Understanding the Conservation Easement Tax Deduction

(or “Strawberry Fields Forever”)[1]

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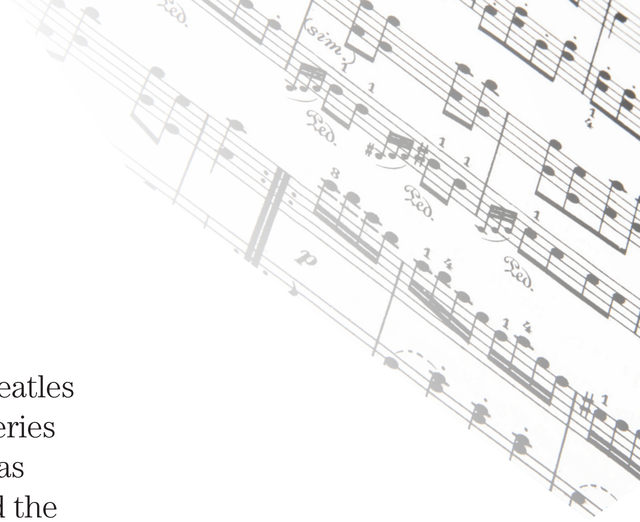

Ed Sullivan introduced 73 million Americans to the Beatles in 1964.[2] The band's massive popularity sparked a series of mop-topped copycats in what came to be known as the British Invasion. The Dave Clark Five, Gerry and the Pacemakers, and the Searchers all followed the Beatles' formula to immediate success, but none of those bands has weathered the test of time like the Beatles. The Beatles surpassed those other bands in the annals of history because their music evolved into something five years later that was almost unrecognizable to one of those 1964 listeners. The songs were more complex, more intricate, and, in some ways more challenging—yet they still remained immensely popular. Many would maintain that those songs are among the very best songs recorded by the band.

Conservation easements have been a popular preservationist's tool for decades, in large part because of the tax benefits available to easement donors. The concept is straightforward: The donor grants a restrictive easement over a qualifying property to a qualifying organization and receives a tax deduction for the charitable contribution based on the value of the easement. The popularity of conservation easements remains steadfast too—if not greater than ever—for both the taxpayers who donate them and the nonprofit organizations that hold them. But like the legendary band, the sustained popularity of this land-protection tool has resulted in a much more complicated and detailed tax instrument. Today, a carefully crafted and well-executed qualified conservation easement truly is an intricate thing.

Akin to a Midwestern teenager's first visit to Central Park, this article is only an introduction to the topic of conservation easements and not a thorough tour of the landscape. We will trace the history of conservation easements, particularly as an element of tax policy, and culminate with a partial review of recent developments in litigation.[3] The rules respecting the deductibility of conservation easement donations are numerous and detailed. They stem not only from the statute and regulations but also from a variety of judicial opinions. This incomplete primer is not an adequate substitute for a consultation with an experienced practitioner with expertise in this subject matter.

So May I Introduce to You[4] (Getting to Know Conservation Easements)

Conservation easements protect both environmental resources, often called open space easements, as well as historical landmarks, sometimes known as façade easements. A conservation easement is first a matter of local real property law.[5] In short, a conservation easement is a negative easement restricting the particular use of a property. The first "conservation easement" protected Frederick Law Olmstead's Boston Greenways in the late 1880s.[6] Conservation easements again were seen early in the 20th century when they were employed by the National Park Service to build the national park system.[7] This article, however, does not address the necessary elements of an effective conservation easement as a matter of local law or real property law. Rather, this article will focus on the particular requirements for the donation of a valid conservation easement to be eligible for a federal income tax deduction.

The last 10 years have seen considerable growth in the scope and number of conservation easements.[8] In 2003, 5 million acres were encumbered by conservation easements in the United States.[9] By 2014, the National Conservation Easement Database estimated that between 22 million and 40 million acres of American real estate was subject to conservation easements.[10] Undoubtedly, the federal tax deduction for qualified conservation contributions has contributed to this growth.

With so many easements and so many deductions, the Internal Revenue Service (IRS) also has been very active in the examination and litigation of the conservation contribution deduction in last decade. The volume of reported opinions in which the IRS has challenged the bona fides of, for example, façade easements has prompted some commentators to question whether these donations are still viable tax deductions.[11]

Despite the IRS scrutiny, conservation easements remain popular with congressional leaders and nonprofit organizations seeking to protect natural habitats and historical resources through the inducement of a tax deduction. While IRS examiners have been on the initiative, the deduction for conservation easements has enjoyed a preference over other outright charitable gifts since 2006 in a provision that has been repeatedly renewed by Congress.

