THE TAX CLUB

SPINNING CHARITABLE FUNCTIONS OFF FROM NON-CHARITABLE ENTITIES; WHAT INTEREST SHOULD THE CHARITY HAVE TO SUSTAIN DEDUCTIBLE FUNDRAISING; TILTING AGAINST WINDMILLS?

J. Edward Shillingburg
March 21, 2001

© 2001 All rights reserved

I. Introduction 1

II. General Principles
A. Basic Requirements 2
B. Public vs. Private Benefit 3
C. Non-Inurement 4
D. Control by Non-Exempt Entities 4

III. Spinoffs Of the Fundraising Activity Alone 5
A. A Scholarly Publication Program 6
B. Fraternity Educational Areas 9

IV. Spinoffs of Program Activities and Fundraising 10
A. A Company Park 10
B. A Bar Association Law Library 11
C. A School 12
E. An Archival Collection 15
F. A Conservation Easement 17

V. A Preliminary Strategy 19

VI. Principles and Strategy Applied 19
A. Background 20
B. Charitable Funding Alternatives 21
1. Cash Grants 21
2. Contribute Cash to a Family Foundation 22
3. Contribute the Windmill to a Family Foundation 23
4. Contribute the Windmill to a New Public Charity 24
5. Contribute the Windmill to an Established Public Entity 25
6. Gift and Removal 25
7. Gift Combined with a Long-term Lease 26
8. Lease the Windmill and Property 27
9. Gift of an Easement on the Field 28
10. Gift of an Easement on the Windmill 29
11. Combined Gift and Sale 30

VII. Conclusion 30

**Spinning Charitable Functions Off From Non-Charitable Entities;
What Interest Should the Charity Have to Sustain Deductible Fundraising;
Tilting Against Windmills?**

> *"Look, your worship," said Sancho. "What we see there are not giants but windmills, and what seem to be their arms are the vanes that turned by the wind make the millstone go."*[1]

I. Introduction

The purpose of this paper is to review the opportunities for spinning off activities from non-charitable organizations to affiliated and independent charitable organizations for the purpose of making the activity eligible for charitable deduction-assisted fundraising. In the typical situation one identifies an activity conducted by a taxable or other non-section 501(c)(3) organization and tests it to determine whether, if it were operated within an appropriately organized and operated nonprofit organization, the organization would qualify under section 501(c)(3). In the first instance, one would review the program activity, as conducted by the non-section 501(c)(3) organization, to determine whether a separately organized section 501(c)(3) organization could be established and qualified to raise funds and make grants to the non-section 501(c)(3) organization to support the program activity. Thus, the fundraising activity is spunoff (or created) but the program activity continues to be conducted by the non-section 501(c)(3) organization. In a second step, one would review the program activity to determine whether it could be conducted by a new section 501(c)(3) organization, which would take over the program activity and the related fundraising activity. Business, administrative and other non-tax considerations may dictate which

---

[1] Miguel de Cervantes, Don Quioxte (trans. John Ormsby), chapter 10 (http://www.knowledgerush.com/books/3.html) (visited 3/19/01).

spinoff is possible or preferable.[2]

I will review the general principles for section 501(c)(3) organizations, outline some successful cases and then turn to an example – a privately owned historic structure – to test alternatives available to its owner. I hope to provide some useful observations, and to benefit from your comments and suggestions.

II. General Principles

A. Basic Requirements

The basic requirements for a section 501(c)(3) organization are (Code section 501(c)(3)):[3]

(a) It is organized and operated exclusively for religious, charitable, scientific, literary or educational purposes;

(b) No part of its income or assets inure to the benefit of any private individual;

(c) No substantial part of its activities is attempting to influence legislation; and

(d) It does not participate in election activities.

The basic requirements for an organization contributions to which qualify for the income tax charitable deduction are that it be organized in the United States and that it meet

---

[2] There will be no discussion of spinoffs by a section 501(c)(3) organization to carry out one of its exempt purposes. E.g., Rev. Rul. 58-194, 1958-1 C.B. 240 (bookstore located on a university campus and operated primarily for the convenience of students, faculty and staff qualified under section 501(c)(3)). There will be no discussion of spinoffs to taxable affiliates. E.g., Center for Corporate Responsibility v. Schultz, 368 F. Supp. 863 (D. D. C. 1973) (organization promoting social welfare through education and litigation was described in § 501(c)(3) notwithstanding having a sister taxable organization engaged in proxy contests). And, there will be no discussion of spinoffs of lobbying and other activities to affiliated section 501(c)(4) and other organizations. E. g., Regan v. Taxation With Representation, 461 U.S. 540 (1983). See, generally, Thomas and Kindell, "Affiliations Among Political, Lobbying and Educational Organizations," Chapter S, Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2000 (IRS, Aug. 31, 1999)

[3] Unless otherwise noted, "Code" references to the Internal Revenue Code of 1986, as amended, and "Treas. Regs." references are to the Treasury Regulations.

the requirements for a section 501(c)(3) organization outlined above. Code § 170(c)(2). Basically, the gift and estate tax charitable deductions are available for gifts to any section 501(c)(3) organization; the organization need not be organized in the United States. Code §§ 2055(a)(2), 2106(a)(2)(A)(ii), 2522(a)(2). As a practical matter, most situations are governed by the "organized and operated" requirement, including whether there is a significant private purpose or benefit, and the "no inurement" requirement.

B. Public vs. Private Benefit

Treasury Regulation § 1.501(c)(3)-1(d)(1)(ii) provides that an organization is not organized or operated exclusively for one or more of the purposes specified in section 501(c)(3) "unless it serves a public rather than a private interest. . . . [It must] not be organized or operated for the benefit of private interests". The presence of a substantial private purpose will prevent qualification. Better Business Bureau v. United States, 326 U.S. 279 (1945) (while the organization provided education to businessmen and the public regarding honest business practices and purchasing goods intelligently, its dominate purpose was to promote a profitable business community); Treas. Regs. § 1.501(c)(3)-1(c)(1). Private benefit and non-inurement intersect in factual situations where an organization's activities are focused on a small group that includes the creator and managers of the organization, but in a broader view inurement probably involves the payment of money to the insider and thus inurement is a subset of private benefit. Compare Rev. Rul. 68-14, 1968-1 C. B. 243 (organization formed to preserve and develop the beauty of an entire city qualified under section 501(c)(3)), with Rev. Rul. 75-286, 1975-2 C. B. 210 (organization formed to improve an area adjacent to its members' property did not qualify because it enhanced their property rights). The scope of these concepts, important as they

are, are developed elsewhere.[4]

C. Non-Inurement

Finally, section 501(c)(3) bars qualification if its "net earnings inure in whole or in part to the benefit" of "persons having a personal and private interest in the activities of the organization". Treas. Regs. §§ 1.501(a)-1(c), 1.501(c)(3)-1(c)(2).[5] Note the handling of capital costs funded by charitable grants in the cases reviewed below. See also Code § 4958 (intermediate sanctions on non-arm's length dealings with public charities) and § 4941 (self-dealing penalties on dealings with private foundations).

