

## UNITED STATES TAX COURT

GEORGE AND LEILA	)	
GORRA,	)	
Petitioners,	)	
	)	
v.	)	Docket No.: 15336-10
	)	
COMMISSIONER OF INTERNAL	)	FILED ELECTRONICALLY
REVENUE,	)	
Respondent.	)	

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### PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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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?<sup>1</sup>

IN SUPPORT THEREOF, Petitioners submit the following:

#### **JURISDICTION AND PROCEDURAL HISTORY**

1. On April 8, 2010, Respondent mailed Petitioners a notice of deficiency (the "Notice"). A copy of the Notice is annexed as **Exhibit B**.
2. On July 6, 2010, Petitioners filed a Petition requesting a redetermination of Petitioners' 2006 and 2007 tax liabilities (the "Petition").

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<sup>1</sup> 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 August 31, 2010, Respondent filed an Answer to the Petition (the “Answer”).

4. The pleadings in this case were closed on September 2, 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).

5. This case has not been set for trial.

### **THE NOTICE OF DEFICIENCY**

6. The Notice disallows the deductions claimed by Petitioners for their Cash Contribution and Non-cash Contribution to the Trust for Architectural Easements.<sup>2</sup> See Exhibit B, statement at (a).

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

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<sup>2</sup> 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). 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 have been satisfied for the noncash charitable contribution of a qualified conservation contribution.

Id.<sup>3</sup>

### **UNDISPUTED MATERIAL FACTS**

#### *The Property*

1. On May 17, 1993, Petitioners George Gorra and Leila Gorra became the fee simple owners of a property located at Block 1520, Lot 9 in the Borough of Manhattan with a street address of 117 East 91st Street, New York, NY (the “Property”). A copy of the deed is attached as **Exhibit C**.

2. The Property is located in the Expanded Carnegie Hill Historic District of New York City. A copy of the Notice of Designation is attached as **Exhibit D**.

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<sup>3</sup> In the alternative, Respondent disputed the valuation of the deduction. This motion does not address valuation. The Notice also contended that the donation was limited to 30% of the Petitioners’ contribution base. This contention was conceded in Respondent’s Answer at ¶ 10(b) & (c).

In addition, Respondent denied Petitioners’ \$44,300 charitable deduction for cash donated to the Trust during 2006. This motion does not address the cash contribution. This motion is limited to the issue of the Qualified Appraisal.

*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 December 2006, 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. 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 2006122200354001. (Exhibit E).

6. In connection with the facade easement contribution, Petitioners retained Jerome Haims Realty, Inc. (“JHR”) 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. JHR prepared a conservation facade easement valuation as of December 11, 2006. (Exhibit A).

8. The Appraisal’s transmittal letter was dated February 2, 2007. (Exhibit A at 1).

9. The date of the Appraisal document was February 2, 2007.  
(Exhibit A at 1).

10. The Facade Easement Conservation Deed was signed by  
Petitioners on December 18, 2006. (Exhibit E at 5).

11. The Trust accepted the Conservation Deed on December 22,  
2006. (Exhibit E at 5).

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

12. At all times relevant, JHR was a New York real estate appraisal  
services firm. (Exhibit A at 65-76).

13. Mr. Eric Haims was Certified as a “General Real Estate  
Appraiser” by New York State; he was awarded the MAI designation from  
the Appraisal Institute on April 19, 2002. (Exhibit A at 65).

14. The Appraisal identifies Haims’ New York State certification  
number as 46000045128. (Exhibit A at 57, 65).

15. The Certification of the appraisers, in the Appraisal, includes:

As of the date of this report, I, Eric P. Haims have completed the  
requirements of the continuing education program of the Appraisal  
Institute.

(Exhibit A at 57)

16. Eric Haims of JHR signed the Appraisal's transmittal letter and the certification statement. (Exhibit A at 2, 57).

17. The Appraisal was dated February 2, 2007. (Exhibit A at 1).

18. In Haims' qualifications, Haims stated: "I have appraised numerous historic preservation easements (facade easements) since December 2002 ..." (Exhibit A at 66).

19. As of December 2006, Haims had prepared hundreds of appraisals and normally received compensation for his services. (Exhibit A at 66).

20. The requirements for the MAI designation in effect as of November 14, 2001 is attached as **Exhibit F**.

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

21. Haims of JHR executed the IRS Form 8283 that Petitioners provided to the IRS. A true and complete copy of the Form 8283 is attached as **Exhibit G**.