"With a Little Help From My Friends"[12] (Encouraging Conservation Through Tax Deductions)

The preservationists' tool was not introduced to the incentive of a federal tax deduction until the 1960s, but they soon became friends. The IRS affirmed the first favorable federal tax treatment of a conservation easement in a 1964 Revenue Ruling. The IRS declared:

> The gratuitous conveyance to the United States of America of a restrictive easement in real property to enable the federal government to preserve the scenic view afforded certain public properties, is a charitable contribution within the meaning of § 170 of the Internal Revenue Code of 1954. The grantor is entitled to a deduction for the fair market value of the restrictive easement. …[13]

Though deductions for the donation of conservation easements presumably were permitted under the 1964 guidance, the deduction was not incorporated into the Internal Revenue Code for over a decade. In the meantime, 16 states adopted legislation allowing for conservation easements between 1969 and 1975.[14]

The Tax Reform Act of 1976 amended the deduction for charitable gifts to include the donation of an easement exclusively for conservation purposes. The deduction was, and still is, an exception to the general rule that charitable contributions of partial interests in property are not deductible.[15]

The 1976 Act allowed a deduction for the donation of a lease, option to purchase, or easement of at least 30 years over real property to a governmental unit or qualifying charitable organization exclusively for conservation purposes.[16] Conservation purpose was defined as the preservation of: land areas for public outdoor recreation, education, or scenic enjoyment; historically important land areas or structures; or natural environmental systems.[17] The new deduction, however, was set to expire after 12 months.[18]

In the first act of congressional loyalty to the conservation contributions, the deduction was saved and extended with the Tax Reduction and Simplification Act of 1977. It was renewed, however, with a simple amendment that would have an enduring effect on the tax treatment of conservation easement donations.[19] The 30-year duration of a qualifying lease, option, or easement in the 1976 language was dropped and replaced with the requirement that the contribution be "granted in perpetuity."[20] The change was intended to ensure that perpetual easements qualify "only in situations where the conservation purposes … will in practice be carried out"[21] and to "limit deductible contributions to those transfers which require that the donee hold the easement."[22]

The amendment might also be viewed as an attempt to establish an objective standard for the donative intent behind a qualified conservation contribution. All deductible charitable contributions require a gift of property to a qualifying entity.[23] The transfer of the donor's entire interest in the contributed property generally provides some tangible evidence of the donative intent of the gift, i.e., the donor no longer has it, but the donee does.[24] The intangible nature of a conservation easement can make it seem as though the donor has given away nothing at all. A donor may grant a restrictive conservation easement over his property but still retain many of the benefits of the property, including ownership and possession. The perpetuity of conservation purpose is meant to discourage any notion that a use restriction can be traded for a current tax deduction and removed when the restriction becomes inconvenient or the deduction invaluable.

Viewed from that perspective, and consistent with the brief legislative history, it seems the enduring restriction on the donor's property was intended as an objectively measured proxy for the donor's intent. The perpetual gift demonstrated the donor's intention to relinquish the granted rights to the property permanently. As we will see, if that was indeed the congressional intent, it has been lost in courtroom battles over technical readings of regulations that established that theoretical objective standard.

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"Strawberry Fields Forever"[25] (The Conservation Contribution Deduction Becomes Permanent)

The charitable deduction for the donation of a conservation easement became a permanent part of the Internal Revenue Code in 1980.[26] Section 170(h) allows a deduction for a "qualified conservation contribution." Whether preserving undeveloped property or protecting a historical location, a qualified conservation contribution is a qualified real property interest, donated to a qualified organization, exclusively for conservation purposes.[27]

A qualifying property interest may be one of three property interests: the entire interest of the donor other than a qualified mineral interest, a remainder interest, or a restriction (granted in perpetuity) on the use of the real property. Leases and options were not preserved as qualifying property interests but were subsumed into the new provision for perpetual use restrictions.[28] The subsequent case law indicates that the most common, or at least most often disputed, qualified property interest is a perpetual use restriction over real property.[29]

A qualified conservation contribution also requires that the property interest be donated to a qualifying organization.[30] While a qualified organization may include governmental units, and any number of publicly-supported charitable groups, many qualified organizations that hold conservation easements are established for the purpose of protecting habitats and landmarks, such as Ducks Unlimited and The L'Enfant Trust Inc.

The qualified conservation contribution must be made "exclusively for conservation purposes." The definition of conservation purpose retained the intent of the original statutory provision but also expanded its scope, i.e., the preservation of open space,[31] and added detail, e.g., defining certified historical structures.[32] The expanded definition also emphasized that a contribution is not exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.[33] The emphasis on a perpetual conservation purpose in the statute is echoed in the regulations and, as we will see below, has been central in the development of the case law.