D. Control by Non-Exempt Entities

Taxable and other non-section 501(c)(3) organizations may establish and control a section 501(c)(3) organization. In Rev. Rul. 54-243, 1954-1 C.B. 92, the IRS ruled that organizations not exempt under section 501(c)(3) may establish a separate fund and if organized and operated exclusively for section 501(c)(3) purposes the fund will qualify under that section. See also Rev. Rul. 58-293, 1958-1 C.B. 146 (contribution to a bar association's library is not a charitable deduction but it would be if made to a separate library fund of the bar association that qualified under section 501(c)(3)); and Rev. Rul. 66-219, 1966-2 C.B. 208 (organization which otherwise meets the section 501(c)(3) requirements will not be precluded from establishing such status merely because the creator

---

[4] See, generally, "Overview of Inurement/Private Benefit Issues in IRS 501(c)(3)," Chapter C, Exempt Organizations Continuing Professional Education Technical Instruction Program for 1990 (IRS, Dec. 29, 1989), pp. 16-71; Megosh, Scollick, Salins & Chasin, "Private Benefit Under IRC 501(c)(3)", Chapter H, Exempt Organizations Continuing Professional Education Technical Instruction Program for 2001 (IRS, Sept. 6, 2000) (focusing on these issues as relating to housing and charter school situations).

[5] See also Rev. Rul. 74-600, 1974-2 C.B. 385 (placing paintings owned by a private foundation in the residence of a substantial contributor with his private collection, which an estimated 2,000 visitors were admitted to view, was self-dealing; the placement results in a direct use of the foundation's assets by or for the benefit of a disqualified person).

of the organization (if a trust) is either the sole or controlling trustee or merely because the organization is controlled by one individual); G.C.M. 34443 (March 3, 1971) (recommending no change in these Rulings); Rev. Rul. 77-272, 1977-2 C.B. 191 (organization established by a labor union to provide vocational training to native Americans under a Bureau of Indian Affairs contract was a section 501(c)(3) organization).

The type of organization typically encountered is a scholarship or other "do good things" organization, such as a company employee scholarship or disaster assistance foundation.[6] Indeed, there are a group of section 501(c)(3) organizations that are treated as public charities if they are controlled or operated in connection with a publically supported section 501(c)(4) social welfare or civic organization, a section 501(c)(5) labor union or a section 501(c)(6) trade association. Code § 509(a) (last sentence).

Fundamental to these conclusions is the IRS position that separate entities will be observed if they are separately organized and operated. Moline Properties v. Commissioner, 319 U.S. 436 (1943). Thus, it is assumed throughout the following examples and alternatives that the parent and spunoff activity are conducted by separately organized and operated entities, with separate officers and directors (albeit they may overlap), separate bank accounts and so on.

III. Spinoffs Of the Fundraising Activity Alone

Before transferring a program activity to a new section 501(c)(3) organization, first consider whether the fundraising activity for that program might be established in a section

---

[6] Regarding employer-related scholarship and educational loan organizations, see Rev. Proc. 76-47, 1976-2 C.B. 670, and Rev. Proc. 80-39, 1980-2 C.B. 772. Regarding employer-related disaster relief and emergency hardship programs, see, e.g., PLR 9630024 (April 26, 1996), revoking PLR 9228045 (April 20, 1992); and Huetter and Friendlander, "Disaster Relief and Emergency Hardship Programs", Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 1999 (IRS, Tax Analysts ed.), pp. 103, 108-113.

501(c)(3) organization. That is, an affiliated section 501(c)(3) organization might be established to a raise funds and grant them to the taxable or other non-section 501(c)(3) organization to fund the operating activity in question. In Rev. Rul. 68-489, 1968-2 C.B. 210, the Service confirmed that an organization would not adversely affect its section 501(c)(3) status by making grants to non-§ 501(c)(3) organizations provided that it retained control and discretion over use of the funds for section 501(c)(3) purposes.[7]

The principle of Rev. Rul. 68-489 was incorporated by Congress into the program related investment and grants to non- section 501(c)(3) organizations rules adopted in 1969 for private foundations. Code §§ 4944 (program related investments) and 4945 (grants to non-exempt organizations).

A. A Scholarly Publication Program

Suppose that a computer chip manufacturer, in an effort to attract and retain Ph.D level researchers, publishes a scholarly quarterly journal covering chip technology. It is made available to the public for a modest subscription price; it publishes articles by the manufacturer's personnel and personnel employed at other businesses and academic institutions; and the selection of articles is done by an editorial board made up of experts in the field in the same fashion that articles are selected by technology journals published by university and other nonprofit research institutions. The publication operates at a loss. The

---

[7] See, for example: Rev. Rul. 66-79, 1966-1 C.B. 48 (grants to foreign organizations lacking § 501(c)(3) determinations); Rev. Rul. 72-559, 1972-2 C.B. 247 (organization subsidizing new lawyers in order to provide legal services to residents of an economically depressed area may qualify under § 501(c)(3)); and Rev. Rul. 74-587, 1974-2 C.B. 162 (organization making low interest loans and equity investments in business enterprises in an economically depressed area may qualify under § 501(c)(3)). See also PLR 8017049 (Dec. 29, 1980) (grant to § 501(c)(4) organization for a feasibility study for an international exposition); PLR 8751051 (Sept. 24, 1987) (grant to a business corporation to produce an aviation documentary); PLR 9044063 (April 6, 1990) (grants to non-exempt newspapers and other media organizations threatened with censorship by force); and PLR 9306034 (Nov. 20, 1992) (grant to § 501(c)(7) fraternity to fund renovations of educational areas of fraternity house).

manufacturer's new chief financial officer comments that the journal should either be shut down or obtain support from other sources. Support from foundations and nonprofit research institutions has been identified.

First, as just discussed, a section 501(c)(3) organization may make a grant to a non-section 501(c)(3) organization if the grant is made for charitable, educational or other purposes described in section 501(c)(3) and the organization retains control over the funds. Rev. Rul. 68-489, 1968-2 C.B. 210. The private foundation regulations authorize loans, equity investments and grants to non-exempt organizations if they are made for charitable, educational, etc., purposes and no significant purpose of which is the production of income. Treas. Regs. §§ 53.4944-3(b) (program related investments), 53.4945-6(c) (grants to non-section 501(c)(3) organizations may be made if made for charitable, educational, etc., purposes and maintained in a separate account). The principle in these rulings and regulations was explained in Rev. Rul. 72-559, 1972-2 C.B. 247, in which the subsidization of new lawyers was deemed to be a charitable purposes, as follows:

> "The fact that the recipients of the organization's financial assistance, the [new lawyers], are not themselves a charitable class does not mean the organization is not operating primarily for charitable purposes. The [lawyers] are merely instruments through which the charitable purposes are accomplished."

