ORAL ARGUMENT SCHEDULED FOR FEBRUARY 4, 2011

No. 10-1063

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOROTHY JEAN SIMMONS,

Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

REPLY BRIEF FOR THE APPELLANT (PROOF)

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. *Parties and Amici*. The parties in the Tax Court and in this Court are Dorothy Jean Simmons and the Commissioner of Internal Revenue. The National Trust for Historic Preservation, the L'Enfant Trust, and the Foundation for the Preservation of Historic Georgetown appeared as *amici curiae*.

B. *Rulings under Review*. The rulings under review are the memorandum opinion of the Tax Court (Judge Robert Goeke) dated September 15, 2009, and the court's accompanying decisions entered on December 16, 2009.

C. *Related Cases*. To the best of their knowledge, counsel for the Commissioner are not aware of any previous or pending related cases in this Court.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

DEFRA	Deficit Reduction Act of 1984
IRS	Internal Revenue Service
L'Enfant	L'Enfant Trust

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INTRODUCTION

Both taxpayer's response brief and the brief of *amici curiae* make a number of arguments that seek to support the Tax Court's upholding of the charitable contribution deductions that taxpayer claimed for her grants of conservation easements to L'Enfant in 2003 and 2004. Despite their efforts, however, taxpayer and *amici* cannot escape the plain language of the easement deeds, which demonstrates that the

easements were not granted "exclusively for conservation purposes," as is necessary to claim the deduction. The easements neither protect the conservation purpose in perpetuity, as required by 26 U.S.C. (I.R.C.) § 170(h)(5), nor contain "legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation," 26 C.F.R. (Treas. Reg.) § 1.170A-14(g)(1). Also fatal to taxpayer's claimed deductions is her failure to obtain qualified appraisals, as required by Section 155 of the Deficit Reduction Act of 1984 (DEFRA). The Donnelly appraisals obtained by taxpayer failed to set forth the information required by Treas. Reg. § 1.170A-13, including, *inter alia*, the valuation method employed and the substantive bases for the valuations. Although taxpayer tries to fill in the blanks left by the Donnelly appraisals, her after-the-fact attempt to bring the appraisals into compliance is unavailing.

This reply brief is directed only to those contentions that warrant a further response. In all other respects, we rely upon our opening brief.

ARGUMENT

The Tax Court erred in holding that taxpayer was entitled to charitable contribution deductions for the façade easements granted to L'Enfant because the easements were not qualified conservation contributions, and taxpayer failed to obtain qualified appraisals

I

The Tax Court erred in holding that the 2003 and 2004 easements were "qualified conservation contributions"

A. Taxpayer's contributions were not made "exclusively for conservation purposes"

As demonstrated in our opening brief (Br. 33-47)[1], the Tax Court erred in concluding that taxpayer had satisfied the necessary prerequisites to claim charitable contribution deductions for the values

[1] "Doc." references are to documents contained in the record, as numbered by the Clerk of the Tax Court. "Ex." references are to the exhibits admitted at trial. "Br." references are to our opening brief. "Aple. Br." references are to appellee's opening brief. "Am. Br." references are to the brief submitted by *amici curiae*. The Addendum attached to our original brief includes the current version of I.R.C. § 170, which was not in effect during the periods in issue. We have reproduced the Addendum with the correct version as an attachment to this brief, and we will not reproduce the earlier Addendum when we submit final briefs.

of the façade easements donated to L'Enfant in 2003 and 2004. As relevant to this case, to claim this deduction, a charitable contribution of a partial interest of property must constitute a "qualified charitable contribution," *see* I.R.C. § 170(f)(3)(B)(iii), (h)(1), which requires, *inter alia*, that the contribution be made "exclusively for conservation purposes," *see* I.R.C. § 170(h)(1)(C). To satisfy this requirement, the conservation purpose of the contribution must be protected "in perpetuity," pursuant to I.R.C. § 170(h)(5).[2] In addition, "any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions . . . that will

[2] In her brief (Aple. Br. 11, 17), taxpayer observes that we did not challenge in our opening brief whether each easement constituted a "qualified real property interest" under I.R.C. § 170(h)(1)(A), (h)(2)(C), which, as we noted in our opening brief (Br. 38), requires that a restriction be granted in perpetuity. The easement documents purport to grant the easements in perpetuity and thus each easement, in form, was a "qualified real property interest." Our lengthy discussion in our opening brief, however, makes clear our position that the conservation purpose underlying these easements was not protected in perpetuity, and, therefore, as a matter of substance, the easements did not qualify as being made exclusively for conservation purposes as required by I.R.C. § 170(h)(1)(C).

prevent uses of the retained interest inconsistent with the conservation purposes of the donation." Treas. Reg. § 1.170A-14(g)(1).

As we showed in our opening brief (Br. 33-47), the easement deeds themselves preclude a finding that the contributions were made exclusively for conservation purposes because each reserves L'Enfant's absolute right "to give its consent (e.g., to changes in a Façade) or to abandon some or all of its rights hereunder." (Ex. 7 at 3; A. ___; Ex. 8 at 3; A. ___.) As L'Enfant itself recognizes in the *amici* brief (Am. Br. 8), "the easements at issue gave L'Enfant the unfettered ability to determine whether change is appropriate." Since L'Enfant can consent to any change, irrespective of its compatibility with the historical preservation of the façades donated, or even to abandon its rights, the easements provide no guarantee that they "will prevent" uses inconsistent with the conservation purpose as required by Treas. Reg. § 1.170A-14(g)(1). Similarly, these expansive rights prohibit the conclusion that the conservation purpose of taxpayer's donations, *viz.*,

the preservation of the historic exteriors of her property, will be protected in perpetuity.[3]

Moreover, as we explained in our opening brief (Br. 43-47), the grounds on which the Tax Court based its decision that taxpayer qualified for charitable contribution deductions are plainly insufficient. The Tax Court concluded that Treas. Reg. § 1.170A-14(d)(5) "allows a donation to satisfy the conservation purposes test even if future development is allowed, as long as that future development is subject to local, State, and Federal laws and regulations." (Doc. 41 at 11; A. ___.) The regulation, however, merely introduces a necessary, but not sufficient, condition, and the Tax Court erred in considering compliance with it as establishing entitlement to the deductions.

