Conservation Easements, Recent *Mayo Clinic* Case, and Expanded Defenses to IRS Attacks on "Conservation Purpose"

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This article examines the main issues in conservation easement disputes, the arguments typically raised by the IRS, various Tax Court cases focused on conservation purpose, and a new, non-easement case that might fortify taxpayer defenses.

The IRS is fixated on challenging partnerships that donate conservation easements, claim the corresponding tax deductions, and pass them along to their partners. One of the many tools utilized by the IRS is conducting widespread audits and claiming that the partnerships are entitled to deductions of $0 because, among other things, their easements lack a "significant" conservation purpose. This position is interesting because it is based solely on the regulations, promulgated by the IRS, not by the related law, enacted by Congress. In other words, the IRS is essentially creating its own, expansive rules and then applying them.

This article examines the main issues in conservation easement disputes, the arguments typically raised by the IRS, various Tax Court cases focused on conservation purpose, and a new, non-easement case that might fortify taxpayer defenses.

Overview of Main Issues in Conservation Easement Disputes

One must first understand the main concepts and terminology in the conservation easement arena in order to appreciate this article. These are examined below.

What Is a Qualified Conservation Contribution?

Taxpayers generally may deduct the value of a charitable donation that they

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make during a year.[1] However, taxpayers are not entitled to deduct a donation of property, if it consists of less than their entire interest in such property.[2] One important exception is that taxpayers can deduct a donation of a partial interest in property (instead of an entire interest), provided that it constitutes a "qualified conservation contribution."[3] To meet this critical definition, taxpayers must show that they are (i) donating a qualified real property interest ("QRPI"), (ii) to a qualified organization, (iii) exclusively for conservation purposes.[4]

What Is a QRPI?

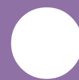
A QRPI can be one of several things, including a restriction, granted in perpetuity, on the use of a particular piece of real property.[5] These are known by many names, among them "conservation easement," "conservation restriction," and "perpetual conservation restriction."[6] Regardless of what you call them, QRPIs must be based on legally enforceable restrictions (such as those memorialized in a Deed of Conservation Easement filed in the appropriate public record) that will prevent uses of the property, forever, which are inconsistent with the conservation purposes of the donation.[7] Stated differently, a donation is not treated as "exclusively for conservation purposes," unless the conservation purposes are "protected in perpetuity."[8]

What if Different Future Uses Might Occur?

The IRS will not disallow a tax deduction merely because the interest granted to the charitable organization might be defeated in the future as a result of some act or event, provided that on the date that the easement is granted, it appears that the possibility that such act or event will take place is "so remote as to be negligible."[9] For instance, the fact that state law requires use restrictions, like conversation easements, to be re-recorded every 30 years to remain in force does not, alone, make easements non-perpetual.[10] Another example is where a taxpayer donates land to a city government for as long as such land is used as a park. If, as of the date of the donation, the city plans to use the land for a park, and the possibility that it could be used for another purpose is negligible, then the donation is considered perpetual, and the taxpayer is entitled to a deduction.[11]

For What Purposes Can Land Be Conserved?

A contribution has an acceptable "conservation purpose" if it meets one or more of the following requirements: (i) It preserves land for outdoor recreation by, or the education of, the general public; (ii) It protects a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; (iii) It preserves open space (including farmland and forest land) for the scenic enjoyment of the general public, and will yield a significant public benefit; (iv) It preserves open space (including farmland and forest land) pursuant to a federal, state, or local governmental conservation policy, and will yield a significant public benefit; or (v) It preserves a historically important land area or a certified historic structure.[12] The conservation categories most relevant to this article are explained below.



All contributions made to preserve open space must yield a "public benefit," and such benefit must be "significant."

Relatively natural habitat of fish, wildlife, plants, or similar ecosystem. When analyzing natural habitats, the fact that they have been altered to some extent by human activity will not result in the disallowance of the tax deduction, if the fish, wildlife, and/or plants continue to exist there in a "relatively natural state."[13] Preservation of a lake formed by a manmade dam or a salt pond formed by a manmade dike would still have an acceptable conservation purpose, provided that such lake or pond were a nature feeding area for a wildlife community that entailed "rare, endangered, or threatened native species."[14]

According to the regulations, "significant" habitats and ecosystems include, but are not limited to: (i) habitats for rare, endangered, or threatened species of animal, fish, or plants, (ii) natural areas that represent high quality examples of a terrestrial or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact, and (iii) natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.[15]

The fact that public access to the conserved property is limited does not trigger a disallowance of the charitable deduction related to the easement.[16] Indeed, taking it a step further, the regulations state that "a restriction on all public access" to the habitat of a threatened native species would not cause an easement donation to be non-deductible.[17]

Open space for scenic enjoyment, plus significant public benefit. The donation of a QRPI to preserve open space (including farmland and forest land) will meet the conservation purposes test, if such preser-

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1 Section 170(a)(1); Reg. 1.170A-1(a).
2 Section 170(f)(3)(A); Reg. 1.170A-7(a)(1).
3 Section 170(f)(3)(B)(iii); Reg. 1.170A-7(a)(5).
4 Section 170(h)(1).
5 Section 170(h)(2); Reg. 1.170A-14(a); Reg. 1.170A-14(b)(2).
6 Reg. 1.170A-14(b)(2).
7 Reg. 1.170A(g)(1); Turner, 126 TC 299 (2006).
8 Section 170(h)(5)(A); Reg. 1.170A-14(e)(1).
9 Reg. 170A-14(g)(3).
10 *Id.*
11 Reg. 170A-1(e).
12 Section 170(h)(4)(A); Reg. 170A-14(d)(1); Tax Treatment Extension Act of 1980, S. Rep't No. 96–1007, 96th Cong., 2d Sess. 10 (1980); Turner, *supra* note 7.
13 Reg. 170A-14(d)(3)(i).
14 *Id.*
15 Reg. 170A-14(d)(3)(ii).
16 Reg. 170A-14(d)(3)(iii).
17 *Id.*

vation is for the scenic enjoyment of the general public *and* will yield a significant public benefit.[18] Generally speaking, preservation belongs here if development of the property would either (i) impair the "scenic character" of the local rural or urban landscape, or (ii) interfere with a "scenic panorama" that can be enjoyed from a park, nature preserve, road, body of water, trail, or historic structure or land, and such area or transportation way is open to, or utilized by, the public.[19]

