

# Creating and Defending Qualified Conservation Easements

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Revised: 07/2019

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## Preliminaries

### Conservation Easements and Charitable Deductions

Our treatment of Qualified Conservation Easements and their taxation follows the outline of the Internal Revenue Code, Treasury Regulations, and the IRS audit manual. Wherever possible, our treatment reflects the donor’s and their advisors’ perspective; Emphasizing what is required to assure that deductions are sustained if challenged? Our presentation reflects tax precedent as it stands in September 2018. Most of the provisions we discuss are effective for returns filed after August 2006.

Our coverage encompasses both general and specific issues:

- General statutory requirements for charitable contributions.<sup>1</sup>
- The Contemporaneous Written Acknowledgment requirement.<sup>2</sup>
- Statutory and regulatory requirements for Form 8283.<sup>3</sup>
- Specific statutory requirements for Qualified Conservation Contributions<sup>4</sup>, including fulfillment of one or more Conservation Purposes.<sup>5</sup>
- The Deed of Conservation Easement and its role in the transaction.
- Contribution Substantiation requirements including the Qualified Appraisal and Qualified Appraiser requirements.<sup>6</sup>
- The Baseline Study requirement.<sup>7</sup>

Conservation easements have become a popular charitable donation. Donor and Practitioners’ knowledge of the detailed and specific requirements for easement donations have not kept pace with the deduction’s popularity. As a direct result (and because there are very high stakes attached), conflict between donors and the Service is frequent. Conservation Easements – particularly documentation and

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<sup>1</sup> IRC § 170(a)

<sup>2</sup> IRC § 170(f)(8)

<sup>3</sup> Treas. Reg. § 1.170A-13(c)(4)

<sup>4</sup> IRC § 170(h); Treas. Reg. § 1.170A-14

<sup>5</sup> IRC § 170(h)(4)(A)

<sup>6</sup> IRC § 170(f)(11); [IRS Notice 2006-96](#), 2006-2 C.B. 902; Treas. Reg. § 1.170A-13

<sup>7</sup> Treas. Reg. § 1.170A-14(g)(5)

substantiation issues – have been a perennial on the Taxpayer Advocate Office’s Annual Report to Congress: their top 10 litigated issues between taxpayers and the Service.

The courts take a very narrow view of “taxpayer discretion” in the litigated cases. In that view, “substantial compliance” is not sufficient to protect the deduction. Instead, the courts require “perfect compliance.” Both the donor and the Donee organization must perform every act required by the Regulations and must perform them correctly.

The courts’ views set a high bar. The Service prevailed in 80%-95% of litigated cases. More compellingly (for court watchers): Most of these high-value cases were reported by/as TC Memo decisions. That pattern indicates the courts think the Services position isn’t far off base, that the issues and their resolution are clear, or that the court finds little merit in the taxpayer’s positions.

As with any popular “tax loophole” a cottage industry has evolved around the conservation easement deduction. The cottage industry’s advice ranges from sound to cretinously negligent. We strongly recommend that donors retain a strict caveat emptor approach to these purveyors. This publication owes its existence to three events that are part of the fabric of that cottage industry:

**Example 1:** The study’s principal author attended a seminar in which the presenter maintained that conservation easements qualified for deduction if they were maintained for fifteen years commencing from the date the donor obtained title to the property – and that any relevant document could be backdated to that date. This “tax advice” is about as dangerously inaccurate as possible.

**Example 2:** The study’s principal author was retained to provide an opinion in a case that sought damages (E&O) from every professional involved in the easement transaction – realtor, escrow, title, lender, appraiser, attorney, and tax professional; all of whom were arguably negligent by providing services in support of something they clearly did not understand.

**Example 3:** The syndicators (who offer to sell pieces of deductions to the unwary) have arrived. When we last updated this study, IRS had just issued [Notice 2017-10: Listing Notice--Syndicated Conservation Easement Transactions](#): that stated the Service’s intention to treat many syndications as Abusive Tax Shelters under IRC § 6707.<sup>8</sup> The Service supplemented that notice on (of all the inauspicious dates) September 11, 2018: announcing the commencement of a Compliance Campaign to address Syndicated Conservation Easement Transactions.<sup>9</sup>

## Disclaimer

The information contained in this publication has been gathered from sources that are believed to be reliable but is not guaranteed as to completeness, currency, or accuracy.

Nothing contained in this publication should be construed as the giving of business, legal or tax advice or the making of a recommendation. It should not be relied on as the basis for any decision or action. The information contained in this document is general in nature and may not apply to the

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<sup>8</sup> [Notice 2017-10: Listing Notice--Syndicated Conservation Easement Transactions](https://www.irs.gov/pub/irs-drop/n-17-10.pdf): <https://www.irs.gov/pub/irs-drop/n-17-10.pdf>

<sup>9</sup> <https://www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-five-large-business-and-international-compliance-campaigns-0>

specifics of your situation or transaction. You must rely only on the advice of qualified tax and/or legal counsel to advise you on your specific situation or transaction.

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## Overview of Conservation Easements

Conservation Easement is the generic term for easements created to:

- Preserve land areas for outdoor recreation;
- Protect a relatively natural habitat for fish, wildlife, or plants, or similar ecosystems;
- Preserve open space for the scenic enjoyment of the public or pursuant to a Federal, State, or local governmental conservation policy; or
- Preserve a historically important land area or historic building.

Conservation Easements restrict how land or buildings within the easement are developed or used. In most states a “Deed of Conservation Easement” describes the Conservation Purpose(s) of the easement, the restrictions imposed by the easement, and the permissible uses of the property.

In a “typical” Deed of Conservation Easement:

- The present owner of the property (The Donor conveys to;
- Someone else (The Donee; An organization that agrees to protect and preserve the property’s environmental or historic value.);
- An Easement on a specified property or a portion of the property (the right to use the property to achieve the Conservation Purpose, but not to “own” the property in the conventional sense of that term),
- For a time period;
- Subject to pre-conditions and performance obligations imposed on the Donee.

To be effective (binding) in most jurisdictions, the Deed of Conservation Easement must be recorded in public records and must contain legally binding restrictions enforceable by the Donee.

By executing and recording the deed, the Donor gives up rights specified in the deed but retains ownership of the underlying property. The extent and nature of the Donee’s control depends on the terms of the Deed of Conservation Easement. The Donee’s interest in the encumbered property runs with the land. That is, the deed restrictions bind not only the Donor but also all future owners of the property during the restriction period.

To encourage conservation grants, the Internal Revenue Code (IRC, or the Code) carves out an exception to the general rule that no charitable contribution deduction is allowed for a transfer of less than your entire interest in a property.<sup>10</sup> This exception, dubbed a Qualified Conservation Easement,<sup>11</sup> is a contribution of:

- A Qualified Real Property Interest
- In Perpetuity, to
- A Qualified Charitable Organization
- Exclusively for Conservation Purposes.

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<sup>10</sup> IRC § 170(f)(3); IRC § 170(f)(3)(B)(iii)

<sup>11</sup> IRC § 170(h)

The Code recognizes four Conservation Purposes that enable Donors to deduct the value of conservation contributions: Each of these purposes is further refined in the Code and Treasury Regulations.<sup>12</sup>

- Preservation of land areas for outdoor recreation by, or the education of, the public.
- Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.
- Preservation of open space (including farmland and forest land).
- Preservation of a historically important land area or a Certified Historic Structure.

To qualify for a deduction under the Qualified Conservation Easement exception, the deed or conveyance that creates the easement must:

- Be legally binding,
- Permanently restrict the use, modification and development of property such as parks, wetlands, farmland, forest land, scenic areas, historic land or historic structures,
- Convey the easement in Perpetuity, and
- Adhere to the property (All current and future owners of the easement and the underlying property must be bound by the terms of the easement.)

Finally, the Donee of the interest must be a Qualified Charitable Organization. That is, it must:

- Be an organization qualified to receive deductible charitable contributions;
- Have a commitment to protect the Conservation Purposes of the donation in Perpetuity; and
- Have sufficient resources to enforce compliance with the terms of the easement agreement.

Qualified Conservation Easement donations are subject to Substantiation requirements, including a Qualified Appraisal prepared and signed by a Qualified Appraiser. Failure to provide Substantiation, or deductions for an improper or overvalued conservation easement subject both Donors and Donees to various penalties.

Qualified Conservation Easements often generate large charitable deductions. High-tax-bracket individuals claim them most often. So, the IRS maintains an active examination program. If the Donor's grant (or its value) is examined, the IRS's Agent focuses on:

- Compliance with general charitable contribution rules; Most often; the IRS's Agent
  - Ascertains that the Donor received no quid-pro-quo or other consideration in exchange for the grant.
  - That any bargain sale elements of the transaction are properly recorded, and
  - That the Qualified Charitable Organization properly acknowledged the contribution.
- Fulfillment of Substantiation requirements.
- Documentation of (or lack of) Conservation Purpose.
- Perpetuity evidenced by terms in the deeds.
- Reserved property rights (some of which may be inconsistent with the Conservation Purpose, and others of which may affect Perpetuity).
- Compliance with Subordination Rules.

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<sup>12</sup> IRC § 170(h)(4)(A) – Note that the list of qualified purposes is a slightly extended, amplified, and elaborated version of our original list.

- Use of proper Appraisal Methodologies and proper valuation of the easements.
- Income from the sale of State Tax Credits.
- Proper allocation of a proportionate share of the proceeds from future property disposition to the Donee organization.

It has been our experience that inadequate Substantiation, and “hidden defects” in the Deed of Conservation Easement most frequently prevent or limit deductions.

We discuss these issues in greater detail below.

## Qualified Conservation Contribution

### Overview

A Qualified Conservation Contribution conveys:

1. A Qualified Real Property Interest to
2. A Qualified Charitable Organization
3. Exclusively for Conservation Purposes.<sup>13</sup>

### Qualified Real Property Interest

Donors may deduct contributions only if they convey a Qualified Real Property Interest. A Qualified Real Property Interest is any of the following interests in real property:<sup>14</sup>

- The Donor’s entire interest in the real property (other than a qualified mineral interest).
- A remainder interest in the real property.
- A restriction on the use of the real property granted in Perpetuity (i.e. a conservation easement).

### Qualified Organization

To sustain a deduction for the value of the Qualified Real Property Interest, the Donee to whom the Qualified Real Property Interest is conveyed must be both a Qualified Charitable Organization and an eligible Donee.<sup>15</sup>

Qualified Charitable Organizations include:<sup>16</sup>

- A governmental unit, including the Federal government, a United States possession, the District of Columbia, a state government, or any political subdivision of a state or United States possession.
- An organization described in IRC § 170(b)(1)(A)(vi).

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<sup>13</sup> IRC § 170(h)(1)

<sup>14</sup> IRC § 170(h)(2)

<sup>15</sup> IRC §§ 170(h)(1)(B), 170(h)(3), Treas. Reg. § 1.170A-14(c)(1).

<sup>16</sup> See Treas. Reg. § 1.170A-14(c)(1) for the requirements to qualify as an eligible Donee. See IRC § 170(h)(3) and *Qualified Organization* (below) for additional information on Qualified Charitable Organizations

- A charity described in IRC § 501(c)(3) that meets the public support test of IRC § 509(a)(2).
- An IRC § 501(c)(3) organization that meets the requirements of IRC § 509(a)(3) and is controlled by one of the organizations described above.

In addition, the organization must have:

- A commitment to protect the Conservation Purpose of the donation and
- The resources to enforce the restrictions in the conservation easements.

See IRC § 170(h)(3) and *Qualified Organization* (below) for additional information on Qualified Charitable Organizations.

**Note:** To verify that a potential Donee is a Qualified Charitable Organization. Refer to the [IRS Charity Search](#)<sup>17</sup> algorithm. Verifying the organization's commitment and resources is more problematic.

### Conservation Purpose

A "Conservation Purpose"<sup>18</sup> includes one or more of the following:

- Preservation of land for outdoor recreation by, or the education of, the public.
- Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.
- Preservation of open space (including farmland and forest land) either for the scenic enjoyment of the public or pursuant to a clearly delineated governmental conservation policy (both purposes must yield a significant public benefit).
- Preservation of a historically important land area or a Certified Historic Structure.

The easement must be created by deed and be exclusively for Conservation Purposes.

See *Conservation Purpose* (below) for additional information.

### Perpetuity

The conservation easement grant must be made in Perpetuity, permanently restricting the use of the property.<sup>19</sup>

The Deed of Conservation Easement must explicitly state that the restriction remains on the property forever and is binding on current and all future owners of the property.

Any Deed of Conservation Easement that does not include this provision does not satisfy the Perpetuity requirement; the value of easement is not deductible.

Some Deed of Conservation Easements impose restrictions that last for a specific period; e.g. ten years. An easement is not enforceable in Perpetuity if it ends after a period of years or if the property

<sup>17</sup> <https://www.irs.gov/charities-non-profits/search-for-charities>

<sup>18</sup> See *Conservation Purpose* (below) for additional information on Conservation Purpose.

<sup>19</sup> IRC § 170(h)(2)(C) requires that the interest in real property be subject to a use restriction granted in Perpetuity, and IRC § 170(h)(5)(A) requires that the Conservation Purpose of the easement be protected in Perpetuity. See also Treas. Reg. § 1.170A-14(b)(2), (g)

can revert to the Donor or to another private party. If a remote future event outside the Donor's control, e.g. an earthquake or wildfire, extinguishes the easement, the easement is treated as in Perpetuity, and a contribution deduction allowed.<sup>20</sup>

In *Carpenter v. Commissioner*,<sup>21</sup> the court ruled that a conservation easement was not enforceable in Perpetuity because it allowed the easement to be extinguished by mutual written consent of the parties<sup>22</sup> if circumstances arise in the future that render the purpose of the conservation easement impossible to accomplish.

Similarly, in *Belk v. Commissioner*,<sup>23</sup> the deed of easement allowed Belk and the Donee to change the property subject to the easement by substituting other property owned by the taxpayers for the property originally subject to the easement. The Tax Court ruled that the provision caused the easement to fail the requirements of IRC § 170(h)(2)(C). The donated property interest was not subject to a use restriction granted in Perpetuity.

### **Recording Easements**

The Deed of Conservation Easement must be recorded in the appropriate recordation office in the jurisdiction where the easement is located.<sup>24</sup> State law determines a taxpayer's interest in property. Tax consequences are determined under Federal law.<sup>25</sup> Under every state's law, an easement is not enforceable in Perpetuity unless and until it is recorded.

Donors may also need to record Exhibits or Attachments to the deed, such as a description of the easement restrictions, diagrams and lender agreements. State law varies on this issue: Hence, courts may reach different conclusions regarding the adequacy of recorded disclosures.

**Example 1:** New York law requires recordation of the deed and all supporting documents. In *Herman v. Commissioner*,<sup>26</sup> Herman recorded a "Declaration of Restrictive Covenant" to donate unused development rights above a building in New York City. The covenant referred to an attached architectural drawing, which described the easement restrictions. The drawing was not recorded. Relying on New York law, the tax court ruled that because the drawing was not recorded, it could not bind subsequent purchasers, did not protect the Conservation Purpose of preserving the apartment building "in Perpetuity," and failed to meet the requirements of IRC § 170(h)(5)(A).

**Example 2:** Georgia law mandated a contrary conclusion in *Butler v. Commissioner*,<sup>27</sup> holding that documents incorporated into the deed by reference do not have to be recorded under Georgia law.

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<sup>20</sup> Treas. Reg. § 1.170A-14(g)(3).

<sup>21</sup> [Carpenter v. Commissioner, T.C. Memo. 2012- 1 motion for reconsideration denied 2013-172](#)

<sup>22</sup> The decision in *Carpenter* hinges on this six-word phrase. IRS Audit Guidelines underemphasize that distinction; implying a blanket prohibition of similar "impossibility clauses." The Service's broader interpretation is directly contradicted by both code and regulations: Treas. Reg. § 1.170A- 14(g)(1), Treas. Reg. § 1.170A-14(g)(6)(i): These Regs unequivocally permit such clauses, but do not permit the parties to be the arbiter of when the condition is satisfied.

<sup>23</sup> [Belk v. Commissioner, 140 T.C. 1 \(2013\), motion for reconsideration denied, T.C. Memo. 2013-154, aff'd 774 F.3d 1243\(4th Cir. 2014\);](#)

<sup>24</sup> Treas. Reg. § 1.170A-14(g)(1)

<sup>25</sup> [United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 \(1985\); Woods v. Commissioner, 137 T.C. 159, 162 \(2011\)](#)

<sup>26</sup> [Herman v. Commissioner, T.C. Memo. 2009-205](#)

<sup>27</sup> [Butler v. Commissioner, T.C. Memo. 2012-72](#)

In view of the contradictory findings in these two cases, it behooves Donors to retain local real estate counsel (local to the property situs) if they wish to donate property or easements.

### *Amendment Clauses in Easement Deeds*

An easement deed that allows any amendment or modification that could adversely affect the perpetual duration of the restriction or Conservation Purposes fails the Perpetuity requirement.

### *Subordination of Mortgages in Lender Agreements*

Easement contributions are not deductible unless all pre-existing mortgagees or lien holders subordinate their rights in the property to the right of the Donee organization to enforce Conservation Purposes of the easement in Perpetuity.<sup>28</sup>

The subordination agreement must be recorded in the public records simultaneously with the Deed of Conservation Easement.

In *Minnick v. Commissioner*,<sup>29</sup> Minnick donated a conservation easement to a qualified Donee but did not execute an agreement under which the mortgagee subordinated its interest in the property to the easement until after the conservation easement was granted. The court held that Minnick was not entitled to a deduction for the conservation easement donation because a subordination agreement was not in place at the time that the conservation easement was granted. During the period when no subordination agreement existed, the mortgagee could seize the easement for default, thus owning the land free of the conservation easement (which was subordinate to the lender's lien). The court also stated that Minnick's intent to seek subordination of the mortgagee's interest in the property at the time the conservation easement was granted was irrelevant.

### *Extinguishment*

Unexpected change in the conditions surrounding the property can make continued use of the property for Conservation Purposes impossible or impractical. The Conservation Purpose can nonetheless be treated as protected in Perpetuity if the restrictions must be extinguished by judicial proceeding and all of the Donee's proceeds<sup>30</sup> from a subsequent sale or exchange of the property are used by the Donee organization in a manner consistent with the Conservation Purposes of the original contribution.<sup>31</sup>

### *Allocation of Proceeds in Deed & Lender Agreements*

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<sup>28</sup> Treas. Reg. § 1.170A-14(g)(2).

<sup>29</sup> [Minnick v. Commissioner, T.C. Memo. 2012-345](#); C.f. also [Mitchell v. Commissioner, 775 F.3d 1243 \(10th Cir. 2015\)](#), [aff'g 138 T.C. 324 \(2012\)](#)

<sup>30</sup> Determined under Treas. Reg. § 1.170A-14(g)(6)(ii); C.f. also, our previous comments regarding [Carpenter v. Commissioner, T.C. Memo. 2012- 1 motion for reconsideration denied 2013-172](#)

<sup>31</sup> Treas. Reg. § 1.170A-14(g)(6)(i)

The proportionate value of the Donee's property rights may not change over time.<sup>32</sup> If a Donee is not absolutely entitled to a proportionate share of extinguishment proceeds, then the Conservation Purpose of the contribution is not protected in Perpetuity.<sup>33</sup>

To claim a deduction for the conservation easement the Donor must, at the time of the gift, agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the Donee organization, with a fair market value at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the value of the entire property.<sup>34</sup>

The Donee's proportionate interest upon extinguishment must be a percentage determined by (1) the fair market value of the conservation easement on the date of the gift (numerator), over (2) the fair market value of the entire property on the date of the gift.<sup>35</sup>

In *Carroll v. Commissioner*,<sup>36</sup> Carroll's Deed of Conservation Easement used a ratio of the charitable contribution deduction allowable over the value of the entire property on the date of the gift. This provision failed the Perpetuity requirement<sup>37</sup> by not guaranteeing the Donee a proportionate share of the extinguishment proceeds based on the fair market value of the conservation easement at the time of the gift. The Tax Court ruled that Carroll's conservation easement violated the requirement because the Conservation Purpose was not protected in Perpetuity and consequently the contribution was not a Qualified Conservation Contribution.

## Cash Contributions

Conservation organizations often request cash contributions (sometimes referred to as a "stewardship fee") from conservation easement donors. To be deductible, the cash payment must be a voluntary transfer made with Charitable Intent to a Qualified Charitable Organization.<sup>38</sup>

In most cases, voluntary transfers of money to a Qualified Charitable Organization are deductible.

Charitable Intent exists if the Donor makes the transfer without receipt of, or the expectation of receiving, a Quid Pro Quo for the transfer. If the Donor receives a direct or indirect economic benefit (other than a tax deduction) as a result of the contribution, the deduction may be limited or disallowed. If the benefits the Donor receives or expects to receive are substantial, rather than incidental to the transfer, the transfer does not satisfy the Charitable Intent requirement<sup>39</sup>

The Code<sup>40</sup> requires that all cash and noncash contributions of \$250 or more be substantiated with a Contemporaneous Written Acknowledgement (CWA). A CWA is required for both the cash payment and the conservation easement. The Donor must obtain the CWA by the earlier of the date they

<sup>32</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>33</sup> Treas. Reg. § 1.170A-14(g)(6)(i) and (ii)

<sup>34</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>35</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>36</sup> [Carroll v. Commissioner, 146 T.C. No. 13 \(2016\)](#)

<sup>37</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>38</sup> IRC § 170 (a) and (c)

<sup>39</sup> IRC § 170. [Hernandez v. Commissioner, 490 U.S. 680, 691 \(1989\)](#); [United States v. American Bar Endowment, 477 U.S. 105, 117-118 \(1986\)](#); [Singer Co. v. United States, 196 Ct. Cl. 90, 106 449 F.2d 413, 422-423 \(1971\)](#)

<sup>40</sup> IRC § 170(f)(8)

file their return or the due date (including extensions) for the return. Note that [Form 8283, Noncash Charitable Contributions](#) (PDF),<sup>41</sup> is NOT a substitute for a CWA.

## Quid Pro Quo Contributions

A Quid Pro Quo contribution is a transfer of money or property made to a Qualified Charitable Organization partly in exchange for goods or services in return from the charity or a third party.

An indirect benefit from a third party may be a Quid Pro Quo.

**Example:** A land developer grants a conservation easement to the county or other Qualified Charitable Organization in exchange for approval of a proposed subdivision. The promised approval is a Quid Pro Quo.

If the Donor receives a Quid Pro Quo, the cash payment is deductible as a charitable contribution only to the extent the amount transferred exceeds the fair market value (FMV) of the Quid Pro Quo, and only if the excess amount was transferred with Charitable Intent.<sup>42</sup> The Donor bears the burden to show that all or part of a payment is a charitable contribution or gift.<sup>43</sup>

## Qualified Organization

### Overview

The Donor must transfer the conservation easement to an eligible Donee to qualify for a contribution deduction. An eligible Donee:<sup>44</sup>

- Is a Qualified Charitable Organization,
- Must have the commitment to protect the Conservation Purpose of the donation, and
- Must have the resources to enforce the conservation restrictions.

### Qualified Organization

A Qualified Charitable Organization is one of the following:

- A governmental unit, including the Federal government, a United States possession, the District of Columbia, a state government, or any political subdivision of a state or United States possession.
- A public charity described in IRC § 501(c)(3) of the Internal Revenue Code that meets the public support test of IRC §170(b)(1)(A)(vi) or section 509(a)(2).
- An IRC § 501(c)(3) organization that meets the requirements of IRC § 509(a)(3) and that is operated, supervised, or controlled by one of the organizations described above.

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<sup>41</sup> <https://www.irs.gov/pub/irs-pdf/f8283.pdf>

<sup>42</sup> [United States v. American Bar Endowment](#), 477 U.S. 105, 117-118 (1986)

<sup>43</sup> Treas. Reg. § 1.170A-1(h)(1) and (2); [United States v. American Bar Endowment](#), 477 U.S. 105, 117-118 (1986); and [Rev. Rul. 67-246, 1967-2 C.B. 104](#)

<sup>44</sup> IRC § 170(h)(3) and Treas. Reg. § 1.170A-14(c)

It is usually quite easy to verify that a potential Donee is a Qualified Charitable Organization. Refer to the IRS Charity Search<sup>45</sup> algorithm. Determining the sufficiency of the organization's commitment and resources is often the more problematic aspect of this requirement.

