

INTERNAL REVENUE SERVICE

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May 24, 1999

Legend

Foundation =
Fraternity =
Housing Corporation =
Chapter House =
University A =
Landmark =
University B =

Dear :

This is in reply to your ruling request, dated October 13, 1998, on behalf of Foundation. This request was supplemented with additional information dated March 25, 1999, April 21, 1999, and April 26, 1999.

ISSUE

Do donations by Fraternity alumni and others to Foundation, a qualified charitable donee, to be used in Foundation's discretion to maintain and preserve the facade and certain interior portions of Chapter House, which is listed on the National Register of Historic Places and owned by Housing Corporation, not a qualified charitable donee, qualify as charitable deductions where a preservation and conservation easement in the facade and certain interior portions of Chapter House is to be granted to a § 170(h) qualified organization?

CONCLUSION

Donations by Fraternity alumni and others to Foundation for the purpose of maintaining and preserving the facade and certain interior portions of Chapter House qualify as charitable contribution deductions under § 170, subject to the usual rules

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of that section including percentage limitations and substantiation requirements for any contribution of \$250 or more. This ruling is conditioned, however, on Housing Corporation granting a preservation and conservation easement in the facade and certain interior portions of Chapter House to a qualified organization under § 170(h) and § 1.170A-14(c) of the Income Tax Regulations.

FACTS

Foundation is a nonprofit corporation organized and operated exclusively for educational and charitable purposes. Foundation is exempt from taxation under § 501(c)(3) and is a publicly supported organization under §§ 170(b)(1)(A)(vi) and 509(a)(1). Foundation is eligible to receive charitable donations under § 170(c).

Fraternity is a national fraternity exempt from taxation under § 501(c)(7).

Housing Corporation is a nonprofit organization exempt from taxation under § 501(c)(7). Housing Corporation owns and maintains Chapter House for the use and occupancy of members of the local chapter of Fraternity.

Most of the active members of the local chapter of Fraternity reside in Chapter House. Chapter House is listed on the National Register of Historic Places and is located on the edge of the campus of University A on a heavily used public thoroughfare. Chapter House is a significant structure in a particular genre of architecture and sits on its original site with virtually all of its features unchanged. Chapter House has been featured in articles, books, and museum displays focusing on the genre of architecture to which it belongs.

Chapter House is an important part of the local and state preservation community and is open to the public for tours. In addition to formal group tours, members of Fraternity who live in Chapter House provide ad hoc tours to members of the public upon request. Chapter House has been used by University A's school of architecture for educational purposes. Chapter House also has been used as a venue for lectures and gatherings by groups unrelated to Fraternity.

Landmark's building also is a significant structure in the genre of architecture to which Chapter House belongs and was built by the same architects that built Chapter House. Landmark is part of University B, which is exempt from taxation under § 501(c)(3) and is eligible to receive charitable donations under § 170(c). Landmark is a publically supported, tax-exempt, nonprofit

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organization whose purposes include the preservation and conservation of sites, buildings, and objects of national significance, especially architectural works and furniture from the genre of architecture to which Chapter House and Landmark belong.

Structural work is critically needed to maintain the historical and architectural aspects of Chapter House. Foundation has determined that support of the historical preservation of Chapter House will further its exempt purposes. In order to meet this end, Foundation proposes to enter into a grant agreement with Housing Corporation and Landmark under which Foundation would provide funding to maintain and preserve the facade and certain interior portions of Chapter House. Prior to receiving these grants, however, Housing Corporation proposes to grant a preservation and conservation easement in the facade and the same interior portions of Chapter House to a qualified organization as defined by § 170(h). As discussed below, the recipient of the easement may be Landmark or may be another charity.

The Grant Agreement

Under the grant agreement, Housing Corporation is required to use the funds provided by Foundation exclusively for the preservation and conservation of the facade and certain interior portions of Chapter House. The interior portions of Chapter House subject to the agreement are the same as those areas subject to the easement described below, namely, the entryway, living room, dining room, and main stairway. The grant agreement requires Housing Corporation to develop detailed plans, with the oversight and assistance of Landmark, and submit those plans to Foundation for review.

