

UNITED STATES TAX COURT

STEVEN AND RORY ROTHMAN,)	
Petitioners,)	
)	
v.)	Docket No.: 17547-10
)	
COMMISSIONER OF INTERNAL)	FILED ELECTRONICALLY
REVENUE,)	
Respondent.)	

PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PETITIONERS MOVE, pursuant to Tax Court Rule 121, for summary adjudication in Petitioners' favor as to whether the appraisal annexed hereto as **Exhibit A** is a "qualified appraisal" for purposes of IRC § 170.¹

IN SUPPORT THEREOF, Petitioners submit the following:

JURISDICTION AND PROCEDURAL HISTORY

1. On May 12, 2010, Respondent mailed Petitioners a notice of deficiency (the "Notice"). A copy of the Notice is annexed as **Exhibit B**.
2. On August 4, 2010, Petitioners filed a Petition requesting a redetermination of Petitioners' 2004 and 2005 tax liabilities (the "Petition").

¹ Unless otherwise defined, all references to Sections refer to the Internal Revenue Code of 1986, as amended, and in effect during the relevant time periods as the context requires.

3. On October 4, 2010, Respondent filed an Answer to the Petition (the “Answer”).

4. On October 5, 2010, the Answer was served on Petitioners.

5. The pleadings in this case were closed on October 5, 2010.

This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay the trial. T.C. Rule 121(a).

6. This case has not been set for trial.

THE NOTICE OF DEFICIENCY

7. The Notice disallows the deductions claimed by Petitioners for their Cash Contribution and Non-cash Contribution to the Trust for Architectural Easements.² See Exhibit B, statement.

8. Respondent disallowed Petitioners’ Non-Cash Contribution contending that:

² Because some relevant facts are arguably still in dispute, Petitioners’ Motion does not address whether the Court should allow a charitable contribution deduction for some or all of the cash payment made to the Trust. The Notice also asserts an IRC § 6662 penalty for a gross valuation misstatement pursuant to IRC § 6662(h) or in the alternative an accuracy-related penalty pursuant to IRC § 6662(a) and IRC § 6662(b). Petitioners dispute Respondent’s penalty determination; however, this motion does not address the assertions of penalties.

It has not been established that all the requirements of IRC Section 170 and the corresponding Treasury Regulations have been satisfied to enable you to deduct the non-cash charitable contribution of a qualified conservation contribution.

Id.³

9. In total the Notice disallowed a charitable contribution of \$275,560 for 2004 and \$42,990 for 2005. Id.

UNDISPUTED MATERIAL FACTS

The Property

1. On June 15, 1998, Petitioners Steven and Rory Rothman became the fee simple owners of a property located at Block 252, Lot 49 in the Borough of Brooklyn (Kings County) with a street address of 53 Joralemon Street, Brooklyn, New York (“the Property”). A copy of the deed is attached as **Exhibit C**.

³ Respondent disputed the valuation of the deduction. This motion does not address valuation. The Notice also contended that the donation was limited by IRC § 170(b)(1); this is also not addressed.

In addition, Respondent denied Petitioners’ \$28,550 charitable deduction for cash donated to the Trust during 2004. This motion does not address the cash contribution. This motion is limited to the Qualified Appraisal issue.

2. The Property is located in and contributes to the significance of the Brooklyn Heights Historic District of New York City. A copy of the National Parks Service Certification is attached as **Exhibit D**.

Facts Showing that the Appraisal is a “Qualified Appraisal” Within the Meaning of Treas. Reg. § 1.170A-13(c)(3) and IRC § 170(f)(11)

3. The Trust for Architectural Easements (the “Trust”) was formerly known as the National Architectural Trust.

4. In October 2004, Petitioners contributed a conservation easement to the Trust. A copy of the recorded Conservation Deed of Easement (the “Conservation Deed”) is attached as **Exhibit E**.

5. In 2004, the Trust recorded the Conservation Deed with the New York City Department of Finance, Office of the City Register. The Conservation Deed bears the document identification number 2004000763900. (Exhibit E).

6. In connection with the facade easement contribution, Petitioners retained Mitchell, Maxwell & Jackson, Inc. (“MMJ”) to prepare an appraisal (the “Appraisal”) of the facade easement. (Exhibit A).

The Appraisal Satisfies
Treas. Reg § 1.170A-13(c)(3)(i)(A)

7. MMJ prepared a conservation facade easement valuation as of September 15, 2004. (Exhibit A).

8. The Appraisal was signed on October 4, 2004. (Exhibit A at ExA0005,⁴ ExA0019).

9. The Appraisers Certification, part of the Appraisal, was signed on October 4, 2004. (Exhibit A at ExA0019).

10. The Facade Easement Conservation Deed was signed by Petitioners on October 12, 2004. (Exhibit E at 8).⁵

11. The Trust accepted the Conservation Deed on October 20, 2004. (Exhibit E at 8).

The Appraisal Satisfies
Treas. Reg § 1.170A-13(c)(3)(i)(B) and
IRC §§ 170(f)(11)(E)(ii) & (iii)

⁴ For the purpose of easy identification of pages, Exhibit A has been bates-stamped.

⁵ Page 1 of the Conservation Easement is the third page of the attached exhibit. References to page numbers correspond to the page's location in the exhibit rather than to the page numbers stated therein.

12. At all times relevant, MMJ was a New York real estate appraisal services firm. (Exhibit A).

13. The MMJ logo included the phrase “Real Estate Appraisals.” (Exhibit A at ExA00001-03).

14. The Appraisal’s cover page indicates that it was provided by “MMJ Appraisals.” (Exhibit A at ExA0002).

15. Mr. Alexander J. Rosado (“Rosado”) was certified as a Residential Real Estate Appraiser by the state of New York. (Exhibit A at ExA0005, ExA0019).

16. Rosado signed the Appraisal’s: transmittal letter (Exhibit A at ExA0003), Uniform Residential Appraisal Report (Exhibit A at ExA0005), and the certification statement. (Exhibit A at ExA0019).

17. The Appraisal is dated October 4, 2004. (Exhibit A at ExA0005).

18. The Appraisal identifies Rosado’s New York State certification number as 45-43599. (Exhibit A at ExA0005, ExA0019).

19. The New York Department of State, Division of Licensing Services website identifies Alexander Rosado as a “CERTIFIED RESIDENTIAL REAL ESTATE APPRAISER.” (**Exhibit F**).

20. Mr. Steven M. Knobel was certified as a Real Estate Appraiser by the state of New York. (Exhibit A at ExA0005, ExA0019).

21. New York State specifies the minimum education, continuing education, and experience requirements for Certified Residential Real Estate Appraisers. See New York Department of State, Division of Licensing Services website at http://www.dos.state.ny.us/licensing/re_appraiser/re_appraiser_faq.html#1.

22. New York State's requirements for certification of Residential Real Estate Appraisers are contained in 19 NYCRR §§ 1101.2 through 1107.

23. Rosado executed the IRS Form 8283. A copy of the Form 8283, which was provided to the IRS, is attached as **Exhibit G**.

24. The Declaration of Appraiser, IRS Form 8283, signed by Mr. Rosado, includes the following:

Also, I declare that I hold myself out to the public as an appraiser or perform appraisals on a regular basis; and that because of my qualifications as described in the appraisal, I am qualified to make appraisals of the type of property being valued.

(Exhibit G).

The Appraisal Satisfies
Treas. Reg § 1.170A-13(c)(3)(i)(D)

25. The appraisal fee charged by MMJ was not based on a percentage of the appraised value of the donated property. (Exhibit G).

26. The certification of the appraisers in the Appraisal states, *inter alia*:

I have no present or prospective interest in the property that is the subject to this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction...

I have no present or contemplated future interest in the subject property, and neither my current or future employment nor my compensation for performing this appraisal is contingent on the appraised value of the property.

(Exhibit A at ExA0019).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(A)

27. The Appraisal contains a description of the Property, including its address, block and lot, photographs, and the description of the donated easement. (Exhibit A at ExA0004-05, ExA0008, ExA0020, ExA0023-25).

28. The Appraisal explains that the Appraisal valued the decrease in value due to the historic facade easement (also referred to as the facade conservation easement). (Exhibit A at ExA0005, ExA0010, ExA0016).

29. The Appraisal states that “The National Architectural Trust owns the rights of ‘prior approval’ of facade: maintenance and other restricts [sic] (signs, paint, liens, certain restrictions) of the entire exterior portion of the subject.” (Exhibit A at ExA0014).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(B)

30. The Appraisal describes the condition of the Property as follows:

The subject is physically and functionally adequate ‘as is.’ No major repairs or modernization are necessary. Upon inspection, the subject was found to be in very good condition overall, with a custom designed kitchen and custom designed marble/ceramic bath facilities. The subject features many ‘turn of the century’ details that generate strong demand for homes within the subject’s market area.

No adverse environmental conditions were observed.

(Exhibit A at ExA0004).

31. The Appraisal also describes the condition of the Property under “Subject Description.” (Exhibit A at ExA0008).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(C)

32. The Appraisal contains the following statement:

The owners of the subject property are contemplating a donation

of a conservation easement to the National Architectural Trust. The National Architectural Trust is a tax exempt organization under the Internal Revenue Code section 501(c)(3).

(Exhibit A at ExA0010).

33. The Appraisal Summary, IRS Form 8283, contains the date of donation, October 20, 2004. (Exhibit G).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(D)

34. The Appraisal values the Conservation Easement granted to the Trust. (Exhibit A at ExA0010, ExA0028-44

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(E)

35. The Appraisal identifies:

(a) Mitchell, Maxwell & Jackson, Inc. as the company engaged to prepare the appraisal;

(b) Alexander J. Rosado as the appraiser;

(c) Steven M. Knobel was the Supervisory Appraiser; and

(e) the branch address of MMJ as 32 Court Street, Suite 609, Brooklyn, NY.

(Exhibit A at ExA0001-04).

36. The invoice for the Appraisal provides MMJ's Federal ID

(taxpayer Identification). (Exhibit A at ExA0001).⁶

37. The Appraisal identifies Rosado as a New York state-certified appraiser and identifies his state certification number as 45-43599. (Exhibit A at ExA0005, ExA0019).

