

Facade Easement Contributions

The purpose of this brief is to review the basic requirements with respect to the charitable contribution of a façade easement. A façade easement preserves an historical structure by restricting changes to the structure. This assures the owner of the historic structure that its façade will be maintained, protected and preserved forever. The Pension Protection Act of 2006 (PPA) added several new requirements with respect to a façade easement contribution. The PPA is effective for charitable contributions made after July 25, 2006. This brief explains the current requirements of the Internal Revenue Code, as amended by the PPA, for the charitable contribution of a façade easement. Some of the requirements do not apply to a building that is individually listed in the National Register of Historic Places.

Façade Easement Requirements

To be deductible as a charitable contribution, a façade easement must be on a “certified historic structure”. Under Internal Revenue Code Section 170(h)(4)(C), a certified historic structure is any building, structure or land area which is listed in the National Register, or any building which is located in a registered historic district and is certified by the Secretary of Interior as being of historic significance to the district. A façade easement can be on a structure that is used for either business or non-business purposes, including a personal residence. A structure must be a certified historic structure at the time of the contribution or on the due date (including extensions)

for filing the donor’s income tax return for the taxable year of the contribution.

The easement must include restrictions preserving the entire exterior of the building (including front, sides, rear, and height) and prohibiting any change to the exterior of the building inconsistent with its historical character.

The public must have visual access to the façade upon which the easement is placed. If the façade is not visible from a public way, the terms of the easement must permit regular viewing of the façade by the general public.

The contribution of a façade easement must be to a “qualified organization”. This will generally be an organization that is an eligible donee under Internal Revenue Code Section 170(c) that has a conservation purpose and the resources and commitment to enforce the easement. The easement is normally conveyed to the donee organization by a deed which is then recorded in appropriate state or county records. The deed must preserve the façade in perpetuity. In addition, the donor and donee must enter into a written agreement certifying, under penalties of perjury, that the recipient organization is a qualified organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and has the resources to manage and enforce the restriction and a commitment to do so.

If a contribution of an interest in real property is subject to a mortgage, no deduction is allowed unless the mortgage holder subordinates its rights in the property to the right of the donee to enforce the façade easement in perpetuity.

Valuation

The donor of a façade easement may be entitled to claim a charitable contribution deduction equal to the fair market value of the easement. The value of the easement is normally determined by the “before and after” method. This approach appraises the underlying property before the grant of the easement and after the grant of the easement, with the difference being the value of the easement.

The fair market value of an easement should not be determined by applying a percentage reduction to the value of the underlying property before the easement. The IRS does not accept this percentage reduction as a method of valuing an easement.

It is possible that the grant of an easement will have no significant effect on the value of the property, particularly if the easement is not more restrictive than local ordinances already in effect.

Substantiation

No deduction is allowed unless the donor properly substantiates the charitable contribution. A deduction can be disallowed if any one of the following requirements is not met.

For a contribution of a façade easement made in a tax year beginning after August 17, 2006, the following must be attached to the donor’s income tax return:

- A “qualified appraisal” of the façade easement prepared by a “qualified appraiser” (no matter what the amount of the claimed deduction);

- A fully-completed Form 8283 (the “appraisal summary”);
- Photographs of the entire exterior of the building; and
- A description of all restrictions on the development of the building.

Qualified Appraisal and Qualified Appraiser. The Internal Revenue Code and Treasury Regulations provide specific requirements for a “qualified appraisal” and a “qualified appraiser”. In addition, in Notice 2006-96, 2006-2 C.B. 902, the IRS provided transitional guidance for the period ending on the date regulations implementing the PPA are finalized. A brief summary of the PPA requirements follows. However, the donor of a façade easement should be aware of the detailed requirements related to a qualified appraisal and qualified appraiser as set forth in Section 170(f)(11) of the Internal Revenue Code and Section 1.170A-13(c)(3) & (5) of the Treasury Regulations.