See also Rev. Rul. 65-271, 1965-2 C.B. 161, in which the Service ruled that an organization promoting an appreciation of jazz music by conducting public jazz festivals and paying famous jazz musicians to perform may qualify under section 501(c)(3).[8]

---

[8] As noted in "The Concept of Charity", Chapter B,1980 Exempt Organizations CPE Technical Instruction Program Textbook (IRS, Feb. 1, 1980), pp. 7, 38:

> "There is no indication in the ruling that the professional musicians constituted a charitable class. Implicit in this ruling is the concept articulated in Rev. Rul. 72-559 that those who perform the charitable activities are mere instruments through which charitable purposes are achieved. In accord Rev. Rul. 73-313, 1973-2 C.B. 174,

The next task is to conclude that the chip manufacturer's publication program is an educational publication. The Service has described such publications as meeting the following requirements: (a) the content of the publication must be educational, (b) the preparation of the materials follows methods traditionally accepted as educational in character, (c) the distribution of the publication must be for educational purposes, and (d) the publishing practices associated with the publication are distinguishable from ordinary commercial publishing practices. Rev. Rul. 67-4, 1967-1 C.B. 121; GCM 33217 (March 15, 1966).[9] Lets look at one such publication, Harpers Magazine, published by the Harpers Magazine Foundation. On its Form 990 for its fiscal year ended in 1999, the Foundation reported revenues net of expenses of $195,000 , but that was based on contributions totalling about $2 million.[10] So, the chip manufacturer's scholarly journal meets the requirements for an educational publication, and foundations and public charities could make grants in support of it. However, individuals cannot make deductible contributions directly in support of the publication but only through a section 501(c)(3) organization.

This is not to say that grant makers will be comfortable with making grants directly to the chip manufacturer. For a number of reasons, the chip manufacturer may find it useful to establish a new section 501(c)(3) organization or interest an existing section 501(c)(3) organization to raise

---

176 [organization formed by residents of an isolated rural community to provide a medical building and facilities at reasonable rent to a doctor in order to obtain medical services for the community qualifies under § 501(c)(3)]."

9 There are a number of private rulings applying these principles. They indicate that the principal factor distinguishing educational publications from others are that they run at a loss. And see "IRC 501(c)(3) Organizations and Publishing Activities", Section E, Exempt Organizations Continuing Professional Education Technical Instruction Program for 1988 (IRS, 1988), p. 62 and following.

10 Forms 990 for the Harpers Magazine Foundation are available at www.guidestar.com (visited 3/19/01).

funds and grant them to the chip manufacturer. The manufacturer will probably find it appropriate to expand the board of the foundation to include a majority of non-company personnel to avoid conflicts of interest, especially if grants are to be made to the manufacturer by a new foundation. And for additional reasons the chip manufacturer may chose to extend the a new foundation's activities to include the publication of the journal.

B. Fraternity Educational Areas

Fraternity houses, providing housing to college students and located on or adjacent to college campuses, have long presented the IRS with ruling challenges. The Service ruled in Rev. Rul. 69-573, 1969-2 C. B. 125, that a college fraternity maintaining a chapter house for active students is exempt as a section 501(c)(7) social club, and that contributions to it consequently do not qualify for the charitable deduction. However, the Service had earlier ruled that contributions to a college through a fraternity alumni fundraising program for the purpose of acquiring or constructing a housing facility for a designated fraternity were deductible where the college owned the facility and rented the facility to the fraternity on short-term leases at rates closely comparable to rentals charged by the college for similar facilities. Rev. Rul. 60-367, 1960-2 C. B. 73.

An effort to spinoff the fundraising activity to support educational areas of fraternity houses was initially rejected by the IRS in GCM 39288 (Feb. 15, 1984), noting that the house corporation was not a section 501(c)(3) organization and that while there was educational benefit, the private benefit was too substantial. However, this effort was successful three years later when the IRS reversed course and issued G.C.M. 39612 (Mar. 11, 1987). A series of private rulings followed in which the principle of Rev. Rul. 68-489 was applied to the educational areas. In PLR 8823088 (Mar 14, 1988), a grant to be made by a foundation to a fraternity to finance renovations and equipping the educational areas of a fraternity house (study rooms, a library and an informal study) and pay the operating costs of such areas was held to be educational and consistent with the foundation's section 501(c)(3) status because (a) the foundation retained control over the grant

funds, (b) grant funds would only be used for educational areas, and (c) the fraternity would repay grant funds if those areas ceased to be used for educational purposes.[11]

Thus, the fraternity educational areas rulings illustrate a situation where it would have been difficult to spin the educational areas off into a section 501(c)(3) organization, but a transfer of the fundraising activity alone worked well.

IV. Spinoffs of Program Activities and Fundraising

A. A Company Park

In Rev. Rul. 66-358, 1966-2 C.B. 218, a business corporation had developed some of its land as a park to attract visitors to its industrial site, and it incorporated a scenic view of the park in its logo and advertising. Later, the corporation established a nonprofit organization and transferred the park and some cash to the nonprofit corporation to make the park available to the public. Corporation officials made up the board of directors of the organization. The park was adjacent to and partially encircling the corporation's industrial site, but had no entrance from the corporation's plant reception area. The corporation continued to use a view of the park in its logo, etc. The Service concluded that the new organization qualified under section 501(c)(3) and that the corporation's continued right to use the logo was an insubstantial private benefit.

This ruling is usually referred to for its conclusion that there was no prohibited inurement from the continued use of the logo, but it also represents a classic spinoff situation. The operation of parks open to the public is a typical charitable activity.

---

[11] Other rulings followed: PLR 9002036 (Oct. 17, 1989) (same fact pattern); PLR 9014061 (Jan. 10, 1990) (same); PLR 9025073 (Mar. 27, 1990) (same); PLR 9219033 (Feb.10, 1992) (same); PLR 9306034 (Nov. 20, 1992) (same); and PLR 9524032 (Mar. 23, 1995) (same). Compare: PLR 9118012 (Jan. 31, 1991) (contributions by fraternity members and graduate members to a foundation that the foundation expected to grant to a fraternity to finance the renovation of a fraternity house portions of which were historic structures in return for a 15 year easement did not qualify for the charitable deduction); and PLR 9119011 (Jan. 31, 1991) (similar). And see generally, Lieber & Rotz, "Fraternity Foundations", Chapter Q, Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 1999 (IRS, Tax Analysts ed.), pp. 163-165).

