

UNITED STATES TAX COURT

1982 EAST, LLC, SOLOMON D. x
ASSER, TAX MATTERS PARTNER, :
 :
Petitioner, :
 :
v. :
 :
COMMISSIONER OF INTERNAL :
REVENUE, :
 :
Respondent. :
----- x

Docket No. 30052-08

**TRUST FOR ARCHITECTURAL EASEMENT'S MOTION FOR LEAVE TO FILE AN
AMICUS BRIEF IN SUPPORT OF PETITIONER**

The Trust for Architectural Easements (the "Trust") respectfully moves for leave to participate as an *Amicus Curiae* in the above-captioned case, and to file the accompanying brief in support of Petitioner in this matter.

IN SUPPORT THEREOF, *Amicus Curiae* states as follows:

I. Background

The Trust for Architectural Easements, formerly known as the National Architectural Trust prior to its name change on July 30, 2007, is the recipient of the donations of a façade conservation easement, transferable development rights and cash by Petitioner in this action effected by that certain Conservation Deed of Easement ("Conservation Deed") accepted by the Trust on December 30, 2004. Internal Revenue Code Section

170(h) allows a deduction for qualified conservation contributions. To obtain a deduction, the donation must be made to a "qualified organization" as defined by the Internal Revenue Code. The Trust is such a qualified organization, as stipulated by the parties.

The Trust's central mission is to preserve historic architecture across the United States, and to educate the public about the importance of preserving historic structures. The Trust's primary tax-exempt activity is to preserve historically or architecturally significant properties through the acceptance and enforcement of historic preservation easements in perpetuity. The Trust has assisted in the drafting and accepted approximately 830 easements, of which approximately 550 are in connection with properties in New York City. Of the conservation easements that the Trust holds, approximately two dozen include a donation of transferable development rights.

The present case is one of many cases pending in Tax Court involving the validity and valuation of a historic preservation easement donated to the Trust.¹ In each case, the language

¹ See Docket Numbers: 15171-08; 30052-08; 30638-08; 948-09; 20913-08; 16534-08; 23645-08; 28849-08; 14866-09; 14952-09; 12282-09S; 9530-09; 16158-09; 16158-09; 15997-09; 13947-09; 14860-09; 20138-09; 14016-09; 12168-09; 14865-09; 15501-09; 10393-09; 15801-09.

contained in the easement is substantially the same as the language in the Conservation Deed.

II. Interests of an *Amicus Curiae* and Relevance of *Amicus Curiae* Brief to the Issues before the Court

A. The Trust Has A Unique Interest In Being Heard On The Issue Of The Interpretation Of Its Easement.

Several issues presented at trial and in the pre-trial brief submitted by Respondent question whether the Conservation Deed complies with the requirements of Internal Code section 170(h) and related Treasury regulations. The terms and provisions of the over 800 deeds of easement drafted and previously accepted by the Trust are substantially similar to the terms and provisions contained in the Conservation Deed. Thus, a decision relating to whether or not the Conservation Deed is a qualified conservation contribution made in perpetuity will have disproportionately greater impact on the Trust and the gifts made and to be made to the Trust and its ability to continue to further its tax-exempt purposes -- compared to the isolated, although significant, impact on the Petitioner. The Trust believes that it is the true party in interest with respect to the challenges to the language of the Conservation Deed, Respondent's interpretation of the code and regulations governing the historic tax incentive designed by Congress, and ultimately, the Court's determination of whether the

Conservation Deed is a qualified conservation contribution. The Court's resolution of these issues are relevant not only to the Trust's not-for-profit activities, but will have an impact on the future viability of conservation easements as an effective preservation tool for the protection of historic structures.

Further, as an organization that drafts, accepts, monitors and enforces façade conservation easements, specifically the easement in question in this case, the Trust is in a unique position regarding the issues in dispute. During the time in which the Trust participated in the drafting of the 800 easements it holds, it reviewed and considered the relevant provisions of the Internal Revenue Code and related regulations, consulted with other leading preservation organizations with regard to the interpretation of such provisions and reviewed drafting "best practices" in the preservation community to ensure the easement terms provided the Trust with perpetual enforceability of the easements. The Trust's *amicus* brief will provide a different perspective from that of Respondent and Petitioner, and the Trust believes its participation would be useful to the Court in its consideration of the issues raised in this case.

B. The Trust Is In A Unique Position To Know That Respondent's Expert, Mr. Von Ancken, Had At One Time Attempted To Donate A Conservation Easement To The Trust.

The Trust is privy to information regarding Respondent's expert witness that affects his credibility and of which the Court should be made aware. On December 9, 2009, Respondent called Robert Von Ancken as an expert on its behalf to testify that a façade easement donated to the Trust has no impact on the market value of the eased property. Representatives of the Trust were present during Mr. Von Ancken's testimony. During the course of his testimony, Mr. Von Ancken testified that he owned certain property. Such property was familiar to the Trust's representatives.

Subsequent to the close of trial, one of the Trust's representatives reviewed the Trust's records and discovered that Mr. Von Ancken had attempted to donate a façade conservation easement to the Trust in connection with the property that he owned in 2004, and as part of his application submitted an appraisal stating that the property's value would be diminished by 11% as a result of the proposed donation of the easement.²

² The property was 127 MacDougal Street, owned by 127 MacDougal Street Associates, an entity in which Mr. Von Ancken held a 50% interest, according to the Trust's records. See Affidavit of Victoria McCormick and exhibits. Because the Trust maintained the records under the name of the entity, the import of this information could not have been determined until after Mr. Von Ancken testified at trial concerning his interest in the property.

Moreover, the Trust's records show that after learning that the property would not qualify for a tax deduction under IRC section 170(h), because it was not located in a National Register historic district, Mr. Von Ancken withdrew his application for the donation of the façade easement.

"An expert must be unbiased." David Laro & Shannon P. Pratt, *Business Valuation and Taxes* 34 (2005); *see also id.* at 388-389 (Standards Rule 10-3 requiring that experts have no bias with respect to property or parties involved).³ While the position that Mr. Von Ancken took in submitting an appraisal in connection with a property in which he has an interest may not be directly determinative of the valuation of Petitioner's noncash donation to the Trust, this Court may also consider the credibility and intellectual honesty of expert testimony asserting that the Conservation Deed had no impact on the value of Petitioner's property. In this case, Mr. Von Ancken's prior experience with a putative donation to the Trust, which was not disclosed at trial, bears on those considerations. The Trust had no basis to realize the potential relevance of this information prior to Mr. Von Ancken's trial testimony since the potential donation to the Trust was submitted by the fee owner

³ *See also* Uniform Standards of Professional Appraisal Practice, Ethics Rule (2010-2011).

of the property - 127 MacDougal Street Associates. The Trust respectfully requests that this new information be given consideration now.

Given that the Trust will provide the Court with new information regarding Respondent's expert's ability to provide a fair and unbiased valuation, as well as the Trust's knowledge about both the factual and legal issues in this case, the Trust respectfully submits that it is crucial that the Court consider its *amicus* brief.


The Trust has informed both Petitioner and Respondent about its intention to file an *amicus* brief. The Petitioner has consented to the filing of same. Respondent has not consented.

The Trust's proposed brief is attached hereto as Exhibit 1. Exhibit 2 is the affidavit of Victoria McCormick in support of the factual issue regarding Mr. Von Ancken, with exhibits.

WHEREFORE, it is prayed that the Court grant this Motion for leave to file the accompanying *Amicus Curiae* brief in support of Petitioner.

Respectfully submitted,

Trust for Architectural
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February 16, 2010

CERTIFICATE OF SERVICE

This is to certify that a copy of the Motion for leave to file and *Amicus Curiae* brief in support of Petitioner with accompanying *Amicus Curiae* brief and Affidavit of Victoria McCormick was served on counsel for Petitioner and counsel for Respondent by mailing the same on February 16, 2010 in a postage-paid wrapper addressed to the following:

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Dated: February 16, 2010


Kathryn Keneally

UNITED STATES TAX COURT

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BRIEF OF *AMICUS CURIAE*
TRUST FOR ARCHITECTURAL EASEMENTS
IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

A. The Trust requests an opportunity to address the interpretation of its Conservation Deed of Easement, which Respondent has put into issue

The Trust for Architectural Easements¹ (the "Trust") is the recipient of the donations of a façade conservation easement, transferable development rights, and cash by Petitioner in this action. Section 170(h) of the Internal Revenue Code² allows for a deduction for qualified charitable contributions. The Code and regulations detail the requirements that must be met to obtain this deduction. Central to these requirements is that the donation must be made to a "qualified organization" as defined by the Code. The parties have stipulated that, for purposes of determining the issues in this case, the Trust is a qualified organization. (Stip. ¶12)

The Trust is a section 501(c)(3) organization that has as its mission the preservation of architectural history. As part of its activities, the Trust provides grants and engages in educational outreach programs. The Trust also acts to encourage the voluntary preservation of historic architecture through the

¹ The Trust was formerly known as the National Architectural Trust, and changed its name to the Trust for Architectural Easements in settlement of a trademark dispute. (See Stip. ¶ 10)

² All references or citations to "Section" or "IRC" relate to the Internal Revenue Code of 1986.

donation of façade conservation easements and transferable development rights. Currently, the Trust holds approximately 830 conservation easements in the eastern part of the United States, of which approximately 550 are in connection with properties in New York City. Of these, two dozen include a donation of transferable development rights. Monitoring and enforcing these easements is central to the Trust's mission. To ensure that the Trust will meet its commitment to monitor these easements in perpetuity, the Trust has set up a Stewardship Fund, which now exceeds \$10 million.

Respondent has put into issue the interpretation of the Trust's Conservation Deed of Easement ("Conservation Deed"), and both parties have made arguments based on the Trust's activities in soliciting donations and its monitoring and enforcement of conservation easements. The Trust respectfully requests the opportunity to present its position on these issues by this *Amicus Curiae* submission. The Court's resolution of these issues are relevant not only to the Trust's not-for-profit activities, but will have an impact on the future viability of conservation easements as an effective presentation tool for the protection of historic structures.

