REAL ESTATE

Conservation Easements and *Pine Mountain*: Favorable Rulings by Court of Appeals and Pending Issues

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This article explains the general rules related to conservation easement donations, critical facts from the *Pine Mountain* case, analysis by the Tax Court, overlooked aspects of the initial decision, recent rulings by the Court of Appeals, issues that the Tax Court must now decide on remand, and the positive aspects of the case thus far for taxpayers making charitable donations.

The IRS has been riding high recently because of several Tax Court victories on "technical" issues in conservation easement disputes. However, several signs exist that the tide might be turning. One of these is the recent decision by the Eleventh Circuit Court of Appeals in *Pine Mountain Preserve, LLLP*.[1] This article explains the general rules related to conservation easement donations, critical facts from the case, analysis by the Tax Court, overlooked aspects of the initial decision, recent rulings by the Court of Appeals, issues that the Tax Court must now decide on remand, and the positive aspects of the case thus far for taxpayers making charitable donations.[2]

Overview of Conservation Easement Donations and Deductions

Taxpayers who own valuable undeveloped real property have several choices. For instance, they might (i) hold the property for investment purposes, selling it when it appreciates sufficiently, (ii) determine how to maximize profitability from the property and do that regardless of any negative effects on the local environment, community, or economy, or (iii) voluntarily restrict future uses of the property, such that it is protected forever for the benefit of society. The third option, known as donating a "conservation easement," not only achieves the goal of environmental protection,

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but also triggers another benefit, tax deductions for donors.[3]

As one would expect, taxpayers cannot donate an easement on any old property and claim a tax deduction; they must demonstrate that the property was worth protecting. A donation has an acceptable "conservation purpose" if it meets at least one of the following requirements: (i) it preserves land for outdoor recreation by, or the education of, the general public; (ii) it preserves 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.[4]

Taxpayers memorialize the donation to charity by filing a public Deed of Conservation Easement ("Deed"). In preparing the Deed, taxpayers often coordinate with a land trust to identify certain limited activities that can continue on the property after the donation, without interfering with the Deed, without prejudicing the conservation purposes, and without jeopardizing the tax deduction.[5] These activities are called "reserved rights." The IRS openly recognizes, in its Conservation Easement Audit Techniques Guide ("ATG"), that reserved rights are ubiquitous.[6]

The IRS will not allow the tax deduction stemming from a conservation easement unless the taxpayer provides the land trust, before making the donation, "documentation sufficient to establish the condition of the property at the time of the gift."[7] This is called the Baseline Report. It may feature several things, including, but not limited to, (i) a map from the U.S. Geological Survey, showing the property line and other contiguous or nearby protected areas, (ii) a map showing all existing man-made improvements or incursions, vegetation, 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 taken as close as possible to the date of the donation, and (iv) on-site photographs taken at various locations.[8]

The value of the conservation easement is the fair market value ("FMV") of the property at the time of the donation.[9] 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.[10] The IRS explains in its ATG that the best evidence of the FMV of an easement would be the sale price of other easements that are comparable in size, location, etc. The ATG recognizes, though, that it is difficult, if not impossible, to find comparable sales of properties encumbered by easements.[11] Consequently, appraisers often must use the before-and-after method instead. This means that an appraiser must determine the highest and best use ("HBU") of the property *and* the corresponding FMV twice. First, the appraiser calculates the FMV if the property were put to its HBU, which generates the "before" value. Second, the appraiser identifies the FMV, taking into account the restrictions on the property imposed by the easement, which creates the "after" value.[12] The difference between the "before" value and "after" value, with certain other adjustments, produces the value of the easement donation.

A key concept mentioned in the preceding paragraph is a property's HBU. This is the most profitable use for which the property is adaptable and needed in the reasonably near future.[13] The term HBU also means the use of property that is physically possible, legally permissible, financially feasible, and maximally productive.[14] Importantly, valuation in the easement context does not depend on whether the owner has actually put the property to its HBU in the past.[15] The HBU can be *any* realistic potential use of the property.[16] Common HBUs are construction of a residential community, creation of a mixed-use development, or mining.

Properly claiming the tax deduction stemming from an easement donation is surprisingly 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 land trust is a "qualified organization," (iii) obtain a Baseline Report adequately describing the condition of the property at the time of the donation and the reasons why it is worthy of protection, (iv) complete a Form 8283 (Noncash Charitable Contributions) and have it executed by all relevant parties, including the taxpayer,

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[1] This case is comprised of multiple proceedings. *See* Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018) (addressing "technical" issues in 2005, 2006, and 2007), Pine Mountain Preserve, LLLP, TCM 2018-214 (addressing easement valuation issue for 2007), and Pine Mountain Preserve, LLLP, 126 AFTR2d 2020-___ (CA-11, 2020).

[2] *See also* Sheppard, "*Pine Mountain Preserve* and Conservation Easements: A Victory in Disguise for Taxpayers?," 130 JTAX 22 (May 2019) .

[3] Section 170(f)(3)(B)(iii); Reg. 1.170A-7(a)(5); Section 170(h)(1); Section 170(h)(2); Reg. 1.170A–14(a); Reg. 1.170A–14(b)(2).

[4] Section 170(h)(4)(A); Reg. 170A–14(d)(1); S. Rept. 96–1007, at 10 (1980).

[5] Reg. 1.170A-14(b)(2).

[6] IRS, *Conservation Easement Audit Techniques Guide* (rev. 11/4/2016), page 23; *see also* Reg. 1.170A-14(e)(2) and (3).

[7] Reg. 1.170A-14(g)(5)(i).

[8] *Id.*

[9] Section 170(a)(1); Reg. 1.170A-1(c)(1).

[10] Reg. 1.170A-1(c)(2).

[11] *Conservation Easement Audit Techniques Guide, supra* note 6, at page 41.

[12] *Id.*

[13] Olson v. United States, 292 U.S. 246, 255 (1934).

[14] Esgar Corp., 744 F.3d 648, 659 n.10 (CA-10, 2014).

[15] *Id.* at 657.

[16] Symington, 87 TC 892, 896 (1986).

appraiser, and land trust, (v) assuming that the taxpayer is a partnership, file a timely Form 1065, enclosing Form 8283 and the qualified appraisal, (vi) receive from the land trust a "contemporaneous written acknowledgement," both for the easement itself and for any endowment/stewardship fee donated to finance perpetual protection of the property, and (vii) send all the partners their Schedules K-1 (Partner's Share of Income, Deductions, Credits, etc.) and a copy of Form 8283.[17]

The conservation purposes for the three easements were to preserve a relatively natural habitat and open space.

