
STATE OF MICHIGAN

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CONSERVATION EASEMENTS: GENERAL PROPERTY TAX ACT: NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT: PROPERTY: TAXATION:	Whether the post-mortem creation of a conservation easement exempts property burdened by the easement from uncapping for real property tax purposes otherwise occasioned by the death of the owner

The General Property Tax Act (GPTA), MCL 211.1 et seq, mandates that the taxable value of real property shall be uncapped when a "transfer of ownership" occurs. For purposes of the GPTA, a "transfer of ownership" that results in uncapping includes transfers by will to the deceased owner's devisees or by intestate succession to the deceased owner's heirs. Title to a decedent's real property passes at the time of his or her death, whether by will or by intestate succession. If, however, the land that passes at the time of death is, at that time, subject to a "conservation easement" as defined by section 2140 of the Natural Resources and Environmental Protection Act, MCL 324.2140, or is eligible for a deduction as a "qualified conservation contribution" under section 170(h) of the Internal Revenue Code, 26 USC 170(h), that transfer of land, but not buildings or structures located on the land, is exempt from uncapping. But a "conservation easement" or a deduction for a "qualified conservation contribution" that is not created until after the death of a property owner will not avoid uncapping of the property's taxable value for the transfer that occurred at death. Finally, qualified agricultural property is exempt from taxes levied for school operating purposes under MCL 211.7ee, and a transfer of such property is exempt from the uncapping of its taxable value under MCL 211.27a(7)(n).

Opinion No. 7233

June 16, 2009

Honorable Michelle A. McManus
State Senator
The Capitol
Lansing, MI 48909

You have asked several questions concerning particular property conveyances occurring at or after the death of an owner that may constitute exceptions to "transfers of ownership" under the applicable tax laws, so as to exempt those transfers from the "uncapping" of their taxable value for property tax purposes.

Michigan voters adopted Proposal A in 1994, amending Const 1963, art 9, § 3 to generally limit increases in property taxes on a parcel of property, as long as it remains owned by the same party, by capping the amount that the "taxable value" of the property may increase each year, even if the property's "true cash value," that is, its actual market value, rises at a greater rate. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 12; 743 NW2d 902 (2008). Const 1963, art 9, § 3 states in relevant part:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property

adjusted for additions and losses, shall not
increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever
is less until ownership of the parcel of property is transferred. *When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed*
at the applicable proportion of current true cash value. [Emphasis added.]

Thus, when ownership of a parcel is transferred as defined by law, the capping required by art 9, § 3 is lifted, and the property is levied for taxes in an amount equal to not more than 50% of true cash value, subject to an equalizing process, multiplied by the total mills assessed within the taxing jurisdictions within which the property is located.

The General Property Tax Act (GPTA), 1893 PA 206, MCL 211.1 *et seq*, further addresses these matters. "Capping" is accomplished by annually establishing a taxable value for property, a value that initially equals 50% of true cash value (subject to equalization), the State Equalized Value (SEV). From year to year thereafter, however, subject to adjustments for losses and additions, the taxable value shall not increase by more than 5% or the inflation rate, whichever is less, and shall in no case exceed the SEV for the tax year. MCL 211.27a(2).[1] Taxes are then levied in an amount equal to the taxable value, multiplied by the total millage.

The cap on taxable value so established, however, is subject to being lifted or "uncapped" when there is a "transfer of ownership" of the property. When uncapped, the taxable value of property is again equal to its SEV. MCL 211.27a(3).[2]

The GPTA defines "transfer of ownership" for purposes of the act to mean "the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." MCL 211.27a(6). Transfers of ownership that result in uncapping include "[a] conveyance by distribution under a will or by intestate succession, except if the distributee is the decedent's spouse." MCL 211.27a(6)(f).