B. The Trust seeks to bring to the Court's attention evidence bearing on the credibility of Respondent's expert witness

Representatives of the Trust were present during portions of the trial. Respondent's expert, Robert Von Ancken, testified at trial that he held an interest in real property located at 127 MacDougal Street in New York City. After hearing this testimony, and following the conclusion of the trial, one of the Trust's representatives determined from Trust records that Mr. Von Ancken had attempted to donate a façade conservation easement in connection with the 127 MacDougal Street property. Because the position taken by Mr. Von Ancken in connection with the proposed donation of the façade conservation easement appears to be in direct contradiction with his expert report and trial testimony, the Trust respectfully seeks to bring this evidence before the Court.

Specifically, the Trust's records show that Mr. Von Ancken obtained an appraisal in connection with his attempted donation, which took the position that granting a façade conservation easement on the property at 127 MacDougal Street would result in an 11% diminution of the value of that property. (McCormick Aff. Ex. B) The Trust's records further show that after a determination was made that the property was outside the historic district and thus would not qualify for a tax

deduction, the offer to make a façade conservation easement donation was withdrawn. (McCormick Aff. ¶10, Ex. C)

The record owner of this property at the time was 127 MacDougal Street Associates, and the Trust's records show that Mr. Von Ancken held a fifty percent interest in that entity. (McCormick Aff. ¶¶5, 6) Because the Trust maintained the records under the name of the entity, the import of this information could not have been determined until after Mr. Von Ancken testified at trial concerning his interest in the property.

In the instant case, Mr. Von Ancken has taken the position that a façade conservation easement donated to the Trust has zero impact on the value of Petitioner's property. While the position that Mr. Von Ancken took in submitting an appraisal in connection with a property in which he has an interest may not be directly determinative of the valuation of Petitioner's noncash donation to the Trust, this Court will also consider the credibility and intellectual honesty of expert testimony. In this case, Mr. Von Ancken's prior experience with a putative donation to the Trust, which was not disclosed at trial, bears on those considerations. The Trust had no basis to realize the potential relevance of this information prior to Mr. Von

Ancken's trial testimony, and respectfully requests that it be given consideration now.

NATURE OF CONTROVERSY

Respondent issued to Solomon D. Asser, Tax Matters Partner of 1982 East, LLC, a Notice of Final Partnership Administrative Adjustment ("FPAA") for the taxable year 2004, which (a) disallowed Petitioner's claimed charitable contribution deduction of \$6,570,000; (b) asserted a forty percent gross valuation misstatement penalty under IRC §6662(h); and (c) alternatively, asserted a twenty percent accuracy-related penalty under IRC §6662(a) and (b).

This case was tried before the Honorable David Laro on December 7 through December 10, 2009. The evidence consists of (1) a Stipulation of Facts, with attached exhibits 1 through 147; (2) a Supplemental Stipulation of Facts, with attached exhibits 148 through 166; (3) oral testimony; and (4) exhibits admitted into evidence during trial. By its motion to make a submission as *Amicus Curiae*, the Trust respectfully asks that the accompanying affidavit of Victoria McCormick and exhibits A, B, and C attached thereto also be considered by the Court.

The Court directed the parties to exchange briefs on February 8, 2010, with a limitation of twenty pages for legal argument. The Court further directed that the parties provide a separate brief for the exclusive purpose of pointing out discrepancies in the opposing party's findings of fact. The

Court instructed that the briefs be provided electronically on disk, and requested that hyperlinks to legal citations and evidence be included. On Respondent's request, the time for the parties to exchange opening briefs was extended to February 17, 2010, and to provide opening briefs with hyperlinks was extended to February 24, 2010, and the time for the parties to exchange second briefs was extended to March 5, 2010, and to provide second briefs with hyperlinks was extended to March 12, 2010.

The Trust is submitting and serving its motion to file an *Amicus Curiae* brief, accompanied by its brief and supporting affidavit with exhibits, by the February 17, 2010 date for the exchange of opening briefs. The Trust's brief limits the legal argument to not more than twenty pages, and is accompanied by a disk that includes hyperlinks to the legal citations and evidence.

ISSUES PRESENTED

1. Did the Trust's Conservation Deed, executed by Petitioner, create a burden on Petitioner's property in perpetuity?
2. Were the rights of the mortgagee subordinated to the Trust's rights to enforce the conservation purposes of the Conservation Deed, as required by Treasury Regulation §1.170A-14(g)(2)?
3. Does the Conservation Deed give the Trust a vested right to a proportionate portion of proceeds upon a sale, exchange or involuntary conversion of Petitioner's property following any extinguishment of the easement, as required by Treasury Regulation §1.170A-14(g)(6)(ii)?
4. Does Petitioner's donation of unused transferable development rights preserve a certified historic structure under IRC §§170(f)(3)(B) and (h)?
5. Was Petitioner's donation of unused transferable development rights a gift of all of Petitioner's interest in property under IRC §§170(f)(3)(A) and (B)(ii)?
6. Were Petitioner's gifts to the Trust made with donative intent?

7. Did Petitioner's donations as set out in the Conservation Deed cause a diminution in the value of the underlying property?

8. There are other matters at issue in this case, in particular relating to valuation, as to which the Trust has no interest and takes no position.

POINTS RELIED UPON

Petitioner contributed a façade conservation easement, transferable development rights, and cash to the Trust. Section 170(h) allows a deduction for a "qualified conservation contribution," which is defined as a contribution of a qualified real property interest, to a qualified organization, exclusively for conservation purposes. Respondent challenges whether Petitioner's non-cash contributions meet the requirements for a deduction under section 170(h), and in the alternative contends that the contribution had zero value. Respondent also challenges whether Petitioner had donative intent, in particular with regard to Petitioner's cash donation.

The parties have stipulated that the Trust is a qualified organization. The Tax Court has repeatedly recognized that façade conservation easements and donations of development rights meet the requirements for a charitable deduction under section 170(h). *E.g., Hilborn v. Commissioner*, 85 T.C. 677

(1985); *Dorsey v. Commissioner*, 59 T.C.M. (CCH) 592 (1990); *Griffin v. Commissioner*, 56 T.C.M. (CCH) 1560 (1989); *Losch v. Commissioner*, 55 T.C.M. (CCH) 909 (1988); *Nicoladis v. Commissioner*, 55 T.C.M. (CCH) 624 (1988); *Simmons v. Commissioner*, 98 T.C.M. (CCH) 211 (2009). The Conservation Deed imposes burdens that are indistinguishable from those previously addressed by the Tax Court.

Respondent argued in pretrial briefs and at trial that Petitioner's noncash donations should not be allowed because the interests of the mortgagee in the eased property were not subordinated to the Trust's rights to enforce the conservation purposes of the easement. To the contrary, the Conservation Deed and the attached Lender Agreement track the language of the applicable regulations and meet all legal requirements. Treas. Reg. §§1.170A-14(g)(2) and (6)(i).

Respondent argued in pretrial briefs and at trial that the language of the Conservation Deed does not ensure that the conservation purposes will be met. Respondent's argument is inconsistent with the language of the Conservation Deed, which is indistinguishable from provisions that have been found sufficient by the Tax Court. See, e.g., *Simmons v. Commissioner*, 98 T.C.M. (CCH) 211 (2009).

Respondent argued in pretrial briefs and at trial that Petitioner lacked donative intent, contending *inter alia* that the cash donation was a fee rather than a charitable contribution. Respondent misconstrues the purpose of the cash donation, which is used by the Trust in its general operations and to maintain a Stewardship Fund to monitor eased properties and to enforce the conservation purposes of its easements in perpetuity. *See Id.* Respondent also appears to be suggesting that, because the Petitioner was interested in obtaining a tax deduction as a result of making a charitable contribution, donative intent was lacking. This argument has been expressly rejected by the Tax Court. *Skripak v. Commissioner*, 84 T.C. 285, 319 (1985) ("a taxpayer's desire to avoid or eliminate taxes by contributing cash or property to charities cannot be used as a basis for disallowing the deduction for that charitable contribution").

Finally, Respondent contends that the Conservation Deed did not diminish the value of Petitioner's property. Respondent ignores or erroneously minimizes the significant differences between the Trust's monitoring and enforcement of its Conservation Deed and the impact of the local laws and ordinances. *See, e.g., Simmons v. Commissioner*, 98 T.C.M. (CCH) 211 (2009). Moreover, the Trust respectfully asks that the

Court consider additional evidence, the import of which the Trust did not recognize until after the conclusion of the trial, that bears on the credibility and conclusions of Respondent's expert witness on valuation.

PROPOSED FINDINGS OF FACT

The Trust respectfully requests the Court to find the following facts:

A. Petitioner's Donations To The Trust

1. Petitioner 1982 East, LLC is a limited liability company organized under New York State law and treated as a partnership for federal income tax purposes during the 2004 taxable year. (Stip. ¶3; Exs.³ 2, 3, 4)

2. During the 2004 taxable year, Petitioner owned real property located at 19 East 82nd Street, New York, New York 10028 (the "Property"). (Stip. ¶5)

3. The Trust is a section 501(c)(3) organization. (Stip. ¶12; Ex. 7.)

4. The Trust is a "qualified organization" within the meaning of section 170(h)(3). (Stip. ¶12)

5. Through the execution of a Conservation Deed signed by Petitioner and the Trust, Petitioner made noncash contributions to the Trust in 2004 of a façade conservation easement on the Property and transferable development rights associated with the Property. (Stip. ¶¶91, 93; Ex. 74)

³ Joint exhibits are cited by the exhibit number without the "-J" suffix.

