

Part III – Administrative, Procedural, and Miscellaneous

Conservation Easements -- Safe Harbor Deed Language for Extinguishment and Boundary Line Adjustment Clauses

Notice 2023-30

SECTION 1. OVERVIEW

.01 This notice sets forth the safe harbor deed language for extinguishment and boundary line adjustment clauses required by § 605(d)(1) of the SECURE 2.0 Act of 2022 (SECURE 2.0 Act), enacted as Division T of the Consolidated Appropriations Act, 2023, Public Law 117-328, 136 Stat. 4459 (December 29, 2022). This notice also describes the process donors may use to amend an original eligible easement deed to substitute the safe harbor language for the corresponding language in the original deed, as provided by § 605(d)(2) of the SECURE 2.0 Act.

.02 This safe harbor notice addresses only amendments to extinguishment and boundary line adjustment clauses in accordance with § 605(d) of the SECURE 2.0 Act. This safe harbor notice does not address any other deed amendments. Donors are not required to make the amendments described in this notice.

SECTION 2. BACKGROUND

.01 Section 170(a) of the Internal Revenue Code (Code) provides, subject to certain limitations and requirements, a deduction for any charitable contribution, as defined in

§ 170(c), payment of which is made within the taxable year.¹ Section 170(f)(3)(A) denies a deduction under § 170 in the case of a contribution of a partial interest in property, except as provided in § 170(f)(3)(B). Section 170(f)(3)(B)(iii) provides an exception to the deduction denial in the case of a qualified conservation contribution as defined in § 170(h).

.02 Under § 170(h)(1), the term qualified conservation contribution means a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. For this purpose, a qualified real property interest is defined in § 170(h)(2)(C) to include a restriction (granted in perpetuity) on the use that may be made of the real property. Under § 1.170A-14(b)(2), a perpetual conservation restriction includes an easement or other interest in real property that under state law has attributes similar to an easement. Section 170(h)(3) defines the term qualified organization (donee organization). Section 170(h)(4) defines the term conservation purpose, which must be protected in perpetuity for the qualified conservation contribution to be treated as exclusively for conservation purposes pursuant to § 170(h)(5).

.03 Section 1.170A-14 provides further guidance on qualified conservation contributions. Section 1.170A-14(g) requires that such a restriction be enforceable in perpetuity. Section 1.170A-14(g)(6)(i) provides a rule pertaining to extinguishment. It provides that if a subsequent unexpected change in the conditions surrounding the property that is the subject of a perpetual conservation restriction makes it impossible or impractical to continue to use the property for conservation purposes, the conservation

¹ Unless otherwise specified, all “section” and “§” references are to the Internal Revenue Code or the Income Tax Regulations (26 CFR Part 1).

purpose can nonetheless be treated as protected in perpetuity if (1) the restrictions are extinguished by judicial proceeding and (2) all of the donee's proceeds (determined under § 1.170A-14(g)(6)(ii)) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

.04 Section 1.170A-14(g)(6)(ii) provides that, for a deduction to be allowed under § 170(a), at the time of the gift, the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the value of the property as a whole at that time. That proportionate value of the donee's property rights must remain constant. Accordingly, under § 1.170A-14(g)(6)(ii), if a change in conditions gives rise to the extinguishment of a perpetual conservation restriction under § 1.170A-14(g)(6)(i), the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

.05 Neither the Code nor the regulations specifically address boundary line adjustments. Under § 170(h)(2)(C), however, the restriction the donor grants on the use of the real property subject to the conservation easement must be made in perpetuity. See also § 170(h)(5)(A).

.06 The SECURE 2.0 Act was signed into law on December 29, 2022. Section 605(d)(1) of the SECURE 2.0 Act directs the Secretary of the Treasury or her delegate (Secretary) to publish safe harbor deed language for extinguishment clauses and boundary line adjustment clauses within 120 days after the date of the enactment of the SECURE 2.0 Act (that 120th day is April 28, 2023). Section 605(d)(2) of the SECURE 2.0 Act provides that, beginning on the date the safe harbor language is published by the Secretary, donors have a 90-day period in which to amend an original eligible easement deed to substitute the safe harbor language for the corresponding language in the original deed. Since this notice is published in the Internal Revenue Bulletin on April 24, 2023, the 90th day is July 22, 2023. Because that date is a Saturday, § 7503 extends the date until Monday, July 24, 2023. The amended deed must be signed by the donor and donee and recorded by July 24, 2023, and the amendment must be treated as effective as of the date of the recording of the original easement deed.