## Commitment & Resources

The organization must commit to protect the Conservation Purposes of the donation and have resources to enforce the restrictions of the conservation easement.

A conservation group organized or operated for one of the Conservation Purposes in IRC § 170(h)(4)(A) (see above) is considered to have the required commitment to protect the Conservation Purposes of the donation.<sup>46</sup> Organizations that accept easement contributions and are committed to conservation usually have an established monitoring program such as annual property inspections to ensure compliance with the conservation easement terms and protect the easement in Perpetuity.

In addition to commitment, the organization must also have the resources to enforce the restrictions of the conservation easement. Resources do not necessarily mean cash. Resources may be volunteer services such as lawyers who provide legal services or people who inspect and prepare monitoring reports.

If the organization at the time of contribution does not have the commitment to protect the Conservation Purposes of the donation or resources to enforce the easement restrictions, no deduction is allowed.

Both the commitment and the resources tests are subjective. To better defend the charitable deduction, the Donor may want to do what the IRS's Agent will probably do. The IRS's Agent will evaluate commitment and resources using:

- The Donee organization's website;
- The Donee organization's tax returns (Forms 990). Obtain them from Guidestar.org,<sup>47</sup> the Economic Research Institute,<sup>48</sup> or the Secretary of State for the state in which the organization was organized;
- Interviews with representatives of the Donee organization;
- Observations during the Donor/Donee's property inspection;
- Property monitoring reports (supplied periodically by the organization or generated in-house);
- Written agreements between the Donor and the organization (This type of agreement is required for contributions of easements in Registered Historic Districts).

Monitoring reports verify that the Donor is compliant with, and the Donee organization is enforcing, the terms of the easement. Donee organizations have sometimes allowed changes to the property that were in violation of the terms of the easement.

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<sup>45</sup> <https://www.irs.gov/charities-non-profits/search-for-charities>

<sup>46</sup> Treas. Reg. § 1.170A-14(c)(1)

<sup>47</sup> <http://www2.guidestar.org/>

<sup>48</sup> <http://www.eri-nonprofit-salaries.com/index.cfm>

It may be beneficial to review the Donee organization's application for exemption:<sup>49</sup> [IRS Form 1023 Application for Recognition of Exemption Under Section 501\(c\)\(3\) of the Internal Revenue Code](#). Regulations<sup>50</sup> state that a conservation group organized or operated primarily or substantially for one of the Conservation Purposes<sup>51</sup> has the requisite commitment. This purpose and commitment will be evident in their Form 1023.

## Special Rules for Buildings in Registered Historic Districts

For a Qualified Real Property Interest with respect to a building in a Registered Historic District, both the Donor and the Donee must certify, under penalty of perjury, in a written agreement, that the Donee is a Qualified Charitable Organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation; that the Donee has the resources to manage and enforce the restriction and a commitment to do so.<sup>52</sup> This rule does not apply to properties listed on the National Register.

## Conservation Purpose

### Overview

A conservation easement charitable contribution must be made exclusively for one or more Conservation Purposes:<sup>53</sup>

- Preservation of land areas for outdoor recreation by, or the education of, the public.
- Protection of a relatively natural habitat for fish, wildlife, or plants, or a similar ecosystem.
- Preservation of open space for the scenic enjoyment of the public, or pursuant to a Federal, State, or local governmental conservation policy.
- Preservation of historically important land area or certified historic buildings.

The conservation easement must be transferred by deed (or other legal instrument as appropriate under the law of the relevant state), recorded in the jurisdiction where the property is located, be exclusively for Conservation Purposes protected in Perpetuity and fulfill at least one of the Conservation Purposes.

The required type and degree of access to the land by the public depends on the Conservation Purpose in the Deed of Conservation Easement. If the claimed Conservation Purpose is preservation of open space the contribution must supply a significant public benefit.<sup>54</sup>

The Deed of Conservation Easement must prohibit inconsistent use of the property that could destroy a significant conservation interest, even if the deed accomplishes a Conservation Purpose.

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<sup>49</sup> <https://www.irs.gov/uac/about-form-1023>

<sup>50</sup> Treas. Reg. § 1.170A-14(c)(1)

<sup>51</sup> IRC § 170(h)(4)(A)

<sup>52</sup> IRC § 170(h)(4)(B)(ii)

<sup>53</sup> IRC § 170(h)(4)(A)

<sup>54</sup> IRC § 170(h)(4)(A)(iii)

A Baseline Study identifies the property's conservation attributes and establishes the property's condition at the time of the conservation easement is granted.

## Land for Outdoor Recreation or Education

If the donation preserves land for outdoor recreation by, or for the education of, the public, substantial and regular physical access by the public to the preserved land is required.<sup>55</sup>

**Example:** A donation to preserve a lake for use by the public for boating or fishing, or to preserve land for a nature preserve or hiking trail.

## Relatively Natural Habitat or Ecosystem

Donations satisfy this Conservation Purpose if the conservation easement protects a significant relatively natural habitat of fish, wildlife or plants, or similar ecosystem.<sup>56</sup> An ordinary tract of land where a common fish, wildlife or plant community, or similar ecosystem normally lives does not satisfy this Conservation Purpose. The conservation easement must protect a habitat that is significant.<sup>57</sup>

Significant habitats and ecosystems include, but are not limited to:

- Habitats for rare, endangered or threatened species.
- Natural areas that are relatively intact and are considered high quality examples of land or aquatic communities.
- Natural areas that are in or contribute to the ecological viability of a park, preserve, wildlife refuge, wilderness area, or other similar conservation area.

Limitations on public access are allowable. For example, a restriction on all public access to the habitat of a threatened native animal species would not defeat the deduction.<sup>58</sup>

Facts and circumstances determine what meets this Conservation Purpose. In *Glass v. Commissioner*,<sup>59</sup> Glass donated two easements that restricted development on a portion of a 10-acre parcel. The Tax Court held that the Conservation Purpose of natural habitat is satisfied when conservation easements are placed on property that has possible places to create or promote a relatively natural habitat of plants or wildlife, and the easements were held exclusively for Conservation Purposes.

However, in *Atkinson v. Commissioner*,<sup>60</sup> Atkinson donated conservation easements over operating golf courses. The Tax Court distinguished the *Glass* case and held that the easements did not protect a relatively natural habitat. The Tax Court reasoned, among other things, that the golf courses' use of pesticides and other chemicals could injure or destroy the ecosystem of the easement. The Tax Court relied on the Service's expert reports and testimony in *Atkinson* demonstrating the importance of expert evidence in "protecting natural habitat" cases.

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<sup>55</sup> IRC § 170(h)(4)(A)(i) and Treas. Reg. § 1.170A-14(d)(2)

<sup>56</sup> IRC § 170(h)(4)(A)(ii)

<sup>57</sup> Treas. Reg. § 1.170A-14(d)(3)

<sup>58</sup> Treas. Reg. § 1.170A-14(d)(3)(iii)

<sup>59</sup> [Glass v. Commissioner, 124 T.C. 258 \(2005\), aff'd, 471 F.3d 698 \(6th Cir. 2006\)](#)

<sup>60</sup> [Atkinson v. Commissioner, T.C. Memo 2015-236](#)

## Open Space

A donation that purports to protect open space (including farmland and forest land) must be (1) for the scenic enjoyment of the public, or (2) pursuant to a clearly delineated federal, state or local governmental conservation policy, AND must provide a significant public benefit.<sup>61</sup>

### *Scenic Enjoyment*

If developing the property

1. Would impair the scenic character of the local rural or urban landscape, or
2. Interfere with a scenic panorama that can be enjoyed by the public,

then, donating the property may provide open space for the scenic enjoyment of the public.<sup>62</sup> Facts and circumstances determine whether an easement provides scenic enjoyment to the public. The burden of proof is on the Donor to show the scenic characteristics of the property. Some factors to consider:<sup>63</sup>

- The compatibility of the land use with other land in the vicinity.
- The degree of contrast and variety provided by the visual scene.
- The openness of the land (a more significant factor in an urban, densely populated setting, or a heavily wooded area).
- Relief from urban closeness.
- A harmonious variety of shapes and textures.
- The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment and sunlight for the surrounding area.
- The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory.
- The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.

The public need not have physical access to a conservation easement of open space that preserves scenic enjoyment. Visual access to or across the property by the public is sufficient. Although the entire property need not be visible to the public, the public benefit from the donation may be insufficient to qualify if only a small portion of the property is visible to the public.<sup>64</sup>

In *Turner v. Commissioner*,<sup>65</sup> the Conservation Purpose of open space was not met because the easement deed did not restrict development and did not include specific provisions to protect the views

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<sup>61</sup> IRC § 170(h)(4)(A)(iii)

<sup>62</sup> Treas. Reg. § 1.170A-14(d)(4)(ii)

<sup>63</sup> Treas. Reg. § 1.170A-14(d)(4)(ii)(A)

<sup>64</sup> Treas. Reg. § 1.170A-14(d)(4)(ii)(B)

<sup>65</sup> [Turner v. Commissioner, 126 T.C. 299 \(2006\)](#)

of the property. Turner was not entitled to a deduction because the conservation easement did not satisfy one of the required Conservation Purposes.

### *Governmental Conservation Policy*

Acceptable Conservation Purposes include preservation of open space where such preservation is pursuant to a clearly delineated federal, state or local government conservation policy.<sup>66</sup>

A broad declaration by a single official or legislative body that the land should be conserved is not sufficient. The donation must further a specific, identified conservation purpose. The fact that the donation was accepted (or purchased) by a government agency is not sufficient, by itself, to satisfy this requirement. The more rigorous the review process by the governmental agency, the more acceptance of the easement establishes the requisite clearly delineated governmental policy.

The government need not fund the conservation program, but it must involve a significant commitment by the government with respect to the conservation project.

Public access to the donated property is not required if the Conservation Purpose would be undermined or frustrated by the public access.<sup>67</sup> For a donation pursuant to a local governmental policy protecting a scenic area, visual access is required. The Conservation Purpose is to protect the scenic beauty of the area.

### *Significant Public Benefit*

A Conservation Purpose based on the preservation of open space, whether for scenic enjoyment or pursuant to a governmental conservation policy, must yield a significant public benefit.<sup>68</sup>

Facts and circumstances determine whether a conservation easement provides a significant public benefit. Regulations<sup>69</sup> list factors that may be considered:

- Uniqueness of the property to the area.
- Intensity of land development in the area.
- Consistency of the proposed open space use with public and private conservation programs.
- Likelihood the property would be developed in the absence of the easement.
- Opportunity of the public to appreciate the property's scenic values.
- Importance of the property to preservation, tourism or commerce.
- Likelihood of the Donee acquiring substitute property or property rights.
- Cost of enforcing the terms of the conservation restrictions.
- Population density in the area.
- Consistency of open space use with a legislatively mandated program identifying particular parcels of land for future protection.

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<sup>66</sup> IRC § 170(h)(4)(A)(iii)(II)

<sup>67</sup> Treas. Reg. § 1.170A-14(d)(4)(iii)(C)

<sup>68</sup> IRC § 170(h)(4)(A)(iii)

<sup>69</sup> Treas. Reg. § 1.170A-14(d)(4)(iv)

Preserving a tract of land does not, in and of itself, provide a significant public benefit.<sup>70</sup> A conservation easement that merely limits the number of lots that the acreage is divided into does not satisfy the open space requirement.<sup>71</sup>

IRC §170(h)'s legislative history<sup>72</sup> shows that Congress did not intend for every easement to qualify for a deduction. A deduction is not allowed unless there is an assurance that the public benefit furthered by the contribution is substantial enough to justify the allowance of a deduction. Significant public benefits include preservation of a unique natural land formation for the enjoyment of the public or preservation of woodland along a well-traveled public highway to preserve the appearance of the area.

## Historically Important Land or Structure

### *Historically Important Land*

Historically important land includes:<sup>73</sup>

- An independently significant land area that meets the National Register Criteria for Evaluation<sup>74</sup>
- Land where the physical or environmental features contribute to the historic or cultural importance and continuing integrity of Certified Historic Structures.

The term “Certified Historic Structures” includes a land area listed in the National Register.<sup>75</sup> The National Register of Historic Places is part of a national program administered by the [NPS National Park Service \(NPS\)](#) to identify, evaluate and protect historic and archeological resources worthy of preservation. A list of National Register properties can be found on the [NPS Web](#) page.<sup>76</sup>

### Certified historic structure

A Certified Historic Structures is:

- Any building, structure, or land area listed on the National Register,<sup>77</sup> or
- Any building located in a Registered Historic District and certified by the Secretary of the Interior as being of historic significance to the district.

The [National Park Service Technical Preservation Service](#) administers the structure certification program for the Department of the Interior.<sup>78</sup> The certification must be done at the time the property is donated or by the due date (including extensions) of the return for the year of the donation. Certified Historic Structures may be commercial property or a personal residence.

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<sup>70</sup> Treas. Reg. § 1.170A-14(d)(4)(iv)(B)

<sup>71</sup> IRC § 170(h). *Turner v. Commissioner*, 126 T.C. 299 (2006)

<sup>72</sup> [S. Rep. 96-1007, at 9-10 \(1980\), reprinted in 1980 U.S.C.C.A.N. 6736, 6744-45](#)

<sup>73</sup> IRC § 170(h)(4)(A)(iv); Treas. Reg. § 1.170A-14(d)(5)(ii)

<sup>74</sup> [How to Apply the National Register Criteria for Evaluation](#); <https://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>

<sup>75</sup> IRC § 170(h)(4)(C);

<sup>76</sup> <https://www.nps.gov/nr/research/>

<sup>77</sup> [National Register of Historical Places: Research](#); <https://www.nps.gov/nr/research/>

<sup>78</sup> <https://www.nps.gov/tps/>

The term “Registered Historic District” means:<sup>79</sup>

1. Any district listed in the National Register, and
2. Any district
  - a. designated under a statute of the appropriate State or local government, if such statute is certified by the Secretary of the Interior to the Secretary as containing criteria which will substantially achieve the purpose of preserving and rehabilitating buildings of historic significance to the district, and
  - b. that is certified by the Secretary of the Interior to the Secretary as meeting substantially all the requirements for the listing of districts in the National Register.

A building in a local historic district does not meet the definition of a Certified Historic Structure unless both the structure and the district have been certified.

Some visual access by the public to the building, structure or land area is required.

### *Special Rules for Buildings in Registered Historic Districts*

The Code imposes additional requirements on contributions of conservation easements on buildings in Registered Historic Districts.<sup>80</sup> These special rules do not apply to properties listed in the National Register.

To qualify, all the following additional requirements must be satisfied:

- The entire exterior of the building, including the front, sides, rear, and height, must be restricted, and no changes can be made to the exterior that are inconsistent with the historical character of the exterior.<sup>81</sup>
- The Donor must enter a written agreement with the Donee certifying, under penalty of perjury, that the Donee is a Qualified Charitable Organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and that the Donee has the resources to manage and enforce the deed restrictions and the commitment to do so.
- You must attach to the return a Qualified Appraisal.<sup>82</sup> Photographs of the entire exterior of the building, and a description of all restrictions on the development of the building.
- For contributions of façade easements on buildings in Registered Historic Districts, the Donor must pay a \$500 filing fee to the U.S. Treasury to claim a deduction for more than \$10,000.<sup>83</sup>

### *National Park Service-Form 10-168*

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<sup>79</sup> IRC § 47(c)(3)(B); Treas. Reg. § 1.170A-14(d)(5)(iv)

<sup>80</sup> IRC § 170(h)(4)(B)

<sup>81</sup> [61 York Acquisition, LLC v. Commissioner, T.C. Memo. 2013-266](#)

<sup>82</sup> As defined in IRC § 170(f)(11)(E)

<sup>83</sup> IRC § 170(f)(13)

Congress provides two incentives for historic preservation: (1) a charitable contribution deduction for historic preservation of a historically important land area or a Certified Historic Structure<sup>84</sup> and (2) the rehabilitation credit.<sup>85</sup>

To secure either incentive, the Donor must submit [Form 10-168](#) (PDF)<sup>86</sup> to the [NPS National Park Service \(NPS\)](#)<sup>87</sup> and NPS must certify the property in a Registered Historic District contributes to the district.

Part I of Form 10-168, details the property's condition at the time of the application. Part II is a notice of proposed work and includes information such as:

- Date of application
- Description of the condition of the building and any proposed work.
- The expected start and completion dates
- Estimated costs
- Architectural drawings

Part II of Form 10-168 is required for any rehabilitation project whether the property is individually listed on the [National Register of Historic Places](#) or in a Registered Historic District.

Donors are under no legal obligation to complete the proposed rehabilitation of the building, prior to submitting the application. However, the Donor must undertake preliminary steps such as obtaining market studies, architectural drawings, cost estimates, financing applications, investment prospectus, legal opinions, lease agreements, partnership agreements, and other documents that may be legally binding.

Being listed on the [National Register of Historic Places](#) or located in a registered district imposes no restrictions on the property. Only local law imposes restrictions. A local historic district may not have the same boundaries as the National Register District of the same name. Thus, a building may be certified for purposes of a charitable contribution deduction by the [NPS](#) but the only restrictions prior to the easement might be local zoning. Be sure to determine whether there are restrictions under local preservation law.

Note: Even if the property is certified by the Secretary of Interior, it does not mean a charitable contribution deduction is allowable. The IRS is responsible for all legal determinations concerning tax consequences.<sup>88</sup>

## Public Access

Except for donation of a relatively natural habitat or ecosystem or donations made pursuant to specified governmental policies, public access (either physical or visual) to the property is generally required.<sup>89</sup> The type of access depends on the claimed Conservation Purpose.

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<sup>84</sup> IRC § 170(h)

<sup>85</sup> IRC § 47

<sup>86</sup> <https://www.nps.gov/tps/tax-incentives/application.htm> ; Form 10-168 Parts 1, 2, and 3 download separately.

<sup>87</sup> <http://www.nps.gov/index.htm>

<sup>88</sup> 36 CFR 67.1

<sup>89</sup> Treas. Reg. § 1.170A-14(d)

If physical access is required, access must be substantial and on a regular basis.

If only visual access is required, the entire property need not be visible to the public for a donation to qualify. However, the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public.

## Inconsistent Uses

Donations must be exclusively for Conservation Purposes, and the Deed of Conservation Easement must prohibit inconsistent uses.<sup>90</sup> An inconsistent use is any use that allows the destruction or potential destruction of significant conservation interests.

Inconsistent uses are permitted if necessary to protect the conservation interests that are the subject of the easement.

Nearly all conservation easement donors reserve some rights to the property. Depending on the nature and extent of these reserved rights, the claimed Conservation Purpose may be eroded or impaired to such a degree that the contribution may not be allowable. A determination of whether the reserved rights defeat the Conservation Purpose must be based on all facts and circumstances.

**Example:** The Conservation Purpose of the easement as described in the Deed of Conservation Easement is to protect the relatively natural habitat for scrub jay, a threatened bird. The deed of easement allows the Donor to use pesticides that destroy the natural food source for the scrub jay. The Donor is not entitled to a deduction because the allowed activity is an inconsistent use.

## Baseline Study

The Donor must provide baseline documentation (sometimes referred to as the Baseline Study) to the Donee, **prior to the time the donation is made.**<sup>91</sup>

The Baseline Study may be prepared by any a person with specific training or skills in the assessment of conservation values such as a biologist, botanist or historian, including a qualified person affiliated with the Donee.

Required documentation may include:

- Survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas.
- A map of the area drawn to scale showing all existing man-made improvements or incursions (such as roads, buildings, fences, or gravel pits), vegetation and identifying flora and fauna (including, for example, rare species locations, animal breeding and roosting areas, and migration routes), land use history (including present uses and recent past disturbances), and distinct natural features (such as large trees and aquatic areas).
- An aerial photograph of the property at an appropriate scale taken as close as possible to the date of the donation.
- On-site photographs taken at appropriate locations on the property.

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<sup>90</sup> Treas. Reg. § 1.170A-14(e)(2) and (e)(3)

<sup>91</sup> Treas. Reg. § 1.170A-14(g)(5)(i)

The documentation must be accompanied by a statement signed by the Donor and a representative of the Donee organization affirming that the documentation accurately represents the protected property at the time of the transfer.

## IRS Examination of Conservation Purposes

During an IRS examination of the Donor's conservation easement deduction, the IRS's Agent (and often the IRS Appraiser) conducts an interview with the Donor (and possibly with the Donor's appraiser and tax representative) and inspects the easement-property.<sup>92</sup>

During these interviews and inspections, the IRS's Agent focuses on:

- The location of the significant or protected habitat or species on the property and within the easement;
- Physical and visual access by the public to the easement property;
- The nature of the surrounding properties and intensity of development in the area;
- The location of buildings and other structures on the property and within the easement;
- Post-easement building or land improvements that impact the stated Conservation Purposes; and
- Any inconsistent use of the property

The IRS's Agent will inspect both the interior and exterior of historic properties. This may necessitate coordination with the Donee organization's personnel.

The interview usually focuses on:

- The Deed of Conservation Easement;
- Subordination Agreements;
- Baseline Study;
- Appraisal; and
- Form 8283;
- Documents provided by the Donee organization.

Some IRS Agents also research the property on [Google Maps](#), [Google Earth](#), [Zillow](#), or other realty mapping and information sites.<sup>93</sup>

The Agent usually interviews or sends information requests to third parties such as representatives of the Donee organization, the appraiser, the Baseline Study author, or other conservation experts as well. (Note: If the Donor, or any information provider, is unresponsive, the Agent may invoke their summons authority to compel delivery. A discussion of this power exceeds this essay's scope.)

An IRS appraiser usually assists the agent with their examination. The IRS appraiser's review focuses on factors that affect the highest and best use of the property before and after the conservation easement grant, such as zoning or other restrictions on the property, topography or flood plains.

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<sup>92</sup> Donors have the absolute right to have any enrolled tax representative (Attorney, CPA, or EA) present for these interviews and inspections. In some cases, subject to powers of attorney, Donors have the right to delegate most of their interview responsibilities to an enrolled tax representative.

<sup>93</sup> <http://maps.google.com/maps?hl=en&tab=wl> ; <https://earth.google.com/> ; <http://www.zillow.com/>

During the site inspection, the Agent will ask the Donor to point out outdoor recreation areas, animals, plants, scenic views, or historic land and structures that contribute to the Conservation Purpose. If the IRS's Agent perceives that conservation attributes are absent, lack of access, a de-minimis public benefit, or use inconsistent with the Conservation Purpose, they will discuss the issues with the Donor or Donor's representative to clarify. They may solicit additional documentation.

As with most IRS examinations, cooperation is often the best defense. If the Donor or the Donor's representative will not consent to an interview or fail to provide at least the minimum Substantiation in a timely manner, the Agent may issue a summons for interview and production, develop the case based on third party contacts, or close the case to the Donor's detriment for lack of substantiation. None of these actions contributes to harmonious relations.

## Substantiation

### Overview

Donors cannot deduct any charitable contribution unless it is properly substantiated.

Over 85% (108 of 125) of recently litigated charitable donation cases turn on substantiation issues. A substantial majority of those cases address the Code requirement for a Contemporaneous Written Acknowledgement<sup>94</sup> and the absence, or inadequacy, of appraisal documents.<sup>95</sup> The courts take a strict view regarding substantiation issues: sustaining disallowance of deduction for even minimal oversights or omissions in about 93% (100 of 108) of substantiation cases.<sup>96</sup>

The Substantiation requirements are extensive.<sup>97</sup> Substantiation requirements are even more extensive for in-kind and property donations.<sup>98</sup> The records required to substantiate a charitable contribution vary depending on the amount, date of contribution, type of property contributed and whether the donation was a cash or noncash contribution. There are additional rules for conservation easements and buildings in Registered Historic Districts.

