

WHAT IS SO EASY ABOUT VALUING A FACADE EASEMENT?

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One of the most valuable instruments for preserving real property is a preservation agreement, referred to as a conservation easement, between a property owner and a qualified conservation organization. More specifically, a facade easement, which prohibits the owner of the property from, in most cases, developing or altering the facade, is designed to maintain the principal face of an historic, archeological, or cultural structure by protecting its most prominent architectural features. The easement must include restrictions preserving the entire exterior of the building, including front, sides, rear, and height, and prohibiting any changes to the exterior of the building inconsistent with its historic character.¹

The donor of a qualifying facade easement may be entitled to claim a charitable contribution deduction equal to the fair market value of the easement, usually the decrease in the fair market value of the underlying property caused by the restrictions placed on the property in accordance with the easement. The value of the easement—and so the value of the charitable contribution deduction—is normally deter-

mined by using the “before and after” method in a qualified appraisal completed by a qualified appraiser in which the underlying property is valued before the grant of the easement and after the grant of the easement, with the difference being the value of the easement.²

After the release of Notice 2004-41, 2004-2 CB 31, the IRS implemented a wide-ranging initiative to audit charitable contribution deductions claimed by taxpayers who made donations of historic preservation easements on real property they own. There is a belief that the current program, in which the IRS takes a very strict view regarding the value of these donations, is having the effect of diluting the intent of Section 170(h), which provides for a tax incentive by means of a charitable deduction for the donation of an historic easement. The current IRS audit effort strains its resources and may fail to distinguish between a legitimate deduction authorized by statute and an abusive tax shelter.³ The Tax Court ruled in *Whitehouse Hotel Ltd. Partnership*, 131 TC 112 (2008), that the donation of an easement in the historic district of New Orleans did in fact diminish the value of the underlying realty despite strong local preservation laws. The Tax Court agreed with the IRS that \$6.295 million of the amount claimed for the limited partnership's undis-

Property owners interested in the facade easement donation should understand that although the process ultimately is beneficial, it is not simple.

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An organization that is eligible under Section 170(c) will generally be considered a qualified organization.

puted qualified conservation easement should be disallowed. In 2010, however, the Fifth Circuit vacated the Tax Court decision on the valuation of the partnership's qualified conservation easement and the case was remanded for reconsideration.⁴ Two 2011 Tax Court cases have added to the history of litigation on this topic.

Statutory background—Charitable contributions

In 1976, Congress provided a financial incentive to the donation of an easement in the form of a charitable contribution deduction. Section 170(h) contains the authority for treating an historic preservation easement donation as a "qualified conservation contribution." As a general rule, for charitable gifts of property, a taxpayer is not allowed to take a deduction if the charitable gift consists of less than the taxpayer's entire interest in that property,⁵ but there is an exception for qualified conservation contributions.⁶ To constitute a "qualified conservation easement," a contribution must be of a qualified real property interest, to a qualified organization, and exclusively for conservation purposes. Such an easement must be based on legally enforceable restrictions that will prevent uses of the retained interest in the property that are inconsistent with the conservation purposes of the contribution.⁷ Moreover, the donation of a conservation easement may be considered a qualified charitable conservation contribution eligible for state and federal tax benefits if it serves one or more of the purposes recognized by the Service, the last of which takes the form of a facade easement.⁸

To be deductible as a charitable contribution, a facade easement must be on a certified historic structure. A certified historic structure is any land area or building listed in the National Register, or located in a registered historic district, and certified by the Secretary of Interior as being of historic importance to the district.⁹ The public must have visual access to the facade on which the easement is placed, if

the facade is not visible from a public byway, or the terms of the easement must permit regular viewing by the general public.¹⁰

