Arapahoe County Open Space - Resolution No. 030381

RESOLUTION NO. 030381. It was moved by Commissioner Mackenzie and duly seconded by Commissioner Zimmer to adopt the following Resolution:

WHEREAS, the Board of County Commissioners and the Open Space and Trails Advisory Group have determined that there is a need to plan and develop an approach for the preservation of open space in Arapahoe County; and

WHEREAS, the County does not have the funds in its treasury sufficient to finance acquisitions of open space without curtailing to an unacceptable level other services which the County is obligated to provide; and

WHEREAS, the County is authorized by law to impose a sales tax on the sale of tangible personal property at retail and the furnishing of services and a use tax for the privilege of using or consuming any construction and building materials purchased at retail and the privilege of storing, using or consuming any motor and other vehicle, purchased at retail on which registration is required, subject to approval of the registered electors of the County; and

WHEREAS, the Board of County Commissioners has determined that it is in the interest of the residents of the County to impose a County-Wide sales and use tax at the rate of one quarter of one percent (0.25%) for the period beginning January 1, 2004 through December 31, 2013, and the receipts from which will be restricted in application to the Open Space objectives as set forth more fully herein; and

WHEREAS, the Board of County Commissioners has determined that a question regarding the imposition of a sales and use tax for the purposes enunciated herein should be submitted by the Board of County Commissioners to the eligible electors of the County; and

WHEREAS, the Board of County Commissioners has reviewed the proposed ballot question to be considered at the November 2003 election; and

WHEREAS, pursuant to Section 1-5-203(3) C.R.S., the Board of County Commissioners must certify ballot contents to the Arapahoe County Clerk and Recorder for said November 2003 election; and

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of the County of Arapahoe, State of Colorado, as follows:

I. General Provisions

A. Purpose. The purpose of this Resolution is, upon the approval of a majority of registered electors voting on such proposal, to impose a sales tax of one quarter of one percent (0.25%) upon the sale at retail of tangible personal property and the furnishing of certain services in the County, and to impose a use tax of one quarter of one percent (0.25%) for the privilege of use or consuming in the County any construction and building materials purchased at retail, and for the privilege of storing, using or consuming in the County any motor and other vehicles,

purchased at retail on which registration is required, all in accordance with the provisions of Article 2 of Title 29, C.R.S., which provisions are incorporated herein by this reference. The sales and use tax shall become effective on January 1, 2004 and cease at 11:59 p.m. on December 31, 2013.

B. Statutory Definitions Incorporated. For purposes of this Resolution, the definitions of the words contained herein shall be as defined in Sections 39-26-102 and 39-26-201, C.R.S., which definitions are incorporated herein by this reference.

II. Imposition of Sales Tax. There is hereby imposed a County-Wide one-quarter of one percent (0.25%) sales tax on all sales of tangible personal property at retail or the furnishing of services in Arapahoe County, as provided in Section 29-2-105(1)(d), C.R.S., effective throughout the incorporated and unincorporated portions of Arapahoe County, subject to the following terms and conditions:

A. Transactions Subject to the Sales Tax.

1. The tangible personal property and services taxable hereunder shall be the same as the tangible personal property and services taxable pursuant to Section 39-26-104, C.R.S., subject to the same exemptions as those specified in Section 39-26-114, C.R.S., including, specifically, and not by way of limitation, the exemption for sales of food (as the term "food" is defined in Section 39-26-102(4.5), C.R.S.), as exempted from the Colorado state sales tax pursuant to Section 39-26-114(1)(a)(XX); the exemption for vending machine sales of food, as described in Section 39-26-114(7.5), C.R.S., the exemption for purchases of machinery and machine tools specified in Section 39-26-114(11), C.R.S.; the exemption for sales and purchases of those items listed in Section 39-26-114(1)(a)(XXI); the exemption for occasional sales by a charitable organization, as provided in Section 39-26-114(18), C.R.S.; the exemption for sales and purchases of farm equipment or farm equipment under lease or contract exempted from the Colorado state sales tax, pursuant to Section 39-26-114(20), C.R.S., excepting from the definition of "farm equipment" parts used in the repair or maintenance of farm equipment, all shipping pallets or aids paid for by a farm operation, and aircraft designed or adapted to undertake agricultural operations; and the exemption for sales of low-emitting motor vehicles, power sources, or parts used for converting such power sources, as specified in Section 39-26-114(22), C.R.S.

2. Such sales tax shall not apply to pesticides that are registered by the Colorado Commissioner of Agriculture for use in the production of agricultural and livestock products, pursuant to the provisions of the "Pesticide Act" Article 9 of Title 35, C.R.S., and offered for sale by dealers licensed to sell such pesticides, pursuant to Section 35-9-115,

C.R.S., notwithstanding the removal of such pesticides from the Colorado state sales tax base, pursuant to House Bill 99-1381, enacted at the first regular session of the Sixty-Second General Assembly.

3. Such sales tax shall not apply to the sale of construction and building materials, as the term is used in Section 29-2-109, C.R.S., if such materials are picked up by the purchaser and if the purchaser of such materials presents to the retailer a building permit or other documentation acceptable to the County evidencing that a local use tax has been paid or is required to be paid.

4. All sales of personal property on which a specific ownership tax has been paid or is payable shall be exempt from the sales tax imposed by Arapahoe County when such sales meet both of the following conditions: (1) the purchaser is a non-resident of or has his principal place of business outside of Arapahoe County, and (2) such personal property is registered or required to be registered outside the limits of Arapahoe County under the laws of the State of Colorado.

5. Such sales tax will not be imposed upon the sale of tangible personal property at retail or the furnishing of services if the transaction was previously subjected to a sales or use tax lawfully imposed on the purchaser or user by another statutory or home rule county equal to or in excess of that sought to be imposed hereunder by Arapahoe County. A credit shall be granted against the sales tax imposed hereunder by Arapahoe County with respect to such transaction equal in amount to the lawfully imposed local sales or use tax previously paid by the purchaser or user to the previous statutory or home rule county. The amount of the credit shall not exceed the sales tax imposed hereunder by Arapahoe County.

6. Such sales tax will not apply to the sale of food purchased with food stamps. For purposes of this section, "food" shall have the meaning as provided in 7 U.S.C. Section 2012(g) as such section exists on October 1, 1987, or is thereafter amended.

7. Such sales tax will not apply to the sale of food purchased with funds provided by the special supplemental food program for women, infants and children, 42 U.S.C. Section 1786. For purposes of this section, "food" shall have the same meaning as provided in 42 U.S.C. Section 1786 as such section exists on October 1, 1987, or is thereafter amended.