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[3] In their brief (Am. Br. 12, n.11), *amici* state that the Commissioner improperly relies on I.R.C. § 170(h)(4)(B), which was added to I.R.C. § 170 in 2006. Although not specifically cited, the language of the statute was referred to in our brief. That provision, however, merely made express the obvious requirement that the point to a façade easement on an historical building was to protect the historical character of the façade. Thus, while the specific provision was not applicable to the years at issue, the requirement that an easement protect the historical façade was applicable if an easement was to qualify as a conservation easement under I.R.C. § 170(h)(4). Nevertheless, we regret any confusion that may have been caused.

B. Taxpayer fails to establish that the easements preserved the conservation purpose of the donations in perpetuity, or included any legally enforceable restrictions that would prohibit inconsistent uses

Taxpayer focuses the bulk of her analysis on the issue whether the conservation purpose of the donation has been properly protected in perpetuity, as necessary to constitute qualified charitable contributions. (Aple. Br. 24-33.) More specifically, taxpayer asserts (Aple. Br. 25) that the purpose is adequately protected in perpetuity by the "laws governing the property, the organizational and statutory requirements governing L'Enfant, or by the easement deeds when read in their entirety," a point that *amici* echo in their own brief (Am. Br. 12-20). Based on these restrictions, taxpayer argues that the likelihood of L'Enfant taking action inconsistent with the conservation purposes set forth in the easement is so remote as to be negligible, and thus not violative of the perpetuity requirement under Treas. Reg. § 1.170A-14(g)(3). (Aple. Br. 33.) In addition to this general argument, taxpayer (Aple. Br. 26) and *amici* (Am. Br. 16-19) fire a number of specific objections at our contention that L'Enfant's right to abandon some or all of its rights, as well as the failure to provide in the easement for the

case that L'Enfant ceases to exist, is incompatible with a finding that the conservation purpose is protected in perpetuity. None of these arguments hit its mark.

1. As an initial matter, this Court should decline taxpayer's overture to look outside the terms of the easement deeds when determining whether the conservation purpose was protected in perpetuity. "If the deed's language is unambiguous, the court need only apply the meaning of the words." *Washington Metro. Area Transit Auth. v. Georgetown Univ.*, 347 F.3d 941, 946 (D.C. Cir. 2003). The deeds here unambiguously provide that "nothing herein contained shall be construed to limit the Grantee's right to give its consent (e.g., to changes in a Façade) or to abandon some or all of its rights hereunder." (Ex. 7 at 3; A. ___; Ex. 8 at 3; A. ___.) This language eliminates any claim that the easements "will prevent" uses inconsistent with the conservation purposes as required by Treas. Reg. § 1.170A-14(g)(1), since L'Enfant can consent to any type of façade change, irrespective of its compatibility with historical preservation. Nor can the restrictions granted in the easements be said to protect the conservation purpose in

perpetuity, since L'Enfant can consent to changes or abandon its enforcement rights. Although taxpayer (Aple. Br. 27-29) and *amici* (Am. Br. 13-14) note that, at other points, the easements state that they were granted "in perpetuity," such language cannot limit the broad rights granted, considering that the easements expressly provide "nothing herein shall be construed to limit" the rights of consent and abandonment. As L'Enfant itself recognizes, therefore, the easements grant an "unfettered ability to determine whether change is appropriate" (Am. Br. 8), and thus contain no limitation requiring L'Enfant to ensure that the conservation purpose of the donations is protected in perpetuity.[4]

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[4] *Amici* assert that model historic preservation easements generated by the federal government resemble the easements at issue in that they "contemplate that change may be permitted by an easement-holding organization within restrictions designed to ensure the satisfaction of conservation purposes." (Am. Br. 7). *Amici* refer the Court's attention to a sample easement found on the National Park Service's website. (*Id*., n. 8.) *Amici's* contention is unfounded. Unlike the easements at issue in this case, the form National Park Service easement does not provide the "unfettered ability to determine whether change is appropriate" (Am. Br. 8), providing, to the contrary, that "no construction, alteration, or remodeling or any other activity shall be undertaken or permitted to be undertaken on the Subject Property"

(continued...)

2. Despite the language of the easements, taxpayer and *amici* claim that the likelihood that L'Enfant would act in a manner inconsistent with the conservation purposes was infinitesimal, based on restrictions contained in the District of Columbia historic preservation law, the requirements imposed on tax-exempt entities, and L'Enfant's own historic preservation mission. Relying on Treas. Reg. § 1.170A-14(g)(3),[5] taxpayer argues that the likelihood of such a violation of the conservation purposes by L'Enfant cannot result in the disallowance of

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[4](...continued)
that would affect any "historically significant" aspect of a building unless the change complied with "the Secretary of the Interior's *Standards for the Treatment of Historic Properties*." National Park Service, Sample Conservation Easement Agreement for a Save America's Treasures Grant (Historic Building), ¶ 4(c), *available at* http://www.nps.gov/history/hps/treasures/downloads/SAT_sample_easement.pdf. Rather than providing the absolute discretion to consent and abandon that L'Enfant received in these easements, therefore, the sample conservation easement provides restrictions ensuring the preservation of the conservation purpose in perpetuity.

[5] Treas. Reg. § 1.170A-14(g)(3) provides that "a deduction shall not be disallowed" simply because the contribution may be defeated by the happening of some event, which is "so remote as to be negligible" on the date of the gift. This regulation does not suggest that the requirement that the conservation purpose be protected in perpetuity can be affirmatively established by satisfying this regulation. Moreover, the regulation is not directed to events expressly contemplated in an easement deed.

a deduction since it "is so remote as to be negligible." An examination of the purported limitations shows that this argument has little force.

As an initial point, taxpayer's passing suggestion that the District's historic preservation scheme itself might establish that the conservation purposes of the donation will be protected in perpetuity runs directly counter to multiple references in her own and *amici's* brief to the alleged limitations of this regime. (*See, e.g.,* Aple. Br. 4-6, 9-10, 21-23; Am. Br. 28.) According to taxpayer and *amici* themselves, therefore, the District's historic preservation scheme can hardly supply the protection for the conservation purposes of the donations that is absent from the easements.[6]

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[6] Moreover, it would be an odd result if a taxpayer could satisfy the perpetuity requirement merely by establishing that an historic preservation scheme was in place. As we observed in our opening brief, the Internal Revenue Code does not recognize a deduction simply for following the law. *See Herman v. Commissioner*, 98 T.C.M. (CCH) 197, 203 n.5 (2009). This does not mean, as *amici* suggest (Am. Br. 10), that a taxpayer living in a community governed by a historic preservation law can never claim a deduction for a conservation easement. Rather, it simply means that taxpayer cannot satisfy the perpetuity requirement *because* a historic preservation regime is in place.