The regulations indicate that this notion of "scenic enjoyment" will be based on all the facts and circumstances relevant to a particular easement donation.[20] They also recognize that regional variations (in terms of topography, geology, biology, and cultural and economic conditions) call for flexibility in analyzing "scenic enjoyment."[21] The following factors, among others, might be considered: (i) The compatibility of the land use with other land in the vicinity; (ii) The degree of contrast and variety provided by the visual scene; (iii) The openness of the land; (iv) Relief from urban closeness; (v) The harmonious variety of shapes and textures; (vi) The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area; (vii) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and (viii) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.[22]

To satisfy this conservation purpose, it suffices that there is visual (instead of physical) access to the property or across the property by the general public.[23] Moreover, the regulations indicate that "the entire property need not be visible to the public . . . although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public."[24]

A tax deduction for preservation of open space for scenic enjoyment of the general public will be disallowed if the easement permits a "degree of intrusion or future development that would interfere with the essential scenic quality of the land . . . ."[25]

All contributions made to preserve open space must yield a "public benefit," and such benefit must be "significant."[26] One must examine all the relevant facts and circumstances to determine whether safeguarding open space will trigger a "public benefit."[27] The IRS considers the following 11 items in making a determination:

> (i) the uniqueness of the property to the area, (ii) the intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development), (iii) the consistency of the proposed open space use with public programs (whether federal, state or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area, (iv) the consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership, in close proximity, (v) the likelihood that development of the property would lead or contribute to degradation of the scenic, natural, or historic character of the area, (vi) the opportunity for the general public to use the property or to appreciate its scenic values, (vii) the importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area, (viii) the likelihood that the donee will acquire equally desirable and valuable substitute property or property rights, (ix) the cost to the donee of enforcing the terms of the conservation restriction, (x) the population density in the area of the property, and (xi) the consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.[28]

The preservation of an ordinary tract of land would not, alone, yield a "significant public benefit."[29] However, preservation, in conjunction with other factors, or preservation of a unique land area for public use, would create a significant public benefit.[30]

The regulations explain that, because the degrees of "scenic enjoyment" offered by a variety of open space easements are subjective, and are not as easily delineated as are increasingly specific levels of governmental policy, the "significant public benefit" of preserving a "scenic view" must be independently established in all cases.[31]

Open space pursuant to a government conservation policy, plus significant public benefit. Donating a QRPI to preserve

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18 Reg. 1.170A-14(d)(4)(i)(B) (emphasis added).
19 Reg. 1.170A-14(d)(4)(ii)(A).
20 *Id.*
21 *Id.*
22 *Id.*
23 Reg. 1.170A-14(d)(4)(ii)(B).
24 *Id.*
25 Reg. 1.170A-14(d)(4)(v).
26 Reg. 1.170A-14(d)(4)(iv)(A).
27 *Id.*
28 *Id.*
29 Reg. 1.170A-14(d)(4)(iv)(B).
30 *Id.*
31 *Id.*
32 Reg. 1.170A-14(d)(4)(i).
33 Reg. 1.170A-14(d)(4)(iii)(A).
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 Reg. 1.170A-14(d)(4)(iii)(B).
39 *Id.*
40 *Id.*
41 Reg. 1.170A-14(d)(4)(iii)(C).
42 *Id.*
43 Reg. 1.170A-14(d)(4)(v).
44 Reg. 1.170A-14(d)(4)(iv)(A).
45 Reg. 1.170A-14(d)(4)(vi)(A).
46 *Id.*
47 Reg. 1.170A-14(d)(4)(vi)(C).
48 *Id.*
49 Reg. 1.170A-14(b)(2).
50 Internal Revenue Service, Conservation Easement Audit Techniques Guide (ATG) (rev. 1/24/2018), page 23.
51 Section 170(a)(1).
52 Section 170(a)(1); Reg. 1.170A-1(c)(1).

open space (including farmland and forest land) will have an acceptable conservation purpose if such preservation is done pursuant to a clearly delineated federal, state, or local governmental conservation policy *and* will yield a significant public benefit.[32] The purpose of this standard is to protect the types of property identified by representatives of the general public (*i.e.*, government officials) as worthy of preservation or conservation.[33] In terms of degree, the regulations state that a "general" declaration of conservation goals by a "single" government official or legislative body is not enough, but it is not necessary that a governmental conservation policy be a "certification program" that identifies particular properties.[34] A taxpayer will meet this standard if it makes a donation that furthers a specific, identified conservation project, including, but not limited to, (i) preservation of land within a state or local landmark district that is locally recognized as being significant to that district, (ii) preservation of a wild or scenic river, (iii) preservation of farmland pursuant to a state program for flood prevention and control, or (iv) protection of the scenic, ecological, or historic character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites.[35]

A conservation program does not need to be funded in order to satisfy this standard; however, it must involve a significant commitment by the government regarding the program.[36] An example would be a program granting preferential taxes or zoning for property considered protection-worthy.[37]

The fact that a federal, state, or local government agency (or a related commission, authority, or body) has accepted an easement tends to demonstrate a clearly delineated governmental policy, but it, alone, is insufficient.[38] The regulations underscore that a rigorous review process by the governmental agency supports the existence of a clearly delineated governmental policy.[39] For instance, in a state where the government has formed an environmental trust to accept property that meets certain conservation purposes, and such trust employs a review process requiring approval from the highest officials in the state, acceptance of a property by the trust fortifies the necessary governmental policy.[40]

Limited public access to the property would not cause the tax deduction to be disallowed, unless the conservation purpose of the donation would be "undermined or frustrated" as a result of such access restrictions.[41] For example, a donation in conformity with a governmental policy to protect the "scenic character" of land near a river necessitates public access to the same extent as a donation aimed at preserving open space (including farmland and forest land) for the scenic enjoyment of the general public.[42]

The fact that a federal, state, or local government agency (or a related commission, authority, or body) has accepted an easement tends to demonstrate a clearly delineated governmental policy, but it, alone, is insufficient.

