June 17, 2020

VIA ELECTRONIC SUBMISSION

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2020-47)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Public Comment, IRS Notice 2020-47

To Whom It May Concern:

The Partnership for Conservation (“P4C”) appreciates the opportunity to provide input to the 2020-2021 Priority Guidance Plan. As discussed further below, we request that the Department of Treasury and the IRS prioritize guidance related to compliance with the rules for conservation easement donations under IRC sec. 170(h). Specifically, the IRS should issue sample conservation easement grant deed language on which taxpayers can rely. The IRS should work with interested tax practitioners in developing this sample language.

P4C is a diverse, national coalition of stakeholders in more than 40 states representing the entire conservation easement ecosystem, including land trusts, landowners and others involved in conservation. P4C believes that conservation should be available to all Americans so we can better protect our most precious land resources for generations to come. P4C’s missions is to ensure the long-term availability and integrity of conservation easement donations for all Americans, make certain that decision makers and the public are well-informed on the importance of conservation easements and the related federal tax incentives, and to ensure open and unbiased coordination among stakeholders to maximize conservation for all generations.

In a typical donation of a conservation easement to a land trust or other qualifying recipient, the donors are advised by competent tax practitioners who have significant conservation easement experience. The donors follow the applicable rules as those rules are interpreted by the IRS and understood by practitioners and the broader land conservation community. Unfortunately for taxpayers, the IRS during audit will often challenge deductions for conservation easement donations by asserting that the language in the conservation easement grant deed is deficient in some minor technical respect.

Donors have no particular stake in the specific conservation easement grant wording they use. The donors’ goal is to preserve land for future generations and obtain the tax benefits Congress provided to incentivize conservation easement donations. Donors often use template grant deeds that have been developed by tax practitioners or the Land Trust Alliance. Donors would be
amenable to reforming grant deed language to conform to IRS guidance – particularly language dealing with remote events that are unlikely to ever occur – if given the opportunity to do so.

We discuss below two crucial examples relating to conservation easement grant deed language that affect the vast majority of conservation easement donations made in the last several years.

Proceeds Clause. One of the requirements for a conservation easement deduction is that the easement be perpetual. As contemplated by current IRS regulations, conservation easement documents typically include language addressing the remote possibility that a condemnation or casualty will extinguish the easement. The IRS regulations do not, however, address how to divide up the condemnation or casualty proceeds in the event the landowner makes improvements to the land after the date of donation. Since the landowner typically pays for any such improvements, it makes economic sense to let the landowner recover those costs out of any condemnation award attributable to the improvements. A 2008 IRS ruling (PLR 200836014) confirmed that the landowner could recover these improvement costs. The Land Trust Alliance adopted this same position in its standard deed templates, and most easement donors relied on this published guidance from the IRS and the Land Trust Alliance.

However, in 2014, the IRS took a surprise position in the Tax Court that this type of contingent proceeds allocation violated its conservation easement regulations. The 5th Circuit Court of Appeals accepted the IRS position in PBBM-Rose Hill, Ltd. v. Comm’r (900 F.3d 193, Aug. 14, 2018). One particularly troubling part of the 5th Circuit opinion is where the court said that the “IRS private letter ruling does not reflect the Commissioner’s current position” – even though the IRS has never withdrawn the private ruling. Earlier this year, the Tax Court also accepted the IRS position in Oakbrook Land Holdings, LLC (154 T.C. No. 10, May 12, 2020), upholding the validity of the relevant 1986 regulation, as newly interpreted by the IRS. In a strongly worded dissent, Tax Court Judge Holmes wrote, “Our holding today will likely deny any charitable deduction to hundreds or thousands of taxpayers who donated the conservation easements that protect perhaps millions of acres.”

Amendment Clause. Another surprise position being taken by the IRS involves amendment clauses in easement deeds. Well-advised donors and land trusts typically include the ability to amend the deed because doing so helps protect the conservation purposes. However, the IRS has recently taken the position that the presence of a clause allowing an amendment invalidates the deduction. The IRS has never taken this position in the regulations or in published guidance. Like the proceeds clause issue discussed above, this is another technical language issue that exists in the vast majority of conservation easement donations and could affect virtually every taxpayer who has ever donated a conservation easement.

It is noteworthy that the Tax Court rejected the IRS position in Pine Mountain Preserve v. Commissioner (151 T.C. 247, Dec. 27, 2018):

Respondent’s argument would apparently prevent the donor of any easement from qualifying for a charitable contribution deduction under section 170(h) if the easement permitted amendments. We find no support for that argument in the statute, the regulations, the decided cases, or the legislative policy underlying the statute.
For additional background on these and other technical arguments being made by the IRS, see the article by Gregory Rhodes and Tucker Thoni, “Top 6 IRS Attacks on Conservation Easement Deductions” (Law360, July 5, 2018).

To avoid such unnecessary controversies that affect conservation easement grants, P4C said in a September 2019 submission, and now reiterates, that it would be appropriate for the IRS to provide sample conservation easement grant deed language on which taxpayers can rely. The IRS has done this in other areas of the tax law including in providing sample organizing documents for public charities (see https://www.irs.gov/charities-non-profits/charitable-organizations/sample-organizing-documents-public-charity) and in recognizing pre-approved retirement plans (see https://www.irs.gov/retirement-plans/preapproved-retirement-plans). Working with interested organizations and tax practitioners, the IRS could develop template conservation easement grant deed language that the IRS would agree satisfies the applicable requirements under IRC sec. 170(h).

Following P4C’s recommendation last year, the IRS National Taxpayer Advocate made the same recommendation. The National Taxpayer Advocate’s 2019 Report to Congress, released this January, identified conservation easements as one of the “most litigated issues.” In her report, then-Acting National Taxpayer Advocate Bridget Roberts reviewed several of the recent court decisions involving conservation easements and indicated that a substantial number of them involved the threshold question of whether a donation constituted a “qualified conservation contribution.” The report recommended that to mitigate disputes the IRS should “[d]evelop and publish guidance to provide safe harbors and/or sample easement provisions to provide taxpayers with examples of how they may construct a conservation easement deed that satisfies the statutory requirements and prevent unnecessary litigation.”

This guidance that P4C recommends satisfies the relevant factors Treasury and the IRS identified in Notice 2020-47 as considerations for whether requested guidance should be included in the Priority Guidance Plan. Specifically, the recommended conservation easement grant template language:

- would resolve significant issues relevant to a broad class of taxpayers;
- would reduce controversy and lessen the burden on taxpayers and the Service;
- relates to existing regulations that are unnecessarily burdensome;
- would be in accordance with executive orders, including Executive Orders 13891 (Promoting the Rule of Law Through Improved Agency Guidance Documents) and 13892 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication). See, Jenny L. Johnson Ware, “New Executive Orders Shift Conservation Easement Battleground,” Tax Notes Federal, Nov. 4, 2019;
- would promote sound tax administration;
can be administered by the Service on a uniform basis; and

can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions.

Sincerely,

[Signature]

Robert Ramsay
President