The contribution of a facade easement must be to a "qualified organization." An organization that is eligible under Section 170(c), having a conservation purpose and the resources and commitment to enforce the easement, will generally be considered a qualified organization. The easement is normally conveyed to the organization by a deed, which is recorded in appropriate state or country records. The deed must preserve the facade in perpetuity. In addition, the donor and donee must enter into a written agreement certifying, under penalties of perjury, that the recipient organization is a qualified organization with a purpose of environmental protection, land conservation, opens space preservation, or historic preservation, and has the resources to manage and enforce the restriction and a commitment to do so.¹¹

The amount of the deduction for the contribution of a conservation easement or other restriction is the fair market value of the interest conveyed to the qualifying organization. Amounts paid for easements or similar restrictions under governmental easement acquisition programs can be used as a basis for determining fair market values, but to arrive at a reasonable conclusion regarding the value of property at issue, one must first determine the rights afforded to the owner of such property by the applicable state law.¹² Determining the fair market value of a preservation easement has challenged appraisers and the IRS alike, since preservation easements are generally not bought and sold in a market that values them directly. If there is a substantial record of sales of easements comparable to the donated easement, the fair market value of the donated easement is based on the sales prices of the comparable easements. When there is no substantial record of sales of easements comparable to a

¹ Section 170(h)(4)(B)(i).

² IRS Brief, "Facade Easement Contributions," available at www.irs.gov/pub/irs-utl/facade_easement_brief_june_2009_final_revision_08272009.pdf.

³ IRS Advisory Council 2009 General Report, available at www.irs.gov/taxpros/article/0,,id=215543,00.html.

⁴ *Whitehouse Hotel Ltd. Partnership*, 615 F3d 321, 106 AFTR2d 2010-5759 (CA-5, 2010), *vac'g and rem'g* 131 TC 112 (2008).

⁵ Section 170(f)(3)(A); Reg. 1.170A-7.

⁶ Section 170(f)(3)(B)(iii).

⁷ Section 170(h)(2).

⁸ Section 170(h)(4). Not all states provide tax breaks for conservation contributions.

⁹ Section 170(h)(4)(C).

¹⁰ Reg. 1.170A-14(d)(5)(iv).

¹¹ Section 170(h)(3).

¹² For example, Louisiana state law allows an owner of immovable property to create a perpetual real right burdening the whole or any part thereof of that immovable property, including the facade, for charitable or historic purposes. La. Rev. Stat. Ann. § 9:1252.

¹³ Reg. 1.170A-14(h)(3).

¹⁴ Section 170(f)(11).

¹⁵ Note 2, *supra*.

donated easement, the "before and after" approach is generally used.¹³

Under this method, the amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction. Finding a property's highest and best use is a critical aspect for determining its fair market value. The reasonable and potential use that supports the highest present value of the property is its highest and best use. The key inquiry is what a hypothetical willing buyer would consider in deciding how much to pay for the property. To the extent possible, the before and after values are determined by using the three commonly recognized methods for valuing real property: the comparable-sales method, the income method, and the replacement-cost method.

Unless the donor properly substantiates the charitable contribution with a "qualified appraisal" of the facade easement prepared by a "qualified appraiser," no deduction is allowed.¹⁴ The donor of a facade easement should be aware of the detailed requirements related to a qualified appraisal and qualified appraiser set forth in Section 170(f)(11) and Regs. 1.170A-13(c)(3) and (c)(5). A qualified appraisal must be conducted by a qualified appraiser in accordance with generally accepted appraisal standards. It must be made no earlier than 60 days prior to the date of contribution of the appraised property and received by the donor before the due date, including extensions, of the return on which a deduction is first claimed. Under Section 170(f)(11)(E)(ii), a qualified appraiser is an individual who regularly performs appraisals for compensation, and who has earned an appraisal designation from a professional appraiser organization or has met minimum education and experience requirements as set forth in regulations.¹⁵

Hilborn

In *Hilborn*, 85 TC 677, a limited partnership called St. Louis Partners, Ltd., owned an apartment building in the French Quarter of New Orleans, a registered historic district. The contract of purchase was conditioned on the local authorities' acceptance of a charitable donation of the building's facade and qualification of the building as an his-

torical landmark. The partnership was further obligated to spend up to \$185,000 to renovate the structure.