According to the regulations, no tax deduction for preservation of open space pursuant to a clearly delineated governmental conservation policy will be permitted if the easement allows a "degree of intrusion or future development that would interfere with the . . . governmental conservation policy that is being furthered by the donation."[43]

As explained above, all donations of QRPI made to preserve open space, including those done pursuant to a governmental conservation policy, must yield a "significant public benefit."[44]

The regulations acknowledge that making a donation in accordance with a "clearly delineated governmental policy," and ensuring that such donation generates a "significant public benefit," are two separate requirements, which must be independently met.[45] The more specific the governmental policy, the more likely the governmental decision to accept an easement, alone, will tend to show that a "significant public benefit" exists.[46]

Finally, the regulations recognize that, in certain situations, an open space easement might be for "scenic enjoyment" *and* done pursuant to a "clearly delineated governmental policy."[47] An example would be the preservation of a scenic view that has been identified as part of a scenic landscape inventory by a rigorous governmental review process.[48]

Can Taxpayers Still Use the Property Under Easement?

A taxpayer can retain certain "reserved rights," still make a qualified conservation contribution, and thus qualify for the tax deduction. However, in keeping something for themselves, taxpayers must ensure that the reserved rights do not unduly conflict with the conservation purposes.[49] The IRS openly recognizes in the ATG that reserved rights are ubiquitous, explaining the following about taxpayer holdbacks:

> All conservation easement donors reserve some rights [to the property]. Depending on the nature and extent of these reserved rights, the claimed conservation purpose may be [eroded or] impaired to such a degree that the contribution may not be allowable. A determination of whether the reserved rights defeat the conservation purpose must be determined based on all [the] facts and circumstances.[50]

What Is an Easement Worth?

Generally, a deduction for a charitable contribution is allowed in the year in which it occurs.[51] If the contribution consists of something other than money, then the amount of the contribution normally is the fair market value ("FMV") of the property at the time the taxpayer makes the donation.[52] For these purposes, the term FMV ordinarily means the price on which a willing buyer

and willing seller would agree, with neither party being obligated to participate in the transaction, and with both parties having reasonable knowledge of the relevant facts.[53]

In deciding the FMV of property, appraisers and courts must take into account not only the current use of the property, but also its highest and best use ("HBU").[54] A property's HBU is the most profitable use for which it is adaptable and needed, or likely to be needed in the reasonably near future.[55] The term HBU has also been defined as the reasonably probable use of property that is physically possible, legally permissible, financially feasible, and maximally productive.[56] Importantly, valuation does not depend on whether the owner has actually put the property to its HBU.[57] The HBU can be any realistic, objective potential use of the property.[58]

How Do Taxpayers Prove the Condition of the Property at Donation Time?

In situations involving the donation of a QRPI where the donor reserves certain rights whose exercise might impair the conservation purposes, the tax deduction will not be allowed unless the donor "makes available" to the easement-recipient, before the donation is made, "documentation sufficient to establish the condition of the property at the time of the gift."[59] This is generally called the Baseline Report.

The Baseline Report "may" (but not "must") include: (i) the appropriate survey maps from the U.S. Geological Survey, showing the property line and other contiguous or nearby protected areas, (ii) a map of the area drawn to scale showing all existing man-made improvements or incursions (*e.g.*, roads, buildings, fences, or gravel pits), vegetation and identification of flora and fauna (*e.g.*, locations of rare species, animal breeding and roosting areas, and migration routes), land use history, and distinct natural features, (iii) an aerial photograph of the property at an appropriate scale taken as close as possible to the date of the donation, and (iv) on-site photographs taken at appropriate locations on the property.[60] If the easement contains restrictions regarding a particular natural resource, such as water or air quality, then the condition of the resource at or near the time of the donation must be established.[61] The Baseline Report "must be accompanied by a statement signed by the donor and a representative of the [easement-recipient] clearly referencing the [Baseline Report] and in substance" confirming that the property description and the natural resources inventory are accurate.[62]

How Do Taxpayers Claim an Easement-Related Tax Deduction?

Properly claiming the tax deduction triggered by an easement donation is, well, complicated. It involves a significant amount of actions and documents. The main ones are as follows: The taxpayer must (i) obtain a "qualified appraisal" from a "qualified appraiser," (ii) demonstrate that the easement-recipient is a "qualified organization," (iii) obtain a timely Baseline Report, generally from the easement-recipient, describing the condition of the property at the time of the donation and the reasons for which it is worthy of protection, (iv) complete a Form 8283 (Noncash Charitable Contributions) and have it executed by all relevant parties, including the taxpayer, appraiser, and easement-recipient, (v) assuming that the taxpayer is a partnership, file a timely Form 1065 (U.S. Return of Partnership Income), enclosing Form 8283 and the qualified appraisal, (vi) receive from the easement-recipient a contemporaneous written acknowledgement, both for the easement itself and for any endowment/stewardship fee donated to finance the perpetual protection of the property, (vii) ensure that all mortgages on the relevant property have been subordinated before granting the easement, and (viii) send to all partners their Schedule K-1 (Partner's Share of In-

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53 Reg. 1.170A-1(c)(2).

54 Stanley Works & Subs., 87 TC 389 (1986); Reg. 1.170A-14(h)(3)(i).

55 Olson v. United States, 292 U.S. 246 (1934).

56 Esgar Corp., 744 F.3d 648 (CA-10, 2014).

57 *Id*.

58 Symington, 87 TC 892 (1986); *See also* Appraisal Institute, The Dictionary of Real Estate Appraisal, 6th Edition (2015); Appraisal Institute, Real Estate Valuation in Litigation, 2nd Edition (1995); Appraisal Institute, The Appraisal of Real Estate, 14th Edition (2013).

59 Reg. 1.170A-14(g)(5)(i).

60 *Id*.

