from the land trust and the payment from the donating owners to the land trust was a reciprocation for those services (called a *quid pro quo*).

The *Model Conservation Easement Donation Agreement* provides the following support for concluding that services performed by or contracted for by the land trust further the easement project and are therefore not a *quid pro quo* reciprocated by cash contribution:

- In §1 the land trust rejects any interpretation that it is being engaged to act as an agent or contractor providing services to the donating owners. The land trust is an independent actor pursuing the easement project in furtherance of its own mission.
- An attachment entitled "Steps Towards Completion of Conservation Easement" delineates the tasks within the scope of the easement project.

Amounts paid to defray the cost of services the land trust performed or contracted for *within* the scope of the easement project are deductible voluntary contributions. The corollary is that amounts paid to reimburse the land trust for services it performed or contracted for *outside* the scope of the easement project may be considered *quid pro quos* rather than voluntary contributions. Such amounts must be paid for by separate invoicing or excluded from amounts acknowledged for federal tax purposes.

### Easement Granted to Comply with Third-Party Obligation Is Not Voluntary

An easement granted as a condition of compliance with a binding commitment to a third party is not voluntary and, thus, not deductible. The below examples illustrate two circumstances in which an obligation to grant the easement results in non-deductibility:

- **Condition of municipal approval.** Donating owners have obtained municipal approval for a residential development with a large open-space area. One of the conditions for approval in the development agreement signed by the owners is that the open space must be protected by a conservation easement. The easement does not qualify as a contribution for federal tax purposes due to the pre-existing binding commitment.
- **Requirement of purchase and sale agreement.** Sellers do not want to part with their property unless it is protected by an easement. The buyers have no problem with conserving the property, so they offer to accept a condition in the sales contract that they will execute and record a conservation easement at closing. The easement does not qualify as a contribution for federal tax purposes because the easement grantors were contractually obligated to do so.

### Must Be a Qualified Real Property Interest

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The Code identifies a “perpetual conservation easement” as one type of qualified real property interest.<sup>4</sup>

### Qualification Criteria

To qualify as a perpetual conservation easement:

- The easement must cover all outstanding interests in the property. For example, if more than one person owns the property, each of the owners must join in granting the easement.
- A qualified real property interest may not include land areas subject to a prior right to extract or remove minerals by any surface mining method. Land subject to minor interests, such as rights-of-way, is not disqualified if the interests will not interfere with the easement’s conservation purposes.
- The easement may include affirmative rights to use a land or water area.

### Supporting Documentation

Title and survey information will disclose whether any ownership interests are outstanding and whether easements or other interests<sup>5</sup> have been granted.

- The easement document, if based upon the *Model Grant*, will contain a description of easement purposes (called “conservation objectives”), and the easement plan (which typically locates easements indicated on the survey) will provide a basis for evaluating whether the nature and location of the outstanding interest potentially interferes with these conservation objectives.
- In the *Model Grant*, the donating owners aver that: they are the sole owners in fee simple of the property; no one holds a disqualifying mineral interest; the future grant of such an interest is prohibited; and, if such a grant is made in violation of the easement, the land trust can prohibit exercise of such a right.

### Must Be Donated to a Qualified Organization

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The requirements for a qualified organization look both to the status of the easement holder as of the donation date and to the possibility of a future transfer of the easement to an unqualified organization.

## Qualification Criteria

To be considered a qualified organization, the easement recipient must:<sup>6</sup>

1. Be recognized as a publicly supported charitable organization described in Code §501(c)(3) or other listed eligible donee;<sup>7</sup>
2. Have a commitment to protect the conservation purposes of the donation;
3. Have the resources to enforce the restrictions; and
4. Covenant not to transfer the easement to a non-qualifying entity.<sup>8</sup>

## Supporting Documentation

The following items (numbered to correspond with the criteria above) may afford support to evidence that the criteria have been met:

1. A copy of the easement holder's exemption letter from the IRS (often included in the BDR).
2. A copy of its articles of incorporation and mission statement (if available) as evidence of its commitment to the easement's conservation purposes.
3. The Code does not set out any guidelines for the resource-related qualification item (other than to state that the organization need not set aside funds for enforcement of the easement in question). The *Model Grant* provides that the easement holder must be and remain a qualified organization. Other support may be afforded by evidence of the land trust's adoption of [Land Trust Standards and Practices](#), which include (in Standard 6) a requirement pertinent to sufficiency of long-term stewardship costs. This standard is also incorporated into the criteria for accreditation of the land trust, if applicable.
4. The *Model Grant* prohibits assignment of the easement to anyone not a qualified organization.

## Must Be Granted for Conservation Purposes

Easement purposes define the scope of the easement holder's rights in the property<sup>9</sup> and are therefore important for many reasons, one of which is qualification for tax deductibility.

### Qualification Criteria

To qualify for deductibility for federal income tax purposes, the easement must preserve or protect land for one or more of the conservation purposes summarized below:<sup>10</sup>

- outdoor recreation or education for substantial and regular use by the general public
- significant, relatively natural habitat for fish, wildlife, plants, or similar ecosystem
- farmland, forest land, or other open space, if a significant public benefit is afforded by the easement and either the easement furthers a clearly delineated governmental policy or provides the opportunity for scenic enjoyment to the general public
- historic importance of land or structures

### Supporting Documentation

The *Model Grant* and BDR provide the foundation for easement donors and their advisors to evaluate whether the easement meets the conservation purposes test set forth in the Code.