Landmark will have a supervisory role in the expenditure of the funds provided by Foundation. Foundation will grant funds to Housing Corporation only after receiving written approval from Landmark that the funds requested are appropriate and in accordance with the purposes of the agreement. Landmark will review the work done to ensure that the funds are used exclusively for historic preservation of Chapter House and to protect the historical integrity of design, materials, and workmanship in Chapter House. The activities of Housing Corporation will be subject to monitoring and inspection by Foundation and Landmark.

Foundation proposes to fund the grants by expending funds that it currently has, along with funds obtained from additional fund raising. This fund raising will include solicitation of funds from Fraternity alumni, other § 501(c)(3) organizations, and the general public. Housing Corporation also may solicit

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contributions to Foundation for this project with Foundation's prior approval.

All funds received from alumni and others, whether suggested for use for this particular project or otherwise, will be expended in the sole discretion of Foundation in furtherance of its educational and charitable purposes. All donors will be notified in writing of Foundation's broad discretion to use the funds for other educational and charitable purposes.

The Preservation and Conservation Easement

Housing Corporation proposes to grant to a qualified organization a perpetual conservation easement, within the meaning of § 170(h) and Reg. § 1.170A-14, in the facade and certain interior portions of Chapter House. The purpose of the easement is to preserve certain architectural, historic, and cultural features of the facade and certain interior portions of Chapter House and to maintain the property's conservation and preservation values. The interior portions of Chapter House subject to the easement are the entryway, living room, dining room, and main stairway. Pursuant to the conveyance of the easement, Housing Corporation will grant to a qualified organization a property interest in Chapter House.

The donee will be a qualified organization as defined by § 170(h)(3), will have a commitment to protect the conservation purposes of the donation, and will have the resources to enforce the restrictions imposed by the easement. It is the hope of Housing Corporation that Landmark will meet the requirements necessary to be the recipient qualified organization and will be willing to accept the easement. If Landmark is unwilling or unable to accept the easement, then Housing Corporation will find another qualified organization to accept the easement. If a qualified organization other than Landmark is the recipient of the easement, then that organization must work in conjunction with Landmark in Landmark's supervisory role of the implementation of the funding provided by Foundation as described in the Grant Agreement.

The easement will place restrictions on Housing Corporation's use and maintenance of Chapter House. Under the terms of the easement, Housing Corporation may not demolish, remove, or raze Chapter House, except in the case of extinguishment of the easement discussed below. Housing Corporation also may not erect or allow anything to grow on the property surrounding Chapter House that may impair the public's view of Chapter House.

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Pursuant to the easement, the qualified organization will have the right to access the entryway, living room, dining room, and main stairway of Chapter House for the purpose of conducting exhibits of those areas on two days per year, up to six consecutive hours on each day. The purpose of the exhibits is to allow the general public to view and study the property. The qualified organization also has the right to access those portions of the interior of Chapter House on one additional day per year for the purpose of photographing and studying the areas for use in public displays and publications. On that particular day, the qualified organization may allow educational, professional architectural, and historical organizations to study and photograph the interior portions of Chapter House that are subject to the easement.

Housing Corporation must obtain the prior approval of the qualified organization to increase or decrease the height of, change the exterior construction materials or otherwise alter, reconstruct, or change the facade of Chapter House, or to erect any sign or advertisement, with minor exceptions. Housing Corporation also must receive prior approval to change the floor plan of or significantly alter the entryway, dining room, living room, and main stairway of Chapter House.

Housing Corporation reserves the right, subject to the above restrictions, to continue the general residential use and maintenance of Chapter House and to continue to use Chapter House for educational and nonprofit activities so long as such uses do not impair the conservation and preservation values of Chapter House and are not inconsistent with the purpose of the easement.

Upon demand of the qualified organization, Housing Corporation is required to certify that it is in compliance with the above restrictions. The easement provides that the qualified organization may, with the consent of Housing Corporation, inspect Chapter House. The easement further provides that the qualified organization has the right to legally enforce the conservation restrictions by appropriate legal or equitable proceedings, including, but not limited to, injunctive relief.

The easement provides that the obligations imposed on Housing Corporation and the qualified organization by the easement shall be effective in perpetuity and shall run as a binding servitude with Chapter House. Further, if the qualified organization transfers the easement, the successor donee must be a qualified organization as defined by § 170(h)(3) and must meet the requirements of Reg. § 1.170A-14(c)(1). The current condition of Chapter House is documented in a report that will be attached to and become part of the easement. The easement requires that

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Housing Corporation record the easement in the land records of the appropriate county.

