

Mortgages and Conservation Easements: Not a Good Mix

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This article reviews *Kaufman* and the Tax Court's reconsideration of its summary judgment decision that rejected the taxpayers' deduction for a facade easement charitable deduction. The issues newly considered are the deductibility of the taxpayers' required cash payments to the charity in connection with obtaining a facade easement charitable deduction and the application of various penalties.

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In *Kaufman*¹ the Tax Court reviewed its partial summary judgment in favor of the government and decided factual issues — the taxpayer's cash contributions and related penalties — that it had earlier held² could not be decided by summary judgment. The government disallowed the taxpayers' 2003 and 2004 charitable contribution deductions of a facade easement and cash to the National Architectural Trust (NAT).³ In its earlier opinion, the court granted the government a partial summary judgment regarding the facade easement contribution only.⁴

The taxpayers, Lorna Kaufman and her husband, were residents of Massachusetts and held doctorates in different fields.⁵ In 1999 Kaufman purchased a lot with a row house in the South End historic district of Boston, which became the taxpayers' residence.⁶ She had written to NAT and in a letter dated October 13, 2003, received a response from a NAT representative who informed her that its program "allowed the owner of a nationally

registered historic building to deduct between 10 and 15 percent of the value of the building on her Federal income tax return." He said the program would require very little effort on her part because NAT "will be handling all the red tape and paperwork."⁷

When Kaufman submitted her application to NAT, she indicated a fair market value of \$1.8 million for the property and disclosed that it was subject to a mortgage.⁸ A \$1,000 deposit required with the application was refundable if the easement was not approved.⁹ The form required the donors to contribute a cash endowment equal to 10 percent of the value of the tax deduction, covering the present and future costs of monitoring the donation in perpetuity.¹⁰

Kaufman received a letter dated December 16, 2003, from the president of NAT. For Kaufman to obtain a 2003 donation deduction, the letter asked her to agree to deliver to NAT by December 26, 2003: an executed, notarized Preservation Restriction Agreement; a signed copy of the letter; and a \$15,840 check representing a cash contribution to the trust, based on 8 percent of its \$198,000 estimated value. The letter required Kaufman to schedule an appraisal within 15 days, and it also required that NAT review the mortgage restrictions to ensure the mortgage was subordinate to the preservation easement. If either requirement failed, Kaufman would "join with the Trust in voiding the easement,"¹¹ and NAT would reimburse her for her appraisal cost and cash contribution.¹²

On December 29, 2003, Kaufman signed and noted her agreement to the letter and mailed it to NAT with a check for \$15,840 dated December 27, 2003. The preservation restriction agreement granted NAT a facade easement. The agreement described the purpose of the restriction as follows:

to assure that the architectural, historic, cultural and open space features of the property will be retained and maintained forever substantially in

⁷*Id.*

⁸*Id.* at 5-6.

⁹*Id.* ("If for any reason the necessary approvals cannot be obtained, the deposit will be promptly refunded.")

¹⁰The form indicated that if the donation could not be processed in time to qualify for a deduction in 2003, NAT would allow a 10 percent reduction in the cash contribution to the donor once the process was completed in 2004. *Id.* at 7.

¹¹*Id.* at 7-8.

¹²*Id.* at 8. If successful, NAT would also record the deed.

¹*Kaufman v. Commissioner*, 136 T.C. No. 13 (2011), Doc 2011-7123, 2011 EOTT 65-1. In *Kaufman*, the court denied the requests from some historic preservation organizations to file briefs, "but instructed them to work with petitioners to develop a coordinated position, which petitioners would set forth in their posttrial briefs." *Id.* at 3. Those organizations are: the Trust for Architectural Easements (formerly National Architectural Trust), Foundation for the Preservation of Historic Georgetown, National Trust for Historic Preservation, and Capitol Historic Trust. *Id.* at n.2.

²See *Kaufman v. Commissioner*, 134 T.C. 182 (2010), Doc 2010-9252, 2010 EOTT 79-13.

³*Id.* at 2. The government also asserted penalties against the petitioners.

⁴*Id.* at 3.

⁵*Id.* at 4-5.