The local authorities accepted the facade donation and approved a renovation plan. The partnership entered into an easement agreement with respect to the facade, qualifying it for a charitable contribution deduction. The Service valued the facade at \$24,000, while holders of the limited partnership interest, seeking to make use of their distributive share of the charitable deduction, set the value at \$108,000.

Because no established market existed to determine the fair market value of the easement, the Tax Court set the value of the donated facade at \$55,278 by using the "before and after" approach to calculate the value of the facade. The judge noted that the IRS approved the use of the "before and after" in Rev. Rul. 73-339, 1973-2 CB 68, and Rev. Rul. 76-376, 1976-2 CB 53. The court considered the expert testimony that was offered by both sides, detailing the considerations in making a valuation under this method. The court pointed out that "before" value is determined with reference to the highest and best use of the property in its current condition, while "after" value is set with reference to the highest and best use of the property as encumbered by the easement.

Richmond

In March 1980, Robert and Barbara Richmond acquired an interest in a building located on Dumaine Street in New Orleans. Toward the end of the year, the Richmonds granted a real right, in perpetuity (facade easement donation) to the city, to be administered by the Vieux Carré Commission (VCC). The VCC is a governmental agency responsible for the historic preservation of the French Quarter, a six-block by thirteen-block area in New Orleans bordering the Mississippi River. Before accepting the facade donation, the city, acting through the VCC, required a commitment that certain specific renovations would be made to the real property. On their 1980 and 1981 joint federal income tax returns, the Richmonds claimed deductions of \$30,010 and \$7,934 respectively. The deductions were based on their allegations that the total value of the facade easement was worth \$150,000, the purchase price of the property, and that the value of their interest in the easement was \$37,500.

The donor of a facade easement should be aware of the detailed requirements related to a qualified appraisal and qualified appraiser.

Pursuant to an audit, the IRS partially disallowed the deduction for 1980 and fully disallowed the deduction for 1981. The U.S. made an assessment against the Richmonds for their 1980 and 1981 federal income tax deficiencies, including interest. Under Section 6621, the interest portion of the assessment was imposed for a substantial underpayment as a result of a "tax-motivated transaction." The couple filed a refund suit in which they alleged that the IRS undervalued the donated facade easement and that the interest penalty was wrongfully imposed on the contested substantial underpayment of their tax debt, which they claimed did not result from a tax-motivated transaction.

As the Tax Court pointed out in *Hilborn*, no well-established commercial market in facade or conservation easements exists. In coming to their conclusion that the value of the facade easement as of the date of the donation was no more than \$59,000, the government's experts followed the procedures set forth in *Hilborn* and used the "before and after" method of determining the fair market value of the qualified conservation contribution. In *Richmond*, 699 F Supp 578, 63 AFTR2d 89-490 (DC La., 1988), the Tax Court determined that the "best and highest" use of the real property was its current use. It said that it was clear the Richmonds overvalued the facade donation by a factor well in excess of 150%, which triggered the valuation overstatement rule in Section 6659(c) (now repealed). A tax-motivated transaction included any valuation overstatement within the meaning Section 6659(c).

The Richmonds' refund claim was granted in part, however. To the extent the government's original assessment exceeded the appropriate assessment, the court agreed that the Richmonds were entitled to a refund of taxes paid. It dismissed their claim to the extent that it was based on any valuation of the easement over \$59,000.

Bruzewicz

Elizabeth Bruzewicz and her husband Howard Prossnitz brought suit seeking a refund of the taxes, penalties, and interest they previously paid as a result of a notice of deficiency issued by the IRS stemming from charitable deductions taken on their 2002-04 income tax returns for the donation of a preservation facade easement on their home in Oak Park, Illinois. The plaintiffs owned their home, which was located in the Frank Lloyd

Wright-Prairie School of Architecture Historic District. In November 2002, Mary Schmidt and her associate Gwen Fiorenzo completed an appraisal, requested by the plaintiffs, of a preservation easement that they were considering donating to the Landmarks Preservation Council of Illinois.