B. Determination of Place at Which Sales are Consummated. For the purposes of this Resolution, all retail sales shall be considered consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to a destination outside the limits of Arapahoe County or to a common carrier for delivery to a destination outside the limits of Arapahoe County. The gross receipts from such sales shall include delivery charges when

such charges are subject to the Colorado state sales and use tax imposed by Article 26 of Title 39, C.R.S., regardless of the place to which delivery is made. In the event a retailer has no permanent place of business in Arapahoe County, or has more than one place of business, the place or places at which the retail sales are consummated for the purpose of a sales tax imposed by this Resolution shall be determined by the provisions of Article 26 of Title 39, C.R.S., and by rules and regulations promulgated by the Department of Revenue. The amount subject to the sales tax imposed hereunder shall not include any Colorado state sales or use tax imposed by Article 26 of Title 39, C.R.S.

C. Collection, Administration, and Enforcement. The sales tax imposed hereunder shall be collected, administered and enforced by the Executive Director of the Colorado Department of Revenue ("Executive Director") in the same manner as the collection, administration and enforcement of the Colorado state sales tax. The provisions of Article 26 of Title 39, C.R.S., and all rules and regulations promulgated thereunder by the Executive Director shall govern the collection, administration, and enforcement of the sales tax imposed hereunder. Distribution of all sales tax collected by the Executive Director, pursuant to this Resolution, shall be to Arapahoe County.

D. Vendor's Fee. At the time of making a monthly return of the sales taxes required by this Resolution, every retailer shall be entitled to withhold a vendor's fee in the amount, as authorized by state law, of the sales tax remitted to cover the retailer's expenses in the collection and remittance of said taxes. If any retailer is delinquent in remitting said taxes, other than in unusual circumstances shown to the satisfaction of the Executive Director of the Department of Revenue of the State of Colorado (the "Executive Director"), the retailer shall not retain any amounts to cover his expenses in collecting and remitting said taxes. If any retailer, during any reporting period, shall collect as a tax an amount in excess of one percent of the total taxable sales, the retailer shall remit to the Executive Director the full amount of the tax herein imposed and also the full amount of said excess.

E. Application of Section 29-2-108, C.R.S. The 6.9% limitation on amount of sales tax provided for in Section 29-2-108, C.R.S., shall be exceeded by 0.80% in the City of Aurora; and by 0.05% in the Cities of Cherry Hills Village, Columbine Valley and Littleton; and by 0.55% in the Cities of Englewood, Glendale and Sheridan. The County sales tax does not exceed the 1% rate permitted by Section 29-2-108, C.R.S.

III. Imposition of Use Tax. There is hereby imposed a County-Wide one-quarter of one percent (0.25%) use tax in accordance with the provisions of Article 2, Title 29, C.R.S., for the privilege of using or consuming in Arapahoe County any construction and building materials purchased at retail and for the privilege of storing, using, or consuming in Arapahoe County any motor and other vehicles, purchased at retail on which registration is required, effective throughout the incorporated and unincorporated portions of Arapahoe County, subject to the following terms and conditions:

A. Exemptions from the Use Tax.

1. Storage, use, or consumption of any tangible personal property the sale of which is subject to a retail sales tax imposed by Arapahoe County.

2. Storage, use or consumption of any tangible personal property purchased for resale in Arapahoe County either in its original form or as an ingredient of a manufactured or compounded product, in the regular course of a business.

3. Storage, use or consumption of tangible personal property brought into Arapahoe County by a nonresident thereof for his own storage, use, or consumption while temporarily within the County; however, this exemption does not apply to the storage, use, or consumption of tangible personal property brought into this State by a nonresident to be used in the conduct of a business in this State.

4. Storage, use, or consumption of tangible personal property by the United States government, or the State of Colorado, or its institutions, or its political subdivisions in their governmental capacities only or by religious or charitable corporations in the conduct of their regular religious or charitable functions.

5. Storage, use, or consumption of tangible personal property by a person engaged in the business of manufacturing or compounding for profit, or the use of any article, substance, or commodity, which tangible personal property enters into the processing of or becomes an ingredient or component part of the product or service which is manufactured, compounded, or furnished and the container, label, or the furnished shipping case thereof.

6. Storage, use, or consumption of any article of tangible personal property, the sale or use of which has already been subjected to a legally imposed sale or use tax of another statutory or home rule county equal to or in excess of that imposed by Arapahoe County. A credit shall be granted against the use tax imposed by Arapahoe County with respect to a person's storage, use, or consumption in Arapahoe County of tangible personal property purchased in another statutory or home rule county. The amount of the credit shall be equal to the tax paid by the person by reason of the imposition of a sales or use tax of the other statutory or home rule county on the purchase or use of the property. The amount of the credit shall not exceed the tax imposed by this proposal.

7. Storage, use, or consumption of tangible personal property and household effects acquired outside of Arapahoe County and brought into it by a non-resident acquiring residency.

8. Storage or use of a motor vehicle if the owner is or was, at the time of purchase, a non-resident of Arapahoe County and he purchased the vehicle outside of Arapahoe County for use outside of Arapahoe County and actually so used it for a substantial and primary purpose for which it was acquired and he registered, titled, and licensed said motor vehicle outside of Arapahoe County.

9. Storage, use, or consumption of any construction and building materials and motor and other vehicles on which registration is required if a written

contract for the purchase thereof was entered into prior to the effective date of this use tax resolution.

10. Storage, use, or consumption of any construction and building materials required or made necessary in the performance of any construction contract bid, let, or entered into any time prior to the effective date of the use tax imposed hereunder.

B. The use tax imposed hereunder shall be applicable to every motor vehicle for which registration is required by the laws of the State of Colorado, and no registration shall be made of any motor or other vehicle for which registration is required, and no certificate of title shall be issued for such vehicle by the Department of Revenue or its authorized agents until any tax due upon the use, storage, or consumption thereof pursuant to this Resolution has been paid.

C. Collection, Administration, and Enforcement. Except as provided by Section 39-26-209, C.R.S., the use tax imposed hereunder shall be collected, enforced and administered by Arapahoe County, consistent with Arapahoe County's guidelines, policies and procedures, which exist or may hereafter be promulgated not inconsistent with this Resolution. The use tax on construction and building materials shall be collected by the County's Building Division of the Development Services & Infrastructure Management Department, by each municipality or, as may be otherwise provided by intergovernmental agreement, based upon an estimate of building and construction materials costs submitted by the owner or contractor at the time a building permit application is made. All use tax collected on construction and building materials pursuant to this Resolution shall be distributed to Arapahoe County. All use tax collected on motor or other vehicles pursuant to this Resolution shall be distributed to Arapahoe County.

IV. Effective Date-Expiration Date. Upon adoption by the electorate at the election on November 4, 2003, the sales and use tax provided herein shall become effective and in force at 12:01 a.m. on January 1, 2004, and shall expire at 11:59 p.m. on December 31, 2013, and upon said expiration, all monies remaining in any of the Funds created hereunder may continue to be expended for the purposes set forth herein until completely exhausted. The effective date of this Resolution and the date upon which the imposition of the sales and use taxes referred to herein begins shall be January 1, 2004.