⁶*Id.* at 5.

their current condition for conservation and preservation purposes in the public interest, and to prevent any use or change of the Property that will significantly impair or interfere with the Property's conservation and preservation values or that would be detrimental to the preservation of the Property.¹³

The agreement stated that this purpose was accomplished through Kaufman's grant of an easement in gross and in perpetuity to NAT.¹⁴

The agreement provided that if it was terminated, part of the proceeds — the same proportion that the value of the initial easement donation had to the value of the property at donation — belonged to NAT unless state law provided that the easement grantor was entitled to full compensation. NAT agreed to use its share of the proceeds consistent with the purposes of the original contribution.

The agreement specified, under the lender agreement, that the bank joined in the agreement to subordinate its rights to NAT's rights to enforce its easement, except that the mortgagee "shall have 'a prior claim to all insurance proceeds as a result of any casualty, hazard or accident occurring to or about the Property and all proceeds of condemnation, and shall be entitled to same in preference to [NAT] until the Mortgage is paid off and discharged, notwithstanding that the Mortgage is subordinate in priority to the Agreement.'"¹⁵

NAT provided the taxpayers with help receiving the mortgagee's subordination agreement, locating qualified appraisers, negotiating agreement terms with the Massachusetts Historical Commission, obtaining agreement approval from the city of Boston and the National Park Service, and explaining various facets of the taxpayers' charitable contribution deduction. On January 20, 2004, the appraiser valued the property at \$1.84 million without the easement grant and estimated the value of the easement at approximately \$220,800.¹⁶

In an April 5, 2004, letter, NAT explained to Kaufman that her required cash donation would be discounted by 10 percent because the taxpayers had been delayed in filing their 2003 tax return because of the uncompleted easement contribution. That resulted in a discounted cash contribution of \$19,872, plus fees of \$300, with a net amount due of \$3,332. That amount was due after the easement had received National Park Service certification, which occurred August 9, 2004.¹⁷ Kaufman submitted the required payment to NAT, which in turn sent her an IRS Form 8283, substantiating her facade easement contribution.

On their 2003 return, the petitioners claimed a facade easement charitable deduction of \$220,800, but because of statutory limitations, they took a deduction of only \$103,377. They also claimed a cash charitable contribu-

tion deduction of \$16,870.¹⁸ On their 2004 return, the petitioners took both a carryover easement charitable contribution deduction of \$117,423 and a cash charitable contribution deduction of \$3,332, which included their \$300 fee payment.¹⁹

The court reviewed its grant of partial summary judgment for the government that denied any deduction for the taxpayers' facade easement contribution because it did not satisfy the "enforceability in perpetuity" requirements outlined in the regulations²⁰ and was not a qualified conservation contribution under section 170(h)(1). The taxpayers contended that the agreement did require enforcement in perpetuity as defined in the regulations.²¹ The government countered that the combination of the easement and lender agreement did not comply with the extinguishment provision in the regulations.²²

Preliminarily, the court explained the difficulties in making a conservation restriction perpetual at common law, with "common law disfavoring the creation of an assignable right of modified unlimited duration to control the use of land."²³ Although every state and the District of Columbia has enacted statutes to create such conservation easements, the treatise *Powell on Real Property* states that conservation easements may nevertheless be changed or extinguished.²⁴ Powell writes, "a conservation easement may be terminated without the consent of the holder: through the foreclosure of a pre-existing mortgage or mechanic's lien on property subsequently encumbered by the easement."²⁵ The doctrine of changed circumstances could apply to those easements, although compensation would be required.²⁶

The court then explained the exception under section 170 for contributions of partial interests in property that constitute qualified conservation contributions.²⁷ The statute requires that a conservation easement protect the conservation purpose in perpetuity.²⁸ The regulations explain the term "perpetual conservation restriction" and the enforceability in perpetuity requirement.²⁹ The donor and his successors in interest may not use his retained interest in a manner inconsistent with the conservation purposes and no deduction is permitted for an interest subject to a mortgage unless the mortgagee subordinates its property rights to the donee organizations' perpetual

¹³*Id.*

¹⁴*Id.* at 8-9.

¹⁵*Id.* at 10.

¹⁶*Id.* at 10-11.

¹⁷*Id.* at 11-12.

¹⁸*Id.* at 12. Actually, they only paid NAT \$16,840 during 2003.

¹⁹*Id.* at 13.

²⁰See reg. section 1.170A-14(g); *Kaufman*, 134 T.C. at 187.

²¹*Kaufman*, 136 T.C. No. 13, at 13-14, referring to reg. sections 1.170A-14(g)(2) and (3).