38. The Appraisal identifies Knobel as a New York state-certified appraiser and identifies his state certification number as 45-18006. (Exhibit A at ExA0005, ExA0019).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(F)

39. The Appraisal identifies Rosado's New York State certification number as 45-43599. (Exhibit A at ExA0005, ExA0019).

40. New York State's requirements for "Residential Real Estate Appraiser" is contained in 19 NYCRR §§ 1101.2 through 1107.

41. Attached as Exhibit F is a page from the New York Department of State, Division of Licensing Services website for Alexander J. Rosado.

42. Attached as **Exhibit H** is a page from the New York Department of State, Division of Licensing Services website for Steven M. Knobel, Residential Real Estate Appraiser.

⁶ The number has been redacted pursuant to Tax Court Rule 27(a).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(G)

43. The Appraisal contains the following statement:

The owners of the subject property are contemplating a donation of a conservation easement to the National Architectural Trust.

...

If certain criteria are met, the owner also may receive a federal income tax deduction equivalent to the value of the rights given away to a charitable, or government organization.

(Exhibit A at ExA0010).

44. The Appraisal, Addendum pages 5 and 6 of 10, provides IRS requirements for donating an easement. (Exhibit A at ExA0012-13).

45. The Appraisal Summary, IRS Form 8283, is used for income tax purposes; IRS Form 8283 was signed by Rosado. (Exhibit G).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(H)

46. The Appraisal provides that the valuation was as of September 15, 2004 . (Exhibit A at ExA0002, ExA0003, ExA0005).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(I)

47. The Appraisal values the historic preservation easement. (“The appraisal is made ‘as is’ and is intended to estimate the impact on the

subject if granted an “architectural facade easement.”). (Exhibit A at ExA0005).

48. The appraiser determines that there would be an 11.15% reduction in value due to the facade easement. (Exhibit A at ExA0010, ExA0016).

49. The Appraisal concludes that the fair market value of the easement donated by Petitioners was \$290,000. (Exhibit A at ExA0010, ExA0016).

The Appraisal Satisfies
Treas. Reg. § 1.170A-13(c)(3)(ii)(J)

50. The Appraisal conforms with the Uniform Standards of Professional Appraisal Practice (USPAP). (Exhibit A at ExA0017).

51. The Appraisal uses five properties in the sales comparison approach to determine the value without an easement. (Exhibit A at ExA0004-05).

52. The Appraisal shows the adjustments to the comparable sales in the Uniform Residential Appraisal Report. (Exhibit A at ExA0005).

53. The Appraisal provides additional information relevant to the sales comparisons in the Addendum. (Exhibit A at ExA008-09).

54. The Appraisal gives the most weight to the sales comparison approach as compared to the cost approach to determine the pre-easement value of the Property. (Exhibit A at ExA0005, ExA0008-09).

55. Using the cost approach, the Appraisal determines that the “before” value was \$2,486,800. (Exhibit A at ExA0005).

56. Using the sales comparison approach, the Appraisal determines that the “before” value was \$2,600,000. (Exhibit A at ExA0005).

57. The Appraisal determines that the overall “before” fair market value was \$2,600,000. (Exhibit A at ExA0005).

58. The Appraisal values the pre-easement value of the Property at \$2,600,000. (Exhibit A at ExA0003, ExA0005, ExA0010).

59. The Appraisal equates the fair market value of the easement to “the decrease in fair market value of the property caused by the restrictions placed on the property because of the easement.” (Exhibit A at ExA0010).

60. The Appraisal contains the statement:

In the subject’s market area, the appraiser cannot precisely estimate the extent to which this ‘loss in value’ will result from the facade easement due to the lack of market data.

(Exhibit A at ExA0010).

61. The Appraisal contains the statement:

It is our opinion that the presence of the facade conservation easement would alter the market value of the subject property. In the subject's market area, the appraiser cannot precisely estimate the extent to which this 'loss in value' will result from the facade easement due to the lack of market data. In this situation it is the appraiser's conclusion that the value of the facade conservation easement (a copy is attached to this appraisal report) on the subject property would be estimated at \$290,000, which is approximately 11.15% of the fee simple value of \$2,600,000. This conclusion is based on consideration of range of value that the I.R.S. Has historically found to be acceptable as well as historical precedents. Therefore, the presence of the historic facade easement would decrease the fair market value of the property rights held by the homeowner of the subject property to \$2,310,000.

(Exhibit A at ExA0010).

62. The Appraisal includes a section on estimating the value of a facade conservation easement. The section contains the phrase:

"[e]stimating the value of a property after the donation of a conservation easement is very much like condemnation appraisal practice where easements or partial fee interests are taken from property owners by a sovereign." (Exhibit A at ExA0016).

63. The appraiser states that he "endeavored to place himself in the mindset of competent buyers and sellers and to examine considerations they have actually had, or are likely to have, in the buying or

selling of a property encumbered by a facade easement.” (Exhibit A at ExA0016).

64. The Appraisal relies on Hilborn v. Commissioner, 85 T.C. 677 (1985). (Exhibit A at ExA0015).

65. The Appraisal defines “Historic Preservation Easements.” (Exhibit A at ExA0010).

66. In determining the diminution in value, the Appraisal considers five elements that negatively affected property values, specifically:

- within the sales comparison approach, a loss that can be shown from sales of eased properties in comparison with comparable properties so eased
- the loss of the right to develop up to the maximum density allowed under zoning codes
- maintenance and insurance requirements that may be in excess of properties not eased
- the loss that may occur if market preference changes as to exterior design, color, windows, doors, roof lines, etc.
- the National Architectural Trust owns the rights of “prior approval” of the facade; maintenance and other restricts [sic] (signs, paint, liens, certain restrictions) of the entire exterior portion of the subject

(Exhibit A at ExA0014).

67. The Appraisal explains historical precedents. (Exhibit A at

ExA0015).

68. The Appraisal explains the method used to determine the fair market value. (Exhibit A at ExA0016).

The Appraisal Satisfies
Treas. Reg. § 1.170a-13(c)(3)(ii)(K)

69. The Appraisal includes a statement by the appraiser about reliance on the IRS regarding the range of 10-15% of the value of the property for the facade easement. (Exhibit A at ExA0016).

70. The Appraisal arrives at a final percentage reduction of the before value based on historical precedents and the value the IRS has historically found acceptable. (Exhibit A at ExA0016).

71. The Appraisal refers the reader to <http://www2.cr.nps.gov/tps/tax/irsfacade.htm>. (Exhibit A at ExA0011).

72. The Appraisal contains the following:

Estimating the value of a property after the donation of a conservation easement is very much like condemnation appraisal practice where easements or partial fee interests are taken from property owners by a sovereign. Attempts must be made to define what rights have been lost by the property owners and what elements of damage (or enhancement) are involved in the loss. Because real estate is not bought and sold in a vacuum, the appraiser has endeavored to place himself in the mindset of competent buyers and sellers and to examine considerations they have actually had, or are likely to have, in the buying or selling of

a property encumbered by a facade easement.

(Exhibit A at ExA0016).

73. The Appraisal contains the statement:

It is now generally recognized by the Internal Revenue Service that the donation of a facade easement of a property results in a loss of value (“dedicated charitable contribution”) of between 10% and 15%. The donation of a commercial property results in a loss of value of between 10% or 12% or higher if development rights are lost. The inclusive data support at least these ranges, depending on how extensive the facade area is in relation to the land parcel.

(Exhibit A at ExA0016).

74. The Appraisal contains the statement:

“Internal Revenue Service Engineers have concluded that the proper valuation of a facade easement should range from approximately 10% to 15% of the value of the property. Once fair market values have been determined, the same ratios are used to allocate the basis of the building and the underlying land to the facade easement for both rehabilitation tax credit and depreciation purposes. See Treasury Regulation 1.170A-14(h).”

(Exhibit A at ExA0015).

75. Prior to 2002, Mark C. Primoli (“Primoli”) wrote an article entitled “Facade Easement Contributions” (the Primoli Article), a copy of which is attached as **Exhibit I**. This copy of the Primoli Article was printed from the National Park Service website on November 6, 2003.

76. The Primoli Article was posted on the IRS website until a revised version of the Primoli Article (the Revised Primoli Article) was posted on the IRS website, replacing the original Primoli Article. A copy of the Revised Article is attached as **Exhibit J**.

77. As part of the IRS' Market Segment Specialization Program (MSSP), the IRS published Audit Technique Guides (ATGs) to assist in training Internal Revenue personnel.

78. The ATGs (approximately 40) are available to the public on the IRS website.

79. The material for the Primoli Article and the Revised Primoli Article was taken from a Chapter in the 1994 MSSP ATG on the Rehabilitation Tax Credit (the 1994 Audit Guide).

80. Copies of Chapters 1 and 18 of the 1994 Audit Guide are attached hereto as **Exhibits K and L**.

81. Primoli was involved in the rewrite of Chapter 18 of the Audit Guide, dealing with facade easements (the Revised Audit Guide).

82. The Revised Audit Guide was released in February 2002.

83. During 2003, the Revised Audit Guide was available on the IRS website, <http://www.irs.gov>.

84. The Primoli Article, and then the Revised Primoli Article were also made available on the National Park Service (“NPS”) website, <http://www.nps.gov>.

85. Attached as **Exhibit M** is the National Park Service’s response to a January 8, 2009 Freedom of Information Act request. The Revised Primoli Article was removed from the NPS website at respondent’s request at some time between February 3, 2007 and July 2007.

86. As of December 2003, the NPS Website contained an article “FACADE EASEMENT CONTRIBUTIONS,” prepared by Mark Primoli of the Internal Revenue Service. The article contained the following statement:

Internal Revenue Service Engineers have concluded that the proper valuation of a facade easement should range from approximately 10% to 15% of the value of the property. Once fair market values have been determined, the same ratios are used to allocate the basis of the building and the underlying land to the facade easement for both rehabilitation tax credit and depreciation purposes. See Treasury Regulation 1.170A-14(h).

A copy of the page from the NPS website, obtained from the Internet Archive, is attached as **Exhibit N**. See also Exhibit I.