Taxpayer and *amici* primarily lean on L'Enfant's tax-exempt status and historic preservation mission to establish that there is a small likelihood that L'Enfant will exercise its rights in a manner inconsistent with the conservation purposes of the donation to protect the historic exteriors of taxpayer's properties. In short, they argue that the federal tax scheme will preserve the conservation purposes of the contribution in perpetuity by limiting L'Enfant's freedom of action, for if it does not preserve the conservation purposes, then it might lose its tax-exempt status. Under I.R.C. § 501(c)(3), an entity "organized and operated exclusively" for charitable purposes is entitled to an exemption for taxation, so long as its activities are in furtherance of its exempt purpose, *see* Treas. Reg. § 1.501(c)(3)-(1)(c)(1). According to taxpayer's brief, the "purpose of L'Enfant is to preserve historically important properties by holding and enforcing conservation easements on historically designated properties in Washington, D.C." (Aple. Br. 27.)

The problem with taxpayer's argument is that there is a distinction between L'Enfant's tax-exempt purpose and the

conservation purpose of the donations at issue, which is the purpose that must be protected in perpetuity. Just because L'Enfant is acting consistently with its historic preservation mission and tax-exempt purpose does not guarantee that the conservation purpose here, *viz.*, the preservation of the historic exteriors of taxpayer's property, will be defended in perpetuity, a point illustrated by L'Enfant's own brief. In their brief, *amici* contemplate the exercise of L'Enfant's right to abandon its rights as part of "an agreement with a developer that releases a single easement (*e.g.*, on a single, modest building next to a Metro stop) in exchange for easements on significant additional properties." (Am. Br. 17.) According to *amici* (*id.*), this action would not run afoul of the entity's tax-exempt status or its own mission. Clearly, however, the exercise of the right to abandon in this hypothetical would not protect the conservation purpose of the donation at issue. *Amici* thus demonstrate that the possibility that a tax-exempt entity would not protect conservation purpose of a contribution is not so

small as to be negligible, particularly when afforded such rights as found in the easements here.[7]

3. *Amici* (Am. Br. 16-19) and taxpayer (Aple. Br. 26) also take aim at our assertion (Br. 41-42) that the conservation purpose was not protected in perpetuity, considering that L'Enfant could abandon any of its rights, and there was no mechanism to enforce the easements that would "prevent uses inconsistent with the conservation purposes of the donation," should L'Enfant choose to exercise this right or cease to exist. *Amici* first note that the right to abandon is enshrined in District of Columbia law, and assert that the restatement of such law in a contract is a non-issue. (Am. Br. 16-17.) This a red herring; that the District of Columbia chooses to recognize a right to abandon an easement has no bearing on whether taxpayer met the requirements to

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[7] Taxpayer did not argue that the possibility, under the Internal Revenue Code and Treasury Regulations, that a tax-exempt entity might lose such status should it fail to abide by its tax-exempt purpose constituted "legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation." Treas. Reg. § 1.170A-14(g)(1). Nor could she, as loss of tax-exempt status is a potential result of failure to act consistently with the tax-exempt purpose, and not a legally enforceable means to restrict uses inconsistent with the conservation purpose of a donation.

claim the deductions. That the donations do not run afoul of District of Columbia law is beside the point. Quite simply, the easements here, which give L'Enfant the "unfettered ability" to consent to changes or to walk away from its enforcement obligations if it so chooses, do not protect the conservation purpose as required for the deduction.[8]

Amici additionally argue (Am. Br. 17-19) that the likelihood of L'Enfant abandoning its rights is so remote as to be negligible, suggesting that it would only occur in such cases as a terrorist strike. *Amici* then suggest that, if L'Enfant were no longer able to continue, it would assign its easements or distribute its assets to another preservation organization, as required by Treasury Regulations governing tax-exempt entities, or the easements would revert to the District of Columbia. (Am. Br. 19.) Taxpayer also chimes in on this

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[8] *Amici* also contend that "the Commissioner has not always asserted that a preservation easement giving a charitable organization the sole discretion to approve changes to the appearance of an historic building fails the 'perpetuity' requirement." (Am. Br. 15, n.14.) This is yet another red herring; it is an entirely unremarkable observation that the Commissioner has not always challenged every issue that he could in litigation. The Tax Court case cited, as well as the Technical Advice Memorandum, have no bearing whatsoever on the instant case.

front (Aple. Br. 26), pointing out that Treas. Reg. § 1.170A-14(g)(6)(i) allows that a "conservation purpose can be treated as protected in perpetuity," in the case of a subsequent unexpected change in the condition of the donated property occurs that make the continued use "impossible or impracticable," so long as "the restrictions are extinguished by judicial proceeding and all of the donee's proceeds . . . are used by the donee organization in a manner consistent with the conservation purpose . . . ." These arguments carry little water.

As an initial matter, the possibility that L'Enfant will exercise its right to abandon its rights is not so remote as to be negligible. The parties deemed this ability to abandon their rights as significant enough to explicitly permit unrestricted changes and abandonment in the easements themselves. Moreover, the perpetual viability of an easement-holding entity like L'Enfant cannot be assumed. The *amici* brief indicates that the donations of façade easements, together with the requisite cash contributions, donated to L'Enfant had diminished substantially over the last five years, and that, over the last three years, only 16 total donations have been made. (Am. Br. 4, n.3.) In

addition, L'Enfant's president testified at trial about an "easement-holding organization in Washington, Preservation Trusts," which was "very active up on Capitol Hill in the seventies," that became dormant. (Doc. 36 at 32, A. ___.) Based on these admissions, it cannot be said that the chance that L'Enfant might cease to exist, or to exercise its right to abandon, which it deemed important enough to include in the easements, is out of the realm of possibility.

