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Are Tenant-Stockholders Entitled to a Charitable Contribution Deduction when a Cooperative Housing Corporation Donates a Preservation Easement?

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Abstract

Most Tenant-Stockholders of cooperative housing corporations (“CHC”) view themselves as the owners of their apartments, a perception encouraged by the Internal Revenue Code (“Code”), which affords them those tax benefits most commonly associated with home ownership. This article explores the question of whether that perception is accurate with respect to the Code’s tax incentives designed to encourage preservation of historic homes. The Code encourages homeowners to protect their historic homes with preservation easements by allowing a charitable contribution deduction equal to the resulting decline in the value of their home. If a CHC donates a preservation easement, the law is clear that the CHC is entitled to claim a charitable contribution deduction but less clear regarding whether the Tenant-Stockholders may do so as well. Because the statutory constraints placed on the amount of income a CHC may recognize, any charitable contribution deduction claimed by the CHC will, most likely, be worthless. The only way to encourage the preservation of historic cooperatives is to allow the Tenant-Stockholders to claim a deduction.

This article posits that Tenant-Stockholders expect, if the CHC encumbers the cooperative premises with a preservation easement, to deduct their proportionate share of the CHC’s charitable contribution deduction, just as they deduct their proportionate share of mortgage interest and real estate taxes paid by the CHC. Because Section 216, which authorizes Tenant-Stockholders to deduct their proportionate share of carrying charges paid by the CHC, does not include the deduction for charitable contributions in its list of
expenses qualifying for deduction by both a CHC and its Tenant-Stockholders, an argument that Tenant-Stockholders are allowed to deduct their proportionate share of the CHC’s charitable contribution deduction is likely to fail. This article argues that current law supports characterizing CHC stock as real estate for purposes of the qualified conservation contribution and, therefore, Tenant-Stockholders should be entitled to grant a qualified conservation contribution with respect to their CHC stock and claim the resulting charitable contribution deduction.
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Introduction

Vernacular usage treats Tenant-Stockholders of a cooperative housing corporation ("CHC") as the owners of their apartments. The Internal Revenue Code (the "Code")\(^1\) encourages this perception by equating Tenant-Stockholders with homeowners for purposes of those tax benefits most commonly associated with home ownership.\(^2\) Tenant-Stockholders typically purchase cooperative apartments in order "to combine the convenience of apartment dwelling with the economics of home ownership."\(^3\) Consequently, they view themselves as homeowners and assume that they are entitled to all the attendant benefits. Questions exist, however, whether the tax advantages granted to Tenant-Stockholders are co-extensive with those enjoyed by other homeowners.

This article explores the question of whether Tenant-Stockholders who live in cooperatives listed on the National Register of Historic Places ("National Register") enjoy the federal tax incentives designed to encourage preservation of historic homes. The Code encourages homeowners and other owners of listed buildings to protect their historic buildings with a preservation easement by allowing a charitable contribution deduction equal to the resulting decline in the value of their building.\(^4\) The CHC, as donor of the preservation easement, is entitled to claim the charitable contribution

\(^1\) Unless otherwise indicated, all Code citations in this article are to the Internal Revenue Code of 1986, as amended.
\(^2\) See infra notes 42 to 67 and accompanying text.
\(^3\) John Mixon, Apartment Ownership in Texas: Cooperative and Condominium, 1 Hous. L. Rev. 226, 227 (1963-64).
deduction, but the statutory constraints placed on the amount of income a CHC may recognize make the deduction illusory.\textsuperscript{5} Unless the Tenant-Stockholders can claim a deduction when the CHC encumbers its historic cooperative\textsuperscript{6} with a preservation easement, there is no tax benefit from the donation.

This article posits that Tenant-Stockholders expect, if the CHC encumbers the cooperative premises with a preservation easement, to deduct their proportionate share of the CHC’s charitable contribution deduction, just as they deduct their proportionate share of mortgage interest and real estate taxes paid by the CHC.\textsuperscript{7} Section 216, which authorizes Tenant-Stockholders to deduct their proportionate share of carrying charges paid by the CHC, does not, however, include the deduction for charitable contributions in its list of expenses qualifying for deduction by both a CHC and its Tenant-Stockholders.\textsuperscript{8} Consequently, the question arises as to whether the Tenant-Stockholders’ expectations are viable.

After discussing the relevant legal background in Section I, the question of whether Section 216 authorizes Tenant-Stockholders to deduct their proportionate share of the CHC’s charitable contribution deduction when the CHC donates a preservation easement is explored in Section II. Section II concludes Tenant-Stockholders would be forced to argue that, based on the Congressional intent implicit in the Code to grant them parity with other homeowners, the charitable contribution deduction should be read into Section 216, an argument that is unlikely to succeed. Section III argues that current law

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 108 to 113 and accompanying text.
\item The phrase “historic cooperative” refers to any cooperative located in a building listed on the National Register, regardless of whether the building’s original use was as a cooperative.
\item See infra notes 42 to 50 and accompanying text.
\end{enumerate}
\end{footnotesize}
offers another basis for allowing Tenant-Stockholders to claim a charitable contribution deduction – a qualified conservation contribution donated by the Tenant-Stockholders with respect to their CHC stock, rather than one donated by the CHC with respect to the cooperative premises. Section III argues that current law supports characterizing CHC stock as real estate for purposes of the qualified conservation contribution and, therefore, Tenant-Stockholders should be entitled to grant a qualified conservation contribution with respect to their CHC stock. Section IV asks the Service to provide the necessary administrative guidance regarding how such a contribution should be made and raises some issues that such guidance should address to ensure that the donation fulfills the purposes underpinning the deduction for qualified conservation contributions.

I. Background

A. Legal Structure of Cooperative Housing Corporations

A cooperative is a multi-family dwelling that allows the owners to share the cost of real property taxes, insurance, property improvements, repairs, maintenance, and other expenses associated with the property. The luxury cooperative, a primarily American phenomenon, first appeared in New York City, as early as 1876, cooperatives for

9. Uniform Common Interest Community Ownership Act (1994) §1-103(7). For simplicity, this article shall refer to the individual dwelling units as apartments; however, a cooperative may also own houses. I.R.C. § 216(b)(1)(B).
lower and middle income families, in the early 20th Century. The popularity of cooperatives has waxed and waned since their introduction to America. Probably the periods of greatest growth followed the two World Wars, when urban housing shortages combined with the post-war economic booms fueled the development of cooperatives for lower and middle income families. Today, the cooperative has been eclipsed in popularity by the condominium: Nationally 9 out of 10 common interest communities are condominiums. Cooperatives remain extremely popular in New York City, where the statistics are almost reversed. The percentage of cooperatives in the District of Columbia also exceeds the national average.