B. A Bar Association Law Library

In Rev. Rul. 75-196, 1975-1 C. B. 155, the IRS considered whether an organization operating a law library in the same building as the local bar association, a section 501(c)(6) trade association, qualified as a section 501(c)(3) organization. The library's principal financial support consisted of contributions from the bar association; all amounts were spent on maintenance and improvement of the library facilities. Use of the library was available only to members of the bar association and their designees. Membership in the bar association was open to all members of the legal profession in good standing with an office or residence in the municipality, and substantially all such persons were members of the bar association. That restriction was due to the physical size of the library and the number of books, and to the library's need to preserve its books and maintain orderly and fair use. The library in practice also accommodated judges, summer law clerks in government agencies and law firms and law students. No mention was made of the composition of the library's board of directors.

The IRS concluded that the library qualified under section 501(c)(3). While the library was available to a restricted group, the IRS reasoned that the group was sufficiently large to conclude that the library's educational facility served a broad public interest, and the restrictions were attributable to the limited size and scope of the facility. The Service noted that while attorneys using the library might derive personal benefit in their law practice, such use was incidental to the library's educational purpose.

Aside from the comment that all of its expenditures were on "maintenance and improvement of the library facilities", the Ruling makes no mention of the details of the relationship between the bar association and the library, such as the composition of the library's board of directors, ownership of the books and other materials, rent paid to the bar association, handling of utilities, etc. The Ruling is usually referred to as an example of how a restricted group may be regarded as the "public", but it illustrates a classic spinoff of a traditional educational activity, a public library.

C. A School

In Rev. Rul. 76-441,1976-2 C.B. 147, the IRS considered two situations. In Situation 1, an otherwise-qualifying section 501(c)(3) organization purchased all of a for-profit school's personal property from its former owner at fair market value and leased the land and buildings at a fair market rental from the former owners. The former owners of the for-profit school were employed by the organization to reside at the school on a 24 hour basis and provide supervision and care of the students. The salaries paid to them were commensurate with their responsibilities and reasonable compensation for their services. None of the organization's officers or directors was related to the former owners, nor was any of them a business associate of the former owners. The IRS ruled that the organization had demonstrated that it was operated for a public, rather than a private, purpose and that it qualified under section 501(c)(3).

In Situation 2, a nonprofit organization received all of the stock of a for-profit school as a gift from its prior owners. The organization dissolved the for-profit school and assumed all of its liabilities, including notes owned to the former owners. The liabilities assumed exceeded the fair market value of its assets. The board of directors of the organization consisted of the former owners of the for-profit school. The IRS ruled that the organization did not qualify under section 501(c)(3) because its directors had benefitted in their individual capacities from the organization's acceptance of the gift and its assumption of the liabilities of the for-profit school and that the organization was serving the private interest of its directors.

This Ruling usefully focuses on the terms of the spinoff. In Situation 1, while funds flowed back from the new organization to the former owners, each flow was tested and found to be on an arm's length basis, as assured by the organization's independent officers and directors. By contrast, in Situation 2, benefits flowed back to the former owners unchecked by an independent board.

D. A University Museum

Bob Jones University was denied section 501(c)(3) status in Bob Jones University v. United States, 461 U.S. 574 (1983) on account of its inter-racial policies. In 1951 the University had established an art museum on its campus that was an integral part of its instructional program. It came to have what was described as the foremost collection of religious art in the Western Hemisphere, and was visited by a substantial number of the public, aside from students, faculty and staff of the University. In 1992 the University established Bob Jones University Museum and Gallery, Inc. as a nonprofit corporation. The University then leased its museum building to the Museum at a less than fair market rental for three years, with the Museum having the right to renew at a rental to be determined, and loaned its art collection to the Museum without charge. The Museum took onto its payroll the University employees who had worked at the museum. The board of directors of the Museum consisted of the chancellor and president of the University and three others not affiliated with the University, and three of the Museum's four officers were affiliated with the University. The Museum initially was to display only the University's collection, but it was intended that the Museum would acquire additional artwork of its own to display. If the Museum provided any restoration services on the University's artwork, the Museum was to require the University to pay reasonable remuneration. The Museum was open to the public free of charge. The Museum expected to receive substantially all of its revenue from contributions and the sale of reproductions through its gift shop.

The Government's position was that the University received an impermissible benefit from the Museum and consequently the Museum had substantial nonexempt purposes, based on (a) its payment of rent to the University, (b) its payment of salaries of former University employees, (c) its exhibition of artwork on loan from the University, (d) the Museum's use of tax-supported contributions to make such payments; (e) the University's influence on the Museum's board, (f) its location on the University campus, and (g) the reputational benefit derived by the University from its association with the Museum.

The Tax Court concluded that the organization qualified as a section 501(c)(3) organization. Bob Jones University Museum v. Commissioner, T.C. Memo 1996-247 (1996). It reasoned that (a) more than 80% of the visitors (the total exceeded 20,000 annually) to the Museum were not affiliated with the University; (b) the rental of the building was very favorable to the Museum (a rental rate of $3 per square foot vs. its fair market rental rate of $10 - $12 per square foot, with the University to pay taxes, repairs and utility costs and maintain personal injury and property damage liability insurance on the building); (c) displaying artwork on loan was a common practice of museums, and the collection was lent free of charge; (d) the employees taken over from the University performed no services for the University thereafter; (e) University personnel constituted only two-fifths of the Museum's board; (f) the Museum admitted visitors and students without racial discrimination; and (g) the University received only an incidental benefit from the location of the Museum on its campus. The Commissioner also argued that if exemption were approved for the Museum, the University might next attempt to spin off other component parts, such as its library, cafeteria and bookstore. In response, Judge Foley noted:

> ". . . libraries, cafeterias, and bookstores are essential parts of a university, while most universities do not maintain art museums. [A] cafeteria or bookstore spun off from a taxable corporation might not independently qualify for exempt status. Finally, while additional concerns may arise if a university were to attempt to spin off one of its essential parts, those concerns are not implicated here."

The Government's position in the Museum's case seems largely driven by the conclusion in the University's earlier exemption case, but it is a very useful guide to establishing a successful spinoff of a traditional educational activity, a museum. Note that no cash, aside from the bargain rent payments, flowed from the Museum to the University, and that the University was required to reimburse the Museum for any restoration costs.

