## Trying Times: Conservation Easements and Federal Tax Law

~Sponsored by Maryland Environmental Trust~



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#### I. Filing Tax Return to Minimize Risk of Audit

- A. Conservation Easement Deed Issues
  - 1. Extensive Reserved Rights
  - 2. Conservation Purposes Test
  - 3. Judicial Extinguishment
  - 4. Movable Building Areas

#### **BREAK**

5. Amendments/Permissible Amendment Clauses

#### **LUNCH**

- 6. Noncompliant Proceeds Clause
- 7. Noncompliant Deemed Approval Clause
- 8. Releasing Land and Transfer to "Comparable" Easement
- B. Contemporaneous Written Acknowledgment
- C. IRS Form 8283, Qualified Appraisal, Final Substantiation Regulations
- D. Baseline Documentation
- E. Lender Agreement

#### II. Other Important Issues

- A. Quid Pro Quo
- B. Date of Donation and Recordation Date
- C. Side Agreements

## I. Filing Tax Return to Minimize Risk of Audit

# A. Recorded Conservation Easement Deed

#### 1. Extensive Reserved Rights

IRS has argued that, at full exercise of all reserved rights, the conservation purposes of a CE would not be "protected in perpetuity" or the conservation purposes test would not be satisfied

#### IRS lost argument

- Glass
- Butler
- Pine Mountain\*
- IRS failed to hire its own envtl experts

#### IRS won argument

- Atkinson\*
- PBBM-Rose Hill
- Champions Retreat
- IRS hired its own envtl experts
- Golf course easements

#### 2. Conservation Purposes Test

IRS has argued that CEs have failed to satisfy one or more of the 170(h) conservation purposes tests on a number of grounds

#### IRS lost argument

- Glass
- Carroll
- PBBM-Rose Hill (outdoor rec)

#### IRS won argument

- Turner
- RP Golf
- Atkinson\*
- PBBM-Rose Hill (habitat, OS)
- Champions Retreat
- Last four involved golf course easements

## 3. Judicial Extinguishment

- Donee must be prohibited selling or transferring the CE, except to another eligible donee that agrees to continue to enforce the CE. Treas. Reg. § 1.170A-14(c)(2)
- CE can be extinguished in a judicial proceeding upon "impossibility or impracticality." Treas. Reg. § 1.170A-14(g)(6)(i)
- Holder must be entitled to at least a minimum proportionate share of proceeds to be used in a manner consistent with the conservation purposes of the original contribution. Treas. Reg. § 1.170A-14(g)(6)(ii)

### Carpenter v. Commissioner

T.C. Memo. 2013-172; T.C. Memo. 2012-1



"To make our position clear, extinguishment by judicial proceedings is mandatory"

The restrictions are supposed to be perpetual, and the decision to terminate them should not be made solely by interested parties.

#### Belk v. Commissioner

774 F.3d 221 (4th Cir. 2014)



Treas. Regs offer a single—and exceedingly narrow—exception to the requirement that a CE impose a perpetual use restriction; a CE can be extinguished <u>only</u> in judicial proceeding upon impossibility or impracticality.

Absent these unexpected and extraordinary circumstances, real property placed under easement must remain there in perpetuity for the donor to claim a deduction.

# 4. Movable Building Areas

## Bosque Canyon Ranch v. Comm'r

867 F.3d 547 (5th Cir. 2017)



## Bosque Canyon Ranch v. Comm'r

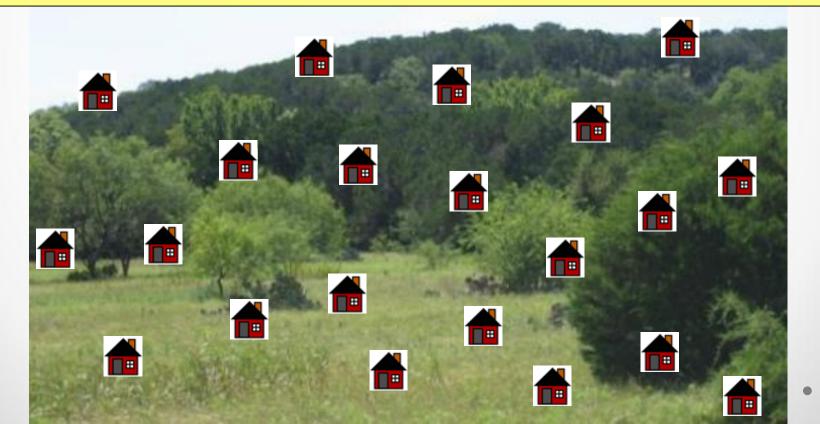
867 F.3d 547 (5th Cir. 2017)



## Bosque Canyon Ranch v. Comm'r

867 F.3d 547 (5th Cir. 2017)

<u>Dissent</u>: Congress did not intend for possibly enormous tax deductions to be based on the likelihood of continued agreement between the donor and donee as to the land subject to the CE; rather, it specifically and unequivocally required that a qualified CE be perpetual.