Cooperatives are superficially similar to condominiums. Both are forms of shared ownership intended to provide their residents with the security and advantages, including the tax advantages, of home ownership while facilitating the pooling of resources to purchase common areas, including those that might otherwise be beyond the reach of individual owners. Cooperatives and condominiums differ substantially, however, with respect to how legal title to the premises is held. Under the cooperative form of shared ownership title to the entire premises, including the individual apartments, is held by the

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12.  *Id.* Internationally, the middle and lower income cooperative is the norm.  *Id; see also,* McCullough, *supra* note 10 at 304.  Cooperatives can trace their roots to 1720 France, where they were built to alleviate an acute housing shortage caused by a fire.  *Id.*
13.  Siegler & Levy, *supra* note 11, at 2-5.  Labor unions seeking affordable housing for their members were responsible for much of the post-war cooperative developments.  *Id.* at 2.
15.  *Id.* at 280.  Cooperatives comprise approximately 80 percent of the common interest communities in New York City.  *Id.*
16.  *Id.*
cooperative. Under the condominium form, owners hold title to their particular units individually in fee simple absolute and hold title to the common areas jointly, typically as tenants in common.

While ownership of the premises by the cooperative is the defining characteristic of a cooperative, there are several ways to organize the cooperative. The most popular form, and the one discussed in this article, is the corporate form, in which a corporation owns the cooperative premises and the beneficial owners of the apartments, the Tenant-Stockholders, own stock in the corporation.

Depending on the laws of the jurisdiction, a corporate cooperative may be organized under a dedicated cooperative statute or under the jurisdiction’s general corporate laws. In addition to the usual attributes of stock ownership, such as the right to participate in the management of the corporation by voting for the board of directors, stock ownership in a cooperative includes the right to lease a particular unit under a proprietary lease. The rent, or annual assessment, required by the proprietary lease is established annually by the board of directors in an amount sufficient to cover the

19. See, e.g., Uniform Common Interest Act, supra note 9 at § 1-103(2).
20. Crimm, supra note 17, at 10. Cooperators may also hold title to the premises as joint tenants with right of survivorship, tenants in common, or in a business trust. Id. at 90; Carolyn S. Bratt, Cooperative Apartments: A Survey of Legal Treatment and an Argument for Homestead Protection, 1978 U. Ill. L.F. 763, 775 (1978).
21. Crimm, supra note 17, at 90. Corporate cooperatives are typically structured to qualify as CHCs in order to maximize the tax advantages to the Tenant-Stockholders. See Eckstein v. United States, 452 F.2d 1032, 1048 (Ct. Cl. 1971). In a 100 percent cooperative all of the individual apartments are owned indirectly by the Tenant-Stockholders. Castle, supra note 18, at 313. Only 100 percent and near 100 percent cooperatives qualify as CHCs for tax purposes due to the requirement that a CHC receive at least 80 percent of its gross income from Tenant-Stockholders. See I.R.C. §216(b)(1)(D).
22. Crimm, supra note 17, at 90 n.10.
23. Castle, supra note 18, at 6. The number of shares owned by each Tenant-Stockholder is determined by the value of her apartment as compared to the value of the entire cooperative premises. Schill, supra note 14, at 288.
Tenant-Stockholder’s proportionate share of the operating costs of the cooperative for the year. 24 Failure to pay the annual rent results in termination of the proprietary lease and sale of a Tenant-Stockholder’s stock. 25

Because it is the legal owner of the cooperative premises, the cooperative, rather than the Tenant-Stockholders, has the right to mortgage the cooperative premises. 26 The cooperative may obtain a blanket mortgage to cover the purchase price of the cooperative premises or the cost of maintenance and repairs. 27 The cooperative generally has a lien against each Tenant-Stockholder’s stock to secure payment of her share of the blanket mortgage. 28 Because one Tenant-Stockholder’s failure to pay her proportionate share may result in foreclosure, the other Tenant-Stockholders must cover the shortage or risk losing their equity. 29 Tenant-Stockholders who require financing in order to purchase their cooperative stock cannot mortgage their cooperative apartments as security for their loans because the apartments do not belong to them. Instead, the Tenant-Stockholders obtain share loans to finance the acquisition of their cooperative stock, pledging their shares as collateral for the loans. 30

B. Taxation of Cooperative Housing Corporations

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24 Id. at 5. In addition to the annual operating costs, such as any interest or principal payments due on a blanket mortgage on the premises, maintenance costs, and real estate taxes, the annual rent may include a special assessment to cover extraordinary expenses such as the cost of building improvements. Id.
25 Id. at 5-6.
27 Id. at 398.
28 Castle, supra note 18, at 4. The lien also ensures payment of the annual assessment. Id. at 7.
Most, if not all, corporate cooperatives are structured to meet the requirements of a cooperative housing corporation (“CHC”). Qualification as a CHC is essential for the Tenant-Stockholders to enjoy the tax benefits of home ownership.

A cooperative must satisfy four requirements to qualify as a CHC. It can only have one class of stock. Ownership of stock must entitle a shareholder to live in an apartment owned by the cooperative. Except in the case of a complete or partial liquidation of the CHC, no shareholder may be entitled to receive any distribution from the CHC that is not out of earnings and profits. Lastly, the corporation must derive at least 80 percent of its gross income from its Tenant-Stockholders.

As a general rule, a CHC computes its taxable income using the rules applicable to corporations. Corporations are separate taxable entities and compute taxable income independently from their shareholders; items of income or expense generated by
corporate property are taxable to, or deductible by, the corporation, not its shareholders. Consequent ly, a CHC reports as gross income all amounts paid or accrued as rent from its shareholders and deducts all ordinary and necessary expenses incurred by it in the trade or business of operating the cooperative, including any interest paid or accrued with respect to a blanket mortgage and all real property taxes paid or accrued with respect to the cooperative.

C. Taxation of Tenant-Stockholders

The primary Code section addressing the tax treatment of Tenant-Stockholders is Section 216, which allows Tenant-Stockholders to deduct their proportionate share of carrying charges paid by the CHC with respect to the cooperative premises that would be deductible by the Tenant-Stockholders if they owned their apartments directly. Those carrying charges are real estate taxes and mortgage interest, both of which the Code allows homeowners to deduct notwithstanding the general disallowance of personal living expenses.