The Museum continues and is very successful. Its Form 990s show a continuing increase

in contributions, and its web site is extensive.[12]

E. An Archival Collection

The Union League of Philadelphia is a section 501(c)(7) social club It is located in a Civil War-era building in the City's center; the building houses a substantial collection of art works, archival materials, artifacts and books. By the early 1990s the League permitted the public at regular intervals to tour the building and view the collection. Burdened by the cost of maintaining and conserving the collection, in 1995 the League incorporated the Abraham Lincoln Foundation of the Union League of Philadelphia and applied for section 501(c)(3) status. The Foundation's corporate purposes were to maintain and exhibit the Foundation's collection of artwork, Civil War and other books, and other articles of historical importance (the "collection"), to maintain the League's building and to educate students and others on art, history, music and other topics. The League was the sole member of the Foundation and the Board of the Foundation consisted of an equal number of individuals who were members of, but not officers or directors of, the League, and of individuals who were not members, officers or directors of the League. The League planned to loan the collection to the Foundation without charge, and the Foundation was to maintain and preserve, and as necessary, repair and restore the collection, and to display the collection in the League's building for public viewing and provide a librarian to maintain, arrange and catalogue the books. The Foundation was to be responsible for conducting tours of the building by advance

---

[12] The Museum's 1998 - 2000 Forms 990 are available at www. guidestar.org (visited 3/19/01). They indicate that contributions had increased to the $1.4 million level by the year ended May 31, 2000; the Museum's rent was increased during the year ended in 2000 from $105,600 to $149,100, an increase from $3 to $3.24 per square foot, and its officers and directors continue to receive no compensation from the Museum.

The Museum's web site (www.bju.edu/bjmg/art_gallery) (visited 3/19/01)) is part of the University's web site, a service that the University presumably provides to the Museum without charge. The site presents the kinds of information customary for a museum, including a planned giving section. Admission is now charged ($3-$5), except for children. The site notes the University's art collection is "now on permanent loan" to the Museum.

appointment for historical societies, scholars and the general public during the times that the building was normally open. The Foundation was to conduct public conferences in the building on historical and educational topics. The Foundation was permitted to solicit and display material which related to the League's collection but which would belong to the Foundation. The League was permitted to designate portions of the building which were of historical or cultural importance for which it desired the Foundation to assume responsibility for preservation, maintenance and improvement. The arrangements between the League and the Foundation were terminable by mutual agreement.

Before the IRS, the Foundation dropped plans to support the maintenance of the League's building and amended its Certificate of Incorporation accordingly. The Foundation also represented that it would make no payments to the League with respect to the building other than to pay the usual cost for meeting rooms, and provided additional information on how the Foundation's tours and exhibitions would be publicized. The IRS issued a favorable determination letter in early 1996.

The Foundation continues to have an active program. Its Form 990s show rising contributions since 1996, and its web site provides extensive information on the collection and access.[13]

Noteworthy is that the plan to have the Foundation maintain and improve portions of the League's building was abandoned before the IRS would issue a favorable determination letter. However, no attention seems to have been given to the consequences of the Foundation's repairs and restoration work on the collection. The Foundation's web site indicates that the Foundation has restored twelve paintings and conserved two exterior bronze statues, presumably items owned by

---

[13] The Foundation's Forms for 1998 and 1999 are available at www. guidestar.org (visited 3/19/01). They indicate contributions reaching the $140,000 level by 1999.

The Foundation's web site is part of the Union League's site, along with two other § 501(c)(3) organizations. See www.unionleague.org/art_and_archives/ and www.unionleague.org/foundations/lincoln/ (visited 3/19/01).

the League and loaned to the Foundation. I expect that some arrangements have been made to protect the Foundation's contribution to these improvements in the event the loan of the collection is terminated.[14]

F. A Conservation Easement

In PLR 199933029, May 24, 1999, a college fraternity foundation (a section 501(c)(3) organization) and a fraternity house corporation (a section 501(c)(7) organization) requested a ruling that contributions by fraternity alumni and others to the foundation which it would use, in its discretion, to maintain and preserve the facade and certain interior rooms of a fraternity chapter house owned by the house corporation would qualify as charitable deductions where a conservation easement on the facade and interior rooms was to be granted to a public charity (the easement organization) under section 170(h). The house was a "historic structure", having been listed on the National Register of Historic Places of the National Park Service. The applicants proposed the following plan:

> (a) the house corporation would give an easement over the facade and the principal rooms to the easement organization;
>
> (b) a housing preservation corporation described in section 501(c)(3) and experienced in structures of the house's period would undertake to supervise the repair and maintenance of the facade and principal rooms;
>
> (c) the foundation would raise and provide funds for the renovation and maintenance of such portions of the house;

---

[14] In 1998, the author is advised, a New York membership organization obtained a section501(c)(3) letter for an organization that was to be loaned the papers, books and related ephemera of the membership organization, which included materials going back to the mid-1800s. The organization was to maintain and protect such materials. Before the IRS, substantial attention was given to whether the new organization might enhance the loaned property, and the IRS required a commitment by the membership organization that it would in the event the lease was terminated pay the organization an amount equal to the fair market value at the time the lease terminated of all enhancements. This is consistent with the repayment commitments in the fraternity house educational area private rulings and the handling of restoration work in the Bob Jones University Museum case.

(d) the foundation and the housing preservation corporation would supervise the renovation and maintenance of such portions by the house corporation; and

(e) the easement organization would enforce the perpetual easement.

The terms of the easement required, among other things, that (i) the house be open to the public at least two days annually for at least six consecutive hours per day, and to be available at least one additional day annually to photographers and architectural scholars, and (ii) in the event that the easement was extinguished by court order (for example, due to a taking for public purposes), any amount received for the property would be divided between the house corporation and the housing preservation corporation in proportion to the ratio which the value of the easement when given bore to the value of the total property without the easement at that time.

Section 170(f)(3)(B)(iii) and (h) provide an exception to the general rule that no deduction is permitted for gifts of partial interests in property. These provisions provide a charitable deduction for an interest in real property consisting of a perpetual easement providing restrictions against development. An easement is provided for the "preservation of certain open space (including farmland . . .", as well as for the preservation of an "historic structure", defined as a structure listed in the National Registry of Historic Places. The requisite public benefit regarding open space is usually satisfied if it can be seen from a public road, while the public benefit regarding the interior of a historic structure is ordinarily satisfied by making the interior available to the public on a regular basis. Treas. Regs. § 1.170A-14(d)(4)(ii) and (d)(5)(iv).

The IRS concluded that the easement was a qualified conservation easement and that the foundation and the easement entity had sufficient charitable interest in the facade and interior of the house that contributions to the foundation would be deductible charitable contributions under section 170.

This ruling builds on the fraternity educational areas rulings discussed above. No

repayment was required because the easement entity had a perpetual interest in the house.[15]

V. A Preliminary Approach

We can now set out an approach that may be useful in considering whether a spinoff is possible – and useful.

(a) Identify program activities and consider whether standing alone the activity might qualify as charitable, educational, etc.