22. The appraisal fee charged by JHR was not based on a percentage of the appraised value of the donated property. (Exhibit A at 57; Exhibit G).

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

We have no present or interest in the property that is the subject of this report, and we have no personal interest or bias with respect to the parties involved.

Our compensation is not contingent on an action or event resulting from the analysis, opinions, or conclusions in, or the use, of this report.

Our analysis, opinions, and conclusions were developed, and this report has been prepared in conformity with the Code of Professional Ethics and the Standards of Professional Practice of the Appraisal Institute.

(Exhibit A at 57).

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

24. The Appraisal contains a description of the Property, including its address, block and lot, photographs, and the description of the donated easement. (Exhibit A, written description at 17-19, photographs at 3, 20-24) Additionally, the Appraisal also contained a copy of the executed Conservation Deed. (Exhibit A, Addendum - Conservation Deed of Easement, at 58-63).

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

25. The Appraisal described the condition of the Property as follows:

The subject's has a smooth brownstone facade with brownstone stoop located on the left hand side having overhanging treads and a metal handrail. To the right of the stoop is a small courtyard having a below grade garden level entrance to the subject. The facade has an angular window bay located on Level Three of the residence having three double hung casement windows, one on each side of the bay. The subject has a recently repointed brick rear facade.

We did not notice any leaks within the ceilings of Level Four, which appeared to be water tight.

Based on our property inspection conducted on December 11, 2006, the subject property has retained many of its original details and appeared to be in good overall condition

(Exhibit A at 18 - 19).

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

26. The Appraisal contained a copy of the executed Conservation Deed. (Exhibit A, Addendum - Conservation Deed of Easement, at 58-63).

27. The included Conservation Deed shows Petitioners executed the deed on December 18, 2006 and that the deed was accepted by the Trust on December 22, 2006. (Exhibit A at 58-62)



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

28. The Appraisal values the Conservation Easement granted to the Trust. The Conservation Deed memorializes the agreement between the Petitioners and the Trust concerning the use, sale or other disposition of the Property; the Conservation Deed was included in the Appraisal. (Exhibit A at 58-62).

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

29. The Appraisal identifies:

- (a) Jerome Haims Realty, Inc. as the company engaged to prepare the appraisal;
- (b) Eric P. Haims as the appraiser;
- (c) Eric P. Haims signed as Senior Vice President of JHR;
- (d) Julia Kusayeva as the appraiser assistant; and
- (e) the address of JHR as 630 Third Avenue, New York, NY.

(Exhibit A at 1).

30. The Appraisal identifies Eric P. Haims as a New York state-certified appraiser and identifies his state certification number as 46000045128. (Exhibit A at 57, 65).

31. The Appraisal identifies Julia Kusayeva as a New York state-licensed appraiser assistant and identifies her state license number as 48000046258. (Exhibit A at 57, 67).

32. The IRS Form 8283 included JHR's Taxpayer Identification Number. (Exhibit G).

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

33. The qualifications of the appraiser and the appraiser's assistant were clearly described in a section of the Appraisal entitled "Qualifications of Appraisers." (Exhibit A at 65-76).

34. Haims was an experienced appraiser. (Exhibit A at 65-66).

35. Haims' qualifications, licenses, education, experience, background, and membership were provided in the Appraisal. (Exhibit A at 65-66).

36. In the Appraisal, Haims stated that he was a New York State Certified General Real Estate Appraiser and that he obtained his MAI from the Appraisal Institute. (Exhibit A at 65).

37. Julia Kusayeva's qualifications, licenses, education, experience, background, and membership were provided in the Appraisal.

(Exhibit A at 67).

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

38. On the transmittal letter of the Appraisal the following statement appears:

The intended use of this appraisal is to assist our client in determining the Federal tax benefits resulting from the creation of the subject's historic preservation easement.

(Exhibit A at 1).

39. The Appraisal states that the intended use of the Appraisal is to determine the Federal tax benefits that result from the historic preservation easement. (Exhibit A at 8).

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

40. The Appraisal provides that the valuation was as of December 11, 2006. (Exhibit A at 1, 2, 5, 49, 56).

41. The Appraisal provides that the property was inspected on December 11, 2006. (Exhibit A at 1, 57).

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

42. The Appraisal values the historic preservation easement.

(Exhibit A at 5).