The plaintiffs executed and recorded the facade easement in December 2002 and deducted \$216,000 as a charitable contribution. On that year's return, they also claimed a \$21,600 deduction for a cash payment made to Landmarks Council during 2002. As a result of certain deductibility limits, those deductions were spread over the years 2002-04. In 2005, the IRS audited the plaintiffs' returns and disallowed the claimed deductions for the \$216,000 easement and the \$21,600 cash donation. The IRS issued the plaintiffs a statutory notice of deficiency that reflected a tax deficiency of \$74,521, which generated \$14,904.20 in penalties. They paid the taxes and penalties together with interest and filed a claim for refund of those amounts. After receiving a small portion of that claim, the plaintiffs then filed suit seeking a refund of the rest of the taxes, penalties, and interest they had paid as a result of the deficiency notice.

The district court in *Bruzewicz*, 604 F Supp 2d 1197, 103 AFTR2d 2009-1428 (DC Ill., 2009) upheld the disallowance of the entire in-kind deduction with related interest and penalties. The court found that the plaintiffs did not comply with the substantiation requirements of Section 170(f)(8) and Reg. 1.170A-13 as to property descriptions, contemporaneous writings, and, foremost, appraiser qualifications in regards to the deduction for the facade easement contribution.

Simmons

Dorothy Simmons owned two rowhouses in Washington, DC during 2003 and 2004. The properties were subject to the Historic Landmark and Historic Preservation Act of 1978 during the years at issue. Simmons granted facade easements on both the Logan Circle and Vermont Avenue parcels to L'Enfant, which is a District of Columbia Section 501(c)(3) corporation organized for the purpose of holding and enforcing conservation easements on historic designated properties in Washington, DC.

Each facade conservation easement granted to L'Enfant was memorialized by a "Conserva-

tion Easement Deed of Gift.” The terms of both easements were essentially identical, except for the identification of the underlying properties. The deeds stated that Simmons could not make any material changes to the respective facades in any way without L’Enfant’s consent. There were exceptions, however, if the facades were damaged. The deeds also required that Simmons periodically clean the facades, keep the L’Enfant plaques polished and visible from the street, and maintain the properties in good condition. Additionally, any work done on the properties, whether L’Enfant consented or not, was required to comply with all applicable federal, state, and local government laws and regulations. Finally, if Simmons sold the properties, the easements would remain in force.

Simmons hired an appraiser to determine the values of the conservation easements. He valued the Logan Circle parcel at \$1,250,000 and the Vermont Avenue parcel at \$845,000. He then valued the Logan Circle easement at \$162,500 and the Vermont Avenue easement at \$93,000.

Simmons did not file federal income tax returns for 2003 and 2004 on time. Therefore, the IRS prepared substitutes for returns under Section 6020(b) on her behalf for those years. In June 2006, the IRS issued statutory notices of deficiency for tax years 2003 and 2004. Simmons filed petitions in the Tax Court contesting the Service’s determinations, and around April 2007, she executed a federal tax return for 2003 and mailed it to the IRS. The return was not processed because this case was pending at the time. At trial, the only disputed issue of fact was the values of the claimed conservation easements. Both parties introduced expert reports valuing the contributions. The appraisers for both parties valued the easements by applying the “before and after” method.

As in *Hilborn* and other previous litigation, the Tax Court in *Simmons*, TCM 2009-208, *aff’d* 107 AFTR2d 2011-2632 (CA-D.C., 2011) determined that no established market existed for determining the fair market value of an easement. The court adopted Simmons’ “before” valuations of the two parcels (\$1,250,000 for Logan Circle and \$845,000 for Vermont Avenue). It then applied a 5% reduction in fair market value to value the easements at \$56,250 and \$42,250. Accordingly, the court held that Simmons was entitled to charitable contribution deductions in those amounts.