(b) If so, consider whether a fundraising activity can be established or found to support the program activity.

(c) Alternatively, consider whether the operating activity can be transferred to a nonprofit entity that can be qualified under a section 501(c)(3) organization.

(d) Consider what aspects of the operating activity can and should be transferred and what terms should accompany it, such as length of the lease, differentiating between current operating costs and capital costs which might have continued benefit in the event the arrangement is terminated, etc.

(e) Consider what business, fundraising and other non-tax issues bear on the decision to spinoff the program activity and/or the fundraising activity.

(f) Consider what inurement issues follow from the proposed arrangement.

(g) Consider what benefits flow to persons other than the general public and whether they are substantial.

(h) Consider how the new entity will be governed – with a controlled board of directors or an independent one, how will they be selected, etc.

(i) Consider what protections are needed, such as an IRS ruling or determination letter.

---

[15] Compare: PLR 9118012 (Jan. 31, 1991) (contributions by fraternity members and graduate members to a foundation that the foundation expected to grant to a fraternity to finance the renovation of a fraternity house portions of which were historic structures in return for a 15 year easement did not qualify for the charitable deduction); and PLR 9119011 (Jan. 31, 1991) (similar).

VI. Principles and Approach Applied

With these principles and approach in mind, let's try to apply them to a privately owned structure with modest operating costs and very substantial capital needs, an early 19th Century wind-powered grist mill (the "Windmill"). The Windmill actually exists, but its owner and location are not important here. Rather, the usefulness of the Windmill is as a concrete example, with attendant attractions and problems. The peculiar titling of this paper should now be clearer.

A. Background

The Windmill was built in the early 1800s by Nathaniel Dominy V (1770-1852), a prominent craftsman on the East End of Long Island, NY.[16] It was moved to a new location by barge in the mid-1800s. It ceased to operate sometime before 1880 and was purchased by a local resident for preservation purposes. It was put back into operation during 1917-1918. Following World War I it was moved to its present location by road. Substantial repairs were made on it in the 1950s. The Windmill retains a high level of internal components. However, it has suffered some hurricane and other damage and is said to presently require repairs to restore it to working condition that are estimated at about $200,000.

The Windmill is one of four surviving mills built by Nathaniel Dominy V,[17] and one of only eleven mills surviving on the East End of Long Island. Of the other ten mills, four are

---

[16] The Dominy family for four generations conducted a wood and metal working business in East Hampton, NY. Their workshop and tools are presently part of the Winterthur Museum in Delaware (www.winterthur.org , -- press "Galleries" and "Dominy Shops") (visited 3/19/01) and are documented in Hummel, With Hammer in Hand (Winterthur Museum & University Press of Virginia, 1968).

[17] Two Dominy windmills are owned by the Village of East Hampton, NY, the Old Hook Windmill and the Gardiner Windmill. The Gardiner was acquired from a private owner about five years ago and moved across the road. It was in poor condition and cost about $300,000 to restore to working condition. The bulk of the restoration costs were paid with contributions raised from the public. A third Dominy windmill is located on Gardiners Island and was recently restored by the Goelets family. John Rather, "Gardiners Island: The War of Wills", N. Y. Times, Mar. 18, 2001, § 14 (Long Island), at 7.

privately owned and six are owned by villages or nonprofit organizations; at least three have been converted to residential or other use and retain modest internal components.[18]

Over the years the owners of the Windmill have opened it to the public for individual and group tours, photography and study. It is listed as a "historic structure" on the National Register of Historic Places.[19]

The Windmill is presently located in the left portion of an open field of about nine acres, on a slight rise, within easy view of, but not adjacent to, a public road, and presents a bucolic view of what a rural East End looked like in the 1800s.[20] The Windmill is not used for commercial purposes. While the owner is interested in visitors, there is presently no program for attracting them. The owner is interested in the restoration and on-going maintenance of the Windmill but does not want to fund the cost of restoration.[21] It has been suggested that there might be a

---

[18] For a review of East End mills, see Robert J. Hefner, Windmills of Long Island (W. W. Norton & Co. & Society for the Preservation of Long Island Antiquities, 1983), and the Library of Congress' American Memory - Historic American Building Survey (http://www..loc.gov) (visited 3/19/01).

[19] For National Register listings, see www.cr.nps.gov/nr/ (visited 3/19/01).

[20] A sketch of the area and photographs of the Windmill will be distributed at the meeting.

[21] Section 47(a)(2) of the Code provides a credit against federal income tax for a portion of the cost of rehabilitation of a "certified historic structure" (such as one listed in the National Register of Historic Places) that is certified as meeting the Secretary of the Interior's Standards for Rehabilitation. However, the credit is available only with respect to income producing property, such as a hotel, bed and breakfast, farm building, etc.. E.g., PLR 8309128 (Dec. 2, 1982) (railroad car barn). Thus, expenditures on the Windmill are not eligible for the federal tax credit.

Section 606(a)(12) the New York Tax Law provides a credit against New York state income tax for a portion of the cost of rehabilitating historic "barns" located in New York. For this purpose, a "barn" is a building originally designed and used for storing farm equipment or agricultural products or for housing livestock. However, since the Windmill is not a "barn" and it is not an income producing asset, expenditures on it are not eligible for the New York tax credit. For rulings involving similar state tax credits, see Schlosser v. Commissioner of Revenue, Minn. Tax Court, County of Hennepin, Regular Division, Docket No. 7142, decided July 27, 2000, 2000 Minn. Tax LEXIS 18 (bed and breakfast); Pfister Corporation v. Wisconsin Department of

charitable solution for the Windmill.

B. Charitable Funding Alternatives

1. Cash Grants

The owner might seek cash grants from foundations and public charities interested in restorations of early farm structures. The Society for the Preservation of Long Island Antiquities supported a study in the 1980s in which the Windmill and a number of the other East End windmills were surveyed, researched, measured and photographed. The study led to the listing of the surviving windmills on the National Register of Historic Places and then to Mr. Hefner's book. Of course, there is a shortage of such funding. In addition, a grant to the owner raises private benefit issues identical to those raised by restoration work by the Bob Jones University Museum and the fraternity house study area rulings. The grantor foundation should require the establishment of an arrangement under which the improvements on the Windmill are made available to the public and, as importantly, do not benefit the owner in case he should decide to sell the Windmill in the future. The owner probably would be agreeable to arrangements to open the Windmill to the public so that they can benefit from the restoration. However, he may not be willing to agree to repay the grantor in the event he should decide to sell the area where the Windmill is located for development. Thus, this alternative may not be feasible from a funding standpoint, and the owner may not be interested because of the complications.