43. The Appraisal concludes that the fair market value of the easement donated by Petitioners was \$605,000. (Exhibit A at 2, 5, 56).<sup>4</sup>

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

44. The Appraisal used the sales comparison approach to determine the pre-easement value of the Property. (Exhibit A at 9, 33-35, 49)

45. The Appraisal valued the pre-easement value of the Property at \$5,500,000. (Exhibit A at 2, 49, 56)

46. The Appraisal used the “before and after” method to determine the value of the easement. (Exhibit A at 32-33, 51-56).

47. The Appraisal included the specific comparable sales used for determining the pre-easement value of the Property. (Exhibit A at 35-44).

48. The Appraisal included the specific adjustments made to the comparable sales. (Exhibit A at 45-49).

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<sup>4</sup> Respondent admitted that the Appraisal contained the appraiser’s opinion of the Fair Market Value of the property contributed. (Petition ¶ 8(y), Answer ¶ 8(y))

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

49. The Appraisal fully describes the analysis and market study (“Empirical Study”) used to determine the diminution in value due to a historic preservation facade easement. (Exhibit A at 52-55).

50. In determining the diminution in value, the Appraisal defined the basis of its findings, specifically:

To support our determination of the loss of value associated with the additional burdens imposed by a historical preservation easement, we conducted an empirically driven market study using paired sales data of residential properties in New York. The Appraisal Institute recognizes several techniques using empirically derived data to quantify adjustments to the sales price of comparable properties; We used the paired sales data analysis technique to determine if a perpetual historic preservation easement causes a reduction in the market value of a residential property that is either located within a historic district or that has independent landmark status. Using this method, we matched unencumbered properties in similar markets with easement encumbered properties. The paired sales analysis demonstrated that the properties encumbered by historic preservation easements had a reduced market value compared to unencumbered properties. The parameters and results of the market study are discussed in more detail on pages 54 through 56.

(Exhibit A at 52).

51. The Appraisal specifically identifies the twelve properties used

to determine the impact of facade easements on the value of real property.  
(Exhibit A at 55).

52. The Appraisal included a description of how the subject properties for the empirical study to determine the effect of a facade easement on value were selected. (Exhibit A at 54).

53. The Appraisal included a list of the specific properties used in the Empirical Study including their addresses, block and lot numbers.  
(Exhibit A at 55).

54. The Appraisal arrived at a final percentage reduction of the before value based on the empirical study. (Exhibit A at 56).

The Appraisal Satisfies  
IRC 170(f)(11)(E)

55. The Appraisal scope of work followed the Uniform Standards of Professional Appraisal Practice and Advisory Opinions (USPAP). (Exhibit A at 9).

56. The Appraisal was prepared in conformity with the Standards of Professional Practice of the Appraisal Institute. (Exhibit A at 57).

**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.

Respectfully Submitted,

Dated:       Hackensack, NJ  
              November 12, 2010

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**UNITED STATES TAX COURT**

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Petitioners, )

v. )

COMMISSIONER OF INTERNAL )  
REVENUE, )  
Respondent. )

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**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

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### **PRELIMINARY STATEMENT**

Petitioners George and Leila Gorra submit this memorandum of law in support of their Motion for Partial Summary Judgment (“Petitioners’ Motion”).<sup>1</sup>

### **RELEVANT PROCEDURAL HISTORY**

1. On April 8, 2010, Respondent sent Petitioners a notice of deficiency (the “Notice”) for 2006 and 2007.

2. The Notice disallows the deductions claimed by Petitioners for their Cash Contribution and Non-cash Contribution (sometimes the “facade easement donation”) to the Trust in the amount of \$238,078 for 2006 and \$68,654 for 2007.<sup>2</sup>

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

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

<sup>2</sup> Petitioners made their facade easement donation during 2006. Respondent’s adjustments to Petitioners’ 2007 income tax return result from Respondent’s denial of Petitioners’ carryover charitable contributions.

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).

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

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 need not repeat them here.

**APPROPRIATENESS OF SUMMARY ADJUDICATION - THE NEED FOR  
AN ANSWER AS TO THE HAIMS APPRAISALS**

7. Eric Haims (“Haims”) prepared the appraisal dated February 2, 2007, used by Petitioners to substantiate the deduction taken by Petitioners on their income tax return for the fair market value of the facade easement donation.

8. Upon information and belief, Haims prepared appraisals used by other Trust donors to substantiate their easement donations.

9. Respondent has determined that the appraisals prepared by Haims to support easement donations to the Trust are not qualified appraisals.