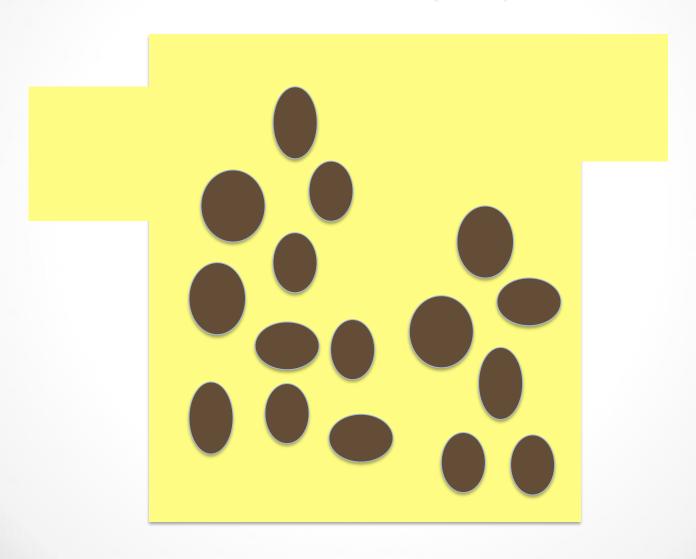
151 T.C. No. 14 (2018)

- <u>6,200-acre tract</u>
  - 2005 CE (560 mostly contiguous acres)
    - 10 residential building areas
    - Sites depicted around man-made lake in Exhibit to CE
      - But building areas can be relocated anywhere on the 560 acres, and the property subdivided, with NALT's approval
    - Additional reserved rights
  - 2006 CE (7 noncontiguous plots; total of 500 acres)
    - 6 residential building areas
    - Sites not identified and can be located anywhere on 500 acres with NALT's approval
    - Additional reserved rights

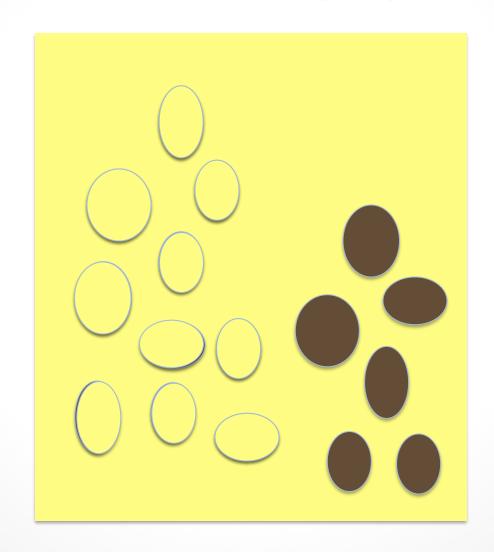




151 T.C. No. 14 (2018)



151 T.C. No. 14 (2018)



#### Arguments Made in Developer's Brief

- Tax Court Majority's holding on movable building areas was wrong because it:
  - incorrectly created a new legal standard under § 170(h)(2)(C), which, under *Belk*, requires only that land not be removed from a CE;
  - conflicts with *Bosque*, in which the 5<sup>th</sup> Circuit majority held that moving *unencumbered* building areas around the property was fine;
  - is logically inconsistent with the Tax Court majority's holding on amendments;
  - conflicts with Treas. Reg. § 1.170A-14(f), Example 4, and Private Letter Rulings;
  - will "invalidate a great many recent easement donations."

#### Arguments Made in LTA's Amicus Brief

- Essentially the same arguments as the developer
- Also argued:
  - Congress vested holders with discretion to address future uncertainty using "consistency with conservation purposes" standard.
  - No particular CE provision or acre must be protected; rather, 170(h) requires protection of only the overall conservation purposes of an easement.
  - Holders can be trusted because they must have a "commitment" and their 501(c)(3) tax-exempt status.
  - Limited discretion to move building areas is essential because the future is unpredictable.
  - IRS has for 3 decades consistently agreed that a deductible CE can delegate siting decisions to holders post-donation.
  - Tax Court majority "upended decades of settled law."