Amici's argument that the conservation purposes of the easements would be protected in perpetuity even if L'Enfant abandoned its rights or ceased to exist fares no better. L'Enfant's president testified at trial about the problems of "orphaned" easements that apparently were being enforced neither by the District of Columbia nor by any other entity. (Doc. 36 at 33-34, A. ___.) Taxpayer herself apparently recognizes (Aple. Br. 31) that the District of Columbia is not "administratively set up" to enforce easements. Therefore, it cannot be said that the conservation purpose will be protected in perpetuity, given the absence of mechanisms in the easements that would assign

them to another easement-enforcing organization in the case of abandonment or if L'Enfant ceases to exist.[9]

Moreover, although Treas. Reg. § 1.170A-14(g)(6)(i) provides a means to treat a "conservation purpose" as "protected in perpetuity" in unexpected circumstances, this certainly does not mean that the conservation purposes must not be protected in perpetuity in the deeds as well. The easements themselves contain no provision for extinguishing the restrictions contained therein by judicial proceeding, or for the distribution of the proceeds from a subsequent sale in a manner consistent with the conservation purpose of the original contribution, as required by Treas. Reg. § 1.170A-14(g)(6)(i). Nor would it make sense to allow a Treasury Regulation, contemplated as a safeguard in case of a sudden, unexpected occurrence, to absolve the

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[9] *Amici* contend that "it is clear that upon dissolution of L'Enfant or the abandonment by L'Enfant of its assets, those assets (or the proceeds from the sale of such assets), will be distributed for one or more exempt purposes." (Am. Br. 19.) As an initial matter, the Treasury Regulation to which taxpayer is apparently referring, Treas. Reg. § 1.501(c)(3)-1(b)(4), applies to dissolutions, and makes no reference to abandonment. In any event, the point is that the easements themselves do not address the matter.

failings of the easements regarding rights specifically contemplated and granted to L'Enfant.

4. In short, taxpayers and *amici* do not establish that a combination of the D.C. historic preservation scheme, together with tax considerations and L'Enfant's corporate mission, makes the likelihood of a violation of the conservation purposes of these contributions so remote as to be negligible. Although both argue that the rights of consent and abandonment included in the easement deeds merely allow for necessary flexibility, the expansive nature of the rights granted wholly undercut the protection of the conservation purpose of this contribution in perpetuity. Moreover, taxpayers and *amici* each supply real-world examples that show that the historic preservation scheme and tax considerations alone do not comprise legally enforceable restrictions that "will prevent uses of the retained interest inconsistent with the conservation purposes of the donation." Treas. Reg. § 1.170A-14(g)(1).[10]

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[10] Taxpayer and *amici* each contend that the "Acknowledgment" executed by the various mortgage holders and attached to the

(continued...)

C. Taxpayer's argument in support of the Tax Court's reliance on Treas. Reg. § 1.170A-14(h)(3) is meritless

Taxpayer also defends (Aple. Br. 19-24) the Tax Court's primary grounds for its conclusion that these were valid conservation easements, arguing that compliance with federal, state, and local law, as required by Treas. Reg. § 1.170A-14(h)(3), "definitionally satisfies the purposes test because the statutes of the registered historic district have been certified as achieving the purpose of preserving and rehabilitating buildings of historic significance" (Aple. Br. 19). Taxpayer's argument on this point is an attempt to hide the ball by claiming that the Tax Court's ruling was narrower than it actually was.

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[10](...continued)
easements properly subordinated their rights to the rights granted to L'Enfant, as required by Treas. Reg. §1.170A-14(g)(2) to claim a charitable contribution deduction. As in our original brief, we note that, although each of the mortgagees of the subject properties executed an "Acknowledgment" of the easements, the documents do not expressly state that the mortgage holders recognize that their interests were subordinated to the rights granted to L'Enfant, as required by Treas. Reg. §1.170A-14(g)(2). Nor is there any indication supporting taxpayer's suggestion that the mortgage holders considered themselves parties to the easements.

As we explained in our opening brief (Br. 43-45), Treas. Reg. § 1.170A-14(d)(5)(i) provides a minimum requirement: "only if" the terms of the restriction comply with appropriate federal, state, and local standards will the deduction be allowed. With this interpretation, taxpayer has no quibble, as she herself concedes that this regulation simply "makes the donation of the partial property interest eligible for a charitable contribution." (Aple. Br. 20.) Taxpayer suggests that this was the extent of the court's ruling. The Tax Court, however, went considerably farther, recognizing that "[a]lthough the grants do allow L'Enfant to consent to changes to the properties," they were valid conservation easements because they complied with this regulation. In so doing, the Tax Court converted a necessary, but not sufficient, condition into a dispositive one. (Doc. 41 at 11, A. __) Taxpayer does not address, much less defend, this fatal misstep in the court's analysis.

Moreover, as we explained in our opening brief (Br. 45-46), if taxpayer conveyed to L'Enfant a promise not to do what she was prohibited from doing by local law, her donation had no value. As we further noted (Br. 45, n.12), the court apparently found value based on

the second layer of necessary approval for changes and more rigorous enforcement of the easements. Taxpayer appears to agree with this conclusion, pointing to situations in which L'Enfant acted to prohibit "window replacement, exterior painting and re-tucking" while the District of Columbia took no action. (Aple. Br. 23.)

This is too slender a reed to support a deduction, however. Taxpayers should be presumed to follow the law, and it is clear in this case that the District of Columbia historic preservation scheme generally forbids: (i) changes to the exterior appearance of a building or structure or its site; (ii) changes in any interior space that has been specifically designated as an historic landmark; and (iii) the painting of unpainted masonry on a historic landmark or on a façade restored as a condition of a previously approved permit. *See* D.C. Code § 6-1102(1). The Tax Court and taxpayer thus are justifying a substantial deduction solely on the grounds that L'Enfant has been more loath to approve changes than the District, based on a few anecdotes. This is an insufficient ground to justify a deduction.