The Service argued that the properties were already subject to District of Columbia preservation laws, but the court said that this did not prevent any charitable contribution deductions. According to the court: “Although the easements were duplicative in some respects, it is important to note that granted easements to L’Enfant meant that petitioner would be subject to a higher level of enforcement than that provided by the District of Columbia.”

Whitehouse Hotel Ltd. Partnership

The taxpayer in *Whitehouse Hotel Ltd. Partnership*, 131 TC 112 (2008), *vac’d and rem’d* 615 F3d 321, 106 AFTR2d 2010-5759 (CA-5, 2010) was formed in 1995 for the purpose of purchasing and renovating a parcel of New Orleans property. The parcel was contained within both the Vieux Carre Historic District, as listed in 1966 in the National Register of Historic Places, and the Canal Street Historic District. This property included the Maison Blanche building (constructed between 1906 and 1908), which consisted of a base level with six floors, a U-shaped tower with eight floors, and two subsequently constructed annexes with five and six floors, respectively. In 1980, the Maison Blanche building was designated a City of New Orleans landmark. The property also included the six-story Kress building (constructed in 1910) that was contiguous to the Maison Blanche building, and a parking garage contiguous to the Kress building. Whitehouse also owned a second parking garage located across the street from the block containing the Maison Blanche and Kress buildings and the Kress garage. Whitehouse purchased the underlying land and the buildings, with plans to renovate the buildings into a Ritz-Carlton hotel. Subsequent to the donation of the historic preservation facade easement, the property within the above-described block was developed into a 452-room Ritz-Carlton Hotel with a spa and parking garage, plus two smaller hotels and retail space.

In 1997, Whitehouse conveyed the easement to the Preservation Alliance of New Orleans through Preservation Resource Center (PRC), a nonprofit corporation. The easement prohibited alterations to the Maison Blanche building’s facade, made primarily of terra-cotta. The easement required Whitehouse to maintain the terra-cotta facade in a “good and sound state of repair,” and, regarding the prohibition against altering the facade, it prohibited any construction or alteration that would affect the appearance of (1) the exterior walls of the lower

stories visible from the street, (2) the exterior portion of the improvement above the lower stories that was not covered by the upper stories, and (3) the exterior walls of the upper stories that are visible from the street.

Pursuant to the easement, PRC approved specific development plans for the contiguous Maison Blanche and Kress buildings. The day after Whitehouse executed and donated the easement, it converted the Maison Blanche and Kress buildings into a single, indivisible condominium unit (Unit RC). That same day, Unit RC was conveyed to RC Hotel, LLC.

On its 1997 tax return, Whitehouse claimed a \$7.445 million charitable-contribution deduction for the conservation easement. Consistent with IRS regulations, as grounds for doing so, Whitehouse obtained a contemporary appraisal of the easement by one Richard Cohen. He valued the easement at the amount claimed by Whitehouse. The parties did not dispute that the easement constituted a "qualified conservation contribution"; only the allowable amount of the deduction was at issue.

In 2003, through a Notice of Final Partnership Administrative Adjustment, the IRS allowed only \$1.15 million for the easement, approximately \$6.3 million less than claimed by Whitehouse. In addition, the IRS assessed a gross undervaluation penalty of 40% of the portion of underpayment of taxes for that year. Whitehouse challenged both assessments in the Tax Court.

Whitehouse and the IRS presented expert testimony on both the easement's fair market value and the difference in the property's before-and-after easement values. A serious illness prevented Richard Cohen from participating at trial. Instead, Richard Roddewig provided the expert testimony for Whitehouse, while Dunbar Argote did so for the Service. Both Roddewig and Argote had extensive experience in valuing real estate. Roddewig was a lawyer as well as a real-estate consultant and appraiser; among other relevant experience, he had authored published works on preservation easements and contributed to *The Conservation Easement Handbook*. Argote had valued more than 50 buildings intended for use as hotels in New Orleans, including four appraisals of the Maison Blanche building.