V. Necessity for Election. The sales and use taxes imposed hereunder shall not become effective until and unless a majority of the registered electors voting thereon, pursuant to Sections 29-2-103(1) and 29-2-104(5), C.R.S., approve the ballot question.

A. Ballot Title/Question. The Ballot Title/Question on the County-Wide Sales and Use Tax Resolution that shall be referred to the registered electors of Arapahoe County at the general election to be held on Tuesday, the 4th day of November, 2003, shall be, in substantially the following form, with only such changes as may be determined by the Board of County Commissioners:

BALLOT TITLE: WATER, WILDLIFE, OPEN SPACE, TRAILS AND NEIGHBORHOOD PARK MEASURE

BALLOT QUESTION:
SHALL ARAPAHOE COUNTY TAXES BE INCREASED $17 MILLION ($17,000,000.00) ANNUALLY, AND BY WHATEVER AMOUNTS ARE

RECEIVED THEREAFTER, BY A COUNTY-WIDE SALES AND USE TAX OF ONE-QUARTER OF ONE PERCENT (0.25% OR 25 CENTS FOR EVERY 100 DOLLARS, WHICH WILL NOT BE COLLECTED ON SALES OF FOOD OR PRESCRIPTION DRUGS), AND WHICH WILL AUTOMATICALLY EXPIRE IN 10 YEARS, IN ORDER TO:

- PRESERVE URBAN AND RURAL OPEN SPACE AND NATURAL AREAS;
- PROTECT LANDS THAT PRESERVE WATER QUALITY IN RIVERS, LAKES AND STREAMS;
- PROVIDE, MAINTAIN AND IMPROVE NEIGHBORHOOD PARKS, OPEN SPACE, SPORTS FIELDS, PICNIC FACILITIES AND BIKING, WALKING AND MULTI-USE TRAILS;
- PROTECT WILDLIFE HABITAT AND CORRIDORS;
- PROTECT VIEWS, VISTAS AND RIDGELINES;
- PRESERVE AGRICULTURAL AND RANCH LANDS; AND
- ENHANCE AND MAINTAIN DESIGNATED HERITAGE AREAS;

WITH THE REQUIREMENTS THAT EVERY INCORPORATED MUNICIPALITY IN ARAPAHOE COUNTY RECEIVE A PRO-RATA SHARE OF THESE REVENUES BASED ON POPULATION (WITH THE TOTAL SHARE OF ALL MUNICIPALITIES BEING 50% OF REVENUES COLLECTED); THAT EACH MUNICIPALITY SHALL SPEND FUNDS SUBJECT TO AN INTERGOVERNMENTAL AGREEMENT WITH ARAPAHOE COUNTY CONSISTENT WITH THIS BALLOT ISSUE; THAT NO MORE THAN 3% OF THE TOTAL ANNUAL REVENUES BE USED FOR COUNTY ADMINISTRATIVE COSTS; THAT THE COUNTY'S PROGRAM EXPENDITURES FOR PROJECTS AND GRANTS WILL FIRST BE SUBMITTED TO A CITIZENS ADVISORY BOARD FOR A RECOMMENDATION TO THE COUNTY COMMISSIONERS; AND THAT THE COUNTY PROGRAM WILL BE SUBJECT TO AN ANNUAL INDEPENDENT AUDIT, ALL AS SPECIFIED IN RESOLUTION 030381.

AND SHALL THE COUNTY BE PERMITTED TO COLLECT, RETAIN AND EXPEND ALL REVENUES DERIVED FROM SUCH SALES AND USE TAX AS A VOTER APPROVED REVENUE CHANGE AND AN EXCEPTION TO LIMITS WHICH WOULD OTHERWISE APPLY UNDER ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW?

B. Cost of Election. The entire cost of the election shall be paid from the general fund of Arapahoe County.

C. Notice by Publication. The Arapahoe County Clerk and Recorder shall publish the text of this Open Space Sales and Use Tax Resolution four separate times, a week apart, in the official newspaper of Arapahoe County and each incorporated municipality within Arapahoe County.

D. Election Officer. The Arapahoe County Clerk and Recorder, as election officer, shall undertake all measures necessary to comply with the election provisions set forth in Colorado Constitution, Article X, Section 20(3), including, but not limited to, the mailing of required election notices and ballot issue summaries.

E. Conduct of Election. The conduct of the election shall conform so far as is practicable to the general election laws of the State of Colorado.

VI. Creation of the Arapahoe County Open Space Fund. A separate fund, to be known as the "Arapahoe County Open Space Fund" (the "Fund"), shall be created and 100% of the revenue derived from the sales and use tax imposed on the incorporated and unincorporated areas of Arapahoe County shall be deposited thereto to be used solely for the purposes stated herein and as further described more fully below.

A. For purposes of Colo. Const., Art. X, Section 20, the receipt and expenditure of revenues of the sales tax and use tax shall be accounted for, budgeted and appropriated separately from other revenues and expenditures of Arapahoe County and outside of the fiscal year spending of the County as calculated under Art. X, Section 20, and nothing in Art. X, Section 20, shall limit the receipt and expenditure in each fiscal year of the full amount of such revenues of the sales tax and use tax, nor shall receipt and expenditure of such revenues affect or limit the receipt or expenditure of any and all other revenues of Arapahoe County for any fiscal year.

B. Interest from Revenues and Income Generated from Acquired Lands. Interest generated from the revenues of the sales and use taxes imposed herein shall be used for the purposes stated herein. Income generated from the use or lease of preserved lands, natural areas, wildlife habitats, and parks acquired with the sales and use taxes imposed herein shall be used for the purposes stated herein.

VII. Open Space and Trails Advisory Board. If said sales and use tax is approved, the Board of County Commissioners shall appoint an Open Space and Trails Advisory Board ("OSTAB") within ninety (90) days following approval of the election question.

A. OSTAB shall consist of seven members.

B. Each County Commissioner shall appoint one resident of his/her commissioner district to serve as an OSTAB member.

C. The Board of County Commissioners shall appoint two Arapahoe County residents as at-large members.

D. OSTAB members shall serve three-year terms of office, except the initial term of three of the seven members shall be for two years. Members may be re-appointed to no more than two successive terms.

E. OSTAB members shall serve at the pleasure of the Board of County Commissioners.

F. Members shall not be compensated for their services.

G. Members shall act in accordance with law, including Colorado conflict of interest laws applicable to public bodies. No member shall vote or participate in the

application process regarding an acquisition or expenditure in which he or she has a financial or ownership interest, or where he or she has an ownership interest in an adjacent property.

H. OSTAB shall meet quarterly, beginning the first quarter of 2004, or as necessary, to review proposed projects and perform other duties in accordance with this Resolution.