Finally, the rules for qualified appraisers and qualified appraisals, which generally apply to any gift of property over $5,000, also apply to conservation easement donations.[34] These rules have also been enmeshed in much of the conservation easement litigation.

"We Can Work It Out" (Amending the Conservation Contribution)

The Pension Protection Act of 2006 contained a series of riders targeting certain elements of conservation easement donations. The 2006 amendments were the culmination of a wave of interest in conservation easements apparently triggered by a series of articles in *The Washington Post* in early 2003.[35] The reporters claimed abuses in the valuation of donation appraisals that formed the basis for deductions and questioned the validity of certain façade easements that replicated protections already in place under local law. The questions raised in the articles were not necessarily novel and had even been litigated before but seemed to raise agency interest.[36]

In summer 2004, the IRS issued Notice 2004-41, which claimed knowledge of taxpayers that "may be improperly claiming charitable contribution deductions under § 170 of the Internal Revenue Code."[37] The notice advised taxpayers that the IRS would disallow deductions and impose penalties in such cases. It also suggested that it would penalize promoters and appraisers and revoke the tax-exempt status of charitable organizations that were involved in these transactions.[38]

The Washington Post published a second cluster of articles in late 2004.[39] The latter series of articles apparently caught the attention of the Joint Committee of Taxation, who launched an investigation. The Senate Finance Committee followed that with a hearing in June 2005. Steven T. Miller,[40] then-deputy commissioner for the Tax-Exempt & Government Entities Division, testified that the IRS would attack the problem of conservation easements and increase examinations of easement donors.[41]

As a result of the uproar, Congress included amendments to qualified conservation contributions, and charitable gifts in general, as part of the Pension Protection Act of 2006. The actual amendments, however, reflect the competing perspectives on the tax benefits associated with conservation easements. Special rules were added for eligible contributions of façade easements.[42] The thresholds for the imposition of accuracy-related penalties were lowered, and the reasonable cause defense for gross valuation misstatements was eliminated.[43] General statutory definitions for qualified appraisers and appraisals were also added.[44]

With the same series of amendments, Congress increased the allowable tax benefit for making a conservation easement donation. Before 2006, qualified conservation contributions were subject to the same rules as any charitable contribution of capital gain property. That is, the donations were deductible up to 30 percent of the donor's adjusted gross income (AGI) and the excess deduction, if any, may carry over for application to any of the following five tax years.[45] The 2006 amendments increased the deduction limit to 50 percent for conservation contributions and added 10 years to the carry-over period, for a total of 15 years.[46]

"What's the New Mary Jane"[47] (Current Legislative Developments)

Even as the IRS initiates hundreds of conservation contribution examinations and sends dozens of cases to the Tax Court, the IRS is well aware of the sustained congressional support of the conservation contribution deduction. Congress has repeatedly renewed the 50 percent deduction preference/15-year carry-over provision added in 2006—and it has done so with IRS support.[48] At the same time, the IRS has proposed restrictions on the organizations that hold conservation easements, modifications to the meaning of conservation purpose, and more reporting requirements for donors.[49] The tension between these two positions on conservation easement deductions—aggressive enforcement and preservation of preferential treatment—sends a mixed signal to donors and taxpayers.

"Taxman"[50] or "You Can't Do That"[51] (IRS Litigation Over Conservation Contributions)

Understanding conservation easement donations today is driven as much by case law as it as by the enabling statute and guiding regulations. Commentators suggest that as many as 70 opinions have been issued on the tax treatment of conservation easement donations since 2005.[52] The reported opinions have dealt with a number of different requirements for a qualified conservation contribution, sometimes with contradictory results.[53]

For many years, the government's litigation approach to a qualified conservation contribution focused on the accuracy of the easement valuation. These disputes regularly involved dueling real estate experts and were often resolved when either the parties or the court engaged in a Solomonic division of value. Each case was driven by

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the specific facts surrounding the donation, valuation, and timing of the gift.

Recognizing the time and expense associated with these cases, the IRS changed its litigation strategy. It shifted to a focus on technical defects in the easement execution and began filing motions for summary judgment seeking early dismissal of these cases as a matter of law. Recent court opinions have been shaped by this litigation strategy.

The IRS has adopted litigation positions pressing specific interpretations of several regulatory requirements—in particular the regulations governing conservation purpose and qualified appraisals. The strategy has heightened (maybe artificially) the importance of language in lender agreements, local recordation statutes, donation documentation, and easement boundaries as the IRS seeks technical foot faults that might allow the disposition of cases without addressing the merits of the conservation donation or its value. As hinted at above, the strategy has been met with mixed results yielding contrary authority in some circuits.[54]

The litigation strategy also raises the important question of whether the IRS' positions are consistent with congressional intent. If, for example, the conservation purpose regulations do serve as a proxy for donative intent, should a technical error in execution deprive the taxpayer of a deduction for the contribution? Is that consistent with the spirit of the law?