2. Contribute Cash to a Family Foundation

It might be suggested that the owner of the Windmill should establish a charitable organization and apply to the IRS for a section 501(c)(3) determination letter. The application would describe a program of raising the $200,000 needed to restore the Windmill and provide for its on-going operation and maintenance. The foundation's officers and directors would be the

---

Revenue, Wisc. State Tax Appeals Commission, Docket Nos. 95-I-1469 and 95-I-1470, May 27, 1997, 1997 Wisc. Tax LEXIS 9 (hotel).

owner and members of his family. Funds would be raised from the owner and his family. The foundation would be classified as a private operating foundation, because it would be supported by a small group of contributors and because it would be buying goods and services (repairs) rather than making grants.[22] Consequently, contributions to it would qualify for the higher charitable contribution deduction treatment that applicable to contributions to a public charity. However, it is doubtful whether the IRS would issue a determination letter for the organization because the Windmill is owned by an officer, director and substantial contributor of the foundation. The IRS would question whether there is a public benefit in such repairs, and there would be potential liability for self-dealing penalty taxes (Code § 4941) if contributions were received and applied to such repairs.

Thus, spinning off the fundraising activity is not a feasible alternative.

3. Contribute the Windmill to a Family Foundation

To establish a charitable interest in the Windmill, the owner could establish a foundation and contribute to the foundation the Windmill, ownership of the ground on which it is located and any right of way necessary to have access to the Windmill from the public road (hereafter, the "related real property"). The foundation would pay for the restoration costs with contributions from the owner and his family. The foundation's officers and directors would be owner, family

---

[22] Section 501(c)(3) organizations are divided into three groups. A so-called "public charity" is a section 501(c)(3) organization that receives its support from broad based sources, as contrasted from a family or small group of supporters. Contributions to such organizations receive the better charitable income deduction treatment (as contrasted with that applicable to private non-operating foundations), and the presence of such an organization would bring credibility to a fundraising effort. So-called "private non-operating foundations" are organizations supported by a family or small group of supporters, and contributions to them are less deductible that contributions to public charities. Such organizations are also subject to detailed operating and reporting rules, enforced by penalty excise taxes. Finally, there is a "mezzanine" level group sharing some of the aspects of both groups – "private operating foundations" which use most of their income to purchase goods and services, rather than making grants; contributions to such organizations qualify for the same deduction treatment as contributions to public charities, but they are subject to most of the operating and reporting rules, and penalty taxes, as private non-operating foundation.

members and residents of the area interested in historic preservation. The foundation would open the Windmill regularly to the public (for example, in association with events at the local historical society).[23] The foundation would be classified as an operating foundation. Contributions for the cash, value of the Windmill and the related real property will be deductible as charitable contributions (except for the right of way).[24] Contributions of experienced construction skills and labor from local contractors might be sought, and contributions of the necessary timbers and other wood products might be sought from hardwood suppliers and dealers. However, contributions of labor do not qualify for the charitable deduction. Treas. Reg. § 1.170A-1(g). Contributions of wood products from inventory are ordinarily deductible only to the extent of the dealer's cost basis in such material, and the special rules for certain contributions of relief supplies, scientific research property and computer technology and equipment would not appear to be applicable. Code § 170(e)(1)(A) and (3) - (5).

This alternative is technically feasible. Arrangements regarding the ground on which the Windmill stands and right of way should be carefully documented. It would provide to the owner charitable deductions for the cash contributed (substantial), the value of the Windmill (probably modest in view of its condition) and the ground on which it is located (probably substantial). And, it permits the owner to continue to be close to the Windmill and its operation. However, the owner may be unwilling to contribute any cash to the project.

---

[23] The availability of the Windmill to the public runs across several alternatives. The requirement is probably reasonable access under all the circumstances, and one would look to the practices of other villages and public charities that own similar mills. Those practices generally are to staff the windmill on weekends during the summer season but during the remainder of the year to make it available only by advance appointment.

[24] Charitable deductions are available for only a limited number of partial interests in property, namely, undivided interests in the whole property, certain trust interests, remainder interests in a home or farm and certain conservation easements. Code § 170(f)(3).

4. Contribute the Windmill to a New Public Charity

The owner in combination with interested members of the public might establish a foundation and the owner might contribute the Windmill and related real property to it. The foundation would have officers and directors drawn largely from the public, the foundation would seek funding from the public, and it would finance the restoration and on-going maintenance of the Windmill. All contributions of cash and real estate to the foundation would be deductible.

This alternative is designed to shift the financing of the restoration from the owner to the public. The downside is the need to establish a new organization and the risk that the new organization will not have sufficient credibility to attract funds initially and over the longer period.

5. Contribute the Windmill to an Established Public Entity

The owner might contribute the Windmill and related real property to the local village or a local historical society or other section 501(c)(3) organization that is a public charity, with an established program and fundraising record. The owner would receive a charitable deduction for the value of the Windmill and related real property (except the right of way). The donee organization would have the ongoing ownership, management and responsibility for the Windmill, and contributions received by the donee organization to fund repairs, maintenance and other costs would be deductible by its contributors as charitable contributions.

This alternative presents a stronger donee with attendant credibility and fundraising prospects. The village would be the better alternative because it could finance on-going maintenance out of its tax revenues.However, the owner might want to limit his contribution to the Windmill and not include the related real property.

6. Gift and Removal

The owner might donate the Windmill to the village or an established public charity on the condition that it be moved by the donee to its own property. Several mills on the East End are owned by villages and located in park areas open to the public. Alternatively, a site on the grounds

of an historical society would permit integration of the Windmill into the regular public events of the society. The owner would receive a charitable deduction for the value of the Windmill. The donee would have the ongoing ownership, management and responsibility for the Windmill as well as the burden of moving it. Cash contributions received by the donee for the removal, repair and maintenance of the Windmill would be deductible as charitable contributions.

This alternative eliminates the need for a gift of real estate and right of way, but substitutes the need for a new site, as well as the cost of moving the Windmill. Alternative sites are probably available, either in a village park or on the grounds of a local historical or other organization. The Windmill has been moved several times in its history, and indeed many of the surviving windmills have had a mobile life experience. However, the cost today of moving such a structure, which is about four stories high, could be quite substantial in view of the growth of overhead utility lines and connections. Moving the Windmill <u>and</u> restoring it might deter prospective donees. And the owner may be reluctant to give up the related real property at this time.