6. Part I, paragraph F of the Conservation Deed states that the Petitioner is granting an Open Space and Architectural Façade Conservation Easement on the Property exclusively for conservation purposes. (Stip. ¶91; Ex. 74)

7. Part II, paragraph D of the Conservation Deed defined the unused development rights as "without limitation, any and all rights, however designated, now or hereafter associated with the Property or any other property that may be used, pursuant to applicable zoning laws or other governmental laws or regulations to compute permitted size, height, bulk or number of structures, development density, lot yield, or any similar development variable on or pertaining to the Property or any other property." (Stip. ¶91; Ex. 74)

8. Pursuant to Part II, paragraph D of the Conservation Deed of Easement, the unused development rights donated by Petitioner to the Trust were extinguished and can never be used in connection with the Property or transferred to another property. (Stip. ¶91; Ex. 74)

9. Petitioner made certain charitable cash contributions to the Trust in 2004. (Stip. ¶¶88; Ex. 73)

10. Petitioner's Form 1065 federal partnership tax return for the 2004 taxable year ("2004 Partnership Tax Return") claimed a charitable contribution deduction as a result of a

\$6,570,000 noncash contribution to the Trust, and a charitable contribution deduction as a result of a \$452,500 cash contribution to the Trust, resulting in a total combined charitable contribution deduction of \$7,022,500. (Stip. ¶6; Ex. 5)

B. The Terms Of The Conservation Deed

11. Part I, paragraph F of the Conservation Deed provides: "It is the intent of the parties that the Façade(s) of 19 East 82nd Street, New York, NY 10028 that is visible from the street-level on the opposite side of East 82nd Street is protected by this Easement so that it remains essentially unchanged and in full public view in perpetuity." (the "Protected Facades") (Stip. ¶91; Ex. 74)

12. The Conservation Deed provides in Part IV, paragraph A, that it is binding on all successors, heirs and assigns of Petitioner's interest in the Property, and is a servitude on the Property that runs in perpetuity with the land. (Stip. ¶91; Ex. 74)

13. Part II, paragraph A(1) of the Conservation Deed requires the owner of the Property to obtain the express written consent of the Trust prior to making any alterations to the Protected Facades or placing any signs or markers that would materially alter the appearance of the Protected Facades; there

is an exception set out in Part II, paragraph (A) (4) for dignified signage indicating the street address or occupants, directing pedestrian or street traffic, or commemorating the history of the Property or the granting of the easement. (Stip. ¶91; Ex. 74)

14. Part II, paragraph A(2) of the Conservation Deed requires the owner of the Property to obtain the express written consent of the Trust prior to extending or erecting any exterior improvements affecting the Protected Facades. (Stip. ¶91; Ex. 74)

15. Part II, paragraph A(3) of the Conservation Deed requires the owner of the Property to obtain the express written consent of the Trust prior to rebuilding the Protected Facades in case of total or substantial destruction; there is an additional provision that, in the case of a need to rebuild following a total or substantial destruction, the Trust will not insist on the replication of the Protected Facades as originally constructed, but will insist that any Protected Facades of a rebuilt structure be consistent with the style, mass and height characteristics of the historic district. (Stip. ¶91; Ex. 74)

16. Part II, paragraph A(4) of the Conservation Deed requires the owner of the Property to obtain the express written consent of the Trust prior to painting or cleaning the Protected

Facades in a manner incompatible with the protection and preservation of the Protected Facades; there is an additional provision that, in the case of the maintenance of any elements of the visible façade that suffer casualty loss, destruction or deterioration, the Conservation Deed provides that replacement or repair must be performed in a manner that will maintain or recreate the essential appearance as of the date of the donation or the date of construction. (Stip. ¶91; Ex. 74)

17. In all circumstances in which the owner of the Property is required to obtain the express written consent of the Trust in connection with proposed alterations and modifications to the Property pursuant to Part II, paragraph A(1) of the Conservation Deed, such consent may be withheld, conditioned or delayed in the sole and absolute discretion of the Trust. (Stip. ¶91; Ex. 74)

18. Part II, paragraph B of the Conservation Deed requires the owner of the Property to maintain the roof, foundation, Protected Facades and overall structural integrity of the building in good order. (Stip. ¶91; Ex. 74)

19. Part II, paragraph C of the Conservation Deed states that any rehabilitation or new construction work must comply with the requirements of all applicable federal, state and local governmental laws and regulations. (Stip. ¶91; Ex. 74)

20. Part II, paragraph C of the Conservation Deed calls the owner's attention to the Secretary of the Interior's Standards for Rehabilitation ("Secretary of Interior's Standards"). (Stip. ¶91; Ex. 74)

21. Part III, paragraph A of the Conservation Deed gives the Trust the rights (1) to inspect the Property; (2) to institute legal proceedings to enjoin a violation or threatened violation of the terms of the Conservation Deed and to be reimbursed for the attorneys fees and costs of such legal proceedings; (3) to enter the Property to correct violations and to hold the owner responsible for the costs; and (4) to place a lien against the Property to secure payment of any obligations. (Stip. ¶91; Ex. 74)

22. Part IV, paragraph B of the Conservation Deed provides that the Trust will not transfer, assign or otherwise convey its rights under the easement except to another "qualified organization" under IRC section 170(h) that agrees to continue the conservation purpose for which the easement was created and further states that this provision shall not be construed to limit the Trust's rights to give consent to changes to the façade or to abandon some or all of its rights under the easement. (Stip. ¶91; Ex. 74)

23. Nothing in Part IV, paragraph B of the Conservation Deed alters or amends the stated purpose of the Conservation Deed or the stated mission of the Trust as a section 501(c)(3) organization, nor does the language of Part IV, paragraph B permit the Trust to act in contradiction to the other provisions of the Conservation Deed or its stated not-for-profit mission. (Stip. ¶91; Ex. 74)

24. The Trust has never abandoned an easement. (Tr. 147-48)

25. Part IV, paragraph C of the Conservation Deed provides that, in the event that the easement is extinguished through a judicial decree, Petitioner agrees on behalf of itself, its heirs, successors and assigns, that the Trust, or its successors and assigns, will be entitled to receive upon the subsequent sale, exchange or involuntary conversion of the Property, a portion of the proceeds from such sale, exchange or conversion equal to the same proportion that the value of the initial Easement donation bore to the entire value of the property at the time of the donation, unless controlling state law provides to the contrary, and further provides that the Trust agrees to use any such proceeds in a manner consistent with the conservation purposes of the original contribution. (Stip. ¶91; Ex. 74)

26. The Conservation Deed was recorded in the Office of the City Register of the City of New York on June 10, 2005.

(Stip. ¶1; Ex. 74)

C. The Mortgagee's Subordination

27. At the time that Petitioner donated the façade conservation easement and transferable development rights to the Trust, First Republic Bank was the only entity that held a mortgage on the Property. (See Stip. ¶¶19-35; 66; Exs. 22 through 28, inclusive)

28. First Republic Bank, on July 15, 2004, executed a Lender Agreement in which it subordinated its rights in the Property to the right of the Trust, its successors and assigns, to enforce the conservation purposes of the Conservation Deed in perpetuity. (Stip. ¶66; Ex. 74)

29. The Lender Agreement executed by First Republic Bank was attached to and recorded with the Conservation Deed. (Stip. ¶¶66, 91; Ex. 74)

30. Paragraph (a) of the Lender Agreement executed by First Republic Bank provides that insurance proceeds and condemnation proceeds shall be paid first to the lender until the mortgage is paid off and discharged. (Stip. ¶91; Ex. 74)

31. Paragraph (b) of the Lender Agreement executed by First Republic Bank provides that the lender or purchaser in

foreclosure shall have no obligation under the Conservation Deed until the lender or purchaser obtains ownership of the property, and expressly provides that the easement is not extinguished by foreclosure or by submission of the deed in lieu of foreclosure. (Stip. ¶91; Ex. 74)

32. Paragraph (c) of the Lender Agreement executed by First Republic Bank provides: "Nothing in this paragraph or in this Easement shall be construed to give any Mortgagee/Lender the right to violate the terms of this Easement or to extinguish this Easement by taking title to the Property by foreclosure or otherwise." (Stip. ¶91; Ex. 74)

33. The payment of insurance proceeds as set out in the Lender Agreement is not dependent on nor will it result in the extinguishment of the easement under the Conservation Deed. (Compare Stip. ¶91; Ex. 74, Conservation Deed, Part IV, paragraph C with Lender Agreement, paragraph (a) and (c))

34. The payment of condemnation proceeds as set out in the Lender Agreement is not dependent on nor will it result in the extinguishment of the easement under the Conservation Deed. (Compare Stip. ¶91, Ex. 74, Conservation Deed, Part IV, paragraph C with Lender Agreement, paragraphs (a) and (c))

D. The Trust's Mission And Operations

35. On November 7, 2005, the Trust filed a Form 990 Return of Organization Exempt from Income Tax for the taxable year 2004. (Stip. ¶15; Ex. 10)

36. The Trust's mission, as stated in its Forms 990, "is to preserve our nation's architectural heritage through the acceptance, monitoring and enforcement of conservation easements, protection and restoration of historic artifacts and education of the public on architectural and historic values." (Stip. ¶¶15, 16, 17; Exs. 10, 11)

37. The Trust fulfills its mission through its work with the preservation community by providing grants and engaging in educational outreach regarding the importance of historic preservation and historic architecture, and by encouraging and facilitating the voluntary preservation of buildings by property owners through the donation of façade conservation easements. (Tr. 109-10)

38. As stated in Statement 11 of the Trust's Form 990 for the taxable year 2004, the Trust designated a portion of its net assets for a Stewardship Fund that was established for the purpose of funding the future costs of monitoring and enforcing the façade conservation easements in the Trust's portfolio. (Stip. ¶15; Ex. 10)

39. As of December 31, 2004, the Trust's Stewardship Fund contained \$9,364,182, reflecting 32% of the Trust's total revenue since its inception. (Stip. ¶15; Ex. 10, St. 11)