II

Taxpayer failed to obtain qualified appraisals of the value of the easements, because the Donnelly appraisals failed to abide by a cognizable valuation method or to provide specific bases for their ultimate conclusions

1. As we explained in our opening brief (Br. 47-63), taxpayer was required to obtain qualified appraisals to claim a charitable contribution deductions of property in excess of $5,000, pursuant to Section 155 of the Deficit Reduction Act of 1984 ("DEFRA"), Pub. L. No. 98-369, 98 Stat. 691.[11] The Donnelly appraisals that taxpayer obtained, however, failed to set forth, *inter alia*, the valuation method for determining the fair market values of the properties in the wake of the easements, and the specific bases for the valuations, necessary elements under Treas. Reg. § 1.170A-13(c)(3)(ii)(J) and (K), which was

[11] At several points in her brief, taxpayer contends that we rely on I.R.C. § 170(f)(11)(C), which does not apply in this case as it governs contributions made after June 3, 2004. In fact, we expressly noted that restriction in our brief (Br. 47-48, n.13), and our analysis centered on taxpayer's failure to satisfy the requirements of a qualified appraisal pursuant to Treas. Reg. § 1.170A-13(c)(3)(ii), which were promulgated in response to DEFRA, as discussed above. In the course of this discussion, we inadvertently referred to § 170(f)(11)(C), and regret any confusion this may have caused.

promulgated pursuant to a specific delegation of authority in DEFRA. The appraisals instead rather cryptically state:

> We have examined numerous sales of easement-encumbered properties and have talked to various parties at interest. We have also considered the potential costs of owning a façade easement property that may be in excess of those ordinarily expected for comparable structures. Beyond the factors from which a dollar figure can reasonably be derived based on hard cost data, our discussions with others active in the marketplace has led us to consider subjective and conjectural factors which we believe may impact on value.

(*Id.*) This statement allows no drawing back of the curtain to understand how Donnelly reached his results. Nor did the Tax Court mount any defense of the appraisals' compliance with these requirements. As the appraisals wholly fail to identify the method used for the "after" valuation, or to provide the specific basis for the valuation, as required under Treas. Reg. § 1.170A-13(c)(3)(ii)(J) and (K), they are not qualified appraisals, as required to claim the deduction.

2. In her brief, taxpayer argues that Donnelly's appraisals contained all the information required by the regulations, including the designation of his method and the substantive basis for his valuation,

laying great stress on Donnelly's qualifications in an attempt to bolster his thin discussion of these substantive requirements. (Aple. Br. 42-52.) Taxpayer argues that, in any event, the requirements of Treas. Reg. § 1.170A-13(c)(3) may be satisfied by substantial compliance, contending that these requirements did not relate to the substance or essence of whether qualified charitable contributions had actually been made. (Aple. Br. 57-59.) Taxpayer also contends that the Donnelly appraisals were much superior to the IRS appraisals, which were not credible and relied on improper information. (Aple. Br. 52-57.) Taxpayer's arguments are misconceived.

3. Taxpayer first argues that the Donnelly appraisals designated his valuation method, as required by Treas. Reg. § 1.170A-13(c)(3)(ii)(J), contending that "Donnelly valued taxpayer's after easement property by examining and quantifying the considerations competent buyers and sellers actually had, or are likely to have, in buying or selling a property encumbered by a façade easement." (Aple. Br. 44.) As explained in our original brief, Treas. Reg. § 1.170A-13(c)(3)(ii)(J) provides that a qualified appraisal must explain

"[t]he method of valuation used to determine the fair market value, such as the income approach, the market-data approach, and the replacement-cost-less-depreciation approach." In the case of easements, however, no substantial record of comparable sales usually exists, and the value of the easement is determined instead using the before-and-after method, that is, the value of the easement is "the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction." Treas. Reg. § 1.170A-14(h)(3)(i). "[T]o the extent possible, the three commonly recognized methods of valuing property (capitalized net operating income, replacement cost and comparable sales [*i.e.*, market-data approach]) are used" for both the "before" and "after" values. *Hilborn v. Commissioner*, 85 T.C. 677, 689 (1985).

The Donnelly appraisals belie the false front that taxpayer seeks to create for them. As stated previously, the Donnelly appraisals do not identify any of the common methods used to determine the "after" fair market values of the properties. Taxpayer attempts to sidestep this

hole in the appraisals by cobbling together a method for Donnelly, stating that he "valued taxpayers after easement properties taking into account factors considered by buyers in acquiring eased properties, and quantifying the economic effect of these factors on the value of the property." (Aple. Br. 47.) The "market approach" that taxpayer claims (Aple. Br. 46) that Donnelly employed is not an accepted method for determining fair market value; instead it is an invitation to take an appraiser's valuation on faith. In addition, taxpayer's summary, and the valuation method it purports to describe, are so general as to be meaningless, thus illustrating the void at the heart of Donnelly's appraisals. The Donnelly appraisals' failure to identify an actual method thus plainly violates Treas. Reg. § 1.170A-13(c)(3)(ii)(J).

Taxpayer's claim that the Donnelly appraisals include the substantive bases for his valuations is similarly unsuccessful. Treas. Reg. § 1.170A-13(c)(3)(ii)(K) establishes that a qualified appraisal must provide "[t]he specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling

procedure employed." As explained above, while the appraisals state that Donnelly examined numerous sales, evaluated costs, and considered "subjective and conjectural factors which we believe may impact on value," the appraisals themselves do not designate any particular basis for Donnelly's valuations. Rather, as noted in our original brief, the Donnelly appraisals incorrectly claim that the IRS had accepted reductions in value within a certain range and picked a number within that range. (Ex. 9 at 21; A. ___; Ex. 10 at 34; A. ___.) This is plainly insufficient to meet the requirements of the regulation.

Taxpayer attempts to remedy this defect by sifting through the appraisal reports and then asserting that various points mentioned by Donnelly constituted the bases for his valuations. (Aple. Br. 47-52.) Although taxpayer is correct that Donnelly mentioned all of the enumerated subjects at different points in his appraisals, the appraisals contain no clue as to how these various subjects played into the determinations of the "after" fair market values of the properties. Taxpayer attempts to bolster these factors by arguing for their significance for reasons that went unsaid in the appraisals. (Aple. Br.