10. If the appraisals prepared by Haims are not qualified appraisals, then there is no need for donors to the Trust, which donors include the Petitioners here, to retain a trial expert or proceed to trial.<sup>3</sup>

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<sup>3</sup> 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. The residential Trust donors include many middle class taxpayers.  
(continued...)

11. In Bond v. Commissioner, 100 T.C. 32 (1993), the Court held that the qualified appraisal issue could be decided on summary judgment.

12. Thus, Petitioners respectfully request that the Court resolve the threshold issue of whether the appraisal reports prepared by Haims are qualified appraisals before setting this case for trial.

13. Moreover, the resolution of the threshold issue could reasonably result in the settlement of cases involving Haims Appraisals.

As this Court made clear in another facade easement case:

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<sup>3</sup>(...continued)

The costs of expert reports and trial preparation are not insubstantial. Respondent has a zero value/no settlement policy on facade easement valuation cases in New York City. (Compare Internal Revenue Service Advisory Council (“IRSAC”) 2009 Public Report, released November 17, 2009 (available at [http://www.irs.gov/pub/irs-utl/irsac\\_2009\\_full\\_report.pdf](http://www.irs.gov/pub/irs-utl/irsac_2009_full_report.pdf)) at 10: “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.”) Petitioners understand and respect Respondent’s desire to protect the fisc. However, the Trust donors should not be required to incur the cost of an appraisal specifically for trial if the Court determines that the Haims appraisals are not qualified appraisals and the trial experts will not be considered.

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).

### **NEED FOR FULL COURT REVIEW**

14. After reviewing the appraisals prepared by Eric Haims of Jerome Haims Realty, Inc. (“JHR”) during the audit of Petitioners’ and other taxpayers’ income tax returns, Respondent determined that none of the appraisals prepared by Jerome Haims Realty, Inc. are qualified appraisals.

15. As stated above, two recent Memorandum Opinions of this Court have addressed the qualified appraisal issue with regard to appraisals of facade easements. In Simmons, the Court found that the appraisal at issue was a qualified appraisal; in Scheidelman, the Court did not.

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

17. Scheidelman directly conflicts with Simmons, T.C. Memo. 2009-208 and Consolidated Investors Group v. Commissioner, T.C. Memo. 2009-290.

18. 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), or (b) a qualified appraisal must also satisfy a threshold burden of persuasion (i.e., Scheidelman). Both Scheidelman and Simmons have been appealed. 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.

## **ISSUES**<sup>4</sup>

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)?<sup>5</sup>

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<sup>4</sup> Because some of the relevant facts are still in dispute, Petitioners' Motion does not address: (a) the amount of the non-cash contribution, (b) whether the Court should allow a charitable contribution deduction for some or all of the cash payment made to the Trust and (c) whether any penalties are appropriate.

<sup>5</sup> The doctrine of substantial compliance is a rule of statutory construction. 3 Sutherland, Statutory Construction §§ 5801-5826 (3d ed. 1943). The issue for summary judgment here is whether Haims Appraisal provides Respondent with the information required by IRC § 170(f)(11) and Treas. Reg. § 1.170A-13(c)(3). IRC § 170(f)(11)(A), added as part of the American Jobs Creation Act of 2004, Pub. L. 108-357, sec. 883, 118 Stat. 1631, effective for contributions made after June 3, 2004 added a reasonable cause exception excusing, in certain circumstances, a

(continued...)

*The Haims 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.”*

### **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. It is annexed to the Motion as Exhibit A.

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<sup>5</sup>(...continued)  
taxpayers failure to comply or substantially comply with Section 170(f)(11)(E). If this Court determines that the Haims Appraisal is not a qualified appraisal, then a trial will be necessary as to whether Petitioner's failure to provide Respondent with a qualified appraisal can be excused pursuant to the reasonable cause provision in IRC § 170(f)(11)(A)(ii)(II). (See, however, footnote 3 above).



## **ARGUMENT**

### **I. THE QUALIFIED APPRAISAL 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. IRC § 170(f)(3)(B)(iii) was added to the Code to allow a charitable deduction for a “qualified contribution” as defined in subsection (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. Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach, 31 Ecology L.Q. 1, 4 (2004), available at <http://ssrn.com/abstract=776645>.

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 “only 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. An appraisal will meet IRC § 170(f)(11)(E) “if the appraisal complies with all of the requirements of section 1.170A-13(c) of the existing regulations (except to the extent the regulations are inconsistent with section 170(f)(11)), and is conducted by a qualified appraiser in accordance with generally accepted appraisal standards.” Notice 2006-96, 2006-2 C.B. 902 at Section 3.02(1).