40. As stated in Statement 11 of the Trust's Form 990 for the taxable year 2004, from the Trust's inception through December 31, 2004, in addition to allocating 32% of its total revenue to its Stewardship Fund, the Trust also allocated 22% of total revenue to unrestricted assets, 39% to program services, 2% to management and general, and 5% to fundraising. (Stip. ¶15; Ex. 10)

41. In November 2006, the Trust filed a Form 990 Return of Organization Exempt from Income Tax for the taxable year 2005. (Stip. ¶17; Ex. 11)

42. As of December 31, 2005, the Trust's Stewardship Fund contained \$13,844,844, reflecting 41% of the Trust's total revenue since its inception. (Stip. ¶17; Ex. 11, St. 14)

43. As stated in Statement 14 of the Trust's Form 990 for the taxable year 2005, from the Trust's inception through December 31, 2005, in addition to allocating 41% of its total revenue to its Stewardship Fund, the Trust also allocated 11% of total revenue to unrestricted assets, 38% to program services, 5% to management and general, and 5% to fundraising. (Stip. ¶17; Ex. 11, St. 14)

E. The Trust's Monitoring And Enforcement Of Conservation Easements

44. Conservation easements donated to the Trust, and donations to the Trust of transferable development rights, are a voluntary disposition of property interests. (Ex. 169-P at 9)

45. The Trust's conservation easements run in perpetuity with the property, become part of the chain of title and are binding on all future property owners. (Exs. 74; 169-P at 4)

46. By the end of 2005, the Trust was monitoring over 650 properties for which a conservation easement was granted from 2001 through 2005. (Stip. ¶17; Ex. 11, St. 13)

47. The Trust currently monitors conservation easements on approximately 830 properties. (Tr. 111)

48. Heather Massler is the Director of Operations and Stewardship for the Trust. (Tr. 110)

49. Ms. Massler oversees the staff that works with donors of conservation easements and transferable development rights, and she also oversees the stewardship of the façade conservation easements that are donated to the Trust. (Tr. 110-11)

50. The three components of the stewardship function of the Trust consist of (1) annual monitoring of eased properties; (2) reviewing requests for changes to eased properties; and (3) tracking the ownership of eased properties. (Tr. 111)

51. As part of its monitoring function, the Trust conducts an annual visit and inspection of every property as to which it holds an easement, to confirm that no changes have been made in violation of the easement and to confirm that the property is being maintained in the same condition as when the easement was granted. (Tr. 111)

52. As part of the annual inspection of each eased property, a member of the Trust's stewardship staff will have available documentation concerning any requests for changes that have been made by the property owner in the prior year and the determinations made by the Trust concerning those requests, as well as documentation of any issues that the Trust may have raised with the property owner concerning the maintenance of the Property. (Tr. 112)

53. As part of the annual inspection of each eased property, the Trust's staff member will make a determination as to whether there is ongoing work on the property; any ongoing work that has not been approved by the Trust will be brought to the immediate attention of senior Trust staff. (Tr. 112-13)

54. As part of the annual inspection of each eased property, the Trust's staff member will look for maintenance conditions, such as peeling paint, or a missing or broken

decorative element, or evidence of water damage, or other damage to the property. (Tr. 113)

55. As part of the annual inspection of each eased property, the Trust's staff member will take a full photograph of each protected façade of the property, and detailed photographs of additional elements necessary to document fully the property's condition and appearance. (Tr. 113-14)

56. The photographs taken by the Trust's staff members during the annual inspection of an eased property are compared by the Trust's staff with baseline photographs of the same eased property, which the Trust maintains in its files. (Tr. 114)

57. Ms. Massler personally reviews all maintenance concerns and changes, including both changes authorized and unauthorized by the Trust, that are indentified as a result of the annual inspection process. (Tr. 114)

58. From time to time, the Trust receives reports from the public concerning potential violations of Trust easements. (Tr. 155)

59. The Trust has successfully stopped work on properties as to which it holds easements until the work was brought in compliance with the terms of the easement. (Tr. 115)

60. The Trust has also instituted litigation to enforce the terms of an easement. (Tr. 115-16)

**F. Differences Between The Trust's Standards And Enforcement
And The Standards And Enforcement Of The Landmarks
Preservation Commission**

61. The Trust's easements provide in guiding language that the eased property should remain essentially unchanged, and the Trust staff looks to this guiding principal in reviewing any application by the owner of an eased property to make modifications. (Tr. 119)

62. The United States Secretary of the Interior, through the National Park Service, promulgated the Secretary of the Interior's Standards for Rehabilitation, codified at 36 CFR Part 67-68. (Tr. 116)

63. If the Trust determines that a request to modify an eased property will not result in an essential change to the eased property, the Trust will next consider the Secretary of Interior's Standards to determine the manner in which the modification to the property may be made. (Tr. 116, 118)

64. The Trust requires owners of eased properties who want to make a modification to a property to complete a written request that requires information about the ownership of the property, the architects and contractors involved, and written description of the work to be performed, as well as architectural drawings, photographs, material samples, and like information as appropriate to the proposal. (Tr. 117-18)

65. Anthony Robins was recognized by the Court as an historian of New York City properties, for the purpose of familiarizing the Court with various aspects of New York City landmarks laws and regulations. (Tr. 51)

66. The New York City Landmarks Preservation Commission ("LPC") is the city agency responsible for identifying and designating landmarks and historic districts in New York City. (Stip. ¶111; Ex. 169-P at 4)

67. The LPC regulates changes to buildings designated as landmarks and to buildings that are governed by New York City's landmark ordinances. (Ex. 169-P at 9)

68. The LPC and preservation laws are frequently subjected to political pressures, which have affected some of the decisions made by the LPC. (Ex. 169-P at 49-54)

69. Preservation laws may be amended or repealed. (See Ex. 169-P at 49-54)

70. The LPC lacks sufficient resources to monitor the approximately 25,000 properties within its jurisdiction. (Tr. 85, 99-100; Ex. 169-P at 43-45, 48).

71. The LPC lacks the resources to enforce a comprehensive maintenance program for the approximately 25,000 properties within its jurisdiction. (Tr. 85, 99-100; Ex. 169-P at 36-42, 48).

72. The determinations made by the LPC are governed by Title 63 of the Rules of the City of New York, the Administrative Code of the City of New York, Chapter 3, sections 25-301 through 25-322, and New York Landmarks Preservation Commission Law, sections 3020 and 3021. (Stip. ¶112; Exs. 86, 87, 88, 169-P at 9-11)

73. Consent for certain requests for modifications or alterations to properties under the jurisdiction of the LPC may be made at the LPC staff level. (Ex. 169-P at 4)

74. Staff-level rejections of requests for modifications or alterations to properties under the jurisdiction of the LPC may be brought before the LPC Commissioners at a public hearing. (Ex. 169-P at 15)

75. The LPC Commissioners have discretion to determine the appropriateness of proposed modifications and are not bound by legislative or regulatory restrictions. (Tr. 55-56, 58-59, 86; Ex. 169-P at 15-18)

76. There are significant differences between the Secretary of Interior's Standards and the alterations that the LPC staff may permit under the LPC's regulatory standards, and even greater differences between the Secretary of Interior's Standards and the discretion reserved to the LPC Commissioners. (Tr. 145; Ex. 169-P at 11-14)

77. The statutes and ordinances governing landmarks preservation in New York City permit alterations and demolition in cases of demonstrated economic hardship. (Tr. 79-80; Ex. 169-P at 48-49).

78. The Trust's Conservation Deed does not contain a provision allowing for alteration or demolition based on economic hardship and the Trust does not consider economic hardship in reviewing proposed modifications to eased properties. (Tr. 79, 116, 119; Stip. ¶91; Ex. 74)

79. There are numerous examples of alterations that have been permitted by the LPC that are not permitted under the Secretary of Interior's Standards. (Tr. 58-60, 69-73; Ex. 169-P at 18-36)

80. There are numerous examples of instances in which the LPC has permitted demolitions that would not be permitted under the Trust's Conservation Deed. (Tr. 63-65, 71-75; Ex. 169-P at 18-36)

81. There are numerous examples of alterations to the Property that may be permitted by the LPC but which are not possible following the donation of transferable development rights to the Trust. (Tr. 73-74)

82. When a property located within a New York City historic district subject to LPC enforcement is also subject to

a Conservation Deed donated to the Trust, the property owner is subject to two distinct sets of restrictions and two distinct processes to review proposed modifications to the property.

(See Tr. 119; Ex. 169-P, at 4.)

83. The Trust has rejected proposed modifications to eased properties following approval from the LPC of such modifications in a number of instances. (Tr. 119)

84. As an example, LPC procedures allow LPC staff to approve alterations to visible windows in a front façade or a side façade that the Trust often could not permit under the Secretary of Interior's Standards. (Tr. 73-74, 95; Ex. 169-P at 12; see Tr. 118)

85. The Conservation Deed for the Property protects the visible side façade, which currently does not have any windows. (Exs. 74; 169-P at 57)

86. The LPC staff has the authority to approve a request for a rooftop addition on the Property that is not visible from the public thoroughfare. (Ex. 169-P at 57)

87. The LPC Commissioners have the discretion to allow any construction on the Property that they conclude is appropriate, including visible rooftop additions and rear-yard additions that are not visible to the public. (Ex. 169-P at 57; see 58-59)

88. No rooftop or rear-yard additions of any kind may be permitted under the Conservation Deed as a result of the donation and extinguishment of the unused development rights.