47-52.) But, this is of no matter, as the appraisals themselves must establish the specific bases for the valuations under Treas. Reg. § 1.170A-13(c)(3)(ii)(K), a requirement which clearly they failed.[12]

4. Faced with this inability to satisfy the requirements of Treas. Reg. § 1.170A-13(c)(3)(ii), taxpayer (Aple. Br. 57-59), like the Tax Court, turns to the doctrine of substantial compliance, arguing that the requirements contained in the regulation are directory rather than mandatory, and thus "may be fulfilled by substantial, if not strict compliance." *Bond v. Commissioner*, 100 T.C. 32, 41 (1993) (quoting

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[12] We again note that the appraisals failed to satisfy other requirements of Treas. Reg. § 1.170A-13(c)(3)(ii). While the appraisals note that taxpayer was "contemplating a donation of a conservation easement" to L'Enfant, they do not specifically state that they were prepared for income tax purposes, as required by Treas. Reg. § 1.170A-13(c)(3)(ii)(G) and Section 155(a)(4)(C) of DEFRA. Also, the appraisals do not expressly state the date of the intended donation, as required by Treas. Reg. § 1.170A-13(c)(3)(ii)(C). Although taxpayer contends that she fulfilled this requirement because she submitted IRS Forms 8283 setting forth the date of contribution as part of her appraisals, these forms were separate and the appraisals themselves did not contain the date of contribution. These omissions might seem trivial, but the mandatory language of the regulation suggests such transgressions doom an appraisal, as discussed below. *See Lord v. Commissioner*, T.C. Memo. 2010-196, 2010 WL 3565240, at * 2 (Sept. 8, 2010).

Taylor v. Commissioner, 67 T.C. 1071, 1077-78 (1977)). Taxpayer argues that we erred in concluding that the provisions of Treas. Reg. § 1.170A-13(c)(3) are mandatory, because these regulations did not qualify as "legislative regulations that concern the essence of the underlying statutes at issue." (Aple. Br. 57.) Taxpayer is wrong on multiple levels.[13]

Taxpayer first errs in her claim that "the primary inquiry in determining whether full compliance with a statute or regulation is required is whether procedural requirements of the statute or regulation relate 'to the substance or essence of the statute' they support." (Aple. Br. 58.) Taxpayer supports this proposition by relying

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[13] In her brief (Aple. Br. 10), taxpayer contends that the Tax Court did not premise its ruling that the appraisals were qualified upon the substantial compliance doctrine. The court's in-depth discussion of substantial compliance (Doc. 41 at 14-16; A. ___) suggests otherwise, as there would be no need for a lengthy discussion of the substantial compliance doctrine if the appraisals were in strict compliance with the requirements of Treas. Reg. § 1.170A-13(c)(3)(ii). The court essentially admits as much, noting that the appraisals "did not contain an explicit statement that they were prepared for income tax purposes" and that the "dates of contribution were likewise included on [taxpayer's] tax returns," rather than on the appraisals themselves (Doc. 41 at 18; A. ___).

on a pre-*Chevron* case from 1977. Much has changed since then. As we noted in our original brief, where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are . . . manifestly contrary to the statute.'" *Nat'l Assn. of Clean Air Agencies v. Envtl. Prot. Agency*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). Here, Congress specifically left a gap in DEFRA for the IRS to fill with requirements, which it did with Treas. Reg. § 1.170A-13(c)(3)(ii). This regulation provides that a qualified appraisal "shall" include the information required thereunder. There is no suggestion that these requirements are directory, rather than mandatory. The doctrine of substantial compliance thus has no role.

In addition, even if taxpayer were correct that full compliance is only required when procedural requirements relate to the substance or essence of the statute that they support (Aple. Br. 58), the doctrine of substantial compliance still could not shield the appraisals here. In

Section 155(a)(1) and (2) of DEFRA, Congress required the Secretary of the Treasury to prescribe regulations which require individuals claiming charitable deductions to obtain "qualified appraisals" for any property valued at greater than $5,000. Section 155(a)(4) of DEFRA defined a "qualified appraisal" as an appraisal by a qualified appraiser that includes:

> (A) a description of the property, (B) the fair market value of such property on the date of the contribution and the specific basis for the valuation, (C) a statement that such appraisal was prepared for income tax purposes, (D) the qualifications of the qualified appraiser, (E) the signature and TIN [taxpayer identification number] of such appraiser, and (F) such additional information as the Secretary prescribes in such regulations.

In accordance with Section 155 of DEFRA, the IRS issued Treas. Reg. § 1.170A-13, which, in fact, contains a number of requirements that mirror the requirements expressly contained in Section 155 of DEFRA. "[I]t is clear that the principal objective of section 155 was to provide a mechanism whereby respondent would obtain sufficient return information in support of the claimed valuation of charitable contributions of property to enable respondent to deal more effectively with the prevalent use of overvaluations." *Hewitt v. Commissioner*, 109

T.C. 258, 265 (1997), *aff'd by unpublished opinion*, 166 F.3d 332 (4th Cir. 1998). Such information is not provided by appraisals that neglect to explain in any sort of detail how they deduced the amounts of diminution of property values attributable to the easements. In short, these requirements relate to the substance and essence of the DEFRA requirement of a qualified appraisal.[14] There was no substantial compliance.

5. Taxpayer also details perceived defects in the IRS's own appraisals. (Aple. Br. 52-57.) This argument has no relevance, as the instant appeal does not concern the relative merits of the two appraisers, but rather addresses whether taxpayer obtained qualified

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[14] Taxpayer asserts in her brief that "if this Court affirms the findings of the Tax Court that the contributions were exclusively for conservation purposes and the appraisals were qualified appraisals, the findings of the Tax Court regarding the value of taxpayer's contribution must stand because the issue is not properly before this Court." (Aple. Br. 2-3.) As explained in our opening brief (Br. 58), the court appeared to pick values for the easements out of thin air. Thus, even should this Court rule that the contributions were exclusively for conservation purposes and the appraisals were qualified, this case should be remanded nonetheless to give the Tax Court an opportunity to properly value the easements.

appraisals as required by Treas. Reg. § 1.170A-13(c)(3)(ii). As we have demonstrated, she did not.[15]

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[15] In their brief, *amici* contend that an encumbrance on a property must be worth something (Am. Br. 22), and assail our contention that a taxpayer is not entitled to a deduction if she has given away nothing more than a promise not to do what the law forbids (Am. Br. 23-29). On the first point, the Treasury Regulations expressly recognize that "there may be instances where the grant of a conservation restriction may have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of property. In such instances no deduction would be allowable." Treas. Reg. § 1.170A-14(h)(3)(ii). Moreover, the record does not establish that the restrictions contained in the easements are any more onerous than those provided for by the District of Columbia's Historic Landmark and Historic District Protection Act of 1978 and the regulations promulgated thereunder. No deduction for taxpayer's contributions is proper, therefore, because she was already prohibited from exercising the rights she relinquished.

