

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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subject: Section 170(h) and Conservation Easement Deed Extinguishment Clauses

This Chief Counsel Advice responds to your request for assistance. This document should not be used or cited as precedent.

**ISSUE**

Does a conservation easement fail to satisfy the requirements of section 170(h) of the Code if the deed contains language subtracting from the donee's extinguishment proceeds the value of post-donation improvements or the post-donation increase in value of the property attributable to improvements?

**CONCLUSION**

Yes. Decreasing the portion of the proceeds that is required to be allocated to the donee upon extinguishment under Treas. Reg. § 1.170A-14(g)(6)(ii) causes the easement to fail to satisfy the requirements of section 170(h) unless, as provided in Treas. Reg. § 1.170A-14(g)(6)(ii), state law provides that the donor is entitled to the full proceeds from the conversion.

**LAW AND ANALYSIS**

Section 170(a) of the Code provides the general rule that a deduction is allowed for a charitable contribution made within the taxable year. The deduction is allowed only if

the charitable contribution is verified under regulations prescribed by the Secretary. See also Treas. Reg. § 1.170A-1.

Section 170(f)(3)(A) provides the general rule that a contribution (not made by a transfer in trust) of an interest in property that consists of less than the taxpayer's entire interest in such property will generally not qualify as a charitable contribution. This rule is commonly referred to as the "partial interest rule." See also Treas. Reg. § 1.170A-7. Section 170(f)(3)(B)(iii) provides an exception to the partial interest rule for a "qualified conservation contribution." See also Treas. Reg. § 1.170A-7(b)(5).

Section 170(h)(1) defines the term "qualified conservation contribution" as a contribution (A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes. Section 170(h)(2) defines the term "qualified real property interest" as any of the following interests in real property: (A) the entire interest of the donor other than a qualified mineral interest, (B) a remainder interest, and (C) a restriction (granted in perpetuity) on the use which may be made of the real property. Section 170(h)(4) defines the term "conservation purpose." Section 170(h)(5)(A) provides that a contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity. A conservation easement must meet both of these perpetuity requirements, meaning the property interest must be granted in perpetuity under section 170(h)(2)(C) and enforceable in perpetuity under section 170(h)(5)(A).

Treasury Regulation § 1.170A-14(g)(6)(i) provides that if conditions surrounding the property unexpectedly change, and if those changes make continued use of the property for conservation purposes impossible or impractical, then the conservation purpose can nonetheless be treated as protected in perpetuity if the easement is extinguished by judicial proceeding and the donee organization uses all of its proceeds from the sale or exchange of the property in a manner that is consistent with the original contribution's conservation purposes.

Treasury Regulation § 1.170A-14(g)(6)(ii) sets forth requirements for the distribution of proceeds in the event the easement is extinguished. It provides that, for a deduction to be allowed, at the time of the gift, the donor must 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 that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the value of the property as a whole at that time. That proportionate value of the donee's property rights must remain constant. As such, if the easement is extinguished, the donee organization must be entitled to a portion of the proceeds at least equal to the proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction. The regulation states that the donor must agree to these requirements at the time of the donation for the donor to be eligible to claim a charitable contribution deduction.

The Tax Court has held that the requirements of Treas. Reg. § 1.170A-14(g)(6)(i) and (ii) are strictly construed; if a grantee is not absolutely entitled to a proportionate share of extinguishment proceeds, then the conservation purpose of the contribution is not protected in perpetuity. Carroll v. Commissioner, 146 T.C. 196, 212 (2016). Reducing the portion of the grantee's proceeds by the value of any post-donation improvements or any post-donation increase in value of the property attributable to improvements reduces the grantee's proportionate share of proceeds and violates Treas. Reg. § 1.170A-14(g)(6)(ii) unless state law provides that the donor is entitled to the full proceeds from the extinguishment. See PBBM- Rose Hill, Ltd. v. Commissioner, 900 F.3d 193, 208 (5th Cir. 2018); Coal Property Holdings, LLC v. Commissioner, 153 T.C. 126, 144 (2019).

A judicial proceeding is the exclusive manner in which a perpetual conservation restriction may be extinguished, and only if a subsequent unexpected change in the conditions surrounding the property that is the subject of this easement has made the continued use of the property for conservation purposes impossible or impractical.

Language in a conservation easement deed that closely adheres to the language of Treas. Reg. § 1.170A-14(g)(6)(ii) generally will not cause a deed to violate the enforceability in perpetuity requirements. For an example, see the following sample conservation easement deed language:

Donor agrees that the donation of the perpetual conservation restriction described in this deed gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction, at the time of the gift, bears to the fair market value of the property as a whole at that time. For purposes of this paragraph, the proportionate value of the donee organization's property rights shall remain constant.

On a subsequent sale, exchange, or involuntary conversion of the subject property, the donee organization will be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction.

All of the donee organization's proceeds from a subsequent sale or exchange of the property must be used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

If there are any questions, please call Joshua Klaber of IT&A at (202) 317-4624.

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By: \_\_\_\_\_

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