

CONSERVATION EASEMENT AMENDMENTS
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Federal Tax Considerations:

26 U.S.C. §170(h) Qualified Conservation Contributions

For the contribution to be **tax deductible**, the contribution must be:

- Of a “...qualified real property interest...”
Either the entire interest except mineral rights; or a remainder Interest; or a perpetual use restriction on **the** property.
- To a “...qualified organization....”
§501(c)(3) Land Trust with capacity; or governmental entity.
- Exclusively for “...conservation purposes...”
Outdoor recreation or education of the public; protection of relatively natural habitat; preservation of open space including farm or forest land for the scenic enjoyment of the public; or consistent with governmental policy and yielding a public benefit; ...or historical preservation.
- In “...perpetuity....”
142 T.C. No. 7 (2014): North Dakota law limiting CE’s to 99 years makes them not tax deductible. (99 years is not enough!)

Treasury Regulations:

- Easement must prevent uses inconsistent with Conservation Purposes of the Easement.
- Must be recorded and enforceable.



- Easement must state that Grantee has right to enter, inspect, and enforce in Court.
- Baseline documentation created and provided to grantor.
- Transfer only to other willing “..qualified organization...” with capacity.
- Mortgages must be subordinated; no extinguishment upon foreclosure.
- Upon Judicial extinguishment, grantee gets share of proceeds to be used for similar conservation purpose.

Belk v. Commissioner; US Court of Appeals for the Fourth Circuit, No. 13-2161
Decided December 16, 2014

- Affirmed Tax Court disallowance of charitable deduction of **\$10,524,000** for donated CE on 184 acres....
- Old Sycamore, LLC grants CE over 184 acres to Land Trust outside Charlotte, NC. Land holds golf course; the surrounding 226 acres hold 402 residential lots around the golf course.
- CE prohibits further development, and limits use to “...outdoor recreation...”. Contains Reserved Right:

To “...substitute an area of abutting land for an equal or lesser area of Conserved land...”. By Amendment. Swapped land must be:



1. Same or better ecological stability (?)
2. No adverse effect on Conservation Purposes of CE
3. Have FMV at least equal to removed area.

- Savings Clause:

The Trust shall have no right or power to agree to any amendment that would result in the CE failing to qualify under Section 170(h).

- Donors deducted \$10,524,000 over three years.... then Notice of Deficiency. Appealed, Upheld by Commissioner, Appealed to Tax Court, Appealed to Court of Appeals.

- ISSUE: Was this a “...qualified real property interest...? In Perpetuity?

(Only exception to perpetuity is Judicial extinguishment)

(Court questioned, did not reach, issue of “conservation purposes”)

Tax Court concluded that since swap possible, use restriction *on land for which deduction claimed* is not in “perpetuity”.

Belks argue: Perpetual Restriction is on SOME property; of equal or greater financial and conservation value...

TC says: §170(h)(2)(C) requires “...a restriction on the use that may be made of **the** real property...” (Not “some”)

“Thus, while the restriction may be perpetual, the restriction on “**the** real property” is not.” (Appraisal; Baseline meaningless; transaction evades IRS review.)

- Belks next argued that Savings Clause saves deduction, since swap is effectively disallowed by subsequent Tax Court ruling, thus no amendment was effective, and deduction saved...



TC: NO dice! Court rejects “condition subsequent” savings clauses which retroactively revoke an amendment if later disallowed by IRS... (This works unless we are caught!)

”Causes that seek to re-characterize the nature of the transaction in the event of a future occurrence will be disregarded for federal income tax purposes.”

THEREFORE: No amendments that change “..**the** conserved property...”