The easement provides that if circumstances arise making impossible the continued use and ownership of Chapter House consistent with the purpose of the easement, then the easement may be extinguished by judicial proceedings. In addition, the qualified organization must use any proceeds received upon extinguishment of the easement in a manner consistent with the purpose of the easement. For purposes of determining the distribution of proceeds in the event of extinguishment or condemnation, the easement provides that both parties are vested with real property interests in Chapter House and that the qualified organization's percentage interest in Chapter House will be determined by the ratio of the value of the easement to the value of the property, without deduction for the value of the easement. The value of the easement and the value of the property will be determined by appraisals made in accordance with Reg. § 1.170A-14(h). That ratio shall remain constant and will be included in the records documenting the condition of Chapter House at the time of conveyance.

LAW AND ANALYSIS

Section 170(a)(1) provides, subject to certain limitations, a deduction for charitable contributions described in § 170(c), payment of which is made within the taxable year.

Section 170(c) defines a charitable contribution as a contribution or gift to or for the use of certain organizations meeting specific criteria, including governmental units and domestic charities.

Rev. Rul. 69-573, 1969-2 C.B. 125, holds that a college fraternity that maintains a chapter house for active student members is exempt from Federal taxation under § 501(c)(7), rather than § 501(c)(3). Therefore, contributions to the fraternity are not deductible under § 170. Rev. Rul. 69-573, citing Phinney v. Dougherty, 307 F.2d 357 (5th Cir. 1962), and Davison v. Commissioner, 60 F.2d 50 (2d Cir. 1932), states that although the typical college fraternity does in some degree contribute to the cultural and educational growth of its members during their student years, that is not its primary purpose. Such an organization is primarily a social club in that its major functions are to provide a meeting place for its members, living quarters, and the headquarters for their entertainment.

Rev. Rul. 60-367, 1960-2 C.B. 73, holds that contributions made to a college through a fund raising program for the purpose of acquiring or constructing a housing facility for use by a

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designated fraternity are deductible under § 170. The college owns the houses and rents the dwellings to fraternity groups on short-term leases at rates closely comparable to the rentals charged by the college for similar housing facilities. Although donors are permitted to designate a particular fraternity, the only practical benefit of the designation is that a specific chapter house might be finished ahead of the others. The funds are not used for improvements on structures owned by anyone other than the college. Rev. Rul. 60-367 further states that in order for the gift to be deductible, it must in reality be gift to the college and not a gift to the fraternity by using the college as a conduit.

I. Beneficiary of Contributions

Similar to the issue in Rev. Rul. 60-367, we must determine which organizations will be benefitted by the contributions to Foundation. Only if the contributions are in reality to a qualified charitable donee will they qualify for the charitable contribution deduction under § 170.

Foundation will be benefitted by the contributions it receives from Fraternity alumni and others as Foundation will maintain control of the funding which will be used in its discretion in furtherance of its educational and charitable purposes. Because Foundation intends to use the funding to preserve and maintain the facade and certain interior portions of Chapter House, Fraternity, as the resident of Chapter House, will benefit from the contributions received by Foundation. Without more, the donations would not qualify for the charitable contribution deduction because the beneficiaries of the donations are Foundation, which is a qualified charitable donee, and Fraternity, which is not a qualified charitable donee.

Housing Corporation, however, plans to grant a preservation and conservation easement in the facade and certain interior portions of Chapter House to a qualified organization. Although Housing Corporation, as a nonprofit organization, will not get the benefit of a charitable deduction, the grant of the easement, if it meets the definition of a qualified conservation contribution under § 170(h) and Reg. § 1.170A-14, would serve the dual purpose of ensuring the perpetual preservation and conservation of those portions of Chapter House covered by the easement and, important to the charitable donation question, will ensure that the donations will benefit a qualified charitable donee.

We now turn to an examination of whether the preservation and conservation easement that Housing Corporation plans to grant to a qualified organization is a qualified conservation contribution within the meaning of § 170(h) and Reg. § 1.170A-14.