The Treasury regulations state, among other things, that a qualified appraisal is made not earlier than 60 days before the date of contribution of the appraised property nor later than the due date of the tax return on which a deduction is first claimed; is prepared, signed, and dated by a qualified appraiser; and 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).

**II. BECAUSE PROVISIONS REGARDING CHARITABLE DEDUCTIONS ARE PROCEDURAL, THEY SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE TAXPAYER UNDER THE SUBSTANTIAL COMPLIANCE STANDARD OF REVIEW**

To substantiate Petitioners' non-cash contribution, the Court must find that the Haims Appraisal complies or substantially complies with the requirements of Treas. Reg. § 1.170A-13. Simmons, T.C. Memo. 2009-208. If the Court finds that the Haims Appraisal does not substantially comply with Treas. Reg. § 1.170A-13, no deduction is allowable. Id. If the Court finds that the Haims Appraisal substantially complies with Treas. Reg. § 1.170A-13, the case can proceed to trial. Id.

The term "substantial compliance" 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), the Court explained 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 rule of statutory construction is that if a provision relates to the essence of the thing to be done so 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).<sup>6</sup>

In determining whether non-compliance will “frustrate legislative intent,” the 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).

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

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<sup>6</sup> 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).

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.

It is against this background that in response to the government's motion for summary judgment, the Court explained:

Under the above test we must examine section 170 to determine whether the requirements of the regulations are mandatory or directory with respect to its statutory purpose. ***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).

In evaluating the Haims Appraisal, the issue is "whether petitioners ***provided sufficient information*** to permit respondent to evaluate their reported contributions, as intended by Congress." Consolidated Investors,

T.C. Memo. 2009-290 (citing Smith, T.C. Memo. 2007-368)(emphasis added); Bond, 100 T.C. 32 (1993); and Hewitt v. Commissioner, 109 T.C. 258 (1997).

In Point IV below, Petitioners explain why the Haims Appraisal, in fact, complies or substantially complies with each of Treas. Reg. § 1.170A-13(c)(3)'s requirements. Accordingly, Petitioners request that the Court review the Haims Appraisal and determine that it complies or substantially complies with the requirements of Treas. Reg. § 1.170A-13.

**III. THERE IS A CONFLICT BETWEEN DIVISIONS OF THE COURT AS TO: (A) WHETHER TREAS. REG. § 1.170A-13(c) REPRESENT REPORTING REQUIREMENTS; AND (B) WHETHER THE DOCTRINE OF SUBSTANTIAL COMPLIANCE MAY EXCUSE A TAXPAYER'S FAILURE TO MEET ONE OR MORE OF THE QUALIFIED APPRAISAL REQUIREMENTS.**

Before addressing the merits of the Haims Appraisal, Petitioners note that they are two of several hundred taxpayers that made facade easement donations to the Trust. Upon information and belief, Haims and/or JHR wrote similar reports for other donors. Respondent has determined that none of the Haims reports are qualified appraisals. Thus, the results of this motion may have impact beyond this case.



It is against this background and out of an abundance of caution that Petitioners note that although many divisions of the Court have held that Treas. Reg. § 1.170A-13(c)(3) represent reporting requirements and not substantive requirements, in a recently decided case involving a similar facade easement donation (i.e., Scheidelman, T.C. Memo. 2010-151), Judge Cohen held that:

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<sup>7</sup> report as a qualified appraisal complying with the substantiation requirements of section 170.

Id. at \*26. (emphasis added).

**First**, neither Hewitt, 109 T.C. 258, nor D'Arcangelo, T.C. Memo. 1994-572 supports Scheidelman's: (a) modification of the doctrine of substantial compliance; or (b) redefinition of the purpose of a qualified appraisal.

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<sup>7</sup> For purposes of Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J) and (K), the Drazner Report rejected in Scheidelman is indistinguishable from the Donnelly report approved by the Court in Simmons.

Specifically, Hewitt does not support the Scheidelman Court's conclusion because, 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. Hewitt instructs that the doctrine of substantial compliance will not excuse a taxpayer's failure to obtain a qualified appraisal before filing of the tax returns for the years at issue. 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.")

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 ("The letter merely states that the 'donation is worth in excess of

\$40,000.’”) D’Arcangelo, like Hewitt, does not support the Scheidelman Court’s refusal to apply the doctrine of substantial compliance.