39. See I.R.C. §§ 11(a), 162(a); Bittker & Stone, Federal Income, Estate and Gift Taxation, ¶ 1.02 (3d Ed. 2001). A shareholder is not taxed on corporate profits until the corporation distributes them. Id.
40. I.R.C. § 61. Any payments made to the cooperative corporation as a contribution to capital, rather than as rent, are excluded from the corporation’s gross income. I.R.C. § 118(a).
41. I.R.C. § 162(a).
42. I.R.C. § 164(a)(1).
43. I.R.C. § 163(h)(1),(h)(2)(D). The mortgage interest must satisfy the requirements for qualified residence interest. See infra notes 56 to 59 and accompanying text.
44. I.R.C. § 262(a).
Section 216 allows Tenant-Stockholders to deduct that portion of the annual assessment which represents their proportionate share of real estate taxes\(^{45}\) and mortgage interest\(^{46}\) paid by the CHC with respect to a blanket mortgage. Absent Section 216, the annual assessment would be considered non-deductible personal rent.\(^{47}\) Tenant-Stockholders would not be allowed to deduct any of the interest paid with respect to a blanket mortgage,\(^{48}\) even though foreclosure of such mortgage would eliminate their investment in the cooperative.\(^{49}\) Nor would they be permitted to deduct the real estate taxes paid with respect to the cooperative.\(^{50}\)

Homeowners may also depreciate the cost of their residence if they use it in an income producing activity.\(^{51}\) Section 216 allows Tenant-Stockholders who rent out their apartment or otherwise use it for income producing purposes to claim depreciation with respect to their stock basis.\(^{52}\) Absent Section 216, Tenant-Stockholders who used their apartment for income producing purposes would not be allowed to claim depreciation because their CHC stock is not a depreciable asset.\(^{53}\)

The second Code section addressing the tax treatment of Tenant-Stockholders is Section 163, which compliments Section 216 by treating CHC stock as the Tenant-

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45. I.R.C. § 216(a)(1). The real estate taxes must be deductible by the CHC under § 164. Id.
46. I.R.C. § 216(a)(2). The mortgage interest must be paid with respect to indebtedness secured by the cooperative premises and incurred to acquire, improve or maintain the cooperative premises. Id. In addition, the interest must be allowable as a deduction to the CHC under § 163. I.R.C. § 216(a)(2).
47. I.R.C. § 262(a).
49. Mixon, supra note 3, at 228.
52. I.R.C. § 216(c).
53. Lake Forrest, Inc. v. Comm'r, 22 T.C.M. (CCH) 156, T.C. Memo 1963-39 (1963); see also Treas. Reg. § 1.167(a)-3. Tenant-Stockholders who hold their apartment for income producing purposes are allowed to deduct the annual assessment as rent, an ordinary and necessary expense. I.R.C. §§ 212, 162(a)(3).
Stockholder’s residence for purposes of determining whether interest paid with respect to
debt secured by such stock is nondeductible personal interest\textsuperscript{54} or “qualified residence
interest.”\textsuperscript{55} Qualified residence interest is interest paid with respect to “acquisition
indebtedness,”\textsuperscript{56} defined as indebtedness incurred to acquire a taxpayer’s residence,\textsuperscript{57} or
“home equity indebtedness,”\textsuperscript{58} defined as indebtedness secured by the equity in a
taxpayer’s residence.\textsuperscript{59} Section 163 treats the purchase and holding of CHC stock as the
purchase and holding of a residence.\textsuperscript{60} Interest paid with respect to indebtedness secured
by CHC stock qualifies as deductible qualified residence interest if the Tenant-
Stockholder uses the apartment as residence\textsuperscript{61} and the indebtedness satisfies the
requirements of acquisition indebtedness or home equity indebtedness.\textsuperscript{62} As a result,
interest paid with respect to a share loan\textsuperscript{63} is treated as qualified residence interest.

The final section specifically addressing the tax treatment of Tenant-Stockholders
is Section 121, which extends the exclusion for gain realized from the sale of a principal
residence to sales of CHC stock.\textsuperscript{64} Section 121 exempts from taxation the first $250,000

\begin{itemize}
  \item \textsuperscript{54} I.R.C. § 163(h)(1).
  \item \textsuperscript{55} I.R.C. § 163(h)(2)(D).
  \item \textsuperscript{56} I.R.C. § 163(h)(3)(A)(i).
  \item \textsuperscript{57} I.R.C. §§ 163(h)(3)(B)(i), (h)(4)(A). Acquisition indebtedness must be secured by the
      residence and cannot exceed $1 million. I.R.C. §§ 163(h)(3)(B)(i), (ii). If the taxpayer has more than one
      residence, the $1 million limit applies to the aggregate acquisition indebtedness incurred to purchase both
      residences. \textit{Id.}
  \item \textsuperscript{58} I.R.C. § 163(h)(3)(A)(ii).
  \item \textsuperscript{59} I.R.C. § 163(h)(3)(C)(i). A taxpayer’s aggregate home equity indebtedness cannot
  \item \textsuperscript{60} I.R.C. § 163(h)(4)(B). For purposes of the qualified residence exception, a residence is
      defined as the taxpayer’s principal residence or one other residence. I.R.C. § 163(h)(4)(A)(i).
  \item \textsuperscript{61} I.R.C. § 163(h)(4)(B).
  \item \textsuperscript{62} I.R.C. §§ 163(h)(3)(B)(i), (h)(4)(A). The debt must be secured by the CHC stock;
      however, if the Tenant-Stockholder is prohibited from using the CHC stock as security, the Tenant-
      Stockholder may still deduct interest paid with respect to debt that otherwise meets the requirements of
  \item \textsuperscript{63} See infra note 30 and accompanying text.
  \item \textsuperscript{64} Section 121 is an exception to the general rule that all gain realized from the disposition
      of property must be recognized. \textit{See} I.R.C. § 1001(c).
\end{itemize}
of gain realized from the sale of a taxpayer’s principal residence. In order to take
advantage of Section 121, the taxpayer must have owned and used the property as her
principal residence for at least two of the five years immediately preceding the sale.
Gain realized from the sale of CHC stock qualifies for the exclusion provided the Tenant-
Stockholder has held her CHC stock and has used her apartment as a residence for the
requisite period of time prior to the sale.

D. Preservation Easements

The National Register promotes the federal government’s policy of giving
“maximum encouragement” to private preservation of the Nation’s historic buildings by
identifying those buildings worthy of protection due to architectural significance,
association with a historic person, or affiliation with a historic event. Listed buildings
must “possess integrity of location, design, setting, materials, workmanship, feeling and
association.”