#### Arguments Made in DOJ's Brief

- Tax Court Majority's holding on movable building areas was correct because:
  - § 170(h)(2)(C) requires that the "use restriction" in a CE be granted in perpetuity with respect to specific real property.
  - IRS must assess compliance with 170(h) requirements at the time of donation.
  - No limit on how many building areas can be moved, or how often they can be moved.
  - Tax Court majority's holding on amendments was wrong.
  - Tax Court majority's holding is consistent with Treas. Reg. § 1.170A-14(f) Examples.
  - PLRs are nonprecedential by law for a reason.

#### Arguments Made in Law Prof. Amicus Brief

- Tax Court majority was correct to deny deductions for the Pine Mountain easements because:
  - IRS is charged with verifying that permitted uses are not destructive of conservation interests or inconsistent with conservation purposes at the time of donation.
  - Developer's argument goes to far.
  - Regulations and Examples therein do not indicate that Congress intended to grant holders this type of broad discretion – the opposite is true.
  - Ways to build flexibility into a CE to address unforeseen or changed circumstances without rendering IRS unable to assess compliance with 170(h) at the time of an easement's donation.

# Addressing Building Areas in light of Pine Mountain

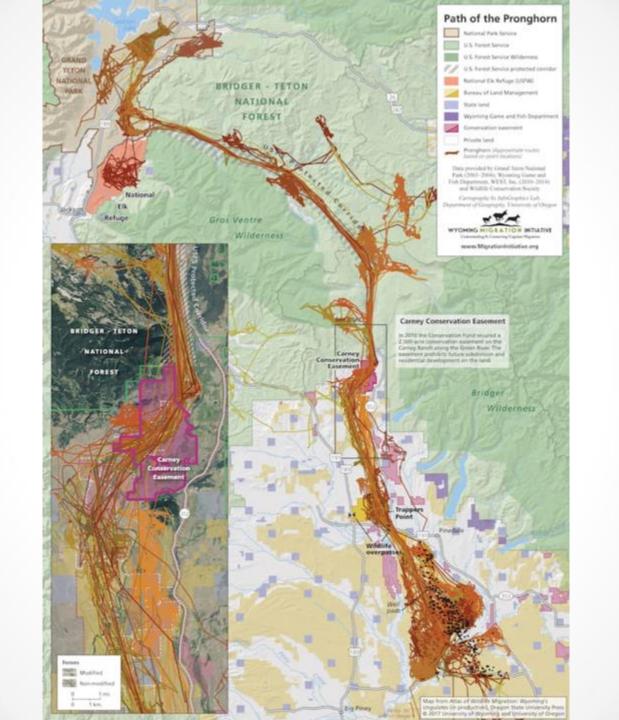
- Identify the building areas in CE and not retain rights to relocate.
- Identify more building areas than needed in CE, and require retirement of unused sites.
- Identify larger building areas than are needed in CE, within which smaller building envelopes can be located.
- Designate all sensitive areas as "no-build" areas and only nonsensitive areas as "build areas"
- Exclude building areas from CE

# 5. Amendments and Permissible Amendment Clauses

## Path of the Pronghorn Controversy







Allowing the landowner to violate the easement sets a precedent that the perpetual moratorium on subdivision and development — the cornerstone of conservation easements — is negotiable.

Other landowners, seeing that asking for forgiveness rather than permission might allow development on easement lands, will be tempted to violate their own conservation easements.

This opens a Pandora's box of enforcement problems for land trusts. If this kind of deal-cutting continues, easements ... will no longer be worth the paper they are printed on.



151 T.C. No. 14 (2018)

~Amendment Clauses ~





#### Arguments Made in DOJ's Brief

- Not all amendment provisions are fatal to the deduction.
- Not all amendment provisions are the same.
- Pine Mtn's amendment provision violates "granted in perpetuity" requirement.
- Pine Mtn's amendment provision violates the "protected-in-perpetuity's" "no-inconsistent-use" requirement because permits trade-offs
- If deductible CEs were mere contracts, an amendment provision could itself be amended and would not a limiting provision.
- If deductible CEs were mere contracts, requiring satisfaction of 170(h) requirements at donation would be meaningless exercise.