61 Reg. 1.170A-14(g)(5)(i)(D).

62 *Id*.; ATG, *supra* note 50, page 24.

63 *See* ATG, *supra* note 50; IRS Pub. 1771, Charitable Contributions—Substantiation and Disclosure Requirements (March 2016); IRS Pub. 526, Charitable Contributions 2018; Section 170(f)(8); Section 170(f)(11); Reg. 1.170A-13; Notice 2006-96; TD 9836.

64 ATG, *supra* note 50, pp. 83-86. The technical challenges include, but are not limited to, the following: (i) The donation of the easement lacked charitable intent, because there was some form of quid pro quo between the donor and the easement-recipient; (ii) The donation of the easement was conditional upon receipt by the donor of the full tax deduction claimed on its Form 1065; (iii) The easement-recipient failed to give a proper "contemporaneous written acknowledgement" letter; (iv) The appraisal was not attached to the partnership's Form 1065; (v) The appraisal was not prepared in accordance with the Uniform Standards of Professional Appraisal Practice; (vi) The appraisal fee was based on a percentage of the easement value; (vii) The appraisal was not timely, in that it was not sufficiently proximate to the making of the donation or the filing of the Form 1065; (viii) The appraisal was not a "qualified appraisal"; (ix) The appraiser was not a "qualified appraiser"; (x) The Form 8283 was missing, incomplete, or inaccurate; (xi) The donor's cost or adjusted basis in the donated property, as listed on Form 8283, was improperly calculated; (xii) Not all appraisers who participated in the analysis signed Form 8283; (xiii) The Baseline Report was insufficient in describing the condition of the property; (xiv) The conservation easement was not protected in perpetuity; (xv) Any mortgages or other encumbrances on the property were not satisfied or subordinated to the easement before the donation; (xvi) The Deed of Conservation Easement contains an improper clause regarding how the proceeds from sale of the property upon extinguishment of the easement would be allocated among the donor and easement-recipient; (xvii) The Deed of Conservation Easement contains an amendment clause, which, in theory, might allow the parties to modify the donation, after taking the tax deduction, in such a way to undermine the conservation purposes; (xviii) The Deed of Conservation Easement contains a merger clause, as a result of which the fee simple title and the easement might end up in the hands of the same party, thereby undermining the ability to protect the property forever; (xiv) The Deed of Conservation Easement was not timely filed with the proper court or other location; (xv) The easement-recipient was not a "qualified organization"; and (xvi) The easement-recipient was not an "eligible donee."

65 *Id*.

66 Section 170(h)(4)(A)(ii).

67 Reg. 1.170A-14(d)(3)(i) (emphasis added).

68 Reg. 1.170A-14(d)(3)(ii).

69 Tax Treatment Extension Act of 1980, *supra* note 12.

70 Strom v. Goldman, Sachs & Co., 2002 F.3d 138 (CA-2, 1999), abrogated on other grounds.

71 Abourezk v. Reagan, 785 F.2d 1043 (CA-D.C., 1986), aff'd, 484 U.S. 1 (1987).

come, Deductions, Credits, etc.) and a copy of the Form 8283.[63]

Technical Arguments Raised by the IRS

The first line of attack by the IRS is to raise a number of technical arguments, *i.e.*, those not related to valuation. The ATG contains a "Conservation Easement Issue Identification Worksheet" that identifies a long list of technical challenges to which the IRS might point as a reason for completely disallowing an easement-related tax deduction.[64] Among the common challenges by the IRS are that the relevant property lacks acceptable "conservation purposes" for any number of reasons, including, but not limited to: (i) the habitat is not protected in a relatively natural state, (ii) there are insufficient threatened or endangered species on the property, (iii) the habitats or ecosystems to be protected are not "significant," (iv) the public lacks physical or visual access to the property, (v) the conservation will not yield a significant public benefit, (vi) the property lacks historical significance, (vii) the conservation purpose does not comport with a clearly-delineated government policy, (viii) the easement allows uses that are inconsistent with the conservation purposes, and (ix) the donor has certain "reserved rights" that interfere with or destroy the conservation purposes.[65]

Eligibility Requirements Expanded by the IRS

As indicated above, the IRS ordinarily starts its attack by raising various technical arguments, including that the relevant property lacks adequate conservation purposes. An important, yet largely unaddressed, issue in this area is that the IRS might have exceeded its authority in promulgating the applicable rules. This matter is clarified below.

Section 170(h)(4)(A), enacted by Congress, states that "the term conservation purpose means [among other things] the protection of *a* [not a "significant"] relatively natural habitat of fish, wildlife, or plants, or similar ecosystem."[66] By contrast, the applicable regulations, issued by the IRS, provide the following:

> The donation of a qualified real property interest to protect a *significant* relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives will meet the conservation purposes test . . .[67]
>
> *Significant* habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial community or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact; and natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.[68]

The legislative history provides additional insight. It states the following:

> [C]onservation purposes includes the protection of a [not a "significant"] relatively natural fish, wildlife or plant habitat, or similar ecosystem. Under this provision, a contribution would be considered to be made for conservation purposes if it will operate to protect or enhance the viability of an [not a "significant"] area or environment in which a fish, wildlife, or plant community normally lives or occurs. It would include the preservation of a [not a "significant"] habitat or environment which to some extent had been altered by human activity if the fish, wildlife, or plants exist there in a [not a "significant"] relatively natural state . . . The committee intends that contributions for this purpose will protect and preserve significant natural habitats and ecosystems, in the United States . . . .[69]

In summary, the law expressly states that the easement must protect "a" relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, whereas the regulations demand that the easement safeguard a "significant" relatively natural habitat of fish, wildlife, or plants, or similar ecosystem. The only support for the IRS to add this critical word to the regulations is one vague reference, in one congressional report. It is unclear whether Congress meant to say that taxpayers must protect "significant" natural habitats or ecosystems, whether it wanted to express that the result of this provision would be the protection of "significant" amounts of natural habitats and ecosystems, or whether this was simply an oversight given that such term is not used elsewhere when referring to safeguarding habitats and ecosystems.