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II. Preservation and Conservation Easement

Under § 170(h)(1), a "qualified conservation contribution" is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.

A. Qualified Real Property Interest

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

The instrument that Housing Corporation proposes to grant to a qualified organization is an easement providing for perpetual restrictions on the use of real property. Accordingly, the interest to be granted in the easement is a qualified real property interest within the meaning of § 170(h)(2)(C) and Reg. § 1.170A-14(b)(2).

B. Qualified Organization

Section 170(h)(3) provides that the term "qualified organization" is one of the following: (1) a governmental unit described in § 170(b)(1)(A)(v), (2) an organization described in § 170(b)(1)(A)(vi), (3) a charitable organization described in § 501(c)(3) that meets the public support test of § 509(a)(2), or (4) a charitable organization described in § 501(c)(3) that meets the requirements of § 509(a)(3) and is controlled by an organization described in (1), (2), or (3). In addition, Reg. § 1.170A-14(c)(1) states that the qualified organization must have a commitment to protect the conservation purposes of the donation and have the resources to enforce the restrictions. Foundation has represented that the recipient of the easement will meet these requirements.

Section 1.170A-14(c)(2) of the regulations provides that the instrument of conveyance must prohibit subsequent transfers by the donee, unless, in the subsequent transfer, the donee requires that the conservation purpose continues to be carried out, and the subsequent transferee meets the requirements necessary to be a qualified organization under § 170(h)(3) and Reg. § 1.170-14(c)(1). The deed of easement contains such a restriction. Accordingly, this requirement would be met.

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C. Conservation Purpose

Section 170(h)(4)(A)(iv) defines the term "conservation purpose" to include the preservation of a certified historic structure. Section 170(h)(4)(B) defines the term "certified historic structure" to include a building listed in the National Register. Chapter House is listed on the National Register. Accordingly, Chapter House is a certified historic structure within the meaning of § 170(h)(4)(B) and its preservation is a conservation purpose within the meaning of § 170(h)(4)(A)(iv).

Section 1.170A-14(d)(5)(iv) of the regulations provides that for the easement to be considered as having been granted for a conservation purpose, some visual public access to the donated property is required. Further, if the donated property is not visible from a public way, for example, the subject of the easement is the interior of a building, then the terms of the easement must provide that the general public is given the opportunity on a regular basis to view the characteristics and features of the donated property consistent with the nature and condition of the property.

Section 1.170A-14(d)(5)(v) of the regulations provides examples of public access to donated property meeting the requirements of Reg. § 1.170A-14(d)(5)(iv). Example (1) describes a donation by A of an easement to the exterior and interior of his Victorian period home that he and his family live in. The view of A's home is obscured by a high stone wall. The easement provides that the house may be opened to the general public from 10:00 a.m. to 4:00 p.m. on one Sunday in May and one Sunday in November each year for house and garden tours. Also, the donee organization is given the right to photograph the exterior and interior of the house for use in publications and to permit persons affiliated with educational organizations, professional architectural associations, and historical societies to make appointments to study the property. In this example, the regulations concluded that the two opportunities for public visits per year, when combined with the ability of the general public to view the subject of the easement through photography, the opportunity for scholarly study of the property, and the fact that the house is used as a residence, will enable the donation to satisfy the requirement of public access.

In the instant case, similar to Example (1) above, the subject of the easement is the exterior and part of the interior of a residence. Like Example (1), the easement at issue provides two opportunities for public visits per year, the ability of the general public to view the subject of the easement through photography and publications, and the opportunity for scholarly study of the property. In addition to those factors discussed in

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Example (1), the exterior of Chapter House is visible from a heavily used public thoroughfare and the terms of the easement prohibit Housing Corporation from allowing anything to obscure the public's view of the facade of Chapter House. Based on these factors, we conclude that there is sufficient public access to the subject of the easement such that the easement would be considered as having been made for conservation purposes within the meaning of Reg. § 1.170A-14(d)(5)(iv).