Donors have the burden to demonstrate that the cash or property transferred to the Qualified Charitable Organization is deductible.<sup>99</sup>

### Contemporaneous Written Acknowledgment

For any contribution of \$250 or more (in cash or property) a Contemporaneous Written Acknowledgement (CWA) from the qualified Donee organization is required.

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<sup>94</sup> [Longino v. Commissioner, T.C. Memo. 2013-80](#);

<sup>95</sup> [Riether v. United States; 919 F. Supp. 2d 1140 \(D.N.M. 2012\)](#)

<sup>96</sup> Cambyeses compiled litigation results from 125 cases reported by the Taxpayer Advocate's Office for 07/01/2010 through 06/30/2015. In case you were wondering; The Service was 98, 12, 15 in the W/L/D count.

<sup>97</sup> IRC § 170(a)(1); IRC § 170(f)(8); IRC § 170(f)(11); IRC § 170(f)(13); IRC § 170(f)(17); Treas. Reg. § 1.170A-13; Treas. Reg. § 1.170A-14; [Publication 1771, Charitable Contributions-Substantiation and Disclosure Requirements](#) (PDF)

<sup>98</sup> [Publication 526, Noncash Contributions](#) (PDF), and [Publication 561, Determining the Value of Donated Property](#) (PDF)

<sup>99</sup> Treas. Reg. § 1.170A-1(h)(1) and (2); [United States v. American Bar Endowment, 477 U.S. 105, 117-118 \(1986\)](#); and [Rev. Rul. 67-246, 1967-2 C.B. 104](#)

“Contemporaneous” means the Donor obtains the acknowledgment by the earlier of the date on which they file their return claiming the charitable contribution deduction, or the due date (including extensions) for the return.<sup>100</sup> This acknowledgment must contain:<sup>101</sup>

- Amount of any cash contribution,
- Description (but not the value) of the conservation easement,
- Statement that no goods or services were provided by the organization in return for the contribution (if this was the case),
- Description and good faith estimate of the value of goods or services, if any, that any organization provided in return for the contribution, and
- A statement that goods or services (if any) that an organization provided in return for the contribution consisted entirely of intangible religious benefits (if this was the case).

Donors must comply with the contemporaneous acknowledgement requirement for a deduction to be allowed. Several courts have stated<sup>102</sup> that “the deterrence value of section 170(f)(8)’s total denial of a deduction comports with the effective administration of a self-assessment and self-reporting system”

**Example:** The following CWA does not meet the statutory requirement since it makes no affirmative statement that goods or services were not provided, nor describes the goods or services provided in exchange for the contribution.

“Thank you for your contribution by deed of a conservation easement on XYZ property and \$10,000 cash contribution for maintenance of the easement that ABC Conservation received on May 5, 2008.”

A CWA is not required to take any specific form. An easement deed may, in specific cases, qualify as a CWA.<sup>103</sup> However, the easement deed must state whether the Donee provided any goods or services in consideration for the easement.<sup>104</sup>

The CWA is specifically required by statute. At examination, it is useless to argue that substantial compliance with the CWA requirement is all that required.

A deed that states that a nominal dollar amount “and other good and valuable consideration” were received does not satisfy the CWA requirement. The description of a nominal dollar amount “and other good and valuable consideration” is ambiguous. It can mean that the consideration was nominal (whether or not it is actually fictitious) or it can mean that the consideration was substantial but was not disclosed. Sometimes a deed states that it constitutes the entire agreement or entire consideration between the parties but does not clearly indicate that no goods or services were given to the donor. The courts have been reluctant to accept these deeds as a CWA.<sup>105</sup>

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<sup>100</sup> IRC § 170(f)(8), Treas. Reg. § 1.170A-13(f)(3), and [Publication 1771, Charitable Contributions-Substantiation and Disclosure Requirements](#) (PDF)

<sup>101</sup> Treas. Reg. § 1.170A-13(f)(2)

<sup>102</sup> *Addis v. Commissioner*, 374 F.3d 881, 887 (9th Cir. 2004), affg. 118 T.C. 528 (2002); cited in *Viralam v. Commissioner*, 136 T.C.151; *Schrimsher v. Commissioner*, T.C. Memo. 2011-71

<sup>103</sup> *Averyt v. Commissioner*, T.C. Memo. 2012-198; *RP Golf, LLC v. Commissioner*, T.C. Memo. 2012-282

<sup>104</sup> *Schrimsher v. Commissioner*, T.C. Memo. 2011-71

<sup>105</sup> *French v. Commissioner*, T.C. Memo. 2016-53

If, in addition to the easement, the Donor gives the Donee organization a cash contribution (e.g. for maintenance of the property) a CWA is required for both the cash payment and the conservation easement. The CWA for the cash contribution must be secured by the earlier of the date the Donor files their return or the due date (including extensions) for the return. [Form 8283, Noncash Charitable Contributions](#) (PDF) is not a substitute for a CWA.

If the Donor or Practitioner has questions or concerns whether the language in the deed or CWA satisfies the requirements, consult with local counsel.

Congress provides one exception to the CWA requirement.<sup>106</sup> A CWA is not required if the Donee organization files a return, on such form and in accordance with such regulations as the Treasury Department may prescribe (Donee reporting), that discloses the donation and its terms. Treasury and the IRS have purposely declined to issue regulations that implement the provision and consistently maintained that the exception is not available unless and until the Treasury Department and the IRS issue final regulations.<sup>107</sup> Thus, the Service has effectively overridden Congressional intent and obviated this defense.

In September 2015, Treasury and the IRS published a notice of proposed rulemaking because some Donors and Donee organizations expressed interest in Donee reporting.<sup>108</sup> However, Treasury and the IRS did not implement the Donee reporting exception to the CWA requirement despite a substantial number of public responses. The Service withdrew the notice of proposed rulemaking in January 2016. Therefore, the Donee reporting exception remains unavailable.

As the IRS Audit Guidelines mention, taxpayers and return preparers frequently confuse the CWA requirement with filing [Form 8283, Noncash Charitable Contributions](#) (PDF). Form 8283 is not a substitute for the Contemporaneous Written Acknowledgment; both are required. Failure to meet either requirement jeopardizes the Donor's charitable contribution deduction.

## Form 8283, Noncash Charitable Contributions

For noncash donations greater than \$5,000, Donors must attach a fully completed "appraisal summary," to their return.<sup>109</sup> Section B of [Form 8283, Noncash Charitable Contributions](#) (PDF) fulfills this requirement. If the donation originates from a flow-through entity (such as S-corporation or partnership), the Donor must attach a copy of the flow-through entity's appraisal summary to their tax return.

In examination, the IRS's Agent looks for any of several error conditions on Form 8283:

- Inadequate description of the property
- Missing information
- Missing signatures
- Inconsistent dates

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<sup>106</sup> IRC § 170(f)(8)(D)

<sup>107</sup> [TD 8690](#);

<sup>108</sup> [80 FR 55802](#)

<sup>109</sup> Deficit Reduction Act of 1984 and in Treas. Reg. § 1.170A-13(c)(4)

The description of the property on the Form 8283 must have sufficient detail for a person unfamiliar with the type of property to ascertain that the appraised property is the same property that was contributed.<sup>110</sup>

Form 8283, Section B, Part I requires information regarding:

- Acquisition date of the property
- How the Donor acquired the property
- The Donor's cost or adjusted basis
- Bargain sale amount received
- Appraised fair market value of the easement donation

The instructions to Form 8283 require a statement that identifies the Conservation Purpose, shows fair market value before and after granting the easement, states whether the donation was made to get an approval, was required by contract, and whether the Donor or any related person has any interest in nearby property. This statement must be attached to the Form 8283.<sup>111</sup>

### *Declaration of Appraiser*

For donations in-kind that exceed \$5,000 a Qualified Appraiser must complete Form 8283, Section B, Part III, Declaration of Appraiser.<sup>112</sup>

### *Donee Acknowledgment*

An official authorized to sign the Donee organization's tax or information returns or a person specifically designated to sign Form 8283 on the organization's behalf must sign Section B, Part IV, Donee Acknowledgment.

### *Failure to Attach Form 8283*

Failure to file Form 8283 or filing an incomplete Form 8283 obviates the charitable contribution deduction, unless:

- The failure was due to a good-faith omission,
- The Donor otherwise complied with Regulations,<sup>113</sup> and
- The Donor complies with any IRS request that they submit a fully completed Form 8283 within 90 days of the request.<sup>114</sup>

In rare and unusual circumstances, it is impossible to obtain the Donee's signature. The Service may not disallow your deduction if you attach a statement to the Form 8283 explaining, in detail, why it was impossible to obtain the Donee's signature.<sup>115</sup>

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<sup>110</sup> Treas. Reg. § 1.170A-13(c)(4)(ii)(B)

<sup>111</sup> [Instructions for Form 8283, Noncash Charitable Contributions](#) (PDF), Treas. Reg. § 1.170A-13(c)(4)

<sup>112</sup> Treas. Reg. § 1.170A-13(c)(4)(ii)(K) and (L)

<sup>113</sup> Treas. Reg. § 1.170A-13(c)(3) and (c)(4)

<sup>114</sup> Treas. Reg. § 1.170A-13(c)(4)(iv)(H)

<sup>115</sup> Treas. Reg. § 1.170A-13(c)(4)(iv)(C)(2)

## Qualified Appraisal

The value of the Donor's contribution is the fair market value (FMV) of the conservation easement at the time contribution. If there have been a substantial number of recent sales of conservation easements comparable to the donated easement in the area, FMV is based on the sales price of those comparable sales. If there have not been a substantial number of market-place sales, the value is the difference between the FMV of the underlying property before and after the easement is granted. Because there are usually not a substantial number of comparable sales, a before and after valuation is used in most cases.

Qualified Appraisals are required for all deductions of conservation easements greater than \$5,000.<sup>116</sup> A Qualified Appraisal, appraisal of property must be (1) treated as a Qualified Appraisal under regulations or other guidance prescribed by the Secretary and (2) conducted by a Qualified Appraiser in accordance with Generally Accepted Appraisal Standards and any regulations or other guidance prescribed by the Secretary.<sup>117</sup>

### *Qualified Appraisal under regulations*

A Qualified Appraisal under regulations<sup>118</sup> is a document that:

1. Relates to an appraisal that is made no earlier than 60 days before the date of contribution of the appraised property and no later than the due date (including extensions) of the return on which a deduction is first claimed;
2. Is prepared, signed, and dated by a Qualified Appraiser;
3. Includes, among other requirements,
  - a. A description of the property appraised;
  - b. The fair market value of such property on the date of contribution and the specific basis for the valuation,
  - c. A statement that such appraisal was prepared for income tax purposes;
  - d. The qualifications of the Qualified Appraiser; and
  - e. The signature and taxpayer identification number of such appraiser; and
4. Does not involve an appraisal fee that violates Treasury rules (e.g. A contingent fee based on the appraised value).

The Service may allow the Donor's deduction if they failed to obtain a Qualified Appraisal due to reasonable cause and not to willful neglect.<sup>119</sup> A determination of whether or not the Donor acted reasonably and not with willful neglect, requires an analysis of the relevant facts and circumstances.

If the Donor claims a noncash charitable contribution deduction of more than \$500,000, they must attach a copy of a Qualified Appraisal of the property to the return for the year of donation.<sup>120</sup> For contributions of façade easements in Registered Historic Districts, a Qualified Appraisal must be

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<sup>116</sup> IRC § 170(f)(11)(C)

<sup>117</sup> [IRS Notice 2006-96](#), 2006-2 C.B. 902

<sup>118</sup> Treas. Reg. § 1.170A-13(c)(3)

<sup>119</sup> IRC § 170(f)(11)(A)(ii)(II)

<sup>120</sup> IRC § 170(f)(11)(D)

attached to the return regardless of the dollar amount claimed for the conservation easement.<sup>121</sup> This special rule does not apply to properties listed on the National Register.

See *Qualified Appraisal Requirements* (below) for additional information.

### Generally Accepted Appraisal Standards

The Qualified Appraisal must be conducted by a Qualified Appraiser in accordance with Generally Accepted Appraisal Standards.<sup>122</sup>

### Façade Easement Filing Fee (Registered Historic District Only)

For deductions of more than \$10,000, for a donation of an easement on a building in a Registered Historic District, the Donor must pay a \$500 filing fee with their return in the taxable year of the contribution.<sup>123</sup> Transmit payment to the IRS using [Form 8283V, Payment Voucher for Filing Fee under Section 170\(f\)\(13\)](#) (PDF).<sup>124</sup>

### Baseline Study

If the Donor retains rights in a donated conservation easement, they must give the Qualified Charitable Organization documentation (Baseline Study) that establishes the condition of the property at the time of the gift, the types of natural habitat on the property (if the Conservation Purpose is for natural habitat), and, the existing restrictions on the property.<sup>125</sup> Both the Donor and the Donee must sign the Baseline Study. The Baseline Study includes maps, surveys and photographs of the property. It must be provided prior to the time the Donor makes the donation.

See *Conservation Purpose-Baseline Study* (above) for additional information on baseline documentation.

### Exhibit: Substantiation Requirement Summary

Required Item	Criteria	Due Date	Attach to Return?
Deed of Conservation Easement	Identifies property interest, conservation purpose, public access, reserved rights, qualified organization, their interest in proceeds on termination, and conveys the interest in perpetuity.	Recordation date determines contribution date. No deduction unless and until recorded.	No
Lender Subordination	All existing lienholders must subordinate to the qualified easement holder.	Simultaneous with recordation of Deed of Conservation Easement.	No

<sup>121</sup> IRC § 170(h)(4)(B)(iii)(I)

<sup>122</sup> IRC § 170(f)(11)(E)

<sup>123</sup> IRC § 170(f)(13)

<sup>124</sup> <https://www.irs.gov/pub/irs-pdf/f8283v.pdf>

<sup>125</sup> Treas. Reg. § 1.170A-14(g)(5)(i)

Required Item	Criteria	Due Date	Attach to Return?
	Subordination must be recorded.		
Contemporaneous Written Acknowledgment	All contributions \$250 or more whether in cash or in-kind.	Earlier of Return filing date or Due Date (with extensions)	No
Form 8283 (Appraisal Summary)	All > \$500 not to exceed \$5,000 Part A All > \$5,000 Part B	Return filing date	Yes Also attach conservation easement statement per Form 8283 Instructions
Qualified Appraisal	All >\$5,000	Must be made no earlier than 60 days before date of contribution but no later than original-amended return filing date	Yes If over \$500,000 or an easement on a building in a Registered Historic District
Facade Filing Fee of \$500	All easement costs >\$10,000 on buildings in Registered Historic Districts	Return filing date	No Mail with Form 8283V
Baseline Study	Required to be given to Donee organization and signed by Donor and Donee to establish condition of property	Time of donation (See note above regarding recordation)	No

## IRS Examination of Required Documents and Form 8283

### *Deed of Conservation Easement*

#### *Overview*

The Deed of Conservation Easement is fundamental to the entire transaction. Therefore, if the IRS examines the Donor's return, expect the IRS's Agent to analyze the deed carefully, question the Donor's (and the Practitioner's) understanding of it, and attack seemingly minor drafting faults to challenge the Donor's entitlement to a tax deduction. Bear in mind during the interview and review process:

- The Agent is not your friend. Even casual questions have an embedded, barbed, snelled hook.
- Answer only the question the Agent asks. Do not anticipate further questions and do not elaborate beyond facts necessary to answer the question.
- Don't lie, or authorize your representative to lie on your behalf... Any IRS agent assigned to high value cases has heard most of it before, can often smell the lies they haven't heard, and really hate it when you insult their intelligence.
- Donors are entitled (under almost all circumstances) to have an enrolled tax representative (Attorney, CPA, EA) present at all interviews.

The Agent will request copies of the recorded deed, the deed that is reproduced in the appraisal report, and any drafts or unexecuted copies of the deed. You must provide both the recorded deed and

the appraisal report's embedded copy. Long before it becomes necessary to present the deed in an examination, (preferably, before recording the deed), check to make sure both these versions are identical. Any differences between the two versions cast doubt on the quality of the Donor's due diligence, the veracity of the appraisal, and prompt many potentially uncomfortable questions.

Donors and their representative should resist the Agent's request to review early drafts of the deed. First, the early drafts are not relevant to the transaction that eventually occurred. Second, and more importantly, differences between successive drafts often patch over deficiencies in the transaction structure or dynamics. In short, differences between the drafts provide the Agent a road map to the most serious deficiencies in the transaction. If the Agent wants to identify those deficiencies, at least make them work for them.

Once the Donor and their representative provide the Agent with deed documentation, the Agent will try to assess (from the deed):

- What property does the easement encumber?
- What stated Conservation Purpose does the easement serve?
- Does the deed protect the property in Perpetuity?
- What type of public access to the property does the deed allow?
- What rights has the Donor reserved?
- What provisions affect subordination and allocation of proceeds?

#### *Perpetuity*

Almost every Deed of Conservation Easement explicitly states that the easement applies in Perpetuity. Indeed, if you want to take a charitable contribution deduction for the easement, the Deed of Conservation Easement must explicitly state that the restriction remains on the property forever, is binding on current and all future owners of the property, and the deed must be recorded.

Unfortunately, some deeds include language that contradicts that assertion. Since Perpetuity is an absolute requirement for the Qualified Conservation Easement deduction, the Agent will seize on every such contradiction to overturn the deduction.

Donors can head the Agent off at the pass if, before they record the deed and include it in the appraisal package, they (or their counsel) review the deed keeping in mind:

- If the grant ends after a period of years or if the property can revert to the Donor or to another private party, the easement is not enforceable in Perpetuity.<sup>126</sup>
- Giving the Donor or someone else too much control over the easement's duration (E.g. a clause that terminates the easement "by mutual written agreement of the parties") defeats Perpetuity.<sup>127</sup>
- Giving the Donor or the Donee organization the right to "swap" properties and easements in the future also defeats Perpetuity.<sup>128</sup>

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<sup>126</sup> . If a remote future event outside the Donor or Donee's control (e.g. an earthquake or wildfire) extinguishes the easement, the grant would generally be treated as in Perpetuity; Treas. Reg. § 1.170A-14(g)(3)

<sup>127</sup> [Carpenter v. Commissioner, T.C. Memo. 2012- 1 motion for reconsideration denied 2013-172](#); Treas. Reg. § 1.170A-14(g)(1), and Treas. Reg. § 1.170A-14(g)(6)(i): unequivocally permit "impossibility reversion" clauses if they are subject to judicial judgement. The parties to the deed cannot be the arbiter of when the condition is satisfied.

<sup>128</sup> [Belk v. Commissioner, 140 T.C. 1 \(2013\), motion for reconsideration denied, T.C. Memo. 2013-154, aff'd 774 F.3d 1243\(4th Cir. 2014\)](#); Cited in [Balsam Mountain Invs. LLC v. Comm'r, T.C. Memo. 2015-43](#)

- Amendment clauses that permit amendments or modifications that adversely affect perpetual duration fail the Perpetuity requirement.
- Reserved Rights often impinge on the Perpetuity requirement. Examine any reservations with a jaundiced eye.
- All pre-existing mortgagees or lien holders must subordinate their rights in the property to the rights of the Donee organization, in Perpetuity. The subordination must be recorded at the same time the deed is recorded.<sup>129</sup>
- The proportionate value of the Donee’s property rights in the underlying property may not change over time.<sup>130</sup> If the Donee is not absolutely entitled to a proportionate share of extinguishment proceeds, then the Conservation Purpose of the contribution is not protected in Perpetuity.<sup>131</sup>

*Conservation Purpose*

Do not regurgitate the Code’s Conservation Purpose language.<sup>132</sup> Include a specific description of the easement’s Conservation Purpose in the deed. Clearly describe and provide documentation to show how the easement meets the Conservation Purpose. If applicable, cite the species, scenic views or building being protected.

Conservation easements that support recreation or education must allow either physical or visual access by the public.<sup>133</sup> The easement deed should specify:

- What access is allowed,
- By whom,
- With what frequency, and
- What rights the Donor has reserved.

We advise that you go a bit beyond the deed provisions to formally document:

- What can be seen from the highway or other public space (if an open space easement for scenic enjoyment), and
- The impact the Donor’s reserved rights have on public access.

This supplemental information is often incorporated in the Baseline Study.

Conservation easements deeds for buildings in Registered Historic Districts must restrict alteration and maintain the easement on the entire exterior of the building (including the front, sides, rear, and height of the building). The Code’s use of the term “height” is sometimes problematic: A deed that describes the restriction as the “roof,” does not satisfy the statute unless it contains additional narrative limiting the “height” of the building. A roof can be raised or lowered, or additional floors can be added to the building.

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<sup>129</sup> Treas. Reg. § 1.170A-14(g)(2)

<sup>130</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>131</sup> Treas. Reg. § 1.170A-14(g)(6)(i) and (ii)

<sup>132</sup> That language is found at IRC § 170(h)(4)(A)

<sup>133</sup> IRC § 170(h)(4)(A)(i)

### *Reserved Rights*

Reserved rights, both on the easement and on the balance of the property sometimes defeat the easement's Conservation Purpose. This happens most often when the Donor reserves rights that are fundamentally inconsistent with the easement's purpose.

**In a classic example:** An easement that protected Virginia Running Buffalo Clover allowed the donor to use all-terrain vehicles on the protected area. This inconsistent use of the easement could destroy the clover. The Service disallowed the donor's deduction.

Other, more subtle examples abound. Often, donors reserve the right to build on either the easement or the unencumbered, but adjacent, property. The rules permit donors to reserve development rights, such as constructing additional homes or structures, installing utilities, and building fences or roads. The donor's deduction is imperiled if those reserved rights potentially impair the easement's Conservation Purposes. Actual impairment is not necessary.

"Potential impairment" is common on "open space" easements that allow development on adjacent property. If the deed does not state the specific location in which construction is permitted or does not limit the size of the construction, the donor could potentially construct buildings that block the public's scenic view. This undermines the Conservation Purpose and casts doubt on the deduction's legitimacy. Again, actual obstruction is not necessary – potential obstruction is sufficient cause for the Agent to challenge the deduction.

Short of eliminating reserved rights clauses from the deed entirely,<sup>134</sup> there is always the possibility that the Donor may be blind-sided by the unanticipated consequence of a seemingly innocuous reservation. Carefully examine any reserved right with the assistance of counsel, Donee's representatives, and outside consultants before the deed is recorded. It helps to take an extreme view and develop "what if" scenarios from that starting point. E.g. Assume that every chemical used on the adjacent property is harmful to the species you hope to protect with the easement... Can that poison affect the easement? A bit of creative paranoia may preserve the deduction, as well as the protected species.

### *Subordination*

It doesn't happen often, but it does happen: a Donor grants a conservation easement on a mortgaged property but fails to inform the lender or obtain the lender's consent. The lender's lien then has priority over rights granted to the Donee.

If the donated property is mortgaged, the lender must subordinate their interest to the Donee before the donation.<sup>135</sup> The subordination agreement must be recorded at the same time the Deed of Conservation Easement is granted.

This error is irreparable. If the Donor fails to properly subordinate and record, they may not plead substantial compliance in defense of the deduction... This one is a slam dunk for the IRS Agent who detects it. The only remedy for this – do it right in the first place.

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<sup>134</sup> Usually not a practical strategy.

<sup>135</sup> Treas. Reg. § 1.170A-14(g)(2)

Recently, lenders have taken a very hard line on subordination. Lender's blame Dodd-Frank for some or all their reluctance. It is wise to start the subordination discussion with the lender long before the Donor needs their cooperation.

### *Allocation of Proceeds*

The deed must protect the Donee's rights in the property in Perpetuity.<sup>136</sup> It follows that the Donee's rights in any disposition of the property must be consistent with the rights they had when the easement was created.<sup>137</sup> This protection is most often ascertained by granting the Donee a percentage interest in the extinguishment determined by:

- (1) the fair market value of the conservation easement on the date of the gift (numerator), over
- (2) the fair market value of the entire property on the date of the gift.<sup>138</sup>

Some donors<sup>139</sup> discover too late that even slight deviations from this formulaic approach compromise their deduction. We recommend that the deed incorporate the exact allocation formula the Regulations contain. The IRS's Agent may insist on it.