However, in keeping something for themselves, taxpayers must ensure that the reserved rights do not unduly conflict with the conservation purposes.

In all events, the caselaw is clear that legislative reports cannot be used to supplant legislation. For instance, the court explained in one case that "[l]egislative committee reports, of course, may not be used as an excuse for ignoring statutory text."[70] Moreover, courts have held that legislative reports should not be viewed narrowly:

> In sum, we think it plainly wrong as a general matter, and in this case in particular, to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports.[71]

Finally, courts have determined that legislative reports are particularly unreliable where the statements for which they are being used conflict with the statutes to which they refer:

> When there is conflict between an unambiguous statute and its legislative history, the legislative history, particularly when equivocal, is to be accorded little or no weight . . . To

> credit a committee report over the statute would elevate the narrow views of a legislative subgroup or of unelected congressional staff over the constitutional enactments of Congress and the President. Committee reports provide scant evidence of even a probable or constructive legislative intent, because they are crafted by staff, not necessarily read by legislators, and are subject to packing via influence of interest groups and other legislative insiders. In sum, even unequivocal evidence of Congress' contrary purpose would not justify this court's ignoring the plain meaning of a statute in favor of its legislative history of supplying a new statutory provision.[72]

The questionable insertion of this one word, "significant," by the IRS in the conservation easement donation regulations has impacted how Tax Court cases are decided, as shown below.

Easement Cases Focused on Conservation Purpose

Conservation purpose has been an important issue in several Tax Court cases.[73] The most recent one was *Champions Retreat Golf Founders, LLC v. Commissioner*.[74] The relevant facts, contentions, and decisions in that case are discussed below.[75]

Background and Main Events

Champions Retreat Golf Founders, LLC ("Partnership") acquired about 463 acres in 2002 for purposes of building a golf course. The property is located near Augusta, Georgia, along the Savannah River and an offshoot, the Little River. Sumter National Forest is located on the other side of the Savannah River, about 700 feet away.

The Partnership initially raised $13.2 million to build the golf course by selling 66 residential lots in a development called Founders Village. It borrowed heavily, too. Each lot in Founders Village came with a lifetime membership at the golf club. Construction of the golf club was completed in June 2005. It is located in a development called the Reserve, which is private and accessible only through a security gate manned around the clock. The golf club occupies about 366 of the 463 acres, and features three nine-hole courses, a pro shop, restaurant, locker room, cart storage facility, driving range, and paved parking lot.

The Partnership was not profitable initially. Therefore, after learning of the decision in *Kiva Dunes Conservation, LLC v. Commissioner* where the Tax Court upheld a charitable tax deduction stemming from the placement of a conservation easement on an operating golf course, the accountant for the Partnership proposed doing the same thing on the entire property, including the golf course.[76] The idea was to attract additional investment, such that the Partnership could reduce the balance of its construction-related debt from years earlier.

Apparently, in exploring this idea, a conservation biologist with the land conservancy to which the easement was eventually granted ("Land Trust") did an initial survey of the property in late 2009, finding that it was worthy of conservation.

The financing was done through Kiokee Creek Preservation Partners, LLC ("Kiokee Creek"), a partnership formed in September 2010. Most of the partners in Kiokee Creek, who contributed total capital of $2.7 million, were clients of the accountant. These funds were then contributed to the Partnership in exchange for a 15 percent ownership interest in the Partnership and a special allocation of the charitable deduction.

The conservation biologist with the Land Trust analyzed the property again in November 2010, shortly after the money had been raised. He concluded, as he had earlier, that the property, including the golf club, had characteristics making it conservation-worthy.

On December 16, 2010, the Partnership donated an easement to the Land Trust that covered about 349 acres, the Deed of Conservation Easement was properly recorded soon thereafter, on December 29, 2010, and the Land Trust provided the contemporaneous written acknowledgement of the easement donation on February 7, 2011. The 349 acres donated covered 25 of the 27 total holes on the three golf courses, most of the remaining two holes, and the driving range. It did not cover the pro shop, restaurant, locker room, cart storage facility, paved parking lot, or various residential developments nearby.

The conservation biologist from the Land Trust returned to the property a third time, on May 12, 2011, which was more than four months after the Partnership had granted the easement. The idea, apparently, was for the biologist to have an opportunity to observe the natural features of the property at different times/seasons throughout the year. All three visits by the biologist were cited in his Baseline Report, even though the last one occurred after the placement of the easement.

The Deed of Conservation Easement identified three conservation purposes, namely, (i) protection of a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem, (ii) preservation of open space for the scenic enjoyment of the general public, while yielding a significant public benefit, and (iii) preservation of open space pursuant to a federal, state, or local governmental conservation policy, while yielding a significant public benefit.

The Deed of Conservation Easement imposed several restrictions on the Partnership with respect to the golf course.

NOTES

[72] Sharp v. United States, 27 Fed. Cl. 52 (Fed. Cl. Ct., 1992), aff'd, 14 F.3d 583 (CA-F.C.,1993).

[73] *See, e.g.,* Glass, 124 TC 258 (2005), aff'd, 471 F.3d 698 (CA-6. 2006); Atkinson, TCM 2015-236; Butler, TCM 2012-72; PBBM-Rose Hill, Ltd., Docket No. 26096-14 (10/07/2016) (Bench Opinion), aff'd, 900 F.3d 193 (CA-5, 2018).

[74] Champions Retreat Golf Founders, LLC, TCM 2018-146.

[75] The author reviewed the following documents in preparing this portion of the article: Petition filed February 23, 2015; Answer filed April 29, 2015; Pre-Trial Memo for Respondent filed October 7, 2016; Pre-Trial Memo for Petitioner filed October 7, 2016; Respondent's Opening Brief filed January 25, 2017; Petitioner's Opening Brief filed January 25, 2017; Respondent's Answering Brief filed March 13, 2017; Petitioner's Answering Brief filed March 13, 2017; First Stipulation of Facts filed October 25, 2016; Joint Stipulation of Settled Issues filed January 13, 2017.

[76] Kiva Dunes Conservation, LLC, TCM 2009-145.