65. I.R.C. § 121(b)(1). If the taxpayer files a joint return with her spouse, the first $500,000
of gain is tax-free. I.R.C. § 121(b)(2)(A).
66. I.R.C. § 121(a).
69. 36 C.F.R. § 60.1(b) (2008). Buildings possessing local, state, or national significance are
eligible for listing on the National Register. 36 C.F.R. § 65.4(a)(1) (2008). An eligible building will not be
70. 36 C.F.R. § 60.4(c) (2008). An architecturally significant building must embody the
distinctive characteristics of a particular style of architecture or method of construction, possess high
artistic value, or have been designed or constructed by a master. 36 C.F.R. § 60.4(c) (2008). A building
may be listed individually or, if it is important to preserve the historic context in which it and any adjacent
buildings are located, as part of a historic district.
73. 36 C.F.R. § 60.4 (2008).
Although National Register listing signifies the historic importance of a particular building, listing does not automatically protect a historic building from destruction. Listing also does not prevent impairment of the building’s architectural features. Instead of making protection an inherent aspect of National Register listing, Congress has chosen tax incentives, such as the charitable deduction for donating a preservation easement, as the primary method of encouraging preservation of historic buildings. Owners of historic buildings, particularly those who have spent time or money restoring the building in accordance with accepted preservation standards, often use preservation easements to counterbalance the National Register’s lack of protection.

A preservation easement is a perpetual restriction encumbering a listed building that gives a charity dedicated to the conservation of historic buildings the right to control the changes made to the building or its site. Taxpayers who donate preservation easements are allowed to deduct the value of the preservation easement as a charitable contribution deduction. The value of a preservation easement equals the amount by

74. 36 C.F.R. § 60.2 (2008).
75. *Id.* There are no federal laws that prevent listed buildings from being demolished; however, listing does subject the property to Section 106 review. 16 U.S.C. 470f (2005); 36 C.F.R. § 60.2(a) (2008). Before a federal agency may engage in an “undertaking” that impacts a listed building, the Advisory Council on Historic Preservation must be given an opportunity to review the undertaking and make suggestions regarding ways to minimize any adverse impact. *Id.* Section 106 review is merely a procedural requirement and the federal agency is free to disregard the suggestions made by the Advisory Council on Historic Preservation. 36 CFR §§ 60.2, (c) (2008).
77. *Id.* The particular terms of a preservation easement vary, depending on the degree of protection desired by the owner; however, most preservation easements consist of a facade easement or a facade easement combined with a developments rights easement. A facade easement typically protects the exterior shell of the building, although there is no prohibition against granting a facade easement with respect to a building’s interior. A developments rights easement restricts construction on the building’s site. Both types of easements give the charity an interest in the encumbered property and the right to control changes to it. *See generally,* Janet Diehl & Thomas S. Barrett, THE CONSERVATION EASEMENT HANDBOOK 5 (1988).
which the value of the encumbered building declines as a result of encumbering it with the preservation easement. 79

II. Protecting Historic Cooperatives with Donations of Preservation Easements by Cooperative Housing Corporations

The Dakota Apartments on the west side of Central Park, one of the early luxury cooperatives and an outstanding example of the German Renaissance style; 80 the Dunbar Apartments in Harlem, 81 “the first large cooperative built for [African Americans];” 82 and Chatham Village in Pittsburgh, 83 an exquisite example of the English Garden City movement of the 1930s, 84 are only a few of the historic cooperatives listed on the National Register. Like all buildings listed on the National Register, these cooperatives are a part of our country’s irreplaceable heritage and serve as a living lesson in history and architecture.

79. Treas. Reg. §1.170A-14(h)(3)(i). If a market exists for conservation easements, the amount of the charitable deduction will be determined by the fair market value of the easement. Id. The amount that can be claimed as a charitable contribution deduction is subject to limitations based on the character of the donated property. I.R.C. § 170(b)(1)(E)(i), (2)(B). Conservation easements donated prior to January 1, 2010 are, generally speaking, deductible up to 50 percent of adjusted gross income in the case of individual donors. I.R.C. § 170(b)(1)(E)(iv). Donations after that date are deductible up to 30 percent of adjusted gross income. §§ 170(b)(1)(A), (b)(1)(G), (c). This assumes that the encumbered property constitutes long term capital gain property, property that would, if sold, result in the recognition of long term capital gain. I.R.C. § 170(b)(1)(C). For corporate donors, the limit is usually 10 percent of taxable income. I.R.C. § 170(b)(2). The excess charitable contribution deduction may be carried forward for five years. I.R.C. §§ 170(d)(1), (2), (b)(2)(C)(ii).

83. Chatham Village is listed on the National Register of Historic Places available at www.nps.gov/nr (last visited September 3, 2008).
What are the tax consequences if the Tenant-Stockholders who live in one of these historic cooperatives decide to protect it with a preservation easement? If the CHC donates a preservation easement, the recipient charity has a property interest that entitles it to control any changes made to the cooperative. As a result, the value of the cooperative premises decreases, entitling the CHC to claim a charitable contribution deduction equal to the amount of the decrease. But, what about the Tenant-Stockholders? The value of their CHC stock is dependent, at least in part, on the value of the CHC’s assets. Because the cooperative premises, a nonincome-producing asset, is the only property owned by the CHC, any substantial decrease in its value is bound to adversely impact the value of the CHC stock; however, there may not be a direct dollar-for-dollar correlation between the decrease in the value of the cooperative premises and the decrease in the value of the CHC stock.

Regardless of the extent of the impact of the donation on the value of their CHC stock, it is a virtual certainty that most of those Tenant-Stockholders see no difference between a donation by the CHC and a gift from themselves and would, therefore, expect to claim their proportionate share of the CHC’s charitable contribution deduction, just as they deduct their share of mortgage interest and real estate taxes paid by the CHC. This section discusses whether Section 216, the section that allows Tenant-Stockholders to deduct their share of mortgage interest and real property taxes paid by the CHC, authorizes Tenant-Stockholders to deduct their share of a charitable contribution deduction claimed by the CHC.

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85. See supra notes 77 to 79 and accompanying text.
86. If for some reason encumbering the cooperative does not diminish its value, no charitable contribution deduction is allowed. Treas. Reg. § 1.170A-14(h)(3)(i).
As a general rule, a corporation and its shareholders are taxed as separate entities. Shareholders do not report their share of a corporation’s income, nor do they deduct their share of the corporation’s deductions. These rules apply to CHCs and their Tenant-Stockholders except to the extent they are overridden by other provisions of the Code. Section 216, which overrides the general rule and allows Tenant-Stockholders to deduct their share of carrying charges paid by the CHC, is silent with respect to charitable contributions made by the CHC. And, Section 170, which authorizes the charitable contribution deduction, is similarly silent. Hence, Tenant-Stockholders seeking to claim their proportionate share of the CHC’s charitable contribution deduction are left in a rather unenviable position: They must argue the Code grants them tax benefits co-extensive with those enjoyed by other homeowners and, therefore, the deduction for charitable contributions should be read into Section 216.