²²*Id.* at 14, referring to reg. section 1.170A-14(g)(6).

²³*Id.* at 15.

²⁴*Id.* *Powell* explains that some states like Massachusetts allow an easement to be released by the holder, although Massachusetts requires a public hearing first.

²⁵*Id.*

²⁶*Id.* at 17 (although *Powell* also explains that public policy considerations may make the doctrine inapplicable *id.*).

²⁷*Id.* at 18. See section 170(f)(3)(B)(iii) and 170(h).

²⁸Section 170(h)(5)(A).

²⁹See reg. section 1.170A-14(b)(2) and 1.170A-14(g).

conservation enforcement obligation. However, a deduction will not be disallowed if an event that could defeat the interest from passing to the donee is only remotely likely to occur.³⁰

The regulations acknowledge that there could be an unexpected change in the property's condition that makes it impossible or impracticable to maintain the property for conservation purposes.³¹ In that instance, the regulations provide for perpetuity treatment for cases in which "the restrictions limiting use of the property for conservation purposes are extinguished by judicial proceeding and all of the donee's proceeds . . . from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution."³² The regulations require that to qualify for a deduction at the time of donation 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."³³

The regulations state that the donee's property rights must remain the same even when there are changed conditions and an extinguishment of the easement. Thus, on a sale, exchange, or involuntary conversion, the organization must retain its proportionate share of the proceeds.³⁴

According to the court, the drafters of those regulations anticipated the difficulties involved in creating perpetual conservation easements and therefore provided for remote contingencies. Yet the regulations did not conceive of a mortgage failure as one of those remote events, and the regs required that the mortgagee's rights be subordinated to the organization's conservation purposes and restrictions. Likewise, the regulations provide for a quasi-cy-pres treatment when changed circumstances require an extinguishment of the easement.³⁵

The court focused on this extinguishment provision and held that the taxpayers did not satisfy this regulatory requirement. According to the lender agreement, the bank had a superior right to all insurance and indemnification proceeds and retained a preference to NAT as long as there was a mortgage outstanding.³⁶

In its earlier opinion, the court had held that "NAT's right to its proportionate share of future proceeds was . . . not guaranteed," which violated the extinguishment requirements in the regulations and therefore failed to create a perpetual conservation restriction. Consequently, the facade easement was not a qualified real property interest or a qualified conservation contribution

as required for a charitable deduction.³⁷ The taxpayers argued on reconsideration that regardless of any superior claims the mortgagee might have had to NAT, the taxpayers' agreement with NAT required that they had to pay NAT its proportionate share of the proceeds on extinguishment, condemnation, or receipt of insurance proceeds and that they could still require reimbursement from Kaufman or her successors in interest.³⁸

The court, however, held on reconsideration that NAT's rights under the lender agreement failed to satisfy the requirements under the regulations. Under the regulations, the donee must have an immediately vested property right superior to the bank's, but the court held that this requirement was not satisfied here.³⁹ The court interpreted the extinguishment regulations to require that "the donee have a right to a share of the proceeds and not merely a contractual claim against the owner of the previously servient estate."⁴⁰

The court rejected the taxpayers' position that the government required subordination of the bank's right to NAT to comply with the extinguishment regulation.⁴¹ Rather, the government argued and the court held that the taxpayers' contribution did not satisfy the extinguishment provision, regardless of whether the bank subordinated its rights to NAT.⁴² The court explained:

We based our grant [of partial summary judgment] solely on the fact, conceded by petitioners, that, because, following a judicial extinguishment of the facade easement, NAT might not receive its proportional share of any future proceeds, the agreement failed to satisfy the requirements of section 1.170A-14(g)(6) . . . , and so failed to satisfy the enforceability-in-perpetuity requirements under section 1.170A-14(g) . . . and section 170(h)(2)(C) and (5)(A).⁴³

Indeed, the court considered subordination immaterial to this issue.⁴⁴

Moreover, although the taxpayers argued the applicability of the regulation's remote and negligible exception,⁴⁵ the court reiterated its interpretation that the "so remote as to be negligible" standard protects against the possibility that "events of such low probability will defeat the donee's interest in the servient property,"⁴⁶ but that the regulation also does not address compensation on actual defeasance. The court noted that the taxpayers

³⁷*Id.*, citing *Kaufman*, 134 T.C. at 186-187.