I. OSTAB shall make recommendations to the Board of County Commissioners regarding the distribution of revenue collected from the Open Space Sales and Use Tax, in accordance with the guidelines set forth in this Resolution.

VIII. Distribution of Sales and Use Tax Revenue. The revenue collected from the Open Space Sales and Use Tax shall be distributed and administered in the following manner and subject to the definitions and conditions as set forth in this Resolution:

A. The annual revenue from the Open Space Sales and Use Tax shall be distributed according to the percentages as set forth below. Expenditure of said revenue is governed by the provisions set forth in Section VIII.

Shareback to all incorporated municipalities or portions thereof based on the population of the incorporated municipality or portions thereof in Arapahoe County versus total population of incorporated areas in Arapahoe County		50%	
County Open Space Program funds to be used as follows:			
	County Administrative Costs	3%	
	Available as grants to incorporated municipalities and special districts within Arapahoe County	12%	
	Designated Arapahoe County Heritage Areas		3.6%
	Maintenance of County Open Space	3.24%	
	Acquisition of open space and/or interests in open space to include for the development of		

multi-use trails 28.16%

50%

Total distribution by percentages of
Open Space Fund created by
Open Space Sales and Use Tax 100%

B. County Administrative Costs are those costs necessary for the County to administer the distribution of funds, to include distribution of Shareback Funds; development, creation, oversight and monitoring of and compliance with Intergovernmental Agreements ("IGAs"); grant review and distribution of grant funds; site reviews for grants and review of certified Annual Municipal Reports, as well as to administer the County's own Open Space Program, excluding maintenance, as set forth more fully below.

C. Shareback Funds are those monies distributed to the incorporated municipalities wholly and/or partially in Arapahoe County for open space uses as more fully set forth below.

1. These funds will be distributed to each incorporated municipality within or partially within Arapahoe County based on the population within said jurisdiction in Arapahoe County and the total incorporated population of Arapahoe County.

2. The population figures will be updated annually based on the official figures provided by the Demography Section of the Colorado Department of Local Affairs or any state agency which takes over the duties and responsibilities of said Demography Section.

3. The Shareback Funds will be distributed on an annual basis to each incorporated municipality, wholly or partially within Arapahoe County, provided that:

   a. The incorporated municipality has entered into an Intergovernmental Agreement (IGA) with the Board of County Commissioners.

   b. Such required IGA reflects the terms, conditions, intent and purpose of this Resolution consistent with the guidelines as set forth in Section VIII (C) and (E) below.

   c. Shareback Funds may be used for the open space uses as set forth in Section VIII (E) below.

d. In addition, Shareback Funds may be used to purchase and/or develop and/or improve existing neighborhood parks and/or sports fields.

e. Further, an incorporated municipality may use up to ten percent (10%) of its Shareback Funds distributed by the County annually to maintain existing or new open space properties, neighborhood parks and sports fields.

f. Incorporated municipalities may bank Shareback Funds from year to year as long as such funds are expended in accordance with the purposes set forth in this Resolution, and such is noted in the Annual Municipal Expenditure Report as set forth in Section VIII (C)(3)(g).

g. Every December 31st, each incorporated municipality, which received Shareback Funds, must certify and submit in writing, to the Board of County Commissioners, that the funds were used in conformance with this Resolution and must detail the expenditures of its Shareback Funds. Such submission shall be called the Annual Municipal Expenditure Report.

h. If Shareback Funds are not used in accordance with the provisions and guidelines set forth in this Resolution and/or are used in violation of the terms and conditions of the IGA, the offending incorporated municipality will be ineligible for future Shareback Funds, unless and until a compliance plan is submitted by the offending municipality to and approved by the Board of County Commissioners.

i. If the offending municipality fails to submit a compliance plan approved by the Board of County Commissioners or fails to meet the requirements of the Board of County Commissioners' approved compliance plan, then the Share of the non-complying entity will be distributed, based on annual population figures, among the other participating incorporated municipalities.

D. The County Open Space Program shall have the following components:

1. Grant Program. The County shall have funds, as specified above in Section VIII (A), available for distribution in the form of grants to incorporated municipalities; special districts, which provide recreational services or amenities; and recreation districts. Said grants shall be used for the purposes specified in Section VIII(C)(3)(d) or VIII(E)(1), and in accordance with the guidelines set forth in this Resolution.

a. Those entities having proposals consistent with the guidelines as set forth in this Resolution may submit their grant applications to OSTAB.

b. OSTAB and County staff shall review the grant applications and make recommendations to the Board of County Commissioners regarding the approval, conditional approval or denial of each application.

c. The Board of County Commissioners then shall approve, conditionally approve or deny the grant application.

d. If the County distributes less than 12% of the Open Space Sales and Use Tax as designated for grants, the remaining portion shall be retained by the County to be used for purposes set forth in Section VIII (D) (5) below.

2. Designated Heritage Areas. The Board of County Commissioners shall authorize expenditure of funds for Designated Arapahoe County Heritage Areas ("Designated Heritage Areas") located in unincorporated Arapahoe County.

a. A Designated Heritage Area is defined as lands or structures which have a cultural or historical significance to Arapahoe County, such as a historic property or a future fairgrounds.

b. The Board of County Commissioners shall consider designating land or a structure as a Designated Heritage Area after OSTAB and County staff have reviewed and made recommendations on a proposal for such an area.

c. Before it designates a Designated Heritage Area, the Board of County Commissioners shall conduct a public hearing on the proposal.

d. Funds allocated to Designated Heritage Areas may be used for maintenance of structures and grounds, as well as for future improvements and operations. Funds may not be used for construction of new buildings.

e. If the County uses less than the allocated funds for Designated Heritage Areas, the remaining portion shall be retained by the County as set forth in Section VIII (D) (5) below.

3. Open Space Maintenance. The County may use funds, as specified in Section VIII (A), for maintenance of County Open Space, to include trails.

a. Open Space maintenance funds may not be used for maintenance of Designated Heritage Areas if said areas' maintenance is funded under the Designated Heritage Areas portion of the County's program.

b. If the County uses less than the allocated amount in the Fund for maintenance, the remaining portion shall be retained by the County as set forth in Section VIII (D) (5) below.

4. Acquisition of Open Space and Trail Development. The County shall use the percentage of the Fund, as specified in Section VIII (A) above, to acquire open space or interests in open space and develop trails. Monies in this category may be banked for future acquisitions and/or projects, consistent with Section VIII (D) (5).

5. If the allocated funds for the County administrative costs, grants, Designated Heritage Areas, County open space maintenance and/or acquisition of open space or interests in open space or trail development are not expended by December 31st of each year, County staff shall bank such funds according to the aforementioned uses. At any time, County staff shall recommend to OSTAB the use of such banked funds for the purposes so designated and/or for acquisition of open space or interests in open space and/or trail purposes. OSTAB and County staff shall make recommendations on the use of the unexpended funds to the Board of County Commissioners. The Board of County Commissioners then will accept or reject OSTAB's and/or County staff's recommendations and/or designate the monies to be expended in a manner consistent with this Resolution.

