

Land Trusts Want More Answers on IRS's Easement Safe Harbors

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By Kristen A. Parillo

The land trust community is worried that the short deadline and limited guidance provided in the IRS's conservation easement safe harbor notice will leave many taxpayers unable to take advantage of the correction opportunity.

"Congress passed a provision that was supposed to be helpful for charitable donors, and while some of them may be able to take advantage of it, for many it will simply not be feasible," said Stephen J. Small of the Law Office of Stephen J. Small Esq. PC.

Small, who helped draft the [section 170\(h\)](#) regulations governing the deductibility of conservation easement donations when he worked in the IRS Office of Chief Counsel, was one of several observers who spoke with *Tax Notes* about questions left unanswered by [Notice 2023-30](#), 2023-17 IRB 1. The notice, released April 10, [provides safe harbor](#) deed language for judicial extinguishment and boundary line adjustment clauses and outlines the process donors may use to make conforming changes to eligible easement deeds.

The guidance was required by conservation easement legislation included as a pay-for in a retirement package enacted in late December 2022 as part of the Consolidated Appropriations Act, 2023 ([P.L. 117-328](#)). In addition to disallowing [section 170\(h\)](#) charitable contribution deductions for abusive syndicated conservation easement transactions, the new law directed Treasury to publish safe harbor deed language for extinguishment and boundary line adjustment clauses within 120 days of enactment — by April 28 — and to provide a 90-day period for donors with eligible easement deeds to conform their deed language to the safe harbor guidance.

Conservation easement deeds that contain judicial extinguishment clauses excluding the value of donor improvements from the proceeds allocation formula, or that include provisions giving donors the right to later adjust boundary lines, had been used by the land conservation community in good faith and unchallenged by the IRS for decades.

"This is not to say that all of these documents were wrong from the outset," Small said. "It is to say that often there was no real notice from the IRS to the conservation easement community that people were doing things wrong until court cases came down that held these provisions invalid."

Some critics claimed that the IRS was focusing on technical language issues in order to deny syndicated easement deductions rather than engaging in the costlier and more time-consuming task of arguing overvaluation. "In any case, the result is that there are many recorded easements across the country in need of fixing," Small said.

The legal uncertainty and flood of litigation contesting the IRS's positions prompted lawmakers and others to [call on the IRS](#) to publish model conservation easement deed language that would comply with [section 170\(h\)](#) and related regulations.

Small said that because the easement legislation was added at the last minute to the omnibus bill, the land trust community and easement tax attorneys had many questions about how they should tackle the safe harbors and the correction process.

"Instead of trying to figure it all out, we figured we should wait and see what the IRS guidance says when it gets published," Small said, adding that Notice 2023-30 "has given us about 20 percent of the answers, I would say."

The notice's safe harbor language for judicial extinguishment clauses closely tracks that of the so-called proceeds regulation (reg. [section 1.170A-14\(g\)\(6\)\(ii\)](#)), which states that a donor must guarantee that a donee will receive its proportionate share of proceeds if an easement is judicially extinguished and the property sold.

The boundary line adjustment safe harbor states: "Donor and Donee agree that boundary line adjustments to the real property subject to the restrictions may be made only pursuant to a judicial proceeding to resolve a bona fide dispute regarding a boundary line's location."

Extinguishment Safe Harbor

According to Diana Norris of the Land Trust Alliance, the extinguishment safe harbor is unsurprising. "It's consistent with the IRS's litigating position that the proceeds regulation doesn't permit subtraction of the value of post-easement improvements made by the donor," she said.

But Norris said there is some uncertainty over how the safe harbor interacts with the Eleventh Circuit's opinion in *Hewitt v. Commissioner*, [21 F.4th 1336](#) (11th Cir. 2021), which held that the IRS's interpretation of reg. [section 1.170A-14\(g\)\(6\)\(ii\)](#) was arbitrary and capricious and therefore invalid under the Administrative Procedure Act's procedural requirements. "What should taxpayers with deeds in the Eleventh Circuit do when the court says one thing and the IRS says another?" she asked.

Timothy Lindstrom, a conservation easement tax attorney, said that if he were an easement donor in the Eleventh Circuit with a proceeds clause that excluded donor improvements, "I would take advantage of the safe harbor."

Small agreed, saying, "If it's the IRS's position, don't challenge that in your documents. An audit is an awful experience."

Nancy McLaughlin of the University of Utah S.J. Quinney College of Law views the safe harbor as a positive development.

"From now on, most conservation easement donors will include the safe harbor judicial extinguishment clause in their easement deeds to avoid possible challenges," McLaughlin said. "That

means that deductible easements, which the public is heavily subsidizing, should be extinguishable only in a judicial proceeding and only if continued use of the subject property for conservation purposes has become impossible or impractical.”

By standardizing the extinguishment clause, it hopefully will be clear that the two parties with a financial interest — the current landowner and the easement holder — can’t simply agree to extinguish a conservation easement, McLaughlin said. “Rather, they will have to prove to the satisfaction of a court that continuing to protect the conservation values of the property has become impossible or impractical.”