³⁸*Id.* at 24.

³⁹*Id.* at 24-25.

⁴⁰*Id.* at 25.

⁴¹*Id.* at 26.

⁴²*Id.*

⁴³*Id.* at 27-28.

⁴⁴*Id.* at 28.

⁴⁵They estimated a 10 percent probability for the occurrence of each of those terminating events, and they calculated a joint probability of 0.001 percent. *Id.* The government contended that this part of the regulation was irrelevant to the extinguishment provision, which it maintained was more like a cy-pres rule. *Id.* at 29.

⁴⁶*Id.* at 30.

³⁰*Kaufman*, 136 T.C. No. 13, at 19, citing reg. sections 1.170A-14(g)(1) - (3).

³¹*Id.* at 20, citing reg. section 1.170A-14(g)(6).

³²*Id.*, citing reg. section 1.170A-14(g)(6)(i).

³³*Id.*, citing reg. section 1.170A-14(g)(6)(ii).

³⁴*Id.*

³⁵*Id.* at 21.

³⁶*Id.* at 22.

misunderstood *Stotler*,⁴⁷ which preceded the effective date of the regulations. Pointing out that the taxpayers were confusing two sets of regulations, the court explained that:

unlike the risk addressed by the so-remote-as-to-be-negligible standard, in order to satisfy the extinguishment provision, section 1.170A-14(g)(6) . . . provides that the donee must *ab initio* have an absolute right to compensation from the postextinguishment proceeds for the restrictions judicially extinguished. It is Lorna Kaufman's failure to accord NAT an absolute right to a fixed share of the postextinguishment proceeds that causes her gift to fail the extinguishment provision.⁴⁸

The court addressed the two new issues in the case: the taxpayers' cash contributions and the applicability of several penalties. The court allowed both parties to amend their positions on the taxpayers' 2003 and 2004 cash charitable deductions,⁴⁹ which in turn caused a reassignment of their respective burdens of proof.⁵⁰ The government denied the taxpayers' deductions of cash contributions to NAT, asserting they were quid pro quo for the services NAT provided regarding the facade easement deductions and because they were conditional on subsequent events (the value of the easement or the allowance of a deduction).⁵¹ The government also denied a deduction for \$3,032 of the 2004 cash payment to NAT, asserting the taxpayers had "relied on a contemporaneous written acknowledgment that they knew was inaccurate in claiming the erroneous charitable deduction."⁵² The taxpayers contended that although the payments may have been subject to a refund, in 2004 they became fixed and deductible because the parties' understanding was that the cash contributions were not refundable.⁵³

The court found that before the 2004 appraisal it was possible for the easement to be valued at zero; therefore, the court held that the taxpayers were not entitled to a cash contribution deduction for 2003.⁵⁴ However, the court agreed with the taxpayers that the clause in the agreement setting cash payments at 10 percent of the

donation value was not intended to allow for a refund if the taxpayers' deductions were disallowed.⁵⁵

The government had the burden of proof on its argument that the cash contributions lacked donative intent and were quid pro quo for substantial services performed to secure the taxpayers' charitable contributions.⁵⁶ In its reply brief, however, the government agreed that the "expected receipt of a tax deduction is not a benefit that invalidates the deduction" but argued that the deduction must be disallowed because the payments were required.⁵⁷ The taxpayers countered that this customary practice was what allowed NAT and similar organizations to have operating funds to administer their easements, and that the cash donation was not conditional on NAT's approval of the easement and provision of a Form 8283.⁵⁸

The court agreed with the government that *Hernandez*⁵⁹ requires payments to be "unrequited" for them to be deductible.⁶⁰ However, the court pointed out that neither party had cited any precedent to support its more specific argument, making it difficult for the court to find any benefit accruing to the taxpayers from the cash contribution apart from its enabling the charitable contribution.⁶¹ The court noted that in another case⁶² it had disallowed a deduction for a required fee paid to a charity to place an adopted child in the taxpayers' home. In that case, the taxpayers' payment significantly inured to their benefit.⁶³ By contrast, the court explained that Kaufman's cash payment to NAT only served to assist her to obtain a charitable deduction and no other benefit.⁶⁴

The taxpayer argued that the fee primarily benefited NAT. The court cited its recent case of *Scheidelman*,⁶⁵ involving a similar cash payment to NAT. However, in *Scheidelman*, the taxpayers had the burden of proof to show the extent to which their payment exceeded the value of their benefit, and they failed to produce any evidence to show that excess.⁶⁶ Here, the government had to prove quid pro quo, and the court found the evidence ambiguous.⁶⁷ The dates of many of NAT's actions to assist the taxpayers preceded Kaufman's cash payment and clearly helped NAT.⁶⁸ Finally, the government failed to provide evidence of the value of Kaufman's benefit.⁶⁹ The government also failed to show that the taxpayers had not substantiated their contribution as

⁴⁷*Stotler v. Commissioner*, T.C. Memo. 1987-275.