.07 Section 3 of this notice describes the process donors may use to amend an eligible easement deed to substitute the safe harbor language for the corresponding language in the original eligible easement deed, and which easement deeds are eligible to be amended, as provided by § 605(d)(2) of the SECURE 2.0 Act. Section 4 of this notice sets forth safe harbor deed language for extinguishment and boundary line adjustment clauses as required by § 605(d)(1) of the SECURE 2.0 Act.

SECTION 3. PROCEDURE TO AMEND ELIGIBLE EASEMENT DEEDS

.01 In general. In accordance with § 605(d)(2) of the SECURE 2.0 Act, to amend an original eligible easement deed to substitute the safe harbor language in section 4.01 or 4.02 of this notice for the corresponding language in the original deed—

(1) The amended deed must be signed by the donor and donee and recorded

on or before July 24, 2023; and

(2) The amendment must be treated as effective as of the date of the recording of the original easement deed. See section 3.03 of this notice.

.02 Exceptions. The term eligible easement deed does not include an easement deed relating to any contribution—

(1) Which is part of a reportable transaction (as defined in § 6707A(c)(1)), or is described in Notice 2017-10, 2017-4 I.R.B. 544;

(2) Which, by reason of § 170(h)(7), is not treated as a qualified conservation contribution;

(3) If a deduction under § 170 has been disallowed by the Secretary and the donor is contesting such disallowance in a case that is docketed in a Federal court on a date before the date the amended deed is recorded by the donor; or

(4) If a claimed deduction for such contribution under § 170 resulted in an underpayment to which a penalty under § 6662 or § 6663 applies and either—

(i) The penalty has been finally determined administratively; or

(ii) If the penalty is challenged in court, the judicial proceeding with respect to such penalty has been concluded by a decision or judgment which has become final.

.03 Effect of correction. If a donor substitutes the safe harbor language in sections 4.01 or 4.02 (or sections 4.01 *and* 4.02) of this notice for the corresponding language in the original eligible easement deed and the amended deed is signed by the donor and donee and recorded on or before July 24, 2023, the amended eligible easement deed will be treated as effective for purposes of § 170, § 605(d)(2) of the SECURE 2.0 Act, and section 3.01(2) of this notice as of the date the eligible

easement deed was originally recorded, regardless of whether the amended eligible easement deed is effective retroactively under relevant state law.

SECTION 4. SAFE HARBOR DEED LANGUAGE

.01 Extinguishment clause. The safe harbor deed language for extinguishment clauses is:

Pursuant to Notice 2023-30, Donor and Donee agree that, if a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation of the perpetual conservation restriction renders impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if (1) the restrictions are extinguished by judicial proceeding and (2) all of Donee's portion of the proceeds (as determined below) from a subsequent sale or exchange of the property are used by the Donee in a manner consistent with the conservation purposes of the original contribution.

Determination of Proceeds. Donor and Donee agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in Donee, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction, at the time of the gift, bears to the fair market value of the property as a whole at that time. The proportionate value of Donee's property rights remains constant such that if a subsequent sale, exchange, or involuntary conversion of the subject property occurs, Donee is entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

.02 Boundary line adjustments clause. The safe harbor boundary line adjustment clause is:

Pursuant to Notice 2023-30, 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.

.03 Similar terms with the same meaning. In substituting deed language, the donor may use the precise terms used in sections 4.01 and 4.02 of this notice, or the donor may use terms that have the same meaning as the terms in sections 4.01 and 4.02. For example, if the original deed uses the terms "Grantor" and "Grantee" instead of "Donor" and "Donee," the donor can use either "Grantor" and "Grantee" or "Donor" and "Donee" because these terms have the same meaning. Also, for example, if the original deed uses the term "easement" or "servitude" instead of "restriction," the donor may use any of those terms, provided the term refers to a qualified real property interest within the meaning of § 170(h)(2)(C) and § 1.170A-14(b)(2).

SECTION 5. DRAFTING AND CONTACT INFORMATION

The principal authors of this notice are Elizabeth Boone and Hannah Kim of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Ms. Boone at (202) 317-5100, or Ms. Kim at (202) 317-7003 (not toll-free numbers).