# Tax Court Clarifies Conservation Easement Qualifications

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On July 25, 2013, the Tax Court held that a conservation easement will only qualify as a conservation easement in perpetuity if the deed requires a judicial proceeding to extinguish the easement. *See M. Carpenter et al. v. Commissioner*, T.C. Memo. 2013-172 (?*Carpenter II*?).

**Background**. A gift of a conservation easement to a charitable organization will only qualify for the charitable deduction under section 170 of the Internal Revenue Code if the conservation easement is a contribution (1) of a "qualified real property interest" (2) to a "qualified organization" (3) that is made "exclusively for conservation purposes." *See 26 U.S.C.* §170(h)(1).

In order to satisfy the third requirement, 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." Treasury Regulation §1.170A-14(g)(6) provides that a conservation easement can be extinguished when ?the restrictions are extinguished by judicial proceeding and all of the donee's proceeds . . . 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.?

The Tax Court had previously stated that a judicial proceeding was not mandatory. *Carpenter v. Comm'r* , 2012 Tax Ct. Memo LEXIS 1 (T.C. 2012). Upon motion for reconsideration in *Carpenter II* the Tax Court declared that a judicial proceeding is mandatory.

**Carpenter II**. In *Carpenter II*, the conservation easement deed provided:

If circumstances arise in the future such that render the purpose of the Conservation Easement impossible to accomplish, this Conservation Easement can be terminated or extinguished, whether in whole or in part, by judicial proceedings, or by mutual written agreement of both parties, provided no other parties will be impacted and no laws or regulations are violated by such termination.

The Tax Court found that the parties? ability to self-extinguish the easement did not protect the

easement in perpetuity.  The Tax Court ruled a conservation easement deed must explicitly require judicial consent to extinguish a conservation easement.

The Tax Court?s position is stricter than the reading given by two Circuit Courts of Appeal.  With respect to a façade easement, the D.C. Circuit Court of Appeals had previously held the language ?nothing herein contained shall be construed to limit the Grantee's right to give its consent (e.g., to changes in a Façade) or to abandon some or all of its rights hereunder? did not prevent a façade easement from qualifying as a charitable contribution in perpetuity.  *See Comm'r v. Simmons*, 646 F.3d 6, 9 (D.C. Cir. 2011).  The First Circuit Court of Appeals held that a provision in the agreement between the donor and donee that stated ?nothing herein contained shall be construed to limit the [donee?s] right to give its consent (e.g., to changes in the Façade) or to abandon some or all of its rights hereunder? also did not prevent the gift from being one in perpetuity.  The First Circuit rejected the IRS?s claim that a charity, overseen by the IRS, would abandon its claim to the easement.

**Planning Consideration**.  The IRS?s position, supported by the Tax Court, assumes that conservation easement recipients will simply abandon their easements.  This is an extreme position and should be rejected on appeal.  (In *Carpenter II*, the Tax Court acknowledged that it was not bound by the decisions of the First Circuit and the D.C. Circuit because *Carpenter II* was appealable to the Tenth Circuit.)  Until the Tax Court and the IRS abandon this position, conservation easement donors will want to consider whether to include in their deeds a provision requiring judicial consent to extinguish or modify a conservation easement.

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