#### Arguments Made in Law Prof. Amicus Brief

- Makes arguments similar to DOJ
- No-inconsistent-use, baseline, and donee notice, access, and enforcement regulations focus on protection of a property's conservation interests, not just conservation purposes generally
- Deductible conservation easements are charitable grants as acknowledged by land trusts in 1980
- 170(h)-compliant amendment provision should not permit (i) land to be removed from CE, (ii) destruction of conservation interests, or (iii) relaxation or elimination of provisions included in deed to satisfy 170(h)
- Developer's position on amendments goes too far

#### Arguments Made in DOJ's Brief

- Not all amendment provisions are fatal to the deduction.
- Not all amendment provisions are the same.
- Pine Mtn's amendment provision violates "granted in perpetuity" requirement.
- Pine Mtn's amendment provision violates the "protected-in-perpetuity's" "no-inconsistent-use" requirement because permits trade-offs
- If deductible CEs were mere contracts, an amendment provision could itself be amended and would not a limiting provision.
- If deductible CEs were mere contracts, requiring satisfaction of 170(h) requirements at donation would be meaningless exercise.

# 6. NoncompliantProceeds Clause

#### Carroll v. Commissioner

146 T.C. No. 13 (2016)



## Proceeds Formula in Regulations

#### Date of Gift

FMV CE: \$300,000 = 30%

FMV property: \$ 1,000,000

Following extinguishment, holder must be entitled to at least 30% of the proceeds from a sale or exchange of the property

### PBBM-Rose Hill v. Comm'r

900 F.3d 193 (5th Cir. 2018)



### Proceeds Formula in PBBM

### Date of Gift

FMV CE: \$300,000 = 30%

FMV property: \$ 1,000,000

Following extinguishment, holder would be entitled to <u>correct</u> % of the proceeds from a sale or exchange of the property

But "proceeds" was defined to exclude the amount attributable to post-donation improvements constructed on the property by the landowner

# Proceeds Formula in Regulations

### Date of Gift

FMV CE: \$ 300,000 FMV property: \$ 1,000,000

Following extinguishment, holder must be entitled to at least 30% of the proceeds from a sale or exchange of the property

- Treasury appears to have specifically chosen a bright-line rule that relies on qualified appraisal obtained at donation
- Minimum % formula will often benefit landowner over holder
- Relevant only if there is an extinguishment, which should be
  - extremely rare

# 7. Noncompliant Deemed Approval Clause

### Hoffman Tax Court Pre-Trial Orders



### Proposed Constructive Denial Clause

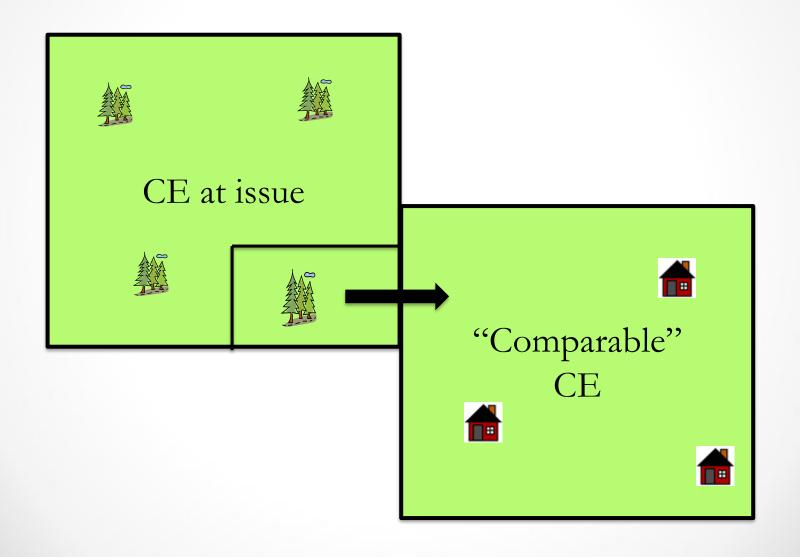
Holder agrees to use reasonable diligence to respond to Owner's request within 60 days of delivery.

Holder's failure to respond within the 60 day period shall be deemed a constructive denial.

Because a constructive denial is not a decision by Holder based on the merits of Owner's request, it is not final or binding on Holder, and Owner can submit the same or a similar request for approval. 7. Releasing Land and Transfer to "Comparable" Easement

# Salt Point Timber v. Comm'r

T.C. Memo. 2017-245



# B. Contemporaneous Written Acknowledgment (CWA)

### IRC § 170(f)(8)(A)

No deduction is allowed for a charitable contribution of \$250 or more unless the taxpayer substantiates the contribution by a CWA obtained from the donee.