Exemptions from uncapping for conservation easements and conservation contributions

Section 27a(7) of the GPTA, MCL 211.27a(7), identifies a number of transfers that are *not* included within a covered "transfer of ownership." To this list of exempt transfers, 2006 PA 446 added two provisions relevant to your question, subparagraphs 27a(7)(p)(*i*) and (*ii*), which state:

(7) Transfer of ownership does not include the following:

* * *

(p) Beginning on the effective date of the amendatory act that added this subdivision, a transfer of land, but not buildings or structures located on the land,
which meets 1 or more of the following requirements:

(*i*) The land is subject to a conservation easement under subpart 11 of part 21 of the natural resources and environmental protection act [NREPA], 1994 PA 451,
MCL 324.2140 to 324.2144. As used in this subparagraph, "conservation easement" means that term as defined in section 2140 of the natural resources and
environmental protection act, 1994 PA 451, MCL 324.2140.

(*ii*) A transfer of ownership of the land or a transfer of an interest in the land is eligible for a deduction as a qualified conservation contribution under section
170(h) of the internal revenue code, 26 USC 170. [MCL 211.27a(7)(p)(i) and (ii).]

In other words, the described transfer of ownership of land, but not buildings or structures located on the land, is exempt from uncapping if, at the time of transfer, the land "is subject to" a conservation easement or the transfer "is eligible for" a deduction as a qualified conservation contribution.

You ask whether the creation or transfer post-mortem (that is, after the death of an owner) of a "conservation easement" under the NREPA or a deductible "qualified conservation contribution" under the federal Internal Revenue Code serves to avoid the uncapping of the taxable value of the affected real property that would otherwise occur as a result of the owner's death.

This question involves first considering the timing by which a decedent owner's property interests are deemed to be transferred to those acquiring title to or an interest in the transferred property. Subject to any probate administration that may occur if real property assets are needed to satisfy debts of the decedent's estate, title to a decedent's real property generally passes at the time of his or her death to any devisees named in the decedent's will (testate succession) or, in the case of an owner who dies without a will (intestate succession), to the heirs as determined by the statutes of descent and distribution.[3]

As summarized in Land Title Standard 7.1 of the State Bar of Michigan's Michigan Land Title Standards, 6th Edition (2007),[4] title to an intestate decedent's property is vested as of the time of death in the heirs at law, subject to: the rights to homestead, exempt property, and family allowances; the widow's right to elect dower; the personal representative's right and duty to possess the real property and to receive the income from that property; the possibility of sale for any purpose permitted by the Estates and Protected Individuals Code, MCL 700.1101 *et seq*; liens for any federal or Michigan estate tax; and any federal or state tax that must be paid before the estate can be closed.[5] See *Diel v Diel*, 298 Mich 127; 298 NW 478 (1941), *Fowler v Cornwell*, 328 Mich 89; 43 NW2d 73 (1950), and *Pardeike v Fargo*, 344 Mich 518; 73 NW2d 924 (1955). Similarly, in the case of a testate decedent, his or her will, when probated, conveys the decedent's title to real property as of the time of death, subject to the same rights and contingent events as apply in the context of intestate transfers but subject to the additional right of the surviving spouse to elect a statutory share. See *In re Allen's Estate*, 240 Mich 661; 216 NW 446 (1927), and *Stewart v Hunt*, 303 Mich 161; 5 NW2d 737 (1942), cited in Michigan Land Title Standard 7.2.

With regard to post-mortem transfers of land, the powers of a personal representative are only those given by statute or in the will. The personal representative has certain fiduciary responsibilities, including protecting the rights of devisees under the will or heirs at law. The personal representative has no inherent right to donate assets of the decedent to others. Neither has the personal representative any inherent right to diminish the value of real property assets of a decedent's estate by granting easements or encumbrances to others. Thus, when considering the timing by which an interest in property passes for tax purposes, it is useful to recall that the authority to sell or encumber the estate can only be exercised where, and in the manner, it is given in the will or by state law. See *Parkhurst v Trumbull*, 130 Mich 408; 90 NW 25 (1902). See generally, 16 *Michigan Law and Practice, Estates*, § 144.