The Code clearly supports an argument that Congress’ general intent is to treat Tenant-Stockholders as homeowners. The reason for the enactment of Section 216 was to put Tenant-Stockholders “in the same position as the owner of a dwelling house so far as deductions for interest and taxes are concerned.” Congress went further, however, and made provision for Tenant-Stockholders in every Code section directed exclusively at homeowners. As a result, the Code treats the purchase of a cooperative as the purchase

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87. See supra notes 42 to 50 and accompanying text.
88. See supra note 39.
89. Id.
91. Section 216 was originally enacted as Section 23(z) of the Internal Revenue Code of 1939.
92. S. Rep. No. 1631, 77th Cong., 2d Sess. 51, 1942-2 CB 504, 546 (1942). Some courts interpret Congress’ intent more broadly. See Eckstein v. United States, 196 Ct. Cl. 644, 663 (1971) ("[a]s the legislative history shows, the very purpose of Section 216 and its predecessor Section 23(z) of the 1939 Code is to give tenant-stockholders of housing cooperatives the same tax deduction as are allowed to homeowners").
of a residence,\textsuperscript{93} the holding of a cooperative as the holding of a residence,\textsuperscript{94} the sale of a cooperative as the sale of a residence,\textsuperscript{95} and the rental of a cooperative as the rental of a residence.\textsuperscript{96}

Given that Congress has included Tenant-Stockholders every time it has explicitly granted a benefit to homeowners, it is only logical to assume that Congress also intends Tenant-Stockholders to enjoy those tax benefits available to, but not primarily directed at, homeowners, such as the charitable contribution deduction for preservation easements. In fact, given the Code’s habit of taxing Tenant-Stockholders as if they were homeowners, it is logical to conclude that that the omission of an explicit authorization for Tenant-Stockholders to deduct their proportionate share of preservation easements donated by a CHC was an oversight, one made because the broad nature of the tax incentive distracted Congress from the necessity of including special language to allow Tenant-Stockholders to enjoy the benefit to the same extent as other homeowners. It seems very reasonable to posit that had Congress been focused on the limited scope of Section 216 while amending the charitable contribution deduction to include preservation easements, it would have amended Section 216 to include charitable contributions made by the CHC. This omission can be easily rectified by reading the deduction for charitable contributions into Section 216.

Further support for reading the charitable contribution deduction into Section 216 can be found in Congress’ express intent to use tax incentives to encourage the

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\item \textsuperscript{93} I.R.C. § 163(h)(4)(B). \textit{See supra} notes 54 to 63 and accompanying text.
\item \textsuperscript{94} I.R.C. § 216(a). \textit{See supra} notes 45 to 50 and accompanying text.
\item \textsuperscript{95} I.R.C. § 121(d)(4). \textit{See supra} notes 64 to 67 and accompanying text.
\item \textsuperscript{96} I.R.C. § 216(c). \textit{See supra} notes 51 to 53 and accompanying text.
\end{itemize}
preservation of all historic buildings.\textsuperscript{97} Given such express intent, to conclude that Congress would discourage the preservation of historic cooperatives by purposefully vitiating the resulting charitable deduction is counterintuitive. With respect to historic cooperatives, the best way to implement Congress’ express intent of encouraging preservation is to allow the Tenant-Stockholders to claim the charitable contribution for a qualified conservation contribution.\textsuperscript{98} Expanding the scope of section 216 to include charitable contributions furthers both the purpose underpinning the qualified conservation contribution and Congress’ general intent to grant Tenant-Stockholders parity with other homeowners.

Although the argument to read the charitable contribution deduction into Section 216 is appealing, general tax principles dictate a narrow reading of Section 216 and suggest that, regardless of Congress’ intent, such argument will fail. Whenever a taxpayer argues in favor of an expansive reading of a deduction, the courts invariably rely on the maxim that “[w]hether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefore can any particular deduction be allowed.”\textsuperscript{99} In fact, Section 216 represents Congress’ statutory response to the courts’ implementation of this principle to deny Tenant-Stockholders the deductions for mortgage interest and real estate taxes.\textsuperscript{100}

Taxpayers’ unsuccessful attempts to have the deduction for casualty losses incorporated into Section 216 indicate that an argument to incorporate charitable

\footnotesize{
\textsuperscript{97} 16 U.S.C. §§ 470(b) 470-l(5) (2005).
\textsuperscript{98} This is especially true since the charitable contribution allowed to the CHC is largely unusable. See infra notes 108 to 113 and accompanying text.
\textsuperscript{100} }
contributions into Section 216 will meet a similar fate. In Private Letter Ruling 7105280410A, the taxpayer argued that the deduction for casualty losses was implicitly incorporated into Section 216 and, therefore, a Tenant-Stockholder is allowed a casualty deduction for the decrease in value of his apartment as a result of storm damage to the cooperative.\textsuperscript{101} The taxpayer argued that Section 216 should be read to include casualty losses as a matter of “consistent treatment,”\textsuperscript{102} asserting that “the original allowance of interest and real estate taxes was expanded to include all other benefits of owning a residence directly as opposed to ownership through a corporation.”\textsuperscript{103} Denying the taxpayer’s request, the IRS said Section 216 created an exception to the general rule that a corporation and its shareholders are separate taxable entities,\textsuperscript{104} but one that was limited to the enumerated expenses and, therefore, did not apply to casualty losses.\textsuperscript{105}

In conclusion, an argument that Section 216 encompasses charitable contributions or any other non-listed deduction is unlikely to succeed. If Congress intends for Section 216 to create complete parity between Tenant-Stockholders and other homeowners, then it should amend Section 216 to expand the list of deduction enumerated therein. Until Congress acts, however, Tenant-Stockholders should be aware that if the CHC makes the qualified conservation contribution, Section 216 does not authorize them to deduct their

