

Internal Revenue Service

Department of the Treasury

Index Number: 170.14-00

Washington, DC 20224

Number: **199927014**

Release Date: 7/9/1999

Person to Contact:

Telephone Number:

(

Refer Reply To:

CC:DOM:IT&A:3-PLR-115219-98

Date:

April 7, 1999

Legend

Trustees =
Trusts =

City =
County =
State =
Sub-Basin =
Water Control District =
State District =

School Board =

:

This is in response to your letter dated [REDACTED]

[REDACTED] in which you request a ruling on behalf of Trusts concerning a proposed charitable contribution.

RULING REQUESTED

You request a ruling that the proposed contribution of a conservation easement constitutes a "qualified conservation contribution" under § 170(h) of the Internal Revenue Code.

FACTS

Trustees are co-trustees and sole, equal beneficiaries of two trusts, which were created in 1973 and 1981 (Trusts). One of the Trusts owns an undivided 69% interest and the other owns an undivided 31% interest in a parcel of undeveloped real property (the parcel) located in City, County, State. For the past 50 years, the parcel has been used by the Trusts or by Trustees' family as farmland. Approximately six years ago, the Trusts excavated a portion of the parcel to create a lake, which was intended to be used for irrigation and water retention.

In addition to the parcel, the Trusts or parties related to Trustees own other tracts or portions of other tracts within the Sub-Basin. The parcel currently is surrounded by hedgerows, which serve as a windbreak for the agricultural operations conducted on the property and obscure visibility of the lake from other nearby parcels. Due to a slight break in the hedgerows on one corner of the parcel, the lake is visible from one corner of a nearby tract owned by a corporation owned by one of Trustees. Otherwise, the lake is not currently visible from the other tracts owned by the Trusts, Trustees, or parties related to Trustees. No commercial or industrial buildings have been constructed on any of the property within the Sub-Basin. There are some agricultural structures (such as sheds and a barn) on some of the property within the Sub-Basin, and there are two existing residential dwellings. The Trusts, Trustees, or parties related to Trustees own no other land in the City where Sub-Basin is located.

Both the State and County have enacted legislation designed to promote the conservation, development, and proper utilization of surface and ground water, to develop and regulate dams, impoundments, reservoirs, and other works, to provide water storage, to prevent damage from floods, soil erosion, and excessive drainage, to prevent degradation of the drinking water supply, to maintain the quality of natural habitats, and to provide conditions necessary for continued recreational development. The State and County have identified the State District and the Water Control District, respectively, to coordinate water usage and protection.

The parcel is located in the Sub-Basin, which is in the Water Control District. There is a canal that runs north to south through the western end of the lake and is part of several interconnected canals and lakes that discharge into the State District flood control system. The Trusts previously had granted County a perpetual easement, recorded in County records, allowing the canal to run through the parcel. There is no barrier between the canal and the rest of the lake.

There is a balance within the Water Control District between conserving the maximum supply of needed water and flood control. The lands comprising the Water Control District are flat with a topographic elevation averaging 12 to 14 feet above sea level. The present groundwater table is 11 feet above sea level. Water resources development and management thus are important issues, and proper management of surface water is

necessary, among other things, to prevent salt water intrusion into the underground water system. In addition, the areas surrounding the parcel have been subjected to increasing residential development. The parcel is bounded to the north by a wetlands preserve and to the south by land owned by the School Board.

In order to develop any property within the Sub-Basin, the property owner must obtain, among other things, plat and site plan approval. When a parcel is submitted for plat approval, the use and intensity of the development proposed are described, along with the impact to the infrastructure and required services to accommodate the proposed use. The property is reviewed by the County for surface water management, drainage, and surface water retention. For plat approval, 15% of the acreage of land to be developed must be set aside for water retention (the 15% water retention requirement). The parcel owner can demonstrate compliance with this requirement by creating a lake on the property itself or by obtaining an equal amount of acreage in an off-site lake within the Sub-Basin and setting it aside for water retention.

Once a parcel is ready to be developed for its intended use, a site plan is submitted for review by the County. The site plan identifies where construction will be undertaken on the parcel and how the 15% water retention requirement will be met, either on or off-site. As part of the site plan approval, the owner must obtain a surface water management license, which is granted by the County and the State District. Once a surface water management license is granted, it is enforceable by the County, which reviews the license periodically. Upon discovering a violation of the permit, the County may revoke or suspend the license and initiate administrative and/or judicial action for any violation of its conditions. By acceptance of the license, the licensee agrees to allow the County access to inspect compliance with the license and with the County Code. To drain, fill in, or engage in any activity that interferes with the water level of a lake that satisfies the 15% water retention requirement, a permit would have to be obtained from the State District and the County.