The first of the two types of exempt transfers identified in MCL 211.27a(7)(p)(i) and (ii) protects from uncapping a transfer of land that, at the time title passes, "is subject to" a conservation easement under Part 21, Subpart 11 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.2140 to 324.2144, which was added by 1995 PA 60, effective May 24, 1995. Part 21, Subpart 11, entitled "Conservation and Historic Preservation Easement," permits the creation, enforcement, transfer, and assignment of certain easements in gross,[6] (as well as restrictions, covenants and conditions) defined as a "conservation easement" or an "historic preservation easement."[7]

MCL 324.2140 defines a conservation easement as:

> [A]n interest in land that provides limitation on the use of land or a body of water or requires or prohibits certain acts on or with respect to the land or body of water,
> whether or not the interest is stated in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument executed by or on behalf of the
> owner of the land or body of water or in an order of taking, which interest is appropriate to retaining or maintaining the land or body of water, predominantly in its
> natural, scenic, or open condition, or in an agricultural, farming, open space, or forest use, or similar use or condition.[8]

Section 2141 of the NREPA, MCL 324.2141, renders a conservation easement "granted to a governmental entity or to a charitable or educational association, corporation, trust, or other legal entity" enforceable against the owner of the land or body of water encumbered by the easement "despite a lack of privity of estate or contract, a lack of benefit running to particular land or a body of water, or the fact that the benefit may be assigned to another governmental entity or legal entity, including a conservation easement executed before March 31, 1981."[9] Additionally, an interest in a conservation easement may be exempt from all real property taxes so long as it is held by:

> (a) The United States, MCL 211.7;
>
> (b) The State of Michigan, MCL 211.7*l*;

(c) A governmental entity, MCL 211.7m; or

(d) A qualifying charitable or educational association, MCL 211.7n and MCL 211.7o.

Generally speaking, when an owner grants a conservation easement on his property, he is voluntarily giving up his right to develop his property while retaining his other rights concerning that property. These retained rights may include, for example, the right to transfer the land, to exclude others from the property, to possess and use the land, and allow others to use the land. Thus, an owner could grant an easement limiting the use of the land for forestry purposes but retaining a right to cut timber in restricted quantities or from selected places on the property, or an owner could grant an easement to maintain open spaces on the property, free of any development, while retaining the right to farm the property for a given number of years, and countless other scenarios. Whenever a property interest is retained by the owner, assessors assign separate values for the conveyed conservation easement and for the fee or other interest retained by the owner; the values of both the retained interest and the conservation easement remain capped.

Under section 27a(7)(p)(i) of the GPTA, MCL 211.27a(p)(7)(*i*), a "transfer of ownership" does not include a transfer of land subject to a conservation easement under Part 21, Subpart 11, of the NREPA. Thus, the creation of a "conservation easement" by gift, grant, purchase, or eminent domain, or the conveyance of lands subject to (that is, burdened by) a conservation easement, will not result in uncapping the values of the interests held or encompassed in the "conservation easement"[10] or the interests in the underlying fee, so long as the "conservation easement" is continued.

The second type of exempt transfer identified in MCL 211.27a(7)(p) is one that is eligible for a deduction as a qualified conservation contribution under section 170(h) of the Internal Revenue Code, 26 USC 170(h). As summarized in the 2009 U.S. Master Tax Guide, CCH, ¶ 1063, p 373:

Generally, no charitable deduction is allowed for gifts to charity of the rent free use of property and other nontrust gifts where less than the taxpayer's entire
interest in the property is contributed, except in the following cases: . . . (3) a qualified conservation contribution.

The 2009 U.S. Master Tax Guide further illuminates how the qualified conservation contribution works:

Qualified Conservation Contributions. A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization
exclusively for conservation purposes that are protected in perpetuity. Qualified real property includes a donor's entire interest in real property (other than an interest
in subsurface oil, gas or other minerals, and the right to access to such minerals), a remainder interest, and a restriction granted in perpetuity on the property's use
(i.e., an easement). A qualified organization includes certain governmental units, public charities that meet certain public support tests, and certain supporting
organizations. A qualified conservation purpose includes: (1) preserving land, for outdoor recreation by or the education of the general public; (2) protecting a
relatively natural habitat of fish, wildlife, or plants; (3) preserving open space for the public's scenic enjoyment or under a governmental conservation policy that
will yield a significant public benefit; and (4) preserving an historically important land area or a certified historic structure. (Code Sec. 170(h)). [Footnote omitted.]