Main Facts in *Pine Mountain*

The main facts in *Pine Mountain* are as follows.

Property and Donations

A father and son team with significant experience in real estate development ("Individuals") acquired various tracts of land near Birmingham, Alabama over the years. They eventually cobbled together 10 contiguous parcels of land consisting of approximately 6,200 acres ("Property"), which were transferred to Pine Mountain Partnership, LLP ("Partnership").

During 2004 and 2005, the Partnership negotiated with representatives of two smaller cities, Westover and Chelsea, regarding which might annex the Property and on what terms. The Partnership ultimately decided to go with Westover, the basic terms of annexation were agreed in early 2005, the parties signed an agreement in September 2006, and the four-month annexation process started soon thereafter, in November 2006.

The Partnership made an initial offering in August 2005. The investors paid about $30 million for 300 limited partnership interests, which entitled them to 50 percent of the profits, losses, etc. from the Partnership. The Individuals, through another entity, owned the other 50 percent. In December 2005, the Partnership granted the first of three conservation easements ("2005 Easement") to the North American Land Trust ("Land Trust").

The Partnership made another offering in December 2006 to its existing limited partners, whereby each could buy another half-interest. As a result of this second offering, the limited partners paid approximately $15 million for 300 half interests. Also, in December 2006, the Partnership applied with the City of Westover to rezone the Property from an "agricultural preserve" to a planned unit development ("PUD"). The relevant zoning ordinance, however, dictated that property annexed into a city initially must be zoned as an agricultural preserve. Later in December 2006, the Partnership conveyed to the Land Trust the second conservation easement ("2006 Easement") covering additional parcels.

Completing the trilogy, in December 2007, the Partnership conveyed to the Land Trust the third conservation easement ("2007 Easement") covering additional parcels of the Property.

Details About the Deeds

The details of the relevant deeds are as follows.

2005 Easement. The conservation purposes for the 2005 Easement were to preserve a relatively natural habitat and open space. Article 2 of the 2005 Deed generally prohibited residential, commercial, and industrial development. However, certain exceptions, called reserved rights, were located in Article 3. Among others, the Partnership or its successors could build one single-family dwelling (along with a shed, garage, gazebo, vehicle parking area, and pool) within each of 10 different one-acre "Building Areas" located within the area protected by the 2005 Easement. The 2005 Deed did not specify the location of the 10 Building Areas, but these were shown in an exhibit.

Article 3.16 of the 2005 Deed stated that the boundaries of the Building Areas could be modified by mutual agreement between the Partnership and the Land Trust. However, this language was softened by the fact that modifications cannot increase a Building Area and they cannot negatively impact any of the conservation purposes, in the reasonable judgment of the Land Trust. Article 3 contained a list of additional reserved rights.

Article 6.7 of the 2005 Deed stated that the Partnership (or its successors) and the Land Trust "shall mutually have the right, in their sole discretion, to agree to amendments to [the 2005 Easement] which are not inconsistent with the conservation purposes," but the Land Trust had "no right or power to agree to any amendments . . . that would result in the [2005 Easement] failing to qualify . . . as a qualified conservation contribution under Section 170(h) of the Internal Revenue Code and applicable regulations." This is generally known as an amendment clause in the easement world.

2006 Easement. The 2006 Deed identified essentially the same conservation purposes as the 2005 Deed. It also generally prohibited residential, commercial, and industrial development, with exceptions for certain reserved rights.

Article 3.1 of the 2006 Deed stated that the Partnership or its successors could build one single-family dwelling (along with a shed, garage, gazebo, and pool) within each of six different one-acre "Building Areas" within the area covered by the 2006 Easement. The 2006 Deed did not specify the location of the Building Areas and placed no limitations on locations, other than stating that they must be approved in advance by the Land Trust, and the Land Trust cannot issue such approval if the locations would negatively impact the conservation purposes.

Article 3.2 of the 2006 Deed allowed the Partnership to construct a water tower within the area covered by the 2006 Easement, along with underground pipelines to the areas served by the water

tower, including the 10 Building Areas contemplated by the 2005 Easement, the six Building Areas contemplated by the 2006 Easement, and any development on the 79 percent of the Property that was not protected by a conservation easement. The Land Trust had to approve in advance the design and location of the water tower and underground pipelines.

The 2006 Deed had an identical amendment clause to the 2005 Deed.

2007 Easement. The 2007 Deed has conservation purposes akin to those in the 2005 Deed and the 2006 Deed. Article 2 generally prohibited residential, commercial, and industrial development, and had certain exceptions for reserved rights. The 2007 Deed had some critical differences, though. Namely, there were no Building Areas anywhere on the property.

The 2007 Deed allowed the Partnership to construct a water tower within the area covered by the 2007 Easement, along with underground pipelines to the areas served by the water tower. However, there were no Building Areas on the property safeguarded by the 2007 Easement, and the 2007 Deed stated that the pipelines could only run to the six Building Areas contemplated by the 2006 Easement and to any development on the 79 percent of the Property unprotected by easement. The Land Trust must approve in advance the design and location of the water tower and underground pipelines.

The 2007 Deed had the same amendment clause as the 2005 Deed and the 2006 Deed.

Start of Litigation

The IRS issued three separate notices of final partnership administrative adjustment ("FPAAs") in January 2013 covering 2005, 2006, and 2007. The IRS, following its *modus operandi* in conservation easement cases, fully disallowed the multi-million dollar deductions, without the courtesy of providing any details as to why. The Partnership, through its tax matters partner, filed a timely Petition with the Tax Court challenging the three FPAAs.

Analysis by the Tax Court—Round One

The Tax Court issued its Opinion in *Pine Mountain* in December 2018, focusing on four issues: (i) whether the three easements constituted qualified real property interests ("QRPIs"); (ii) whether the easements were made "exclusively for conservation purposes"; (iii) whether the so-called amendment clauses in the three Deeds cause the Property not to be protected "in perpetuity"; and (iv) the value of the 2007 Easement. These four issues are addressed below.

First Issue—Are the Easements QRPIs?