(Exs. 74; 169-P at 57)

89. The Deputy Director of the Preservation Department of the LPC views the Trust's criteria for modifications and alterations as dissimilar from and less flexible than that of the LPC. (Tr. 97)

90. The Director of Enforcement for the LPC considers façade conservation easements to be helpful to the preservation process and to the monitoring of properties in historic districts. (Tr. 102-03)

G. The Trust's Outreach Efforts And Cash Donations

91. In 2004, some of the educational services that are currently provided by the Trust, including the outreach to potential donors, were provided by Springfield Management Services ("SMS"), a for-profit entity. (Tr. 128)

92. In 2004, the Trust made payments to SMS, which in turn made payments to area representatives that SMS engaged, in connection with SMS's efforts to facilitate donations to the Trust. (See Stip. ¶89; Ex. 46)

93. In 2004, the services provided by SMS to the Trust, for which SMS was paid by the Trust, included processing applications for easement donations. (Stip. ¶15; Ex. 10, St. 9)

94. The Trust's service agreement with SMS was terminated on December 31, 2004, after which the Trust compensated SMS in connection with easement donation applications received on or before December 31, 2004, and SMS provided the Trust with processing services through March 31, 2005. (Stip. ¶¶15, 17; Exs. 10, St. 9; 11, St. 12)

95. The Trust's relationship with SMS was described in detail on its 2004 and 2005 Forms 990. (Stip. ¶¶15, 17; Exs. 10, St. 9; 11, St. 12)

96. Donations to the Trust were necessary and instrumental in building the Stewardship Fund that enables the Trust to monitor eased properties and to enforce its rights under façade conservation easements in perpetuity. (See Tr. 110-11; Stip. ¶¶15, 17; Exs. 10, 11)

H. Petitioner's Desire To Ensure The Historic Architectural Preservation Of The Property

97. Solomon Asser is the tax matters partner and managing member for the Petitioner. (Tr. 605)

98. Mr. Asser earned a professional degree in architecture in Paris, France, and holds a degree in urban planning and

another degree in architecture and urban design from Columbia University in New York. (Tr. 605-06)

99. For over twenty-four years, Mr. Asser has engaged in the design, building and rehabilitation of buildings in New York City, including buildings in landmark districts. (Tr. 606-07)

100. Mr. Asser currently owns and operates a firm that designs building interiors and exteriors in New York City, including a substantial amount of rehabilitation of existing buildings. (Tr. 606)

101. As a result of his professional experience, Mr. Asser is familiar with the requirements, processes and procedures of the LPC. (Tr. 613)

102. At the time that Petitioner purchased the Property, the Property was in complete disrepair. (Tr. 607)

103. Petitioner was attracted to the purchase of the Property because the characteristics of the property, including the exterior, the location, size and zoning, combined with its condition of disrepair and Mr. Asser's expertise in renovation and conservation, made it an attractive opportunity for development. (Tr. 608)

104. Petitioner purchased the Property in 2002. (Stip. ¶21)

105. Petitioner undertook a substantial renovation of the Property. (Tr. 609, 627-28)

106. In connection with the renovation of the Property, Petitioner sought and obtained approval from the LPC. (Tr. 613)

107. The Property is subject to zoning ordinances that allow it to be used for residential or commercial purposes. (Tr. 608)

108. The Property is located in a section of New York City that is a highly desirable residential area, with a significant concentration of high net worth families. (Tr. 610)

109. The Property is proximate to several desirable public and private schools, shopping, and public transportation, and is within one block of the Metropolitan Museum of Art. (Tr. 610)

110. The Property is located within the Metropolitan Museum Historic District, and is on the eastern border of that district. (Tr. 612)

111. Mr. Asser developed an understanding of New York City real estate by walking throughout the city to see how the buildings affect the community. (Tr. 612)

112. Mr. Asser first learned of tax incentives in connection with historic preservation during his graduate studies at Columbia University. (Tr. 614)

113. Mr. Asser first became aware of the Trust's façade conservation easement program when one of his partners provided him with a flyer in 2002. (Tr. 614)

114. Mr. Asser made inquiries in his business operations concerning the Trust, researched various websites to determine that the federal tax incentive program was in place, made inquiries of representatives of the Trust, and sought legal advice from two of the partners of Petitioner. (Tr. 614, 618)

115. Mr. Asser sought and received a copy of the determination by the Internal Revenue Service ("IRS" or "Service") that the Trust is a section 501(c)(3) organization. (Tr. 615)

116. Mr. Asser and other members of Petitioner viewed the donation of a façade conservation easement as an opportunity to contribute to the architectural heritage of New York City. (Tr. 619)

117. Mr. Asser viewed the donation of transferable development rights as an opportunity to preserve the texture of the architectural heritage of the Property within the community where the Property is located. (Tr. 620-21)

I. The Donation Process

118. Petitioner submitted a Façade Conservation Easement Application, dated April 10, 2003, to the Trust. (Stip. ¶57; Ex. 45)

119. In connection with the April 10, 2003 Façade Conservation Easement Application, Petitioner made a deposit to the Trust in the amount of \$1,000, by check dated April 10, 2003. (Stip. ¶58).

120. Petitioner submitted a second Façade Conservation Easement Application, dated December 8, 2004, to the Trust in connection with the Property's transferable development rights. (Stip. ¶82; Ex. 66)

121. In connection with the December 8, 2004 Façade Conservation Easement Application, Petitioner made a deposit to the Trust in the amount of \$1,000, by check dated December 9, 2004. (Stip. ¶84; Ex. 69)

122. As part of its consideration and processing of Petitioner's application to contribute a façade conservation easement, the Trust sought necessary certifications from applicable government agencies. (See Stip. ¶59; Ex. 47)

123. As part of its consideration and processing of Petitioner's application to contribute a façade conservation

easement, the Trust worked with First Republic Bank to obtain the Lender Agreement. (See Stip. ¶59; Ex. 47)

124. The U.S. Department of the Interior National Park Service classified the Property as a "certified historic structure" for a charitable contribution for conservation purposes on May 12, 2003. (Stip. ¶60; Ex. 48)

125. Petitioner submitted a Façade Conservation Easement Application Crossover Addendum, also on December 8, 2004, to the Trust, in which Petitioner agreed to cooperate in completion of various items following the donation of a façade conservation easement and acknowledged that the Trust would not provide a completed IRS Form 8283 until the listed items were completed. (Stip. ¶82; Ex. 67)

126. Although the Façade Conservation Easement Application Crossover Agreement recited that Petitioner agreed to cooperate to have the Property classified as a certified historic structure, such classification had in fact been made prior to the execution of the Façade Conservation Easement Crossover Agreement. (Compare Stip. ¶82; Ex. 67 with Stip. ¶60; Ex. 48)

127. Although the Façade Conservation Easement Application Crossover Agreement recited that Petitioner understood that subordination of existing liens by my lending organization(s) must be completed by no later than February 15, 2005, the

subordination had in fact been completed prior to the execution of the Façade Conservation Easement Crossover Agreement.

(Compare Stip. ¶82; Ex. 67 with Stip. ¶66; Ex. 74).

128. At the time that the Façade Conservation Easement Application Crossover Agreement was executed, the only items listed in that agreement that remained to be done were (1) Petitioner was to obtain an appraisal of the noncash charitable contribution within the time frame provided by the Internal Revenue Code and regulations thereunder; (2) Petitioner was to deliver documents necessary for recording the Conservation Deed; and (3) Petitioner was to make an agreed-upon cash contribution to the Trust. (Compare Stip. ¶82; Ex. 67 with Stip. ¶¶60, 66, 86; Exs. 48, 71; 74)

129. Petitioner made a cash contribution to the Trust in the amount of \$451,500, payable by check dated December 17, 2004. (Stip. ¶88; Ex. 73)

130. Petitioner understood that the cash contribution was necessary to enable the Trust to build and maintain a fund to monitor properties as to which the Trust held façade conservation easements. (Tr. 625)

131. The cash contributions received by the Trust are used to pay operating expenses and to maintain a Stewardship Fund to

allow for the monitoring and enforcement of easements in perpetuity. (Tr. 131)

132. Petitioner's application to make a donation to the Trust expressly stated that the cash donation was needed by the Trust to pay for operating expenses and to fund the Stewardship Fund. (Stip. ¶57; Ex. 45)

133. The amount of cash contributed by any particular donor is not determined by what will be needed to monitor and enforce the easement in connection with that donor's property, but rather is intended to provide general funds for the Trust's operating and stewardship expenses in perpetuity. (Tr. 131)

134. On December 26, 2004, Solomon Asser executed the Conservation Deed on behalf of Petitioner. (Stip. ¶¶91, 92; Ex. 74)

135. The donations contained in the Conservation Deed of a façade conservation easement on the Property and transferable development rights as described in the Deed of Easement were accepted by the Trust on December 30, 2004, when an authorized representative of the Trust signed the Conservation Deed.

(Stip. ¶93; Ex. 74)

136. The Trust sent Petitioner a letter dated March 31, 2005, that (1) acknowledged Petitioner's donation in 2004 to the Trust of a façade conservation easement, with development

rights, on 19 East 82nd Street; (2) acknowledged Petitioner's cash contributions to the Trust of \$2,000 in 2003 and \$451,500 in 2004; and (3) enclosed a copy of IRS Form 8283 signed by the Trust.