Thus, under MCL 211.27a(7)(p)(*ii*), a qualified conservation contribution made by an owner exempts the transfer of land, a part of which qualifies for the deduction under 26 USC 170(h), from uncapping. The GPTA does not, however, exempt from uncapping subsequent transfers of any interests in the land that were retained and not included in the qualified conservation easement. In that respect, an exemption under MCL 211.27a(7)(p)(*ii*) differs from an exemption under MCL 211.27a(7)(p)(*i*). Subsequent transfers of retained interests in land for which a deduction for a qualified conservation contribution was previously taken, may be made exempt from uncapping, however, if that subsequent transfer qualifies as one that is subject to a conservation easement under MCL 211.27a(7)(p)(*i*).

Reducing a decedent's "gross estate" for estate tax purposes

Your request also asks about section 2031 of the Internal Revenue Code, 26 USC 2031.[11] This provision defines a decedent's

"gross estate" and its valuation for federal estate tax purposes. The section permits the reduction of the value of an estate, and the resulting federal estate tax liability, by the value of certain qualifying post-mortem grants of qualified conservation easements. The relevant provisions of section 2031 specify how the value of the gross estate shall be determined, how the estate tax due shall be calculated, and how easements granted after death shall be treated. They also include definitions of applicable terms.

But 26 USC 2031 does not affect the GPTA. It does not make it competent for any person not otherwise authorized under state laws or the will of a decedent or trust instrument to effectuate a grant of a trust in land. It does not in any way affect either the date on which a conveyance is effective to pass title to devisees or heirs or the validity of any conveyance. When title passes free from any "conservation easement," the taxable value is uncapped. The post-mortem creation of a conservation easement that encumbers lands, title to which previously vested in heirs or devisees at the time of the decedent prior owner's death, does not serve to avoid the uncapping that occurred because of the conveyance at the time of death. Thus, while the creation of a conservation easement after the death of the property owner may be accomplished consistent with 26 USC 2031 in such a way as to reduce liability for federal (and any corresponding state) estate taxes, the process by which a particular conveyance qualifies as exempt from uncapping under the GPTA is entirely separate and unrelated.

Exemption of qualified agricultural property from school operating taxes and uncapping

You also ask about the provisions of the GPTA that exempt "qualified agricultural property" from taxes levied by a local school district for school operating purposes and that permit successive owners of qualifying property to enjoy the same exemption from school operating millages. See MCL 211.7dd(d) and MCL 211.7ee.

Section 7ee(1) of the GPTA, MCL 211.7ee(1), provides an exemption from taxes imposed for school operating purposes:

> Qualified agricultural property is exempt from the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211, according to the provisions of this section.

"Qualified agricultural property" is defined by section 7dd(d) of the GPTA which refers to the definition in MCL 324.36101:

> "Qualified agricultural property" means unoccupied property and related buildings classified as agricultural, or other unoccupied property and related buildings located on that property devoted primarily to agricultural use as defined in section 36101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.36101. Related buildings include a residence occupied by a person employed in or actively involved in the agricultural use and who has not claimed a principal residence exemption on other property. Property used for commercial storage, commercial processing, commercial distribution, commercial marketing, or commercial shipping operations or other commercial or industrial purposes is not qualified agricultural property. A parcel of property is devoted primarily to agricultural use only if more than 50% of the parcel's acreage is devoted to agricultural use. An owner shall not receive an exemption for that portion of the total state equalized valuation of the property that is used for a commercial or industrial purpose or that is a residence that is not a related building. [MCL 211.7dd(d).]

An "owner" of such property is defined in relevant part by section 7dd(a) of the GPTA, MCL 211.7dd(a), to include a person whose ownership is acquired when the property passes by will or intestacy:

> (*i*) A person who owns property or who is purchasing property under a land contract.
>
> (*ii*) A person who is a partial owner of property.
>
> (*iii*) A person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession.

