

glean from the Trust's amicus brief that is not already contained in Petitioner's Opening Brief.

Trust's Motion. Petitioner has no objection to the Court granting the Trust's Motion.

As the Court is aware, one of the issues in this case involves the interpretation of the Conservation Deed of Easement which provided for the donation of the historic preservation of the visible façade of the property located at 19 East 82nd Street, New York, New York (the "Property") and the extinguishment of all of the Property's otherwise available transferable development rights ("TDRs"). The Conservation Deed of Easement is a Trust prepared document and Petitioner understands that the form of the document has been used by many taxpayers who have donated easements to the Trust. As a result, it is a fair statement that the Trust, although not a party to this case, has a significant vested interest in how that document is interpreted by the Court. The Trust's mission includes the preservation of architectural history through the acceptance of donations of conservation easements, a congressionally sanctioned program provided in section 170(h) of the Internal Revenue Code. An adverse decision in this case would adversely affect the Trust and similarly situated section

170(h)(3) qualified organizations in carrying out their preservation mission.

While Petitioner is not aware of a specific rule permitting amicus briefs in this Court, Petitioner understands this Court has accepted amicus briefs in the past, most recently in TG Missouri Corporation v. Commissioner, 133 T.C. No. 13 (November 12, 2005) (Judge Marvel). See also Bank One Corporation v. Commissioner, 120 T.C. 174 (2003) (Judge Laro). The Trust's Motion and Amicus Brief appear to satisfy the requirements of Rule 29(b) of the Federal Rules of Appellate Procedure. See e.g. Neonatology Associates, P.A., v. Commissioner, 293 F. 3d 128 (3rd Cir. 2002) (relating to a motion for leave to file an amicus brief in connection with an appeal from the Court's decision in 115 T.C. 43 (2000)).

Robert Von Ancken. The Trust's Motion indicates that it is "privy to information regarding respondent's expert witness [Robert Von Ancken] that affects his credibility."

Petitioner was not aware of the information submitted to the Court in the Trust's Motion and Amicus Brief at the time of the trial of this case.

As the Court is aware, Petitioner challenged Respondent's expert at the trial and moved to have him not accepted as an expert, at least in so far as the valuation of the façade

portion of the Easement, on the basis that he had no experience in valuing historic façade easements, and Petitioner also challenged the admissibility of his report submitted to the Court on the basis that the report lacked any analysis (upon close review of the report, as indicated during the trial, Petitioner believes the conclusions reached therein were without support or underlying analysis in the report and therefore failed under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)).

Petitioner, at the trial, also repeatedly questioned Respondent's expert's conclusions, (i) particularly with respect to his conclusion that the historic façade preservation portion of the Easement had no additional meaningful burdens on the Property, when he testified, with respect to his own properties, that he was able to obtain approval from the New York City Landmarks Preservation Commission to make modifications to these historic properties and that these changes could not have been made if his properties had been encumbered with easements similar to Petitioner's Easement (see Tr. 696, 727-728, 748, 779-780 (Von Ancken)); and (ii) similarly, with respect to his unsupported determination of the non-feasibility of using the Property's TDRs on either 1100 Madison Avenue or the Property itself, when in his own testimony he indicated he was successful in making additions on a tenant occupied property he owned (as

well as with respect to the properties referenced above) in similar situations (see Tr. 696, 727-728, 748, 779-780, 1036 (Von Ancken)). These points, among others are detailed in Petitioner's Opening Brief.

It strains credibility for Respondent's expert, on the one hand, to state that the Easement has no value, when, on the other hand, according to the Trust's records, he was a participant in seeking to contribute an easement to the Trust with an asserted contribution value of 11% of the property that was to be encumbered.

Petitioner submits that, at a minimum, the Trust's disclosure should be considered by the Court in further determining the weight that should be given to Respondent's expert and his report. See Bank One Corporation v. Commissioner, supra ("XIII Postscript - Weight Given to Expert Testimony").

We are assuming that Respondent was not aware of the Trust information at the time of the trial (Respondent's expert's other discussions with the Trust were disclosed at the trial), as Petitioner believes Respondent would have been under an affirmative obligation to so disclose this apparent conflict to the Court at the time of the trial.

Given this new information, Petitioner renews his objections to the Court's consideration of Respondent's expert's

report and testimony on the basis that the witness, based on his own testimony, coupled with the new disclosure submitted by the Trust, was not credible and unbiased and therefore excludible under Daubert principles.


If the Court decides to consider the Trust's submission, we believe the Court, on its own, should consider the need to reopen the record solely for the limited purpose of taking testimony and evidence from the Trust relating to the bias issue asserted in the Amicus Brief. Cf. Coleman v. Commissioner, T.C. Memo. 1989-248 (Judge Clapp) (regarding standard for reopening a record).

Trust's Amicus Brief. After reviewing the Amicus Brief, Petitioner acknowledges that there is overlap in the discussion in the Amicus Brief and Petitioner's Opening Brief; nevertheless Petitioner requests that the Amicus Brief be considered by the Court because Petitioner believes that the extended discussion by the Trust with respect to the interpretation and application of the terms of the Easement (which is a Trust created document) would be helpful to the Court in its analysis of same (see, for example, pages 53-54, 55-57 relating to the relationship of the terms in the Lender Agreement and the terms in the Easement; pages 57-60, relating to the Trust's enforcement of the conservation purposes and abandonment language in the Easement;

and pages 60-62, relating to the conservation purposes gained by extinguishing the Property's TDRs). In addition, the Court's decision in this case will impact not only Petitioner, but also all section 170(h)(3) qualified organizations that actively accept, as part of their mission to preserve architectural history, the donations of historical preservation easements in cities that also have landmarks preservation rules and regulations.

Respectfully submitted,

Date: 2/25/2010



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