J. The IRS's Public Statements Concerning The Valuation Of Façade Conservation Easements

137. For a period of time from 2001 through at least part of 2003, an article authored by Mark C. Primoli, IRS Examination Group Manager, was posted on the IRS website and said in pertinent part: "Internal Revenue Service Engineers have concluded that the proper valuation of a façade easement should range from approximately 10% to 15% of the value of the property." (See Stip. ¶¶39, 45; Ex. 29)

138. For a period of time from 2001 through at least part of 2003, the article authored by Mark C. Primoli containing the language that "Internal Revenue Service Engineers have concluded that the proper valuation of a façade easement should range from approximately 10% to 15% of the value of the property" also appeared on the website for the U.S. Department of the Interior, National Park Service.⁴ (Stip. ¶¶39, 46; Ex. 29)

⁴ Although the parties stipulated that the article was revised to delete this language and that the revised article was replaced on the National Park Service website in 2003, the Trust has seen

K. Petitioner's Tax Return Preparation

139. The Trust includes statements in its printed materials urging donors and prospective donors to consult appropriate tax advisors concerning the tax treatment of donations to the Trust. (Stip. ¶¶52, 53; Exs. 40, 41)

140. The Trust specifically stated in correspondence to Petitioner's representatives that they should consult appropriate tax advisors concerning the tax treatment of donations to the Trust. (Stip. ¶¶59; Exs. 47)

141. Irwin Weissman was the accountant and return preparer for Petitioner and for Mr. Asser during the time period in issue. (Tr. 473, 639)

142. Mr. Weissman had been the personal accountant for Mr. Asser since 1985. (Tr. 473, 639)

143. Mr. Weissman had been Petitioner's accountant and return preparer since Petitioner's inception. (Tr. 473-74)

144. Mr. Weissman prepared Petitioner's 2004 tax return. (Tr. 474)

145. Petitioner relied on Mr. Weissman concerning all aspects of tax advice relating to the preparation of Petitioner's 2004 tax return. (Tr. 640-41)

documents that establish that the quoted language remained on the National Park Service website until at least 2005.

146. Mr. Weissman reviewed the Form 8283 in connection with the donations made by Petitioner to the Trust. (Tr. 474)

147. The Form 8283 provided to Mr. Weissman by Petitioner included all necessary information and signatures. (Tr. 482-83)

148. Mr. Weissman attached only the second page of the Form 8283 to Petitioner's 2004 tax return after determining that the first page was a blank form that added no additional information. (Tr. 475)

149. Mr. Weissman concluded that the appraisal was a valid appraisal because the date that the appraisal was completed was within sixty days of the date of the gift, without regard to the valuation date. (Tr. 489-90)

L. Post-Donation History Of The Property

150. Petitioner sold the Property in July 2006 to Four Stars, LLC ("Four Stars"). (Tr. 639)

151. The principals of Four Stars had recently lost the lease to operate a gallery at a location within four blocks of the location of the Property and were in need of a new location in the same geographic area. (Tr. 642, 680)

152. Four Stars intended to use the two lower floors of the Property as a gallery and the two upper floors of the Property as a private residence. (Tr. 639)

153. The physical layout of the Property provided a particularly good opportunity for Four Stars to use the Property for a gallery. (Tr. 642-43)

154. The Property was also particularly attractive to Four Stars because the zoning allowed for both commercial and residential use. (Tr. 639)

155. Because the Property presented an ideal opportunity to fulfill the unique needs of the principals of Four Stars, they did not make the effort to become familiar with the terms of the Conservation Deed held by the Trust. (Tr. 690)

156. The Trust sent a letter dated January 16, 2007, to Four Stars, informing Four Stars that the Trust held an easement on the Property, describing the mission of the Trust and the role of the easement in historic preservation, setting out and enclosing materials concerning the requirements for seeking modifications to the Property, and describing the monitoring process. (Tr. 160; Stip. ¶152; Exs. 130, 131, 132)

157. The Trust has made regular monitoring visits to the Property. (E.g., Stip. ¶¶159, 160, 153, 164, 165, 166; Exs. 139, 140, 143, 144, 145, 146)

158. The Trust maintained records of the notes made during monitoring inspections of the Property by a Trust representative, and the subsequent comparison by a Trust

representative of the photographs taken during the inspections with the baseline photographs. (Tr. 152-53; Suppl. Stip. ¶¶172-177; Exs. 153 through 157, inclusive, see ¶186, Ex. 165)

159. Through its monitoring activities, the Trust has found two minor alterations to the Property. (Tr. 148)

160. In one instance, the Trust found that a sign had been put on the property identifying the gallery; signage identifying occupants of the property is expressly permitted under the Conservation Deed. (Tr. 148; Stip. ¶¶91, 165; Exs. 74; 145)

161. In another instance, the Trust found that a modern railing around a curb at the sidewalk had been removed; because this was not an historic element, the Trust did not object. (Tr. 148; Stip. ¶91; Ex. 74)

M. Credibility Of Respondent's Expert

162. Respondent's expert, Robert Von Ancken, testified at trial that he owned real property located at 127 MacDougal Street in New York City. (Tr. 778-779)

163. Victoria McCormick, vice president of the Trust, was in the courtroom when Mr. Von Ancken gave this testimony. (Tr. 663; McCormick Aff. ¶3)

164. Upon returning to her office after the conclusion of the trial, Ms. McCormick reviewed the Trust's records concerning

the property located at 127 MacDougal Street. (McCormick Aff. ¶ 4)

165. According to Trust records, Mr. Von Ancken held a fifty percent interest in 127 MacDougal Street Associates in 2004. (McCormick Aff. ¶6; Ex. A)

166. According to the Trust's records, on or about November 5, 2004, Mr. Von Ancken submitted an application to donate a façade conservation easement to the Trust in connection with a building owned by 127 MacDougal Street Associates. (McCormick Aff. ¶7; Ex. A)

167. According to the Trust's records, 127 MacDougal Street Associates submitted an appraisal, which was addressed to Mr. Von Ancken, in connection with his proposed donation of a façade conservation easement to the Trust, showing a diminution in value to the property of approximately 11% as a result of the proposed donation of the façade conservation easement. (McCormick Aff., ¶ 8; Ex. B)

168. According to the Trust's records, during the processing of Mr. Von Ancken's application, the Trust learned that the property, 127 MacDougal Street, was not located in an historic district and was not listed on the National Register, and accordingly would not qualify for a tax deduction under IRC section 170(h). (See McCormick Aff. ¶9; Ex. C)

169. According to the Trust's records, after learning that 127 MacDougal Street would not qualify as a "certified historic structure" under IRC section 170(h), its owners withdrew from making the donation of a façade conservation easement.

(McCormick Aff. ¶10, Ex. C)

ULTIMATE FINDINGS OF FACT

170. The Trust's Conservation Deed, executed by Petitioner, creates a burden on Petitioner's property in perpetuity.

171. The rights of the mortgagee are subordinated to the Trust's rights to enforce the conservation purposes of the Conservation Deed.

172. The Conservation Deed gives the Trust a vested right to a proportionate portion of proceeds upon a sale, exchange or involuntary conversion of Petitioner's property following any extinguishment of the easement.

173. Petitioner's donation of unused transferable development rights preserves a certified historic structure.

174. Petitioner's donation of unused transferable development rights was a gift of all of Petitioner's interest in property.

175. Petitioner's gifts to the Trust of a façade conservation easement, transferable development rights, and cash were made with donative intent.

176. Petitioner's donations as set out in the Conservation Deed caused a diminution in the value of the underlying property.

ARGUMENT

I. The Trust's Conservation Deed Creates A Burden On Property In Perpetuity

The Conservation Deed donated to the Trust a façade easement and unused transferable development rights. As a result, certain burdens were placed on the Property that will preserve its historic architectural features in perpetuity.

The Tax Court has upheld charitable deductions for façade easement donations in a number of cases, dating back decades. *E.g.*, *Hilborn v. Comm'r*, 85 T.C. 677 (1985); *Dorsey v. Comm'r*, 59 T.C.M. (CCH) 592 (1990); *Griffin v. Comm'r*, 56 T.C.M. (CCH) 1560 (1989); *Losch v. Comm'r*, 55 T.C.M. (CCH) 909 (1988); *Nicoladis v. Comm'r*, 55 T.C.M. (CCH) 624 (1988). The most recent decision, *Simmons v. Comm'r*, 98 T.C.M. (CCH) 211 (2009), sustained a deduction for the donation of easements indistinguishable from the one here.

The Court in *Simmons* described easement provisions similar to or less stringent than the Conservation Deed's terms. In this case, the Conservation Deed requires the owner obtain the Trust's express written consent before altering the Protected Facades, or painting or cleaning in a way that might affect its historic appearance. (Ex. 74, Part II, ¶¶A(1), (2), and (4)) The roof, foundation, Protected Facades, and overall structural

integrity of the building must be maintained in good order.

(Ex. 74, Part II, ¶B) The replacement or repair of protected elements must be made in a manner that will maintain or recreate the historical appearance. (Ex. 74, Part II, ¶A(4)) If the building is destroyed, the owner must obtain the Trust's consent to any plan to rebuild, which must be consistent with the characteristics of the historic district. (Ex. 74, Part II, ¶A(3)) As in *Simmons*, any work must also comply with applicable laws and regulations, a term required by Treas. Reg. §1.170A-14(d)(5)(i). (Ex. 74, Part II, ¶ C) *Simmons*, at 213-214.

As in *Simmons*, the Trust conducts an annual inspection of every eased property. A staff member examines maintenance conditions, and makes a determination as to whether the property has been altered in violation of the Trust's rights. Multiple detailed photographs of each protected façade are compared annually to the Trust's baseline photographs. The Trust also receives reports of potential violations from the public. The Trust has sued to enforce easement terms, and has successfully stopped work until plans were made to comply with the easement. Compare Tr. 111-14, 155, with *Simmons*, at 212-213.

As in *Simmons*, the Conservation Deed is recorded and becomes part of the chain of title, binding subsequent owners. (Ex. 74, Part IV, ¶ A) *Simmons*, at 212.

II. The Conservation Deed Complies With The Code And Regulations

Section 170(h) allows a deduction for a "qualified conservation contribution," which is in turn defined as a contribution of a qualified real property interest, to a qualified organization, exclusively for conservation purposes. A qualified real property interest includes a restriction granted in perpetuity on the use of real property, such as the Conservation Deed. IRC §170(h)(2)(C). The Trust is a qualified organization. (Stip. ¶12) The Conservation Deed states that Petitioner's grant of an open space and architectural façade conservation easement was made exclusively for conservation purposes. (Ex. 74, Part I, ¶ E) Petitioner's contribution fully complies with the Code and regulations, and Respondent's list of contentions to the contrary cannot withstand analysis.