\textsuperscript{100} Holmes v. United States, 85 F.3d 956, 960 (2d Cir. 1996); see Wood v. Rasquin, 21 F. Supp. 211, 213-14 (E.D.N.Y. 1937), aff’d without op. 97 F.2d 1023 (2d Cir. 1938) (denying interest deduction); Holden v. Comm’r, 27 B.T.A. 530, 538 (1933) (denying a deduction for real estate taxes).
\textsuperscript{101} Priv. Ltr. Rul. 7105280410A (May 28, 1971).
\textsuperscript{102} Id. Homeowners are allowed to claim a casualty loss deduction for uninsured damage to their personal residence. I.R.C. § 165(c)(3).
\textsuperscript{103} Priv. Ltr. Rul. 7105280410A (May 28, 1971). No authority is cited to support this contention.
\textsuperscript{104} Id., citing Watson v. Comm’r, 124 F.2d 437 (1942); Weigman v. Comm’r, 400 F.2d 584 (1968); New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934).
\textsuperscript{105} Priv. Ltr. Rul. 7105280410A (May 28, 1971). There is also case law to the same effect, but it is not directly on point as none of the cases mention Section 216 nor indicate the corporation involved was a CHC, and none of the taxpayers asserted Section 216 as the basis for claiming their casualty
proportionate share of the CHC’s charitable contribution deduction. In order for the Tenant-Stockholders to claim a deduction, the Tenant-Stockholders must be considered the donors.106

III. Donations of Qualified Conservation Contributions by Tenant-Stockholders

If a CHC donates a preservation easement, the CHC is entitled to claim the decline in the value of the cooperative premises as a charitable contribution.107 Section 216, however, does not authorize the Tenant-Stockholders to claim their proportionate share of such deduction on their individual tax returns. Because of the crucial distinction between a CHC and a regular corporation, if the Tenant-Stockholders are not allowed some sort of charitable contribution deduction, there is no tax incentive for them to protect their historic cooperative.

A charitable contribution deduction is virtually useless to a CHC because it is, essentially, a non-profit corporation. A CHC, unlike a regular corporation, must derive at least 80 percent of its gross income from its Tenant-Stockholders.108 This constraint in essence limits the property the CHC may own to the cooperative premises and the income

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106. In some instances, Tenant-Stockholders may be able to circumvent the problem. One way would be to have the CHC elect Subchapter S status, if it meets the requirements. See I.R.C. § 1361(b); Gen. Couns. Mem. 39289 (Sept. 27, 1984). Another possibility is to liquidate the CHC and convert to one of the alternative forms of cooperative ownership. If all of the Tenant-Stockholders use their cooperative apartment as their principal residence, liquidation is a nontaxable event to the CHC. I.R.C. § 216(e). See supra note 38. The Tenant-Stockholders would be treated as having sold their CHC stock; however, for those who had used their cooperative apartment as their principal residence for at least 2 of the 5 years preceding the liquidation some or all of the gain would be excluded from income. I.R.C. §§ 331(a),121(a)-(b). See supra notes 64 to 67 and accompanying text.


108. I.R.C. § 216(b)(1)(D). If the CHC is a 100 percent cooperative, one that leases all of its units to Tenant-Stockholders, all of its gross income is derived from its Tenant-Stockholders. Crimm, supra note 17, at 10.
it can earn to the annual assessment, which functions as the annual rental charge for a Tenant-Stockholder’s apartment. The amount of the aggregate annual assessment is determined by the amount of the CHC’s annual operating expenditures, which are, as a general rule, deductible by the CHC as ordinary and necessary business expenses. Consequently, a CHC generally has little or no taxable income because its operating deductions generally offset its income. As a result, deductions in addition to its normal operating expenses, such as a deduction for a charitable donation, are useless to a CHC.

If the CHC is allowed a charitable contribution deduction but cannot use it and the Tenant-Stockholders are denied any deduction, clearly there is no incentive for either the CHC or the Tenant-Stockholders to donate a preservation easement. This is especially true for the Tenant-Stockholders, since, viewed from their perspective, the donation of a preservation easement is a double whammy that adversely affects both the value of their CHC stock and the value of the cooperative premises they own indirectly. Furthermore, depending on the terms of the preservation easement, the donation may increase the cost of maintaining the cooperative premises, which means that the Tenant-Stockholders’ annual assessment will increase.

This section argues that a Tenant-Stockholder’s interest in CHC stock should be characterized as an interest in real property and, therefore, a Tenant-Stockholder should be entitled to make a qualified conservation contribution with respect to the CHC stock.

109. See supra note 24 and accompanying text.
110. See id.
111. I.R.C. § 162(a).
112. Bratt, supra note 20, at 775.
A qualified conservation contribution\(^\text{114}\) is a donation\(^\text{115}\) of a “qualified real property interest”\(^\text{116}\) that is made “exclusively for conservation purposes,” such as the preservation of a National Register-listed building.\(^\text{117}\)

The Code defines a qualified real property interest as a “restriction (granted in perpetuity) on the use which may be made of the real property.”\(^\text{118}\) Although the most common type of qualified conservation contribution used to protect historic buildings is the preservation easement, the Code does not prescribe any particular form for the restriction. The Regulations provide slightly more guidance, defining a qualified real property interest to include a "perpetual conservation restriction."\(^\text{119}\) A perpetual conservation restriction is “a restriction granted in perpetuity on the use which may be made of real property -- including, an easement or other interest in real property that under state law has attributes similar to an easement.”\(^\text{120}\) Without explaining which attributes of an easement the restriction must have, the Regulations cite restrictive
covenants and equitable servitudes as examples of other types of acceptable restrictions.\footnote{121} Presumably the most important attribute these three restrictions share is that they give the holder an interest in the encumbered property,\footnote{122} since the transfer of a property interest is a prerequisite to claiming a charitable contribution deduction.\footnote{123}

Tenant-Stockholders of a CHC that owns a historic cooperative are entitled to claim a charitable contribution deduction for a qualified conservation contribution if they make a charitable donation that meets the definition of a qualified conservation contribution. Provided their CHC stock qualifies as a real property interest, all that should be required is that the Tenant-Stockholders donate a perpetual restriction with respect to their CHC stock that protects, in perpetuity, the historic cooperative owned by the CHC.\footnote{124}

There is ample support for the proposition that CHC stock should be treated as real property for purposes of qualified conservation contributions. As previously discussed, the Code implicitly equates ownership of CHC stock with ownership of a personal residence and permits Tenant-Stockholders to treat certain amounts paid or received with respect to their CHC stock as if paid or received with respect to their residence.\footnote{125} Influenced by the Code’s treatment of Tenant-Stockholders, the courts and the IRS recognize the “underlying similarity”\footnote{126} between owning stock in a cooperative apartment and owning real estate. As a result, the courts and the Service frequently ignore the technical nature of a Tenant-Stockholder’s property interest, which consists of

\begin{itemize}
  \item \footnote{121} Id.
  \item \footnote{122} See First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1122-243 (10th Cir. 2002) (“easements are constitutionally cognizable property interests”).
  \item \footnote{124} The donation must be made to a qualified charity. I.R.C. § 170(h)(1)(B).
  \item \footnote{125} See supra notes 91 to 96 and accompanying text.
\end{itemize}
stock in the CHC coupled with an interest in a proprietary lease, and apply rules respecting real estate transactions to transactions involving CHC stock.\textsuperscript{127}