1. The BDR typically includes surveys, reports, photographs, statements of public policy, and descriptions of the condition of the property as of the date of the grant. This information provides evidence in support of the proposition that the eased property contains natural and scenic resources worthy of being protected and preserved. Delivery of the BDR no later than the date the easement is granted is required as a condition of deductibility.
2. The text of the *Model Grant* empowers the easement holder to protect the natural and scenic resources included in the conservation objectives. The statement of conservation objectives does not parrot the Code-defined conservation

purposes set forth above. Conservation objectives are tailored to the resources within the eased property and may go beyond Code-defined purposes. Nevertheless, it should be apparent to a reader of the easement grant that one or more of the Code-defined purposes is included in a conservation objective.

3. The covenants in the *Model Grant* (articles 2-5) set forth a program for easement management designed to further conservation objectives. The donating owners should keep in mind that the exceptions and accommodations they negotiate may result in compromising deductibility if the terms of the final document do not provide adequate protection for the Code-defined conservation purposes so as to preserve them over time.

## Must Protect the Conservation Purposes in Perpetuity

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Easements exist only to serve identified purposes. The corollary to that centuries-old rule is that, once an easement no longer serves the purpose for which it was created, courts will, if asked, clean up land titles by declaring the easement null and void. The *Model Grant* addresses that concern by describing its purposes with sufficient breadth and resiliency to be upheld as useful and beneficial far into the future.

### Qualification Criteria

To be deductible for federal tax purposes, the donated easement must be enforceable in perpetuity.<sup>11</sup> The grant must be recorded in the public records. All outstanding mortgages as of the recording date must be subordinated.<sup>12</sup> The grant must provide that, if the easement is extinguished,<sup>13</sup> the easement holder is entitled to a proportionate share of the uneased value of the property.

### Supporting Documentation

The text of the *Model Grant* includes the following support for the perpetuity Code requirement:

- §1.02 The easement grant is unconditional and perpetual.

§1.07(e) If the easement is extinguished, the easement holder is entitled to receive proceeds calculated per the Code requirements.

§1.10 Donating owners warrant that conservation easement is superior to all liens.

§6.01(c) Holder and its successors will use proceeds of extinguishment only for Code-defined conservation purposes.

§6.01(d) If Holder fails to abide by the covenants in §6.01, its interest in the property is subject to forfeiture to another Qualified Organization ready, willing, and able to abide by the covenants.

§6.03 Holder limits its ability to amend the easement to Amendments that will not impair Holder's power to exercise the power it has been granted to block land uses inconsistent with the Conservation Objectives.<sup>14</sup>

## Other Deductibility Requirements

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Section 1.07 (entitled "Federal Tax Items") of the *Model Grant* and the accompanying commentary, in addition to addressing some of the Code requirements for deductibility described above, addresses the requirement for notice (§1.07(d)) and other tax-deduction related matters.

## Resources at ConservationTools.org

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To find other resources regarding donation agreements, see the right column of the online edition at <https://conservationtools.org/guides/159>

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## Submit Comments

Help improve the next edition of this guide. Email your suggestions to the Pennsylvania Land Trust Association at [info@conserveland.org](mailto:info@conserveland.org). Thank you.

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<sup>1</sup> See "[IRS Appraisal Requirements for Gifts of Land and Conservation Easements](#)," published by the Western Pennsylvania Conservancy and available at [ConservationTools.org](http://ConservationTools.org).

<sup>2</sup> Treas.Reg. 1.170A-14.

<sup>3</sup> Several appeals court decisions resolve issues pertaining to the voluntariness of easement donations and accompanying cash contributions: *Scheidelman v. Commissioner* (US Court of Appeals, 2<sup>nd</sup> Circuit, 2012); *Kaufman v. Commissioner* (US Court of Appeals, 1<sup>st</sup> Circuit, 2015).

<sup>4</sup> Treas. Reg. §1.170A-14(b)(2).

<sup>5</sup> The commentary to the *Model Grant* §3.01(b) discusses issues arising from the existence of outstanding interests.

<sup>6</sup> In addition to the criteria listed below, if the easement is located within a registered historic district, the donor and donee must enter into a sworn written agreement certifying that the donee is a qualified organization with a qualifying purpose and that it has the resources to manage and enforce the conservation easement (Treas. Reg. 170(h)(4)(B)(ii)).

<sup>7</sup> Treas. Reg. § 1.170A-14(c)(1). Qualified organizations for purposes of conservation easement donations include, among others, §501(c)(3) charitable organizations and governmental units

<sup>8</sup> Treas.Reg. §1.170A-14(c)(2).

<sup>9</sup> For an in-depth analysis and discussion, see the Pennsylvania Land Trust Association's guide [The Nature of the Conservation Easement and the Document Granting It](#).

<sup>10</sup> Treas. Reg. §1.170A-14(d).

<sup>11</sup> Treas.Reg.1.170A-14(g). The Code provides lengthy discussion and numerous examples describing circumstances in which the conservation purposes test has been satisfied (or not). Other sources of guidance are appeals of IRS determinations of non-deductibility for failure to meet the public benefit test or to demonstrate the existence of a relatively natural habitat.

<sup>12</sup> For further discussion of this topic, see the Pennsylvania Land Trust Association's guide [Mortgage Subordination](#).

<sup>13</sup> Treas.Reg. §1.170A-14(g)(6).

<sup>14</sup> For an in-depth discussion, see the Pennsylvania Land Trust Association's guide [Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#). See also the Land Trust Alliance's guide *Amending Conservation Easements: Evolving Practices and Legal Principles* (2<sup>nd</sup> edition).