CONCLUSION

The Tax Court's decisions should be reversed.

Respectfully submitted,

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Dated: December 7, 2010

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It is hereby certified that this brief was filed with the Clerk and served on counsel for the appellee and counsel for *amici curiae* on this 7th day of December, 2010 via the CM/ECF system. It is further certified that eight (8) copies of the brief were mailed to the Clerk via First Class Mail on the 7th day of December, 2010. It is also certified that service of this brief has been made on counsel for the appellee and counsel for *amici curiae* on this 7th day of December, 2010, by sending, via First Class Mail, two copies in envelopes properly addressed as follows:

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ADDENDUM

Internal Revenue Code (26 U.S.C.):

§ 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) Allowance of deduction.–

(1) General rule.– There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

. . . . .

(f) Disallowance of deduction in certain cases and special rules.–

(1) In general.–No deduction shall be allowed under this section for a contribution to or for the use of an organization or trust described in section 508(d) or 4948(c)(4) subject to the conditions specified in such sections.

. . . . .

(3) Denial of deduction in case of certain contributions of partial interests in property.–

(A) In general.–In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to

use property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

(B) Exceptions.–Subparagraph (A) shall not apply to–

(i) a contribution of a remainder interest in a personal residence or farm,

(ii) a contribution of an undivided portion of the taxpayer's entire interest in property, and

(iii) a qualified conservation contribution.

. . . . .

(h) Qualified conservation contribution.–

(1) In general.--For purposes of subsection (f)(3)(B)(iii), the term "qualified conservation contribution" means a contribution–

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) Qualified real property interest.–For purposes of this subsection, the term "qualified real property interest" means any of the following interests in real property:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) Qualified organization.–For purposes of paragraph (1), the term "qualified organization" means an organization which–

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 501(c)(3) and–

(i) meets the requirements of section 509(a)(2), or

(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined.–

(A) In general.–For purposes of this subsection, the term "conservation purpose" means–

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is–

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,

and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

(B) Certified historic structure.–For purposes of subparagraph (A)(iv), the term "certified historic structure" means any building, structure, or land area which–

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.

(5) Exclusively for conservation purposes.–For purposes of this subsection–

(A) Conservation purpose must be protected.–A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

. . . . .

Treasury Regulations (26 C.F.R.):

§ 1.170A-13. Recordkeeping and Return Requirements for Deductions for Charitable Contributions.

(c) Deductions in excess of $5,000 for certain charitable contributions of property made after December 31, 1984–

(1) General Rule–

(i) In general. This paragraph applies to any charitable contribution made after December 31, 1984, by an individual, closely held corporation, personal service corporation, partnership, or S corporation of an item of property (other than money and publicly traded securities to which § 1.170A-13(c)(7)(xi)(B) does not apply if the amount claimed or reported as a deduction under section 170 with respect to such item exceeds $5,000. This paragraph also applies to charitable contributions by C corporations (as defined in section 1361(a)(2) of the Code) to the extent described in paragraph (c)(2)(ii) of this section. No deduction under section 170 shall be allowed with respect to a charitable contribution to which this paragraph applies unless the substantiation requirements described in paragraph (c)(2) of this section are met. For purposes of this paragraph (c), the amount claimed or reported as a deduction for an item of property is the aggregate amount claimed or reported as a deduction for a charitable contribution under section 170 for such items of property and all similar items of property (as defined in paragraph (c)(7)(iii) of this section) by the same donor for the same taxable year (whether or not donated to the same donee).

(ii) Special rule for property to which section 170(e)(3) or (4) applies. For purposes of this paragraph (c), in computing the amount claimed or reported as a deduction

for donated property to which section 170(e) (3) or (4) applies (pertaining to certain contributions of inventory and scientific equipment) there shall be taken into account only the amount claimed or reported as a deduction in excess of the amount which would have been taken into account for tax purposes by the donor as costs of goods sold if the donor had sold the contributed property to the donee. For example, assume that a donor makes a contribution from inventory of clothing for the care of the needy to which section 170(e)(3) applies. The cost of the property to the donor was $5,000, and, pursuant to section 170(e)(3)(B), the donor claims a charitable contribution deduction of $8,000 with respect to the property. Therefore, $3,000 ($8,000-$5,000) is the amount taken into account for purposes of determining whether the $5,000 threshold of this paragraph (c)(1) is met.

(2) Substantiation requirements–

(i) In general. Except as provided in paragraph (c)(2)(ii) of this section, a donor who claims or reports a deduction with respect to a charitable contribution to which this paragraph (c) applies must comply with the following three requirements:

(A) Obtain a qualified appraisal (as defined in paragraph (c)(3) of this section) for such property contributed. If the contributed property is a partial interest, the appraisal shall be of the partial interest.

(B) Attach a fully completed appraisal summary (as defined in paragraph (c) (4) of this section) to the tax return (or, in the case of a donor that is a partnership or S corporation, the information return) on which the deduction for the contribution is first claimed (or reported) by the donor.

(C) Maintain records containing the information required by paragraph (b)(2)(ii) of this section.

(ii) Special rules for certain nonpublicly traded stock, certain publicly traded securities, and contributions by certain C corporations. (A) In cases described in paragraph (c)(2)(ii)(B) of this section, a qualified appraisal is not required, and only a partially completed appraisal summary form (as described in paragraph (c)(4)(iv)(A) of this section) is required to be attached to the tax or information return specified in paragraph (c)(2)(i)(B) of this section. However, in all cases donors must maintain records containing the information required by paragraph (b)(2)(ii) of this section.

(B) This paragraph (c)(2)(ii) applies in each of the following cases:

(1) The contribution of nonpublicly traded stock, if the amount claimed or reported as a deduction for the charitable contribution of such stock is greater than $5,000 but does not exceed $10,000;

(2) The contribution of a security to which paragraph (c)(7)(xi)(B) of this section applies; and

(3) The contribution of an item of property or of similar items of property described in paragraph (c)(1) of this section made after June 6, 1988, by a C corporation (as defined in section 1361(a)(2) of the Code), other than a closely held corporation or a personal service corporation.