### IRC § 170(f)(8)(B)

#### CWA must state:

- 1. amount of cash and description (but not value) of property contributed,
- 2. whether the donee provided any goods or services in consideration, and
- 3. if goods and services were provided, a description and good faith estimate of the value of such goods or services.

### IRC § 170(f)(8)(C)

# A CWA will be contemporaneous only if the TP obtains it on or before the earlier of:

- 1. the date on which the TP files a return for the taxable year in which the contribution was made, or
- 2. the due date (including extensions) for the filing of such return.

### Contemporaneous Written Acknowledgment

- 1. No particular form is required (letter, postcard, email).
- 2. Substantial compliance doctrine will not apply to excuse failure to obtain a CWA.
- 3. Form 8283 cannot serve as a CWA.
- 4. Case law is unpredictable.
- 5. Donors should <u>always</u> obtain a separate CWA from donee at time of donation and retain it.

# C. IRS Form 8283 and Supplemental Statement, Qualified Appraisal, Final Substantiation Regulations

# Instructions to Form 8283 (pg. 3) Supplemental Statement

#### Attach a statement that:

- Identifies the conservation purposes furthered by your donation,
- Shows, if before and after valuation is used, the FMV of the underlying property before and after the gift,
- States whether you made the donation in order to get a permit or other approval from a local or other governing authority and whether the donation was required by a contract, and
- If you or a related person has any interest in other property nearby, describes that interest.

# **Example 1: Simple Donation**

### CE Protected Land (300 acres)

```
Before easement value: $1,000,000
After easement value: $700,000
```

Easement value: \$ 300,000

Deduction is \$300,000

### **Example 1: Simple Donation**

Before easement value: \$1,000,000

After easement value: \$700,000

Easement value: \$300,000

Information on Donated Property

Check the box that describes the type of property donated:

Part I

		21.	,									
	a Art* (contrib	d 🗌 Art* (contrib	☐ Art* (contribution of less than \$20,000) <b>g</b> ☐ Collectibles*									
<b>b</b> Qualified Conservation Contribution <b>e</b>			Other Real	te	h $\square$	Intellectual P	rope	erty				
	<b>c</b> Equipment	1	f Securities	Securities i Vehicles								
othe	Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, arother similar objects.											
		, stamps, books, gems, jewelry, spo you must attach a qualified app				ve.						
5		of donated property (if you need attach a separate statement)		(b) If any tangible personal property or real property was donated, give a brief summary of the overall physical condition of the property at the time of the gift								
Α	Conservation ease	ement (IRC 170(h)) on 300 acr	res Overall cond	Overall condition of underlying property is excellent. \$300,00								
В	in Bath County, VA	A, to protect open space.	See attached	See attached Supplemental Statement and Deed of Gift (appraise								
С	See attached Supp	olemental Statement and Dee	d of Conserva	of Conservation Easement.								
D	of Gift of Conserva	ation Easement							easement)			
	(d) Date acquired	(f) Donor's cost		(g) For bargain sales, ente	See inst			tructions				
	by donor (mo., yr.)	(e) How acquired by donor	adjusted basi	S	amount received	unt received (h) Amo		а	(i) Date of contribution			
Α	August 2005	Purchase	\$750,000 (pr	e-								
В	(date donor	(how donor acquired	contrib. basis	in								
С	acquired	underlying prop.)	underlying prop	).)								
D	underlying prop.)		See Supp. Str	nt								

# Example 2: Simple Bargain Sale

### CE Protected Land (300 acres)

Before easement value: \$1,000,000

After easement value: \$ 700,000

Easement value: \$ 300,000

Taxpayer is paid \$150,000 for easement

Deduction is \$150,000

# Example 2: Simple Bargain Sale

Before easement value: \$1,000,000

After easement value: \$ 700,000

Easement value: \$ 300,000

Information on Donated Property

Check the box that describes the type of property donated:

Taxpayer is paid \$150,000 for easement

To the box that describes the type of property donated.											
<b>a</b> Art* (contribution of \$20,000 or more) <b>d</b>			☐ Art* (contribution of less than \$20,000) <b>g</b> ☐ Collectibles**					*	j 🗌 Other		
<b>b</b> Qualified Conservation Contribution <b>e</b>			Other Real Estate h Intellectual Pro						erty		
<b>c</b> Equipment	1	f [	Securities	Securities i Vehicles							
Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and ther similar objects.  Collectibles include coins, stamps, books, gems, jewelry, sports memorabilia, dolls, etc., but not art as defined above.											
lote. In certain cases, you must attach a qualified appraisal of the property. See instructions.											
(a) Description of donated property (if you need more space, attach a separate statement)					(c) Appraised fair market value						
Conservation ease	Overall condition	7	\$300,000								
in Bath County, VA, to protect open space.			See attached Su		(appraised FMV						
See attached Supp	of Conservation	of conservation									
of Gift of Conserva	ation Easement				easement)						
(d) Date acquired	(e) How acquired by donor		(f) Donor's cost or			nter	See	inst	ructions		
by donor (mo., yr.)	(c) How adquired by donor	ulled by donor			amount received		(h) Amount claimed as a deduction		(i) Date of contribution		
August 2005	Purchase		\$750,000 (pre-		\$150,000						
(date donor	(how donor acquired	C	ontrib. basis in		See Supp. Stmt						
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# Conservation Easement-Specific Valuation Rules

Treas. Reg. § 1.170A-14(h)(3)

# Rule 1: Contiguous Parcel

Treas. Reg. § 1.170A-14(h)(3)(i) - 4<sup>th</sup> sentence

If land contiguous to the land encumbered by the easement is owned by the donor or a member of the donor's family, the deduction is equal to the difference between the before-easement and aftereasement values of the entire contiguous parcel.

"Family": brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

# Rule 2: Enhancement

Treas. Reg. § 1.170A-14(h)(3)(i) - 5<sup>th</sup> sentence

If the easement enhances the value of any other property owned by the donor or a "related person," the donor's deduction must be reduced by an amount equal to the value of any such enhancement, whether or not such other property is contiguous.

"Related person": family members and certain entities.

# IRS Chief Counsel Memo. 201334039

released Aug. 23, 2012

(contiguous parcel and enhancement rules)

http://www.irs.gov/pub/irs-wd/1334039.pdf

# Example 3: Rule 1 Contiguous Parcel

Parcel 1
CE Protected Land
(300 acres)

Parcel 2 (100 acres)

Before-easement value of entire contiguous parcel: \$1,500,000

After-easement value of entire contiguous parcel: \$1,250,000

Easement value: \$ 250,000

Deduction is \$250,000

# Example 3: Rule 1 Contiguous Parcel

	Before-easement value of entire contiguous parcel: \$1,500,000  After-easement value of entire contiguous parcel: \$1,250,000											
	Easemen	250,000										
	art I Inform	nation on Donated Prop	erty					<u> </u>				
9	Check the box that describes the type of property donated:  a											
		of donated property (if you need attach a separate statement)		(b) If any tangible personal property or real property was donated, give a brief summary of the overall physical condition of the property at the time of the gift market value								
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	of Gift of Conserv	ation Easement				1		applied)	_			
	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, e	(g) For bargain sales, enter							
	August 2005	Purchase	\$750,000 (pre-			(h) Amount claimed as deduction	Ι	(i) Date of contribution	_			
_	(date donor	(how donor acquired	contrib. basis in						_			
	(	Access manners manners		1	I	I	1	I				

See Supp. Stmt

underlying prop.)

# Example 4: Rule 2 Enhancement

#### CE Protected Land (300 acres)

Before easement value: \$1,000,000

After easement value: \$ 700,000

Easement value: \$ 300,000

### Noncontiguous Parcel

value enhanced \$50,000 by donation

Deduction is \$250,000

# Example 4: Rule 2 Enhancement

Before easement value:	\$1	,000,000
After easement value:	\$	700,000
Easement value:	\$	300,000

Information on Donated Property

CE enhances value of noncontiguous parcel by \$50,000

\*Address \$50,000 enhancement in Appraisal and Supp. Statement

4	Check the box that describes the type of property donated:											
	a Art* (contrib	oution of \$20,000 or more)		Art* (contribution of less than \$20,000)				g ☐ Collectibles**		j 🗌 Other		
	<b>b</b> Qualified Conservation Contribution <b>e</b>			Other Real Estate				h Intellectual Pr	ope	erty		
	<b>c</b> Equipment	•	f 🗌	Securities i Vehicles								
othe	Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and ther similar objects.  Collectibles include coins, stamps, books, gems, jewelry, sports memorabilia, dolls, etc., but not art as defined above.											
		ou must attach a qualified app					abov	<b>6.</b>				
5	(a) Description of denoted preparty (if you need			(b) If any tangible summary of the over		(c) Appraised fair market value						
Α	Conservation ease	res	Overall condition		\$300,000							
	in Bath County, VA	See attached S	$\top$	(see Supp. Stmt								
С	See attached Supp	d	of Conservation Easement.						for enhancement			
D	of Gift of Conserva	ation Easement							$\top$	reducing ded.)		
	(d) Date acquired	(e) How acquired by donor		(f) Donor's cost or adjusted basis		(g) For bargain sales, enter amount received		See ii	nstrı	structions		
	by donor (mo., yr.)	(e) Flow acquired by dollor						(h) Amount claimed as a deduction		(i) Date of contribution		
Α	August 2005	Purchase		750,000 (pre-								
В	(date donor	(how donor acquired	CC	ontrib. basis in								
С	acquired	underlying prop.)	und	derlying prop.)								
D	underlying prop.)		S	ee Supp. Stmt								