6. On an annual basis, the County will hire an independent auditor to audit the County's expenditures of the Fund.

E. Additional Guidelines for Use of Funds:

1. Revenues collected from the Open Space Sales and Use Tax may be used in the following manner:

a. To acquire fee title interest in real property for the purposes provided herein;

b. To acquire less than fee interests in real property for the purposes provided herein; such as easements (including conservation and agricultural), future interests, covenants, development rights, subsurface

rights and contractual rights, either on an exclusive or nonexclusive basis;

c. To acquire water rights for use in connection with the purposes provided herein;

d. To acquire lands that preserve urban and rural open space; natural areas; agricultural and ranch lands; water quality; lakes; rivers; streams; corridors of rivers and streams; views; vistas; ridgelines; wildlife habitat and movement corridors; trail corridors; flood plains and wetlands;

e. To acquire lands that are buffers maintaining community identity;

f. To acquire lands for outdoor recreation purposes limited to passive recreational use, including but not limited to hiking, snowshoeing, photography, nature studies, and if specifically designated, bicycling, horseback riding, hunting and fishing;

g. To acquire lands with other important values such as historic sites that contribute to the County's and County municipalities' natural and cultural heritage;

h. To acquire rights-of-way and easements for trails and access to public lands, and to build and improve such trails and access ways;

i. To allow expenditure of funds, consistent with the guidelines set forth in this Resolution, for joint projects between counties and municipalities, special districts which have a recreational component, recreation districts, or other governmental entities in the County;

j. To improve, restore and/or protect open space lands as provided herein;

k. To manage, patrol and maintain those lands as provided herein;

l. To pay for related acquisition, construction, equipment, and/or improvements;

m. To allow for construction of picnic facilities in a manner consistent with the purposes of this Resolution;

n. To allow for the funding of environmental education programs in a manner consistent with the purposes of this Resolution;

o. To implement and effectuate the purposes of the Open Space Program.

2. No land or interests acquired with the revenues of the Open Space Sales and Use Tax may be sold, leased, traded, or otherwise conveyed, nor may an exclusive license or permit on such land or interests be given, without such approval by the governing body of the entity having received any portion of the Fund, after conducting a public hearing.

3. If the Board of County Commissioners sells land or interests as specified in paragraph 2 above, the proceeds shall be deposited with the Open Space Fund.

4. If any incorporated municipality; special district, which provides recreational services or amenities; or recreation district, sells land or interests as specified in Paragraph 2 above, the proceeds shall be deposited in a fund to be used for purposes consistent with this Resolution.

IX. Repeal and Amendment

A. If this Resolution is approved by a majority of the registered electors of Arapahoe County at the election to be held on November 4, 2003, its provisions relating to the amount of tax imposed, specifically the one-quarter of one percent (0.25%) sales tax specified in Section II and one-quarter of one percent (0.25%) use tax specified in Section III, the provisions relating to the deposit and expenditure of revenue as set forth in Section VI, and the provisions of Sections VII and VIII, shall not be repealed or amended except by a vote of the registered electors of the County.

B. Except as provided in subsection A. hereof, or as otherwise provided in Article 2 of Title 29, C.R.S., the provisions of this Resolution may be repealed or amended, subsequent to its adoption of the sales and use tax by a majority of the voters of Arapahoe County, by a majority vote of the Board of County Commissioners, and such repeal or amendment need not be submitted to the registered electors of the County for their approval.

X. Miscellaneous

A. Limitation on Amount of Tax. In the event the 6.9% percent limitation provided in Section 29-2-108, C.R.S., were to be exceeded in any incorporated municipality within the County by the sales and use tax imposed by this Resolution, such limitation shall be exceeded by no more than one percent in said incorporated municipality.

B. Severability. If any section, paragraph, clause, or provision of this Resolution, or the ballot question submitted to the registered electors at the election provided in Section V above, shall be adjudged to be invalid or unenforceable, the invalidity or enforceability of such section, paragraph, clause or provision shall not affect any of the remaining sections, paragraphs, clauses, or provisions of this Resolution or said ballot question. It is the intention of the Board that the various parts of this Resolution and said ballot question are severable.

The vote was 5-0: Commissioner Mackenzie, yes; Commissioner Vickrey, yes; Commissioner Myers, yes; Commissioner Beckman, yes; Commissioner Zimmer, yes.

The Chair declared the motion carried and so ordered.

PASSED AND ADOPTED this 17th day of June, 2003, in Littleton, Arapahoe County, Colorado.

Estate Planning
October, 2004
Conservation Easements

*489 ALTERNATIVES TO DONATING A CONSERVATION EASEMENT

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For a client who wishes to preserve open land while generating cash flow, selling a conservation easement through a charitable remainder trust can be a favorable technique. This article explains the details of this strategy.

This has been a banner period for real estate. While the paper profits have been enormous, the tax cost implicit in realizing them has sometimes put a damper on the celebration. Although the Jobs and Growth Tax Relief Reconciliation Act of 2003 ('JGTRRA') reduced the top marginal rate to 15% for long-term capital gains associated with real estate, [FN1] the states have moved in the opposite direction in a desperate search from revenue. In Massachusetts, for example, a sale of real estate could trigger state and federal income taxes totaling at least 20.3% of the gain, and up to as much as 30.3% if depreciable real estate is involved. [FN2] Unless the client has offsetting losses, the tax cost is often too great to justify consummating the sale.

Those individuals with substantial vacant, desirable land are often approached to donate conservation easements on the property, to preserve them in perpetuity. While donation of conservation easements can be enormously beneficial from a tax planning perspective, many clients simply do not have the wherewithal to give up thousands of dollars in assets at one time. Moreover, they may not be inclined to do so, especially in this era of uncertainty in both the economy and transfer tax planning. They may also wish to benefit charities other than the putative donee of the conservation easement.

One alternative for preserving vacant land while reaping at least some of the tax benefits associated with a charitable gift is to sell a conservation easement on the property through a charitable remainder trust ('CRT'). By having the CRT sell the easement rather than selling it himself, a landowner would accomplish three purposes. He would protect the land in perpetuity; he would retain an income stream for himself or named beneficiaries; and he would reduce his taxable income and perhaps taxable estate. Although the client must transfer the parcel of land to the CRT in order to sell the conservation easement, the charitable deductions afforded by the gift in this era of inflated real estate prices can be enormously beneficial.

Tax deductions associated with conservation easements

A client who wishes to dispose of his land while still protecting it, has four choices: he can sell it to a conservation group and pay a tax on the capital gain; [FN3] he can give the property away, which provides income and gift tax deductions but entails a substantial loss of capital; he can give away a conservation easement on the property, which will provide him substantial income and transfer tax benefits, but no capital; or he can sell a qualified conservation easement on the property.