A taxpayer must donate a QRPI in order to qualify for a charitable tax deduction. Among other things, this can be a restriction "granted in perpetuity" on the acceptable uses of the donated property.[18] The IRS argued that the easements did not constitute QRPIs because of the reserved rights for the Partnership, particularly the ability to build as many as 16 one-acre residences in the 2005 Easement area and the 2006 Easement area, plus surrounding structures.

Summary of Tax Court precedent. The Tax Court discussed three prior cases in analyzing this issue, namely, *Belk*, 140 TC 1 (2013), *aff'd*, 774 F.3d 221 (CA-4, 2014), *Balsam Mountain Investments, LLC*, TCM 2015-43, and *Bosque Canyon Ranch, LP*, TCM 2015-130, which was overturned by *BC Ranch II, LP*, 867 F.3d 547 (CA-5, 2017).

Belk: The taxpayer in *Belk* donated a conservation easement over a golf course, which was surrounded by a single-family residential development. The relevant Deed allowed the parties, by mutual agreement, to change the specific property subject to the easement. According to the Deed, land could be removed from the easement, provided that (i) the taxpayer "substituted" a contiguous piece of land that was of equal or larger size, value, and ecological quality, (ii) the land trust approved the substitution, and (iii) the substitution had no negative effect on the conservation purposes of the easement. The Deed did not contain any limitations on when the substitution could occur or how much of the protected land could be affected.

The Tax Court held that the easement was not a QRPI because it was not perpetual in that it contained a so-called substitution clause. The Tax Court arrived at the same conclusion in its response to the Motion for Reconsideration filed by the taxpayer, emphasizing that taxpayers must donate an interest in an "identifiable, specific piece of real property." The Fourth Circuit Court of Appeals, likewise, held against the taxpayer based on the substitution clause and the fact that the relevant tax provision requires a perpetual use restriction on a defined piece of property, rather than on some, any, or interchangeable pieces of property.

Balsam Mountain: In *Balsam Mountain*, the Tax Court indicated that terms of the Deed were similar to those in *Belk*, except that the taxpayer's ability to substitute land was different. The Deed permitted "minor alterations to the boundary" of the property protected by easement, as long as (i) the land trust approved the substitution, (ii) the substitution had no negative effect on the conservation purposes of the easement, (iii) the substitution occurred within five years of the original easement date, and (iv) no more than five percent of the original easement area could be substituted. The Tax Court did not find these distinctions from the Deed in *Belk* decisive. For the same reasons set forth in *Belk*, the Tax Court in *Balsam Mountain* held that the easement was not a QRPI.

Bosque Canyon: The Tax Court indicated that the Deed in *Bosque Canyon* contained terms "very similar" to those in the 2005 Deed, 2006 Deed, and 2007 Deed related to the Partnership. In both situations, the taxpayer donated an easement, reserved a certain portion for development of residential home sites, and had numerous reserved rights. According to the Deed in *Bosque Canyon*, land could be removed from the easement, on the condition that (i) the taxpayer

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[17] *See Conservation Easement Audit Techniques Guide, supra* note 6, at pages 24-30; IRS Publication 1771, *Charitable Contributions—Substantiation and Disclosure Requirements*; IRS Publication 526, *Charitable Contributions*; Section 170(f)(8); Section 170(f)(11); Reg. 1.170A-13; Notice 2006-96; TD 9836.

[18] Section 170(h)(1) and (2).

substituted land, (ii) the size of each home site could not be expanded, (iii) the land trust approved the substitution, and (iv) the substitution had no negative effect on the conservation purposes. Unlike the Deeds in *Belk* and *Balsam Mountain*, the Deed in *Bosque Canyon* did not allow the substitution to change the exterior boundaries of the property under easement.

The Tax Court held consistently with its earlier decisions, in that the ability to substitute property, even within the conservation area and not affecting the exterior boundaries, still means that the property originally under easement could lose its protection. The Tax Court held that the easement in *Bosque Canyon* was not a QRPI because it was not perpetual as a result of the substitution clause. However, upon appeal by the taxpayer, the Fifth Circuit Court of Appeals disagreed with the Tax Court and vacated its decision, holding in favor of the taxpayer. The key for the Fifth Circuit Court of Appeals was that, unlike in *Belk* and *Balsam Mountain*, the substitution clause in *Bosque Canyon* did not permit modification of the exterior boundaries of the easement.

Application of precedent to *Pine Mountain*. The Tax Court in *Pine Mountain*, based on its review of *Belk*, *Balsam Mountain*, and *Bosque Canyon*, presented the following analysis with respect to the Partnership. It began by disregarding the earlier decision by the Fifth Circuit Court of Appeals, which had decided *Bosque Canyon* in favor of the taxpayer, because *Pine Mountain*, if appealed, would be reviewed by the Eleventh Circuit Court of Appeals, not the Fifth Circuit Court of Appeals.[19] The Tax Court then declared that, "[u]pon careful consideration of our precedents and the relevant appellate opinions, we are not persuaded to abandon our earlier view."[20]

The Tax Court went on to borrow a Swiss cheese metaphor, utilized previously by Judge Dennis in his dissent in *Bosque Canyon*. Judge Dennis explained that the entire easement property is a hunk of Swiss cheese, the holes in such cheese represent portions reserved for future development by the taxpayer, and Section 170(h)(2)(C) "bars the [taxpayer] from putting any new holes in the cheese."[21]

The Tax Court explained that the Deed in *Belk* contemplated putting new holes in the cheese and then adding an equal amount of new, previously unprotected land to the conservation area, whereas the Deed in *Bosque Canyon* entailed inserting new holes in the cheese and then plugging the same number of holes elsewhere in the conservation area. The Tax Court indicated that the Deeds for the Partnership were similar to those in *Bosque Canyon*, but reasoned that the conclusion would be the same, even if the Deeds were more akin to those in *Belk*.

> [The Partnership] has achieved the impermissible objective of putting new holes in the cheese, *i.e.*, subjecting to commercial or residential development land that was supposed to be protected in perpetuity from such development... [W]e are unable to discern any meaningful legal distinction between these two paths to the same bottom line. In both scenarios, the developer has retained the right to develop a portion of the conservation area by substituting other property. The only difference among *Belk*, *Bosque Canyon*, and [*Pine Mountain*] is whether the other property lies inside or adjacent to the conservation area. We do not see why it matters where the other property lies. What matters is whether there is a perpetual use restriction on "the real property" covered by the easement at the time the easement is granted. We will accordingly adhere in this case to the approach we embraced in *Belk* and *Bosque Canyon*.[22]

The Tax Court borrowed a Swiss cheese metaphor, utilized previously by Judge Dennis in his dissent in *Bosque Canyon*.