[77] Reg. 1.170A-14(d)(3)(ii).

[78] Champions Retreat Golf Founders, LLC, *supra* note 74.

[79] *Id.* (emphasis added).

[80] *Id.*

[81] *Id.*

[82] *Id.*

These consisted of the following. First, it restricted the ways in which the Partnership could use the easement area, including the types of structures that it could build. Second, it required the Partnership to use "the best environmental practices then prevailing in the golfing industry" in maintaining the golf club, to keep records relating to such maintenance, and to submit an annual maintenance report to the Land Trust. Third, it prevented the Partnership from removing surface or ground water, live or dead trees, or any other raw materials. Fourth, it stopped the Partnership from placing signs, outdoor advertising, or any new roads. Fifth, it forced the Partnership not to manipulate a creek or pond, allow chemical discharge to flow into a creek or pond, clear vegetation within 100 feet of a creek or pond, or cause soil erosion or sedimentation into a creek or pond. Sixth, it prohibited the Partnership from dividing the easement area into lots. Finally, it obligated the Partnership to notify the Land Trust in writing before it exercises any reserved right in a way that might impair the conservation purposes.

As is true with most cases of easements, there were several exceptions to the restrictions, described above, in the Deed of Conservation Easement. For example, the Partnership can build structures covering up to 10,000 square feet on the easement area, and it can remove trees and vegetation, and it can shift features of the golf courses (including fairways and greens), as part of the building process. Moreover, the Partnership has the right to widen by 10 feet and then pave an existing road. The Partnership can also remove any tree, whether it be standing or fallen, that is within 30 feet of a playable area on the golf course. Lastly, and importantly to the case, the Partnership can maintain in manicured condition all golf course play areas, including the lakes, creeks, ponds, and other water areas that are an integral part of the golf course. The list of reserved rights entails the ability to use chemicals.

The Tax Dispute Begins

The Partnership claimed a charitable deduction of $10,427,435 on its 2010 Form 1065, 98.8 percent of which was allocated to Kiokee Creek, even though it held only a 15 percent ownership interest. An audit ensued, at the end of which the IRS issued an FPAA fully disallowing the charitable deduction on two main grounds. The IRS first claimed that the Partnership had one or more technical violations of the requirements under Section 170. Even if the Partnership complied with Section 170, the IRS claimed that the deduction was worthless because the Partnership had failed to establish that the value exceeds $0.

Decision by the Tax Court

The Partnership filed a timely Petition disputing the FPAA, the case was litigated, and the Tax Court rendered its decision. Its analysis was solely focused on one issue; that is, whether the conservation easement meets at least one of the acceptable conservation purposes. First the IRS, then the Tax Court, disagreed with the assertions by the Partnership.

Relatively natural habitat. The regulations indicate that significant habitats and ecosystems encompass, among other things, (i) habitats for rare, endangered, or threatened species of animal, fish, or plants, (ii) natural areas that represent high quality examples of a terrestrial or aquatic community, and (iii) natural areas that are included in, or contribute to, the ecological viability of a park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.[77]

The Partnership argued that the easement area provides a habitat for several species, including birds, the southern fox squirrel, and the denseflower knotweed. The Tax Court agreed with the Partnership that the concept of "rare, endangered, or threatened," which is not specifically defined in the regulations under Section 170, is not limited to those species listed under the Endangered Species Act of 1973.[78] After the Tax Court buoyed the spirits of the Partnership, it quickly dashed them, stating: "Nonetheless, *we do not find a sufficient presence* of rare, endangered, or threatened species in the easement area to satisfy the conservation purpose requirement."[79]

Applying that notion to the first species, birds, the Tax Court explained that the experts observed several types of birds that were listed on the watchlist of one conservation group or another, but they were generally found within a lower threat level or listed as not a concern in the relevant region. The Tax Court underscored that none of the birds observed had been assigned the highest threat level by any of the conservation organizations.[80]

An important, yet largely unaddressed, issue in this area is that the IRS might have exceeded its authority in promulgating the applicable rules.

With respect to the southern fox squirrels, the Tax Court indicated that, while all the trial experts agreed that these creatures might be in decline, it could not conclude they fell into the category of rare, endangered, or threatened. Indeed, one conservation group indicated that the squirrels are secure on a global level, and they are still hunted legally in Georgia.[81]

The Tax Court next turned to the denseflower knotweed. The Tax Court acknowledged that the evidence presented at trial created uncertainty about the threat status of this plant in Georgia. Nevertheless, the Tax Court focused on the fact that the plant was found almost exclusively in a 26-acre area, which constitutes just 7.5 percent of the total easement area of 349 acres.[82] Assuming that the denseflower knotweed could grow in another similar area (*i.e.*, undisturbed bottomland forest) in the easement area, these two parts together would comprise less than 17 percent of the total easement area. Moreover, underscored the Tax Court, one hole on the golf course is designed to drain into the only area were the plant was found, thereby introducing chemicals (*e.g.*, fertilizers, pesticides, herbicides, and fungicides) into its habi-

tat. Interpreting the expert testimony in a manner favorable to the Partnership, the Tax Court still held that the existence of the plant on less than 17 percent of the total easement area is insufficient to fully satisfy the conservation purpose of protecting a significant relatively natural habitat.[83]

The Tax Court summarized its decision that the golf course easement did not protect a relatively natural habitat in the following manner:

> [The Partnership] has presented evidence of only one rare, endangered, or threatened species with a habitat on the easement area - denseflower knotweed - and *it inhabits just a small fraction of the easement area.* To get around these facts, [the Partnership] would have us ignore the specific wording of the regulation and adopt a standard that includes *any species* of current or future conservation concern. This we cannot do . . . We, therefore, conclude that [the Partnership] has not met the conservation purpose requirement by providing a "habitat for rare, endangered, or threatened species of animals, fish, or plants."[84]