### *The Baseline Study*

A Baseline Study is required if the Donor reserves any right which may impair the Conservation Purpose of the easement.<sup>140</sup> A Baseline Study is an excellent idea even if the Donor doesn't consciously reserve rights in the property. IRS Agents sometimes see reservations in places you'd never imagine. As the Audit guideline points out: "Nearly all easement deeds reserve some rights, so nearly all must have a Baseline Study."

The Baseline Study records the property's condition at the time the Donor donates it. It serves two purposes: 1) It satisfies Treasury Regulations and 2) It helps the Donee organization and others monitor and enforce the easement.

Review the Baseline Study to ascertain that it includes:

- 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 including aerial photographs;

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<sup>136</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>137</sup> Treas. Reg. § 1.170A-14(g)(6)(i) and (ii)

<sup>138</sup> Treas. Reg. § 1.170A-14(g)(6)(ii)

<sup>139</sup> [\*Carroll v. Commissioner\*, 146 T.C. No. 13 \(2016\)](#) (*Carroll* is a veritable cornucopia of nearly every drafting error it is possible to make. It should be "required reading" for tax representatives and counsel who deal with conservation easements.)

<sup>140</sup> Treas. Reg. §§ 1.170A-14(g)(5)(i); 1.170A-13(c)(4)(ii)(M)

- The study author’s name and professional credentials;
- The Donor’s signature and the Donee organization representative’s signature, and the date each signed it.

Baseline studies prepared by properly trained professionals (with beefy credentials) hold up better than those prepared by either the Donor or the Donee organization – unless the donor or organization has similar credentials. Sadly, most IRS Agents trust conservationists, biologists, foresters or botanists more than they trust Donors or the beneficiary of Donors’ largess.

The more property specific the Baseline Report, the more likely the Agent will accept it. Generic narratives about the area or State that lack specific references to the donated property do not meet the regulatory requirements.<sup>141</sup>

A study based on inaccurate information does not satisfy the regulation. Contact federal, state or local conservation agencies or historic preservation groups or enlist help from the internet<sup>142</sup> to build a defensible study that supports the claimed Conservation Purpose.

Do not attach the Baseline Study to the Donor’s return or the Deed of Conservation Easement. The Donor must provide the study to the Donee *prior to the time the donation is completed*. Both the Donor and a Donee representative must sign and date the study.

The statement required by Form 8283 is not a Baseline Study and will not be accepted as such.

### **Form 8283**

The IRS Audit Manual specifically admonishes IRS Agents to review the Form 8283 and all accompanying documentation: The examiner will seek out and challenge:

- Incomplete or missing information such as inadequate descriptions of the property, lack of acquisition date, or basis in the property.
- Missing appraiser or Donee acknowledgments.
- Inconsistent dates when compared to the appraisal or other attached documents.
- A short time between the acquisition of the property and the donation date.
- High valuation of the easement compared to the basis of the underlying property, in light of holding period and the market conditions for the relevant market.
- High valuation of the easement in light of the total acreage of the underlying land.
- Use of an appraiser who does not generally perform appraisals where the easement is located.

The Audit Manual cautions:

- “Completion of the appraisal summary (Form 8283) does not satisfy the Contemporaneous Written Acknowledgement requirement outlined in IRC § 170(f)(8). Failure to comply with the contemporaneous written acknowledgment requirement will result in disallowance of the charitable contribution deduction.”

<sup>141</sup> Treas. Reg. § 1.170A-14(g)(5)

<sup>142</sup> E.g. [Naturereserve.org](http://Naturereserve.org)

- “If a Qualified Appraisal was required to be attached but was not attached to the original return claiming the conservation easement, the charitable contribution may be disallowed for failing to meet the IRC 170(f)(11) requirements.”
- “Donors must pay a \$500 filing fee to the U.S. Treasury for donations of easements on buildings in Registered Historic Districts if a deduction of more than \$10,000 is claimed. No deduction is allowed unless the taxpayer includes the fee with the return. IRC § 170(f)(13)(A).”
- Paraphrased: Contributions are allowable only to Qualified Charitable Organizations. Verify that the Donee organization is qualified to receive both public contributions and (specifically) qualified conservation easement contributions.<sup>143</sup>

### *Substantial Compliance*

If the Donor’s deduction is disallowed, in whole or in part, due to noncompliance with the Substantiation rules, the Donor or your representative may argue for reversal based on the judicial doctrine of “substantial compliance.”

This argument is, at best a long shot.

The burden is on the Donor to comply with all statutory requirements to substantiate a charitable contribution. Charitable contributions are allowed only if they comply with all “directory” Treasury Regulations.<sup>144</sup> A substantial compliance argument *might* have prevailed<sup>145</sup> before the American Jobs Creation Act (2004) and the Pension Protection Act (2006), both of which imposed new mandatory statutory requirements.

The substantial compliance argument is unlikely to prevail in the wake of those Acts.

In *Costello v. Commissioner*,<sup>146</sup> for example, the Tax Court declined to apply the substantial compliance doctrine where Costello’s appraisal valued “a fee simple interest before and after a hypothetical sale of development rights” instead of a conservation easement. The Tax Court stated that an appraisal of the wrong asset cannot substantially comply with the regulations. Citing a number of Tax Court cases,<sup>147</sup> a district court case, and a court of appeals case, the Tax Court stated that the substantial compliance doctrine should not be liberally applied.

The same court ruled that failure to comply with the Contemporaneous Written Acknowledgement requirement cannot be excused by the substantial compliance doctrine.<sup>148</sup>

These harsh results imply that “perfect compliance” is preferable to “substantial compliance” to preserve the Donor’s deduction.

<sup>143</sup> Verify whether the organization has tax-exempt status. An [online searchable database](#) can be found IRS.gov.

<sup>144</sup> IRC § 170(a)(1); *Smith v. Commissioner*, T.C. Memo 2007-368; *Hewitt v. Commissioner*, 109 T.C. 258, 261 (1997), *aff’d without published opinion*, 166 F.3d 332 (4th Cir. 1998)

<sup>145</sup> *Bond v. Commissioner*, 100 T.C. 32, 41 (1993); *Simmons v. Commissioner*, T.C. Memo. 2009-208

<sup>146</sup> *Costello v. Commissioner*, T.C. Memo. 2015-87

<sup>147</sup> E.g. *Cave Buttes, LLC v. Commissioner*, 147 T.C. 10 (2016)

<sup>148</sup> *Boone Operations Co. LLC v. Commissioner*, T.C. Memo. 2013-101

## *Appeal and Protests*

If, after examination, the IRS's Agent assesses additional tax and/or penalties, the Donor (or their representative, must file a formal written protest to exercise appeal rights. If the total amount of tax for any tax period is less than \$25,000, a small case request can be submitted instead of a formal written protest.

[Publication 5, Your Appeal Rights and How to Prepare a Protest If You Don't Agree \(PDF\)](#)<sup>149</sup> specifies the required contents of a formal protest. The Donor or their representative must provide a list of changes they do not agree with, the facts supporting their position, and the authority they are relying upon.

A protest is not adequate if it does not comply with the requirements in Publication 5. General statements without clear explanations or that do not cite a legal basis for disagreement are not sufficient.

The Service prepares and mails Letter 3615, Letter Advising of Incomplete Protest if they determine the protest is inadequate. The Donor must provide a complete protest within 10 days or the case will be closed and a Statutory Notice of Deficiency will be issued.

## Statute of Limitation and Document Retention Policy

Barring egregious understatement of the Donor's tax or overstatement of their deductions, the IRS has three years (from the later of the due date or date the Donor filed the return) to initiate an audit of the return on which the Donor claims a charitable deduction for a Qualified Conservation Easement.<sup>150</sup> State statutes have longer statutory limits however few states maintain a meaningful independent examination function. Thus, the extended state statute has little relevance unless the IRS initiates an examination and shares the result of that examination with the state.

Two factors sometimes extend the period in which the deduction (and the supporting documentation) may be reviewed.

The first factor is largely, avoidable.

- The IRS can extend the statute to 6 years if the return under reports income by 25% or more.
- They can extend the statute indefinitely if the return is false or fraudulent.

The Internal Revenue Manual lists nearly forty return conditions that extend the statute. In our context, the statute is most commonly extended for overstatement of the value of the Qualified Conservation Easement, or failure to properly document the easement deduction.

Superficially, it seems that the most efficient way to avoid understating income would be: don't overestimate the easement's value and follow the documentation guidelines rigorously.

Unfortunately, this is where sole reliance on the Code becomes a bit sketchy. Reasonable people may disagree about the value of the easement and the public benefit it provides. Since conservation

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<sup>149</sup> <https://www.irs.gov/pub/irs-pdf/p5.pdf>

<sup>150</sup> IRC § 6501

easements are often quite large – disallowing the deduction (e.g. because the appraisal is not “qualified.”) can easily add 25% or more to the Donor’s tax bill for the year of the contribution.

The second factor that extends the statute operates more subtly. Deductions for Qualified Conservation Easements are frequently quite large. The deduction may exceed the 50% (or 30%) of AGI limitation for deductible contributions in the year the easement is granted.<sup>151</sup> The Code permits Donors to “carry over” any excess contribution to future years.<sup>152</sup> The carryover is an auditable part of those future returns and is subject to the same three-year, six-year, or indefinite review period as any other item on the carryover return. The IRS’s Agent insists that the carryover be documented. This means that the original deduction is still fair game – even if the original deduction is well past its statutory limit. Sneaky, huh?

These observations imply a document retention policy for Qualified Conservation Contributions that mirrors that for long-lived assets. That is, maintain/retain all documentation for the original donation until at least three years after the last contribution carryover (if the appraisal and all documentation is rock solid)’ - six years after the last contribution carryover (if the appraisal or any of the documentation is iffy.)

## Qualified Appraisal Requirement

### Overview

Deductions for noncash charitable contributions that exceed \$5,000 must be supported by a Qualified Appraisal that meets Generally Accepted Appraisal Standards and is prepared by a Qualified Appraiser.<sup>153</sup>

The Code provides definitions of Qualified Appraisal and Qualified Appraiser.<sup>154</sup> To fully understand the Code requirement, additional resources are required. Other Regulations impose Substantiation requirements that the appraisal must meet to be considered a Qualified Appraisal.<sup>155</sup>

[Publication 561, Determining the Value of Donated Property](#) (PDF) and Treas. Reg. § 1.170A-13 provide additional guidance on Qualified Appraisal requirements.

### Qualified Appraisal

The Code<sup>156</sup> requires a Qualified Appraisal for property donations that exceed \$5,000. If the deduction the Donor claims exceeds \$500,000 they must attach the Qualified Appraisal to their return.<sup>157</sup> A Qualified Appraisal of façade easements in Registered Historic Districts, must be attached regardless

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<sup>151</sup> IRC § 170(b)(1)

<sup>152</sup> IRC § 170(d)(1); IRC § 170(b)(1)(D)(ii)

<sup>153</sup> IRC § 170(f)(11)(C) and (E)(i)(II)

<sup>154</sup> IRC § 170(f)(11)(E)

<sup>155</sup> IRC § 170(f)(11)(E); Treas. Reg. § 1.170A-13(c)(3); **Caution:** Treas. Reg. § 1.170A-13(c)(3) predates the current incarnation of IRC § 170(f)(11)(E). IRC § 170(f)(11)(E) supersedes some provisions of Treas. Reg. § 1.170A-13(c)(3).

<sup>156</sup> IRC § 170(f)(11)

<sup>157</sup> IRC § 170(f)(11)(D)

of the amount claimed as a deduction.<sup>158</sup> This façade rule does not apply to properties listed on the National Register.

An appraisal is treated as a Qualified Appraisal if the appraisal satisfies all the relevant Regulations.<sup>159</sup>

A Qualified Appraisal must:

- Be prepared no earlier than 60 days before the date of contribution nor later than the due date (including extensions) of the tax return on which the charitable contribution deduction is first claimed.<sup>160</sup>
- Be prepared, signed and dated by a Qualified Appraiser.<sup>161</sup>
- Not involve a prohibited appraisal fee, which, in general, means that the appraisal fee may not be based on a percentage of the appraised value of the property.<sup>162</sup>

A long list of items must be included in the appraisal report:<sup>163</sup>

- A detailed description of the property.
- The property's physical condition (for a contribution of tangible property).
- The date or expected date of the contribution.
- The terms of any agreement relating to the property's use, sale or other disposition.
- The appraiser's name, address, and taxpayer identification number, and that of the appraiser's employer or partnership.
- The appraiser's qualifications, including the appraiser's background experience, education and membership in professional appraisal associations.
- The appraiser's qualifications must establish that the appraiser is qualified to make appraisals of the type of property being valued.
- A statement that the appraisal was prepared for income tax purposes.
- The date the property was appraised.
- The appraised fair market value of the property on the date or expected date of the contribution.
- The method of valuation used to determine the fair market value.
- The specific basis for the valuation (such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure used).

## Reasonable Cause Exception

The Donor's charitable deduction will not be denied if failure to comply with the requirements was due to reasonable cause and not willful neglect.<sup>164</sup> Establishing reasonable cause can be problematic.

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<sup>158</sup> IRC § 170(h)(4)(B)(iii)(I).

<sup>159</sup> IRC § 170(f)(11)(E); Treas. Reg. § 1.170A-13(c) (except to the extent it is inconsistent with IRC § 170(f)(11)(E))

<sup>160</sup> Treas. Reg. § 1.170A-13(c)(3)(i)(A)

<sup>161</sup> Treas. Reg. § 1.170A-13(c)(3)(i)(B)

<sup>162</sup> Treas. Reg. § 1.170A-13(c)(6)

<sup>163</sup> Treas. Reg. § 1.170A-13(c)(3)(ii)

<sup>164</sup> IRC § 170(f)(11)(A)(ii)(II)

## Qualified Appraiser

The term “Qualified Appraiser” means an individual who:<sup>165</sup>

- Has earned an appraisal designation from a recognized professional appraiser organization or met minimum education and experience requirements as set forth in the regulations,
- Regularly performs appraisals for which the individual receives compensation, and
- Meets such other requirements as prescribed by the Secretary in regulations or other guidance.

An individual is not a Qualified Appraiser unless the individual demonstrates verifiable education and experience in valuing the type of property subject to the appraisal and the individual has not been prohibited from practicing before the IRS any time in the 3-year period ending on the date of the appraisal.<sup>166</sup>

IRS [Notice 2006-96](#) provides “transitional” guidance on the Qualified Appraiser requirements.<sup>167</sup> Donors may rely on that guidance until final regulations are published. The Notice provides that:

- The appraisal designation from a recognized appraiser organization must be based on demonstrated competency in valuing the type of property for which the appraisal is performed.
- The appraiser is treated as having demonstrated verifiable education and experience in valuing the type of property if the appraiser makes a declaration in the appraisal that, because of the appraiser’s background, experience, education and membership in professional associations, the appraiser is qualified to make appraisals of the type of property being valued.
- The appraiser will be treated as having met minimum education and experience requirements if, for real property, the appraiser is licensed or certified for the type of property being appraised in the state in which the appraised real property is located.

An individual is not a Qualified Appraiser if the Donor or their Representative has knowledge of facts that would cause a reasonable person to expect the appraiser to falsely overstate the value of the donated property.<sup>168</sup>

The appraiser’s resume, which is typically included in the appraisal, provides a good starting point to assess whether the appraiser is a Qualified Appraiser. The resume provides information about the appraiser's experience and professional designations. It also indicates jurisdictions where the appraiser holds a license or certification.

License information (including appraisers’ license jurisdictions, history and disciplinary actions) can be found on [The Appraisal Foundation’s web page](#).<sup>169</sup> Search for information on a specific appraiser by selecting the [Find an Appraiser](#) button.<sup>170</sup>

Some states provide appraisal licensing information online. You can contact most state boards by telephone to determine if there are any past or pending disciplinary actions against the appraiser. The

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<sup>165</sup> IRC § 170(f)(11)(E)(ii)

<sup>166</sup> IRC § 170(f)(11)(E)(iii)

<sup>167</sup> [https://www.irs.gov/irb/2006-46\\_IRB/ar13.html#d0e2324](https://www.irs.gov/irb/2006-46_IRB/ar13.html#d0e2324)

<sup>168</sup> Treas. Reg. § 1.170A-13(c)(5)(ii)

<sup>169</sup> <https://www.asc.gov/National-Registry/NationalRegistry.aspx>

<sup>170</sup> <https://www.asc.gov/National-Registry/FindAnAppraiser.aspx>

IRS [Office of Professional Responsibility \(OPR\)](#) publishes a list of practitioners, including appraisers, who have been subject to disciplinary action by the IRS.<sup>171</sup>

## Generally Accepted Appraisal Standards

A Qualified Appraisal is an appraisal conducted by a Qualified Appraiser in accordance with Generally Accepted Appraisal Standards and any regulations or other guidance prescribed by the Secretary.<sup>172</sup>

An appraisal has been conducted in accordance with Generally Accepted Appraisal Standards if, for example, the appraisal is consistent with the substance and principles of the [Uniform Standards of Professional Appraisal Practice \(USPAP\)](#), developed by the [Appraisal Standards Board of The Appraisal Foundation](#).<sup>173</sup>

### *Uniform Standards of Professional Appraisal Practice*

[The Appraisal Foundation](#) adopts licensing and appraisal standards for the appraisal industry. The [Uniform Standards of Professional Appraisal Practice \(USPAP\)](#) are the minimum acceptable appraisal standards for federally regulated transactions. USPAP is recognized throughout the United States as the generally accepted standard of professional appraisal practice.

Although USPAP was intended for appraisals prepared for federally regulated transactions, all states have adopted USPAP for appraisals completed by licensed or certified appraisers. USPAP is applicable to an appraisal assignment in three ways:

- By law or regulation,
- By client request or requirement, or
- By choice.

Appraisal organizations such as The [Appraisal Institute \(AI\)](#), [National Association of Independent Fee Appraisers \(NIAFA\)](#), [American Society of Appraisers \(ASA\)](#), and [American Society of Farm Managers and Rural Appraisers \(ASFMRA\)](#) enforce additional standards and ethics on their members. For the most part these organizations adhere to USPAP.

The Code<sup>174</sup> does not mandate compliance with USPAP but does require the appraisal to be prepared in accordance with Generally Accepted Appraisal Standards. Qualified Appraisers holding themselves out to the public as appraisers must comply with USPAP by virtue of their appraisal licenses and professional designations.

When assessing whether an appraisal is a Qualified Appraisal, consider whether the appraisal is consistent with the substance and principles of USPAP and, if not, whether the appraisal satisfies the generally accepted appraisal standard requirement.

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<sup>171</sup> <https://www.irs.gov/tax-professionals/enrolled-actuaries/disciplinary-sanctions-internal-revenue-bulletin>

<sup>172</sup> IRC § 170(f)(11)(E)(i)(II); [IRS Notice 2006-96](#)

<sup>173</sup> Section 3.02(2) of [IRS Notice 2006-96](#)

<sup>174</sup> IRC § 170(f)(11)(E)(i)(II)

## Appraisal Fees

Donors cannot deduct appraisal fees they pay to determine the fair market value (FMV) of donated property as charitable contributions. For years prior to 2018, Donors could claim appraisal fees, as miscellaneous itemized deductions subject to the two percent of adjusted gross income (AGI) limit on [Schedule A, Itemized Deductions](#) (PDF),<sup>175</sup> of [Form 1040, U.S. Individual Income Tax Return](#) (PDF). The Tax Cuts and Jobs Act (HR-1, 115th Congress, 131 Stat. 2054) eliminated the itemized deduction entirely for transactions that occur after 12/31/2017.

## Valuing Conservation Easements

### Overview

To determine the fair market value (FMV) of a conservation easement, appraisers must understand IRC § 170 and the accompanying Treasury regulations and meet the definition of a “Qualified Appraiser.”<sup>176</sup>

The value of a conservation easement is its FMV at the time of contribution, which depends on the facts and circumstances of the property.<sup>177</sup> The appraisal must satisfy Substantiation requirements to be considered a Qualified Appraisal.<sup>178</sup>

If a substantial record of sales of comparable easements exists, those sales are used to value conservation easements.<sup>179</sup> There usually too few sales to use a comparable easement sales approach since easements are not typically sold. Therefore, the "before and after" method of valuing conservation easements is often used.

This paper provides only a general overview of conservation easement valuation and Generally Accepted Appraisal Standards. A comprehensive valuation discussion is beyond the scope of this paper.<sup>180</sup>

### Valuation Process

The [Appraisal Institute \(AI\)](#) defines Valuation as: the process of estimating the FMV of an identified interest in a specific parcel or parcels of real estate as of a specified date.<sup>181</sup> The term is interchangeable with “appraisal.” The valuation process consists of several steps and procedures:

- Defining the problem/scope of work,
- Data collection and property description,
- Data analysis,

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<sup>175</sup> <https://www.irs.gov/pub/irs-pdf/f1040sa.pdf>

<sup>176</sup> IRC § 170(f)(11)(E)

<sup>177</sup> Treas. Reg. § 1.170A-14(h)(3)(i)

<sup>178</sup> IRC § 170(f)(11)(E); Treas. Reg. § 1.170A-13(c)(3)

<sup>179</sup> Treas. Reg. § 1.170A-14(h)(3)(i)

<sup>180</sup> See Treas. Reg. §§ 1.170A-13 and 1.170A-14; [IRS Notice 2006-96](#), 2006-2 C.B. 902; [Publication 526, Charitable Contributions](#) (PDF), [Publication 561, Determining the Value of Donated Property](#) (PDF), [Form 8283, Noncash Charitable Contributions](#) (PDF); and [Instructions for Form 8283](#) (PDF)

<sup>181</sup> *Dictionary of Real Estate Appraisal, Sixth Edition*, The Appraisal Institute, Chicago, Ill., 2015

- Land Value Opinion
- Application of the approaches to value,
- Reconciliation of value indications and final opinion of value, and
- Reporting the defined value.

The Donor's appraiser should prepare (and include in their report) a detailed scope of work that allows any reader to understand what steps and procedures the appraiser utilized in their analyses. Make sure the Appraiser has a thorough understanding of which property rights the Donor "gives up" or relinquishes and which rights they retain.

## Valuation Date

The value of a conservation easement contribution is the fair market value of the easement at the time of the contribution.<sup>182</sup> The date the deed of easement is recorded pursuant to state law is the date of contribution. A Qualified Appraisal must state the date or expected date of the contribution.<sup>183</sup>

## Fair Market Value (FMV)

The value of the donated easement is FMV *as defined by Treasury Regulations*.<sup>184</sup> The Code states:

"The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." Some appraisals submitted for federal tax purposes utilize an incorrect FMV definition.

A conservation easement may have no material effect on the value of the property or may enhance the value of property.<sup>185</sup> Neither scenario results in a charitable deduction. The FMV of the property must decrease after granting the conservation easement to generate a charitable contribution deduction.<sup>186</sup> (See *Before and After Method* – below)

## Before and After Method

The sale price of comparable easements is the best evidence of FMV for a conservation easement. However, in most instances, there are no comparable easement sales.

If there are few (or no) comparable easement sales, appraisers use the "before and after" method:

- FMV of the property before the easement
- Less: FMV of the property after the easement
- Equals FMV of the easement

<sup>182</sup> Treas. Reg. § 1.170A-14(h)(3)(i)

<sup>183</sup> Treas. Reg. § 1.170A-13(c)(3)(ii)(C)

<sup>184</sup> Treas. Reg. § 1.170A-1(c)(2)

<sup>185</sup> Treas. Reg. § 1.170A-14(h)(3)(ii)

<sup>186</sup> [Kaufman v. Commissioner, T.C. Memo. 2014-52](#); [Scheidelman v. Commissioner, 755 F.3d 148, 150 \(2d Cir. 2014\)](#), [aff'g T.C. Memo. 2013-18](#)

The appraiser determines the highest and best use (HBU) and the corresponding FMV of the property twice: first, without regard to the conservation easement (“before” value), and again giving effect to the restrictions imposed on the property by the easement document (“after” value).