87. Guidance was circulated by the NPS during 2003 entitled: “Historic Preservation Easements - A Directory of Historic Preservation

Easement Holding Organizations” (2003) (PDF format). The brochure is attached as **Exhibit O**. (The brochure can also be found on the NPS website at <http://www.nps.gov/history/hps/tps/tax/download/easements.pdf>.)

ARGUMENT

Petitioners incorporate by reference the simultaneously filed “Memorandum of Law in Support of Petitioners’ Motion for Partial Summary Judgment.”

RULE 50 STATEMENT

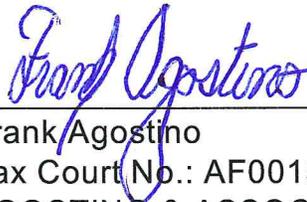
Respondent objects to the granting of this motion.

CONCLUSION

WHEREFORE, Petitioners respectfully request that the Court enter an order granting summary judgment (partial) finding that the Appraisal was a "qualified appraisal" under IRC § 170 and Treas. Reg. § 1.170A-13.

Dated: Hackensack, NJ
December 10, 2010

Respectfully Submitted,



Frank Agostino
Tax Court No.: AF0015
AGOSTINO & ASSOCIATES
A Professional Corporation
Attorneys for Petitioners

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PRELIMINARY STATEMENT

Petitioners Steven and Rory Rothman submit this memorandum of law in support of their Motion for Partial Summary Judgment (“Petitioners’ Motion”).

FACTS

The facts are set forth in Petitioners’ Motion. Other than the pleadings, the only document necessary to evaluate the issue here in dispute is the Appraisal.

The Appraisal is annexed to the Motion as Exhibit A.¹

RELEVANT HISTORY

1. On May 12, 2010, Respondent sent Petitioners a notice of deficiency (the “Notice”) for 2004 and 2005.
2. The Notice disallows the deductions claimed by Petitioners for their Cash Contribution and Non-cash Contribution (sometimes the “facade easement donation”) to the National Architectural Trust n/k/a the Trust for

¹ Unless otherwise defined, capitalized terms have the meaning given to them in Petitioners’ Motion.

Architectural Easements (the “Trust”) in the amount of \$275,560 for 2004 and \$42,990 for 2005.²

3. The Court recently decided the following cases that directly address the issues here:

A. Scheidelman v. Commissioner, T.C. Memo. 2010-151 (J. Cohen)(appeal pending)(Trust case).

B. Simmons v. Commissioner, T.C. Memo. 2009-208 (J. Goeke)(appeal pending)(non-Trust case).

C. Evans v. Commissioner, T.C. Memo. 2010-207 (J. Wherry).

4. Four cases involving taxpayers’ contributions to the Trust have been tried. The first case decided was Scheidelman; the other three are currently pending:

A. 1982 East, LLC v. Commissioner, Docket No. 30052-08;

B. Dunlap v. Commissioner, Docket No. 28849-08; and

² Petitioners made their facade easement donation during 2004. Respondent’s adjustments to Petitioners’ 2005 income tax return result from Respondent’s denial of Petitioners’ carryover charitable contributions.

C. Kaufman v. Commissioner, Docket No. 15997-09 (partial summary judgment granted, 134 T.C. No. 9; reconsideration pending after trial).

5. The issue of whether the form of Conservation Deed used by the Trust in New York satisfies the requirements of IRC § 170(h) is at issue in Schultz v. Commissioner, Docket No. 24388-09.

6. Since the parties in Schultz have briefed the issues involving the Conservation Deed, Petitioners do not repeat them here.

SUMMARY ADJUDICATION OF THE QUALIFIED APPRAISAL ISSUE IS APPROPRIATE - RESPONDENT AND SIMILARLY SITUATED TAXPAYERS NEED GUIDANCE ON WHETHER TAXPAYERS WITH MMJ APPRAISALS CAN TRY THEIR CASES

7. In Bond v. Commissioner, 100 T.C. 32 (1993), the Court held that the issue of whether an appraisal constitutes a qualified appraisal could be decided on summary judgment.

8. Alexander Rosado of Mitchell, Maxwell & Jackson, Inc. (MMJ) prepared the appraisal dated October 4, 2004 substantiating the value of Petitioners' facade easement donation (sometimes the "MMJ Appraisal"). Petitioners annexed the MMJ Appraisal to the Motion as Exhibit A.

9. MMJ prepared appraisals used by other New York City-based Trust donors to substantiate the value of their easement donations. See e.g., Scheidelman v. Commissioner, T.C. Memo. 2010-151.

10. Respondent has determined that the MMJ Appraisals are not qualified appraisals for purposes of Treas. Reg. § 1.170A-13(c)(3).

11. In Scheidelman, the Court observed:

The evidence at trial, notably conflicting expert testimony, and the arguments of the parties, deal in large part with valuation of the facade easement by traditional fair market analysis. *Because we conclude that the Drazner report is not a qualified appraisal, we do not discuss this evidence or reach a conclusion as to the value of the easement.*

Scheidelman v. Commissioner, T.C. Memo. 2010-151 (emphasis added).

12. *If*: (a) the MMJ Appraisals are not qualified appraisals, and (b) *if* the Court cannot excuse the alleged deficiencies in the MMJ Appraisals based on reasonable cause, then, (c) there is no need for either Respondent or the New York City-based donors to the Trust, which donors include the Petitioners here, to retain a trial expert or go to trial.

13. The costs of expert reports and trial preparation are not insubstantial.

14. Respondent has a zero value/no settlement policy on facade easement valuation cases in New York City. (See Internal Revenue Service Advisory Council 2009 Public Report (sometimes the “IRSAC Report”) at 10, released November 17, 2009 (available at http://www.irs.gov/pub/irs-utl/irsac_2009_full_report.pdf).

15. *If* the MMJ Appraisal is not a qualified appraisal and *if* the reports of the parties' trial experts will not be considered by the Court, Petitioners respectfully submit that the Court should not require Respondent or Petitioners to incur the cost of an appraisal for trial.

16. By contrast, if the MMJ Appraisal is a qualified appraisal, then the resolution of the threshold issue in the taxpayers' favor could reasonably result in the settlement of the case. As this Court made clear in another easement case:

The bottom line is that we are more than ever convinced that valuation cases should be disposed of by the parties by way of settlement or other procedures short of court proceedings.

Symington v. Commissioner, 87 T.C. 892, 904-905 (1986).

17. Respectfully, Petitioners request that the Court resolve the qualified appraisal issue as a threshold issue before setting this case for trial.

THE LITIGANTS' NEED FOR A REVIEW BY THE FULL COURT

18. Three recent Memorandum Opinions of this Court have addressed the qualified appraisal issue with regard to appraisals of facade easements. In Simmons, T.C. Memo. 2009-208, and in Evans, T.C. Memo. 2010-207 at *22, the Court found that the appraisal at issue was a qualified appraisal; in Scheidelman, the Court did not.

19. For purposes of Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J) and (K), the Donnelly report approved by the Court in Simmons is indistinguishable from the Drazner Report rejected in Scheidelman and the appraisal here.

20. Scheidelman directly conflicts with Simmons and Evans. See also Consolidated Investors Group v. Commissioner, T.C. Memo. 2009-290.

21. There is a clear split among divisions of this Court as to whether:

(a) an appraisal that provides the INFORMATION REQUIRED by Treas. Reg. §§ 1.170A-13(c)(3)(ii) satisfies the qualified appraisal requirement (i.e., Simmons and Evans), or

(b) a qualified appraisal must also satisfy a threshold burden of persuasion (i.e., Scheidelman).

22. Scheidelman and Simmons have been appealed.

23. To assure uniformity on an issue of continuing importance to charitable donors, Petitioners respectfully request that this motion be directed to the full Court.

ISSUES³

1. Are the regulatory provisions of Treas. Reg. § 1.170A-13(c)(3) mandatory, requiring strict compliance, or directory, requiring substantial compliance?

Because Treas. Reg. § 1.170A-13(c)(3) relates to a procedure to substantiate a charitable deduction rather than to the substance of the facade easement deduction, it is directory. Bond v. Commissioner, 100 T.C. 32, 40-41 (1993) (quoting Sperapani v. Commissioner, 42 T.C. 308, 331 (1964) and 3 Sutherland, Statutory Construction §§ 5801-5826 (3d ed. 1943)).

2. Did the Petitioners substantiate their Non-cash Contribution as required by IRC § 170(f)(11) and Treas. Reg. § 1.170A-13(c)(3)?

The MMJ Appraisal (sometimes the “Appraisal”) satisfies the requirements of IRC § 170(f)(11) and Treas. Reg. § 1.170A-13(c)(3) and is a “qualified appraisal.”

³ Because reasonable cause and valuation are always factual issues for trial, Petitioners’ Motion does not address these issues. Because some relevant facts are still in dispute, Petitioners’ Motion does not address: (a) whether the Court should allow a charitable contribution deduction for some or all of the cash payment made to the Trust and (b) whether any penalties are appropriate.

ARGUMENT

I. THE QUALIFIED APPRAISAL STATUTE AND REGULATIONS MUST BE CONSTRUED IN FAVOR OF THE CONGRESSIONAL DESIRE TO INCENTIVIZE FACADE EASEMENT DONATIONS.

In 1976, Congress created the Federal Historic Preservation Tax Incentives Program to encourage individual property owners, like Petitioners, living in historic districts, to make easement donations to qualified easement holders. Specifically, IRC § 170(f)(3)(B)(iii) allows a charitable deduction for a “qualified contribution” as defined in IRC § 170(h). The legislative intent, or essence, of IRC § 170(h) was to provide a financial incentive to easement donation in the form of a charitable deduction. See General Explanation of the Tax Reform Act of 1976 (H.R. 10612, 94th Congress, Public Law 94-455), p. 643, prepared by the Joint Committee on Taxation, JCS-33-76, 94th Cong. (1976).

Pursuant to the statute, Petitioners made their facade easement donation to the Trust. After Petitioners made their donation, Respondent implemented a wide-ranging initiative to audit charitable deductions claimed by taxpayers who made donations of historic preservation easements on real property they own. In fact, the IRSAC Report noted:

Practitioners observed that the audit outcome almost always resulted in a zero deduction. The grounds asserted to support this position were several: an easement has zero value where local preservation laws are already in place; use of the 10-15 percent informal safe harbor for easement valuation is not appropriate; the appraisal failed the technical substantiation requirements and therefore the appraisal was not a “qualified appraisal” under the regulations.

