

## Appendix C

### Tax Benefits

The majority of conservation easements qualify for a federal income tax deduction as protecting “open space pursuant to a clearly delineated governmental conservation policy”. Gwinnett County should ensure that its comprehensive land use plan, as well as ordinances, clearly delineate its conservation policy. IRS regulations §1.170A-14 (d)(4)(iii) indicate that a “general declaration of conservation goals by a single official or legislative body is not sufficient. However, a governmental conservation policy need not be a certification program that identifies particular lots...This requirement will be met by donations that further a specific, identified conservation project, such as the preservation of land within a state....”

The regulation goes on to state that “acceptance of an easement ... tends to establish the requisite clearly delineated governmental policy, although such acceptance, without more, is not sufficient. 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.... If [a governmental body] accepts such gifts without a review process, the requisite clearly delineated governmental policy is not established.” While the adoption of a County greenspace plan will tend to establish the requisite policy, the County must adopt a rigorous review process, incorporating factors from the list above and others as appropriate to ensure that tax deductions remain an incentive for donations of easements.

Further, a deduction for contribution of an open space easement or similar restrictive covenant is predicated upon a significant public benefit accruing from the donation, whether it is “scenic” or “pursuant to governmental policy”. Regulation §1.170A-14(d)(iv)(A) lists factors to be considered in the evaluation of public benefit. Inclusion of at least some of these factors in the County plan would facilitate review and deductibility. They are:

- (1) Uniqueness of the property to the area;
- (2) Intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);
- (3) Consistency of the proposed open space use with public programs (whether Federal, state or local) for conservation in the region;
- (4) Consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in 1.170A-14(c)(1) in close proximity to the property;
- (5) Likelihood that development of the property would lead to or contribute to degradation of the scenic natural, or historic character of the area;
- (6) Opportunity for the general public to use the property or to appreciate its scenic values;
- (7) Importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
- (8) Likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
- (9) Cost to the donee of enforcing the terms of the conservation restriction;
- (10) Population density in the area of the property;
- (11) Consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.

A rigorous review process will tend to establish significant public benefit as well as delineated governmental policy, although the two are separate requirements. Because this determination is central to both requirements, it is strongly recommended that a stepwise review process be implemented by specific ordinance and that the process follow predetermined criteria for acceptance.

The exclusivity requirement is separate and includes the requirement that the conservation purpose be protected in perpetuity. Regulation §1.170A-14 requires, among other things, that the instrument transferring the easement or other right must provide that the property will be preserved, and that the conservation purposes are to be protected, in perpetuity.

The deed must also provide that the donee (County) will hold the property interest for the conservation purpose stated in the deed and will be *prohibited from transferring it* except to other qualified organizations that will hold the interest exclusively for conservation purposes. (This also ensures that the Governor's Greenspace requirement of protection in perpetuity is met.) To protect the donor's deduction, the County should require that the deed contain such restrictions. Further, the terms of the restriction must be such that future development or intrusion that would interfere with the governmental conservation policy is precluded.

#### *Information on Tax Benefits*

*a. Income Tax Deductions* - Section 170 of the IRC allows income tax deductions for individuals who donate property, including land, to "political subdivisions" such as counties "only if the contribution or gift is made for exclusively public purposes." The deduction is allowed only when the taxpayer's entire interest in the property (fee simple) is transferred, with some exceptions (such as for the donated conservation easement described below). To help ensure that the deductions are available for greenspace contributors, the County should make clear that such donations are for exclusively public purposes – Melbourne Beach, Florida, has helped meet the requirement in a different context by finding, as a part of their city Code, that donations to a library fund are exclusively for public use pursuant to the IRC. The ordinance reads:

The legislative intent of this article is to create a trust fund for the donation of funds by the general public to provide expanded library programs, books, and services, and to provide for the funding of the purchase of additional library programs, books, and services to benefit and be used primarily at the Melbourne Beach Public Library. The Town Commission hereby makes a legislative finding that donations to the fund for Brevard County's Melbourne Beach Public Library for increased library programs, books, and services is a valid and exclusively public purpose. The Town Commission notes that pursuant to the Section 170(a), (b)(1)(v), and (c)(1) of U.S. Internal Revenue Code of 1986, donations to a local government for an "exclusively public purpose" are tax deductible to the extent provided by Federal law. It is the intent of the Town Commission that donations, gifts, or bequests to the fund shall be for an exclusively public purpose for the purpose of making such donation, gift, or bequest tax deductible from U.S. income tax to the extent provided by law. Melbourne Beach, Florida Code § 15-90 (c).

To ensure that the individual donor will receive a federal deduction, special language may need to be included on the deed. A deed which was allowed by the IRS was described as follows:

The deed provides that the Property will be preserved for the outdoor recreational use of the general public and that the conservation purposes are to be protected in perpetuity. Donee will hold the Property for the conservation purpose stated in the deed and will be prohibited from transferring it except to other qualified organizations that will hold the Property exclusively for conservation purposes. Donee, as well as Taxpayer, will have the right to enforce the conservation restrictions by appropriate legal proceedings.

*b. Record keeping & Documentation* - In order to deduct the fair market value of donated property with value in excess of \$250 the taxpayer must substantiate the donation by a contemporaneous written acknowledgment furnished by the recipient (Gwinnett County, in this case). There is no prescribed form for the acknowledgment, but it must contain a description of the property, the name of the donee, the date and location of the donation, whether the donee provided any consideration for the donation in the form of goods or services, and a description and good faith estimate of the value of any such goods or services. The acknowledgment must be provided to the taxpayer and dated on or before the date that the taxpayer files his return for the year in which the deduction is claimed (IRS Regulation 1.170A-13).

For property valued at greater than \$500, the taxpayer will be required to file, among other things, IRS Form 8283. The form must be signed by a qualified appraiser and a representative of the donee. Because the IRS regulations also require appraisals to be made when property is donated, the County may wish to require an appraisal before accepting donations. The County must designate a representative and implement such record keeping as is needed to facilitate the signing process. If the County imposes restrictions such as those described above on donations, the records would need to state whether the requirements have been met. Where property is donated in fee simple and the County disposes of the property within two years of receipt, the County must file Form 8262 and provide a copy to the taxpayer. Again, the County needs a procedure to accommodate this requirement

*c. Gift Tax* - Section 2501 of the U.S. Internal Revenue Code imposes a tax on property transferred by gift, but §2522 and Regulation §20.2055 provide a deduction for contributions to charitable organizations, including a provision for contributions of split interests (like conservation easements) allowed by the income tax regulations. Thus the gift of either fee simple property or a qualified conservation contribution is not likely to be taxed.

#### *Additional concerns*

The taxpayer will need professional assistance to determine the amount and allowability of his deduction, and should be aware of the following restrictions:

- Amount of deduction – often, the deduction will be limited to 30% of the taxpayer’s adjusted gross income. Some contributions will be deductible up to 50% of the AGI, however, and others will be limited based on the actual income.
- Limitations – particularly in the case of restrictions, the deed must be quite specific as to present and future uses of the property.
- Donative intent – the donation must be motivated by “detached and disinterested generosity,” and no *quid pro quo* or benefit must be expected or received in order for the contribution to be deductible. A donation is deductible if, and only to the extent it exceeds

the market value of the benefit received in return (e.g. zoning variances) and only if the excess was given with the intention of making a gift.

- Property subject to a mortgage – no deduction will be permitted unless the mortgagee subordinates its rights in the property to the right of the County to enforce the conservation purposes of the gift in perpetuity. The subordination agreement should be recorded in the County land records immediately before the deed of the conservation easement/restriction.