To determine the “before” value of the property, the appraiser considers the current use of the property and objectively assesses the likelihood that the property could be developed absent the conservation easement restriction. Existing zoning, conservation, historic preservation, or other laws and restrictions limit the property’s potential HBU.<sup>187</sup>

To determine the “after” value of the property, the appraiser considers both the restrictions imposed by the conservation easement and the restrictions imposed by easements on any “comparable” properties.

Each easement must be valued before and after the grant based on the facts and circumstances of that property. The value must be substantiated with a Qualified Appraisal. The Code recognizes no standard value or percentage impact on the “before” value of the property due to the granting a conservation easement.

## Contiguous Parcels

The charitable contribution deduction for granting a conservation easement covering a portion of a contiguous property owned by the Donor and their family<sup>188</sup> is the difference between the FMV of the entire contiguous parcel of the property before and after granting the easement.<sup>189</sup>

“Family” includes only “brothers and sisters (whether by the whole or half-blood), spouse, ancestors and lineal descendants.” Parents, children, grandparents, grandchildren, half-brothers and half-sisters are Family. Cousins, nieces, nephews, in-laws, and step relations are not.<sup>190</sup>

**Example:** J owns a 1,000-acre farm. J puts a conservation easement on the southern 500 acres. The appraisal values the entire 1,000 acres before and after the easement because the same donor owns the property and the unencumbered parcel is contiguous to the encumbered parcel.

The appraiser identifies and determines ownership of any contiguous or adjacent parcels at the outset of the appraisal assignment. Next, the appraiser assesses whether the owners of any contiguous parcels are the Donor or their family.

Application of the contiguous parcel rules can be complex. Appraisers may contact an IRS program analyst or counsel for guidance.<sup>191</sup>

## Enhancement Rule

The appraisal must also reflect enhancements to the value of any other property you or a related person own resulting from the conservation easement. An increase in the value of other property reduces

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<sup>187</sup> Treas. Reg. § 1.170A-14(h)(3)(ii)

<sup>188</sup> Defined in IRC § 267(c)(4)

<sup>189</sup> Treas. Reg. § 1.170A-14(h)(3)(i)

<sup>190</sup> IRC § 267(c)(4)

<sup>191</sup> CCA 201334039 (8/23/2013)

the amount of the Donor's conservation contribution deduction, contiguous or not.<sup>192</sup> A related person, for purposes of the enhancement rule, is defined in the Code.<sup>193</sup>

Two important differences distinguish the contiguous parcel from the enhancement rules:

- The contiguous parcel rule applies only to contiguous property. The enhancement rule applies to both contiguous and noncontiguous property.
- The contiguous parcel rule applies to contiguous property owned by the Donor or their family (as defined in IRC § 267(c)(4)). The enhancement rule applies to contiguous or noncontiguous property owned by any related party under §§ 267(b) or 707(b), which are broader.

**Example:** J owns a 1,000-acre farm. J puts a conservation easement on the southern 500 acres. The appraiser values the entire 1,000-acre parcel under the contiguous parcel rule. J also owns a noncontiguous 50-acre parcel located near the property. The conservation easement gives the 50-acre parcel superior views of the river that lies beyond the 500-acre parcel. The appraiser values the 50-acre parcel and reduces the conservation easement contribution by the amount of the increase in value (if any) to the 50-acre parcel.

## Market Analysis

Market analysis examines the demand for and supply of a property type in the geographic market area of that property type. The analysis establishes Highest and Best Use<sup>194</sup> under the four test criteria (physically possible, legally permissible, financially feasible and maximally productive).

An appraiser uses current and historical market conditions to infer future supply and demand. To forecast subject-specific supply, demand, absorption and capture rate<sup>195</sup> over a property's projected holding period, the appraiser augments the current and historical market analysis with fundamental analysis. In many conservation easement scenarios, the property is undeveloped. Therefore, more emphasis is placed on the fundamental analysis. A fundamental analysis requires historic and projected: population, income, zoning, demand, absorption, supply, ideal improvement, existing space, proposed space, occupied space, market demographics, market income and expense information, capitalization rates; and is much more detailed than an inferred analysis. Market analysis employs a six-step process:

- Step 1-Property Productivity Analysis: Physical, Legal and Location Attributes
- Step 2-Market Delineation: Competitive Market Area
- Step 3-Demand Analysis: Demand Segmentation, Historical Growth & Demand Drivers
- Step 4-Supply Analysis: Existing, Under Construction and Proposed Competition
- Step 5-Interaction of Supply and Demand: Competitive and Residual Demand
- Step 6-Forecast Subject Capture: Reconciliation of Inferred and Fundamental Forecasts

The appraiser analyzes how competitive the property is or will be in its market area. The analysis estimates current and future demand for similar properties and compares it to the estimated current and

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<sup>192</sup> Treas. Reg. § 1.170A-14(h)(3)(i)

<sup>193</sup> IRC §§ 267(b), or 707(b)

<sup>194</sup> See, e.g., *The Appraisal of Real Estate, 14th Edition*, The Appraisal Institute, Chicago, Ill., 2013, page 299

<sup>195</sup> The percentage of total market demand a specific property or group of properties is expected to capture

future supply within the market area.

If the appraiser fails to follow the six-step process, and does not support demand, supply and a capture rate for the subject property, it can lead to erroneous conclusions regarding highest and best use. This, in turn may expose the Donor to accuracy and valuation penalties.

## Highest and Best Use (HBU)

The “highest and best use” of a property is the “reasonable and probable use that supports the highest present value” The vital question is “What uses would a hypothetical willing buyer consider when deciding how much to pay for the property.” Every professional appraisal organization recognizes that HBU is key to a proper valuation. To qualify as the HBU, a hypothetical use must satisfy four criteria. It must be:

- **Physically Possible** - The land must be able to accommodate the size and shape of the ideal improvement. What uses of the subject site are physically possible?
- **Legally Permissible** – The property use must be either currently allowed or most probably allowable under applicable laws and regulations. What uses of the subject site are permitted by zoning, deed restrictions, environment restrictions, and government restrictions?
- **Financial Feasibility** - The property use must generate sufficient income to support itself. Among those uses that are physically possible and legally permissible, which uses produce a net return to the owner?
- **Maximally Productive** - The selected HBU must yield the highest value among the possible uses. Among the feasible uses, which use produces the highest net return or the highest present worth?

The “highest and best use” for a property is very fact-specific, complex, sometimes baffling, and (due to the absence of clear regulations and bright-line interpretations in case law) subject to frequent and prolonged litigation. There are few better illustrations of this than *Whitehouse Hotel Limited Partnership v. Commissioner*.<sup>196</sup> In *Whitehouse*, two courts had to distinguish between HBU candidates that included a luxury hotel, a non-luxury hotel, and a “shell building ...suitable for conversion to [a] hotel.” Even after a close reading of both courts’ rulings, it is difficult to see what the court ruled, much less why they ruled that way. After six-plus years of litigation and nearly 200 pages of opinion, the courts ruled (in essence) that the distinction made no difference. In short – Olly-Olly-Oxen....

The *Whitehouse* decision is morbidly entertaining. If the appraiser identifies a clearly incorrect HBU, your Donor’s deduction is in trouble. In *Esgar Corp. v. Commissioner*<sup>197</sup> Esgar’s appraiser apparently took a modified “Field of Dreams” approach<sup>198</sup> to determining a property's highest and best use. Esgar granted an easement that specifically prohibited mining the (apparently plentiful) sand, gravel, rock, and minerals on three properties that were devoted to agriculture at the time of the grant. Ignoring the fact that there was virtually no market for sand, gravel, rock or minerals in the local economy (thus ignoring both financial feasibility and maximum productivity criteria) - the appraiser

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<sup>196</sup> [Whitehouse Hotel Limited Partnership v. Commissioner, 755 F.3d 236 \(5th Cir. 2014\), aff'g in part, vacating in part 130 T.C. 304 Villa v. Commissioner](#)

<sup>197</sup> [Esgar Corp. v. Commissioner, 744 F.3d 648, 651 \(10th Cir. 2014\), aff'g T.C. Memo. 2012-35](#)

<sup>198</sup> “Build it and they will come.” – Or in this case: “Dig it up and someone will buy it.”

determined that mining and selling those deposits was the property's pre-contribution HBU. This placed a high value on the easement restriction - which the IRS successfully challenged.

The HBU analysis and conclusion must be documented in the appraisal report. A comprehensive discussion supported by relevant market data or other information sources must support the conclusions.

Appraisers may rely in part on analysis by another professional such as a land planner or geologist. However, Generally Accepted Appraisal Standards require appraisers to exercise due diligence with respect to the assumptions put forth by the other professionals. The appraiser must have a reasonable basis to believe that the other professional's work product is credible and must disclose such reliance in the appraisal report.

## Methodology

Regulations allow two different types of valuation: direct comparison or indirect analysis.<sup>199</sup>

Direct comparison analyzes sales of comparable properties to derive value. Direct comparisons are based on direct sales of easements; the price paid to purchase easements with the same or similar restrictions.

Conservation easement sales are rare. If the appraiser identifies easement sales the properties or deed restrictions might not be comparable, and the number of sales might not be substantial. Accordingly, most conservation easements are valued by indirect analysis.

The appraisal industry recognizes three valuation methodologies:

- Sales Comparison Approach (SCA)
- Cost Approach (CA)
- Income Capitalization Approach (ICA)

All three approaches should be evaluated in every appraisal. However, appraisal standards do not require that all three approaches be given equal emphasis.

**Example:** The appraiser is valuing the impact of a conservation façade easement on a single-family home in an area in which single-family homes are typically not rental income properties. It is not necessary to complete the income capitalization approach. A statement that due to the lack of market information the income capitalization approach was not completed would be sufficient. Given the age of the property's improvements (they must be at least 50 years old to qualify), it is also acceptable if the cost approach is not completed due to the subjective nature of the depreciation estimate (if a similar statement is made in the appraisal).

### *Sales Comparison Approach<sup>200</sup>*

The sales comparison approach is the most common and preferred method of land valuation when an adequate supply of comparable sales is available. The Sales Comparison Approach derives a value for the property by comparing the property to similar properties that have been sold recently. The

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<sup>199</sup> Treas. Reg. § 1.170A-14(h)(3)(i) and (ii)

<sup>200</sup> *The Dictionary of Real Estate Appraisal, Sixth Edition*, which was published by The Appraisal Institute Chicago, Ill., 2015

appraiser identifies appropriate units of comparison and adjusts the sale prices of the comparable properties based on those units of comparison. The sales comparison approach is the most common and preferred method of land valuation when an adequate number of comparable sales are available.

The units (or elements) of comparison are defined as “the characteristics or attributes of properties and transactions that explain variances in the prices paid for real property.” They are divided into two categories: transactional adjustments and property adjustments.<sup>201</sup>

Transactional adjustments:

- Real property rights conveyed
- Financing terms
- Conditions of sale
- Expenditures made immediately after purchase
- Market conditions

Transactional adjustments are “generally applied in the order listed” and are successive.

Property adjustments are:

- Location
- Physical characteristics
- Economic characteristics
- Legal characteristics
- Non-realty components of value.

Property adjustments are usually applied after the transactional adjustments, in no specific order, and are not successive.

In the Sales Comparison approach, the appraiser compares the property to recent sales of similar properties. The appraiser adjusts the sales to account for differences between the properties to estimate the FMV of the subject property. If there are enough comparable sales, this is the preferred valuation method for land.

### ***Cost Approach***<sup>202</sup>

This procedure estimates value for the fee simple interest in a property by:

1. Estimating the current cost to replicate or replace the existing structure, including an entrepreneurial incentive or profit;
2. Deducting depreciation from the total cost; and
3. Adding the estimated land value.

Improvement cost is estimated using national cost manuals (e.g., Marshall Valuation Service Manual), builder cost estimates or market extraction. Cost manuals provide a cost for

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<sup>201</sup> *The Appraisal of Real Estate, 14th Edition*, The Appraisal Institute, Chicago, Ill, 2013, page 404

<sup>202</sup> *The Dictionary of Real Estate Appraisal, Sixth Edition*, which was published by The Appraisal Institute Chicago, Ill., 2015

new improvements. Therefore, the appraiser must deduct an allowance for depreciation of the improvements to their current condition.

In the Cost Approach, the appraiser estimates the FMV of the subject property's improvements "as is" and adds the depreciated improvement value to the land value to estimate FMV for the entire property. This approach is typically not utilized for vacant land since there are no improvements to value.

### *Income Capitalization Approach<sup>203</sup>*

This procedure derives a value for an income-producing property (i.e., rental property) by converting its anticipated benefits (cash flows and reversion) into property value. The value can be derived in two ways:

- Capitalize one year's net income expectancy or an annual average of several years' income expectancies at a market-derived capitalization rate.
- Discount annual cash flows for each year of the holding period and the cash received from reversion at a specified yield rate.

In the Income Capitalization approach the appraiser estimates the FMV of the property based on the anticipated net income from the property. The appraiser estimates potential gross income, subtracts vacancy, collection loss and operating expenses to estimate the net income to the property. If the appraiser estimates one year's net income, that income is capitalized via a market-derived capitalization rate to provide an indication of FMV. If the appraiser estimates multiple years' net income, the cash flows and reversion are discounted to provide an indication of FMV.

### *Subdivision Development Method<sup>204</sup>*

Many land conservation easement appraisals employ a land residual analysis using a Subdivision Development Method. This approach is an adaptation (or subset) of the income capitalization approach. The Subdivision Development Method utilizes a combination of both the sales comparison and cost approaches.

This method assumes that subdivision and development of the property is the HBU of the parcel of land being appraised. All direct, indirect costs, and entrepreneurial incentive (expected return on investment) are deducted from the anticipated gross sales price of hypothetical finished lots. These net sales proceeds are discounted to present value at a market-derived rate over the development and absorption period to value the raw land.<sup>205</sup>

The appraiser estimates the FMV of the property by first estimating what "finished" lots would sell for in the market place. Costs, including anticipated profit, are deducted to estimate the net income of the property. The appraiser discounts the projected net income (i.e., cash flow) account for the time necessary to get approvals, finish the lots and sell the lots, to derive FMV.

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<sup>203</sup> *The Dictionary of Real Estate Appraisal, Sixth Edition*, which was published by The Appraisal Institute Chicago, Ill., 2015

<sup>204</sup> *The Dictionary of Real Estate Appraisal, Sixth Edition*, which was published by The Appraisal Institute Chicago, Ill., 2015

<sup>205</sup> *The Dictionary of Real Estate Appraisal, Sixth Edition*, The Appraisal Institute Chicago, Ill., 2015, pages 223

**Example:** Parcel C is a 100-acre parcel that is zoned residential. The appraiser concludes that the HBU of the property is a 50-lot residential subdivision. The appraiser uses the sales comparison approach to determine the market value of the hypothetical “finished” lots. The appraiser examines and reports information on similar projects to estimate the absorption period to sell the lots. The appraiser deducts the costs to improve the property (development costs) necessary to convert the property to the hypothetical finished lots. Finally, the appraiser discounts cash flows over a (hypothetical) absorption period to account for the time get the approvals, take the lots to the finished lot stage, and to sell the lots. This estimates the present value of the property as raw land.

The Subdivision Development Method is a complex procedure and requires a significant amount of data: e.g. development costs, profit margins, sales projections and pricing of developed lots. It is typically completed using a Discounted Cash Flow (DCF) analysis.

The Tax Court has not addressed the merits of the Subdivision Development Method. Several Federal Court decisions provide insight.

The Supreme Court stated in *Olson v. United States*<sup>206</sup> that “Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration.” This position was cited in *United States v. 320.0 Acres of Land* and *United States v. 47.3096 Acres of Land*,<sup>207</sup> where the court stated, “that the property was ‘needed or likely to be needed in the reasonably near future’ for residential subdivision.”

There are many variables in this analysis. So, there is a great chance of errors, which could result in incorrect valuations. Some common errors include:

- Failure to account for time to obtain necessary project approval.
- Failure to recognize time to put infrastructure in place.
- Failure to include the cost of the infrastructure.
- Failure to recognize the time necessary to sell the units (absorption) or to provide support for the absorption estimate.
- Failure to include developer’s profit.
- Failure to recognize existing competing properties or properties that are still in the planning stage.
- Inadequate assessment of the risk associated with development.

## Transferable Development Rights (TDRs)

A transferable development right (TDR) is a development right that can be transferred to another location. These programs manage land development through the exchange of zoning privileges. This allows property owners to separate development rights from the underlying property and sell them to purchasers who want to increase the density of development in other areas.

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<sup>206</sup> [\*Olson v. United States\*, 292 U.S. 246, 257 \(1934\)](#)

<sup>207</sup> [\*United States v. 320.0 Acres of Land\*, 605 F.2d 762, 814-820 \(5th Cir. 1979\); \*United States v. 47.3096 Acres of Land\*, 583 F.2d 270, 272 \(6th Cir. 1978\)](#)

A transfer of development rights is not a transfer of the owner's entire interest in the property and may not qualify for a charitable contribution. The Donor and the appraisers should consult with Counsel if the conservation easement case involves TDRs.

## Amount of Deduction

### Overview

Several factors affect the amount Donors may claim as a charitable contribution deduction for a conservation easement:

- Percentage limitations;
- Basis limitations;
- Type of property (ordinary income, short-term capital gain, long-term capital gain);
- Bargain sale;
- Quid pro quo and charitable intent;
- Rehabilitation tax credits;

Charitable contributions that the Donor cannot utilize in the year they donate the conservation easement can be carried over and claimed on subsequent year tax returns, generally for at least five years (unused conservation easement deductions can be carried over for 15 years).

### Percentage Limitations

For property donations other than cash, the deduction is subject to percentage limitations based on.<sup>208</sup>

- The type of property donated,
- The type of Qualified Charitable Organization, and
- The use of the property by the Qualified Charitable Organization.

### Individuals

Deductible contributions may not exceed 50% of the Donor's Contribution Base. Lower limits apply if the Donor donates appreciated property or makes contributions to private foundations.

- A 30% limit applies to contributions of long-term capital gain property (with some exceptions) donated to 50% limit organizations,<sup>209</sup> and
- A 20% limit applies for similar gifts to 30% organizations (such as private foundations).<sup>210</sup>

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<sup>208</sup> [Publication 526, Charitable Contributions](https://www.irs.gov/pub/irs-pdf/p526.pdf) (PDF) - <https://www.irs.gov/pub/irs-pdf/p526.pdf>

<sup>209</sup> IRC § 170(b)(1)(A)

<sup>210</sup> IRC § 170(b)(1)(B)

Individual Donors' Contribution Base is their Adjusted Gross Income (AGI) for the year they donate the property (or claim a carryover), without regard to any Net Operating Loss Carryback to that year.<sup>211</sup>

Conservation easements are considered long-term capital gain property if the underlying property is a capital asset held for more than a year. Donors may deduct a Qualified Conservation Easement contribution up to 50% of their Contribution Base (after reducing the contribution base by other contributions).<sup>212</sup> The maximum percentage limitation for cash contributions is 50% of the Donors' Contribution Base.

### *Corporations*

For corporations, the maximum allowable charitable contribution deduction for any taxable year is 10% of the corporation's modified taxable income computed without regard to any NOL or capital loss carryback for that year.<sup>213</sup>

### *Special Rules for Individuals and Corporations that are Farmers and Ranchers*

A qualified farmer or rancher may deduct up to 100% of their Contribution Base (after reduction by other contributions) when they donate a Qualified Conservation Contribution.

A qualified farmer or rancher is an individual whose gross income from farming is greater than 50% of their gross income for the taxable year.<sup>214</sup>

The 100% limitation applies only if the contribution is subject to a restriction that mandates that the donated land remain available for agriculture or livestock production.<sup>215</sup> If the contribution is not subject to such a restriction, the 50% limitation applies.

A qualified farming or ranching corporation may also deduct up to 100% of the corporation's taxable income provided the donated land remains available for agriculture or livestock production.<sup>216</sup>

### *Carryovers*

Both individuals and corporations can carry over any unused charitable contribution for up to five years. For conservation easement contributions, the carryover period is 15 years.

### **Basis Limitations**

With several exceptions (see below) the deduction for a charitable contribution of property is equal to the fair market value (FMV) of the property. In some cases, the deduction may be limited to the lesser of FMV or basis.

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<sup>211</sup> IRC § 170(b)(1)(G)

<sup>212</sup> IRC § 170(b)(1)(E)(i)

<sup>213</sup> IRC § 170(b)(2)(D)

<sup>214</sup> IRC § 2032A(e)(5)

<sup>215</sup> IRC § 170(b)(1)(E)(iv)(II)

<sup>216</sup> IRC § 170(b)(2)(B)

For tangible property, if the Donee uses the property for purposes unrelated to the Donee's charitable purpose the deduction is limited to the lesser of FMV or basis. For example, if you donate a piece of art work to a land trust the deduction is limited to the lesser of the art's FMV or your basis in the art.<sup>217</sup>

## Contributing Appreciated Property

If the Donor contributes property with a FMV higher than their basis, they may have to reduce the FMV by the amount of appreciation to determine your deduction.<sup>218</sup> Different rules apply depending on whether the property is:<sup>219</sup>

- Ordinary income property
- Short-term capital gain property, or
- Long-term capital gain property

### *Ordinary Income and Short-Term Capital Gain Property*

If the property is ordinary income property or short-term capital gain property, the Donor's deduction is limited to basis.<sup>220</sup> Property is ordinary income or short-term capital gain property if its sale at FMV on the date of contribution would result in ordinary income or short-term capital gain.

Real property (land and anything built on it) held by a real estate dealer/developer that is primarily held for sale to customers in the ordinary course of trade or business is ordinary income property. If the property is ordinary income property in the Donor's hands, then the deduction is limited to their basis.<sup>221</sup>

Gain on the disposition of depreciable real property is ordinary income to the extent of additional depreciation allowed or allowable on the property. Additional depreciation is the amount of the actual depreciation over the depreciation figured using the straight-line method.<sup>222</sup>

Capital gain property (such as real estate held for investment) held for one year or less is also ordinary income property.

**Example:** J contributes a conservation easement on a parcel that they held for 11 months. The conservation easement is short-term capital gain property. J's deduction is limited to the lesser of their basis in the easement or its fair market value.

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<sup>217</sup> IRC § 170(e)(1)(B)(i)(I)

<sup>218</sup> IRC § 170(e)(1)

<sup>219</sup> [Publication 544, Sales and Other Dispositions of Assets](https://www.irs.gov/pub/irs-pdf/p544.pdf) (PDF) - <https://www.irs.gov/pub/irs-pdf/p544.pdf>

<sup>220</sup> IRC § 170(e)(1)(A)

<sup>221</sup> [Flood v. Commissioner, T.C. Memo. 2012-243](#)

<sup>222</sup> [Publication 544, Sales and Other Disposition of Assets](#) (PDF); [Form 4797](#) (PDF) and the related instructions. The audit guide mentions only IRC § 1250 "Additional Depreciation" under this heading. For real property, interaction of IRC § 1250 with IRC § 1245 can produce other results... see your tax counsel.

The amount of basis allocable to the conservation easement bears the same ratio to the total basis of the property as the FMV of the conservation easement bears to the FMV of the entire parcel before granting the conversation easement.

**Example:** M paid \$80,000 for a parcel held for investment. The parcel has a FMV of \$100,000. M donates a conservation easement with a FMV of \$5,000.

If M held the parcel for less than one year, the deduction for the easement is \$4,000 ( $\$80,000 \times \$5,000 / \$100,000 = \$4,000$ ). If M held the property for more than a year, the deduction is the easement's FMV (\$5,000).

### *Long-Term Capital Gain Property*

If the donated property is long-term capital gain property, the Donor's deduction may be as much as FMV.<sup>223</sup> The deduction is not limited to the Donor's basis.

Long-term capital gain property is a capital asset held for more than a year. Property is long-term capital gain property if its sale at FMV on the date of the contribution would result in long-term capital gain.

Examples are (1) real estate held for investment (or production of income) for more than one year, or (2) a personal residence held for more than one year.

The holding period for tangible capital gain property commences on the date the Donor acquires full title to the property. An option or tie-up agreement may not be sufficient to start the holding period.