In addition to that exemption from taxes levied for school operating purposes, section 27a(7)(n) of the GPTA specifies that, for

uncapping purposes, a "transfer of ownership" does not include a transfer of qualified agricultural property under the following circumstances:

> A transfer of qualified agricultural property, if the person to whom the qualified agricultural property is transferred files an affidavit with the assessor of the local tax collecting unit in which the qualified agricultural property is located and with the register of deeds for the county in which the qualified agricultural property is located attesting that the qualified agricultural property shall remain qualified agricultural property. The affidavit under this subdivision shall be in a form prescribed by the department of treasury. An owner of qualified agricultural property shall inform a prospective buyer of that qualified agricultural property that the qualified agricultural property is subject to the recapture tax provided in the agricultural property recapture act, 2000 PA 261, MCL 211.1001 to 211.1007, if the qualified agricultural property is converted by a change in use. If property ceases to be qualified agricultural property at any time after being transferred, all of the following shall occur:
>
> (*i*) The taxable value of that property shall be adjusted under subsection (3) as of the December 31 in the year that the property ceases to be qualified agricultural property.
>
> (*ii*) The property is subject to the recapture tax provided for under the agricultural property recapture act, 2000 PA 261, MCL 211.1001 to 211.1007. [MCL 211.27a(7)(n).]

To continue to qualify for the tax treatment associated with the ownership and use of "qualified agricultural property," successor owners, including those acquiring the qualified lands by testate or intestate succession, must continue to devote the property to agricultural use as defined by section 36101 of the NREPA, MCL 324.36101.[12]

Section 27a(7)(n) of the GPTA, MCL 211.27a(7)(n), provides that the transfer of qualified agricultural property is an exempt transfer, "if the person to whom the qualified agricultural property is transferred files an affidavit with the assessor of the local tax collecting unit," as provided in that subsection. Section 7ee of the GPTA, MCL 211.7ee, spells out the circumstances for which an affidavit must be filed to maintain the exemption from school operating taxes.

It is my opinion, therefore, that the General Property Tax Act (GPTA), MCL 211.1 *et seq*, mandates that the taxable value of real property shall be uncapped when a "transfer of ownership" occurs. For purposes of the GPTA, a "transfer of ownership" that results in uncapping includes transfers by will to the deceased owner's devisees or by intestate succession to the deceased owner's heirs. Title to a decedent's real property passes at the time of his or her death, whether by will or by intestate succession. If, however, the land that passes at the time of death is, at that time, subject to a "conservation easement" as defined by section 2140 of the Natural Resources and Environmental Protection Act, MCL 324.2140, or is eligible for a deduction as a "qualified conservation contribution" under section 170(h) of the Internal Revenue Code, 26 USC 170(h), that transfer of land, but not buildings or structures located on the land, is exempt from uncapping. But a "conservation easement" or a deduction for a "qualified conservation contribution" that is not created until after the death of a property owner will not avoid uncapping of the property's taxable value for the transfer that occurred at death. Finally, qualified agricultural property is exempt from taxes levied for school operating purposes under MCL 211.7ee, and a transfer of such property is exempt from the uncapping of its taxable value under MCL 211.27a(7)(n).

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[1] Section 27a of the GPTA states in relevant part:

> (1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.
>
> (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the

property's state equalized valuation in 1994.

(b) The property's current state equalized valuation.

[2] "Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer."

[3] Other transfers of land or interests in land are effective at the time an instrument of conveyance (properly executed and acknowledged) is delivered to, and accepted by, the grantee. *Resh v Fox*, 365 Mich 288; 112 NW2d 486 (1961); *Taft v Taft*, 59 Mich 185; 26 NW 426 (1886); and *Thatcher v St Andrews Church*, 37 Mich 264 (1877).

[4] Available at < https://www.michbar.org/realproperty/LTS6/Chapter%207.pdf> (accessed April 20, 2009).

[5] Concerning the possibility of sale during administration, see MCL 700.3617 (intestate decedent) and MCL 700.3902 (testate decedent).