**Second** and most important, Scheidelman’s analysis confuses and conflates: (1) a substantiation/reporting requirement designed to provide Respondent with the information necessary to determine if Respondent should examine a return, with (2) the burden of persuasion in valuation cases.

More specifically, 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 statutory framework for processing returns is contained in IRC § 6011 *et seq.* 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.

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 the valuation 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 F.2d 174 (5th Cir. 1967). Thus, it is within this understanding that the Court has held that Treas. Reg. § 1.170A-13(c)(3) represent reporting requirements designed to help Respondent decide whether to examine a return.

As explained in Bond, nothing in Treas. Reg. § 1.170A-13(c)(3) eliminates the doctrine of substantial compliance or, 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.

Similarly, in Hewitt, 109 T.C. at 264-266, the Court 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, in determining that the doctrine of substantial compliance did not apply, 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,<sup>3</sup> 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.** See S. Comm. on Finance, Deficit Reduction Act of 1984, Explanation of Provisions Approved by the Committee on March 21, 1984, S. Prt. 98-169 (Vol. I), at 444-445 (S. Comm.

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<sup>3</sup> By contrast, Scheidelman rejected the Drazner report because: "the 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." Stated simply, the flaw in Scheidelman is its transformation of a reporting/substantiation requirement into a proof requirement.

Print 1984); Staff of Joint Comm. on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984 (J. Comm. Print 1985); cf. *Atlantic Veneer Corp. v. Commissioner*, 85 T.C. 1075, 1084 (1985), *affd.* 812 F.2d 158 (4th Cir. 1987).

Id. at 265 (emphasis added).

By contrast, the ultimate arbiter of valuation has always been 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).

The Scheidelman Court rejected the “Drazner Report” 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. Petitioners respectfully submit that a key flaw in Scheidelman's substantial compliance analysis is that even where taxpayers hire a

qualified appraiser to prepare a qualified appraisal, it, in effect, transforms a substantiation requirement to a proof requirement, and, as a result, directly conflicts with Hewitt, 109 T.C. 258 (1997); Simmons, T.C. Memo. 2009-209; and Consolidated Investors Group, T.C. Memo. 2009-290. Stated simply, Judge Cohen was not persuaded by the Drazner Report; however, the regulations only require a qualified appraisal to contain certain information. The burden of persuasion is irrelevant to whether the required information was provided.

Against this background, Petitioners respectfully submit that there is an inconsistency between the Court's Scheidelman and Simmons opinions as to:

- (1) whether Treas. Reg. §§ 1.170A-13(c)(3)(ii)(J) and (K) represent reporting requirements or substantive requirements; and
- (2) whether the doctrine of substantial compliance may excuse a taxpayer's failure to meet one or more of the qualified appraisal requirements.

In light of the number of cases involving this issue, Petitioners respectfully submit that *en banc* consideration is necessary to resolve the



conflict among the divisions of this Court and to obtain uniformity in the Court's evaluation of the qualified appraisals prepared in connection with facade easement donations.

**IV. 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)(i), as well as the transitional guidance in IRS Notice 2006-96, 2006-46 I.R.B. 902.<sup>4</sup>

**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

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<sup>4</sup> The years here at issue are 2006 and 2007. On August 7, 2008, the Internal Revenue Service published proposed rules relative to the enacted provisions in the American Jobs Creation Act of 2004 and the Pension Protection Act of 2006 at 26 CFR Part 1, REG-140029-07. Comments on the proposed regulations were due November 5, 2008. Neither temporary nor final regulations have been issued as of the date of this motion. The notice of proposed rule making was issued after the returns, here at issue, were filed.

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 February 2, 2007 and the due date for Petitioners' 2006 return was April 16, 2007. (Motion, Exhibit A at 1; Exhibit E).

Because the date of the Appraisal is prior to the due date for Petitioners' 2006 tax return and after the facade easement donation, Treas. Reg. § 1.170A-13(c)(3)(i) is satisfied.

***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. Haims signed the Appraiser's Certification. (Motion, Exhibit A at 2, 57). Haims dated his Appraisal report on the letter of transmittal. (Motion, Exhibit A at 1).

Section 3.02 of Notice 2006-96 requires that a qualified appraisal must be prepared by a qualified appraiser "in accordance with generally accepted appraisal standards."

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.

(See also Notice 2006-96).