In *Williams v. Commissioner*,<sup>224</sup> Williams signed an agreement to purchase unidentified artwork. Williams did not obtain title or take possession of the unidentified artwork on execution of the agreement, paid only five percent of the purchase price, had no obligation to honor the contract, and bore none of the expenses and risk in the transaction - apart from his initial payment. Two different courts held that the Art Purchase Agreement was not a contract for sale but rather an option contract and that the date on which the taxpayer actually paid for and acquired a present interest in the art was the date that determines if the property was long-term capital gain property.

### **Bargain Sale**

If the Donor sells property to a Qualified Charitable Organization for less than the property's fair market value (FMV), the sale is considered a "Bargain Sale." A bargain sale may be treated as part charitable contribution and part sale or exchange. To claim the charitable deduction, the Donor must exhibit Charitable Intent, purposely accepting less than FMV for the property.<sup>225</sup> An accidental bargain sale is not charity.

If the Donor has the requisite intent, the Donor's charitable deduction is the amount by which FMV of the property exceeds the amount paid by the Qualified Charitable Organization. The donation must also meet all the statutory and regulatory requirements for a Qualified Conservation Easement

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<sup>223</sup> IRC § 170(e)(1)

<sup>224</sup> [Williams v. Commissioner](#), 498 F. App'x 284 (4th Cir. 2012), aff'g T.C. Memo. 2011-89

<sup>225</sup> IRC § 1011(b)

contribution if the Donor claims a noncash charitable deduction for the donation portion of any bargain sale.

**Example:** B sells a conservation easement (on property held for investment for more than one year) to a conservation organization for \$10,000. The FMV of the easement is \$12,500. If all the requirements to claim a conservation easement deduction have been met, B's charitable contribution deduction from the bargain sale is \$2,500 (\$12,500 - \$10,000).

If the Donor contributes property subject to a debt (such as a mortgage) that the Donee assumes, the transaction is treated as a bargain sale. The Donor's contribution deduction is the FMV of the property reduced by the amount of the debt.

### *Taxable Gain*

The part of the bargain sale that is a sale or exchange may result in a taxable gain. Determine the taxable gain by allocating basis between the portion of the property sold and the portion of property contributed.<sup>226</sup>

### *Federal and State Easement Purchase Programs*

Many states and some federal agencies have land or conservation easement purchase programs; e.g. the [Agricultural Conservation Easement Program](#) (ACEP). The agency may purchase the property at fair market value (FMV) or a discounted price. If the agency purchases a conservation easement for FMV no charitable deduction is allowed.

If the agency purchases at a discount, the Donor's charitable deduction is the amount by which FMV of the property exceeds the amount paid by the agency. The donation must also meet all the statutory and regulatory requirements (including Charitable Intent) for a Qualified Conservation Easement contribution if you claim a noncash charitable contribution for the donation portion of a bargain sale.

### *Quid Pro Quo and Charitable Intent*

Charitable Intent exists if the Donor makes a transfer without the receipt of, or the expectation of receiving, a Quid Pro Quo. If the Donor receives or expects to receive benefits that are greater than those that inure to the public, the transfer does not satisfy the Charitable Intent requirement.<sup>227</sup>

If the Donor or a related person receives, or reasonably expects to receive, a substantial financial or economic benefit, but can clearly show that the benefit is less than the amount of the transfer, then a deduction is allowable for the excess of the amount transferred over the amount of financial or economic benefit the Donor or the related person receives or reasonably expects to receive.

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<sup>226</sup> See "Bargain Sales to Charity" in [Publication 544, Sales and Other Dispositions of Assets](#) (PDF); IRC § 1011(b); Treas. Reg. § 1.170A-14(h)(3)(iii)

<sup>227</sup> [Hernandez v. Commissioner, 490 U.S. 680, 691 \(1989\)](#); benefits that are greater than those that inure to the public, the transfer does not satisfy the charitable intent requirement

**Example 1:** S is a real estate developer. S contributes a conservation easement with the expectation that S will receive preferential zoning from the city zoning board. S may not claim a charitable deduction.

**Example 2:** J lives along a scenic highway. To secure a variance on the property, the zoning board requires an easement on 10 percent of the property. J places an easement on 25 percent of the property. J may deduct the value of the easement on 15 percent of the property.

The burden is on the Donor to show that all or part of a payment or property transfer is a charitable contribution or gift.<sup>228</sup>

## Rehabilitation Tax Credit

### *In General*

Investment tax credits encourage rehabilitation of historic buildings for urban and rural revitalization.<sup>229</sup> The rehabilitation tax credit is a two-tier credit:

- A 20% credit for Certified Historic Structures, and
- A 10% credit for qualified rehabilitated buildings other than Certified Historic Structures, first placed in service before 1936.

The [NPS National Park Service \(NPS\)](#) and the IRS in partnership with [State Historic Preservation Offices](#)<sup>230</sup> jointly administer the [Historic Preservation Tax Incentives Program](#).<sup>231</sup> See the [IRS Rehabilitation Tax Credit Market Segment Specialization Program Guide \(PDF\)](#)<sup>232</sup> for additional information.

Only the property owner (and certain lessees) may claim the rehabilitation tax credit. If the Donor does not own all the interests in real property to which the rehabilitation relates, the Donor not entitled to the entire rehabilitation tax credit. No tax credit is permitted for property that the Donor does not own.<sup>233</sup>

If a deduction for the easement is allowable, the Donor's appraiser must adjust the appraisal for any reserved rehabilitation rights when determining the fair market value of the conservation contribution.<sup>234</sup> The Donor's appraiser must consider local zoning, conservation and historic preservation laws.

### *Rehabilitation Tax Credit Recapture*

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<sup>228</sup> Treas. Reg. § 1.170A-1(h)(1) and (2); [United States v. American Bar Endowment](#), 477 U.S. 105, 117-118 (1986); [Rev. Rul. 67-246, 1967-2 C.B. 104](#)

<sup>229</sup> IRC § 47

<sup>230</sup> <http://www.ncshpo.org/>

<sup>231</sup> <http://www.nps.gov/tps/tax-incentives.htm>

<sup>232</sup> <https://www.irs.gov/pub/irs-mssp/rehab.pdf>

<sup>233</sup> [Villa v. Commissioner](#), T.C.M. 1980-305; [Davenport v. Commissioner](#), T.C.M. 1977-34; [Schaevitz v. Commissioner](#), T.C.M.1971-197; [Bailey v. Commissioner](#), 88 T.C. 1293 (1987)

<sup>234</sup> Treas. Reg. 1.170A-14(h)(3)(ii).

The rehabilitation tax credit is recaptured upon disposition.<sup>235</sup>

If the Donor conveys a façade easement in the same year that they place a qualified rehabilitated building in service, they are not entitled to claim the portion of the rehabilitation tax credit attributable to the façade easement.<sup>236</sup>

If the Donor claims a rehabilitation tax credit and subsequently makes a Qualified Conservation Contribution (i.e., contribute a façade easement) with respect to the property, the charitable contribution is treated as a partial disposition of the property. This triggers recapture of all or part of the credit if the contribution is made within the recapture period (5 years from the placed-in-service date).<sup>237</sup>

If, during the 5 years preceding the date of a façade easement contribution the Donor claimed a rehabilitation credit for the building, the Donor must reduce their charitable contribution deduction in proportion to the sum of the credits allowed for those 5 years over the fair market value of the building on the date of contribution.<sup>238</sup>

## State Tax Credits

### Overview

Sixteen states and Puerto Rico offer income tax credits instead of income tax deductions for donated conservation easements. Some state programs allow transfer and sale of the tax credits. Because state requirements may differ from Federal requirements, the Donor may qualify for a state tax credit, but still not qualify for a federal tax deduction.

### State Tax Credit Programs

Sixteen states and Puerto Rico offer income tax credits

Arkansas [A “wetland and riparian zone conservation tax credit.”]; California; Colorado; Connecticut; Delaware; Georgia; Iowa; Maryland; Massachusetts; Mississippi; New Mexico; New York; North Carolina; South Carolina; Virginia; Wisconsin [Limited to farmland preservation agreements, and the farmland must be in a “farmland preservation area identified in a certified farmland preservation plan.”]; and Puerto Rico

Most state tax credit program requirements are similar to the requirements for deducting a conservation easement contribution. Most state programs determine the amount of the credit based on a percentage of the fair market value of the donated easement. Most programs allow you to carry forward unused tax credits. Five states<sup>239</sup> have transferable tax credits. Puerto Rico allows only the original donor to transfer tax credits.

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<sup>235</sup> IRC § 50(a)(1)

<sup>236</sup> *Rome I, Ltd. v. Commissioner*, 96 T.C. 697 (1991); *Rev. Rul. 89-90, 1989-2 C.B. 3*

<sup>237</sup> *Rev. Rul. 89-90, 1989-2 C.B. 3*

<sup>238</sup> IRC § 170(f)(14); See IRS’s [Rehabilitation Tax Credit Market Segment Specialization Program Guide](#) (PDF) for additional information.

<sup>239</sup> Colorado, South Carolina, Virginia, New Mexico, and Georgia

Transferability permits the Donor to sell tax credits to third parties. Credit brokers or facilitators assist Donors to negotiate the sales price and are reimbursed and compensated for their services from the proceeds of the sale. The third-party purchaser uses the credits to pay their own state tax liabilities. [The Conservation Resource Center](#) states that sellers receive as much as 70 to 82 percent of the face value of their transferable state tax credits, depending on market interest rates at the time of the sale.<sup>240</sup>

## Receipt of State Tax Credits

If a state tax credit can only be applied to the Donor's current or future state tax liability, it is treated for federal income tax purposes as a reduction or potential reduction in your state tax liability, not as a payment of cash or property includible in gross income.<sup>241</sup> Accordingly, a state conservation easement tax credit is not a return benefit and does not reduce the amount of the Donor's federal charitable contribution deduction.<sup>242</sup>

## Sale of State Tax Credits

By itself, the fact that a state tax credit is transferable does not alter its character as a reduction or potential reduction in liability in the hands of anyone who originally qualified for the credit.

Gain from any sale or other disposition of property is the excess of the amount realized over the adjusted basis of the property.<sup>243</sup> The original recipient of a state tax credit must recognize gain if and when they transfer state tax credits to another person for value.

The amount realized from the sale of a credit is the sum of any money received plus the fair market value of any property received.<sup>244</sup> The original recipient of state issued tax credits has no basis in the credits because they paid nothing to receive the credits and the tax credit is not includible in gross income. Hence, the gain from sale of tax credits by the original recipient is usually equal to the entire amount realized.

The state tax credit sale produces capital gain unless a statutory exclusion applies. The sale of a capital asset held for more than 1-year results in long-term capital gain.

Capital gains result from the sale or exchange of a capital asset. Property the Donor holds, whether or not connected with a trade or business, is a "capital asset" unless the property meets one of eight statutory exceptions.<sup>245</sup>

The Supreme Court stated "it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset"; rather, "the term 'capital asset' is to be construed narrowly in accordance with the purpose of Congress to afford capital-gains treatment only in situations typically involving the realization of appreciation in value accrued

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<sup>240</sup> <http://www.taxcreditexchange.com/>

<sup>241</sup> *Maines v. Commissioner*, 144 T.C. 123 (2015)

<sup>242</sup> *Tempel v. Commissioner*, 136 T.C. 341, 351 n.17 (2011), *aff'd sub nom*, *Esgar Corp. v. Commissioner*, 744 F.3d 648, 651 (10th Cir. 2014), *aff'g* T.C. Memo. 2012-35

<sup>243</sup> IRC § 1001

<sup>244</sup> IRC § 1001(b)

<sup>245</sup> § 1221(a)

over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year.”<sup>246</sup>

Notwithstanding that, in *Tempel*,<sup>247</sup> the Tax Court held that a state tax credit is a capital asset because the amount realized from the sale of a credit is not a substitute for ordinary income. The Tax Court also held that the holding period for tax credits begins when the credits are granted and ends when the credits are sold.

## Appendix: Charitable Contributions: General Statutory Requirements

### Overview

To claim a charitable contribution deduction for a conservation easement, the Donor must meet both the statutory requirements for charitable contributions, and the specific requirements for conservation easements. Before the Donor makes a large contribution, it is useful to review what the IRS says about the subject.<sup>248</sup> According to the IRS, A charitable contribution<sup>249</sup> is:

- a voluntary gift of money or property,
- made with Charitable Intent
- without receipt of adequate consideration
- to or for the use of a qualifying organization,

### Charitable Intent

A charitable contribution is a donation that is voluntary and made without receipt, or the expectation of receipt, of anything of economic value – i.e. a transfer or gift that proceeds from “disinterested generosity.”<sup>250</sup>

A transfer of money or property is not voluntary if it is required or it is made with the expectation of a direct or indirect benefit. A benefit received or expected to be received because of a payment or transfer is called a Quid Pro Quo. See *Amount of Deduction* (above) for a more detailed discussion of Charitable Intent and Quid Pro Quo.

For real estate donations, including contributions of conservation easements, there is no “transfer,” and therefore no deductible charitable contribution, **unless** there is:

- A **Deed** transferring the property,
- **Delivery** to a Qualified Charitable Organization, and
- **Acceptance** by the Qualified Charitable Organization.

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<sup>246</sup> [Commissioner v. Gillette Motor Transport, Inc., 364 U.S. 130, 134 \(1960\)](#)

<sup>247</sup> [Tempel v. Commissioner, 136 T.C. 341, 351 n.17 \(2011\), aff'd sub nom, Esgar Corp. v. Commissioner, 744 F.3d 648, 651 \(10th Cir. 2014\), aff'g T.C. Memo. 2012-35](#)

<sup>248</sup> [Publication 526, Charitable Contributions \(PDF\)](#), [Publication 561, Determining the Value of Donated Property \(PDF\)](#), and [Publication 1771, Charitable Contributions - Substantiation and Disclosure Requirements \(PDF\)](#)

<sup>249</sup> IRC § 170(c)

<sup>250</sup> [Comm'r v. Duberstein, 363 U.S. 278, 285 \(1960\)](#)

If the IRS examines the Donor's conservation easement deduction, the IRS's Agent (and possibly an IRS Appraiser) will interview the Donor to ascertain their Charitable Intent when making the contribution.

Deed of Conservation Easements must be recorded in public records. The donation is not complete unless and until the deed is recorded. This may be a "problem" if the deed is recorded too soon, too late, or not-at-all. It can also be a tool that allows the Donor to time the deduction by timing the transfer's recordation.

## Partial Interest Rule

Usually Donors must contribute their entire interest in property to take a contribution deduction.<sup>251</sup> This is known as the "partial interest" rule.

Qualified Conservation Contributions are an exception to the partial interest rule.<sup>252</sup>

## Conditional Gifts

If the Donor makes a conditional contribution, they cannot take a deduction until the condition is satisfied:

**Example:** J transfers land in Maine to a city government on condition that the land is used by the city for an unlikely use (e.g., alligator habitat). J cannot deduct the charitable contribution until the specified use occurs.

If there is only a negligible chance the gift will be defeated, the deduction is allowed.<sup>253</sup>

**Example:** S transfers land to a city government on the condition that the land is used by the city for a public park. If, on the date of the gift, the city government plans to use the property as a park, and the possibility that it will not be used as a park is so remote as to be negligible, the deduction is allowed at the time of the transfer to the city government.

## Earmarking

Earmarked donations are treated as transfers to the earmarked beneficiary - not as transfers to the Qualified Charitable Organization. Thus, Donors may not deduct contributions earmarked. (e.g.) for the benefit of a specific individual or family.

**Example:** S made payments to a church, earmarked for J, a needy individual. S cannot deduct the payments since the funds are specifically designated for J.

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<sup>251</sup> IRC § 170(f)(3)(A); [Patel v. Commissioner, 138 T.C. 395 \(2012\)](#)

<sup>252</sup> IRC § 170(f)(3)(B)(iii) and (h)

<sup>253</sup> Treas. Reg. §§ 1.170A-1(e) and 1.170A-7(a)(3)

## Year of Donation

Donors may deduct contributions paid or completed within your taxable year.<sup>254</sup>

A promise or pledge to pay cash or transfer property in the future is not deductible. Donors may deduct payments made by check when the check is mailed or delivered to the Qualified Charitable Organization.<sup>255</sup> Note, however, that a charge to the Donor's credit card is deductible in the year in which it is charged to their account... even if they carry a balance on the account and even if they do not receive an account statement that reflects the payment until after the close of their tax year.

For real estate donations, the year of the deduction is the year in which the real estate is transferred under the law of the state where the real estate is located. Deduct the value of a conservation easement in the year it is recorded.

**Example:** D grants a conservation easement to a Qualified Charitable Organization on December 20, Year 1, as evidenced by the dated signatures on the Deed of Conservation Easement. However, the easement was not recorded in public records until March 12, Year 2. D claims the deduction in Year 2.

## Substantiating Noncash Contributions

A charitable contribution is not deductible unless it is properly substantiated. The documentation required varies depending on the date of contribution, nature of the contribution (noncash in the case of a conservation easement), type of property contributed, and the dollar amount claimed.

For conservation easements, the following documents are required:<sup>256</sup>

1. A Contemporaneous Written Acknowledgement from the charity.<sup>257</sup> The acknowledgment must:
  - a. Describe the property;
  - b. Contain a statement of whether the Donee provided any goods or services in consideration in whole or in part, for the gift; and
  - c. Provide a description of and a good faith estimate of any goods or services, other than intangible religious benefits, provided to the Donor.
2. IRS Form 8283; *Non-Cash Charitable Contributions*
3. Deed of Conservation Easement (stamped with the recording date)
4. Qualified Appraisal (for contributions of more than \$5,000), and
5. Baseline Study

Additional documentation may be required or advisable (e.g. for historic buildings or property in historic districts).

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<sup>254</sup> IRC § 170(a)(1) and Treas. Reg. § 1.170A-1(b).

<sup>255</sup> Treas. Reg. § 1.170A-1(b).

<sup>256</sup> See [Publication 526, Charitable Contributions](#) (PDF), and [Publication 1771, Charitable Contributions - Substantiation and Disclosure Requirements](#) (PDF) and [Substantiation](#) (above) for additional guidance on [Substantiation](#) requirements.

<sup>257</sup> I.R.C. § 170(f)(8)

## Amount of Deduction

Several factors affect the amount Donors may claim as a charitable contribution deduction for a conservation easement:

- Quid Pro Quo and Charitable Intent
- Bargain sale elements present in the transaction
- Type of property (ordinary income, short-term capital gain, long-term capital gain)
- Donor's basis in the property
- Percentage (of AGI or Taxable income) limitations
- Type of Donee organization

See *Amount of Deduction* (above) and IRS [Publication 526, Charitable Contributions](#) (PDF) for additional guidance on charitable contribution limitations.

## Qualified Organization

Donors may only deduct contributions made to organizations eligible to accept tax-deductible contributions. Those organizations are described in IRC § 170(c). Qualified Charitable Organizations are listed in the [IRS Charity Search](#)<sup>258</sup> algorithm.

Any organization that accepts conservation easement contributions must meet additional requirements. See *Qualified Organization* (above) for additional guidance on Qualified Charitable Organizations in the context of conservation easements.

## Appendix: Federal, and State Conservation Agencies

To help ascertain the physical characteristics of a property as well as evaluate the Conservation Purposes of your donation, you may want to contact various federal and state conservation agencies, including but not limited to:

- [NPS National Park Service \(NPS\)](#)
- [U.S. Fish and Wildlife Service](#)
- [U.S. Environmental Protection Agency](#)
- [U.S. Department of Agriculture](#)
- [U.S. Army Corps of Engineers](#)
- State Departments of Natural Resources

## Appendix: Conservation Easement Issues and Precedents

### Code and Regulations

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<sup>258</sup> <https://www.irs.gov/charities-non-profits/search-for-charities>

Text of [Code](#)<sup>259</sup> and [Regulations](#)<sup>260</sup> can be found at Cornell University's Legal Information Institute's web site. The IRS's professional assistance web-page draws on Cornell's resources. While you are there, consider a donation to support the Center's work.

This is not an all-inclusive list of either potential issues that affect conservation easement donations or the precedents that govern them. See also, IRC section 170, DEFRA section 155, the corresponding Treasury Regulations, Notice 2006-96 and case law.

<b>General Rule Issues</b>	<b>Code/Regulation Reference</b>
Charitable Intent (including Quid Pro Quo)	170(a); 1.170A-1(h)
Conditional gifts	1.170A-1(e); 1.170A-7(a)(3)
Contemporaneous Written Acknowledgment (CWA)	170(f)(8); 1.170A-13(f)
<b>Qualified Appraisal Issues</b>	<b>Code/Regulation Reference</b>
The Deficit Reduction Act of 1984 (DEFRA) and section 170(f)(11) outline statutory appraisal requirements.)	170(f)(11) DEFRA 155(a)(1)(A),(a)(4) 1.170A-13(c)(3)(i) Notice 2006-96 §3.02(1)
Appraisal not attached to return (FMV >\$500K)	170(f)(11)(D)
Appraisal not prepared in accordance with Generally Accepted Appraisal Standards	170(f)(11)(E)(i)(II); Notice 2006-96 §3.02(2)
Appraisal not timely	1.170A-13(c)(3)(i)(A)
Appraisal not prepared by a Qualified Appraiser	170(f)(11)(E)(ii) 1.170A-13(c)(3)(i)(B); Notice 2006-96, §3.03
Appraisal doesn't meet IRC, DEFRA, or Treas. Reg. requirements	170(f)(11)(E)(i)(I) 1.170A-13(c)(3)(ii) 1.170A-13(c)(3)(i)(C); Notice 2006-96
Appraisal fee based on percentage of value	1.170A-13(c)(3)(i)(D); 1.170A-13(c)(6)
Form 8283 (appraisal summary) missing or incomplete	1.170A-13(c)(4) DEFRA 155(a)(1)(B); DEFRA 155(a)(3)
<b>Qualified Real Property Interest Issues</b>	<b>Code/Regs</b>
Qualified Real Property Interest	170(h)(2); 1.170A-14(a), (b)
Lack of Perpetuity	170(h)(2)(C); 170(h)(5)
Lack of Perpetuity - Failure to properly subordinate	1.170A-14(g)(2)

<sup>259</sup> <https://www.law.cornell.edu/uscode/text/26>

<sup>260</sup> <https://www.law.cornell.edu/cfr/text/26/chapter-I>

<b>Qualified Real Property Interest Issues</b>	<b>Code/Regs</b>
Lack of Perpetuity - Extinguishment-allocation of proceeds	1.170A-14(g)(6)(ii)
Not a qualified organization or eligible Donee	170(h)(3); 1.170A-14(c)(1)
<b>Conservation Purpose Issues</b>	<b>Code/Regulation Reference</b>
Conservation Purpose	170(h)(4); 1.170A-14(d)
Outdoor recreation or education of public	170(h)(4)(A)(i); 1.170A-14(d)(2)
Outdoor recreation or education of public - access	1.170A-14(d)(2)(ii)
Protection of environmental system (natural habitat)	170(h)(4)(A)(ii); 1.170A-14(d)(3)
Protection of environmental system -Significant habitat or ecosystem	1.170A-14(d)(3)(ii)
Preservation of open space	170(h)(4)(A)(iii); 1.170A-14(d)(4)
Preservation of open space -Scenic enjoyment	170(h)(4)(A)(iii)(I); 1.170A-14(d)(4)(ii)
Preservation of open space -Scenic enjoyment - visual access	1.170A-14(d)(4)(ii)(B)
Preservation of open space -Governmental conservation policy	170(h)(4)(A)(iii)(II); 1.170A-14(d)(4)(iii)
Preservation of open space -Governmental conservation policy - Physical or visual access required if Conservation Purpose is frustrated without access	1.170A-14(d)(4)(iii)(C)
Preservation of historic land or Certified Historic Structure	170(h)(4)(A)(iv); 1.170A-14(d)(5)
Preservation of historic land or Certified Historic Structure - Historic land	1.170A-14(d)(5)(ii)
Preservation of historic land or Certified Historic Structure - Certified Historic Structure	1.170A-14(d)(5)(iii)
Preservation of historic land or Certified Historic Structure - Certified Historic Structure (1) Individually listed or (2) in historic district and NPS certifies	170(h)(4)(C) (donations made after 8/17/06); 1.170A-14(d)(5)(iii)
Preservation of historic land or Certified Historic Structure - visual access	1.170A-14(d)(5)(iv)(A)
Failure to comply w/ PPA for buildings not individually listed. ( <b>façade only</b> )	170(h)(4)(B)