In 2006, Congress ratified the Federal Historic Preservation Tax Incentive Program but adjusted several features of the incentive contained in Section 170(h) including tightening the standards for the “qualified appraisal” that supports the deduction. It is noteworthy that Congress otherwise left the deduction intact.

Against this background, Petitioners respectfully request that the Court evaluate their facade easement donation in light of the clear Congressional desire to encourage facade easement donations. Stated another way:

Congress may be strict or lavish in its allowance of deductions or tax benefits. The formula it writes may be arbitrary and harsh in its applications. ***But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall.***

Lewyt Corporation v. Commissioner, 349 U.S. 237, 240 (1955).

II. TREASURY REGULATION § 1.170A-13 SETS FORTH THE RELEVANT “RECORDKEEPING AND RETURN REQUIREMENTS FOR DEDUCTIONS FOR CHARITABLE CONTRIBUTIONS.”

The procedures to substantiate a charitable donation are set forth in the following Code sections and Treasury Regulations:

1. IRC § 170(a)(1) provides for a deduction for a charitable contribution “if verified under regulations prescribed by the Secretary.”
2. To claim a deduction for a non-cash contribution in excess of \$5,000, a noncash charitable contribution must be substantiated by a qualified appraisal. Treas. Reg. § 1.170A-13(b)(2)(ii).
3. IRC § 170(f)(11)(E) defines the term “qualified appraisal” as an appraisal of property which is treated as a qualified appraisal under regulations or other guidance prescribed by the Secretary.⁴
4. The relevant Treasury Regulation, Treas. Reg. § 1.170a-13, is entitled “***Recordkeeping and Return Requirements for Deductions for***

⁴ On November 13, 2006, the Service published transitional guidance relating to IRC § 170(f)(11) as added by section 883 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004). However, the MMJ Appraisal was completed on November 4, 2004. Accordingly, this memorandum analyzes the Appraisal against the Treasury Regulations in effect on November 4, 2004. See IRC § 7805(b)(1).

Charitable Contributions” and provides among other things, that a qualified appraisal includes 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, * * *
- (E) The name, address, and * * * identifying number of 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.

Treas. Reg. 1.170A-13(c)(3)(ii).

III. AN APPRAISAL IS A QUALIFIED APPRAISAL IF IT COMPLIES, OR SUBSTANTIALLY COMPLIES, WITH THE RECORDKEEPING AND REPORTING REQUIREMENTS OF TREAS. REG. § 1.170A-13(c)(3).

To substantiate Petitioners' non-cash contribution, the Court must find that the MMJ Appraisal complies or substantially complies with the requirements of Treas. Reg. § 1.170A-13. Simmons, T.C. Memo. 2009-208.

Stated another way, *if* the Court finds that the Appraisal substantially complies with Treas. Reg. § 1.170A-13, *then*, this case can proceed to trial on the valuation issue. Id.

The "substantial compliance" standard of review is not defined by the Internal Revenue Code. However, the courts have applied the doctrine of substantial compliance in tax cases for over eighty years. See, e.g.,

Bonwit Teller & Co. v. U.S., 283 U.S. 258, 263-265 (1931); Commissioner v. Stevens, 78 F.2d 713 (2d. Cir. 1935).

In Sperapani v. Commissioner, 42 T.C. 308 (1964), this Court held that the taxpayer's failure to attach a statement in the form prescribed by the regulations under IRC § 1361 was procedural, merely directory and not mandatory. In its opinion, this Court quoted verbatim the following explanation for the rule that the doctrine of substantial compliance is a rule of statutory construction:

Generally those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute, are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.

Id. at 331 (citing 2 Sutherland, Statutory Construction, § 2802, p. 216 (3d ed. 1943)).

Stated another way, the general rules of construction provide that if a provision relates to the essence of the thing to be done such that noncompliance will frustrate the legislative intent, it is mandatory. On the

other hand, if a provision relates to a detail of procedure rather than to substance, it is directory. Vaughan v. John C. Winston Co., 83 F.2d 370, 372 (10th Cir.1936); Indiana Rolling Mills Co. v. Commissioner, 13 B.T.A. 1141, 1144, (1928); see generally, 3 Sutherland, Statutory Construction §§ 5801-5826 (3d ed. 1943).⁵

In determining whether non-compliance will frustrate “legislative intent,” the relevant rules of construction provide as follows:

1. When Congress provides a general tax incentive through a deduction from income, those falling within the general beneficiary class are entitled to participate in the benefit. Chisolm v. United States, 19 F. Supp. 274, 277 (Cl. Ct. 1937); see also Lewyt Corporation v. Commissioner, 349 U.S. 237, 240 (1955); and

2. “Provisions regarding charitable deductions should . . . be liberally construed in favor of the taxpayer.” Weingarden v. Commissioner,

⁵ See also Tipps v. Commissioner, 75 T.C. 458 (1980), acq. 1981-2 C.B. 2; American Air Filter Co. v. Commissioner, 81 T.C. 709 (1983); Taylor v. Commissioner, 67 T.C. 1071 (1977), acq. 1979-2 C.B. 2; and Hewlett Packard Co. v. Commissioner, 67 T.C. 736 (1977).

825 F.2d 1027 (6th Cir. 1987). More specifically, the Weingarden Court explained:

The general canon of construction is that statutes imposing a tax are interpreted liberally (in favor of the taxpayer). See Porter v. Commissioner, 288 U.S. 436, 442 (1933); 1 R. Mertens, *Law of Federal Income Taxation* § 3.05 (1986). But provisions granting a deduction or exemption are matters of legislative “grace” and are construed strictly (in favor of the government). See 1 R. Mertens, *supra*, at § 3.07. A special rule applies to charitable deductions, however, because these provisions are an expression of “public policy” rather than legislative grace. See Helvering v. Bliss, 293 U.S. 144, 150-51 (1934); Hartwick College v. United States, 801 F.2d 608, 615 (2d Cir.1986). Provisions regarding charitable deductions should therefore be liberally construed in favor of the taxpayer.

Id. at 1029.

In Bond, the Tax Court compared the qualified appraisal regulations and the applicable rules of construction, and concluded:

At the outset, it is apparent that the essence of section 170 is to allow certain taxpayers a charitable deduction for contributions made to certain organizations. **It is equally apparent that the reporting requirements of section 1.170A-13, Income Tax Regs., are helpful to respondent in the processing and auditing of returns on which charitable deductions are claimed. However, the reporting requirements do not relate to the substance or essence of whether or not a charitable contribution was actually made. We conclude, therefore, that the reporting requirements are directory and not mandatory.**

Bond v. Commissioner, 100 T.C. 32, 40-41 (1993)(emphasis added); see also Consolidated Investors, T.C. Memo. 2009-290.⁶

It is against this background that, in Point V below, Petitioners request that the Court determine that the Appraisal complies, or substantially complies, with each of the reporting requirements set forth in Treas. Reg. § 1.170A-13(c)(3).

⁶ In Respondent's Appeal Brief in Simmons, Respondent argues that the doctrine of substantial compliance does not apply to the statutory provisions of the qualified appraisal requirements as enacted in the Deficit Reduction Act of 1984, P. L. 98-369 (DEFRA) § 155(a)(4). This Court has rejected Respondent's argument and held 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, 109 T.C. 258, 265 (1997)(emphasis added).

Stated simply, Respondent's rejection of the doctrine of substantial compliance has, in turn, been rejected by this Court. See, e.g., Bond, 100 T.C. 32 (1993); Smith v. Commissioner, T.C. Memo. 2007-368 affd, 364 Fed. Appx. 317 (9th Cir. 2009)(not published). All of the cases in the preceding sentence were decided after the enactment of DEFRA and, in all the cases cited above, the Court adopted the substantial compliance test and rejected the "strict compliance" analysis urged by the Respondent.

IV. THERE IS A CONFLICT BETWEEN DIVISIONS OF THE COURT AS TO: (A) WHETHER TREAS. REG. § 1.170A-13(c) REPRESENTS REPORTING REQUIREMENTS; AND (B) WHETHER STRICT OR SUBSTANTIAL COMPLIANCE IS THE STANDARD BY WHICH TO JUDGE AN APPRAISAL'S COMPLIANCE WITH THE QUALIFIED APPRAISAL REQUIREMENTS.

Petitioners, like the taxpayer in Scheidelman, hired MMJ, New York's largest privately-held real estate appraisal company⁷ to prepare a qualified appraisal. Thus, before addressing the merits of the MMJ Appraisal, Petitioners are required to advise the Court that in Scheidelman, T.C. Memo. 2010-151, Judge Cohen found that an appraisal report completed by Michael Drazner of MMJ (hereinafter the "Drazner Appraisal") was not a qualified appraisal under IRC § 170(f)(11).

The Scheidelman case is on appeal. However, for the reasons set forth below, Petitioners respectfully submit that the Court's memorandum opinion in Scheidelman is inconsistent with Bond, 100 T.C. 32 (1993), Hewitt, 109 T.C. 258 (1997); Simmons, T.C. Memo. 2009-208; Evans, T.C. Memo. 2010-207; and Consolidated Investors Group, T.C. Memo. 2009-290. Scheidelman does not control the result here.

⁷ See <http://www.mmjappraisals.com/site2004/site2004/default.asp>.

A. Scheidelman confuses: (1) the Court's obligation to determine whether the Appraisal complies or substantially complies with IRC § 170(f)(11), and (2) the courts obligation to consider whether reasonable cause (under IRC § 170(f)(11)(A)(ii)(II)) exists to excuse the Appraisal's failure to comply with IRC § 170(f)(11)

In Scheidelman, Judge Cohen wrote:

Petitioners have not persuaded us that reasonable cause⁸ existed and **excuses** the failure to comply with the requirements for obtaining a qualified appraisal.

Scheidelman, T.C. Memo. 2010-151 at *24 (emphasis added).