> In any event, the key point under Section 170(h)(2)(C) is that both easements have the same defect. By permitting the homesite parcels to be relocated to other sections of the conservation area, the deed allows the developer to subject to residential development land that was supposed to be protected in perpetuity from any form of development.[23]

The Tax Court, building on its general conclusions described above, reviewed the situation on a year-by-year basis.

With respect to 2005, the Tax Court explained that, in addition to allowing relocation of the Building Areas, the 2005 Deed permits the Partnership to build a number of other structures and facilities in connection with the residential homes. It does not specify where they may be located, the location can change if the Building Areas change, pre-approval by the Land Trust is not necessary for all items, and, together, they have the effect of increasing the residential development well beyond the 10 acres comprising the Building Areas. Applying the Swiss cheese metaphor, the Tax Court explained that the reserved rights in the 2005 Deed allow the Partnership "not only to put new holes in the cheese for the ten residences, but to put 20 acres of extra holes in the cheese for structures appurtenant to these residences."[24] The Tax Court concluded that, because the 2005 Easement is not a QRPI, the Partnership cannot claim the charitable deduction; it got $0 for 2005.

Regarding 2006, the Tax Court explained that it was impossible to define, at the time that the 2006 Easement was granted to the Land Trust, which property would actually be restricted from development forever because the six Building Areas could have been placed anywhere within the conservation area. Consequently, the perpetual restriction on use did not attach from the outset to a single, defined, immutable parcel of property, and this is not changed by the fact that the Land Trust must approve any placement beforehand to ensure that the conservation values are protected.[25] As with the first year, the Tax Court held that the 2006 Easement did not constitute a QRPI, such that the Part-

nership was entitled to a deduction of $0 for 2006.

The 2007 Deed, unlike those for the other two years, did not allow for any Building Areas or structures nearby. This changed the Tax Court's perspective entirely. It held that the 2007 Easement was a QRPI because it "does not permit [the Partnership], under any circumstances, to place any new holes in the cheese."[26]

Second Issue—Are the Easements Solely for Conservation Purposes?

As explained above, a contribution is made for a conservation purpose if it preserves land for outdoor recreation by, or education of, the general public; a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems; open space for the scenic enjoyment of the general public; land pursuant to a federal, state, or local governmental conservation policy; or a historically important land area or a certified historic structure.[27] The IRS argued in *Pine Mountain* that the Partnership should get a tax deduction of $0 each year because the easements were not made "exclusively for conservation purposes."

This turned out to be a non-issue with the Tax Court. The Partnership presented testimony from a biologist with the Land Trust that none of the reserved rights would impair the conservation purposes or prevent them from being protected in perpetuity. The IRS did not present any contrary evidence; therefore, the Tax Court held in favor of the Partnership.

Third Issue—Does Potential Amendment Ruin Perpetual Protection?

The IRS challenged the amendment clauses in the 2005 Deed, 2006 Deed, and 2007 Deed, which were identical. The amendment clauses recognized that, when dealing with perpetuity, circumstances might arise that would justify modification of certain restrictions contained in easements, such that the Partnership and the Land Trust "shall mutually have the right, in their sole discretion, to agree to amendments to this Conservation Easement which are not inconsistent with the Conservation Purposes."[28]

The IRS contended that the amendment clauses would allow the parties to violate the perpetuity requirement, which necessarily means that the Land Trust would "be unfaithful to the charitable purposes on which its exemption rests."[29] This line of reasoning comports with the general guidance that the IRS provides to its personnel in the ATG. It states that "[a]n easement deed will fail the perpetuity requirements . . . if it allows *any amendment or modification* that could adversely affect the perpetual duration of the restriction or conservation purposes."[30]

Citing to various cases in the façade easement and conservation easement arena, the Tax Court stated that it and various Courts of Appeal have rejected similar arguments by the IRS in the past. The Tax Court explained that easements involve a conveyance, which is a form of contract. Normally, parties to a contract can amend it, regardless of whether they explicitly reserve the right to amend in the contract itself. Grounded in the notion of the amendable contracts, the Tax Court explained that the amendment clause in the Deeds should be interpreted as "*a limiting provision*, confining the permissible subset of amendments to those that would not be 'inconsistent with the Conservation Purposes.'"[31] The Tax Court went on to point out how the IRS's extreme position would lead to absurd results; it would "prevent the donor of *any easement* from qualifying for a charitable deduction under Section 170(h) if the easement permitted amendments [and] we find no support for that argument in the statute, the regulations, the decided cases, or the legislative policy under the statute."[32]

Fourth Issue—What Is the 2007 Easement Worth?

As indicated above, the Tax Court determined that the 2005 Easement and the 2006 Easement did not involve QRPIs, such that the Partnership should get a charitable deduction of $0 for each. It was unnecessary, therefore, for the Tax Court to address valuation issues for 2005 and 2006. It focused only on the 2007 Easement in this regard, devoting an entire separate Opinion to this one issue.[33]

Preliminary comments about valuation. The Tax Court started with four comments that hinted at a low valuation. First, it said that the Partnership was seeking a total charitable deduction, as determined by the valuation expert used at trial, of approximately $97 million for restrictions on property for which the Partnership only paid around $24 million. Second, the Tax Court noted that the three easements, combined, protected less than 21 percent of the total Property, thereby leaving about 79 percent for future development by the Partnership or its successors. Third, the Tax Court explained that the limited partners paid $45 million for their 50 percent interest in the Partnership, they would get a total tax deduction of about $48.7 million if the Tax Court were to accept the figures suggested by the Partnership, and they would still own a 50 percent interest in the unprotected portion of the Property, which could later be used for profitable development. Fourth, the Tax Court commented on the rapid appreciation in value, stating that "[b]ecause the easements were placed on the various parcels within two years of their acquisition, [the Partnership's] valuations

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[19] Golsen, 54 TC 742 (1970) (holding that the Tax Court must follow the precedent of the Court of Appeals to which a case would be elevated for further review).

[20] Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), page 41.

[21] *Id.* at page 42.

[22] *Id.* at pages 42-44.

[23] *Id.* at note 6.

[24] *Id.* at page 48.

[25] *Id.* at page 45.

[26] *Id.* at page 52.