The safe harbor language will also ensure that, in the rare event of a judicial extinguishment, there will be no loss in conservation assets that benefit the public, McLaughlin added. “The holder will receive a share of proceeds and will be required to use those proceeds to accomplish similar conservation purposes elsewhere.”

Boundary Line Safe Harbor

The IRS’s reasoning for the boundary line adjustment safe harbor may be murkier to decipher.

The provision is very restrictive and will reduce some of the existing flexibility that donors and donees have, Norris said. The possible legal wrinkle from another Eleventh Circuit opinion — *Pine Mountain Preserve LLLP v. Commissioner*, [978 F.3d 1200](#) (11th Cir. 2020) — is another open question, she said. The court in *Pine Mountain* rejected the IRS’s position that a donor’s retained right to move building areas within the fixed boundaries of the restricted property violated the granted-in-perpetuity requirement.

“My understanding is that what the IRS is getting at with the boundary line adjustment safe harbor is that people have been abusing the ability to make boundary line adjustments,” Small said. “They’ve been taking land out from under easements and doing swaps that *Belk* said you couldn’t do,” he said, referring to *Belk v. Commissioner*, [774 F.3d 221](#) (4th Cir. 2014).

Small believes that the IRS’s position is that the only permissible boundary line adjustments are for correcting errors in the deed description or in what the parties thought were the correct title or boundary lines of the property. “But the safe harbor guidance doesn’t say that at all — it doesn’t come close to that,” he said. “From reading the boundary line adjustment language, it’s not clear what the IRS is trying to accomplish.”

Lindstrom said the IRS “fumbled the ball” in drafting the boundary line adjustment safe harbor.

“The regulations require only that the restrictions imposed on the real property be in perpetuity, not that the underlying property boundaries must be fixed in perpetuity,” Lindstrom said. “Also, the Tax Court rulings have all dealt with what the court considered — rightly or wrongly — to be changes in the boundaries of the easement.”

"There are a great many easements — many written by me — that provide for adjustments to the boundaries of the underlying property, but only if the boundaries of the easement do not change," Lindstrom continued. "The safe harbor text should have addressed adjustments of the boundaries of the easement, not the underlying property."

"This may be a case where the cure is far worse than the ailment," Lindstrom added.

Time Crunch

The 90-day window to get eligible deeds amended, signed by donors and donees, and recorded is another major concern, according to Norris. "This is a really tight turnaround, even for simple situations," she said. "But if government agencies are parties to the easement, it could be impossible to get this done by the deadline."

Small agreed that the 90-day period could be challenging because the process for amending and recording deeds varies by state. The Massachusetts process is among the most time-intensive, he said, noting that state law requires that all conservation easements be reviewed by the Executive Office of Energy and Environmental Affairs and approved by the Secretary of Energy and Environmental Affairs before they can be recorded.

"We know that, historically, we have had to build in extra time in the Massachusetts process," Small said. But the Executive Office of Energy and Environmental Affairs "has indicated they're terribly backlogged and aren't sure they have the personnel to be able to handle this within the 90-day period."

Some states may require a review by their attorney general, Small said, adding that "I also know that government agencies at all levels have a very difficult time deviating from their template for conservation easements."

Another hurdle to meeting the deadline could arise if a donor is dead or has sold the property to someone else, Small said. "Who has the authority to sign the amended deed, and what if the current property owner doesn't want to but the grantor does?"

There will likely also be grantors and grantees in many situations who either won't learn about the IRS's correction opportunity or will hear about it when it's too late to meet the deadline, Small said. "This is particularly so if a government agency, at any level, is the easement holder but is really out of the mainstream loop. This isn't an IRS problem, but it is a very real problem."

Duty to Review?

For organizations that hold conservation easements, perhaps the most difficult question is whether they have any legal obligation to review every easement donation recorded in the last decade, Small said.

"And what is their obligation to donors if they find something arguably defective?" Small asked. "There are staffing and capacity issues, very personal donor issues — like the ability to use up the deduction and statute of limitations issues — Form 990 reporting issues, and on and on."

A possible solution would be for the IRS to offer some kind administrative relief, Small said. "If a tax return is not audited by 18-24 months after it was filed, anecdotally the chance of an audit at that point is unlikely," he said. "I see no reason why the IRS can't say, as a matter of administrative convenience for all parties — the IRS, easement holders, and grantors — something like: 'Any easement that was recorded prior to December 31, 2019, does not need to be reviewed for compliance with the safe harbor notice.'"

Small said the relief could further state: "If an easement was recorded prior to that date and is subsequently subject to audit, and it meets all the other requirements of [section 170\(h\)](#) but the provisions of that easement do not meet the requirements of Notice 2023-30, the taxpayer will be given the opportunity to amend the easement to comply with the provisions of Notice 2023-30. And solely for purposes of the examination, the amendment will be treated as effective as of the original date of recording the easement."

Consistent with the restrictions imposed by the new easement law, the administrative relief wouldn't apply to any syndicated easement transactions, Small said.