"When I'm Sixty-Four"[55] (The Problem of Perpetuity)

The question of what constitutes a perpetual conservation purpose was central to two cases that challenged deductions for façade easement donations. In *Simmons v. Commissioner*,[56] the taxpayers donated façade easements over two Washington, D.C., parcels to The L'Enfant Trust Inc. The IRS argued that provisions in the easement deed that allowed the donee to consent to alterations of the façade or to abandon its rights altogether were inconsistent with a donation in perpetuity and in violation of the regulation. The Tax Court disagreed, finding that a deed provision requiring that any changes to the façade be consistent with local, state, and federal laws was sufficient to protect the conservation purpose of the donation. The government appealed, and the D.C. Circuit affirmed the Tax Court.[57] The D.C. Circuit specifically noted the local rules hinted at in the Tax Court opinion and held that the consent and abandonment clauses have "no discrete effect on the perpetuity of the easements."[58]

In *Kaufman v. Commissioner*,[59] the Tax Court ruled as a matter of law that a provision in the mortgage subordination agreement[60] that gave the lender priority over insurance proceeds in the event of a casualty event did not preserve the conservation purpose of the donation in perpetuity. The court reasoned that the donation of a façade in Boston's South End historical district was not protected in perpetuity, because the donee's right to its proportionate share of future proceeds was not guaranteed.

The First Circuit Court of Appeals reversed the Tax Court,[61] noting the reasonableness of a position that would deny the donors the benefit of a windfall from insurance proceeds (in short, getting back cash for their donation) but holding that such a position should not be extended to third parties. The Circuit Court held that such a "reading of its regulation would appear to doom practically all donations of easements, which is surely contrary to the purpose of Congress."[62] The First Circuit's opinion in *Kaufman,* like the D.C. Circuit's opinion in *Simmons,* implies an acknowledgement of the goal of the perpetual conservation purpose regulations, i.e., to create an objective measurement of the donor's intent to part with the property permanently, not to guarantee that the donation forever remain unchanged in the hands of donee.

"Any Time At All"[63] (Timing of Recordation)

The timely recordation of easement deeds and mortgage subordination agreements has generated a series of cases that also consider the perpetual duration of conservation purpose. Failure to record at the time of the donation is a consistent theme in these cases and calls into question the respective taxpayers' motives. These are cases where the failure to meet an objective standard for donative intent (conservation purpose) is easier to reconcile with taxpayers' actions (or lack thereof).

The Tax Court has considered several New York City façade easements—all generally governed by the laws of New York state. Yet two memorandum opinions of the Tax Court both dealing with the timely recordation of the easement deed reached different results based largely on different facts. The taxpayers in *Gorra v. Commissioner* executed a conservation deed over the façade of their New York City home in 2006 and entrusted it to the donee trust for recording.[64] The taxpayers took a 2006 tax deduction for the easement donation, and the IRS challenged it on the basis that the deed had not been recorded (thus, not securing the conservation purpose in perpetuity). The deed was delivered to the city registrar in 2006 but was not recorded until January 2007. The court found that the easement deed was recorded at the time of delivery and allowed the 2006 deduction (though the value of the deduction was ultimately reduced due to the quality of the taxpayer's appraisal).[65]

The taxpayers in *Zarlengo v. Commissioner* also executed a façade easement in New York City.[66] The taxpayers executed the conservation deed with the donee in September 2004 and took a deduction for the 2004 tax year based on the conservation contribution. However, the deed was not recorded until January 2005.[67] The IRS challenged the deduction because, without recordation, the conservation purpose was not protected in perpetuity. The *Zarlengo* court agreed, relying on a provision of New York law specific to conservation easements requiring recordation.[68] Because recordation was mandatory for recognition of the instrument under local law, the court found that the recordation date controlled and denied the deduction for 2004.

Conservation deeds are not the only documents subject to timely recordation to protect a conservation purpose in perpetuity. The regulations require that any mortgages on the encumbered property must be subordinated to the easement to protect the conservation purpose. If those documents are not recorded at the time of the donation, the gift will not meet the perpetual conservation purpose requirement.