A. The Lender's Rights Were Properly Subordinated

- 1. In separate sections, the regulations address (a) the mortgagee's subordination and (b) the easement holder's rights to proceeds of a sale following judicial extinguishment**

Under the regulations, to obtain a deduction for a conservation easement on property subject to a mortgage, the mortgagee must subordinate its rights to "the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity." Treas. Reg. §1.170A-14(g)(2).

By separate provision, the regulations provide that the perpetuity requirement may be met under circumstances where subsequent events make continued use of the property for conservation purposes impractical or impossible "if the restrictions are extinguished by judicial decree and all of the donee's proceeds (determined under paragraph (g) (6) (ii) of this section) 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." Treas. Reg. §1.170A-14(g) (6) (i). The referenced subsection states that

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.

Treas. Reg. §1.170A-14(g) (6) (ii). The regulation then states that, barring contrary provisions in state law, upon extinguishment of the easement "the donee organization, on a subsequent sale, exchange or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction." *Id.*

2. The Conservation Deed and Lender Agreement track the language of the Regulations

The sole mortgagee of the Property executed the Lender Agreement, which was made part of and recorded with the Conservation Deed. (Stip. ¶¶66, 91; Ex. 74) Subject to certain clarifying provisions, the Lender Agreement states that the mortgagee of the Property is "subordinating its rights in the Property to the right of the [Trust], its successors or assigns, to enforce the conservation purposes of this Easement in perpetuity." (Ex. 74 at 7) See *Simmons*, 98 T.C.M. (CCH) 211, 214 (identical subordination language).

The Conservation Deed also expressly includes Petitioner's agreement that, upon extinguishment, the Trust

will be entitled to receive upon the subsequent sale, exchange or involuntary conversion of the Property, a portion of the proceeds from such sale, exchange or conversion equal to the same proportion that the value of the initial Easement donation bore to the entire value of the property at the time of the donation as estimated by a state licensed appraiser

(Ex. 74, Part IV, ¶ B) The Conservation Deed further provides:

"Grantee agrees to use any proceeds so realized in a manner consistent with the conservation purposes of the original contribution." (Ex. 74, Part IV, ¶ B)

Respondent erroneously contends that the clarifying provisions of the Lender Agreement somehow undermine the Conservation Deed's compliance with the regulatory requirements. Respondent points to the provision in the Lender Agreement that

states that the mortgagee "shall have a prior claim to all insurance proceeds as a result of any casualty, hazard or accident occurring to or about the property and all proceeds of condemnation." (Ex. 74, at 7, ¶ (a); see R. Pretrial Br. at 43-44) Contrary to Respondent's argument, nothing in the Code or regulations requires a mortgagee to "fully subordinate" its rights. (See R. Pretrial Br. at 43) Rather, the regulations require only that the mortgagee subordinate its rights to the easement holder's rights to enforce the easement's conservation purposes. Treas. Reg. §1.170A-14(g)(2). The easement's express language meets this requirement.

The purpose of the regulation is to ensure that the conservation protections of an easement will not be lost if a mortgagee forecloses on the eased property. That purpose is well met here: in the clarifying provisions, the Lender Agreement makes clear that the mortgagee has no right to undermine the easement's conservation purposes. (Ex. 74, at 7, ¶¶(b) and (c)) The Lender Agreement thus reiterates in its concluding paragraph: "Nothing contained in this paragraph or in this Easement shall be construed to give any Mortgagee/Lender the right to violate the terms of this Easement or to extinguish this Easement by taking title to the Property by foreclosure or otherwise." (Ex. 74, at 7, ¶(c))

3. Respondent seeks to impose requirements not contained in the Regulations

Respondent attempts to conflate the requirements that the mortgagee subordinate its rights to the right of the Trust to enforce the conservation purposes of the Conservation Deed, and the requirement that the Trust be entitled to receive a portion of the proceeds on any sale subsequent to a judicial extinguishment of the easement. Quite simply, the payment of insurance proceeds or condemnation proceeds does not equate to a judicial extinguishment of the easement. Under the terms of the Conservation Deed, the easement is "a servitude running in perpetuity with the land." (Ex. 74) Neither the destruction nor the condemnation of the Property extinguishes the easement, and thus neither triggers the regulatory requirement that a portion of any proceeds be paid to the easement holder.

To the contrary, several provisions in the Conservation Deed require historically consistent rebuilding, repair or reconstruction of the Property in the event of a casualty loss or substantial destruction. (Ex. 74, Part II, ¶¶A(3) and (4)) Thus, as required by the regulations, the conservation restrictions remain in place on the Property in perpetuity regardless of whether a Lender receives insurance proceeds.

The reference to condemnation proceeds is also consistent with the regulatory requirements. The regulations set out the provision requiring subordination, and the provision concerning the payment of proceeds upon extinguishment of the easement, in separate subsections. See Treas. Reg. §1.170A-14(g)(2) and § 1.170A-14(g)(6)(ii). Nothing in subsection 1.170A-14(g)(2), which requires the mortgagee to subordinate its interests to the enforcement of the easement's conservation purpose, purports to require that the mortgagee subordinate any other interests. Similarly, nowhere in subsection 1.170A-14(g)(6)(ii), regarding extinguishment proceeds, is there any mention of subordination by a mortgagee. Only in Respondent's argument is there any suggestion that one provision has anything to do with the other. To allow Respondent to invent such a requirement would run contrary to legislative intent by placing an untenable burden on the historic preservation community.

By expressly tracking the language of the regulation, the Conservation Deed includes a provision that the Property's owner is required to pay the Trust a proportionate share of any proceeds from the sale following any judicial extinguishment of the easement. (Ex. 74, Part IV, ¶B) Contrary to Respondent's implicit contention, and giving Respondent the benefit of the assumption that condemnation might result in the easement's

judicial extinguishment, the regulations simply do not require that the rights to proceeds of any mortgagee be subordinated to the rights of the Trust. Moreover, the absence of any such subordination by the mortgagee does not leave the Trust without a remedy. Under the terms of the Conservation Deed, as well as under New York law, the Trust retains a right against the Property owner for its proportionate share of the proceeds. See N.Y. RPAPL §1951(2) (damages upon easement's extinguishment). The donation's conservation purposes will remain in perpetuity consistent with the intent and language of the regulations.

B. The Easement's Conservation Purposes Will Be Enforced

Respondent attempts to take a single clause in the Conservation Deed out of context to claim that the recorded easement will not be enforced in perpetuity. (See R. Pretrial Br. at 45) Specifically, the Conservation Deed states that the Trust will not transfer its rights under the easement except to another qualified organization, and further states that

it will not transfer this Easement unless the transferee first agrees to continue to carry out the conservation purposes for which this Easement was created, provided, however, that nothing herein contained shall be construed to limit the [Trust's] rights to give consent (e.g., to changes in the Protected Façade(s)) or to abandon some or all of its rights hereunder.

(Ex. 74, Part IV, ¶ B) Respondent would have this Court find that the careful delineation of the parties' rights and obligations in the Conservation Deed are somehow eviscerated by a single clause referencing the Trust's right to consent to changes in the Protected Facades or to elect not to enforce some of its rights - rights the Trust would have absent this clause.

Respondent made similar arguments in *Simmons*, contending that language allowing the easement holder to "consent to changes in the facades, even if they are contrary to the conservation purposes of the easements," and its right "not to exercise any of its obligations" violated the requirement that the easement prevent uses inconsistent with conservation purposes. *Simmons*, at 214; see Treas. Reg. §1.170A-14(g)(1). Citing an easement term identical to one in the Conservation Deed, the Court dismissed Respondent's argument, stating that "although the grants do allow [the easement holder] to consent to changes to the properties, the grants require any rehabilitative work or new construction on the façades to comply with the requirements of all Federal, State, and local government laws and regulations." *Simmons*, at 214.

The entirety of the Conservation Deed is directed toward preserving the architectural history of the Property in perpetuity. The Conservation Deed recites that the easement

donations are being made "exclusively for conservation purposes." (Ex. 74, Part I, ¶F) The Conservation Deed states the parties' intention that the Protected Facades remain "essentially unchanged and in full public view in perpetuity" and permanently extinguishes the development rights. (Ex. 74, Part I, ¶F, Part II, ¶D) In detailed provisions, the Conservation Deed restricts changes to the Protected Facades, ensures their maintenance, and gives the Trust monitoring and enforcement rights. (Ex. 74, e.g, at Parts II, ¶¶A, B, C; III)

Fundamentally, Petitioner gave up the rights of the property owner freely to alter the Protected Façade in perpetuity to a "qualified organization," which is all that the Code and regulations require. The regulations define a qualified organization as one that has the commitment to protect the conservation purposes of the donation. Treas. Reg. §1.170A-14(c)(1). Even were Respondent to gain traction with its argument that the Trust might fail to comply with its mandate, this remote possibility cannot invalidate the Petitioner's deduction.

Moreover, Respondent's concerns are factually baseless. The record amply demonstrates the Trust's dedication to the enforcement of its easements. The record also reflects that the Trust has never abandoned an easement. (Tr. 147-48)

Nothing in the single clause cited by Respondent alters the enforceability of the Conservation Deed in perpetuity, nor does the language permit the Trust to act in contradiction to the Conservation Deed's other provisions or the Trust's not-for-profit mission. Indeed, the clause itself is contained in a paragraph that provides that, if the Trust cannot fulfill its mission, it must transfer the Conservation Deed to a qualified organization that will carry out its conservation purpose. Respondent's argument that the Trust would act in a manner other than to meet its commitment to historic architectural preservation is baseless.

C. The Donation Of Unused Development Rights Serves Conservation Purposes

1. The donation of unused development rights protects a certified historic structure under section 170(f)(3)(B)(iii) and (h)(4)(A)(iv)

Prior to the execution of the Conservation Deed, Petitioner owned 15,165 square feet of unused development rights, which could be deployed on the Property or transferred to certain adjacent properties. Pursuant to the Conservation Deed, these rights were extinguished and can never be used. (Ex. 74, Part II, ¶D(1)) Respondent debates whether this donation protected "a certified historic structure" under IRC § 170(h)(4)(A)(iv).