In 1996, a conceptual plan of surface water management for the Sub-Basin was submitted to County. Under the plan, the lake is to be the site for the drainage, flowage, and storage of water within the Sub-Basin, as well as to provide the area with a plan for moving and storing storm water from the properties within Sub-Basin. The parcels are to connect to the lake via a proposed storm water collection system. If the conceptual plan is implemented, the lake will satisfy the 15% water retention requirement for development of the land within Sub-Basin by allowing each owner to take advantage of the storage provided by the lake without having to set aside 15% of that owner's parcel for water management. After the conceptual plan was found by the Water Control District to satisfy the relevant criteria, it was forwarded for licensing to the County, which issued a surface water management license for Sub-Basin to a corporation wholly-owned by one of the Trustees. This license granted approval of the plan for surface water management in the Sub-Basin. However, it did not authorize any construction or other development of any property within the Sub-Basin.

The School Board is regulated by the State Department of Education and is subject to certain statutory requirements and policies for the acquisition and ownership of real property. For example, the School Board is required to have written agreements with the appropriate local or state agencies for provision of, among other things, drainage and flood control. For development of a site, the State requires that the School Board take into account storm water management, and site drainage and retention ponds must be accommodated on the site as required by law. In addition, the School Board must contact the appropriate local agencies about environmental issues with regard to both the acquisition and maintenance of the site.

The School Board purchased the Sub-Basin property because the site met the necessary requirements for the construction of a high school, such as its geographic location, size, current and projected student enrollment, and the infrastructure necessary to support the high school. The School Board does not engage in speculative buying and selling of land and has expended a substantial portion of its budgeted funds to select and purchase the site, to prepare a plat for approval, and to apply for permits. Before it can construct the high school, the School Board must have the appropriate land use designation and must obtain rezoning, plat, and site plan approval. As part of this process, it must obtain a surface water management license, which requires, among other things, a properly-functioning storm water drainage system for the property.

To assist the School Board in obtaining its surface water management license to build the high school, Trusts propose to convey jointly a conservation easement to the School Board, restricting 7.5 acres of the lake (the 7.5 acres) for use as a water area predominantly in its current natural condition. The 7.5 acres will be contiguous to the drainage, flowage, and storage easement previously granted to the County in connection with the canal. Conveyance of the easement will allow the School Board to use all of its land for the construction of the high school and at the same time to meet its required set-aside for water retention. Taxpayers represent that the School Board has the resources to enforce the conservation easement whether or not the school is constructed. Before the surface water management license is granted, the various governmental agencies that would approve the School Board's land development permits will review the terms of the proposed conservation contribution to ensure that it meets adopted governmental conservation policies.

The Deed of Conservation Easement (Deed) provides that the Trusts grant to the School Board full and free rights to store storm water from adjacent lands owned by the School Board and grant a perpetual conservation easement across the 7.5 acres. Under the Deed, the Trusts covenant that they will not use the 7.5 acres in any way that adversely affects the School Board's right and authority to store storm water from the adjacent land owned by the School Board upon and across the 7.5 acres, or which adversely affects the drainage, flood control, or water conservation of the land or other adjacent land. The Trusts also covenant that, barring a natural disaster or act of God, the 7.5 acres will be

used in a way that is consistent with conservation purposes and that, if the Trusts damage the land, they will restore it to a condition as close as possible to its prior condition.

The Deed provides that the 7.5 acres shall forever remain as open space, and that no buildings or permanent structures may be constructed on the property. The Trusts and the School Board must preserve and protect the 7.5 acres, preventing all pollution. The Deed provides that the conservation easement may not be assigned or transferred by the School Board unless it requires that the conservation purposes of the easement be carried out and unless the assignee is a qualified organization under § 170(h)(3) of the Code and § 1.170A-14(c) of the Regulations.

According to the Deed, the School Board also agrees that the restrictions set forth in the State Statute, providing for the creation, acquisition, and enforcement of conservation easements, govern the use and condition of the property and the easement. A conservation easement under the State Statute is a right or interest in real property which is appropriate for retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition. Under the State Statute a conservation easement may be acquired by any governmental body or agency and is enforceable by the holder of the easement, an owner of property burdened by the easement, or a person authorized by another law. The School Board is a governmental agency and has agreed to accept the easement, acknowledging that the easement will allow the School Board to meet its 15% water retention requirement.