The taxpayers in *Mitchell v. Commissioner*[69] executed a conservation easement in December 2003. The encumbered property was subject to a private mortgage secured by a deed of trust. The deed of trust was not subordinated to the conservation deed until 2005. The taxpayers took a deduction for the conservation contribution on their 2003 tax return, and the IRS challenged it on the grounds that the failure to subordinate the deed at the time of the gift did not protect the conservation purpose in perpetuity. The taxpayers countered, relying on another regulation defining conservation purpose—specifically, that a deduction will not be disallowed because, on the date of the gift, there is a possibility that the conservation purposes will be defeated, so long as on that date, the possibility is so remote as to be negligible.[70] The taxpayers argued that the possibility of foreclosure was so remote as to be negligible at the time of the donation, such that subordination of the mortgage was unnecessary. Stated differently, the taxpayers argued that the so-remote-as-to-be-negligible regulation should trump the mortgage subordination regulation. The Tax Court disagreed in a regular opinion, holding that the so-remote-as-to-be-negligible rule did not apply to the mortgage subordination rule, and the taxpayer's failure to record the mortgage subordination at the time of the donation failed to protect the conservation purpose of the donation in perpetuity. The Tenth Circuit affirmed the Tax Court's decision in *Mitchell* based on a plain reading of the regulation.[71]

In *Minnick v. Commissioner*,[72] the taxpayer, a lawyer and former congressman,[73] did not execute a mortgage subordination agreement until five years after granting a conservation easement over the encumbered property and 18 months after filing a petition in Tax Court. The tardy mortgage subordination and whether it satisfied the perpetual conservation purpose requirement under the regulations became the central issue in the case. The taxpayer argued, among other things, that Idaho's cy pres doctrine saved the conservation purpose. The Tax Court rejected that argument and found that the failure to subordinate the mortgage at the time of the donation did not protect the conservation purpose in perpetuity. The Ninth Circuit Court of Appeals affirmed the decision following the Tenth Circuit's opinion in *Mitchell* holding that "[b]ecause a conservation easement subject to a prior mortgage obligation is at risk of extinguishment upon foreclosure, requiring subordination at the time of the donation is consistent with the Code's requirement that the conservation purpose be protected in perpetuity."[74]

"Here, There, and Everywhere"[75] (Boundary Substitutions)

The same question lurking in *Simmons* and *Kaufman*—the meaning behind perpetual conservation purposes—re-emerged in a line of cases about easements that allowed changes to the boundaries of the easement. For many years conservation purpose was the sole focus of the "in perpetuity" requirement, but *Belk v. Commissioner* demonstrated that the requirement encompassed more than that.[76]

In *Belk*, the taxpayers donated an open space conservation easement over a 184-acre golf course. The easement agreement included a provision that allowed the taxpayers to substitute the property subject to the easement with contiguous property of an equal or lesser area. The IRS combined its argument that the donation was not a qualified real property interest with its argument that the conservation purpose was not protected in perpetuity—consistent with the Tax Court's approach in earlier opinions.[77] The *Belk* court parsed the issue more carefully, holding that a qualified property interest must be subject to an independent perpetual restriction on use.[78] The court held that because a use restriction existed only so long as the substitution provision in the agreement was not exercised, the donation did not constitute a "qualified real property interest" granted in perpetuity. The court did not reach the question of conservation purpose.

On appeal to the Fourth Circuit Court of Appeals, the taxpayers argued that the use restriction on the property was perpetual, because any property removed from the easement under the substitution provision had to be replaced by property of equal value subject to the same use restrictions. The Circuit Court employed a plain language reading of the statute, focusing on the use of "the" to modify real property in the statute as opposed to "some" or "any," and rejected the taxpayer arguments.[79]

"Can't Buy Me Love"[80] (Qualified Appraisals)

Qualified appraisals are a requirement for a deduction of any charitable donation of property with a value in excess of $5,000 and play an important role in qualified conservation contributions.[81] When Congress responded to calls to stiffen the standards for the conservation easement deduction in 2006, qualified appraisals and qualified appraisers were among the provisions specifically amended. The IRS, in turn, stiffened its examination standards for these donation requirements.

The Tax Court took particular issue with the taxpayer's qualified appraisal in *Scheidelman v. Commissioner*.[82] The taxpayer donated a façade conservation easement over her townhome in the Fort Greene Historic District of Brooklyn, New York, and employed an appraiser suggested by the donee trust to prepare the qualified appraisal for tax purposes. The appraiser used the sales comparison approach to estimate the before-and-after market value of the property and determined that the façade easement value was about 11 percent to 11.5 percent of the total value of the property, "based on consideration of a range of value that the IRS has historically found to be acceptable as well as historical precedents."[83]

The Tax Court held the report did not constitute a qualified appraisal under the regulations emphasizing the need for information about the valuation method and a "reasoned analysis" to complete a "qualified appraisal."[84] The court ultimately rejected the appraiser's report because it "failed to outline and analyze qualitative factors" of the subject property.[85]