When a qualified appraisal has not been submitted, we have not applied the doctrine of substantial compliance to **excuse** a taxpayer's failure to meet the qualified appraisal requirement. . . See, e.g., Hewitt v. Commissioner, 109 T.C. 258, 264-266 (1997), affd. without published opinion 166 F.3d 332 (4th Cir. 1998); D'Arcangelo v. Commissioner, T.C. Memo. 1994-572. We cannot accept the Drazner report as a qualified appraisal complying with the substantiation requirements of section 170.

Id. at *26. (emphasis added).

The substantial compliance standard of review does not always excuse a taxpayer's failure to satisfy the qualified appraisal requirement. "Substantial compliance" is the standard of review by which a Court will determine whether an appraisal satisfies the reporting requirements of

⁸ There are no reported cases on the application of IRC § 170(f)(11)(A)(ii)(II).

Treas. Reg. § 1.170A-13(c)(3). See Smith v. Commissioner, T.C. Memo. 2007-368 affd, 364 Fed. Appx. 317 (9th Cir. 2009)(not published)(“Bond [...] and Hewitt [...], considered together provide a **standard** by which we can consider whether petitioners **provided sufficient information to permit respondent to evaluate their reported contributions, as intended by Congress.**”)(emphasis added).

If, the Court finds that the Appraisal did not satisfy the reporting requirements of Treas. Reg. § 1.170A-13(c)(3), then the Court can excuse compliance with the substantiation requirements on the ground of reasonable cause.

IRC § 170(f)(11)(A)(ii)(II) provides that the requirement to obtain a qualified appraisal under section 170(f)(11)(C) will not apply if it is shown that the failure to meet the requirement is due to reasonable cause and not due to willful neglect.

Petitioners respectfully submit that the passages of Scheidelman quoted above suggest that Judge Cohen confused the substantial compliance standard - i.e., the standard by which the Court evaluates a purported qualified appraisal - with the reasonable cause exception under

IRC § 170(f)(11)(A)(ii)(II), i.e., the standard by which the Court excuses a taxpayers' failure to provide sufficient information to permit respondent to evaluate a taxpayer's reported contributions. By doing so, Judge Cohen modified the existing Bond Court's definition of the substantial compliance standard of review.

Petitioners submit that their contention is supported by the fact that neither of the cases relied upon by the Court, Hewitt, 109 T.C. 258 and D'Arcangelo, T.C. Memo. 1994-572, supports Scheidelman's conclusion or the resulting modification of the substantial compliance standard of review.

In Hewitt:

[t]he taxpayers, however, had not obtained qualified appraisals before filing their returns for the years at issue. **The IRS disallowed a portion of the deduction because of the lack of a qualified appraisal.**

Simmons, T.C. Memo. 2009-208 at *15 (emphasis added). In Hewitt, the

Court observed:

Petitioners herein furnished practically none of the information required by either the statute or the regulations. **Given the statutory language and the thrust of the concerns about the need of respondent to be provided with appropriate information in order to alert respondent to potential overvaluations, * * * petitioners simply do not fall within the permissible boundaries of Bond v. Commissioner, supra,**

where an appraisal summary, which was completed by a qualified appraiser, contained most of the required information and could therefore be treated as a written appraisal, was attached to the return. Cf. D'Arcangelo v. Commissioner, T.C. Memo. 1994-572 (respondent prevailed where no qualified appraisal was obtained).

Hewitt, 109 T.C. at 264. Hewitt instructs that the doctrine of substantial compliance will not excuse a taxpayer's *failure* to provide the information necessary to ascertain whether an appraisal complies or substantially complies with the qualified appraisal requirements. Hewitt, 109 T.C. at 261, 264; see also Friedman v. Commissioner, T.C. Memo. 2010-45 at *4 ("In Bond, the submission of the information ... required to prove that a qualified appraisal had been performed was untimely, but the performance of the appraisal itself was not.")

Similarly, the Scheidelman Court's reliance on D'Arcangelo is also misplaced. In D'Arcangelo, T.C. Memo. 1994-572, the Court denied the taxpayer's deduction because:

(a) the purported appraiser was not a "qualified appraiser" (i.e., the appraiser had a relationship that was prohibited under Treas. Reg. § 1.170A-13(c)(5)(iv)(D)); and

(b) the appraisal literally *did not state* the method used to determine the fair market value of the items or the specific basis of the valuation. Id. at *9.

D’Arcangelo, like Hewitt, does not support the Scheidelman Court’s refusal to apply the doctrine of substantial compliance in cases where there is not a similarly egregious *absence* of necessary information.

Petitioners’ contentions are also supported by Simmons, T.C. Memo. 2009-208; Evans, T.C. Memo. 2010-207; and Consolidated Investors Group, T.C. Memo. 2009-290.

For purposes of Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J) and (K), the qualified appraisals accepted by the Court in Simmons and Evans are indistinguishable from the Drazner Report rejected in Scheidelman.

Based on the foregoing, Petitioners respectfully submit that Scheidelman is not controlling as to whether the appraisals prepared by MMJ comply or substantially comply with Treas. Reg. § 1.170A-13(c)(3)(ii). Scheidelman confused the substantial compliance standard - i.e., the standard by which the Court evaluates a purported qualified appraisal -

with the reasonable cause exception under IRC § 170(f)(11)(A)(ii)(II) which excuses non-compliance with Treas. Reg. § 1.170A-13(c)(3)(ii).

B. Scheidelman also confuses the review of an appraisal's substantial compliance with IRC § 170(f)(11) with the burden of proof requirements of IRC § 7491(a).

As a result of Scheidelman's focus on whether the methodology used by Drazner was persuasive, the Scheidelman Court improperly redefined the purpose of a qualified appraisal.

As explained above, Treas. Reg. § 1.170A-13(c)(3)(ii) is entitled "**Recordkeeping and Return Requirements for Deductions for Charitable Contributions**" and requires that a qualified appraisal identify *inter alia*:

(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.

Scheidelman held that the Drazner Appraisal did not satisfy Treas. Reg. § 1.170A-13(c)(3)(ii)(J) and (K) because:

Drazner's report applied mechanically a percentage with no demonstrated support as to its derivation, other than acceptance of similar percentages in prior controversies. Further, **no MEANINGFUL ANALYSIS** was provided in the Drazner report to explain why Drazner applied 11.33 percent to the before fair market value of the property to calculate the facade easement value **other than his statement:**

For most attached row properties in New York City, where there are many municipal regulations restricting changes to properties located in historic districts, **the facade easement value tends to be about 11 - 11.5% of the total value of the property. That figure is based on the appraiser's experience as to what the Internal Revenue Service has found acceptable (on prior appraisals).**

This assertion fails to explain how the specific attributes of the subject property led to the value determined in the Drazner report.

Id. at *20.

* * *

[T]he Drazner report used only estimates based on prior cases and displayed no independent or RELIABLE METHODOLOGY applied to the subject property as the basis for the valuation reached. Thus, we conclude that petitioners have failed to comply with the substantiation requirements under section 170(f) and section 1.170A-13, Income Tax Regs.

Id. at *24.

By incorporating an evaluation of whether the appraisal included a “MEANINGFUL ANALYSIS” or a “RELIABLE METHODOLOGY” into the

existing reporting requirements, Judge Cohen rewrote the relevant regulation thereby conflating a reporting requirement into a proof requirement. For the reasons set forth below, Scheidelman directly conflicts with Simmons, T.C. Memo. 2009-209, as well as Hewitt, 109 T.C. 258 (1997); and Consolidated Investors Group, T.C. Memo. 2009-290.

The Scheidelman Court's addition of "MEANINGFUL ANALYSIS" and "RELIABLE METHODOLOGY," requirements to an otherwise discrete and straightforward reporting requirement is not permitted by the rules of regulatory construction. The rules for interpreting a valid regulation are similar to those governing the interpretation of statutes. Intel Corp. & Consol. Subs. v. Commissioner, 100 T.C. 616, 631 (1993), *affd.* 67 F.3d 1445 (9th Cir. 1995):

1. When construing a regulation, the Court will give effect to its plain and ordinary meaning unless to do so would produce absurd results. Exxon Corp. v. Commissioner, 102 T.C. 721, 726 (1994).

2. The most basic tenet of regulatory construction is to begin with the language of the regulation itself. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

3. When the plain language of the regulation is clear and unambiguous, that is where the inquiry should end. Id.

4. Where a regulation is silent or ambiguous, we look to legislative history to ascertain congressional intent. Peterson Marital Trust v. Commissioner, 102 T.C. 790, 799 (1994), affd. 78 F.3d 795 (2d Cir. 1996).

5. “Provisions regarding charitable deductions should . . . be liberally construed in favor of the taxpayer.” Weingarden, 825 F.2d 1027 (6th Cir. 1987).

Here, the language of the reporting requirements is clear. Treas. Reg. § 1.170A-13(c)(3)(ii) does not use the words “MEANINGFUL ANALYSIS” or “RELIABLE METHODOLOGY.” As explained above, the inquiry should end here. Ron Pair Enters., 489 U.S. at 241.

Moreover, if the language were unclear, this Court has held that the principal objective of Treas. Reg. § 1.170A-13(c)(3)(ii) is “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, 109 T.C. at 265. Nothing in the regulations or

legislative history of IRC § 170(f)(11) supports the Scheidelman Court's inclusion of a "MEANINGFUL ANALYSIS" or a "RELIABLE METHODOLOGY" requirement into the reporting requirements set forth in Treas. Reg. § 1.170A-13(c)(3)(ii).

Scheidelman's analysis has the result of transforming a substantiation/reporting requirement designed to provide Respondent with the information necessary to determine if Respondent should examine a return, into a burden of persuasion requirement conditioning a taxpayer's ability to have this Court redetermine Respondent's valuation of taxpayers' non-cash charitable donations.