Under the Deed, the Trusts reserve no right to cultivate or develop the 7.5 acres. The Trusts also will affirmatively covenant that the entire lake will be used in a way that is consistent with conservation purposes. In addition, the Trusts will covenant that the immediately adjacent property owned by the Trusts that is not subject to the easement--some of which is the unrestricted portion the lake and some of which is land--will not be used in any way that adversely affects the drainage, flood control, or water conservation of the 7.5 acres or adjacent property. These covenants will be recorded in the land records of County prior to the charitable contribution.

Under State requirements, if the School Board does not build or ceases to operate the high school, the School Board must ensure that the site continues to meet certain minimum safety, casualty, and sanitation requirements. For example, the State requires that the School Board maintain the storm water drainage system for the site in an operational condition at all times. This requirement extends to all property owned by the School Board, whether or not it is developed.

LAW & ANALYSIS

Section 170(a)(1) of the Code permits a deduction for a "charitable contribution", as defined in § 170(c). Under § 170(f)(3)(A) of the Code, a taxpayer who contributes not in

trust less than the taxpayer's entire interest in property generally is not allowed a deduction; however, § 170(f)(3)(B)(iii) provides an exception to this rule in the case of a qualified conservation contribution.

Under § 170(h)(1) and § 1.170A-14(a) of the Income Tax Regulations, a "qualified conservation contribution" is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.

Qualified Real Property Interest

Section 170(h)(2)(C) of the Code defines the term "qualified real property interest" to include a restriction granted in perpetuity on the use of real property. Section 1.170A-14(b)(2) of the Income Tax Regulations states that a qualified real property interest includes a perpetual conservation restriction, which is a restriction granted in perpetuity on the use that may be made of real property--including an easement.

The proposed contribution is of an easement providing for restrictions to be imposed in perpetuity on the use of real property. Consequently, the contribution is of a qualified real property interest within the meaning of § 170(h)(2)(C) of the Code and § 1.170A-14(b)(2) of the Regulations.

Qualified Organization; Eligible Donee

Under § 170(h)(3)(A) of the Code and § 1.170A-14(c)(1)(i) of the Regulations, the term "qualified organization" includes a governmental unit described in § 170(b)(1)(A)(v). Under § 170(c)(1), a governmental unit includes a State or political subdivision thereof. Generally, an agency that is an integral part of a governmental unit is eligible to receive deductible charitable contributions. See, e.g., Rev. Rul. 73-296, 1973-2 C.B. 67 (contributions to United States Army Unit Funds, which are integral parts of the Army, are deductible under § 170). School Board is an integral part of County and, therefore, constitutes a qualified organization.

To be an eligible donee under § 1.170A-14(c)(1) of the Regulations, a qualified organization also must have a commitment to protect the conservation purposes of the donation, and must have the resources to enforce the restrictions. The School Board has acknowledged that the permission to use the 7.5 acres for water retention under the easement allows it to meet its 15% water retention requirement, which constitutes one of the conditions for the granting of the School Board's surface water management license to construct and operate the high school. The 7.5 acres must continue to exist in their present state to satisfy this requirement. The School Board's license requires periodic renewal, and, in the event that its terms are violated, the County can revoke it. The School Board thus has an incentive to enforce the terms of the easement in order to

maintain its license. In addition, the School Board does not engage in the speculative investment in land. In the unlikely event that the School Board does not build or ceases to operate the high school, it is required by State law to maintain the storm water drainage system for the site in an operational condition at all times. Therefore, the School Board has an incentive to see that the terms of the easement are enforced. In addition, taxpayers represent that the School Board has the resources to enforce the easement.

Under § 1.170A-14(c)(2) of the Regulations, the donor also must prohibit transfers of the easement by the donee, unless, in the subsequent transfer, the donee requires that the conservation purpose continues to be carried out, and the subsequent transferee qualifies as an eligible donee under § 1.170A-14(c)(1) of the Regulations. The deed of easement contains such a restriction. Consequently, we conclude that the School Board is an eligible donee.

Conservation Purposes

Section 170(h)(1)(C) of the Code provides that a qualified conservation contribution must be exclusively for "conservation purposes." A conservation purpose as defined in section 170(h)(4)(A)(iii)(II) includes the preservation of open space (including farmland and forest land) where such preservation is pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and where it will yield a significant public benefit.