[6] While an easement commonly benefits one tract of land to the detriment of another tract of land (an easement appurtenant), an "easement in gross," such as those created by Part 21, is an easement that encumbers one tract of land without benefiting another tract of land. Easements in gross are not assignable at common law, except those which are commercial in nature, such as an easement for pipelines, telephone or telegraph lines, or railroads. See *Stockdale v Yerden*, 220 Mich 444; 190 NW 225 (1922), and *Johnston v Mich Consolidated Gas Co*, 337 Mich 572; 60 NW2d 464 (1953), cited in Michigan Land Title Standards, 6th Edition, Standard 14.2. See also *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597; 456 NW2d 425 (1990) (suggesting that an electric power line easement is an assignable easement in gross).

[7] This part succeeds 1980 PA 197 (effective March 31, 1981), MCL 399.251, which it repeals.

[8] See, for example, the Farmland and Open Space Preservation Act, Part 361 of the NREPA, MCL 324.36101, former 1974 PA 116, MCL 554.701 (before its codification into the NREPA).

[9] March 31, 1981, is the effective date of former 1980 PA 197 (former MCL 339.251), which was recodified in 1995 as Part 21, Subpart 11, of the NREPA. At common law, an easement in gross could not be assigned. This statute altered the common law by providing that a non-appurtenant conservation easement or easement in gross may be created, freely assigned, and enforced. This provision would validate conservation easements created both before or after the 1980 enabling act.

[10] The State of Michigan, as well as local units of government, may acquire interests qualifying as a conservation easement under the Farmland and Open Space Preservation Program, provided for under Part 361 of the NREPA, MCL 324.36101.

[11] For the complete text of 26 USC 2031, see Appendix A to this opinion.

[12] MCL 211.27a(11)(f) provides that, "'[q]ualified agricultural property' means that term as defined in section 7dd." MCL 211.7dd(d) defines "qualified agricultural property" by reference to section 36101 of the NREPA, MCL 324.36101.

APPENDIX A

26 USC 2031

§ 2031. Definition of gross estate

(a) General. – The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

(b) Valuation of unlisted stock and securities. – In the case of stock and securities of a corporation the value of which, by reason of their not being listed on an exchange and by reason of the absence of sales thereof, cannot be determined with reference to bid and asked prices or with reference to sales prices, the value thereof shall be determined by taking into consideration, in addition to all other factors, the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange.

(c) Estate tax with respect to land subject to a qualified conservation easement. –

(1) In general. – If the executor makes the election described in paragraph (6), then, except as otherwise provided in this

subsection, there shall be excluded from the gross estate the lesser of –

(A) the applicable percentage of the value of land subject to a qualified conservation easement, reduced by the amount of any deduction under section 2055(f) with respect to such land, or

(B) the exclusion limitation.

(2) Applicable percentage. – For purposes of paragraph (1), the term "applicable percentage" means 40 percent reduced (but not below zero) by 2 percentage points for each percentage point (or fraction thereof) by which the value of the qualified conservation easement is less than 30 percent of the value of the land ([1]determined without regard to the value of such easement and reduced by the value of any retained development right (as defined in paragraph (5)). The values taken into account under the preceding sentence shall be such values as of the date of the contribution referred to in paragraph (8)(B).

(3) Exclusion limitation. – For purposes of paragraph (1), the exclusion limitation is the limitation determined in accordance with the following table:

In the case of estates of decedents dying during:	The exclusion limitation is:
1998	$100,000
1999	$200,000
2000	$300,000
2001	$400,000
2002 or thereafter	$500,000

(4) Treatment of certain indebtedness. –

(A) In general. – The exclusion provided in paragraph (1) shall not apply to the extent that the land is debt-financed property.

(B) Definitions. – For purposes of this paragraph –

(i) Debt-financed property. – The term "debt-financed property" means any property with respect to which there is an acquisition indebtedness (as defined in clause (ii)) on the date of the decedent's death.

(ii) Acquisition indebtedness. – The term "acquisition indebtedness" means, with respect to debt-financed property, the unpaid amount of –

(I) the indebtedness incurred by the donor in acquiring such property,

(II) the indebtedness incurred before the acquisition of such property if such indebtedness would not have been incurred but for such acquisition,

(III) the indebtedness incurred after the acquisition of such property if such indebtedness would not have been incurred but for such acquisition and the incurrence of such indebtedness was reasonably foreseeable at the time of such acquisition, and

(IV) the extension, renewal, or refinancing of an acquisition indebtedness.