<b>Conservation Purpose Issues</b>	<b>Code/Regulation Reference</b>
Failure to comply w/ PPA for buildings not individually listed - No restriction for entire exterior.	170(h)(4)(B)(i)
Failure to comply w/ PPA for buildings not individually listed - Lack of Donor/Donee written agreement: re <u>Donee's</u> qualifications.	170(h)(4)(B)(ii)
Failure to comply w/ PPA for buildings not individually listed - Failure to attach appraisal, with photos and description of restrictions.	170(h)(4)(B)(iii)
Failure to comply w/ PPA for buildings not individually listed - Failure to pay \$500 filing fee ( <b>façade only</b> )	170(f)(13)
Not exclusively for Conservation Purpose	170(h)(5); 1.170A-14(e)
Not exclusively for Conservation Purpose - Inconsistent Use	1.170A-14(e)(2) and (3)
Insufficient or lack of documentation for Conservation Purpose (Baseline Study)	1.170A-14(g)(5)(i); 1.170A-13(c)(4)(ii)(M)
<b>Valuation Issues</b>	<b>Code/Regulation Reference</b>
Overvaluation	170(a); 1.170A-14(h)(3)
Deduction not based on FMV	170(a); 1.170A-1(c); 1.170A-14(h)(3)
Deduction limited to basis	170(e)(1)(A)
Contiguous parcel/noncontiguous parcel	1.170A-14(h)(3)(i)
<b>Miscellaneous Issues</b>	<b>Code/Regulation Reference</b>
Percentage limitations not computed properly	170(b)
Rehabilitation credit-reduction of deduction ( <b>façade only</b> )	170(f)(14)
Rehabilitation credit-recapture ( <b>façade only</b> )	50(a); Rev. Rul. 89-90
<b>Penalty Issues</b>	<b>Code/Regulation Reference</b>
Taxpayer penalties	6662(a), (e), (h); 6664(c)(1) - (3)
Appraiser penalty	6695A

### Case Table – E-Citations and Cross References

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<u><a href="#">61 York Acquisition, LLC v. Commissioner, T.C. Memo. 2013-266</a></u>	
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<u><a href="#">Addis v. Commissioner, 374 F.3d 881, 887 (9th Cir. 2004), affg. 118 T.C. 528 (2002)</a></u>	
<u><a href="https://scholar.google.com/scholar_case?case=11288307590788135730&amp;q=Addis+v.+Commissioner&amp;hl=en&amp;as_sdt=2006&amp;as_vis=1">https://scholar.google.com/scholar_case?case=11288307590788135730&amp;q=Addis+v.+Commissioner&amp;hl=en&amp;as_sdt=2006&amp;as_vis=1</a></u>	Substantiation/Contemporaneous written acknowledgement; An easement deed may qualify as a CWA. IRC § 170(f)(8), Treas. Reg. § 1.170A-13(f)(2) & (3); cited in <u><a href="#">Viralam v. Commissioner, 136 T.C.151</a></u> ; <u><a href="#">Schrimsher v. Commissioner, T.C. Memo. 2011-71</a></u>
<u><a href="#">Atkinson v. Commissioner, T.C. Memo 2015-236</a></u>	
<u><a href="https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10611">https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10611</a></u>	Conservation Purpose/Relatively Natural Habitat or Ecosystem; Facts and circumstances determine outcome. IRC § 170(h)(4)(A)(ii); Treas. Reg. § 1.170A-14(d)(3); Contrast <u><a href="#">Glass v. Commissioner, 124 T.C. 258 (2005), aff'd, 471 F.3d 698 (6th Cir. 2006)</a></u>
<u><a href="#">Averyt v. Commissioner, T.C. Memo. 2012-198</a></u>	
<u><a href="https://www.ustaxcourt.gov/InOpHistoric/AverytMemo.TCM.WPD.pdf">https://www.ustaxcourt.gov/InOpHistoric/AverytMemo.TCM.WPD.pdf</a></u>	Substantiation/Contemporaneous written acknowledgement; An easement deed may qualify as a CWA. <u><a href="#">RP Golf, LLC v. Commissioner, T.C. Memo. 2012-282</a></u> ; Contrast: <u><a href="#">Schrimsher v. Commissioner, T.C. Memo. 2011-71</a></u>
<u><a href="#">Bailey v. Commissioner, 88 T.C. 1293 (1987)</a></u>	
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<u><a href="#">Balsam Mountain Invs., LLC v. Comm’r, T.C. Memo. 2015-43</a></u>	
<u><a href="https://www.ustaxcourt.gov/InOpHistoric/BalsamMountainInvestmentsLLCMemo.Morrison.TCM.WPD.pdf">https://www.ustaxcourt.gov/InOpHistoric/BalsamMountainInvestmentsLLCMemo.Morrison.TCM.WPD.pdf</a></u>	Substantiation/IRS Examination of Documents Cites <u><a href="#">Belk v. Commissioner, 140 T.C. 1 (2013)</a></u> , motion for reconsideration denied, T.C. Memo. 2013-154, aff’d 774 F.3d 1243(4th Cir. 2014), Below
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<u><a href="http://www.ustaxcourt.gov/inophistoric/belkdiv.tc.wpd.pdf">http://www.ustaxcourt.gov/inophistoric/belkdiv.tc.wpd.pdf</a></u>	Qualified Conservation Contribution/Perpetuity (Ability to change property defeats perpetuity.); Substantiation/IRS Examination.../Deed of Conservation Easement IRC § 170(h)(2)(C)
<u><a href="#">Bond v. Commissioner, 100 T.C. 32, 41 (1993)</a></u>	
<u><a href="http://ustaxcourt.gov/InOpHistoric/Friedm8an.TCM.WPD.pdf">http://ustaxcourt.gov/InOpHistoric/Friedm8an.TCM.WPD.pdf</a></u>	Substantiation/IRS Examination.../Substantial Compliance (Old law case, probably no longer applicable) IRC § 170(a)(1); c.f. also <u><a href="#">Simmons v. Commissioner, T.C. Memo. 2009-208</a></u>
<u><a href="#">Boone Operations Co. LLC v. Commissioner, T.C. Memo. 2013-101</a></u>	
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	<a href="#"><u>Butler v. Commissioner, T.C. Memo. 2012-72</u></a>
	<a href="http://taxtrials.com/wp-content/uploads/2012/05/ButlerMemo.TCM.WPD.pdf"><u>http://taxtrials.com/wp-content/uploads/2012/05/ButlerMemo.TCM.WPD.pdf</u></a>
	Qualified Conservation Contribution/Perpetuity/Recordation; Local law determines what must be recorded. Contrast: <a href="#"><u>Herman v. Commissioner, T.C. Memo. 2009-205</u></a>
	<a href="#"><u>Carpenter v. Commissioner, T.C. Memo. 2012- 1 motion for reconsideration denied 2013-172</u></a>
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	<a href="#"><u>Comm’r v. Duberstein, 363 U.S. 278, 285 (1960)</u></a>
	<a href="https://supreme.justia.com/cases/federal/us/363/278/case.html"><u>https://supreme.justia.com/cases/federal/us/363/278/case.html</u></a>
	Appendix: Charitable Contributions/Charitable Intent; Charitable contribution = transfer or gift that proceeds from “disinterested generosity.”
	<a href="#"><u>Commissioner v. Gillette Motor Transport, Inc., 364 U.S. 130, 134 (1960)</u></a>
	<a href="https://supreme.justia.com/cases/federal/us/364/130/case.html"><u>https://supreme.justia.com/cases/federal/us/364/130/case.html</u></a>
	State Tax Credits/Sale of State Tax Credits; Purpose of capital gain rule, to ameliorate the hardship of taxation of the entire gain in one year.
	<a href="#"><u>Costello v. Commissioner, T.C. Memo. 2015-87</u></a>
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	Substantiation/IRS Examination/Substantial Compliance; Substantial compliance inapplicable where appraiser valued the wrong property. – Too many imponderables in method used to value property interests. See Also: <a href="#"><u>Cave Buttes, LLC v. Commissioner, 147 T.C. 10 (2016)</u></a>
	<a href="#"><u>Davenport v. Commissioner, T.C.M. 1977-34</u></a>
	<a href="http://www.ustaxcourt.gov/InOpHistoric/davenport.TCM.WPD.pdf"><u>http://www.ustaxcourt.gov/InOpHistoric/davenport.TCM.WPD.pdf</u></a>
	Amount of Deduction/Rehabilitation Tax Credit/In General; No tax credit is permitted for property that the taxpayer does not own:

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[Esgar Corp. v. Commissioner](#), 744 F.3d 648, 651 (10th Cir. 2014), aff'g T.C. Memo. 2012-35

<http://www.ustaxcourt.gov/InOpHistoric/esgar.TCM.WPD.pdf>

State Tax Credits/Receipt of Credit & Sale of Credit; state conservation easement tax credit is not a return benefit and does not reduce the amount of your federal charitable contribution deduction  
Also: [Tempel v. Commissioner](#), 136 T.C. 341, 351 n.17 (2011).

[Flood v. Commissioner](#), T.C. Memo. 2012-243

<https://www.ustaxcourt.gov/InOpHistoric/floodmemo.TCM.WPD.pdf>

Amount of Deduction/Appreciated Property/Ordinary Income and Short Term; If the property is ordinary income property in your hands, then the deduction is limited to your basis.  
IRC § 170(e)(1)(A)

[French v. Commissioner](#), T.C. Memo. 2016-53

<https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10735>

Substantiation/Contemporaneous Written Acknowledgement; If deed serves as CWA, the deed must state whether the Donee provided any goods or services in consideration for the easement

[Glass v. Commissioner](#), 124 T.C. 258 (2005), aff'd, 471 F.3d 698 (6th Cir. 2006)

<https://www.ustaxcourt.gov/InOpHistoric/glass.TC.WPD.pdf>

Conservation Purpose/Relatively Natural Habitat; Facts and Circumstances determine outcome.  
Contrast: [Atkinson v. Commissioner](#), T.C. Memo 2015-236

[Herman v. Commissioner](#), T.C. Memo. 2009-205

<http://www.ustaxcourt.gov/InOpHistoric/herman.TCM.WPD.pdf>

Qualified Conservation Easement/Perpetuity/Recording Easements; Local law determines what must be recorded.  
Contrast: [Butler v. Commissioner](#), T.C. Memo. 2012-72

[Hernandez v. Commissioner](#), 490 U.S. 680, 691 (1989)

<https://supreme.justia.com/cases/federal/us/490/680/>

Amount of Deduction/Quid Pro Quo and Charitable Intent; donor benefits are greater than those that inure to the public, the transfer does not satisfy the charitable intent requirement  
Also: [United States v. American Bar Endowment](#), 477 U.S. 105, 117-118 (1986); [Singer Co. v. United States](#), 196 Ct. Cl. 90, 106 449 F.2d 413, 422-423 (1971)  
IRC § 170 (a) and (c)

[Hewitt v. Commissioner](#), 109 T.C. 258, 261 (1997), aff'd without published opinion, 166 F.3d 332 (4th Cir. 1998)

[http://www.leagle.com/decision/19973671091tc258\\_1356/HEWITT%20v.%20COMMISSIONER#](http://www.leagle.com/decision/19973671091tc258_1356/HEWITT%20v.%20COMMISSIONER#)

Substantiation/IRS Examination/Substantial Compliance; Charitable contributions are allowed only if they comply with all “directory” Treasury Regulations.  
[Smith v. Commissioner](#), T.C. Memo 2007-368  
IRC § 170(a)(1)

[Kaufman v. Commissioner](#), T.C. Memo. 2014-52

<https://ustaxcourt.gov/InOpHistoric/kaufman.TC.WPD.pdf>

## Case Table – E-Citations and Cross References

	Valuing Conservation Easements/Before and After Method; FMV of the property must decrease after granting the conservation easement to generate a charitable contribution deduction. <a href="#">Scheidelman v. Commissioner, 755 F.3d 148, 150 (2d Cir. 2014), aff'g T.C. Memo. 2013-18</a>
	<a href="#">Longino v. Commissioner, T.C. Memo. 2013-80</a>
	<a href="http://www.allcourtdata.com/law/case/john-thomas-longino-v-commissioner/cG6w9if">http://www.allcourtdata.com/law/case/john-thomas-longino-v-commissioner/cG6w9if</a>
	Substantiation/Overview; A substantial majority of litigated cases address the Code requirement for a <u>Contemporaneous Written Acknowledgement</u> IRC § 170(f)(8)
	<a href="#">Maines v. Commissioner, 144 T.C. 123 (2015)</a>
	<a href="https://www.ustaxcourt.gov/InOpHistoric/MainesDiv.Holmes.TC.WPD.pdf">https://www.ustaxcourt.gov/InOpHistoric/MainesDiv.Holmes.TC.WPD.pdf</a>
	State Tax Credits/Receipt of Credit; Receipt of credit not taxable income
	<a href="#">Minnick v. Commissioner, T.C. Memo. 2012-345</a>
	<a href="http://www.ustaxcourt.gov/inophistoric/minnickmemo.tcm.wpd.pdf">http://www.ustaxcourt.gov/inophistoric/minnickmemo.tcm.wpd.pdf</a>
	Qualified Conservation Easement/Perpetuity/Subordination; not entitled to a deduction for the conservation easement donation because a subordination agreement was not in place at the time that the conservation easement was granted. C.f. also <a href="#">Mitchell v. Commissioner, 775 F.3d 1243 (10th Cir. 2015), aff'g 138 T.C. 324 (2012)</a>
	<a href="#">Mitchell v. Commissioner, 775 F.3d 1243 (10th Cir. 2015), aff'g 138 T.C. 324 (2012)</a>
	<a href="http://www.ustaxcourt.gov/inophistoric/mitchellramona.tc.wpd.pdf">http://www.ustaxcourt.gov/inophistoric/mitchellramona.tc.wpd.pdf</a>
	Qualified Conservation Easement/Perpetuity/Subordination; not entitled to a deduction for the conservation easement donation because a subordination agreement was not in place at the time that the conservation easement was granted. C.f. also <a href="#">Minnick v. Commissioner, T.C. Memo. 2012-345</a>
	<a href="#">Olson v. United States, 292 U.S. 246, 257 (1934)</a>
	<a href="https://supreme.justia.com/cases/federal/us/292/246/">https://supreme.justia.com/cases/federal/us/292/246/</a>
	Valuing Conservation Easements/ Methodology/ Subdivision Development Method; Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration Also: <a href="#">United States v. 320.0 Acres of Land, 605 F.2d 762, 814-820 (5th Cir. 1979)</a> ; <a href="#">United States v. 47.3096 Acres of Land, 583 F.2d 270, 272 (6th Cir. 1978)</a>
	<a href="#">Patel v. Commissioner, 138 T.C. 395 (2012)</a>
	<a href="https://www.ustaxcourt.gov/inophistoric/pateldivision.tc.wpd.pdf">https://www.ustaxcourt.gov/inophistoric/pateldivision.tc.wpd.pdf</a>
	Appendix: Charitable Deductions/Partial Interest Rule; you must contribute your entire interest in property to take a contribution deduction IRC § 170(f)(3)(A)
	<a href="#">Riether v. United States, 919 F. Supp. 2d 1140 (D.N.M. 2012)</a>
	<a href="https://casetext.com/case/riether-v-united-states">https://casetext.com/case/riether-v-united-states</a>
	Substantiation/Overview; Litigation based on absence or inadequacy of appraisal documents
	<a href="#">Rome I, Ltd. v. Commissioner, 96 T.C. 697 (1991)</a>
	<a href="https://casetext.com/case/rome-i-ltd-v-commissioner-of-internal-revenue">https://casetext.com/case/rome-i-ltd-v-commissioner-of-internal-revenue</a>
	Amount of Deduction/Rehabilitation Tax Credit/Recapture; convey a façade easement in the same year that you place a qualified rehabilitated building in service, you are not entitled to claim the portion of the rehabilitation tax credit attributable to the façade easement <a href="#">Rev. Rul. 89-90, 1989-2 C.B. 3</a>

## Case Table – E-Citations and Cross References

<a href="#"><u>RP Golf, LLC v. Commissioner, T.C. Memo. 2012-282</u></a>	
	<a href="http://www.ustaxcourt.gov/InOpHistoric/rpgolfgmemo.TCM.WPD.pdf">http://www.ustaxcourt.gov/InOpHistoric/rpgolfgmemo.TCM.WPD.pdf</a>
	Substantiation/Contemporaneous written acknowledgement; An easement deed may qualify as a CWA. <a href="#"><u>Averyt v. Commissioner, T.C. Memo. 2012-198</u></a> Contrast: <a href="#"><u>Schrimsher v. Commissioner, T.C. Memo. 2011-71</u></a>
<a href="#"><u>Schaevitz v. Commissioner, T.C.M.1971-197</u></a>	
	<a href="https://casetext.com/case/stella-a-schaevitz-trust-v-director-div-of-tax">https://casetext.com/case/stella-a-schaevitz-trust-v-director-div-of-tax</a>
	Amount of Deduction/Rehabilitation Tax Credit; Rehabilitation tax credit not allowed for property you do not own, <a href="#"><u>Villa v. Commissioner, T.C.M. 1980-305</u></a> ; <a href="#"><u>Davenport v. Commissioner, T.C.M. 1977-34</u></a> ; <a href="#"><u>Bailey v. Commissioner, 88 T.C. 1293 (1987)</u></a>
<a href="#"><u>Scheidelman v. Commissioner, 755 F.3d 148, 150 (2d Cir. 2014), aff'g T.C. Memo. 2013-18</u></a>	
	<a href="https://www.ustaxcourt.gov/InOpHistoric/ScheidelmanMemo.TCM.WPD.pdf">https://www.ustaxcourt.gov/InOpHistoric/ScheidelmanMemo.TCM.WPD.pdf</a>
	Valuing Conservation Easements/Before and After Method; FMV of the property must decrease after granting the conservation easement to generate a charitable contribution deduction. <a href="#"><u>Kaufman v. Commissioner, T.C. Memo. 2014-52</u></a>
<a href="#"><u>Schrimsher v. Commissioner, T.C. Memo. 2011-71</u></a>	
	<a href="http://www.ustaxcourt.gov/InOpHistoric/schrimsher.TCM.WPD.pdf">http://www.ustaxcourt.gov/InOpHistoric/schrimsher.TCM.WPD.pdf</a>
	Substantiation/Contemporaneous written acknowledgement; An easement deed may qualify as a CWA. <a href="#"><u>Addis v. Commissioner, 374 F.3d 881, 887 (9th Cir. 2004), affg. 118 T.C. 528 (2002)</u></a> ; <a href="#"><u>Viralam v. Commissioner, 136 T.C.151</u></a>
<a href="#"><u>Simmons v. Commissioner, T.C. Memo. 2009-208</u></a>	
	<a href="http://taxlaw.typepad.com/files/simmons2.tcm.wpd.pdf">http://taxlaw.typepad.com/files/simmons2.tcm.wpd.pdf</a>
	Substantiation/IRS Examination.../Substantial Compliance; Doctrine construed narrowly. <a href="#"><u>Bond v. Commissioner, 100 T.C. 32, 41 (1993) (Old Law)</u></a>
<a href="#"><u>Singer Co. v. United States, 196 Ct. Cl. 90, 106 449 F.2d 413, 422-423 (1971)</u></a>	
	<a href="http://openjurist.org/449/f2d/413/singer-company-v-united-states">http://openjurist.org/449/f2d/413/singer-company-v-united-states</a>
	Amount of Deduction/Quid Pro Quo and Charitable Intent; donor benefits are greater than those that inure to the public, the transfer does not satisfy the <u>charitable intent</u> requirement Also: <a href="#"><u>United States v. American Bar Endowment, 477 U.S. 105, 117-118 (1986)</u></a> ; <a href="#"><u>Hernandez v. Commissioner, 490 U.S. 680, 691 (1989)</u></a> ; IRC § 170 (a) and (c)
<a href="#"><u>Smith v. Commissioner, T.C. Memo 2007-368</u></a>	
	<a href="http://www.ustaxcourt.gov/InOpHistoric/sm2ith.TCM.WPD.pdf">http://www.ustaxcourt.gov/InOpHistoric/sm2ith.TCM.WPD.pdf</a>
	Substantiation/IRS Examination/Substantial Compliance; Charitable contributions are allowed only if they comply with all “directory” Treasury Regulations. <a href="#"><u>Hewitt v. Commissioner, 109 T.C. 258, 261 (1997), aff'd without published opinion, 166 F.3d 332 (4th Cir. 1998)</u></a> IRC § 170(a)(1)
<a href="#"><u>Tempel v. Commissioner, 136 T.C. 341, 351 n.17 (2011), aff'd sub nom, Esgar Corp. v. Commissioner, 744 F.3d 648 (10th Cir. 2014)</u></a>	
	<a href="http://www.ustaxcourt.gov/InOpHistoric/tempel.TC.WPD.pdf">http://www.ustaxcourt.gov/InOpHistoric/tempel.TC.WPD.pdf</a>
	State Tax Credits/Receipt of Credit & Sale of Credit; state conservation easement tax credit is not a return benefit and does not reduce the amount of your federal charitable contribution deduction

## Case Table – E-Citations and Cross References

	<a href="#"><i>Esgar Corp. v. Commissioner</i>, 744 F.3d 648, 651 (10th Cir. 2014), aff'g T.C. Memo. 2012-35</a>
	<a href="#"><i>Turner v. Commissioner</i>, 126 T.C. 299 (2006)</a>
	<a href="http://www.ustaxcourt.gov/InOpHistoric/ney.sum.WPD.pdf">http://www.ustaxcourt.gov/InOpHistoric/ney.sum.WPD.pdf</a>
	Appendix: Penalties/Accruacy Related Penalties IRC § 6662
	<a href="#"><i>United States v. 320.0 Acres of Land</i>, 605 F.2d 762, 814-820 (5th Cir. 1979)</a>
	<a href="http://openjurist.org/605/f2d/762/united-states-v-acres-of-land-more-or-less-in-county-of-monroe-state-of-r">http://openjurist.org/605/f2d/762/united-states-v-acres-of-land-more-or-less-in-county-of-monroe-state-of-r</a>
	Valuing Conservation Easements/ Methodology/ Subdivision Development Method; Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration <a href="#"><i>United States v. 47.3096 Acres of Land</i>, 583 F.2d 270, 272 (6th Cir. 1978)</a> ; <a href="#"><i>Olson v. United States</i>, 292 U.S. 246, 257 (1934)</a>
	<a href="#"><i>United States v. 47.3096 Acres of Land</i>, 583 F.2d 270, 272 (6th Cir. 1978)</a>
	<a href="https://www.ravellaw.com/opinions/eb2a5db62411a34023a0fafeddbf9e4a">https://www.ravellaw.com/opinions/eb2a5db62411a34023a0fafeddbf9e4a</a>
	Valuing Conservation Easements/ Methodology/ Subdivision Development Method; Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration <a href="#"><i>United States v. 320.0 Acres of Land</i>, 605 F.2d 762, 814-820 (5th Cir. 1979)</a> ; <a href="#"><i>Olson v. United States</i>, 292 U.S. 246, 257 (1934)</a>
	<a href="#"><i>United States v. American Bar Endowment</i>, 477 U.S. 105, 117-118 (1986)</a>
	<a href="https://supreme.justia.com/cases/federal/us/477/105/case.html">https://supreme.justia.com/cases/federal/us/477/105/case.html</a>
	Amount of Deduction/Quid Pro Quo and Charitable Intent; donor benefits are greater than those that inure to the public, the transfer does not satisfy the <u>charitable intent</u> requirement <a href="#"><i>Hernandez v. Commissioner</i>, 490 U.S. 680, 691 (1989)</a> ; <a href="#"><i>Singer Co. v. United States</i>, 196 Ct. Cl. 90, 106 449 F.2d 413, 422-423 (1971)</a> <a href="#">Rev. Rul. 67-246, 1967-2 C.B. 104</a> ; Treas. Reg. § 1.170A-1(h)(1) and (2); IRC § 170.
	<a href="#"><i>United States v. Nat'l Bank of Commerce</i>, 472 U.S. 713, 722 (1985)</a>
	<a href="https://supreme.justia.com/cases/federal/us/472/713/case.html">https://supreme.justia.com/cases/federal/us/472/713/case.html</a>
	Qualified Conservation Easement/Perpetuity/Recording; State law determines a taxpayer's interest in property. Tax consequences are determined under Federal law. <a href="#"><i>Woods v. Commissioner</i>, 137 T.C. 159, 162 (2011)</a>
	<a href="#"><i>Villa v. Commissioner</i>, T.C.M. 1980-305</a>
	<a href="http://www.leagle.com/decision/198097840hhtcm938_1763/VILLA%20v.%20COMMISSIONER">http://www.leagle.com/decision/198097840hhtcm938_1763/VILLA%20v.%20COMMISSIONER</a>
	Amount of Deduction/Rehabilitation Tax Credit; Rehabilitation tax credit not allowed for property you do not own, <a href="#"><i>Davenport v. Commissioner</i>, T.C.M. 1977-34</a> ; <a href="#"><i>Schaevitz v. Commissioner</i>, T.C.M.1971-197</a> ; <a href="#"><i>Bailey v. Commissioner</i>, 88 T.C. 1293 (1987)</a>
	<a href="#"><i>Viralam v. Commissioner</i>, 136 T.C.151</a>
	<a href="http://www.leagle.com/decision/In%20TCO%2020110214958/VIRALAM%20v.%20COMMISSIONER">http://www.leagle.com/decision/In%20TCO%2020110214958/VIRALAM%20v.%20COMMISSIONER</a>
	Substantiation/Contemporaneous written acknowledgement; An easement deed may qualify as a CWA. <a href="#"><i>Addis v. Commissioner</i>, 374 F.3d 881, 887 (9th Cir. 2004), affg. 118 T.C. 528 (2002)</a> ; <a href="#"><i>Schrimsher v. Commissioner</i>, T.C. Memo. 2011-71</a>

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[Whitehouse Hotel Limited Partnership v. Commissioner, 755 F.3d 236 \(5th Cir. 2014\), aff'g in part, vacating in part 130 T.C. 304 Villa v. Commissioner](#)

<https://casetext.com/case/whitehouse-hotel-ltd-v-commr>

Amount of Deduction/Rehabilitation Tax Credit; Rehabilitation tax credit not allowed for property you do not own,  
[Davenport v. Commissioner, T.C.M. 1977-34](#); [Schaevitz v. Commissioner, T.C.M.1971-197](#); [Bailey v. Commissioner, 88 T.C. 1293 \(1987\)](#)

[Williams v. Commissioner, 498 F. App'x 284 \(4th Cir. 2012\), aff'g T.C. Memo. 2011-89](#)

<http://www.ustaxcourt.gov/InOpHistoric/williamsj.TCM.WPD.pdf>

Amount of Deduction/Appreciated Property/Capital Gain Property; The holding period for tangible capital gain property commences on the date you acquire full title to the property. An option or tie-up agreement may not be sufficient to start the holding period.