In terms of the water aspects of the easement area (including lakes, ponds, and creeks), one expert said that the ponds were high-quality aquatic environments. The Tax Court emphasized, however, that the chemicals used by the Partnership to maintain the golf course would damage such environments, regardless of whether the chemicals were applied directly or through runoff.[85] The Partnership countered that use of chemicals should not invalidate the conservation qualities because it complied with all applicable state rules in selecting and applying chemicals, and the Deed of Conservation Easement demands that the Partnership follow the best environmental practices in the golf industry.[86] The Tax Court held that it had no doubt that the Partnership aimed to use chem-

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icals responsibly, but it did not prove that the best practices in the golf industry are equal to or better than "the best environmental practices then prevailing for conservation, as might be expected if conservation was the purpose of the easement."[87]

The Partnership also argued that the easement area is a relatively natural habitat because it constitutes a "natural area" that contributes to the ecological viability of Sumter National Forest, which is located across the Savannah River, about 700 feet away from the golf course. In short, the Partnership contended that the golf course was worthy of conservation because birds, insects, and pollen will travel back and forth to Sumter National Forest.[88]

The Tax Court agreed that Sumter National Forest is a "national park," but emphasized that the easement area does not constitute a "natural area," as required by the regulation.[89] The Tax Court then indicated that, contrary to the claims by the Partnership, just having trees, vegetation, and species that inhabit them does not suffice to be a "natural area" when such trees and vegetation are heavily managed and manicured, as they are on and around the golf course.[90] The Tax Court went on to explain that, even if it were to hold that the areas between the fairways on the golf course resembling open pine woodlands were "natural areas" for these purposes, there is no guarantee that such areas will be adequately protected, because the Deed of Conservation Easement specifically permits the Partnership to remove any tree, standing or fallen, that is located within 30 feet of a playable area.[91]

Preservation of open space for the general public. As explained above, to fall into the category of preservation of open space for the scenic enjoyment of the general public, it suffices that there is visual (instead of physical) access to the property or across the property by the general public.[92] Also, it is not necessary that the whole property be visible to the public.[93]

The Tax Court, even applying this flexible standard, determined that the conservation easement was insufficient because the public had no physical access to a private golf course protected by a gate and personnel, the only visual access would be from the two rivers running alongside the golf course, the river banks ranging from three to 10 feet high obstruct the views from the water, and there is ongoing legal uncertainty regarding whether the public can even utilize one of the two rivers, the Little River.[94]

In summary, the law expressly states that the easement must protect "a" relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, whereas the regulations demand that the easement safeguard a "significant" relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.

Preservation of open space pursuant to governmental policy. The Partnership argued that it donated the easement to the Land Trust to preserve open space pursuant to a Georgia law directing the Georgia Department of Natural Resources and local governments to create minimum standards for protecting natural resources, the environment, and vital areas, including river corridors, and the local county's implementation of the Georgia Greenspace Program.[95] The Tax Court rejected this argument, explaining that the Georgia law cited by the Partnership does not support an "identified conservation project," and there is no evidence that the Georgia Greenspace Program designated the easement area as "worthy of protection for conservation purposes" or that the easement is held by the Land Trust under the Georgia Greenspace Program.[96]

At trial, the Partnership further argued that the designation of the golf club as "open space" under the Columbia County Planning Commission's Vision 2035 plan shows that the donation was made pursuant to a local government conservation policy. The Tax Court acknowledged that Vision 2035 was produced pursuant to Georgia law, but pointed out that such law was focused on land development, not land conservation.[97]

For these reasons, the Tax Court concluded that "the preservation of open space was not pursuant to a clearly delineated governmental conservation policy."[98]

Ultimate Determination by Tax Court

The Tax Court resolved the entire case by deciding just one issue; that is, that the donation of the easement by the Partnership lacked sufficient "conservation purpose" to meet the requirements of Section 170(h).[99]

New Case Questioning Regulatory Actions by IRS

A recent case, focused on Section 170 and certain regulations promulgated by the IRS to implement it, calls into question actions by the IRS in the conservation easement field. The case, decided in August 2019, is *Mayo Clinic v. United States.*[100] It is examined below.

NOTES

83 *Id.*
84 *Id.* (emphasis added).
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 Reg. 1.170A-14(d)(4)(ii)(B).
93 *Id.*
94 Champions Retreat Golf Founders, LLC, *supra* note 74.
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 Mayo Clinic v. United States, AFTR 2d 2019-5448 (DC Minn., 2019).

Mayo is a nonprofit corporation and tax-exempt organization under Section 501(c)(3). After conducting an audit, the IRS issued a Notice of Proposed Adjustment asserting that Mayo owed tax on certain income that it received from various partnerships because Mayo was not an "educational organization." Mayo paid the disputed taxes of approximately $12 million, filed a claim for refund, and, eventually, lodged a suit for refund with the District Court.[101]

According to the District Court, Mayo would be entitled to a refund if it fell into the following category described in Section 170(b)(1)(A)(ii):

> [A]n educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its education activities are regularly carried on.[102]

The government's position was that, while Mayo maintains a regular faculty, curriculum, and student body, it is not an "educational organization" and, thus, not deserving of the refund. In taking this position, the government relied on its own regulation interpreting Section 170(b)(1)(A)(ii), which states that an entity cannot be an "educational organization," unless education is its "primary function" and its non-educational functions are "merely incidental" to its educational activities.[103] The relevant regulation states the following:

> An educational organization is described in Section 170(b)(1)(A)(ii) if its *primary function* is the presentation of formal instruction and it normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on . . . It does not include organizations engaged in both educational and noneducational activities unless the latter are *merely incidental* to the educational activities.[104]

The District Court examined the issue applying the so-called *Chevron* test or standard.[105] The District Court held in favor of Mayo for a number of reasons, the primary ones being that (i) the relevant statute, Section 170(b)(1)(A)(ii), did not include the primary-function test or the merely-incidental test, and (ii) Congress knew how to insert such requirements if that was its intent, as demonstrated by the fact that the following tax provision, Section 170(b)(1)(A)(iii), specifically mandates that the relevant organization have a "principal purpose or function" of providing certain services or engaging in certain activities. Some of the key quotes by the District Court are set forth below.