(5) Treatment of retained development right. –

(A) In general. – Paragraph (1) shall not apply to the value of any development right retained by the donor in the conveyance

of a qualified conservation easement.

(B) Termination of retained development right. – If every person in being who has an interest (whether or not in possession) in the land executes an agreement to extinguish permanently some or all of any development rights (as defined in subparagraph (D)) retained by the donor on or before the date for filing the return of the tax imposed by section 2001, then any tax imposed by section 2001 shall be reduced accordingly. Such agreement shall be filed with the return of the tax imposed by section 2001. The agreement shall be in such form as the Secretary shall prescribe.

(C) Additional tax. – Any failure to implement the agreement described in subparagraph (B) not later than the earlier of –

(i) the date which is 2 years after the date of the decedent's death, or

(ii) the date of the sale of such land subject to the qualified conservation easement,

shall result in the imposition of an additional tax in the amount of the tax which would have been due on the retained development rights subject to such agreement. Such additional tax shall be due and payable on the last day of the 6th month following such date.

(D) Development right defined. – For purposes of this paragraph, the term "development right" means any right to use the land subject to the qualified conservation easement in which such right is retained for any commercial purpose which is not subordinate to and directly supportive of the use of such land as a farm for farming purposes (within the meaning of section 2032A(e)(5)).

(6) Election. – The election under this subsection shall be made on or before the due date (including extensions) for filing the return of tax imposed by section 2001 and shall be made on such return. Such an election, once made, shall be irrevocable.

(7) Calculation of estate tax due. – An executor making the election described in paragraph (6) shall, for purposes of calculating the amount of tax imposed by section 2001, include the value of any development right (as defined in paragraph (5)) retained by the donor in the conveyance of such qualified conservation easement. The computation of tax on any retained development right prescribed in this paragraph shall be done in such manner and on such forms as the Secretary shall prescribe.

(8) Definitions. – For purposes of this subsection –

A) Land subject to a qualified conservation easement. – The term "land subject to a qualified conservation easement" means land –

(i) which is located in the United States or any possession of the United States,

(ii) which was owned by the decedent or a member of the decedent's family at all times during the 3-year period ending on the date of the decedent's death, and

(iii) with respect to which a qualified conservation easement has been made by an individual described in subparagraph (C), as of the date of the election described in paragraph (6).

(B) Qualified conservation easement. – The term "qualified conservation easement" means a qualified conservation contribution (as defined in section 170(h)(1) of a qualified real property interest (as defined in section 170(h)(2)(C), except that clause (iv) of section 170(h)(4)(A) shall not apply, and the restriction on the use of such interest described in section 170(h)(2)(C) shall include a prohibition on more than a de minimis use for a commercial recreational activity.

(C) Individual described. – An individual is described in this subparagraph if such individual is –

(i) the decedent,

(ii) a member of the decedent's family,

(iii) the executor of the decedent's estate, or

(iv) the trustee of a trust the corpus of which includes the land to be subject to the qualified conservation easement.

(D) Member of family. – The term "member of the decedent's family" means any member of the family (as defined in section 2032A(e)(2)) of the decedent.

(9) Treatment of easements granted after death. – In any case in which the qualified conservation easement is granted after the date of the decedent's death and on or before the due date (including extensions) for filing the return of tax imposed by section 2001, the deduction under section 2055(f) with respect to such easement shall be allowed to the estate but only if no charitable deduction is allowed under chapter 1 to any person with respect to the grant of such easement.

(10) Application of this section to interests in partnerships, corporations, and trusts. – This section shall apply to an interest in a partnership, corporation, or trust if at least 30 percent of the entity is owned (directly or indirectly) by the decedent, as determined under the rules described in section 2057(e)(3).

(d) Cross reference. – For executor's right to be furnished on request a statement regarding any valuation made by the Secretary within the gross estate, see section 7517.

[1] So in original. No closing parenthesis was enacted.