[27] Section 170(h)(4)(A); Reg. 170A–14(d)(1); S. Rept. 96–1007, at 10 (1980).

[28] Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), page 54.

[29] *Id.* at pages 54-55.

[30] *Conservation Easement Audit Techniques Guide, supra* note 6, at page 13 (emphasis added).

[31] Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), page 56 (emphasis in original)

[32] *Id.* at pages 56-57 (emphasis added).

[33] Pine Mountain Preserve, LLLP, TCM 2018-214.

presuppose a large increase in value over a very short time."[34]

These initial observations notwithstanding, the Tax Court ultimately determined that the Partnership was entitled to a deduction, for 2007 only, even larger than the one that it had originally claimed.

Overview of valuation rules and regulations. Generally, a deduction for a charitable contribution is allowed in the year in which it occurs.[35] If the contribution consists of something other than money, then the amount of the deduction normally is the FMV of the property at the time the taxpayer makes the donation.[36] 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.[37]

Reg. 1.170A-14(h)(3) ("Easement-Valuation-Methods Regulation") provides special rules for calculating a deduction stemming from the donation of a conservation easement. The relevant portion of the Easement-Valuation-Methods Regulation, broken down to enhance readability and to conform to the Tax Court's analysis in *Pine Mountain*, is set forth below:[38]

> [Sentence 1] The value of the contribution under Section 170 in the case of a charitable contribution of a perpetual conservation restriction is the [FMV] of the perpetual conservation restriction at the time of the contribution.
>
> [Sentence 2] If there is a substantial record of sales of easements comparable to the donated easement (such as purchases pursuant to a governmental program), the [FMV] of the donated easement is based on the sales prices of such comparable easements.
>
> [Sentence 3] If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the [FMV] of a perpetual conservation restriction is equal to the difference between the [FMV] of the property it encumbers *before* the granting of the restriction and the [FMV] of the encumbered property *after* the granting of the restriction.
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> [Sentence 4] The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor and the donor's family (as defined in Section 267(c)(4)) is the difference between the [FMV] of the entire contiguous parcel of property before and after the granting of the restriction.
>
> [Sentence 5] If the granting of a perpetual conservation restriction . . . has the effect of increasing the value of any other property owned by the donor or a related person, the amount of the deduction for the conservation contribution shall be reduced by the amount of the increase in the value of the other property, whether or not such property is contiguous.

Because neither the Partnership nor the IRS presented an appraisal that comported with the regulation, the Tax Court pointed out that it could, and would, take valuation matters into its own hands.

The IRS explains that the best evidence of FMV of an easement is the sale price of easements comparable to the easement in question, but, "in most instances, there are no comparable easement sales."[39] Appraisers, therefore, often must use the before-and-after method. This effectively means that an appraiser must determine the highest and best use ("HBU") *and* the corresponding FMV of the relevant property twice: (i) first, without regard to the easement, which generates the before value, and (ii) again, taking into account the restrictions on the property imposed by the easement, which creates the after value.[40]

A property's HBU is the highest and most profitable use for which it is adaptable and needed, or likely to be needed, in the reasonably near future.[41] The term HBU has also been defined as the reasonably probable use of vacant land or improved property that is physically possible, legally permissible, financially feasible, and maximally productive.[42] Importantly, valuation does not depend on whether the owner has actually put the property to its HBU.[43] The HBU can be any realistic, objective potential use of the property.[44]

The Easement-Valuation-Methods Regulation provides additional guidance in situations where the appraiser uses the before-and-after method, described in Sentence 3, above. It states the following:[45]

> If before and after valuation is used, the [FMV] of the property before contribution of the conservation restriction must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use . . . .
>
> In the case of a conservation restriction that allows for any development, however limited, on the property to be protected, the [FMV] of the property after contribution of the restriction must take into account the effect of the development.

Application of rules by Tax Court. The Tax Court determined that neither the Partnership's expert nor the IRS's expert used a method accepted by the Easement-Valuation-Methods Regulation, as follows.[46]

Sentence 1 simply contains the general rule and was not part of the analysis.

The Tax Court held that the IRS's expert violated Sentence 2 of the Easement-Valuation-Methods Regulation because he compared the Property to the wrong type of property in performing his sales-comparison analysis. Sentence 2 dictates that, if a substantial record of sales of easements comparable to the

donated easement exists, then the FMV is based on the sales price of such comparable easements. The Tax Court pointed out that, because the Property had development potential, the sales of rural land with little development potential on which the IRS's expert relied were not comparable.[47]

The Partnership's expert did not escape criticism either. The Tax Court indicated that he violated Sentence 3 of the Easement-Valuation-Methods Regulation, which says that, if there is no substantial record of market-place sales, then "as a general rule (but not necessarily in all cases)" the FMV of a conservation easement is determined using the before-and-after method. The Tax Court underscored that Sentence 3 only contains the general rule, and the situation in *Pine Mountain* justified a departure because the before-and-after method, as applied by the Partnership's expert, resulted in an overestimate of the value of the 2007 Easement.[48]

The Tax Court next turned to Sentence 4 of the Easement-Valuation-Methods Regulation, which says that an easement covering a portion of the contiguous property that is owned by the taxpayer or a related party is the difference between the FMV of the entire contiguous property before and after the granting of the easement. The Tax Court explained that Sentence 4 obligates an appraiser to take into account the beneficial effects of an easement on unrestricted contiguous property. The Partnership's expert assumed that the easements contributed by the Partnership did not have any effect on the value of the portions of the property not restricted by an easement. However, the Tax Court pointed out that the 2007 Easement had "positive external effects" on the contiguous property, which the Partnership's expert failed to properly consider.[49]

Finally, the Tax Court explained that Sentence 5 of the Easement-Valuation-Methods Regulation was not relevant because the method described there applies only when the unprotected property is not contiguous, which was not the case with the 2007 Easement.[50]

Splitting the baby. Because neither the Partnership nor the IRS presented an appraisal that comported with the Easement-Valuation-Methods Regulation, the Tax Court pointed out that it could, and would, take valuation matters into its own hands:

> In summary both [the Partnership] and the IRS favor valuation opinions that are based on methods that do not meet the requirements of the [Easement-Valuation-Methods Regulation]. Now consider the legal significance of this. In a case of unilateral noncompliance, where one party's proffered method complies with the regulation but the other's does not, it might be appropriate, or even mandatory, for a court to adopt the opinion of the expert whose method complies with the regulation. In this case, however, neither expert's methods complies. Nothing in the [Easement-Valuation-Methods Regulation] counsels one expert's method over the other in this case of bilateral noncompliance.... Because the [Easement-Valuation-Methods Regulation] does not require us to accept one expert's conclusion over the other's, this case is like any other case in which experts offer competing estimates of fair market value. The Court decides what weight to give those estimates by, among other things, examining the factors they considered in reaching their conclusions. The Court is not bound by the opinion of any expert witness, and it may accept or reject expert testimony in the exercise of its sound judgment. The Court may selectively use a portion of the opinion of an expert. The Court may also reach a decision as to the value of property that is based on its own examination of the evidence in the record.[51]

The Tax Court ultimately decided to give equal weight to the improper values proposed by the Partnership's expert and the IRS's expert. In other words, the Tax Court opted to "split the baby." This rendered the following value for the 2007 Easement: (i) 50 percent of the value by the Partnership's expert of $9,110,000, (ii) plus 50 percent of the valuation by the IRS's expert of $449,000, (iii) equals $4,779,500.

Interesting and Obscure Issues from Tax Court Case

Pine Mountain, like most cases, is full of interesting aspects, most of which are missed by those who limit themselves to reading quick summaries published by electronic tax news services, blogs, spin pieces by special interest groups, and superficial articles. Identified below are some of the overlooked issues.

Acceptance of HBU Without Zoning

The regulations under Section 170 provide that the FMV of the property before granting of the easement must take into account not only the current use of the property, but also an objective assessment of how immediate or remote the likelihood is that the property, absent the easement, would be developed.[52] The regulations also provide that the FMV must consider "any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use."[53] In other words, in determining the FMV before the granting of the conservation easement, taxpayers must consider all existing local, state, and federal restrictions on development and use of the pertinent property.

Interestingly, in *Pine Mountain*, the Tax Court accepted the opinion of the

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[34] Pine Mountain Preserve, LLLP, 151 TC No. 14 (2018), page 57.
[35] Section 170(a)(1).
[36] Section 170(a)(1); Reg. 1.170A-1(c)(1).
[37] Reg. 1.170A-1(c)(2).
[38] Reg. 1.170A-14(h)(3)(i).
[39] *Conservation Easement Audit Techniques Guide, supra* note 6, at page 41.
[40] *Id.* at page 41; Stanley Works & Subs., 87 TC 389, 400 (1986); Reg. 1.170A–14(h)(3)(i) and (ii).
[41] Olson v. United States, 292 U.S. 246, 255 (1934).
[42] Esgar Corp., 744 F.3d 648, 659 n.10 (CA-10, 2014).
[43] *Id.* at page 657.
[44] Symington, 87 TC 892, 896 (1986).
[45] Reg. 1.170A-14(h)(3)(ii).
[46] Pine Mountain Preserve, LLLP, TCM 2018-214, page 16.
[47] *Id.* at page 21.
[48] *Id.* at page 23.
[49] *Id.* at pages 25-27.
[50] *Id.* at pages 27-28.
[51] *Id.* at pages 28-29 (internal citations omitted).
[52] Reg. 1.170A–14(h)(3)(ii).
[53] *Id.*

Partnership's expert and other witnesses that the HBU of the Property was residential development, even though zoning for such development was not in place when the Partnership donated the 2005 Easement and the 2006 Easement; it was not granted until early 2007.

The IRS contended that it would have been unreasonable to assume, at the time that the three easements were granted, that the Property would be developed. The IRS first observed that when the Partnership donated the 2005 Easement and the 2006 Easement, zoning regulations in effect prohibited development of the Property; it was considered agricultural land.[54]

Next, with respect to the 2007 Easement, the IRS argued that development could only have occurred if the Property were in the hands of the Individuals, because of their proven experience in developing real estate. The IRS pointed out, however, that the regulations and caselaw indicate that, in valuing the 2007 Easement using the before-and-after method, an appraiser must assume that the Property is held by hypothetical persons, not the Individuals.[55]

The Tax Court rejected the positions advanced by the IRS for the following reasons:

> Although the [Property] was *not* zoned for development by the town of Westover until April 2007, [the Individuals] and the mayor of Westover convincingly testified that they reasonably assumed early in the process of negotiating the annexation of the [Property] that [it] would eventually be zoned for development.
>
> Despite [the Individuals'] significant personal role in getting the land zoned for residential development, a third party could also have accomplished this. The [Property] was between the city of Chelsea and the town of Westover. These two municipalities had an incentive to compete with each other for development. Even without [the Individuals'] personal influence, one of these municipalities would have been convinced to annex the [Property] and allow it to be developed. Thus, it was reasonably probable that the [Property] would eventually be zoned for development.[56]

The Tax Court and the Court of Appeals agreed on one issue, and diverged on two.

No Hindsight Allowed

The regulations generally provide that, in the case of a charitable donation of property other than money, the amount of the contribution is the FMV "at the time of the contribution."[57] Of course, in disputes before the Tax Court, both the IRS and taxpayers often attempt to introduce evidence of valuation in later years, using hindsight, depending on whether the market has declined or improved.

The Tax Court in *Pine Mountain* was having none of that, explaining that the easement values claimed by the Partnership should not change because of the precipitous fall in the real estate market in Alabama after the Partnership donated the easements or the fact that the Property was never actually developed.

> The question of whether there was a reasonable probability the property would be developed is resolved according to the circumstances existing as of the dates of valuation, which are the dates the easements were donated . . . . [The Partnership] kept buying land during each of the three years in which the easements were donated. The last of the 10 parcels of the [Property] was bought in the year 2007. The continual buying of property showed that the [Individuals] still thought that the [Property] would be developed. Two sales of partnership interests [in the Partnership] suggested that outside investors also thought that the [Property] would be developed. The basic facts affecting the prospects of developing the [Property]—the access from the property to highways, the likelihood that one of the municipalities would approve a real-estate subdivision, and the changing state of the real-estate market—are facts that would be known to third parties or could easily be learned by third parties. These considerations lead us to believe that when the 2007 easement was granted, the [Property] could be sold to a third-party buyer and the buyer would have paid a relatively high price that corresponded to the development potential of the [Property].[58]

Acknowledgement of Possible Diamond in the Rough

A common tactic of the IRS in conservation easement cases is to try to drive down the value by focusing the Tax Court's attention on items that have little to do with the true issue, such as the tax-assessment value of the property or the original price paid for the property by the Partnership. The IRS pointed toward the latter in *Pine Mountain*, but the Tax Court rejected the notion that the Property could not be the proverbial diamond in the rough.