Whitehouse also presented testimony from Robert Drawbridge, the hotel's asset manager and an executive vice president of assets at Whitehouse's general partner and tax matters partner. He testified that Whitehouse had also relied on another contemporary appraisal performed by Revac, Inc. The court ruled any reliance on the Revac appraisal was misplaced because it did not determine a value for the easement specifically. Further, because Drawbridge was not associated with Whitehouse until several years after the deduction was claimed, the court rejected as not credible his testimony regarding Whitehouse's efforts at the time it claimed the deduction.

Among other things, the experts disagreed on two threshold issues: which property should be valued and the nature of its "highest and best use," which is, of course, a key factor in determining fair market value. Roddewig determined the relevant property to consist of the Maison Blanche building (including annexes) and the contiguous Kress building, but not the Kress parking garage. Argote valued only the Maison Blanche building (including annexes). Contrary to Reg. 1.170A-14(h)(3)(i), he did not consider the easement's impact on the contiguous and commonly owned Kress building. Based on this, the court said that although Whitehouse could argue that Argote's direct testimony provided no basis to support the Service's adjustment to Whitehouse's charitable contribution deduction, it would not exclude his testimony as unreliable for failing to take account of any value reduction to the Kress Building. According to the court, Argote was not asked by IRS to opine on that issue. His assignment was to estimate the change in value of the Maison Blanche Building to Whitehouse on account of its conveyance of the servitude to PRC.

Roddewig also determined that the before-donation highest and best use of this property, at the time the easement was conveyed, was as a luxury hotel, such as the Ritz-Carlton hotel. On the other hand, Argote concluded that the highest and best use of the Maison Blanche building was as a mixed non-luxury hotel and retail complex.

Each expert determined values of the property for before and after the easement was donated, then subtracted the latter from the former. Roddewig's report used three recognized methods to reach a before-donation value: re-

¹⁶ Schrimsher, TCM 2011-71.

placement-cost, income, and comparable-sales. In contrast, Argote used only the comparable-sales method.

The Tax Court did not credit all of either expert's report and testimony, but undertook its own analysis, based on parts of each expert's evaluation. It disregarded as unreliable Roddewig's valuations under the replacement-cost and income methods. Using only the comparable-sales method, the Tax Court found a before-donation value of \$12,092,301 and an after-donation value of \$10.3 million, resulting in a charitable-contribution deduction of \$1,792,301, which was much closer to the Service's \$1.15 million value; accordingly, it ruled Whitehouse overstated the deductible amount by \$5,652,699. Additionally, the court assessed a gross valuation misstatement penalty of 40% of the portion of Whitehouse's underpayment of 1997 taxes.

On appeal, the Fifth Circuit ruled that the Tax Court erred in failing to consider the effect of the historic-preservation facade easement on the contiguous Kress building. The Tax Court considered only whether the easement burdened the Kress building; concluding it did not, the court found there was no difference between the potential use of the building before and after the conveyance of the easement. According to the Fifth Circuit, the Tax Court made a mistake in declining to consider both buildings' highest and best use in the light of both the reasonable and probable condominium regime (the buildings were combined into Unit RC the day after the easement was donated), and the combination of those buildings into a single functional unit. Both of these foreclosed the realistic possibility, for valuation purposes, that the buildings could come under separate ownership. Therefore, regardless of the easement's not burdening the Kress building, it affected the fair market value of the Maison Blanche and Kress buildings.

The Fifth Circuit required the Tax Court to reconsider all three methods of valuation in determining the value of the easement. The appellate court said that the Tax Court should, among other things, reconsider the experts' reports and valuation methods and the appraisers' conclusions regarding highest and best use as a luxury or non-luxury hotel. The Fifth Circuit also vacated the Tax Court's imposition of the gross undervaluation penalty on Whitehouse.