On appeal, the Second Circuit Court of Appeals took a different view, holding that the taxpayer did, indeed, obtain a qualified appraisal for the façade easement donation.[86] The Second Circuit focused on two provisions of the same regulation relied upon by the Tax Court as the basis for the reversal.[87] The regulation requires that a qualified appraisal contains both a method of valuation and a specific basis for the valuation.[88] The Circuit Court held that the appraiser's use of the before-and-after method and his reliance on a published IRS article proposing an acceptable discount range for facade easements provided an appropriate method and a specific basis. The court further held that the appraisal accomplished the purpose of the regulation by giving the IRS "sufficient information to evaluate the claimed deduction."[89]

In *Costello v. Commissioner,*[90] the Tax Court evaluated a qualified appraisal under the statutory definition added by the PPA of 2006. The taxpayers resided in an area that uses a density exchange program to restrict development. The taxpayers granted an easement to the county to sell a portion of their property for development. The taxpayers then sold almost all of their available development rights.

The taxpayers also commissioned an appraisal so that they might take a federal income tax deduction. The appraisal determined the value of the taxpayers' property without consideration of the development rights that had been sold or the easement that was granted to the county. The court found that the appraiser was not informed of these facts. The court further found that the appraisal was not a qualified appraisal under the regulations because it "failed to inform the IRS of the essence of the transaction in which petitioners engaged."[91]

"The End"[92] (Conclusion)

With a maze of statutory and regulatory requirements, a litany of trial and appellate opinions, and the apparently inconsistent intentions of Congress and the IRS, you might ask yourself if there is anything Sir Paul McCartney or John Lennon might give us to better understand the future of qualified conservation contributions. Maybe this: In the end, the easement you take is equal to the easement you make. ⊙

Endnotes

[1]The well-known and often photographed "Imagine" monument to John Lennon in New York's Central Park is called Strawberry Fields. The monument is among many managed by the Central Park Conservancy, a private, nonprofit organization whose mission is to restore, manage, and enhance Central Park in partnership with the public. The author thanks Brian Gardner for his invaluable assistance in the preparation of this article.

[2]By the time American families crowded around their black-and-white console sets to watch John, Paul, George, and Ringo, the Beatles had a No. 1 song on the Billboard charts with "I Want to Hold Your Hand." Nonetheless, the band's Feb. 9, 1964 appearance on the Ed Sullivan television show is still popularly recognized as the Beatles "introduction" to U.S. audiences and the beginning of the British Invasion.

[3]As discussed below, there has not been a substantive amendment to the statute governing qualified conservation contributions in nearly a decade. However, numerous resolved and pending dockets have changed, and threaten to change, the interpretation of that statute on nearly a monthly basis.

[4]The Beatles, *Sgt. Pepper's Lonely Hearts Club Band* (Capitol Records 1990) (1967).

[5]Failure to meet the requirements of local law can and will result in the disallowance of any related federal tax deduction. *See e.g., Zarlengo v. Commissioner,* T.C. Memo. 2014-161 (2005) (New York law did not permit conservation easement to have legal effect until it was properly recorded).

[6]Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 Harv. Envtl. L. Rev. 120, 127 (2010).

[7]*Id.*

[8]Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. Land Resources & Envtl. L. 47, 51 (2005).

[9]*Id.* at 49.

[10]Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. Prop. & Soc'y 107, 127 (2015).

[11]*Façade Easement Donations Remain Viable With Local Rules, But Require Good Appraisal*, Daily Tax Report (BNA), Nov. 21, 2014, at J-1.

[12]The Beatles, "With a Little Help from My Friends" (Capitol Records 1990) (1967).

[13]Rev. Rul. 64-205, 1964-2 C.B. 62.

[14]Bray, *supra* note 5, at 128.

[15]I.R.C. § 170(f)(3)(A).

[16]The Tax Reform Act of 1976, Pub. L. No. 94-455, § 170, 90 Stat. 1519, 1919 (1976) "easement with respect to real property of not less than 30 years."

[17]I.R.C. § 170(f)(3)(C) (1976).

[18]The Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1519 (1976). The Conference Report notes the expiration date of the then new provision, one year after enactment, without explanation. Staff of the Joint Committee on Taxation, 94th Cong., *Summary of The Tax Reform Act of 1976* (Oct. 4, 1976).

[19]The Tax Reduction and Simplification Act of 1977, Pub. L. 95-30, § 170, 91 Stat. 126, 154 (1977).

[20]§ 170(f)(3)(B)(iii) (1977).

[21]S. Rep. No. 95-263, at 30 (1977) (Conf. Rep.).

[22]*Id.* at 31.

[23]§ 170(c).

[24]§ 170(f)(3)(A).

[25]*See supra* note 1.