> The IRS also attacks [the Partnership's expert] valuations of the [Property] before the easements because he did not consider the relatively low actual prices [that the Partnership] paid for the property. We are not persuaded that the . . . method was flawed for this reason. [The Partnership's expert] opined that the value of the [Property] was much higher than its purchase price because he thought that when the easements were granted, it was reasonably probable that the land could be developed. We agree with this assumption. The purchase price of the [Property] did not reflect the value of the land as a commercial and residential subdivision. This is because the land was assembled parcel by parcel. The low price for each parcel did not reflect, for example, that the fully assembled property would have access to the highway system. This access was necessary for the fully assembled property to be developed into a subdivision.[59]

The IRS Did Not Assert Penalties

In a normal conservation easement case, where the IRS issues an FPAA arguing that a taxpayer is entitled to a deduction of $0 based first on "technical" arguments, and then on valuation issues, the IRS ordinarily proposes a long list of alternative penalties, ranging in severity. These penalties often include negligence

or disregard of rules and regulations, substantial understatement of income tax, substantial valuation misstatement, gross valuation misstatement, or reportable transaction understatement penalty.[60] Indeed, one of the "audit tips" provided to IRS personnel in the ATG is that an FPAA "will generally include a tiering of proposed penalties with multiple alternative positions."[61]

Some penalties can be avoided if the partnership can demonstrate that there was "reasonable cause" for the violation.[62] Others will not be asserted if the value was based on a qualified appraisal by a qualified appraiser, and the taxpayer made a good faith investigation of the value of the property.[63] Finally, certain penalties, like the one for making a gross valuation misstatement, cannot be overcome by evidence of "reasonable cause." It is mathematical in nature; that is, if the value of the easement/deduction originally claimed by the taxpayer on the Form 1065 (and enclosed Form 8283) exceeds the value ultimately determined by the Tax Court by a certain percentage, then the penalty applies, period.[64]

Given the IRS's position in *Pine Mountain* that the 2005 Easement, the 2006 Easement, and the 2007 Easement were each worth $0, and given that this position was based on both "technical" violations of the requirements under Section 170 and supposed deficiencies with the appraisals, it is interesting that the IRS did not assert its normal litany of penalties. Of course, *Pine Mountain* is an old case, with the first donation occurring 15 years ago, and the IRS issuing the FPAA over seven years ago, long before the IRS implemented its current "compliance campaign" aimed at "syndicated conservation easement transactions."[65]

Analysis by the Court of Appeals—Round Two

The Tax Court issued its Opinion in *Pine Mountain* in December 2018, while the Court of Appeals released its Decision nearly two years later, in November 2020. The courts agreed on one issue, and diverged on two, as discussed below.

Granted-In-Perpetuity/QRPI Issue

The Court of Appeals held in favor of the Partnership with respect to whether the conservation easement donations constituted QRPIs (*i.e.*, whether they were "granted in perpetuity" pursuant to Section 170(h)(2)(C)). In doing so, it criticized the IRS's legal position in several manners.

First, the Court of Appeals explained that "[a] broad limitation on the use of the property that applies to the parcel as a whole satisfies the statutory test, even if within the parcel there exist certain narrow exceptions to that limitation."[66]

Next, the Court of Appeals summarized the IRS's position as follows: "[E]very inch of land must be subject to the restriction in perpetuity . . . even a limited reservation of developmental rights violates the granted-in-perpetuity requirement."[67] It indicated that the IRS misunderstands both the plain language of Section 170(h)(2)(C) (establishing the granted-in-perpetuity or QRPI requirement) and the common law origin of the term "perpetuity." The Court of Appeals pointed out that Section 170(h)(2)(C) refers to "a" restriction, singular, on the potential uses of the relevant property. It also emphasized that the term "perpetuity," as defined by common law, means that the Partnership, its heirs and/or assigns remain indefinitely subject to the easements because nothing in the Deeds causes them, automatically or upon certain events occurring, to revert to the Partnership or its successors.[68] In addition, the Court of Appeals announced that the term "perpetuity" in the easement context does not mean "inalienability, unreleasability, or unamendability."[69]

The Court of Appeals also explained that, at the core, the IRS and Tax Court questioned the quality, substance, or merits of the three easements donated by the Partnership. These types of challenges, concluded the Court of Appeals, implicate the protected-in-perpetuity issue under Section 170(h)(5)(A), not the granted-in-perpetuity or QRPI issue under Section 170(h)(2)(C).[70]

The Court of Appeals went on to reason that the legal precedent on which the Tax Court primarily relied, *Belk*, was inapplicable because the Deed in that earlier case allowed the landowner to substitute/switch/swap conserved land and unrestricted land. By contrast, the 2005 Deed and 2006 Deed in *Pine Mountain* only allowed "Building Areas" to be moved around within the fixed boundaries of the 2005 Easement and 2006 Easement.[71]

Ultimately, the Court of Appeals rendered a statutory interpretation favorable to the Partnerships, as well as to many other easement donors under attack by the IRS:

> In brief, we hold that [Section] 170(h)(2)(C) means just what it says it means—that to qualify for a deduction, a conservation easement must grant "a restriction" (meaning at least one) on the use to which the subject property can be put, and must do so "in perpetuity," as that term has been traditionally used and understood in common-law practice. An easement granted in perpetuity over a defined conservation area clears [Section] 170(h)(2)(C)'s relatively low threshold, even if it reserves targeted development rights for homesite construction. Based on these metrics, the 2005, 2006, and 2007 easements all qualify.[72]