All of the protected elements of an historic structure need not be visible to the public; rather, only "some visual public access to the donated property is required." Treas. Reg. §1.170A-14(d)(5)(iv). In fact, in 2006, section 170(h) was amended to require that the restrictions in a conservation easement must preserve "the entire exterior of the building (including the front, sides, rear, and height of the building)," regardless of visibility. IRC §170(h)(4)(A).

This amendment facilitated the Trust's ability to insist on full envelope easements. At the time of Petitioner's donation, a deduction was allowed for an easement restricting less than a structure's entire exterior. There is no dispute that the Conservation Deed covenants preserving the visible facades serve a conservation purpose. Other property features, such as its setting, adjacent open space, footprint, fenestration patterns, air and light, can reveal its history and the history of the people who have been its occupants. (Stip. Ex. 169-P, Att. 3 at 62, 102-09.) Thus, only the donation of the unused development rights enables the Trust to preserve the Property's original siting and setting, including its footprint, open space, rear, roof, massing, and interior floor area. (Exs. 74; 169-P at 57)

The donation of transferable development rights not only protected the Property's architectural history, but also made it

more likely that the Property would be maintained in its historic context by eliminating their use by neighboring properties. (See Tr. 620-21) The donation of a façade easement is often described as a "gift to the street." The donation of development rights is a gift to the broader community. It makes more likely the preservation of a neighborhood's light and air, its other historic structures, and its overall historic feel. Such a donation is rightly viewed as protecting historic structures.

2. Petitioner donated its entire interest in development rights under section 170(f)(3)(A) and (B)(iii)

Sections 170(f)(3)(B)(iii) and (h)(4)(A)(iv) are not necessarily determinative of Petitioner's donation of unused development rights. Section 170(f)(3) provides an exception to the general rule that a taxpayer must gift the entire interest in a property for conservation donations. As to the unused development rights, however, Petitioner in fact gifted its entire interest in those property rights, and its donation may be considered instead under section 170(f)(3)(A) and (B)(ii), which make no reference to the preservation of an historic structure. The Tax Court has long recognized that air rights may constitute separate property, and that the donation of such

rights may give rise to a charitable deduction. *Fair v. Comm'r*, 27 T.C. 866, 872 (1957).

Respondent cites to the recent decision in *Herman v. Comm'r*, 98 T.C.M. (CCH) 57931. The petitioner in *Herman* held 22,000 square feet of development rights, but no longer owned the underlying structure. By a recorded covenant, he transferred 10,000 square feet of those rights. The Court found that, under these circumstances, the assignment of the development rights did not bind the petitioner, or current or future owners, to preserve an historic structure. The Court distinguished *Dorsey*, 59 T.C.M. (CCH) 592, which upheld deductions for gifts of both a façade easement and development rights where the taxpayer, like Petitioner, owned both the building and the development rights prior to the donation. Moreover, as distinguished from *Herman*, Petitioner here donated all of the unused development rights.

Significantly, Respondent would seem to ignore that the *Herman* decision is not the final resolution in the case, but only a memorandum opinion on a motion for partial summary judgment. Following the cited decision, the Tax Court granted the petitioner's motion to amend the Petition to assert that his donation of transferable development rights constituted a gift of his entire interest in property, and that his deduction

should be determined under section 170(f)(3)(A) and (B)(ii). See *Herman v. Comm'r*, No. 14005-07, Order dated December 14, 2009. Thus the *Herman* decision is neither analogous nor precedential. Once again, Respondent strains but fails to provide grounds to disallow Petitioner's deduction.

D. The Gifts Set Out In The Conservation Deed And The Cash Contribution Were Made With Donative Intent

Respondent argues that Petitioner lacked donative intent, contending that (1) Petitioner considered the tax benefits prior to making the donation and (2) the cash contribution was not directly related to the Trust's anticipated costs in monitoring and enforcing Petitioner's easements. (Tr. 1061-65)

The uncontroverted testimony establishes that Petitioner believed that the easement was a contribution to the architectural heritage of New York City, and the donation of the development rights would preserve the building in its historic context. (Tr. 619-21) Respondent notes that the potential tax benefits of making a donation were included in materials provided by the Trust. (Tr. 1061) The Trust's materials were not different from materials on the websites of the National Park Service and the IRS, and in fact the Trust's materials often quoted or cited to those government materials. (*Compare*, e.g., Exs. 35 through 42 with Stip. ¶¶39, 46; Ex. 29) More to

the point, the deduction at issue is included in the Code as a tax incentive. It would defy Congressional intent to deny Petitioner a deduction on the grounds either that Petitioner expected a tax benefit when making the donation, or that the charitable organization acted to inform the Petitioner of the tax benefits. *Skripak v. Comm'r*, 84 T.C. 285, 319 (1985).

Respondent similarly cannot prevail in asserting that the cash contribution lacked donative intent. Respondent would cast the cash contribution as a "fee" ostensibly required by the Trust in exchange for enabling Petitioner to obtain a tax deduction. (Tr. 1062-63) By claiming that the cash contribution is somehow not related to the Trust's enforcement of Petitioner's easement, Respondent misconstrues both the record and the purpose of the cash contribution. Such cash contributions are common among easement-holding organizations. *See, e.g., Simmons*, at 213 (cash contribution required).

A qualified organization is required to maintain resources sufficient to protect its eased properties. Treas. Reg. §§1.170A-14(c)(1). The Trust recognized that it needed resources to meet this commitment, and it established a Stewardship Fund.⁵ As Petitioner was told at the time of the

⁵ To build its Stewardship Fund, while minimizing the risk to its limited assets, at one time the Trust utilized the services of

donation, the cash contribution is not intended to ensure the enforcement of a particular easement, but to ensure that the Trust will meet its mission in perpetuity. (Ex. 45; Tr. 110-11, 635)

E. Respondent's Valuation Position Is Factually Suspect And Not Legally Sustainable

The Trust is neutral to this Court's determination of the value of Petitioner's contribution. The Trust cannot remain neutral, however, to key errors in Respondent's arguments.

Respondent claims that the Conservation Deed does not cause a diminution in value because the Property was already subject to local landmark and zoning laws. Respondent ignores the basic rule that fair market value must be based on a determination of "the price at which the property would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or sell and both having reasonable knowledge of relevant facts." Treas. Reg. §1.170A-1(c)(2). Because there is no market for façade easements, the value of an easement may be determined by the "before and after" value of the eased property. *E.g., Hilborn*, 85 T.C. at 688. The test is how the market reacts to the easement.

individuals engaged by SMS on a commission basis, which succeeded in these goals. The Trust assumed SMS's functions as of March 2006. (See Tr. 128; Exs. 10, St. 9; 11, St. 12)

Respondent is simply factually in error in contending that the Conservation Deed is not a further burden on the Property. The record establishes that, in considering whether to allow an alteration to the Property, the Trust uses different standards, and will come to different results, from the LPC. The Trust begins with the Conservation Deed's guiding language that the Property should remain essentially unchanged. (Tr. 119) If the Trust determines that a modification may be permitted, the Trust will next consider the Secretary of Interior's Standards, which differ on their face from the local preservation standards. (Tr. 116, 118, 145; Ex. 169-P at 11-14)

While the Trust monitors every eased property at least annually, the LPC lacks sufficient resources to monitor or to enforce a maintenance program for the approximately 25,000 properties within its jurisdiction. (Tr. 85, 99-100; Ex. 169-P at 36-45, 48) Many requests for modifications that would be rejected by the Trust are permitted on a staff level by the LPC, and the LPC Commissioners have unfettered discretion to allow the alteration of historic features or the demolition of buildings. (Tr. 55-56, 58-59, 86; Ex. 169-P at 4, 15-18) While the Trust has historic preservation as its sole mission, the LPC is required by statute to consider economic burdens, and is often subject to political pressures. (Tr. 79-80, 116, 119; Ex.

169-P at 48-54) Indeed, the LPC Director of Enforcement considers façade conservation easements to be helpful to the preservation and monitoring of properties in historic districts. (Tr. 102-03) Similarly, the LPC's Deputy Director of Preservation described the Trust's criteria as dissimilar from and less flexible than that of the LPC. (Tr. 97)

Despite this record, Respondent's expert testified that the Conservation Deed had zero impact on the fair market value of the Property. This position was flatly rejected in *Simmons*, at 217 ("We do not find respondent's expert reports credible insofar as they maintain that an easement would have absolutely no effect on the fair market value of valuable real estate.")

Moreover, this has not always been the position of Respondent's expert. In late 2004, Mr. Von Ancken attempted to donate a façade conservation easement to the Trust and in support submitted an appraisal showing an 11% diminution in value. (McCormick Aff., ¶¶5-8; Exs. A, B) The Trust submits that Mr. Von Ancken should not now be heard to argue, as he did at trial, that it is his expert belief that a façade conservation easement donated to the Trust has zero impact on the market value of the eased property.

CONCLUSION

The Internal Revenue Code expressly permits a deduction for the donations of façade conservation easements and development rights to preserve the nation's architectural history. Rather than accept this legislative scheme, the Internal Revenue Service has elected to bring repeated challenges, based on increasingly arcane arguments. This case is just one of a growing number pending before the Tax Court that involve issues relating to conservation easement donations. Concerns and objections to the IRS's tactics were recently highlighted in a report by the Internal Revenue Service Advisory Council. See Internal Revenue Service Advisory Council 2009 Report, November 18, 2009, at 3-6.

Petitioner's contributions to the Trust furthered the Trust's mission of historic architectural preservation. Petitioner's contribution also resulted in the imposition of burdens on Petitioner's Property, and the extinguishment of other valuable rights. Respectfully, Petitioner should not be thwarted in its exercise of its right to a deduction for its charitable contribution.

Respectfully submitted,


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