[26]Tax Treatment Extension Act of 1980, Pub. L. 96-541, 94 Stat. 3205 (1980) (adding new § 170(h)).

[27]§ 170(h)(1).

[28]S. Rep. No. 96-1007 (1980).

[29]§ 170(h)(2).

[30]§ 170(h)(3).

[31]§ 170(h)(4)(A)(iii).

[32]§ 170(h)(4)(B).

[33]§ 170(h)(5)(A).

[34]§ 170(f)(11)(E)(i) and (ii).

[35]Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. Prop. & Soc'y 107, 127 (2015).

[36]*See, e.g.*, *Browning v. Commissioner,* 109 T.C. 303 (1997) (adopting the before and after valuation method for determining the value of a conservation easement donation); *Satullo v. Commissioner,* T.C. Memo 1993-614, *aff'd* 67 F.3d 314 (11th Cir. 1995) (considering the application of state law in façade easement donation).

[37]Notice 2004-41, 2004-28 I.R.B. 31.

[38]*Id.* Whether influenced by The Washington Post articles or not, § 170 was amended in 2004 with the addition of subparagraph (f)(11) which provided "For purposes of this paragraph, the term (qualified appraisal) means, with respect to any property, an appraisal of such property which is treated for purposes of this paragraph as a qualified appraisal under regulations or other guidance prescribed by the Secretary." American Jobs Creation Act of 2004, Pub. L. 108-357 § 170(f)(11), 118 Stat. 1418 (2004).

[39]Joe Stephens, *For Owners of Upscale Homes, Loophole Pays; Pledging To Retain the Facade Affords a Charitable Deductions*, The Wash. Post, Dec. 12, 2004, at A1; Joe Stephens, *Local Laws Already Bar Alterations; Intervention by Trusts Is Rare for Preservation*, The Wash. Post, Dec. 12, 2004, at A15; Joe Stephens, *Tax Break Turns Into Big Business*, The Wash. Post, Dec. 13, 2004, at A1.

[40]Steven T. Miller was promoted to Acting Commissioner of Internal Revenue in Nov. 2012. He was forced to resign from that position in May 2013 in the wake of the IRS scandal involving the improper scrutiny of certain 501(c)(4) political organization applications.

[41]*The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Before the S. Comm. on Finance*, 109th Cong. 109-1006 (2005) (statement of Steven T. Miller, deputy commissioner, IRS Tax Exempt & Government Entities Division).

[42]§ 170(h)(4)(B).

[43]I.R.C. §§ 6662(d)(1)(A), 6664(c)(3).

[44]I.R.C. § 170(f)(11)(E)(iii). A qualified appraiser must also demonstrate verifiable education and experience in valuing the type

of property subject to the appraisal, and not been prohibited from practicing before the Internal Revenue Service by the Secretary under § 330(c) of Title 31, U.S. Code, at any time during the three-year period ending on the date of the appraisal. I.R.C. § 170(b)(1)(E)(i).

[45]For purposes of the limitation, AGI is calculated without regard to any net operating loss carry-back applicable to the taxable year. § 170(b)(1)(G).

[46]Pension Protection Act of 2006, Pub. L. No. 109-280, § 170, 120 Stat. 780, 1068 (2006).

[47]The Beatles, "What's the New Mary Jane" (Apple Records 1996) (1968).

[48]The Dep't. of Treasury repeatedly has supported renewal of the accelerated deduction preference for conservation contributions in its annual revenue proposals. Dep't. of the Treasury, *General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals*, (Feb. 2015), *available at* www.treasury.gov/resource-center/tax-policy/Pages/general_explanation.aspx.

[49]*Id.*

[50]The Beatles, "Taxman" (Capitol Records 1987) (1966).

[51]The Beatles, "You Can't Do That" (United Artists 1987) (1964).

[52]Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. Prop. & Soc'y 107, 127 (2015).

[53]Decisions in the First, Second and D.C. Circuit Courts of Appeals represent "jurisdiction splits in authority" with the national jurisdiction of the Tax Court on issues ranging from abandonment and extinguishment of easements to qualified appraisals. *See e.g.*, *Simmons v. Commissioner,* 646 F.3d 6 (D.C. Cir. 2011), *Kaufman v. Shulman,* 687 F.3d 21 (1st Cir. 2012); *Scheidelman v. Commissioner,* 682 F.3d 189 (2d Cir. 2012), *remanded to* T.C. Memo. 2013-18, *aff'd* 755 F.3d 148 (2d Cir. 2014).

[54]*Id.*

[55]The Beatles, "When I'm Sixty-Four" (Capitol Records 1990) (1967).

[56]*Simmons v. Commissioner*, T.C. Memo 2009-208, *aff'd* 646 F.3d 6 (D.C. Cir. 2011).