D. Exclusively for Conservation Purposes

Section 170(h)(1)(C) provides that the contribution must be exclusively for conservation purposes. Section 170(h)(5)(A) provides that a "contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." Section 1.170A-14(g)(1) of the regulations provides that any interest retained by the donor must be subject to legally enforceable restrictions that will prevent use of the donor's retained interest that is inconsistent with the conservation purposes of the donation. Section 1.170A-14(g)(5)(i) of the regulations provides that when the donor retains rights, the exercise of which may impair the conservation interests associated with the property, the donor must make available to the donee documentation sufficient to establish the condition of the property at the time of conveyance. Section 1.170A-14(g)(5)(ii) of the regulations states that the terms of the donation must provide that the donor notify the donee before exercise of any reserved rights, the donee has a right of inspection to ensure compliance with the donation, and the donee has rights to legally enforce the conservation restrictions.

Section 1.170A-14(g)(6)(i) of the regulations provides that if circumstances change making impossible or impractical the continued use of the property for conservation purposes, then the easement will be treated as protected in perpetuity if the restrictions are extinguished by judicial proceedings and all of the proceeds received by the donee are used by the donee in a manner consistent with the conservation purposes of the original contribution. Section 1.170A-14(g)(6)(ii) of the regulations provides that the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right with a fair market value that is at least equal to the proportionate value that the restriction at the time of the gift bears to the value of the property as a whole. Further, that proportionate value of the donee's property rights shall remain constant.

The easement in the instant case complies with these requirements. It provides that the qualified organization has rights to legally enforce the conservation restrictions, requires

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Housing Corporation to file the easement in the appropriate county's land records, and provides the qualified organization with the right of inspection. Under the terms of the easement, Housing Corporation is required to provide to the qualified organization documentation of the condition of Chapter House at the time of conveyance and to notify and get the approval of the qualified organization prior to exercise of any reserved rights. Further, the easement provides for extinguishment pursuant to judicial proceedings, limits the use of proceeds received by the donee as a result of extinguishment, and meets the requisite percentage values, which are to remain constant, with respect to property rights. Accordingly, the proposed donation would be considered as having been made exclusively for conservation purposes within the meaning of the relevant regulations.

E. Qualified Conservation Contribution

Based upon the facts submitted and representations made in your ruling request, we conclude that the contribution of the preservation and conservation easement would meet the definition of a qualified conservation contribution within the meaning of § 170(h).

III. Summary and Conclusion

As is the case in Rev. Rul. 60-367, the proposed donations in the instant case are, in substance, donations to charitable donees-- namely, Foundation and the recipient of the preservation and conservation easement-- in furtherance of their exempt purposes. The funding benefits Foundation in that Foundation maintains control of the funding which will be used in Foundation's discretion in furtherance of its educational and charitable purposes. Housing Corporation plans to grant a preservation and conservation easement in the facade and certain interior portions of Chapter House to a qualified organization having a commitment to protect the conservation purposes of the easement. Also, Fraternity's and Housing Corporation's policies with respect to public access to Chapter House provide a public benefit. Although even with these policies they do not qualify as charitable donations, see Rev. Rul. 69-573, supra, Fraternity's and Housing Corporation's policies with respect to public access to Chapter House provide a public benefit in that Fraternity members give scheduled and ad hoc public tours of Chapter House, permit photography of Chapter House for use in publications, and permit University A and other organizations to use Chapter House for educational and other purposes. Therefore, amounts raised and expended by Foundation to maintain and preserve the facade and certain interior portions of Chapter House will further the exempt purposes of itself and of the qualified organization that owns, by virtue of the easement, a real property interest in

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Chapter House. The contributions will only incidently benefit Fraternity.

Accordingly, if Housing Corporation grants an easement in the facade and certain interior portions of Chapter House to a qualified organization described in § 170(h)(3) and Reg. § 1.170A-14(c), then the donations by Fraternity alumni and others to Foundation for the purpose of maintaining and preserving the facade and certain interior portions of Chapter House qualify for the charitable contribution deduction under § 170, subject to the usual rules of that section including percentage limitations and substantiation requirements for any contribution of \$250 or more.

No opinion is expressed concerning the federal income tax consequences of these donations under any other provisions of the Internal Revenue Code. A copy of this ruling should be attached to taxpayer's federal income tax returns for the tax years affected.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) provides that this ruling may not be used or cited as precedent.

Sincerely,

Assistant Chief Counsel
(Income Tax & Accounting)

By: _____
Michael D. Finley
Chief, Branch 3

Enclosure:
Copy for § 6110 purposes