Qualified conservation easements are a creature of state property law (which determines the requirements for a valid easement), and federal tax law (which determines deductibility). For *490 example, Chapter 184, ss. 31 to 33 of the General Laws of Massachusetts govern and define conservation and preservation restrictions in that state. To be deductible, a donated interest must qualify under section 31, and must be enforceable under section 32.

Pursuant to section 32, various bodies are charged with and must approve restrictions before they are enforceable, the sine

qua non of deductibility. Normal rules of running covenants and privity do not defeat the interests, as long as the approval process has been followed. [FN4] The restriction may be repurchased by the landowner, but only at its then current fair market value ('FMV').

Donation of a qualified conservation restriction during life provides a charitable income tax deduction under IRC Section 170(h), and a charitable gift tax deduction under IRC Section 2522(d). For both deductions, the value of the gift would typically be the difference between the value of the land with and without restriction. On undeveloped land in desirable areas, deductions totaling 80% of the value of the land without the restriction, are common. The restriction does, of course, reduce the value of the land for estate tax purposes. In addition, the property tax value may be reduced.

Reduction of the FMV of the land for transfer tax purposes is not the only reduction available. If certain requirements are met and the executor makes the appropriate election, 40% of the value of the encumbered land, up to $500,000, may be excluded from the gross estate. [FN5] Unlike the income and gift tax deductions, however, the estate tax exclusion requires that the land must have been owned by either the decedent or a member of his family for the three years before his death. Contrary to the usual requirement, the executor may place the easement on the property after the decedent's death, provided he does so by the due date of the decedent's estate tax return, as extended. [FN6]

The tax rules for creating a deductible interest, contained in IRC Section 170(h), are complex and are outlined briefly as follows. First, the property contributed must be a 'qualified real property interest,' as defined by statute. Second, the donee must be a 'qualified organization,' including government entities, as well as publicly supported charitable organizations and support organizations controlled by either a governmental unit or a publicly supported charity. [FN7] Private foundations would not qualify. Moreover, the donee must have the financial wherewithal to enforce the conservation restriction, and the will, embodied in a conservation purpose, to do so. [FN8]

Third, the gift must be for 'conservation purposes' as defined in IRC Section 170(h)(4)(A) and Reg. 1.170A-14(d). Fourth, the contribution must be 'exclusively for conservation purposes.' [FN9]

The Regulations provide significant detail on the circumstances under which the requirement of a 'conservation purpose' has been fulfilled. It is noteworthy that there must be a 'significant' public benefit, which must be determined by an analysis of the interest donated in the context of the surroundings in which it is located. The ostensible conservation purpose must typically be tied to extant government programs.

The Economic Growth and Tax Relief Reconciliation Act of 2001 ('EGTRRA ') significantly expanded the availability of the exclusion for a conservation easement, eliminating prior law's location requirements. Now the land has to be located only within the United States. There is, however, EGTRRA's sunset provision, which turns the clock back in 2011, so that those arcane requirements will reappear unless Congress extends the law. State law requirements may differ, as do those in Massachusetts. [FN10]

At the federal level, the charitable deduction is usable in the year of the gift, and can be carried forward for the five subsequent years. If the property is long-term capital gain property and the donee is a qualified charity (which it would have to be, pursuant to both the provisions of IRC Section 170(h) and state law requirements), the deduction is limited to 30% of the donor's 'contribution base' [FN11] per year. There are significant substantiation requirements, including a 'qualified appraisal' done within 60 days of the date of the gift.

Sale of a conservation restriction

While the tax deductions associated with donating a qualified conservation easement can be very advantageous, they do little to help a client who is land rich and cash poor. If the land preservation people can reach him before the developers do, he might consider selling, rather than donating, a *491 conservation easement. The price of it is typically calculated to be the value of the land at its highest and best use, minus the value of the land with the restriction.

The real problem for the client may be the tax cost of the sale. If the vacant land is part of his homestead, he can sell it outright and treat it as the sale of his principal residence, thereby sheltering up to $500,000 of the gain if he is married and files jointly with his wife pursuant to Reg. 1.121- 1(b)(3). [FN12] Unfortunately, he cannot take advantage of this exemption unless he sells his principal residence either two years before, or two years after, sale of the vacant adjacent land. If he does not sell his principal residence at all, he is stuck with a taxable capital gain.

At the federal level, the taxpayer will receive favorable capital gains treatment on the sale of a conservation easement if he has satisfied the long-term holding period, presently more than one year. Although income tax Reg. 1.61-6(a) provides that basis is normally equitably apportioned when part of a larger tract is sold, this provision does not apply where it is impractical or impossible to determine. Consequently, the amount realized will be used first to reduce the basis of the entire parcel, [FN13] with the balance being treated as capital gain. For sales occurring after 5/5/03, the maximum long-term capital gains tax payable federally would be 15% on vacant land. [FN14] The problem for the taxpayer is often not the tax treatment, but rather the fact that he has no basis to use. An installment sale is probably unrealistic where municipalities are involved. [FN15]

Using a charitable remainder unitrust

For the client who cannot afford to donate the property but still has charitable intent, selling the land or a conservation easement on it through a CRT may make the most sense. If the land is donated to a CRT which then sells a conservation easement, the donor can both preserve the land and retain cash flow, while obtaining various tax deductions. Moreover, the CRT would allow the landowner to benefit a charity other than one with conservation purposes.

It is noteworthy that the Taxpayer Relief Act of 1997 added two requirements to the usual ones for creating a valid CRT. First, the value of the remainder interest must equal at least 10% of the initial FMV if a charitable remainder annuity trust ('CRAT') or, if a charitable remainder unitrust ('CRUT'), at the time of each contribution. [FN16] Second, the annual payout percentage cannot exceed 50%. [FN17]

Unitrusts are only marginally affected by changes in the Section 7520 rate, because the annuity is based on the value of the underlying assets valued year to year. An annuity trust, on the other hand, is totally dependent on it. Indeed, the 10% requirement renders the tests for a valid CRT virtually impossible for a CRAT to pass in this period of low interest rates, so *492 only a CRUT will be considered here. Furthermore, the inherent flexibility of the CRUT makes it the only vehicle to choose if there is any possible delay between transfer and ultimate sale.

If the trust satisfies IRC Section 664 and the remainder beneficiaries qualify under IRC Sections 170(c) and 2522(a), the donor will receive two deductions when the trust is funded: an income tax deduction for the present value of the remainder interest, and a gift tax deduction. The amount of the income tax deduction is further limited by the nature of the charity that is the remainder beneficiary of the trust, the type of property contributed, and the donor's income.

In general, if the remainder beneficiary is a qualified public charity and the donor contributes long-term capital gain property, he would be entitled to a deduction based on the full FMV of the property, up to 30% of his adjusted gross income computed without regard to any net operating loss carryback (his 'contribution base'), with the opportunity to carry the excess deduction

amount forward for five years. [FN18] The donor can elect a 50% charitable deduction if he forgoes deducting the long-term capital gain portion of the gift.