More specifically, IRC § 6011 *et seq.* contains the statutory framework for processing returns. IRC § 6011 *et seq.* explain that our tax collection system depends primarily on the voluntary compliance of taxpayers acting in good faith. The preparation of tax returns is not meant to be an adversary process, but rather is part of a self-reporting regime that relies on the good faith of taxpayers. The purpose of a qualified appraisal

(i.e., Treas. Reg. § 1.170A-13) is not to prepare for litigation but rather to allow the Respondent to verify self-assessment.⁹

Congress has chosen to enforce this system of self-assessment by vesting Respondent with broad investigatory powers. IRC § 7602 authorizes the Secretary to examine any books, papers, records, or other data which may be relevant or material to determine if a return is correct. Respondent may verify a taxpayer's valuation of his or her non-cash charitable deductions set forth on a return by a thorough audit of a taxpayer's records, including but not limited to an examination of an appraisal substantiating a return position. United States v. McKay, 372

⁹ The verification function of a qualified appraisal is supported by the Treasury Regulations. Treas. Reg. § 1.170A-13(c)(iv)(D) provides, in part:

If an appraisal is disregarded pursuant to 31 U.S.C. 330(c) it shall have **no probative effect as to the value** of the appraised property. **Such appraisal will, however, otherwise constitute a “qualified appraisal”** for purposes of this paragraph (c) if the appraisal summary includes the declaration described in paragraph (c)(4)(ii)(L)(2) and the taxpayer had no knowledge that such declaration was false as of the time described in paragraph (c)(4)(i)(B) of this section.

(emphasis added). The regulations recognize that under certain circumstances an appraisal with no probative value is nonetheless deemed to be a qualified appraisal. *Id.*

F.2d 174 (5th Cir. 1967). Nevertheless, an IRS audit, including its informal internal appeal component, is not itself a judicial proceeding. United States v. Baggot, 463 US 476, 479 (1983). “[T]he purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels.” Id. at 480

Based on the system for selecting returns for audit, this Court on more than one occasion has reviewed the qualified appraisal requirements set forth in Treas. Reg. § 1.170A-13(c)(3) and concluded that they are reporting requirements designed to help Respondent decide whether to examine a return. Simmons, T.C. Memo. 2009-209; and Consolidated Investors Group, T.C. Memo. 2009-290. As explained by the Court in Bond, nothing in Treas. Reg. § 1.170A-13(c)(3): (a) eliminates the doctrine of substantial compliance or, (b) in any way, affects the ability of a taxpayer who provides the *information required* by Treas. Reg. § 1.170A-13(c)(3) to petition the Court for a redetermination of a value determined by Respondent in a notice of deficiency. Bond, 100 T.C. at 40-41.

This Court made the purpose of the reporting requirements clear in Hewitt, 109 T.C. at 264-266, where it explained that although Congress

designed qualified appraisal requirements to assist Respondent's examination division in identifying those returns that Respondent should examine, the qualified appraisal regulations do not eliminate the doctrine of substantial compliance. Specifically, the Court explained:

Petitioners' reliance on cases such as Taylor v. Commissioner, 67 T.C. 1071 (1977); Columbia Iron & Metal Co. v. Commissioner, 61 T.C. 5 (1973); Sperapani v. Commissioner, 42 T.C. 308 (1964); and Cary v. Commissioner, 41 T.C. 214 (1963), where taxpayers prevailed on the basis of substantial compliance, is likewise without merit. **The key to those cases is that, as in Bond v. Commissioner, supra, the taxpayers had provided most of the INFORMATION REQUIRED, and the single defect in furnishing everything required was not significant.** Cf. Knight-Ridder Newspapers v. United States, 743 F.2d 781, 793-797 (11th Cir. 1984).

Moreover, it is clear that the principal objective of DEFRA 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.**

Id. at 265 (emphasis added).

If after the conclusion of the audit and any internal administrative appeals, Respondent concludes that the taxpayer's valuation is overstated, Respondent can issue the notice of deficiency prescribed by IRC § 6212. After receiving a notice of deficiency, the taxpayer can, among other things,

petition this Court for a redetermination of the deficiency. Once this Court's jurisdiction has been invoked, the only arbiter of valuation is the Court:

The Tax Court is not bound by the formulas or opinions proffered by expert witnesses. It may reach a determination of value based upon its own analysis of all the evidence in the record. Helvering v. National Grocery Co., 304 U.S. 282, 294, (1938); Palmer v. Commissioner, 523 F.2d 1308 (8th Cir. 1975); Fitts' Estate v. Commissioner, 237 F.2d 729, 732-33 (8th Cir. 1956); Penn v. Commissioner, 219 F.2d 18, 21 (9th Cir. 1955). **“Such a [factual] determination is one that is entitled to be made on all the elements of the particular case.”** Heil Beauty Supplies, Inc. v. Commissioner, 199 F.2d 193, 195 (8th Cir. 1952). “Valuation is . . . necessarily an approximation. . . . **It is not necessary that the value arrived at by the trial court be a figure as to which there is specific testimony, if it is within the range of figures that may properly be deduced from the evidence.**” Anderson v. Commissioner, 250 F.2d 242, 249 (5th Cir. 1957), cert. denied, 356 U.S. 950 (1958).

Silverman v. Commissioner, 538 F.2d 927, 931 (2d Cir. 1976)(emphasis added); compare Van Der Aa Invs., Inc. v. Commissioner, 125 T.C. 1, 6-7 (2005)(indicating that an appraisal report would be inadmissible as evidence of fair market value if the author did not testify and make himself available for cross-examination); and Droz v. Commissioner, T.C. Memo. 1996-81 (refusing to accept an appraisal report attached to a Federal income tax return where the author was not called as a witness at trial and

was therefore not available to be cross-examined about his qualifications and methodology).

By incorporating a requirement that a qualified appraisal include “MEANINGFUL ANALYSIS” or a “RELIABLE METHODOLOGY,” Judge Cohen incorporated the judicial concept known as the burden of persuasion into the audit process. Stated another way, the Scheidelman Court transformed a reporting/substantiation requirement into a proof requirement.

Against this background, Petitioners respectfully submit that there is an inconsistency between the Court’s Scheidelman and Simmons decisions.

* * *

For purposes of Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J) and (K), the qualified appraisal accepted by the Court in Simmons is indistinguishable from the Drazner Report rejected in Scheidelman. Because Simmons and Scheidelman are both on appeal, to assure uniformity on an issue of continuing importance to charitable donors, Petitioners respectfully request that this motion should be directed to the full Court.

**V. THE APPRAISAL COMPLIES WITH IRC § 170(f)(11)(E) AND
TREAS. REG. § 1.170A-13**

As explained below and summarized by the chart annexed hereto as Exhibit A, the Appraisal here is a qualified appraisal within the meaning of IRC § 170(f)(11)(E) and Treas. Reg. § 1.170A-13 because the Appraisal here satisfies Treas. Reg. § 1.170A-13(c)(3).

A. *The Appraisal Satisfies Treas. Reg. § 1.170A-13(c)(3)(i)(A).*

Treas. Reg. § 1.170A-13(c)(3)(i) requires that the appraisal not be made earlier than 60 days prior to the contribution date nor later than the date specified in Treas. Reg. § 1.170A-13(c)(3)(iv)(B), i.e., before the due-date of the return in which the charitable deduction is first claimed.

Here, the date of the Appraisal is October 4, 2004 and the due date for Petitioners' 2004 return was April 15, 2005. (Motion, Exhibit A at ExA0005; Exhibit E). Because the date of the Appraisal is prior to the due date for Petitioners' 2004 tax return and within 60 days of the easement donation, Treas. Reg. § 1.170A-13(c)(3)(i) is satisfied. Evans, T.C. Memo. 2010-207 at *23.

B. The Appraisal Satisfies Treas. Reg. § 1.170A-13(c)(3)(i)(B).

Treas. Reg. § 1.170A-13(c)(5) provides that the Appraisal must be prepared, signed, and dated by a qualified appraiser. Alexander J. Rosado of MMJ signed the Appraisers Certification, and the Uniform Residential Appraisal Report. (Motion, Exhibit A at ExA0005, ExA0019). Rosado dated the Appraisal report. (Motion, Exhibit A).

Under IRC § 170(f)(11)(E)(ii)(I), an appraiser is a qualified appraiser if he or she:

- (I) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary,
- (II) regularly performs appraisals for which the individual receives compensation, and
- (III) meets such other requirements as may be prescribed by the Secretary in regulations or other guidance.

Rosado was certified as a “Residential Real Estate Appraiser” by New York State. (Motion, Exhibit A at ExA0019). General qualifications as a real estate appraiser provide requisite expertise to value preservation facade easements. Whitehouse Hotel Ltd. P’ship v. Commissioner, 615 F.3d 321, 331 (5th Cir. 2010). Provision of a state certification number is

sufficient to meet the requirement of Treas. Reg. § 1.170A-13(c)(3)(i)(B).

Evans, T.C. Memo. 2010-207 at *23-27.

Moreover, Rosado and MMJ are regularly hired to conduct appraisals. (See Motion, Exhibit A at ExA0007 where MMJ provided its website address, which listed MMJ's client inventory).

Based on the above, Alexander J. Rosado of MMJ is a qualified appraiser as defined in Treas. Reg. § 1.170A-13(c)(5) and IRC § 170(f)(11)(E) (Motion, Exhibit A) and the Appraisal satisfies Treas. Reg. § 1.170A-13(c)(3)(i)(B).

C. The Appraisal Meets Treas. Reg. § 1.170A-13(c)(3)(i)(D).

The Appraisal was not produced for an appraisal fee prohibited by Treas. Reg. § 1.170A-13(c)(6). (Motion, Exhibit A at ExA0019, item 5; and ExA0017, ¶ 4; Motion, Exhibit G).

D. The Appraisal Satisfies Treas. Reg. § 1.170A-13(c)(3)(i)(C)

Treas. Reg. § 1.170A-13(c)(3)(i) requires that the appraisal include all of the information required by Treas. Reg. § 1.170A-13(c)(3)(ii). The requirements of paragraph (c)(3)(ii) are analyzed in turn below:

a. Treas. Reg. § 1.170A-13(c)(3)(ii)(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*

The Appraisal includes the Property's address, block and lot, photographs, and a description of the facade easement. (Motion, Exhibit A at ExA0004-05; ExA0008; ExA0020; ExA0023-25).