⁴⁸*Kaufman*, 136 T.C. No. 13, at 31.

⁴⁹In May 2010, before the trial, petitioners amended their petition, claiming a 2004 deduction of \$16,840. In June 2010, after the trial, the government amended its answer to increase the taxpayers' 2004 deficiency and to assess an accuracy-related penalty. Both parties agree that the \$300 bank fee Kaufman paid to NAT is nondeductible. *Id.* at 33-34.

⁵⁰After its amendments, the government bore the burden of proof regarding the increased deficiency and penalty for 2004 from its disallowing the \$3,032 deduction, and the quid pro quo ground for disallowing the taxpayers' 2003 \$16,840 deduction, as it represented new matter for the taxpayers to rebut. *Id.* at 35.

⁵¹*Id.* at 33.

⁵²*Id.* at 34-35.

⁵³*Id.* at 36.

⁵⁴*Id.* at 37.

⁵⁵*Id.* at 37-38.

⁵⁶*Id.* at 38.

⁵⁷*Id.* at 38-39.

⁵⁸*Id.* at 39-40.

⁵⁹*Hernandez v. Commissioner*, 490 U.S. 680 (1989).

⁶⁰*Kaufman*, 136 T.C. No. 13, at 40.

⁶¹*Id.*

⁶²See *McMillan v. Commissioner*, 31 T.C. 1143 (1959).

⁶³*Kaufman*, 136 T.C. No. 13, at 40, n.12.

⁶⁴*Id.* at 41.

⁶⁵*Scheidelman v. Commissioner*, T.C. Memo. 2010-151, Doc 2010-15685, 2010 EOTT 135-4.

⁶⁶*Kaufman*, 136 T.C. No. 13, at 42.

⁶⁷*Id.* at 42-43.

⁶⁸*Id.* at 43-44.

⁶⁹*Id.* at 44.

required by statute.⁷⁰ Therefore, the court allowed the taxpayers a 2004 cash charitable contribution deduction for \$19,872.

Finally, the court reviewed the penalties the government sought to impose on the taxpayers, but it upheld only the accuracy-related penalty that found the taxpayers had been negligent in their 2003 underpayment attributable to Kaufman's cash payments to NAT.⁷¹

Scheidelman

In *Scheidelman*, the New York City taxpayers attempted to make a historic facade easement donation to NAT. Their appraiser estimated a value for the easement of \$115,000, approximately 11.33 percent of the entire property's \$1.02 million value.⁷² But, the court denied the taxpayer's deduction based on the inadequacy of that appraisal.⁷³

[The appraiser'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 [appraiser's] report to explain why [he] applied 11.33 percent to the before fair market value of the property to calculate the facade easement value other than his statement.⁷⁴

The court denied that it had established a 10 percent rule applicable to facade donations⁷⁵ and held that the taxpayers were not entitled to a charitable contribution deduction because they had not satisfied the substantiation requirements under section 170(f) and the regulations.⁷⁶

The court did not consider whether the easement satisfied the requirements of section 170(h), the principal issue in *Kaufman*. However, the court did consider the issue of the taxpayers' cash contribution to NAT. The taxpayers bore the burden of proof, and the court held they did not satisfy that burden because they did not provide evidence necessary to determine that in return for the payment of cash to NAT, "they received nothing of substantial value or, if they did receive something of substantial value, that they are entitled to a partial charitable contribution deduction because the payment exceeded the value of the benefits received."⁷⁷

⁷⁰Section 170(f)(8)(A); and *Kaufman*, 136 T.C. No. 13, at 45-46.

⁷¹*Id.* at 52. The court explained that the government had the burden of proof regarding penalties "and must come forward with sufficient evidence indicating that it is proper to impose penalties." At that point, "the burden of proof remains with the taxpayer, including the burden of proving that the penalties are inappropriate because of reasonable cause" (citations omitted).