In \textit{Holmes v. United States}, the Second Circuit considered whether ownership of CHC stock constitutes ownership of a “dwelling unit” for purposes of Section 280A.\textsuperscript{128} Section 280A, which limits the amount that may be deducted when a taxpayer uses a residence for income producing purposes,\textsuperscript{129} defines a dwelling unit as “a house, apartment, condominium, mobile home, boat, or similar property, and all structures or other property appurtenant to such dwelling unit.”\textsuperscript{130} The government argued that the phrase “similar property” was broad enough to incorporate a cooperative apartment into the definition of dwelling unit.\textsuperscript{131} The taxpayer countered with the argument that the property in question was shares of stock, not the cooperative apartment.\textsuperscript{132} The taxpayer argued that, because inhabitation of stock is impossible, the property, CHC stock, could not be characterized as a “dwelling unit” or “similar property.”\textsuperscript{133} The \textit{Holmes} court, noting that enactment of Section 216 indicated Congress’ recognition of the similarity between stock of a CHC and real property, held that Section 280A applied to limit deductions arising from the ownership of stock in a CHC if the Tenant-Stockholder used the cooperative as a residence.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{126} \textit{Holmes}, 85 F. 3d at 961.
\item \textsuperscript{127} Many of these decisions have involved interpreting Section 216 where, as one commentator puts it, “theInternal Revenue Service or the courts … have, for the most part, reached reasonably intelligent conclusions consistent with the purpose of that section – if not always consistent with its literal language.” Robert A. Jacobs & Lewis A. Kurfist, \textit{Cooperative Apartment Living and Loving - Part I}, \textit{7 J. REAL ESTATE TAX’N} 307, 307-08 (1980).\textsuperscript{126}
\item \textsuperscript{128} 83 F.3d 956.
\item \textsuperscript{129} I.R.C. § 280A.
\item \textsuperscript{130} I.R.C. § 280A(f)(1)(A).
\item \textsuperscript{131} \textit{Holmes}, 85 F.3d at 960.
\item \textsuperscript{132} \textit{Id}.
\item \textsuperscript{133} \textit{Id}. The taxpayer also argued that shares of stock are not “similar property” to real estate. \textsuperscript{132} Id.
\item \textsuperscript{134} \textit{Id}. at 961.
\end{itemize}
According to the Service, the “unique nature of a Tenant-Stockholder’s interest, consisting of leasehold rights linked with stock ownership, [makes] it an oversimplification to regard the Tenant-Stockholder as merely a stockholder with no interest in the realty.” Several administrative pronouncements characterize CHC stock as an interest in real estate. The most germane is Regulation § 1.170A-7(b)(3), which treats CHC stock as real estate for purposes of Section 170(f)(3)(B)(i). Section 170(f)(3)(B)(i) authorizes a charitable contribution deduction for taxpayers who donate a remainder interest in their personal residence. Regulation § 1.170A-7(b)(3) defines a personal residence for purposes of Section 170(f)(3)(B)(i) as any property used as a residence by the donor. According to the Regulation, CHC stock is considered a personal residence, so long as the Tenant-Stockholder uses the cooperative apartment as a personal residence.

The characterization of CHC stock as a personal residence for purposes of Section 170(f)(3)(B)(i) is particularly persuasive when the question is whether CHC stock should be treated as real estate for purposes of the charitable deduction for qualified

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136. Notwithstanding explicit statutory language excluding stock from the list of property qualified for like kind exchange treat, the IRS allows the exchange of CHC stock for real property to qualify as a like kind exchange. Id.; Priv. Ltr. Rul. 84-45-010 (Jul. 30, 1984). The like kind exchange rules allow taxpayers who hold property in a profit making enterprise to defer recognition of any gain realized upon the exchange of that property for other property of like kind. I.R.C. § 1031(a).

The IRS has also ruled that an interest in CHC stock qualifies as an interest in real estate for purposes of the gift tax. See Priv. Ltr. Rul. 94-06-012 (Feb. 11, 1994) (holding that a Tenant-Stockholder who put CHC stock into a personal residence trust in order to give away a remainder interest in the CHC stock did not run afoul of Section 2702).

138. Treas. Reg. § 1.170A-7(b)(3). Use as a residence includes use as either the principal residence or a vacation residence. Id.

139. Id. A Tenant-Stockholder who uses her cooperative apartment as a residence and donates a remainder interest in her CHC stock is treated as donating a remainder interest in her residence, the cooperative apartment. The donation entitles the Tenant-Stockholder to claim a charitable contribution deduction equal to the value of the remainder interest, which is determined by reference to the value of the Tenant-Stockholder’s CHC stock. See Priv. Ltr. Rul. 84-31-007 (Apr. 20, 1984).
conservation contributions. The deduction for qualified conservation contributions is an exception to the partial interest rule,\(^{140}\) which denies a charitable contribution deduction whenever a taxpayer donates less than her entire interest in property.\(^{141}\) Section 170(f)(3)(B)(i) is also an exception to the partial interest rule.\(^{142}\) Since a Tenant-Stockholder’s interest in her CHC stock is considered real estate for one exception to the partial interest rule, logic dictates that it should be considered real estate for all exceptions to the partial interest rule. If Tenant-Stockholders can treat their CHC stock as real estate for purposes of donating a remainder interest to charity, they should be able to treat their CHC stock treat as real estate for purposes of making a qualified conservation contribution. Therefore, Tenant-Stockholders should be able to protect their National Register listed cooperative apartment by making a qualified conservation contribution with respect to an interest in their CHC stock.

IV. The IRS Should Issue Guidance on Charitable Contribution Deductions for Tenant-Stockholders

The IRS should issue administrative guidance regarding the proper procedure Tenant-Stockholders should follow in order to protect a historic cooperative and claim the charitable contribution deduction on their individual tax returns. The IRS might start by analogizing to the situation in which a Tenant-Stockholder donates a remainder interest in her CHC stock to charity.\(^{143}\) If donating a remainder interest in CHC stock is equivalent to donating a remainder interest in the cooperative apartment, then


encumbering CHC stock with a perpetual restriction should be tantamount to encumbering the cooperative apartment with a preservation easement. A Tenant-Stockholder should be able to donate a qualified conservation contribution by encumbering her CHC stock with a perpetual restriction that gives the charity control over how the stock is voted in matters pertaining to the use of the cooperative premises.\textsuperscript{144} Alternatively, the Service may choose to have the Tenant-Stockholders and the CHC jointly encumber the stock and the cooperative premises. A joint donation solves the problem of protecting the cooperative premises in perpetuity, discussed below.\textsuperscript{145}

When issuing guidance, the Service should to be cognizant of the Congressional purposes underpinning the deduction for donations of preservation easements: the perpetual preservation of the architectural features of the protected building.\textsuperscript{146} Consequently, if the Tenant-Stockholders are to make the donation by placing a restriction on their CHC stock, the following issues should be addressed in order to abide by Congress’s mandate that the building be protected in perpetuity.