> Congress unambiguously chose not to include a primary-function requirement in [Section] 170(b)(1)(A)(ii), and the Treasury Department exceeded the bounds of its statutory authority when it promulgated the primary-function requirement in [Reg.] 1.170A-9(c)(1). Section 170(b)(1)(A)(ii) contains no explicit primary-function requirement, but the equivalent of that very requirement appears in the very next subsection of the statute, [Section] 170(b)(1)(A)(iii). In this situation—that is, when Congress imposes a particular requirement in one subsection of a statute but not in another—settled rules of statutory construction say that the absence of the requirement is generally to be considered a deliberate omission [by Congress] that must be respected [by the IRS].[106]

> The conclusion that a primary-function or merely-incidental requirement is inconsistent with [Section] 170(b)(1)(A)(ii) is based primarily on the explicit presence of a primary-purpose test in the next subsection of the same statute, [Section] 170(b)(1)(A)(iii). That adjoining subsection was enacted at the same time as [Section] 170(b)(1)(A)(ii) and for the same purpose.[107]

> The corollary of determining that Congress unambiguously did not include a primary-function requirement in [Section] 170(b)(1)(A)(ii) is that Congress also must be understood to have decided not to include a merely-incidental test in this statute, at least as that test is described in the corresponding regulations.[108]

> The government's position that Mayo is not entitled to the refunds it seeks is premised entirely on Mayo's alleged inability to satisfy the primary-function and merely-incidental requirements in [Reg.] 1.170A-9(c)(1). Because these requirements exceed the bounds of authority given by [Section] 170(b)(1)(A)(ii), they are unlawful.[109]

> [T]he regulation does more than the law allows because it adds requirements—the primary-function and merely-incidental tests—Congress intended not to include in the statute. Because the government's position is based entirely on these impermissible requirements, Mayo is entitled to the sued-for refunds.[110]

Application of *Mayo Clinic* to Conservation Easement Cases

In the context of conservation easements, Section 170(h)(4)(A), enacted by Congress, states that the term "conservation purpose" means the following:

1. the preservation of land areas for outdoor recreation by, or the education of, the general public,
2. the protection of a [not a "significant"] relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
3. the preservation of open space (including farmland and forest land) where such preservation is (I) for scenic enjoyment of the general public, or (II) pursuant to a clearly delineated federal, state, or local governmental conservation policy,

NOTES

[101] *Id.*

[102] *Id.*

[103] *Id.;* Reg. 1.170A-9(c)(1).

[104] Reg. 1.170A-9(c)(1) (emphasis added).

[105] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[106] Mayo Clinic, *supra* note 100.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Section 170(h)(4)(A) (emphasis added).

[112] Reg. 1.170A-14(d)(3)(i) (emphasis added).

[113] Reg. 1.170A-14(d)(3)(ii) (emphasis added).

[114] *See, e.g.,* Champions Retreat Golf Founders, LLC, *supra* note 74; Glass, *supra* note 73; Atkinson, *supra* note 73.

[115] Champions Retreat Golf Founders, LLC, *supra* note 74 (emphasis added).

[116] *Id.* (emphasis added).

[117] Atkinson, *supra* note 73.

[118] *Id.* (emphasis added).

and will yield a *significant* public benefit, or

4. the preservation of an historically important land area or a certified historic structure.[111]

However, the corresponding regulations, promulgated by the IRS, state that the "conservation purpose" test is met only if a taxpayer donates a QRPI "to protect a *significant* relatively natural habitat in which fish, wildlife, or plant community, or similar ecosystem normally lives."[112] The regulations go on to provide a definition of a "*significant* habitat or ecosystem."[113]

Several Tax Court cases have focused on the adequacy of conservation purposes.[114] Notably, *Champions Retreat*, analyzed above, was decided against the taxpayers for a few reasons, including the Tax Court did not find "a *sufficient presence* of rare, endangered, or threatened species in the easement area to satisfy the conservation purpose requirement,"[115] particularly since the only pertinent species identified, the denseflower knotweed, only existed on a portion of the eased land. According to the Tax Court in *Champions Retreat*, "[l]ess than 17% of the easement area is not enough to fulfill the conservation purpose of providing a *significant* relatively natural habitat."[116]

The Tax Court came to a similar conclusion in an earlier case, *Atkinson v. Commissioner*.[117] There, the Tax Court indicated that the existence of two types of rare plants on "only 24%" of the easement property "represents *too insignificant* a portion of the 2003 easement to lead us to conclude that the whole 2003 easement property is a *significant* natural habitat."[118]

The similarities between *Mayo Clinic* and the conservation easement cases is striking. First, in both instances, the relevant portion of Section 170, enacted by Congress, is devoid of certain key terms. In *Mayo Clinic*, the statute lacked the primary-function and merely-incidental requirements, while in the conservation easement cases, the statute does not contain the word "significant." Second, in promulgating the applicable regulations, the IRS exceeded the standards established by Congress by inserting new requirements. Third, in both instances, Congress included stricter requirements in the very next part of the law. In *Mayo Clinic*, 170(b)(1)(A)(iii), which follows the key provision, 170(b)(1)(A)(ii), specifically demands that the relevant organizations have a "principal purpose or function" of providing certain services or engaging in certain activities, which is akin to "primary function." With respect to easement cases, Section 170(h)(4)(A)(iii) expressly states that the donation must preserve open space and yield a "significant" public benefit, which is the term conspicuously absent from the relevant provision, Section 170(h)(4)(A)(ii).

The difference between *Mayo Clinic* and the conservation easement cases is that the District Court in *Mayo Clinic* rejected the notion that the IRS can unilaterally add requirements via a regulation, whereas the Tax Court has seemed to accept, or perhaps the partnerships neglected to adequately argue, the notion that the IRS is permitted to insert the critical term "significant" when discussing habitats and ecosystems.

Conclusion

The future holds more audits of conservation easement partnerships, which will include challenges to whether the conservation purposes were "significant" enough, at least from the IRS's perspective. This article demonstrates that taxpayers now have more ammunition in defending against such attacks, thanks to the recent decision, *Mayo Clinic*, and its potential applicability to the conservation easement arena.