A qualified appraisal must comply with all the requirements of Treasury Regulation Section 1.170A-13(c)(3) and must be conducted by a qualified appraiser in accordance with generally accepted appraisal standards. It will be treated as meeting generally accepted appraisal standards if, for example, it is consistent with the substance and principles of the Uniform Standards of Professional Appraisal Practice. A qualified appraisal must be made not earlier than 60 days prior to the date of contribution of the appraised property and received by the donor before the due date (including extensions) of the return on which a deduction is first claimed.

Under Internal Revenue Code Section 170(f)(11)(E)(ii), a qualified appraiser is an individual who regularly performs appraisals for compensation and who has

earned an appraisal designation from a professional appraiser organization or has met minimum education and experience requirements as set forth in regulations. Notice 2006-96 provides that, until regulations are promulgated, an individual will be treated as meeting the appraisal designation requirement if the individual's appraisal designation is awarded on the basis of demonstrated competency in valuing the type of property for which the appraisal is performed. For an appraisal of real property, the appraiser will be treated as having met minimum education and experience requirements if the appraiser is licensed or certified for the type of property being appraised in the state in which the appraised property is located.

Under Internal Revenue Code Section 170(f)(11)(iii), for each specific appraisal, an individual will not be treated as a qualified appraiser unless the individual demonstrates verifiable education and experience in valuing the type of property subject to the appraisal and has not been prohibited from practicing before the IRS at any time during the 3-year period ending on the date of the appraisal. Notice 2006-96 provides that an individual will be treated as meeting the verifiable education and experience requirement 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 appraise the type of property being appraised.

Form 8283. A fully-completed Form 8283 is the "appraisal summary" and must be attached to the tax return for the year the property is contributed and a deduction is first claimed. For a contribution for which a deduction of more than \$5,000 is claimed, the form

requires signatures of the donee and the qualified appraiser, in addition to other important information relevant to the charitable contribution of the façade easement. See Treasury Regulation Section 1.170A-13(c)(4).

Contemporaneous Written Acknowledgment. For any charitable contribution of \$250 or more, no deduction is allowed unless the taxpayer obtains a contemporaneous written acknowledgment, as required by Internal Revenue Code Section 170(f)(8). This acknowledgment must contain the amount of cash and a description of any property contributed, whether the donee organization provided any goods or services in consideration for any property contributed and, if so, a description and good faith estimate of the value of any such goods or services. The donor must obtain the acknowledgment on or before the earlier of the date on which the taxpayer files a return for the year the contribution was made, or the due date (including extensions) for filing the return.

Filing Fee

For a charitable contribution of a façade easement made on or after February 13, 2007, if the claimed deduction is more than \$10,000, no deduction is allowed unless the taxpayer includes with the return a \$500 filing fee. See Form 8283-V, Payment Voucher for Filing Fee and the instructions at <http://www.irs.gov/pub/irs-pdf/f8283v.pdf>.

Rehabilitation Tax Credit and Charitable Contributions

When a façade easement is conveyed during the same year that a qualified rehabilitated building is placed in

service, the taxpayer will not be entitled to claim the portion of the rehabilitation tax credit attributable to the façade easement.

If a taxpayer claims a rehabilitation tax credit with respect to property and subsequently makes a qualified conservation contribution (i.e., a façade easement) with respect to the property, the charitable contribution is considered a partial disposition of the property. This event will trigger 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).

Please refer to Rev. Rul. 89-90, 1989-2 C.B. 3, and Rome I, Ltd.v. Comm., 96 T.C.697 (1991) for further information on the tax effect of combining the rehabilitation tax credit with a façade easement donation.

If, during the 5 preceding years, a rehabilitation credit under section 47 was claimed for the building, the amount of the charitable contribution deduction must be reduced by the ratio of the sum of the credits over the fair market value of the building on the date of contribution.

Penalties

A charitable contribution deduction may be disallowed and penalties imposed on the donor if substantiation or other requirements are not met, or if the façade easement is overvalued.

In addition, under Internal Revenue Code Section 6695A (added by the PPA), if the claimed value of property based on an appraisal results in a substantial or gross valuation misstatement, a penalty is imposed on any person who prepared the appraisal

and who knew, or reasonably should have known, the appraisal would be used in connection with a tax return or claim for refund. The appraiser must make a written declaration that he or she is aware of this penalty provision.