Because a person who is not generally familiar with the type of property may ascertain that the property appraised was the property contributed, the Appraisal satisfies Treas. Reg. § 1.170A-13(c)(3)(ii)(A). Smith, T.C. Memo. 2007-368; Simmons, T.C. Memo. 2009-208.

b. Treas. Reg. § 1.170A-13(c)(3)(ii)(B) - *In the case of tangible property, the physical condition of the property*

To the extent applicable, the Appraisal satisfied the "physical condition" requirement of Treas. Reg. § 1.170A-13(c)(3)(ii)(B) by describing the condition of the Property in detail (Motion, Exhibit A at ExA0004, ExA0008).

c. Treas. Reg. § 1.170A-13(c)(3)(ii)(C) - *The date (or expected date) of contribution to the donee*

The Appraisal Summary, signed by the appraiser, contained the date of the donation. Because the Petitioners' filed 2004 tax return necessarily included the Appraisal Summary, i.e., the Form 8283, which identified the contribution date, the Appraisal substantially complies with Treas. Reg. § 1.170A-13(c)(3)(ii)(C). Simmons v. Commissioner, T.C. Memo. 2009-208 at *18.

d. Treas. Reg. § 1.170A-13(c)(3)(ii)(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*

The Conservation Deed provides the terms of the agreement between Petitioners and the Trust concerning the use, sale or other disposition of the property after the grant of the Easement. By including copies of two Conservation Deeds of Easement in blank, which were in use during the relevant time period, the Appraisal Report satisfied Treas. Reg. § 1.170A-13(c)(3)(ii)(D). (Motion, Exhibit A at ExA0028-0044).

e. Treas. Reg. § 1.170A-13(c)(3)(ii)(E) -The name, address, and * * * identifying number of the qualified appraiser

Pursuant to Treas. Reg. § 1.170A-13(c)(3)(ii)(E), the Appraisers

Certification:

1. includes the name, and identifying number of both Rosado and Steven M. Knobel (“Knobel”);
 2. the address of the MMJ firm;
 3. identifies Rosado as a New York state certified appraiser;
 4. discloses that Rosado’s State Certification Number is 45-43599;
 5. identifies Knobel, the Supervisory Appraiser, as a New York state licensed appraiser;
 6. discloses that Knobel’s State Certificate Number is 45-18006.
- (Motion, Exhibit A at ExA0005, ExA0019).

MMJ’s invoice included in the Appraisal provides the Taxpayer Identification Number of the appraiser, 13-xxxxxxx. (Motion, Exhibit A).¹⁰

¹⁰ Pursuant to Tax Court Rule 27(a), the number is not included here and is redacted in the Exhibit annexed to Petitioners’ Motion.

Thus, the MMJ Appraisal provided the information required by Treas. Reg. § 1.170A-13(c)(3)(ii)(E).

f. Treas. Reg. § 1.170A-13(c)(3)(ii)(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*

As required by Treas. Reg. § 1.170A-13(c)(3)(ii)(F), the Appraisal contained the New York State certification information for both Rosado and Knobel. (Motion, Exhibit A at ExA0005, ExA0019). Evans, T.C. Memo. 2010-207 at *24-27.

g. Treas. Reg. § 1.170A-13(c)(3)(ii)(G) - *A statement that the appraisal was prepared for income tax purposes*

Treas. Reg. § 1.170A-13(c)(3)(ii)(G) requires a “statement that the appraisal was prepared for income tax purposes.” Here, the Appraisal mentions that the Property owners, i.e., the Petitioners, are contemplating a donation of an easement to the Trust, and proceeds to detail the criteria the owners must meet to claim an income tax deduction. (Motion, Exhibit A at ExA0010). Although the Appraisal does not expressly say that it was prepared for income tax purposes, it is clear that the Appraisal was prepared for these purposes based on the statement that

the donors intended to make an easement donation and the explanation of the Federal tax benefits. Simmons v. Commissioner, T.C. Memo.

2009-208; Consolidated Investors Group, T.C. Memo. 2009-290 at *58.

Also, the Appraisal Summary was signed by the appraiser clearly indicating the intent of the Appraisal Report to be used for Federal income tax purposes. Bond v. Commissioner, 100 T.C. 32, 42 (1993).

Therefore, the Appraisal literally, or substantially complies, with Treas. Reg. § 1.170A-13(c)(3)(ii)(G).

h. Treas. Reg. § 1.170A-13(c)(3)(ii)(H) - The date (or dates) on which the property was appraised

Pursuant to Treas. Reg. § 1.170A-13(c)(3)(ii)(H), the Appraisal states that the date of the valuation was September 15, 2004. (Motion, Exhibit A at ExA0002, ExA0003, ExA0005).

i. Treas. Reg. § 1.170A-13(c)(3)(ii)(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

Pursuant to Treas. Reg. § 1.170A-13(c)(3)(ii)(I), the Appraisal Report sets forth that the fair market value of the Property as of the effective date was \$2,310,000 after the Easement and the Easement's fair market value was \$290,000.

The Appraisal confirms that the conservation contribution caused an approximate 11.15% diminution in the fair market value of the Property. (Motion, Exhibit A at ExA0016).

j. Treas. Reg. § 1.170A-13(c)(3)(ii)(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*

“In the subject's market area, the appraiser cannot precisely estimate the extent to which this ‘loss in value’ will result from the facade easement due to the lack of market data.” (Motion, Exhibit A at ExA0010).

Nevertheless, “ordinarily any encumbrance on real property, howsoever slight, would tend to have some negative effect on that property's fair market value. Even a nominal encumbrance that is placed by the current owner of the property would, at the very least, deprive a subsequent owner of the opportunity of placing a similar encumbrance on that property.”

Evans, T.C. Memo. 2010-207. Acknowledging this fact, the MMJ Appraisal explained the method of valuation used to determined the fair market value as follows:

It is our opinion that the presence of the facade conservation easement would alter the market value of the subject property. In the subject's market area, the appraiser cannot precisely estimate

the extent to which this 'loss in value' will result from the facade easement due to the lack of market data. In this situation it is the appraiser's conclusion that the value of the facade conservation easement (a copy is attached to this appraisal report) on the subject property would be estimated at \$290,000, which is approximately 11.15% of the fee simple value of \$2,600,000. This conclusion is based on consideration of range of value that the I.R.S. has historically found to be acceptable as well as historical precedents. Therefore, the presence of the historic facade easement would decrease the fair market value of the property rights held by the homeowner of the subject property to \$2,310,000.

(Motion, Exhibit A at ExA0010).

This method is known as the “before” and “after” method:

Owners are often willing to donate easements – at least in part – because they are reasonably content with the condition of the property at the time of the easement. Some owners, particularly those of single family dwellings and completely rehabilitated properties, frequently do not foresee the effect the changes in economic conditions and building technology will have over time. Owners of commercial property, owners of unrehabilitated properties, owners of timberland and owners of land with subdivision potential do not usually share this kind of shortsightedness. **However, the market value of all types of properties is diminished the moment the easement is conveyed. The diminution varies broadly with the type of property and the provisions of the easement but it always exists, even as a minor amount. Given the choice between two properties of equal qualities, one that is free of preservation or conservation easement and one that bears an easement – assuming equal qualities, the market will rationally select the unencumbered real property. The**

encumbered property would be selected only at a lower price. The difference in the two represents the easement value.”

Judith Reynolds, Historic Properties: Preservation and the Valuation Process 107-108 (Chicago, Appraisal Institute, 2d ed. 1997)(emphasis added).

For the “before value,” the Appraisal used both the cost and sales comparison approach. (Motion, Exhibit A at ExA0005). Under the cost approach, the Appraisal concluded that the before value for the Property was \$2,486,800. *Id.* Under the sales comparison approach, the Appraisal included five properties in determining the before value. *Id.* The Appraisal concluded that the sales comparison approach indicated a before value for the property of \$2,600,000. *Id.* The Appraisal reconciled the two approaches in finding a before value of the Property of \$2,600,000. *Id.*

For the “after” value, the MMJ Appraisal, relying on Hilborn v. Commissioner, 85 T.C. 677 (1985):¹¹

¹¹ In Hilborn, the Court approved a determination of the after-value of eased property that is “calculated by first determining the highest and best use of the property as encumbered by the easement and then by comparing the burdens of the easement with existing zoning regulations and other controls (such as local historic preservation ordinances) to

(continued...)

1. defined Historic Preservation Easements (Motion, Exhibit A at ExA0010);
2. explained the additional restrictions on the homeowner resulting from the donation of a preservation easement (Id. at ExA0014);
3. explained the historical precedents (Id. at ExA0015); and
4. explained the method used to determine the fair market value (Id. at ExA0016).

Specifically, the Appraisal noted the following among elements that negatively affect the “after value” of the eased Property:

1. loss of development rights to maximum density;
2. additional maintenance and insurance requirements;
3. loss that may occur if future market preferences differ from the restricted exterior design, color, windows, doors, and roof lines; and
4. the Trust’s right to prior approval of facade maintenance and alterations. (Motion, Exhibit A aExA0014).

¹¹(...continued)

estimate whether, and the extent to which, the easement will affect current and alternate future uses of the property.” Hilborn, 85 T.C. at 690.

For purposes of Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J), the Donnelly report approved by the Court in Simmons is indistinguishable from the MMJ Appraisal. Against this background, the MMJ Appraisal satisfied the reporting requirement set forth in Treas. Reg. § 1.170A-13(c)(3)(ii)(J). See e.g., Evans, T.C. Memo. 2010-207 at *29.

k. Treas. Reg. § 1.170A-13(c)(3)(ii)(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.*

The MMJ Appraisal satisfies Treas. Reg. § 1.170A-13(c)(3)(ii)(K) by explaining the specific basis for its “before” and “after” values. (Motion, Exhibit A).

At the outset, the MMJ Appraisal makes clear that:

1. “It is our opinion that the presence of the facade conservation easement would alter the market value of the subject property”; and
2. “In the subject's market area, the appraiser cannot precisely estimate the extent to which this ‘loss in value’ will result from the facade easement due to the lack of market data.” (Motion, Exhibit A at ExA0010).

In the absence of market data, the MMJ appraisal explains:

It is now generally recognized by the Internal Revenue Service that the donation of a facade easement of a property results in a loss of value (“dedicated charitable contribution”) of between 10% and 15%. The donation of a commercial property results in a loss of value of between 10% or 12% or higher if development rights are lost. The inclusive data support at least these ranges, depending on how extensive the facade area is in relation to the land parcel.