⁷²*Scheidelman*, T.C. Memo. 2010-151, at 9.

⁷³*Id.* at 16.

⁷⁴*Id.* at 20.

⁷⁵*Id.* at 19.

⁷⁶*Id.* at 26-27. See also reg. section 1.170A-13.

⁷⁷*Id.* at 29.

American Bar Endowment

In *American Bar Endowment*,⁷⁸ the Supreme Court held not only that the American Bar Endowment (ABE) had unrelated business taxable income from its sale of group insurance, but also that ABE members were not entitled to take charitable deductions for the portion of their premium exceeding ABE's insurance cost. The Court held that when a donation includes only a nominal donee benefit, a taxpayer is entitled to a deduction equal to the excess that benefited the charity "on the theory that the payment has the 'dual character' of a purchase and a contribution."⁷⁹ In accordance with that dichotomy, the Court held that the donee "must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return."⁸⁰ The trial court found, and the Court agreed, that the insurance cost was comparable to similar policies.⁸¹ In *American Bar Endowment*, the Court held that the taxpayers had not established that any part of their ABE premium costs were eligible for a charitable deduction.⁸²

Hernandez

In *Hernandez*,⁸³ the Supreme Court held that the fees that Church of Scientology members paid for auditing and training sessions were quid pro quo exchanges for which the church members were not entitled to charitable deductions. The church established fixed payments for the sessions, the payments varied by "a session's length and level of sophistication,"⁸⁴ and members received discounts for advance payments.⁸⁵ The church prohibited giving those services to its members for free.⁸⁶

The Court explained that the legislative history of the charitable deduction indicated that Congress wanted to distinguish "between unrequited payments to qualified recipients and payments made to such recipients in return for goods or services."⁸⁷ One example given in the House and Senate reports concerned hospital payments: "Gift characterization should not apply to 'a payment by an individual to a hospital in consideration of a binding obligation to provide medical treatment for the individual's employees. It would apply only if there were no expectation of any quid pro quo from the hospital.'"⁸⁸

To avoid the need to interpret a taxpayer's actual motivation, the Court adopted the IRS's and lower courts' focus on an analysis of the external features of the

⁷⁸*United States v. American Bar Endowment*, 477 U.S. 105 (1986).

⁷⁹*Id.* at 117.

⁸⁰*Id.* at 118.

⁸¹*Id.* at 116.

⁸²*Id.* at 119.

⁸³After the *Hernandez* decision, the IRS issued Rev. Rul. 93-73, 1993-2 C.B. 75, making obsolete its earlier revenue ruling on which the *Hernandez* decision was based.

⁸⁴*Hernandez*, at 685.

⁸⁵*Id.* at 686.

⁸⁶*Id.* at 692.

⁸⁷*Id.* at 690.

⁸⁸*Id.* (citations omitted).

applicable transaction.⁸⁹ The Court held that the taxpayers were involved in a "quintessential" quid pro quo transaction where in exchange for their payments, the taxpayers "received an identifiable benefit, namely, auditing and training sessions."⁹⁰ The Court rejected the taxpayers' argument that this analysis was inapplicable to church members' receipts of purely spiritual benefits, because the deduction statute did not make that distinction and that contention would "expand the charitable contribution deduction far beyond what Congress has provided."⁹¹

Analysis and Conclusion

The section 170 regulations clearly require that on extinguishment of a conservation easement, a portion of the proceeds must be paid to the donee charity. That requirement is not satisfied by the donor's contractual obligation in those circumstances to pay an equivalent amount to the charity. It is not surprising that a mortgagee would want priority to all of the proceeds in the event of a casualty or condemnation as was the case in the lender agreement here. That is why conservation easements are seldom recommended for mortgaged property.

It is unclear from *Kaufman* whether required cash payments, made in exchange for tax-planning services and customarily offered by charities, constitute a significant benefit to donors or whether those types of payments are exempt from a quid pro quo analysis because the payments ultimately benefit the charity and its ability to enforce the easement in perpetuity. However, *Kaufman* and *Scheidelman* underscore the importance of providing evidence establishing the value of that donor benefit.

⁸⁹*Id.* at 690-691.

⁹⁰*Id.* at 691.

⁹¹*Id.* at 693.

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