(3) Qualified appraisal–

(i) In general. For purposes of this paragraph (c), the term "qualified appraisal" means an appraisal document that–

(A) Relates to an appraisal that is made not earlier than 60 days prior to the date of contribution of the appraised property nor later than the date specified in paragraph (c)(3)(iv)(B) of this section;

(B) Is prepared, signed, and dated by a qualified appraiser (within the meaning of paragraph (c) (5) of this section);

(C) Includes the information required by paragraph (c)(3)(ii) of this section; and

(D) Does not involve an appraisal fee prohibited by paragraph (c) (6) of this section.

(ii) Information included in qualified appraisal. A qualified appraisal shall include the following information:

(A) A description of the property in sufficient detail for a person who is not generally familiar with the type of property to ascertain that the property that was appraised is the property that was (or will be) contributed;

(B) In the case of tangible property, the physical condition of the property;

(C) The date (or expected date) of contribution to the donee;

(D) The terms of any agreement or understanding entered into (or expected to be entered

into) by or on behalf of the donor or donee that relates to the use, sale, or other disposition of the property contributed, including, for example, the terms of any agreement or understanding that–

(1) Restricts temporarily or permanently a donee's right to use or dispose of the donated property,

(2) Reserves to, or confers upon, anyone (other than a donee organization or an organization participating with a donee organization in cooperative fundraising) any right to the income from the contributed property or to the possession of the property, including the right to vote donated securities, to acquire the property by purchase or otherwise, or to designate the person having such income, possession, or right to acquire, or

(3) Earmarks donated property for a particular use;

(E) The name, address, and (if a taxpayer identification number is otherwise required by section 6109 and the regulations thereunder) the identifying number of the qualified appraiser; and, if the qualified appraiser is acting in his or her capacity as a partner in a partnership, an employee of any person (whether an individual, corporation, or partnerships), or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number (if a number is otherwise required by section 6109 and the regulations thereunder) of the partnership or the person who employs or engages the qualified appraiser;

(F) The qualifications of the qualified appraiser who signs the appraisal, including the appraiser's background, experience, education, and membership, if any, in professional appraisal associations;

(G) A statement that the appraisal was prepared for income tax purposes;

(H) The date (or dates) on which the property was appraised;

(I) The appraised fair market value (within the meaning of § 1.170A-1(c)(2)) of the property on the date (or expected date) of contribution;

(J) The method of valuation used to determine the fair market value, such as the income approach, the market-data approach, and the replacement-cost-less-depreciation approach; and

(K) The specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure employed.

. . . . .

§ 1.170A-14. Qualified Conservation Contributions.

(e) Exclusively for conservation purposes–

(1) In general. To meet the requirements of this section, a donation must be exclusively for conservation purposes. See paragraphs (c)(1) and (g)(1) through (g)(6)(ii) of this section. A deduction will not be denied under this section when incidental benefit inures to the donor merely as a result of conservation

restrictions limiting the uses to which the donor's property may be put.

(2) Inconsistent use. Except as provided in paragraph (e)(4) of this section, a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. For example, the preservation of farmland pursuant to a State program for flood prevention and control would not qualify under paragraph (d)(4) of this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.

(3) Inconsistent use permitted. A use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution. For example, a deduction for the donation of an easement to preserve an archaeological site that is listed on the National Register of Historic Places will not be disallowed if site excavation consistent with sound archaeological practices may impair a scenic view of which the land is a part. A donor may continue a pre-existing use of the property that does not conflict with the conservation purposes of the gift.

. . . . .

(g) Enforceable in perpetuity–

(1) In general. In the case of any donation under this section, any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land

records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution.

(2) Protection of a conservation purpose in case of donation of property subject to a mortgage. In the case of conservation contributions made after February 13, 1986, no deduction will be permitted under this section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity. For conservation contributions made prior to February 14, 1986, the requirement of section 170(h)(5)(A) is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.

(3) Remote future event. A deduction shall not be disallowed under section 170(f)(3)(B)(iii) and this section merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible. See paragraph (e) of § 1.170A-1. For example, a state's statutory requirement that use restrictions must be rerecorded every 30 years to remain enforceable shall not, by itself, render an easement nonperpetual.

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(5) Protection of conservation purpose where taxpayer reserves certain rights–

(i) Documentation. In the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift. Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. Such documentation may include:

(A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;

(B) A map of the area drawn to scale showing all existing man-made improvements or incursions (such as roads, buildings, fences, or gravel pits), vegetation and identification of flora and fauna (including, for example, rare species locations, animal breeding and roosting areas, and migration routes), land use history (including present uses and recent past disturbances), and distinct natural features (such as large trees and aquatic areas);

(C) An aerial photograph of the property at an appropriate scale taken as close as possible to the date the donation is made; and

(D) On-site photographs taken at appropriate locations on the property. If the terms of the donation contain restrictions with regard to a particular natural resource to be protected, such as water quality or air quality, the condition of the resource at or near the time of the gift must be established. The documentation, including the maps and photographs, must be accompanied by a statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying "This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer.".

(ii) Donee's right to inspection and legal remedies. In the case of any donation referred to in paragraph (g)(5)(i) of this section, the donor must agree to notify the donee, in writing, before exercising any reserved right, e.g. the right to extract certain minerals which may have an adverse impact on the conservation interests associated with the qualified real property interest. The terms of the donation must provide a right of the donee to enter the property at reasonable times for the purpose of inspecting the property to determine if there is compliance with the terms of the donation. Additionally, the terms of the donation must provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings, including but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

(6) Extinguishment.

(i) In general. If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation

purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding 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.

(ii) Proceeds. In case of a donation made after February 13, 1986, for a deduction to be allowed under this section, at the time of the gift 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. See § 1.170A-14(h)(3)(iii) relating to the allocation of basis. For purposes of this paragraph (g)(6)(ii), that proportionate value of the donee's property rights shall remain constant. Accordingly, when a change in conditions give rise to the extinguishment of a perpetual conservation restriction under paragraph (g)(6)(i) of this section, 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, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.