First, the Service needs to ensure that the restriction cannot be defeated by the other Tenant-Stockholders. A single Tenant-Stockholder should not be able to restrict

\textsuperscript{143} See Treas. Reg. § 1.170A-7(b)(3).
\textsuperscript{144} I.R.C. § 170(h)(2)(C).
\textsuperscript{145} An argument can also be made that the Tenant-Stockholders are the deemed contributors when a CHC donates a preservation easement. Over the years, various administrative rulings have ignored the technical distinction between a CHC and its Tenant-Stockholders. See, e.g., Rev. Rul. 60-76, 1960-1 C.B. 296 (holding that a Tenant-Stockholder’s basis in her CHC stock includes her share of the blanket mortgage encumbering the cooperative premises at the time of purchase). Given the enhanced level of control and participation in management decisions that Tenant-Stockholders have with respect to transactions involving the CHC premises, compared with that retained by shareholders of regular corporations, it is logical to treat them as the donor. Unlike a traditional corporation, a CHC is not permitted to donate a preservation easement without the consent of its stockholders, and for many CHCs, such consent must be unanimous. Because the Tenant-Stockholders, rather than the board of directors, control whether a CHC grants a preservation easement, arguably they should be treated as the donors, either alone or in conjunction with the CHC.
her stock and claim a deduction for a qualified conservation contribution unless the CHC requires unanimous approval from the Tenant-Stockholders in order to sell or make alterations to the cooperative premises. 147 Although the preferable alternative is that all Tenant-Stockholders simultaneously restrict their stock, at a minimum, a sufficient number of Tenant-Stockholders must join in the transfer to block any actions by the CHC that might violate the terms of the restriction. 148

Second, under the Regulations a restriction is not considered to last in perpetuity unless it has priority over all mortgages encumbering the historic property. 149 The purpose of this requirement is to prevent the restriction from being eliminated by a foreclosure action. Because the foreclosure of a blanket mortgage wipes out the Tenant-Stockholders’ equity in their CHC stock as well as any subordinate liens on the cooperative premises, 150 the restriction granted by the Tenant-Stockholders must have priority over liens encumbering the cooperative premises as well as any liens encumbering their CHC stock. 151

147. Most CHCs require either the unanimous consent of the Tenant-Stockholders or the approval of a super-majority in order to alter or sell the cooperative premises. Bratt, supra note 20, at 775.
148. As a general rule, each Tenant-Stockholder generally has one vote, regardless of the number of shares owned. Bernstein-Baker, supra note 26, at 397.
149. Treas. Reg. §1.170A-14(g)(2).
150. Mixon, supra note 3, at 228. See also Bratt, supra note 20, at 776. This is why the CHC has a lien to secure payment of the annual assessment, the source of repayment for any mortgage. It is also why if one Tenant-Stockholder defaults, the other Tenant-Stockholders assume responsibility for the defaulting Tenant-Stockholder’s annual assessment - to prevent loss of their units in a foreclosure. Mixon, supra note 3, at 228; Bratt, supra note 20, at 776.
151. The bylaws of a CHC typically grant the CHC a prior lien on all outstanding shares of CHC stock to enforce the Tenant-Stockholders’ obligations under their proprietary leases. Castle, supra note 18, at 4. The proprietary lease also generally echoes the bylaws and includes a provision in which the Tenant-Stockholder pledges his shares to ensure payment of the annual assessment. Id. at 7. This lien would also have to be subordinate. If a Tenant-Stockholder fails to pay her annual assessment, the CHC can foreclose and sell her stock, an action that would eliminate all inferior interests, including the restriction. Id.
Allowing Tenant-Stockholders to make qualified conservation contributions with respect to their CHC stock is a more appropriate solution to the question of how to grant Tenant-Stockholders parity with other homeowners while encouraging the preservation of historic cooperatives than reading the deduction for charitable contributions into Section 216. It furthers the purposes behind the enactment of the deduction for qualified conservation contributions. It is also consistent with Congress’ intent, implicit in the Code, that the tax benefits available to homeowners should also be enjoyed by Tenant-Stockholders.

Allowing the Tenant-Stockholders to make the qualified conservation contribution directly is a better way to encourage preservation of historic cooperatives than reading the charitable contribution deduction into Section 216: It provides a more appropriate method for determining the amount of the Tenant-Stockholders’ charitable deduction than simply apportioning the CHC’s deduction among them. Any deduction allowed to the CHC will be based on the value of the preservation easement, which, as a general rule, is determined by the decline in value of the cooperative premises as a result of the grant of the easement. 152 The amount of the Tenant-Stockholders’ charitable contribution deduction should be calculated by reference to the impact of the restriction on the value of their property, the CHC stock, not by reference to the impact of such restriction on the value of the CHC’s property. Each Tenant-Stockholder should be permitted a charitable contribution deduction only to the extent that the value of her CHC stock declines, which may be more or less than her proportionate share of any resulting decline in value of the cooperative premises. Furthermore, if the impact of the qualified

152. See supra notes 78 to 79 and accompanying text.
conservation contribution is to make the CHC stock more valuable, no deduction should be allowed. If the Tenant-Stockholders make the donation, the amount of their donation will be determined by the impact of the donation on the value of their property, not by its impact on the value of the CHC’s property.

Conclusion

The expectation of Tenant-Stockholders that they are entitled to deduct a portion of the CHC’s charitable contribution deduction for the donation of a preservation easement finds little support in current law. There is, however, support for the proposition that Tenant-Stockholders can make a qualified conservation contribution with respect to their CHC stock, in which case they would be entitled to claim a charitable contribution deduction for the decline in value of the CHC stock. Allowing the Tenant-Stockholders to make the donation furthers Congress’ intent to treat Tenant-Stockholders as homeowners, encourages preservation, and coincides with the expectations of Tenant-Stockholders, who consider themselves homeowners. Lastly, it forces Tenant-Stockholders to base the amount of their deduction on the impact of the contribution on the value of their property, not on the impact of such contribution on the value of the CHC’s property.