Assignment of income

Apart from the technical requirements, from a tax standpoint the biggest hurdle to establishing an effective CRT to sell an interest in real estate, is the principle of anticipatory assignment of income. Generally, if a donor has gone too far down the road with the sale--if he is legally bound to complete it--the donation of the asset to the CRT will not give the desired result. [FN19] Rather than having the transaction treated as a deductible gift of the real estate, followed by a tax-free sale of the conservation easement by the CRT, the transaction could be recharacterized as a taxable sale by the donor, followed by a donation of the net proceeds to the CRT.

In Rev. Rul. 78-197, [FN20] the Service announced that it would not use assignment of income principles in a stock redemption context as long as the donee was not legally bound to go through with a sale, or could not be compelled by the corporation to surrender donated stock. In this Ruling, the Service announced it would follow the decision in Palmer. [FN21] The Service decided to treat the transaction in accordance with its form because the donee organization was not a sham, the transfer of stock was a valid gift, and the donee was not legally bound to consummate a sale. In essence, the Service relies on a bright-line test which focuses on the donee's control over the ultimate disposition of the property. [FN22] This Ruling has been confirmed in subsequent letter rulings in different gift contexts. [FN23]

Despite the comfort accorded by Rev. Rul. 78-197, donors contemplating a gift transaction followed by a sale by the donee organization should review the case of Ferguson. [FN24] There, the taxpayers donated stock which was subject to a merger agreement, for which 50% of the shareholders had already tendered shares. Even though the merger had not yet been technically approved at the time of the gift, the Tax Court ruled that the tender of more 50% of the shares was equivalent to approval of the merger and, in essence, the sale would go through.

The taxpayer also triggered assignment of income problems in Blake. [FN25] There, he donated stock to a charity with the understanding that the charity would sell the stock and buy the taxpayer's yacht. The Second Circuit concluded that because the donor received consideration for the gift, he was taxable on the proceeds of the sale.

Fortunately for potential donors and the charities they would benefit, the assignment of income test is primarily an objective one, which *493 looks to the objective indicia of a legal obligation to sell, rather than amorphous and subjective criteria. If the donor becomes greedy or waits too long to make the gift, substance over form analysis will prevail and the donor will end up being taxable on the sale.

Economic impact

JGTRRA reduced the value of the charitable deduction associated with establishing a CRT by reducing both marginal and capital gains tax rates. While the highest federal rate on ordinary income used to be 38.6%, it is now 35% for taxable incomes over $319,100. More importantly, JGTRRA reduced the capital gains rate for taxpayers in the 25% or higher brackets from 20% to 15% for property that is not subject to depreciation. The top tax rate for dividends was reduced to 15%. [FN26]

A simple example illustrates the impact of the rate reductions. If a piece of land with a basis of $50,000 is sold for $2 million, the federal capital gains tax payable would be roughly $292,500. [FN27] If the land is part of the principal residence which is also sold two years before or after the sale of adjacent vacant land, the tax on the gain would be reduced to $217,500. After tax, the owner would be left with anywhere between $1,707,500 and $1,782,500 to invest. Because it is likely that a large

portion of the proceeds would be invested in equities, it is also likely the vast bulk of the income would come from either capital gains or dividends, both taxed at a maximum rate of 15%. And when the donor dies (as long as he dies in a year other than 2010 [FN28]), his heirs would receive a step-up in basis to the date of death value, so that no capital gains taxes would typically be paid on the pre-death appreciation.

In this era of reduced tax rates, the financial benefit of a CRT boils down to having the ability to: (1) invest the entire amount of the proceeds on a pre-tax basis; (2) reduce the donor's taxable income by the amount of the charitable deduction; and (3) defer recognition of the capital gain from the sale. Moreover, the donor would receive a charitable deduction based on the interest he retained and the period for which he retained it. For instance, a 10% CRUT established for a 20-year period under an IRC Section 7520 rate of 3.6% would give the donor a charitable deduction of $255,220. If he decreased the annuity to 5%, his charitable deduction would be increased to $733,620. Unless he had taxable income in the $2.1 million range, the deduction would have to be used over several years. Because the highest marginal income tax rate is now only 35%, the maximum income tax value of the deduction for a 5% CRT under these assumptions would be 256,767. [FN29] The table in Exhibit 1 illustrates these results.

The numbers become far different if the real estate is the donor's only asset and only source of income. If one assumes the donor is in only the 15% bracket this year with an income up to $58,100 if he is married and filing jointly, the tax savings would be reduced to $110,043 for a 5% CRUT and $38,283 for a 10% CRUT.

What the donor is typically interested in is determining the overall economic impact over time of establishing a CRT. If one uses a default income tax rate of 20% for both ordinary income and capital gains [FN30] and considers only *494 the income tax and not the estate tax impact, the family unit would end up with significantly more in assets if they simply sold the real estate than they would if the CRT were established, as shown in Exhibit 2.

The tables in the exhibits imply a consistency of economic result that may not be present in fact. First, a 5% CRT with the charity already named would typically entitle the trust to professional management at no cost to the donor. Second, one must be mindful of the reality that a large bank balance in the hands of someone with little experience managing money could expose the funds to the many charlatans of the marketplace or the donor's (or his children's) own whims, with the result that the anticipated growth never occurs. Last, an individual would have to pay tax on the full amount of his earnings each year, whereas his trust distributions would trigger tax only to the extent trust income were in fact distributed to him.

Of course, an individual would typically have more flexibility in timing the recognition of capital gains, and could certainly plan his affairs to minimize their tax impact. He could, for example, purchase municipal bonds or replacement real estate whose appreciation would not trigger currently taxable income. Last, he could certainly invest the proceeds in index funds, thereby beating 80% or more of professional managers and minimizing his tax exposure in the process.

The income tax results are obviously not the end of the story. We still must consider the estate tax impact of establishing the CRT versus not establishing it. The problem with this calculation is that very different results occur, depending on the year of death.

If the donor dies at a time when estate tax rates are at current levels (that is, an estate tax applicable exclusion amount of $1.5 million), the total estate tax payable on a gross estate of $3,015,788 with no marital deduction would be $800,722, leaving a net to the family of $2,124,593, assuming administration expenses of 3%. If the applicable exclusion amount has increased to $2 million, the tax is reduced to $601,073, leaving $2,324,242 for the family. And if the applicable exclusion amount is up to $3.5 million, the only estate tax payable would be the Massachusetts tax of $175,428, leaving $2,749,887 for the family.