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[54] Pine Mountain Preserve, LLLP, TCM 2018-214, pages 18-20.
[55] *Id.* at pages 18-20.
[56] *Id.* at pages 18-19 (internal citations omitted).
[57] Reg. 1.170A-1(c)(1).
[58] Pine Mountain Preserve, LLLP, TCM 2018-214, pages 20-21.
[59] Pine Mountain Preserve, LLLP, TCM 2018-214, note 11.
[60] Section 6662; Section 6662A.
[61] *Conservation Easement Audit Techniques Guide*, *supra* note 6, at page 77.
[62] Section 6664(c)(1); Section 6664(d)(1); Reg. 1.6664-4.
[63] Section 6664(c)(3); Reg. 1.6664-4.
[64] Section 6664(c)(3); Reg. 1.6664-4.
[65] IR-2019-182, "IRS Increases Enforcement Action on Syndicated Conservation Easements," Nov. 12, 2019; IR-2019-213, "IRS Continues Enforcement Efforts in Conservation Easement Cases Following Latest Tax Court Decision," Dec. 20, 2019; Richman, "Multiple Divisions Coming for Syndicated Conservation Easements," 2019 Tax Notes Today 220-3 (Nov. 13, 2019); William Hoffman, "Conservation Easement Crackdown a Portent, Rettig Says," 2019 Tax Notes Today 221-9 (Nov. 14, 2019); Kristen A. Parillo, "IRS Is Building Up Its Easement Toolbox," 2019 Tax Notes Today 222-6 (Nov. 15, 2019).
[66] Pine Mountain Preserve, LLLP, 126 AFTR2d 2020-___ (CA-11, 2020), slip op. at page 12.
[67] *Id.* at page 12.
[68] *Id.* at pages 12-13.
[69] *Id.* at pages 19.
[70] *Id.* at pages 13.
[71] *Id.* at pages 15-17.
[72] *Id.* at pages 17-18.

Protected-in-Perpetuity/Amendment Clause Issues

The IRS argued that the amendment clauses in the Deeds granted by the Partnership give so much discretion to the parties that it causes the easements to violate the protected-in-perpetuity requirement under Section 170(h)(5)(A). The Court of Appeals rejected this argument.

It began by explaining that parties to any bilateral contract can always agree to amend the contract after the fact, regardless of whether they expressly reserve that right in the contract. Indeed, emphasized the Court of Appeals, "[i]f the possibility of amendment were a deal-killer, then there could be no such thing as a tax-deductible conservation easement."[73] The Court of Appeals fortified its analysis by explaining that it is "hornbook contract law" that contracting parties are free to later amend, and further that the Uniform Conservation Easement Act envisions possible bilateral amendments.[74]

The Court of Appeals featured another taxpayer-favorable ruling about the protected-in-perpetuity issue in a footnote. It rejected the IRS's argument that an amendment clause, alone, should render a conservation easement invalid because of the risk "the parties will agree to amendments that undermine the conservation purposes of the entire grant." The Court of Appeals characterized such risk as "so remote as to be negligible."[75]

Although absent from the analysis by the Court of Appeals, there have been at least two prior cases in which the relevant Deeds were actually amended by the parties after the fact, but this was neither challenged by the IRS nor addressed *sua sponte* by the Tax Court.[76] Moreover, the IRS recently published guidance conceding that an amendment clause is not always problematic in the conservation easement context. It acknowledged that "[t]he fact that a conservation easement includes an amendment clause does not necessarily cause the easement to fail to satisfy the requirements of Section 170(h)."[77]

The Court of Appeals said it was obvious that the Tax Court simply "split the baby" when it came to valuing the easement, without following one of the specific standards set forth in the regulation.

Value of 2007 Easement

The Court of Appeals said it was obvious that the Tax Court simply "split the baby" when it came to valuing the 2007 Easement. The Court of Appeals acknowledged that valuation is a difficult issue and then mandated that the Tax Court try again, applying a "discernible methodology that is appropriately tied" to the Easement-Valuation-Methods Regulation.[78]

Back to the Tax Court—Round Three

Based on the decision by the Court of Appeals, the case will now be "remanded" (*i.e.*, sent back) to the Tax Court for round three in this multi-year legal battle. The Tax Court will need to address the following issues.

First, the Tax Court must determine whether the conservation purposes in 2005 and 2006 were not only "granted in perpetuity," as required by Section 170(h)(2)(C), but also "protected in perpetuity," as mandated by Section 170(h)(5)(A). These phrases vary by just one word, but they have different meanings and apply different criteria. The Court of Appeals held that the Partnership satisfied the former, while instructing the Tax Court to determine the latter. The Court of Appeals warned that the Tax Court must wrangle with the thornier issue, stating that whether a particular easement is "protected in perpetuity" is "likely where Congress envisioned the heavy lifting—the more rigorous analysis of the degree to which the grant protects conservation purposes—should occur."[79]

Second, if the Tax Court concludes that the 2005 Easement and 2006 Easement are "protected in perpetuity," then it will need to determine each of their values, in accordance with the methodologies set forth in the Easement-Valuation-Methods Regulation.

Third, regardless of what happens with 2005 and 2006, the Tax Court is obligated to ascertain the value of the 2007 Easement, using the Easement-Valuation-Methods Regulation, instead of "splitting the baby," as it originally did.

Conclusion

The recent decision by the Court of Appeals in *Pine Mountain* is positive for taxpayers donating conservation easements in several manners. It establishes a very low standard for meeting the granted-in-perpetuity requirement under Section 170(h)(2)(C). Moreover, it confirms that the existence of an amendment clause in a Deed does not cause an easement to fail the protected-in-perpetuity mandate under Section 170(h)(5)(A). It also clarifies that the Tax Court must adhere to the Easement-Valuation-Methods Regulation in calculating the value of a conservation easement, which contemplates the before-and-after method, as well as the importance of a property's HBU. Finally, it contains favorable comments about land trusts and their mission, which should help taxpayers in defending against the "deemed consent" argument often raised by the IRS.[80] The Court of Appeals recognized, for instance, that the Land Trust "is a sophisticated land-conservation organization [that] is well positioned and equipped to look after conservation interests," and "would be quite unlikely to agree to amendments that would clearly violate a grant's conservation purposes."[81] The easement community, as well as the IRS, will be watching as the case begins round three in the Tax Court.

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[73] *Id.* at page 20.
[74] *Id.* at pages 20-21.
[75] *Id.* at page note 6 (citing to Reg. 1.170A-14(g)(3)).
[76] Strasburg, TCM 2000-94; Butler, TCM 2012-72.
[77] Chief Counsel Memorandum AM-2020-0001, March 17, 2020.
[78] Pine Mountain Preserve, LLLP, 126 AFTR2d 2020-___ (CA-11, 2020), slip op. at pages 20-21.
[79] *Id.* at note 4.
[80] *See, e.g.*, Hoffmann Properties II, L.P., Docket No. 14130-15 (July 12, 2017).
[81] Pine Mountain Preserve, LLLP, 126 AFTR2d 2020-___ (CA-11, 2020), slip op. at notes 4 and 6.