[Woods v. Commissioner, 137 T.C. 159, 162 \(2011\)](#)

<http://www.ileagle.com/decision/In%20TCO%2020111027H32/WOODS%20v.%20COMMISSIONER>

Qualified Conservation Easement/Perpetuity/Recording; State law determines a taxpayer's interest in property. Tax consequences are determined under Federal law.  
[United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 \(1985\)](#)

## Publications, Forms, Rulings, and Notices – E-Citations

### Publications, Forms, Rulings, and Notices

#### **Publications**

[IRS - Conservation Easement Audit Techniques Guide](#)

<https://www.irs.gov/businesses/small-businesses-self-employed/conservation-easement-audit-techniques-guide>

IRS - Publication 78, Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code

Technically, this publication no longer exists.

Use: [IRS Charity Search](#); <https://www.irs.gov/charities-non-profits/search-for-charities>

[IRS Publication 1771, Charitable Contributions-Substantiation and Disclosure Requirements \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/p1771.pdf>

[IRS Publication 5, Your Appeal Rights and How to Prepare a Protest If You Don't Agree \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/p5.pdf>

[IRS Publication 526, Noncash Contributions \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/p526.pdf>

## Publications, Forms, Rulings, and Notices

[IRS Publication 544, Sales and Other Dispositions of Assets \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/p544.pdf>

[IRS Publication 561, Determining the Value of Donated Property \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/p561.pdf>

[IRS Rehabilitation Tax Credit Market Segment Specialization Program Guide \(PDF\)](#)

<https://www.irs.gov/pub/irs-mssp/rehab.pdf>

[NPS How to Apply the National Register Criteria for Evaluation.](#)

<https://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>

### **Commercial Publications, Hard Copy Only:**

Appraisal Institute; *Dictionary of Real Estate Appraisal, Sixth Edition*, The Appraisal Institute, Chicago, Ill., 2015

Appraisal Institute; *The Appraisal of Real Estate, 14th Edition*, The Appraisal Institute, Chicago, Ill., 2013

### **Form Exemplars and Instructions**

[IRS Form 1023 Application for Recognition of Exemption Under Section 501\(c\)\(3\) of the Internal Revenue Code](#)

<https://www.irs.gov/uac/about-form-1023>

[IRS Form 1040, Schedule A, Itemized Deductions \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/f1040sa.pdf>

[IRS Form 4797 \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/f4797.pdf>

[IRS Form 8283, Noncash Charitable Contributions \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/f8283.pdf>

[IRS Form 8283V, Payment Voucher for Filing Fee under Section 170\(f\)\(13\) \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/f8283v.pdf>

[IRS Instructions for Form 8283, Noncash Charitable Contributions \(PDF\)](#)

<https://www.irs.gov/pub/irs-pdf/i8283.pdf>

[NPS Form 10-168 \(PDF\)](#)

<https://www.nps.gov/tps/tax-incentives/application.htm>

### **Rulings, Procedures, and Notices**

[80 FR 55802](#)

[https://www.irs.gov/irb/2016-04\\_IRB/ar10.html](https://www.irs.gov/irb/2016-04_IRB/ar10.html)

## Publications, Forms, Rulings, and Notices

<b>Publications, Forms, Rulings, and Notices</b>	
<a href="#">IRS Notice 2006-96, 2006-2 C.B. 902</a>	
	<a href="https://www.irs.gov/irb/2006-46_IRB/ar13.html#d0e2324">https://www.irs.gov/irb/2006-46_IRB/ar13.html#d0e2324</a>
<a href="#">Rev. Rul. 67-246, 1967-2 C.B. 104</a>	
	<a href="https://www.irs.gov/pub/irs-tege/rr_67_246.pdf">https://www.irs.gov/pub/irs-tege/rr_67_246.pdf</a>
<a href="#">Rev. Rul. 89-90, 1989-2 C.B. 3</a>	
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<a href="#">S. Rep. 96-1007, at 9-10 (1980), reprinted in 1980 U.S.C.C.A.N. 6736, 6744-45</a>	
	<a href="http://www.finance.senate.gov/imo/media/doc/Rpt96-1007.pdf">http://www.finance.senate.gov/imo/media/doc/Rpt96-1007.pdf</a>
<a href="#">TD 8690</a>	
	<a href="https://www.irs.gov/pub/irs-tege/td8690.pdf">https://www.irs.gov/pub/irs-tege/td8690.pdf</a>
<a href="#">Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, sec. 1219(a)(2)(B), 120 Stat. at 1083</a>	
	<a href="https://www.congress.gov/109/plaws/publ280/PLAW-109publ280.pdf">https://www.congress.gov/109/plaws/publ280/PLAW-109publ280.pdf</a>
<a href="#">Fascade Easement Contributions</a>	
	<a href="https://www.irs.gov/pub/irs-wd/0947053.pdf">https://www.irs.gov/pub/irs-wd/0947053.pdf</a>

## Organizations and Resources – E-Citations

### Organizations and Resources – E-Citations

<b>Organizations and Resources – E-Citations</b>	
<a href="#">American Society of Appraisers (ASA)</a>	
	<a href="http://www.appraisers.org/">http://www.appraisers.org/</a>
<a href="#">American Society of Farm Managers and Rural Appraisers (ASFMRA)</a>	
	<a href="http://www.asfmra.org/">http://www.asfmra.org/</a>
<a href="#">Appraisal Foundation</a>	
	<a href="https://www.asc.gov/National-Registry/NationalRegistry.aspx">https://www.asc.gov/National-Registry/NationalRegistry.aspx</a>
<a href="#">Appraisal Institute (AI)</a>	
	<a href="http://www.appraisalinstitute.org/">http://www.appraisalinstitute.org/</a>
<a href="#">Appraisal Standards Board</a>	
	<a href="https://www.appraisalfoundation.org/imis/TAF/About_Us/TAF_Boards/TAF/TAF_Boards.aspx?hkey=40ed8f0a-c2de-482e-8bf3-e00eb0db4f93">https://www.appraisalfoundation.org/imis/TAF/About_Us/TAF_Boards/TAF/TAF_Boards.aspx?hkey=40ed8f0a-c2de-482e-8bf3-e00eb0db4f93</a>
<a href="#">Appraisal Foundation - Find an Appraiser</a>	
	<a href="https://www.asc.gov/National-Registry/FindAnAppraiser.aspx">https://www.asc.gov/National-Registry/FindAnAppraiser.aspx</a>

## Organizations and Resources – E-Citations

### [Conservation Resource Center](#)

<http://www.taxcreditexchange.com/>

### [Cornell Law USCode](#)

<https://www.law.cornell.edu/uscode/text/26>

### [Cornell Law USRegs](#)

<https://www.law.cornell.edu/cfr/text/26/chapter-I>

### [Economic Research Institute](#)

<http://www.eri-nonprofit-salaries.com/index.cfm>

### [Google Earth](#)

<https://earth.google.com/>

### [Google Maps](#)

<http://maps.google.com/maps?hl=en&tab=wl>

### [Guidestar.org](#)

<http://www2.guidestar.org/>

### [Historic Preservation Tax Incentives Program](#)

<http://www.nps.gov/tps/tax-incentives.htm>

### [IRS Charity Search](#)

<https://www.irs.gov/charities-non-profits/search-for-charities>

### [IRS Office of Professional Responsibility \(OPR\)](#)

<https://www.irs.gov/tax-professionals/enrolled-actuaries/disciplinary-sanctions-internal-revenue-bulletin>

### [National Association of Independent Fee Appraisers \(NIAFA\)](#)

<http://www.naifa.com/>

### [National Register of Historical Places: Research](#)

<https://www.nps.gov/nr/research/>

### [Natureserve.org](#)

<http://www.natureserve.org/>

### [NPS National Park Service](#)

<http://www.nps.gov/index.htm>

## Organizations and Resources – E-Citations

<u>NPS National Park Service Technical Preservation Service</u>	
	<a href="https://www.nps.gov/tps/">https://www.nps.gov/tps/</a>
<u>NPS Web</u>	
	<a href="https://www.nps.gov/nr/research/">https://www.nps.gov/nr/research/</a>
<u>State Historic Preservation Offices</u>	
	<a href="http://www.ncshpo.org/">http://www.ncshpo.org/</a>
<u>U.S. Army Corps of Engineers</u>	
	<a href="http://www.usace.army.mil/">http://www.usace.army.mil/</a>
<u>U.S. Department of Agriculture</u>	
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<u>U.S. Fish and Wildlife Service</u>	
	<a href="http://www.fws.gov/">http://www.fws.gov/</a>
<u>Uniform Standards of Professional Appraisal Practice (USPAP)</u>	
	<a href="https://www.appraisalfoundation.org/imis/TAF/Resources/Courses/USPAP_Courses/TAF/USPAP_Courses.aspx?hkey=0d793914-9db1-4a5c-a387-f2f2b1681abc">https://www.appraisalfoundation.org/imis/TAF/Resources/Courses/USPAP_Courses/TAF/USPAP_Courses.aspx?hkey=0d793914-9db1-4a5c-a387-f2f2b1681abc</a>
<u>Zillow</u>	
	<a href="http://www.zillow.com/">http://www.zillow.com/</a>

## Appendix: Penalties

### Overview

Penalties encourage voluntary compliance by supporting the standards of behavior required by the Internal Revenue Code.<sup>261</sup> Penalties may be imposed on the taxpayer, return preparer, appraisers and/or other tax advisors.

The “usual” penalties apply to charitable conservation easements.

See the IRM 20.1, *Penalty Handbook*, for additional guidance on penalties.

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<sup>261</sup> IRC § 6751(b)

## Accuracy-Related Penalties

IRC § 6662 imposes accuracy-related penalties on underpayments. The maximum accuracy-related penalty imposed on any portion of an underpayment is 20% (40% in the case of a gross valuation misstatement), even if that portion of the underpayment is attributable to more than one type of misconduct.

### *IRC § 6662(c) Negligence or Disregard of Rules or Regulations*

A 20% accuracy-related penalty can be asserted if the underpayment of tax is attributable to negligence or to careless, reckless, or intentional disregard of rules or regulations.<sup>262</sup>

Negligence includes any failure to make a reasonable attempt to comply with the provisions of the Internal Revenue Code or to exercise ordinary and reasonable care in the preparation of a tax return.<sup>263</sup>

In *Turner v. Commissioner*<sup>264</sup> the tax court held Turner liable for a 20% negligence penalty. The appraiser's report was not sufficient to satisfy the reasonable cause exception<sup>265</sup> because the report was based on erroneous assumptions.

The term “disregard” includes any careless, reckless, or intentional disregard of rules or regulations. Disregard is careless if the taxpayer does not exercise reasonable diligence to determine the correctness of a return position that is contrary to a rule or regulation. Disregard is reckless where the taxpayer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable person would observe. Disregard is intentional where the taxpayer has knowledge of the rule or regulation that the taxpayer disregards.<sup>266</sup>

“Rules or regulations” under this section include the provisions of the Internal Revenue Code, temporary or final Treasury regulations, and revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin.<sup>267</sup>

If the facts indicate that the taxpayer took a return position contrary to a published notice or revenue ruling, the taxpayer may be subject to the accuracy-related penalty for an underpayment attributable to disregard of rules or regulations.

See IRM 20.1.5.7, *Negligence or Disregard of Rules or Regulations* for additional guidance.

### *IRC § 6662(d) Substantial Understatement of Income Tax*

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<sup>262</sup> IRC § 6662(c)

<sup>263</sup> IRC § 6662(c); Treas. Reg. § 1.6662-3(b)

<sup>264</sup> [Turner v. Commissioner, 126 T.C. 299 \(2006\)](#)

<sup>265</sup> IRC § 6664(c)

<sup>266</sup> Treas. Reg. § 1.6662-3(b)(2)

<sup>267</sup> IRC § 1.6662-3(b)(2)

A 20% accuracy-related penalty can be asserted if the underpayment of tax is attributable to a substantial understatement of income tax.<sup>268</sup>

A substantial understatement of income tax exists for a taxable year of an individual if the amount of understatement exceeds the greater of 10% of the tax required to be shown on the return or \$5,000.<sup>269</sup>

An understatement of income tax of a corporation (other than an S-Corporation or a personal holding company) is substantial if it exceeds the lesser of (i) 10% of the tax required to be shown on the return (or, if greater, \$10,000), or (ii) \$10,000,000.

The amount of the understatement generally is reduced by the portion of the understatement attributable to any item if:

- The treatment is, or was, supported by substantial authority, or
- Facts relevant to the tax treatment were adequately disclosed on the return or on a statement attached to the return and there is a reasonable basis for the tax treatment.

The exceptions do not apply tax shelters: i.e. (1) a partnership or other entity, (2) any investment plan or arrangement, or (3) any other plan or arrangement if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.<sup>270</sup>

See IRM 20.1.5.8, *Substantial Understatement*, for additional guidance.

### *IRC § 6662(e) Valuation Misstatements*

A 20% accuracy-related penalty can be asserted if the underpayment of tax is attributable to a substantial valuation misstatement.<sup>271</sup>

A 40% accuracy-related penalty can be asserted if the underpayment of income tax is attributable to a gross valuation misstatement.<sup>272</sup>

A substantial valuation misstatement exists when the claimed value of any property is 150% or more of the amount determined to be the correct value. A gross valuation misstatement occurs when the claimed value of any property is 200% or more of the amount determined to be the correct value.

No penalty is imposed unless the portion of the underpayment attributable to the valuation misstatement exceeds \$5,000 (\$10,000 in the case of a corporation other than an S corporation or a personal holding company).

**Note:** The Pension Protection Act<sup>273</sup> amended the rules for the 40% gross valuation misstatement penalty. Before PPA, the penalty applied when taxpayers misstated the value of their property by 400% or more. Taxpayers could avoid the penalty under certain circumstances if they made the misstatement

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<sup>268</sup> IRC § 6662(d)

<sup>269</sup> IRC § 6662(d)(1)

<sup>270</sup> IRC § 6662(d)(2)(C)

<sup>271</sup> IRC §§ 6662(e) & (e)(1)

<sup>272</sup> IRC § 6662(h)

<sup>273</sup> [Pension Protection Act of 2006 \(PPA\), Pub. L. No. 109–280, sec. 1219\(a\)\(2\)\(B\), 120 Stat. at 1083](#)

in good faith and with reasonable cause. The reasonable cause exception applied to both substantial and gross valuation misstatements. The PPA lowered the threshold for gross valuation misstatements to 200% and eliminated the reasonable cause exception for gross valuation misstatements of charitable contribution property.<sup>274</sup>

See IRM 20.1.5.9, *Substantial Valuation Misstatement*, for additional guidance.

### ***IRC § 6663 Civil Fraud Penalties***

IRC § 6663 states that if any portion of the underpayment of tax is due to fraud, a penalty of 75% may be asserted on the portion of underpayment attributable to fraud.

See IRM 20.1.5.12, *Civil Fraud Penalty*, for additional guidance.

### ***IRC § 6664 Reasonable Cause Exception***

No penalty will be asserted under IRC §§ 6662 or 6663 if the taxpayer establishes there was reasonable cause for the underpayment and you acted in good faith.<sup>275</sup>

Reasonable cause is determined on a case-by-case basis based on all the pertinent facts and circumstances. To determine whether reasonable cause exists, examiners consider your experience, knowledge, education, the extent of your review or inquiry in assessing the correctness of the conservation easement donation, and whether you relied on appraisers, return preparers or other professionals.

See IRM 20.1.5.6, *Reasonable Cause*, for additional guidance.

### ***Special Rules for Overvaluation of Charitable Contributions***

#### *Reasonable Cause*

Reasonable cause applies to substantial valuation misstatements of charitable contribution property, only if:

- The claimed value of the property was based on a Qualified Appraisal made by a Qualified Appraiser, and
- The Taxpayer made a good faith investigation of the value of the contributed property.

Accordingly, if the claimed value of a donated property is substantially overvalued (150% or more), the reasonable cause exception cannot apply unless the appraisal was a Qualified Appraisal by a Qualified Appraiser and the taxpayer also made a good faith investigation of the value.

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<sup>274</sup> IRC §§ 6662(h) & 6664(c)

<sup>275</sup> IRC § 6664(c)(1)

The reasonable cause exception is not available for gross valuation misstatements.<sup>276</sup>

#### *Reasonable Reliance on Professionals*

Reliance on a return preparer or other professional such as an attorney or appraiser does not automatically constitute reasonable cause and good faith.<sup>277</sup>

Reliance constitutes reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith.

Reasonable cause and good faith exist if the taxpayer can demonstrate that:

- They did not know, nor should have known, that the advisor suffered from a conflict of interest or a lack of expertise,
- They provided complete, accurate and all necessary information to the advisor, and
- They actually relied in good faith on the advisor's judgment.

Review IRM 20.1.5.6.4, *Reliance on Advice*, for additional guidance.

## Return Preparer Penalties

The IRS's Agent may impose preparer penalties for "Understatement of Taxpayer's Liability by Tax Return Preparer."<sup>278</sup> Preparer penalties can be asserted only after consideration of all facts and circumstances. They cannot be imposed based solely on the determination of deficiencies. Under certain circumstances<sup>279</sup> appraisers may be sanctioned under this provision in lieu of appraiser penalties.<sup>280</sup>

IRM 20.1.6.3, *Preparer Conduct Penalties*, provides additional guidance on the return preparer penalties.

## Appraiser Penalties

A civil penalty may be imposed on any person who prepares an appraisal of the value of property that the appraiser knows (or reasonably should have known) is to be used with a return or a claim for refund, if the appraisal results in a substantial or gross valuation misstatement.<sup>281</sup>

The amount of the penalty is the lesser of:

- The greater of 10% of the amount of the underpayment attributable to the misstatement or \$1,000, or
- 125% of the gross income received from the preparation of the appraisal

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<sup>276</sup> IRC § 6664(c)(3)

<sup>277</sup> Treas. Reg. § 1.6664-4(b)

<sup>278</sup> IRC § 6694

<sup>279</sup> E.g. if the appraiser meets the definition of a non-signing return preparer; Treas. Reg. § 301.7701-15(b)(2)

<sup>280</sup> IRC § 6695A

<sup>281</sup> IRC § 6695A; substantial and gross misstatements are defined in IRC §§ 6662(e) & (h)

This penalty applies to returns with respect to easements based on any of the first three Conservation Purposes.<sup>282</sup> The penalty does not apply if the appraiser establishes that it was "more likely than not" that the value established in the appraisal was correct.<sup>283</sup>

The statute of limitations for the appraiser penalty case is three years from the later of the due date of the related return or the date the return was filed. Securing an extension of the statute for the return being examined does not extend the appraiser penalty statute. Consent to extend the statute on the appraiser assessment must be sought separately on Form 872-AP, Consent to Extend the Time on Assessment of IRC Section 6695A Penalty.

The appraiser has no pre-assessment appeal rights before the penalty is proposed. The appraiser may request an appeals conference only upon notice of the service's intent to assess the penalty.

Appraisers may also be penalized or sanctioned for direct or indirect participation in the sale of a tax plan or arrangement that results in a material gross overvaluation misstatement (an "Abusive Tax Shelter").<sup>284</sup> Additional sanctions apply if the appraiser knows or had reason to believe that the appraisal was to be used in connection with a material tax matter and knows that use of the document would result in an understatement of tax.<sup>285</sup>

See IRM 20.1.12, *Penalties Applicable to Incorrect Appraisals* for additional guidance on the assessment of this penalty.

## Promoter Penalties

The IRS's Agent may refer return preparers, appraisers, promoters, authors of legal opinions, Donee organizations, or anyone else who was directly or indirectly involved with a scheme or promotion advocating improper or overvalued conservation easement donations to the SB/SE Lead Development Center (LDC).

The Agent may secure information on the role and level of involvement of each person in conjunction with the determination of the appropriateness of taxpayer penalties. However, the Agent cannot commence a Promoting Abusive Tax Shelters, Etc.,<sup>286</sup> or an Aiding and Abetting Understatement of Tax Liability,<sup>287</sup> penalty investigation without specific authorization from the SB/SE LDC.

See IRM 20.1.6.1, *Overview of the Return Preparer, Promoter, and Material Advisor Penalties*, and IRM 4.32 for additional guidance.

## Office of Professional Responsibility Sanctions

The Agent may now seek disciplinary action before the [Office of Professional Responsibility](#) (OPR) against a tax professional, appraiser, or promoter before asserting a penalty for

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<sup>282</sup> See IRC § 170(h)(4)(A) for these purposes.

<sup>283</sup> IRC § 6695A(c)

<sup>284</sup> IRC § 6700

<sup>285</sup> IRC § 6701

<sup>286</sup> IRC § 6700

<sup>287</sup> IRC § 6701

aiding and abetting.<sup>288</sup> The Pension Protection Act (2006) eliminated the penalty assessment requirement.

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<sup>288</sup> IRC § 6701