# Final Substantiation Regulations

### Noncash Charitable Contributions

### Treas. Reg. § 1.170A-16 Contributions made after July 30, 2018

- Deduction > \$5,000
  - Contemporaneous Written Acknowledgment (CWA)\*
  - Qualified Appraisal from Qualified Appraiser
  - Attach Form 8283 to return
- Deduction > \$500,000
  - All of the above
  - and attach Qualified Appraisal to return
- Carryover year substantiation
  - Same as for year of contribution

<sup>\*</sup> Form 8283 cannot serve as CWA. CWA need not be attached to return but it may be helpful to include a copy of it in the tax return package.

# "Qualified Appraisal"

Treas. Reg. § 1.170A-17(a)
Contributions made on or after Jan. 1, 2019

An appraisal document that is prepared by a qualified appraiser in accordance with the substance and principles of the *Uniform Standards of Professional Appraisal Practice* (USPAP), as developed by the Appraisal Standards Board of the Appraisal Foundation.

### "Qualified Appraiser"

Treas. Reg. § 1.170A-17(b)
Contributions made on or after Jan. 1, 2019

- An individual with verifiable education and experience in valuing the type of property for which the appraisal is performed...
- An individual is treated as having education and experience in valuing the type of property...if, as of the date the individual signs the appraisal, the individual has:
  - 1. successfully completed professional or college-level coursework in valuing the type of property,

#### and

2. two or more years of experience in valuing the type of property.

# "Qualified Appraiser"

Treas. Reg. § 1.170A-17(b)
Contributions made on or after Jan. 1, 2019

#### Coursework:

 must be obtained from an educational organization, generally recognized professional trade or appraiser organization, or employer educational program,

#### <u>or</u>

- the individual has earned a "recognized appraiser designation."
  - A recognized appraiser designation means a designation awarded by a generally recognized professional appraiser organization on the basis of demonstrated competency <u>for the type of property</u> <u>being valued</u>.

# "Qualified Appraiser"

Treas. Reg. § 1.170A-17(b) Contributions made on or after Jan. 1, 2019

### Education and experience is verifiable if the appraiser:

- 1. specifies in the appraisal the appraiser's education and experience in valuing the type of property, and
- 2. makes a declaration in the appraisal that, because of the appraiser's education and experience, the appraiser is qualified to make appraisals of <u>the type</u> of property being valued.

# Other Requirements

- Timely "valuation effective date"
  - For an appraisal report dated before the date of the contribution, the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution.
  - For an appraisal report dated on or after the date of the contribution, the valuation effective date must be the date of the contribution.

# Other Requirements

- Two or More Signing Appraisers
  - Form 8283 must be signed by all appraisers who signed the appraisal report.
- Retention of Qualified Appraisal
  - <u>Donor</u> must keep the qualified appraisal for so long as it may be relevant in the administration of any internal revenue law. Treas. Reg. § 1.170A-17(a)(10).
- Retention of Form 8283
  - <u>Donee</u> must keep the Form 8283 for so long as it may be relevant in the administration of any internal revenue law. Treas. Reg. § 1.6050L-1(d)(2).

# D. Baseline Documentation

### Treas. Reg. § 1.170A-14(g)(5)(i)

Donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the subject property at the time of the gift.

- <u>Purpose</u>: To protect the <u>conservation interests</u> associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights.
- <u>Certification</u>: Baseline must be accompanied by a statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying:

"This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer."

### Baseline Tips

- 1. Should be detailed and compelling.
- 2. Must be fully completed at the time of the donation and not altered thereafter.
- 3. Does not need to be filed with donor's tax return, but must be supplied to IRS if donation is audited.