[57]*Simmons v. Commissioner*, 646 F.3d 6 (D.C. Cir. 2010).

[58]*Id.* at 10.

[59]*Kaufman v. Commissioner*, 134 T.C. 182 (2010), *rev'd* 687 F.3d 21 (1st Cir. 2012).

[60]Treas. Reg. § 1.170A-14(g)(2) requires that the rights of any mortgagors to the underlying property be subordinated to the rights of the donee organization so as to preserve the perpetual conservation purpose of the donation.

[61]*Kaufman*, 687 F.3d 21 (1st Cir. 2012).

[62]*Id.* at 27.

[63]The Beatles, "Any Time At All" (United Artists 1987) (1964).

[64]*Gorra v. Commissioner*, T.C. Memo. 2013-254.

[65]In so finding, the court relied on a 19th-century New York precedent regarding the formation of a limited partnership. *Manhattan Co. v. Laimbeer*, 15 N.E. 712 (N.Y. 1888).

[66]*Zarlengo v. Commissioner*, T.C. Memo. 2014-161.

[67]Petitioners argued on brief that the deed was mailed in Dec. 2004 but put forth no credible evidence to demonstrate that allegation. *Zarlengo v. Commissioner*, T.C. Memo. 2014-161 *24 n.10.

[68]N.Y. Envtl. Conserv. Law (NYEC law) § 49-0305(4) (McKinney 2008 and Supp. 2014). It is unclear from the opinions whether respondent raised this issue in *Gorra*.

[69]*Mitchell v. Commissioner*, 128 T.C. 324 (2012), *aff'd* 775 F.3d 1243 (10th Cir. 2015).

[70]Treas. Reg. § 1.170A-14(g)(3).

[71]*Mitchell v. Commissioner*, 775 F.3d 1243 (10th Cir. 2015).

[72]*Minnick v. Commissioner*, T.C. Memo. 2012-345, *aff'd* 796 F.3d 1156 (9th Cir. 2015).

[73]Walter Minnick served in the 111th Congress (2009-11) as the representative from Idaho. At least once, Minnick voted to extend the 50 percent deduction preference for qualified conservation contributions. H.R. Res. 1766, 111th Cong. (2010) (enacted) (Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, also known as the 2010 Tax Relief Act passed by Congress on Dec. 16, 2010, extending I.R.C. § 170(b)(1)(E) from Dec. 31, 2009, to Dec. 31, 2011).

[74]*Minnick v. Commissioner*, 796 F.3d 1156 (9th Cir. 2015) (*Minnick* II). The Ninth Circuit released two opinions in the *Minnick* case. A published per curium opinion addressed the validity of the donation. A second unpublished disposition addressed the procedural issue in the Tax Court, alternative arguments, and the accuracy-related penalty.

[75]The Beatles, "Here, There, and Everywhere" (Capitol Records 1987) (1966).

[76]*Belk v. Commissioner*, 140 T.C. 1 (2013) *aff'd* 774 F.3d 221 (4th Cir. 2014).

[77]*Id.* at 12 (citing *Turner v. Commissioner*, 126 T.C. 299, (2006); *Glass v. Commissioner*, 124 T.C. 258 (2005); and *Simmons v. Commissioner*, T.C. Memo. 2009–208).

[78]§ 170(h)(2)(C).

[79]*Belk v. Commissioner*, 774 F.3d 221(4th Cir. 2014).

[80]The Beatles, "Can't Buy Me Love" (United Artists 1987) (1964).

[81]§ 170(f)(11)(c).

[82]T.C. Memo. 2010-151, *vacated,* 682 F.3d 189 (2d Cir. 2012), *remanded to* T.C. Memo. 2013-18, *aff'd* 755 F.3d 148 (2d Cir. 2014).

[83]*Id.*

[84]*Id.*

[85]*Id.*

[86]*Scheidelman v. Commissioner*, 682 F.3d 189 (2d Cir. 2012), *remanded to* T.C. Memo. 2013-18, *aff'd* 755 F.3d 148 (2d Cir. 2014).

[87]Treas. Reg. § 1.170A-13(c)(3)(ii).

[88]Specifically, Treas. Reg. § 1.170A-13(c)(3)(ii)(J) requires that a qualified appraisal specify a "method of appraisal" and Treas. Reg. § 1.170A-13(c)(3)(ii)(K) requires that a qualified appraisal contain a "basis of valuation."

[89]*Scheidelman*, 682 F.3d at 198.

[90]*Costello v. Commissioner*, T.C. Memo 2015-87.

[91]*Id.*

[92]The Beatles, "The End" (Apple Records 1996) (1969).