7. Gift Combined with a Long-term Lease

The owner might contribute the Windmill to the village or established public charity and lease the related real property to the donee for, say, 30 years at a nominal rent.[25] The donee would have the ongoing ownership, management and responsibility for the Windmill and related real property, including the obligation to insure the owner against personal injury and property damage, as well as the burden of removing the Windmill at the end of the lease (or its renewal). Gifts to the donee/tenant for repair, maintenance and removal of the Windmill would be deductible as charitable

---

[25] The rental is nominal for simplicity purposes, and in the context a significant rental may not be possible. As indicated in the school and Bob Jones University Museum cases, rent can be charged but it must not exceed a fair market rental, taking into account all of the terms of the relationship between the owner and the organization.

contributions.[26]

The length of the lease is intended to permit the donee/tenant organization to make substantial repairs and improvements to the Windmill, which the donee owns outright, and to defer the need to remove the Windmill for many years. If and when the lease terminates, the donee may remove the Windmill to another site. The alternative of abandoning the Windmill back to the owner (or his successors) seems unlikely where the donee is an established public charity, although, as pointed out above, moving the Windmill may not be feasible. It seems more likely that this approach simply delays a gift by the owner (or his successors) of the related real property to the end of lease.

And the owner may not be prepared to make a completed gift of either the Windmill or the related real property at this time.

8. Lease the Windmill and Property

The owner might lease the Windmill and related real property for, say, 30 years for a nominal rent to the village or an established public charity on the condition that the tenant restore and maintain the Windmill and make it available to the public. The tenant would be barred from changing the character of the Windmill or making improvements other than those supplemental to making the Windmill available to the public, such as a parking area. The lease would require the owner (and his successors) to pay to the donee the value of any improvements made to the Windmill, measured as of the date of lease termination, following the approach of the fraternity educational area rulings. The owner would receive no charitable deduction for the value of the lease. Contributions made to the donee would be deductible as charitable contributions, but an IRS private ruling should sought to confirm this conclusion.

---

[26] While the lease would be possible where the donee is a new public charity (Alternative 3 , above), it is not suggested because it raises the question whether the donee is likely to be financially sufficient enough to pursue removal, or more likely to abandon the Windmill back to the owner, with attendant self-dealing possibilities.

This alternative defers both the donees's need to remove, and the owner's need to reach a conclusion on an outright gift of the Windmill and the related real property. This alternative might be helpful if there is likely to be a generational change in the ownership of the property and there is interest in deferring a decision on a gift.

However, the owner might be interested in sharing ownership of the Windmill with the village or a public charity through a qualified conservation easement.

9. Gift of an Easement on the Field

The owner might give a perpetual qualified conservation easement on a portion of the field where the Windmill is located to the local village or a public charity experienced with easement enforcement. The Windmill would be excluded from the easement; the owner would retain the right to move the Windmill; and no access to the Windmill would be included in the easement. The field would continue to be owned by the owner subject to the terms of the easement, which would preserve the area as open space, limit its future use to agricultural uses, but permit changes in existing structures so long as the changes are consistent with non-residential development.[27] The owner would have a charitable deduction for the value of the easement (essentially, the value of the development rights given up), and the owner could use the resulting tax savings to pay the cost of restoring the Windmill. For example, assume for illustrative purposes that the value of 4.5 acres under and adjacent to the Windmill for residential development purposes is $100,000 per acre, and that the value as farm land after the easement is imposed is $20,000 per acre. Then, the value of the easement for charitable deduction purposes would be $360,000 ($80,000 x 4.5), and the tax benefit received by the owner from that deduction would be about $200,000 (assuming a 45% combined federal and state income tax rate). No contributions would be raised from the public, and

[27] The easement would be for the "preservation of certain open space (including farmland . . ." Code § 170(h)(4)(A)(iii). The public benefit is satisfied if the property can be seen from a public road. Treas. Regs. § 1.170A-14(d)(4)(ii).

the Windmill would remain in its present location and under the ownership and management of the owner, subject to the easement.

This alternative illustrates a contribution technique that avoids seeking contributions from the public, but it involves a perpetual limitation on the right of the owner to develop the easement area. The Windmill is excluded from the easement because it probably has little value for easement contribution purposes and thus its exclusion simply retains to the owner as much as possible. However, the owner may not be able to use such a deduction and want to have the restoration financed by contributions from the public.

10. Gift of an Easement on the Windmill

The owner might give a perpetual qualified conservation easement on the exterior and interior of the Windmill and underlying ground, and provide for public access, following the approach of PLR 199933029 (May 24, 1999), described above. The easement donee would commit to managing the Windmill and applying funds contributed to it to the repair and preservation of the interior and exterior. The interior of the Windmill would be open to the public as required by the easement regulation.[28] The underlying ground would continue to be owned by the owner subject to the terms of the easement which would basically limit the future use of the property to agricultural uses with some structural changes and additions relating to such use permitted, except that the owner could not remove the Windmill or substantially change it. The owner would have a charitable deduction for the value of the easement, essentially the value of the

---

[28] The easement regarding the Windmill would be to preserve an "historic structure", defined as a structure listed in the National Registry of Historic Places. Code § 170(h)(4)(A)(iv). While the Regulations might be read to provide that the Windmill would have to be available to the public at least every other weekend, a reasonable reading would require only the availability that other windmill owners in the area provide. Treas. Regs. § 1.170A-14(d)(5)(iv) and (v), Example (2) (uninhabited house adjoining a battlefield must be open at least every other weekend). See, generally, Losch v. Commissioner, T.C. Memo 1988-230 (May 23, 1988) (valuation issues in an historic building easement).

development rights given up.

Contributions to the donee would be deductible as charitable contributions but an IRS ruling should be sought to confirm this conclusion.

In this alternative, the owner has provided an easement on a smaller area than in Alternative 9, and has established a structure for raising funds from the public, while reserving his development rights over the remaining portion of the field and possibly making those homesites more valuable by reason of the presence of the Windmill.

11. Combined Gift and Sale

Let's mention one further variation to be sure that it has not been ignored. In recent years there has been an increase in public and private available to finance the acquisition of open space and open space easements. The owner might pursue a transaction with the village, county and/or a public charity in which his transfer of the Windmill and related real property, whether outright or to the extent of an easement, is a combination of a sale for cash and a gift of the remainder of the value of such property. The owner's goals here are not only to transfer the burden of restoration of the Windmill to others but also to benefit from a cash purchase payment as well as charitable deduction tax benefits. The effects of such transactions are not unique to spinoff situations and are not discussed further here.

VII. Conclusion

The numerous, and probably tedious, alternatives suggested for the Windmill are intended to outline the possibilities generally available under current rulings for obtaining charitable deductible support for the capital costs associated with a program activity, the maintenance and exhibition of an early 19th Century historic structure. Out right ownership of the structure presents the best approach but others are possible. And, the alternatives also suggest the non-tax problems that may be associated, ranging from credibility for fundraising purposes to availability of alternative sites to the degree of interest that the owner has in giving up ownership to others in

order to assure the flow of contributions. Contrary to the suggestion in the title of this paper, the listing of alternatives indicates that finding a charitable solution is not an impossible task but the selection of one that is acceptable in a given situation may burden the adviser.