### Baseline Tips (from Audit Techniques Guide)

#### 4. Should generally include:

- A description of the encumbrance
- A description and map of the conservation characteristics and areas (i.e., listing of identified plants or wildlife)
- A map or series of maps depicting roads, fences, existing structures, trails, water bodies, wetlands, and any other property features
- Identification of any reserved building sites
- Surveys or plat maps
- Description of any management plans, such as a timber plan
- · On-site photographs possibly including aerial photographs
- The study author's name and professional credentials

### Baseline Tips (from Audit Techniques Guide)

- 5. Baseline prepared by an independent qualified expert will generally be considered more credible than one prepared by less qualified individual or TP's self assessment.
- 6. Baseline with a lot of documentary evidence will be more credible than one with little support.
- 7. A narrative about the general area or the State without specific reference to the subject property will not meet the requirements of the Regulations.

D. Lender Agreement(Mortgage Subordination)

#### Treas. Reg. § 1.170A-14(g)(2)

No deduction will be permitted for the donation of an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.

#### 1. Timing

#### 2. Priority Rights

# **Timing**

RP Golf, LLC v. Comm'r 860 F.3d 1096 (8th Cir. 2017)

Minnick v. Comm'r 796 F.3d 1156 (9th Cir. 2015)

Mitchell v. Comm'r 775 F.3d 1243 (10<sup>th</sup> Cir. 2015)

## Priority Rights

Palmolive Building Investors v. Comm'r 149 T.C. No. 18 (2017)

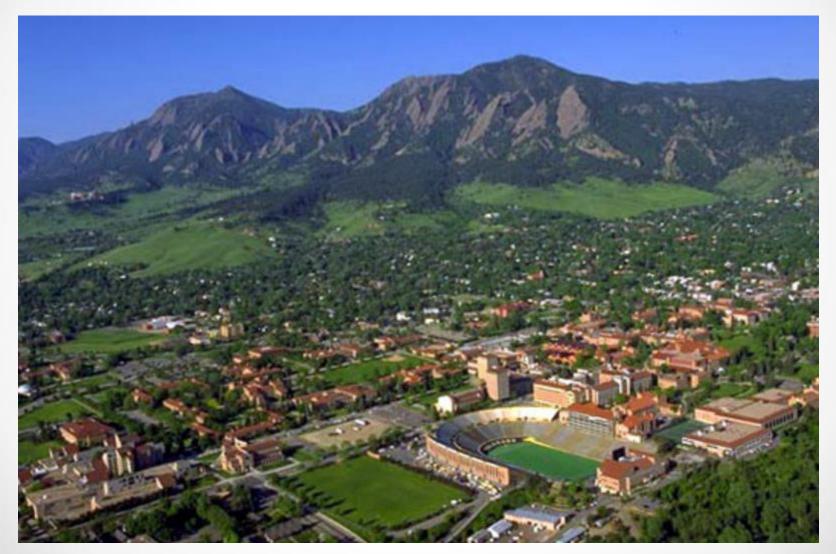


#### II. Other Important Issues

# A. Quid Pro Quo

# Pollard v. Commissioner

T.C. Memo. 2013-48



## Form 8283

Part IV Donee Acknowledgment—To be completed by the charitable organization.		
This charitable organization acknowledges that it is a qualified organization un	der section 170(c) and that it received the	e donated property as described
in Section B, Part I, above on the following date ►		
Furthermore, this organization affirms that in the event it sells, exchanges, or portion thereof) within 3 years after the date of receipt, it will file <b>Form 8282</b> , form. This acknowledgment does not represent agreement with the claimed fa	Donee Information Return, with the IRS a	
Does the organization intend to use the property for an unrelated use?		. ▶ ☐ Yes ☐ No
Name of charitable organization (donee)	Employer identification number	
Address (number, street, and room or suite no.)	City or town, state, and ZIP code	
Authorized signature	Title	Date

Form **8283** (Rev. 12-2014)

# **SALT Deduction**

# B. Date of Donation and Recordation Date



#### IRS CE Audit Techniques Guide

"An easement is not enforceable in perpetuity before it is recorded."

#### **Example**

A CE was granted to a qualified organization on Dec. 20, 2007, as evidenced by the dated signatures on the CE deed.

However, the CE was not recorded in the public records until March 12, 2008.

The year of donation is 2008.

# C. Side Agreements

# Graev v. Commissioner

140 T.C. 377 (2013)



The possibility that a gift will be defeated will be considered "so remote as to be negligible" only if it is "so highly improbable that one might ignore it with reasonable safety in undertaking a serious business transaction"