An appraiser is treated as having earned an appraisal designation “if the appraisal designation is awarded on the basis of demonstrated competency in valuing the type of property for which the appraisal is performed.” Id. at Section 3.03(1).

For the reasons set forth below, the appraiser here, Eric Haims of JHR is a qualified appraiser. (Motion, Exhibit A).

First, Haims was certified as a “General Real Estate Appraiser” by New York State and was awarded the MAI designation from the Appraisal Institute on April 19, 2002. The MAI designation is held by appraisers who are experienced in the valuation and evaluation of commercial, industrial, residential and other types of properties.” (Motion, Exhibit F.) 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).<sup>5</sup>

Second, Haims is regularly hired to conduct appraisals. (Motion, Exhibit A at 68-76).

Stated simply, Haims is a qualified appraiser as defined in Treas. Reg. § 1.170A-13(c)(5) and IRC § 170(f)(11)(E).

Thus, 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 57; 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*

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<sup>5</sup> Haims has also met the “minimum education and experience requirements” of IRC § 170(f)(11)(E)(iii)(I) and as defined by Section 3.03(2) of Notice 2006-96.

*that was appraised is the property that was (or will be) contributed*

The Appraisal includes the Property's block and lot, a description of the Property's dimensions and area, utilities, topography, flood hazard area and improvement. The appraisal also describes the architecture, interior and exterior features, pictures and a floor plan. (Motion, Exhibit A at 3, 8, 17-24). The Appraisal attaches the Conservation Deed and values the easement that encumbers the property. (Motion, Exhibit A at 1, 2, 5, 8, 56, 58-63).

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 v. Commissioner, 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 including pictures of the Property (inclusive of the facade) to the Appraisal, in

addition to the physical description described above. (Motion, Exhibit A at 3, 17-24).

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

The Conservation Deed was made part of and attached to the Appraisal. (Motion, Exhibit A at 58-64). Because the Conservation Deed, in turn, stated the date of the contribution, the Appraisal complies with Treas. Reg. § 1.170A-13(c)(3)(ii)(C).

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*

By including a copy of the signed Conservation Deed of Easement, the Appraisal Report also satisfied Treas. Reg. § 1.170A-13(c)(3)(ii)(D).

Stated simply, the Conservation Deed is the agreement between Petitioners and the Trust concerning the use, sale or other disposition of the property after the grant of the Easement. (Motion, Exhibit A at 58-62).

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 Haims and Julia Kusayeva (“Kusayeva”);
- (2) identifies Haims as a New York state certified appraiser;
- (3) discloses that Haims’s State Certification Number is 46000045128;
- (4) identifies Kusayeva, the appraiser assistant, as a New York state licensed appraiser assistant;
- (5) discloses that Kusayeva’s State Certificate Number is 48000046258. (Motion, Exhibit A at 57).

The Letter of Transmittal included in the Appraisal provides the name and address of JHR and that Haims is the Senior Vice President of JHR. (Motion, Exhibit A at 1-2). The Taxpayer Identification Number of the appraiser, 13-2611458, was provided on IRS Form 8283. (Motion, Exhibit G).

Thus, the provided information demonstrates that the Appraisal satisfies 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 qualifications of both Haims and Kusayeva. (Motion, Exhibit A at 65-67).

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 states that the intended use is to determine the Federal tax benefits that result from the historic preservation easement. (Motion, Exhibit A at 1, 8).

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 December 11, 2006, which is the date of inspection. (Motion, Exhibit A at 1, 2, 5, 49, 56, 57).

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 on December 11, 2006 was \$5,500,000 and the Easement's fair market value was \$605,000.

The Appraisal confirms that the conservation contribution caused an approximate 11% diminution in the fair market value of the Property.

(Motion, Exhibit A at 2, 5, 56)(Answer ¶ 8(r)).

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*

Pursuant to Treas. Reg. § 1.170A-13(c)(3)(ii)(J), the Appraisal identified and explained its use of the “before and after” method of valuation. (Motion, Exhibit A at 51-52).

For the “before value,” the Appraisal used the sales comparison approach. (Motion, Exhibit A at 9, 32-35). The Appraisal specified that the sales comparison approach was used to determine the Property's pre-easement value. (Motion, Exhibit A at 2, 49, 56). The Appraisal included four properties in determining the before value. (Motion, Exhibit A at 35-49).