Exhibit 3 shows the comparison at various estate tax levels for this estate with and without a CRT. [FN31]

The tables in Exhibit 3 illustrate a number of points. First, there is no way to predict the actual estate tax payable, because there is no way to predict the year of death, the estate tax rates that will be applicable at that point, or what the estate will be worth. An increase in the federal exemption equivalent from $1.5 million to $3.5 million, currently scheduled to take place over a five-year period, would result in a decrease of estate taxes payable by $625,000 if the conservation easement is simply sold. If one looks strictly at financial results, it appears the heirs will be better off without a CRT, but that assumes equivalent investment results. Second, when one takes the estate tax into consideration, *495 the difference in net amount passing to heirs in the estate with and without the CRT is not as pronounced as one would expect due to the impact of the estate tax. It is not until the estate tax is effectively repealed by the implementation of the $3.5 million credit equivalent that the differential becomes dramatic.

Conclusion

A CRT can be a very useful vehicle through which to sell a conservation easement, but only in the right circumstances. As with every other tax vehicle, there are caveats to its use. First, transfer of the real estate to the trust must be completed before the donor is legally committed to sell the land or the conservation easement. If it is not, the sale will be fully taxable to the donor under assignment of income principles.

Second, once the real estate has been transferred to the trust, it is totally unavailable to the donor, regardless of his needs. His interest is limited to his retained interest in the trust, whose duration is limited to no more than 20 years. There is no way to guarantee against reversals the donor might suffer during his own lifetime. If he retains the interest for his life or for the joint lives of two individuals, he risks premature termination of the income stream, unless he purchases life insurance to mitigate that risk. And if he forgoes the life insurance, his heirs could be significantly short-changed by his premature death.

Third, the perhaps short-lived reduction in capital gains rates at the federal level should not be ignored. If the landowner should sell the conservation easement this year, he would pay capital gains tax on the sale at the 15% rate federally, an historically low rate. If he donates the land to the CRT which then sells the conservation easement, his capital gain distributions would be taxed at the rate in effect at the time the distributions are made, which may be higher. Although the proceeds would be invested on a pre-tax basis, the increased financial demands of the federal government may render future tax treatment difficult to predict. Moreover, the estate tax ramifications are totally unpredictable, because they depend on the year of death and whether the significant reductions in estate tax rates remain in effect.

For the client whose motivation is primarily preserving open land rather than profiting from the Tax Code, selling a conservation easement through a CRT can be a truly beneficial technique. It would allow the donor to preserve land for future generations while maintaining an income stream for himself, and it would allow him to benefit his preferred charities rather than limiting him to those with a conservation purpose. Whether he or his heirs will benefit financially from the arrangement is not clear, because economic results are dependent on so many unpredictable variables. Yet what cannot be ignored is the enormous psychological satisfaction of preserving open land for generations yet unborn; in the end, this alone may be enough.

*492 Exhibit 1

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Income Tax Results of Various Alternatives

*493 Exhibit 2

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Overall Economic Results at Trust Termination

*494 Exhibit 3

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Comparison of Net Results in Different Years of Death

[FNa1]. JOAN B. DI COLA practices estate planning law in Boston. She is a past Co-Chair of the Estate Planning Committee of the Boston Bar Association, and has written and lectured frequently on estate planning. Copyright (c) 2004, Joan B. Di Cola.

[FN1]. Other than certain gains attributable to excess depreciation on real estate, which continue to be taxed at 25%. See IRC Section 1(h)(1)(D).

[FN2]. See Technical Information Release 02-21.

[FN3]. Unless exclusions attributable to the sale of his principal residence apply. See IRC Section 121.

[FN4]. G.L.M. c. 184, s. 32.

[FN5]. See IRC Section 2031(c).

[FN6]. IRC Section 2031(c)(8)(A).

[FN7]. IRC Section 170(h)(3) and Reg. 1.170A-14(c)(1).

[FN8]. Reg. 1.170A-14(c)(1).

[FN9]. IRC Section 170(h)(1)(C).

[FN10]. See Chapter 186, section 28 of the Acts of 2002, amending G.L.M. c. 65C, s. 2A, which refers to the Internal Revenue Code in effect on 12/31/00.

[FN11]. Roughly speaking, adjusted gross income. See IRC Section 170(b)(1)(C)(i).

[FN12]. Nevertheless, there are restrictions. A vacant parcel of land adjacent to the client's principal residence can qualify for the exclusion only if the land is used as part of his residence.

[FN13]. Rev. Rul. 77-414, 1977-2 CB 299.

[FN14]. IRC Section 1(h)(1)(C), as amended by JGTRRA.

[FN15]. But see Rev. Rul. 77-414, supra note 13.

[FN16]. IRC Sections 664(d)(1)(D) and 664(d)(2)(D).

[FN17]. IRC Sections 664(d)(1)(A) and 664(d)(2)(A).

[FN18]. The calculation becomes significantly more complicated if the donor names a private foundation as remainder beneficiary.

[FN19]. Farrier, 15 TC 277 (1950), acq.; Ltr. Rul. 9413020.

[FN20]. 1978-1 CB 83.

[FN21]. 62 TC 684 (1974), aff'd on another issue, 523 F.2d 1308, 36 AFTR2d 75-5942 (CA-8, 1975), acq. 1978-2 CB 2, nonacq. 1978-2 CB 4. See also Grove, 490 F.2d 241, 32 AFTR2d 73-5523 (CA-2, 1973); Carrington, 476 F.2d 704, 31 AFTR2d 73-1166 (CA-5, 1973).

[FN22]. See Rauenhorst, 119 TC 157 (2002).

[FN23]. Ltr. Ruls. 9452026 and 9452020 [securities], and Ltr. Rul. 8533006 [real estate].

[FN24]. 174 F.3d 997, 83 AFTR2d 99-1775 (CA-9, 1999).

[FN25]. 697 F.2d 473, 51 AFTR2d 83-445 (CA-2, 1982).

[FN26]. In typical Washington fashion, the reduced capital gains and dividend rates will sunset in 2008, and the reduced ordinary income rates will sunset in 2010.

[FN27]. This ignores both the state capital gains tax and the deductibility of that tax on the federal return.

[FN28]. The year when the estate tax is repealed and the basis of assets in an estate reverts to a carryover basis (though there is up to $4.3 million of allocable basis increase if the decedent is married and his assets are left in certain qualified ways for the benefit of his spouse).

[FN29]. The calculations are derived from the software program PGCalc, which is the premier program for calculating the tax impact of establishing various charitable gifts.

[FN30]. The default assumption in the planned giving software is typically that the person who sells and reinvests receives all ordinary income in subsequent years, whereas the tier system for taxing the income of the CRT means that it is allocated between favorably taxed capital gain and ordinary income. This obviously provides an unfair advantage in the analysis to the CRT, which the assumptions in the text eliminate.

[FN31]. These numbers were derived using the BNA Estate Tax Planner software, and assume a Massachusetts resident decedent who is single and has no other assets.

31 Est. Plan. 489, 2004 WL 2137068 (W.G.&.L.)

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