2011 cases

Since *Whitehouse* was decided by the Fifth Circuit in August 2010, the courts have continued to hold that all Code sections and regulations must be followed in order for donors of facade easements to successfully claim the associated charitable contribution deduction, and that failure to comply will result in partial or even total loss of the deduction and related penalties.

In March 2011, Randall and Kelly Schrimsher challenged the Service's finding of deficiencies in their 2004 through 2006 federal income taxes and associated penalties. The deficiencies resulted from the Service's disallowance of the charitable contribution deduction claimed by the taxpayers for their donation of a facade easement in a commercial building in Huntsville, Alabama. The Schrimshers claimed the value of the facade easement was \$705,000.

The IRS said that the petitioner failed to obtain a contemporaneous written acknowledgment of the facade easement as required by Section 170(f)(8). The preservation and conservation easement agreement that the Schrimshers entered into with the Alabama Historical Commission lacked a description and good faith estimate of the value of any consideration given to the donor taxpayer by the recipient organization or statement that no such consideration was given. Concurring with the IRS, the Tax Court pointed out that the only statement in the agreement concerning consideration was the statement that the commission provided consideration of \$10 plus other good and valuable consideration. This statement, the court pointed out, did not indicate that the commission provided no goods or services. Also, the court said that the Schrimshers had failed to raise the issue of the applicability of any exception to the contemporaneous writing acknowledgment requirement. Accordingly, it granted the Service's motion for partial summary judgment, disallowing the disputed deductions.¹⁶

In the latest facade easement case, *1982 East, LLC*, TCM 2011-84, the tax matters partner (TMP) of the LLC challenged the deficiencies and the accuracy-related penalty levied as a result of the Service's rejection of the charitable contribution deduction claimed by the LLC for an historic preservation facade easement on a New York City townhouse that it donated to the National Architectural Trust. The Service disputed the validity of the donation as it related to Sections 170(h)(4) and (5), which require the

contribution to be solely for preservation purposes. It argued, and the court agreed, that because the donation was not guaranteed (a portion of the proceeds in the event of a casualty or condemnation were to be used to satisfy the mortgage obligations on the property) the property was not protected in perpetuity.¹⁷ Furthermore, the court determined that New York City landmark and zoning law protected the facade of the townhouse, rather than the donated facade easement, so the donation did not meet the requirements of Section 170(h)(4). Because the LLC made a good faith attempt to comply with Section 170, the Tax Court ruled in its favor in regard to an accuracy-related penalty.

Conclusion

The cases discussed above demonstrate that the valuation of qualified conservation easements, facade easements in particular, is based on the

unique facts and circumstances of each case. No two underlying properties on which a facade easement's value is based are the same. Appraisals of facade easements are also not the same. In reality, appraisal of a facade easement as well as the underlying property can result in several substantially different valuations. Therefore, how do the IRS, courts, and taxpayers decide what factors are most significant in assessing a facade easement?

When donating a qualified charitable contribution, it is vital that taxpayers closely follow all of the regulatory guidelines when coming to a final numerical worth of the deduction, so as to be certain to reap the benefit of claiming the deduction rather than suffering the cost of improperly valuing their easement. Property owners interested in the facade easement donation should understand that although the process ultimately is beneficial, it is not simple. It can be complex just to sign up for the program. Taxpayers should seek advice from tax professionals familiar with qualified charitable organizations and their requirements in order to complete the proper forms, meet the requirements, and gain lender approval to ensure that the full tax advantage can be gained.¹⁸ ■

¹⁷ Section 170(h)(5)(A) provides that "[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity."

¹⁸ See Wieder, "Donate a historic facade to reap tax benefit," *Real Estate Weekly*, 9/29/04, www.allbusiness.com/operations/facilities-commercial-real-estate/230952-1.html.