

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

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

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

ISSUE

Whether a conservation easement fails to satisfy the requirements of section 170(h) of the Code as a matter of law if it contains an amendment clause.

CONCLUSION

No. The fact that a conservation easement includes an amendment clause does not necessarily cause the easement to fail to satisfy the requirements of section 170(h).

BACKGROUND

There are many cases pending in LBI and SB/SE involving the disallowance of a section 170 deduction for the contribution of a conservation easement. A significant number of these cases contain issues concerning the interpretation of the deed and the effect of certain clauses, including amendment clauses. You have requested our advice pursuant to CCDM 33.1.2.2.3.5 to help determine whether there is compliance with the

perpetuity requirements more precisely and efficiently and to ensure consistent treatment of similarly situated taxpayers.

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) provides various rules concerning qualified conservation contributions. 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.

An amendment clause must be considered in the context of the deed as a whole and the surrounding facts and circumstances to determine the parties' rights, powers, obligations, and duties. This determination requires a case-by-case analysis.

With the caveat that the inquiry is based on the deed as a whole and the surrounding facts and circumstances, the following provision is compliant with the perpetuity requirements of section 170(h):

Grantee and Grantor may amend this Easement to enhance the Property's conservation values or add real property subject to the restrictions set forth in this deed to the restricted property by an amended deed of easement, provided that no amendment shall (i) affect this Easement's perpetual duration, (ii) permit development, improvements, or uses prohibited by this Easement on its effective date, (iii) conflict with or be contrary to or inconsistent with the conservation purposes of this Easement, (iv) reduce the protection of the conservation values, (v) affect the qualification of this Easement as a "qualified conservation contribution" or "interest in land", (vi)

affect the status of Grantee as a “qualified organization” or “eligible done”, or (vii) create an impermissible private benefit or private inurement in violation of federal tax law. No amendment shall be effective unless documented in a notarized writing executed by Grantee and Grantor and recorded in the Clerk’s Office of the Circuit Court of [County, State].

If there are any questions, please call Sophia Wang of IT&A at (202) 317-5100.

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