Section 1.170A-14(d)(4)(iii)(A) of the Regulations provides that the governmental policy test is met by donations that further a specific, identified conservation project, such as the preservation of farmland pursuant to a state program for flood prevention and control. The donation of the easement on the 7.5 acres furthers the flood control and water retention policies of the Water Control District by providing a permanent location for water storage and drainage within the Sub-Basin. In addition, to further its water preservation efforts, the County previously obtained from the Trusts a perpetual easement extending the canal through the portion of the lake adjacent to the 7.5 acres. Thus the lake already has been designated as important to County's water conservation policies. Therefore, donation of the easement is pursuant to a clearly delineated governmental conservation policy under § 170(h)(4)(A)(iii)(II).

The flush language of § 170(h)(4)(A)(iii) states that preservation of open space also must yield a significant public benefit. Section 1.170A-14(d)(4)(iv) of the Regulations enumerates several factors to consider in determining whether an open space easement will yield a significant public benefit, some of which would be met by the donation of the easement.

One of the factors in § 1.170A-14(d)(iv)(A) of the Regulations is the uniqueness of the property to the area. The lake is part of an interconnected series of canals and lakes that flow into the State water management system. Because of its important location, the lake

is subject to a County easement through which the canal flows. The lake also has been identified in the conceptual plan for surface water management in the Sub-Basin as satisfying the 15% water retention requirement, allowing each parcel owner in the Sub-Basin to take advantage of the storage provided by the lake without having to set aside 15% of each owner's parcel for water management. Permanent protection of a portion of the lake from development will support the interests of all Sub-Basin landowners, and the lake thus serves an important regional role. Another factor described in the regulations is the consistency of the proposed open space easement with public programs for conservation in the region, including programs for water supply protection, water quality maintenance or enhancement, and flood prevention and control. Preservation of the 7.5 acres would further the County's efforts to provide permanently for drainage and reclamation, protect against flood damage, protect the water supply, provide for irrigation, and abate water pollution. Another factor in the regulations is the likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area. The lake is bounded on the north by wetlands, which will be better preserved by requiring that the lake be permanently kept in its natural state. Therefore, donation of the conservation easement will yield a significant public benefit.

Accordingly, donation of the easement will be for conservation purposes.

Exclusively for Conservation Purposes/Enforceable in Perpetuity

Section 170(h)(1)(C) of the Code provides that the contribution must be "exclusively" for conservation purposes. Section 170(h)(5)(A) provides that a "contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." Section 1.170A-14(e)(2) of the Regulations provides that no deduction will be allowed if the contribution would accomplish one conservation purpose but would permit destruction of other significant conservation interests. Similarly, § 1.170A-14(d)(4)(v) of the Regulations provides that a deduction for an open space easement will not be allowed if the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation.

Section 1.170A-14(g)(1) of the Regulations provides that any interest in the property retained by the donor and the donor's successors must be subject to legally enforceable restrictions that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.

As part of the proposed transaction, the Trusts reserve no right to cultivate or develop the 7.5 acres and affirmatively covenant that the lake will be used in a way that is consistent with conservation purposes. In addition, the Trusts agree not to use adjacent property in any way that adversely affects the drainage, flood control, or water conservation of the 7.5 acres or adjacent property. These restrictions, which will be binding upon the Trusts

and their successors in interest, will be recorded in the land records of County prior to the proposed contribution.

Accordingly, we conclude that the Trusts have demonstrated that the proposed contribution of a conservation easement is exclusively for conservation purposes and is enforceable in perpetuity within the meaning of § 170(h)(5)(A) of the Code and §§ 1.170A-14(e) & (g)(1) of the Regulations.

CONCLUSION

Based upon the facts submitted and representations made in your ruling request, we conclude that the contribution of the conservation easement in the 7.5 acres constitutes a qualified conservation contribution under § 170(h) of the Code.

It is possible that the value of property in the Sub-Basin owned by the Trusts or related parties could be increased as a result of the easement. The contribution is deductible only to the extent that its value exceeds the value of benefits received. See section 1.170A-1(h)(2)(i) of the Regulations; Rev. Rul. 67-246, 1967-2 C.B. 104.

The ruling contained in this letter is based upon information and representations submitted by the Trusts and accompanied by a penalties of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings, and it is subject to verification on examination.

This ruling is directed only to the Trusts requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Acting Assistant Chief Counsel
(Income Tax & Accounting)

by: _____
Karin G. Gross
Senior Technician Reviewer
Branch 3