For the “after value,” Haims adopted the method approved by the Court in Hilborn v. Commissioner, 85 T.C. 677 (1985).<sup>6</sup> Specifically, Haims analyzed the impact of the relinquishment of a part of the property owner’s bundle of rights on the value of the Property. Hilborn, 85 T.C. at 688. In accordance with the Hilborn methodology, Haims analyzed the restrictions imposed by the easement as compared to the existing historic preservation ordinances pursuant to the New York City Landmarks Preservation Commission (“LPC”). The Appraisal explained the summary of its findings and conclusions. Among the significant findings, the Appraisal noted that the easement covers the entire facade of the property, including roof and rear of the property.

In addition to being the method approved by this Court in Hilborn, the before-and-after method chosen by Haims is the method recommended by the National Trust for Historic Preservation and the Land Trust Exchange in

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<sup>6</sup> 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 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.

Appraising Easements - Guidelines for Valuation of Historic Preservation and Land Conservation Easements, 19 (3d ed. 1999).

Because the Appraisal identifies and faithfully applies the before and after method of valuation to determine the fair market value of the Easement, the Appraisal satisfies Treas. Reg. § 1.170A-13(c)(3)(ii)(J). See, e.g., Simmons, T.C. Memo. 2009-208.

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 Appraisal here explains the basis for the valuation as required by Treas. Reg. § 1.170A-13(c)(3)(ii)(K) in exactly the way directed by the regulation. The Appraisal explains that the after value was confirmed by considering an “empirically driven market study using paired sales data of residential properties in New York.” (Motion, Exhibit A at 52).

The Appraisal specified that the reduction in value due to the Easement was based on an empirical market study of the impact of a historical preservation easements on the market value of New York residential property. (Motion, Exhibit A at 52-55). This empirical study

conducted by JHR included six property pairs (twelve properties in total), where one property had an easement and the comparable sale property did not. (Motion, Exhibit A at 54-56). The Appraisal detailed how the properties for the empirical study were selected out of a larger pool of 370 properties. (Id. at 54). The paired matched sales analysis yielded the following result:

The six pairs indicate a reduction in value attributable to the historic preservation (facade) easement ranging from 4.71% to 15.82%, with an average reduction in value of 10.15% and a median reduction in value of 11.46%. Three of the six paired sales have reductions in market value ranging from 11.43% to 11.54%.

On the basis of the results of this analysis, the Appraisal concluded that an 11% reduction in value was appropriate here to value the easement. The derivation of a percentage reduction based on “qualitative factors” has been accepted by the Court. Griffin v. Commissioner, T.C. Memo. 1989-130; Losch v. Commissioner, T.C. Memo. 1988-230.

Because the Haims Appraisal identifies and faithfully applies the specific paired sales analysis as the basis for its valuation, the Appraisal satisfies Treas. Reg. § 1.170A-13(c)(3)(ii)(K). See, e.g., Simmons, T.C. Memo. 2009-208.

***e. The Appraisal Was Conducted In Accordance with Generally Accepted Appraisal Standards***

In addition to Treas. Reg. § 1.170A-13(c), IRC § 170(f)(11)(E) requires that the qualified appraisal be conducted by a qualified appraiser in accordance with generally accepted appraisal standards. Similarly, Section 3.02 of Notice 2006-96 requires that a qualified appraisal must be prepared by a qualified appraiser “in accordance with generally accepted appraisal standards.”

Section 3.02 of Notice 2006-96 provides:

An appraisal will be treated as having been conducted in accordance with generally accepted appraisal standards within the meaning of § 170(f)(11)(E)(i)(II) if, for example, the appraisal is consistent with the substance and principles of the Uniform Standards of Professional Appraisal Practice (“USPAP”), as developed by the Appraisal Standards Board of the Appraisal Foundation.

Here, the Haims Appraisal explicitly incorporates the Standards of Professional Appraisal Practice of the Appraisal Institute. (See Motion Exhibit A at 57).

The Standards of Professional Appraisal Practice of the Appraisal Institute are the Uniform Standards of Professional Practice promulgated by the Appraisal Standards Board of The Appraisal Foundation.

([http://www.appraisalinstitute.org/ppc/ethics\\_standards.aspx](http://www.appraisalinstitute.org/ppc/ethics_standards.aspx) (accessed Nov. 2, 2010)); see also Appraising Easements, *supra*.

\* \* \*

The Haims Appraisal 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)(I), as well as the transitional guidance in IRS Notice 2006-96, 2006-46 I.R.B. 902.

**CONCLUSION**

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

Respectfully Submitted,

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