It is our opinion that the presence of the facade conservation easement would alter the market value of the subject property. **In the subject's market area, the appraiser cannot precisely estimate the extent to which this 'loss in value' will result from the facade easement due to the lack of market data.** In this situation it is the appraiser's conclusion that the value of the facade conservation easement (a copy is attached to this appraisal report) on the subject property would be estimated at \$290,000, which is approximately 11.15% of the fee simple value of \$2,600,000. This conclusion is based on consideration of range of value that the I.R.S. has historically found to be acceptable as well as historical precedents. Therefore, the presence of the historic facade easement would decrease the fair market value of the property rights held by the homeowner of the subject property to \$2,310,000.

Thus, like the qualified appraisal in Simmons and Evans, the MMJ Appraisal was based, in part, “on consideration of a range of value that the I.R.S. has historically found to be acceptable as well as historical precedents.” Scheidelman, T.C. Memo. 2010-15 at *18.

To support its conclusions, the MMJ Appraisal refers the reader to guidance that appeared on the National Park Service’s website. (Motion,

Exhibit A at ExA0010, ExA0014). By following the hyperlink, until some time in November 2003, the reader was advised that IRS engineers had concluded that “the proper valuation of a facade easement should range from approximately 10% to 15% of the value of the property.”¹²

Next, as recommended by Judge Laro in his treatise, Mr. Rosado reviewed the existing easement case law. Laro and Pratt, Business Valuation and Taxes: Procedure, Law, and Perspective, John Wiley & Sons, Inc. (2005), at 4. (“One should always consult the relevant case law to determine how the court applies a given definition of value to a particular set of facts.”) The relevance of the case law was explained by the Appraisal Institute as follows:

The first historic preservation facade easement valuation case was decided by the U. S. Tax Court in Hilborn v. Commissioner, 87 T.C. 677 (1985). Favorably citing Appraising Easements, and affirming the “before and after” valuation test outlined in this publication, the court determined that the donation of an easement on a historic property undergoing rehabilitation in New

¹² See also the NPS Brochure entitled: “Historic Preservation Easements - A Directory of Historic Preservation Easement Holding Organizations” (Motion, Exhibit O) at 5 (example calculation of easement value is approximately 15% of the fair market value of the property). Also note that the contribution for the “Holding organization’s monitoring fee” is “deductible as a cash contribution.”

Orleans' Vieux Carre historic district caused a 10 percent reduction in the value of the property as rehabilitated. ***The decision has served as a valuation benchmark for subsequent historic preservation easement valuation cases, which generally recognized a 12 percent to 15 percent valuation differential attributable to easements.*** See, e.g., Nicoladis v. Commissioner, 1988 T.C. Memo 163 (1988); Losch v. Commissioner, 1988 T.C. Memo 230 (1988); Richmond v. U.S., 699 F. Supp. 578 (E.D. La. 1988); Granger v. U.S., 1989 U.S. Dist. LEXIS 1167 (1989). Most recently, the U.S. Tax Court recognized a 20 percent value differential (Griffin v. Commissioner, 56 T.C. 1560 (1989)), and a 33 percent value differential (Dorsey v. Commissioner, 1990 T.C. Memo. 242 (1990)) attributable to historic preservation easements.

Appraising Easements - Guidelines for Valuation of Historic Preservation and Land Conservation Easements, 9 (3d ed. 1999).

Finally, because of the absence of direct data, the MMJ Appraisal explains that his basis for valuing a facade easement is similar to that used in condemnation cases. Specifically, at page 9 of the Addendum to the MMJ Appraisal, Rosado explains:

Estimating the value of a property after the donation of a conservation easement is very much like condemnation appraisal practice where easements or partial fee interests are taken from property owners by a sovereign. Attempts must be made to define what rights have been lost by the property owners and what elements of damage (or enhancement) are involved in the loss. Because real estate is not bought and sold in a vacuum, the appraiser has endeavored to place himself in the mindset of competent buyers and sellers and to examine considerations they

have actually had, or are likely to have, in the buying or selling of a property encumbered by a facade easement.

For purposes of Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J) and (K), the Donnelly report approved by the Court in Simmons is indistinguishable from the MMJ Appraisal. In Simmons, T.C. Memo. 2009-208, and Evans, T.C. Memo. 2010-207, this Court found that an appraisal using the format of the MMJ Appraisal (i.e., an appraisal that identifies an easement value based on IRS guidance and prior cases), is sufficient to satisfy the method and basis reporting requirements.¹³

Against this background, Petitioners respectfully submit that the Appraisal satisfies Treas. Reg. § 1.170A-13(c)(3)(ii)(K).

E. The Appraisal Was Conducted In Accordance with Generally Accepted Appraisal Standards

In addition to the requirements set forth above, IRC § 170(f)(11)(E) also requires that the qualified appraisal be conducted by a qualified appraiser in accordance with generally accepted appraisal standards.

¹³ In making the determination of the drafters' intent, the Court should note that the drafters of Treas. Reg. § 1.170A-13(c)(3)(ii)(J) and (K) chose the words "such as" to modify the reporting requirement, and not that words "reasoned," "meaningful," or "reliable." (See Point III, supra).

First, as explained above, Rosado was a qualified appraiser. See Evans v. Commissioner, T.C. Memo. 2010-207 (Court can take judicial notice of the regulations governing education and experience requirements necessary to be licensed as a residential real estate appraiser).

Second, the MMJ Appraisal explicitly incorporates the Uniform Standards of Professional Practice (“USPAP”) promulgated by the Appraisal Standards Board of The Appraisal Foundation. USPAP is widely-recognized and accepted as containing standards applicable to the appraisal profession. Adherence to those standards is evidence that the appraiser is applying methods that are generally accepted within the appraisal profession. See Whitehouse v. Commissioner, 131 T.C. 208, 217 (2008) rev’d on other grounds, 615 F.3d 321 (5th Cir. 2010).

Consequently, the MMJ Appraisal is a qualified appraisal within the meaning of IRC § 170(f)(11)(E).

* * *

Petitioners respectfully submit that the MMJ Appraisal applied a methodology that during 2004 was generally accepted within the appraisal

profession. Petitioners' contentions are supported by the IRSAC Report

which observed:

Following a series of Tax Court cases which sustained taxpayers' contentions that easements diminished the value of their properties, the IRS published a Topical Tax Brief which contained the statement that IRS engineers had concluded "the proper valuation" of a preservation easement was approximately 10-15 percent of the property.¹⁴ **This document and the court cases had the collective effect of establishing an informal safe harbor for easement valuation of 10-15 percent, upon which the easement donating public apparently relied.**

Id. at 9-10.

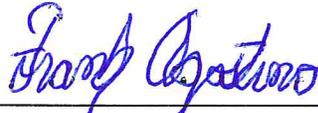
¹⁴ As for the Topical Tax Brief which contained the statement that IRS engineers had concluded "the proper valuation" of a preservation easement was approximately 10-15 percent of the property, Petitioners ask that the Court note that Respondent has acknowledged that "[t]hese documents at one time suggested a range within which a facade easement might be expected to reduce the value of property." CCA 200738013 (August 9, 2007). Respondent did not disclaim the 10-15 percent safe harbor until 2007. The MMJ Appraisal was completed in 2004.

CONCLUSION

For the foregoing reasons, Petitioners' Motion for Partial Summary Judgment should be granted.

Respectfully Submitted,

Dated: Hackensack, NJ
December 10, 2010



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EXHIBIT A

Chart Showing How MMJ Appraisal Complies with Every Requirement for a Qualified Appraisal Under the Treasury Regulation

REQUIREMENT	WHERE SATISFIED ¹
Treas. Reg. § 1.170A-13(c)(3)(i)(A)	Motion, Exhibit A at ExA0005, ExA0019; Exhibit E at 8.
Treas. Reg. § 1.170A-13(c)(3)(i)(B) IRC §§ 170(f)(11)(E)(ii) & (iii)	Motion, Exhibit A at ExA0001, ExA0002, ExA0003, ExA0005, ExA0019; Exhibit F, Exhibit G.
Treas. Reg. § 1.170A-13(c)(3)(i)(D)	Motion, Exhibit A at ExA0017, ExA0019; Exhibit G
Treas. Reg. § 1.170A-13(c)(3)(i)(C)	See Below
Treas. Reg. § 1.170A-13(c)(3)(ii)(A)	Motion, Exhibit A at ExA0004-05, ExA0008, ExA0010, ExA0014, ExA0016, ExA0020-25
Treas. Reg. § 1.170A-13(c)(3)(ii)(B)	Motion, Exhibit A at ExA0004, ExA0008
Treas. Reg. § 1.170A-13(c)(3)(ii)(C)	Motion, Exhibit A at ExA0010, Exhibit G
Treas. Reg. § 1.170A-13(c)(3)(ii)(D)	Motion, Exhibit A at ExA0028-44
Treas. Reg. § 1.170A-13(c)(3)(ii)(E)	Motion, Exhibit A at ExA0001-05, ExA0019
Treas. Reg. § 1.170A-13(c)(3)(ii)(F)	Motion, Exhibit A at ExA0005, ExA0019; Exhibit H
Treas. Reg. § 1.170A-13(c)(3)(ii)(G)	Motion, Exhibit A at ExA0010
Treas. Reg. § 1.170A-13(c)(3)(ii)(H)	Motion, Exhibit A at ExA0002, ExA0003, ExA0005

¹ All references are to exhibits attached to the Motion.

Treas. Reg. § 1.170A-13(c)(3)(ii)(I)	Motion, Exhibit A at ExA0005, ExA0010, ExA0016
Treas. Reg. § 1.170A-13(c)(3)(ii)(J)	Motion, Exhibit A at ExA0004-05, ExA0008-09, ExA0010, ExA0014 -16, ExA0017
Treas. Reg. § 1.170A-13(c)(3)(ii)(K)	Motion, Exhibit A at ExA0010, ExA0014, ExA0015, ExA0016; Exhibit I, Exhibit J, Exhibit K, Exhibit L, Exhibit M, Exhibit N, Exhibit O
IRC § 170 (f)(11)(E)(i)(II)	Motion Exhibit A at ExA0004-05, ExA0014, ExA0016