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OFFERING A MULLIGAN ON CONSERVATION EASEMENT TAX LAW:

ENSURING PUBLIC ACCESS ON CONSERVED LAND

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Abstract

Conservation easements have long served as a private land conservation tool by allowing landowners to keep their land while forgoing certain rights, like the right to develop their land. Congress created federal income tax deductions for conservation easements to provide an income tax benefit to private landowners with conservation easements meeting Internal Revenue Code requirements. These deductions benefit the government, the public, and private landowners by encouraging conservation easements to keep land beautiful and wild.

Large real estate investors are misusing this tool to gain hefty tax deductions on outdoor recreational areas like golf courses and resorts with limited public access. The Internal Revenue Code and the relevant Treasury regulations controlling conservation easement deductions require recreational areas be usable by the general public but fail to explain what constitutes general public access. This

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ambiguity creates uncertainty over whether a deduction is appropriate for recreational areas that may restrict public access physically or financially. Modifying the relevant regulations is essential to resolve such ambiguity and to ensure deductions for conservation easements serve their intended purpose of encouraging conservation and the preservation of American heritage. This Article offers a mulligan on the Treasury regulations to fulfill the hope of conservation by: (1) defining "general public" as "public at large," (2) preventing limitations on access unless a limitation is for the health and safety of the general public, and (3) including an example of a recreational property where access is limited with an interpretation of whether the property qualifies for a deduction.

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I. The Importance of the Conservation Easements Tax Deduction and Its Misuse

Several large investors including President Donald Trump, billionaire Chris Cline, and the Forbes family have received millions in tax deductions by using—and in some cases abusing—a conservation tool called a conservation easement.[2] A conservation easement is an agreement between a landowner and a qualified organization[3] permanently limiting the use of an area of land to protect the land for its conservation value.[4] When land is encumbered by a conservation easement, the landowner maintains ownership of the land and can still use it, so long as they abide by the terms of the easement, like not developing the land further.[5] To mitigate the landowner's cost of their conservation commitment and to reduce the burden on the government to provide the public conservation services, conservation easements can provide federal income tax benefits for the landowner if the easement meets certain requirements.[6] Tax deductions for conservation easements serve as an

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[2] *See* Lorie Konish, *This Tax Move Could Get Wealthy Investors in Hot Water with the IRS*, CNBC (Jan. 12, 2018, 8:46 AM), https://www.cnbc.com/2018/01/12/this-tax-move-trump-used-could-get-wealthy-investors-in-hot-water-with-the-irs.html; Richard Rubin, *Donald Trump Got a Big Tax Break on 2005 Taxes*, WALL STREET JOURNAL (Mar. 17, 2016, 5:25 PM) (citing 2005 U.S. Individual Income Tax Return for Donald J. Trump, DOCUMENTCLOUD, https://assets.documentcloud.org/documents/3517446/Donald-Trump-2005-Tax.pdf (last visited Feb. 21, 2019)), https://www.wsj.com/articles/donald-trump-got-a-big-break-on-2005-taxes-1458249902 (President Trump placed conservation easements on a number of his resorts, including his Bedminster, New Jersey golf course, limiting construction of improvements on the land); Angus M. Thuermer Jr., *Ranch Owner Builds in Path of Pronghorn*, WYOFILE (Jan. 3, 2017), https://www.wyofile.com/ranch-owner-builds-path-pronghorn/ (Chris Cline placed a conservation easement on his ranch in the upper Green River to protect a path for migratory pronghorn deer. The conservation easement was violated because a building was constructed on the land); Miguel Llanos, *Billionaire pledges 90,000 acres for conservation area in Colorado*, MSNBC (Aug. 22, 2013; 4:31 PM), http://www.msnbc.com/msnbc/billionaire-pledges-90000-acres-con (the Forbes family placed a conservation easement protecting over 80,000 acres of ranch land in the Southwest providing scenic natural views).

[3] A qualified organization can be a land trust or a government agency, however the former is more common. *See* 26 U.S.C. § 170(h)(3) (2018); 26 C.F.R. § 1.170A-14(c)(1) (2020); C. Timothy Lindstrom, *A Guide to the Tax Aspects of Conservation Easement Contributions*, 7 WYO. L. REV. 441, 451 (2007).

[4] *See id.*; *What You Can Do*, LAND TRUST ALLIANCE, https://www.landtrustalliance.org/what-you-can-do/conserve-your-land/questions (last visited Sept. 9, 2020) [hereinafter *What You Can Do*].

[5] *Id.*

[6] *See id.*; 26 U.S.C. § 170(h) (2018). The government provides deductions when it wants to incentivize certain behaviors which often decrease government spending creating a win-win for the taxpayer and the government. *See* Pete Sepp, *Shortsighted: How the IRS's Campaign Against Conservation Easement Deductions Threatens Taxpayers and the Environment*, NAT'L TAXPAYERS UNION (November 29, 2018), https://www.ntu.org/publications/page/shortsighted-how-the-irss-campaign-against-conservation-easement-deductions-threatens-taxpayers-and-the-environment. This system works because income tax revenue for the government is what is used for government spending, including spending for conserving public land. *Id.* By requiring less tax from someone who provides their land for the public benefit, the bill essentially zeros out because the government no longer needs to collect revenue for something that it no longer needs to spend on. *Id.* Additionally, encouraging private land conservation through tax deductions can create large economic benefits

incredibly important incentive for landowners to protect their land and preserve it in the private arena.[7] Each year the number of conservation easements grows in large part due to the tax incentives for land protection.[8] Currently, there are over 191,000 conservation easements that exist covering more than 32.7 million acres of land, which is equivalent to the total land coverage of the National Park Service in the continental United States.[9] Having a valid conservation purpose for a conservation easement is the essence behind Congress's decision to provide federal income tax deductions for conservation easements.[10]

At the same time, ambiguities still exist in the Internal Revenue Code (Tax Code) and the Treasury Department (Treasury) regulations regarding whether an easement fulfills Congress's enumerated conservation purposes, particularly the public outdoor recreation purpose.[11] For example, some investors take recreational land that they did not plan to fully develop—such as a golf course or ski resort—and place a conservation easement on the land to limit its use and prevent future development in exchange for millions of dollars in tax deductions.[12] Consequently, recreational land is a contentious area when it comes to conservation easement tax deductions because areas often limit use through physical barriers, membership, or fees.[13] Limitations on access can create issues when the purpose of conservation easements is to provide "significant public benefit."[14] Ambiguities in the Tax Code and Treasury regulations create confusion in the tax system and prevent courts and landowners from knowing whether or not a conservation easement will lead to a tax deduction.[15]

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for communities surrounding properties protected by conservation easements. *See Study Details Economic Benefit of Protecting Space in Beaufort County*, THE TRUST FOR PUBLIC LAND (Jan. 22, 2018), https://www.tpl.org/media-room/study-details-economic-benefit-protecting-space-beaufort-county#sm.0000pklmhdqw2dgqubx1muvx4g1ai (where a study on the economic benefits of conserving open space in South Carolina lead to an increase in property value of $127 million, an increase in property tax revenue of $1.12 million a year, stormwater management savings of $27.4 million a year, reduction in air pollution control costs of $317,000 a year, and medical cost savings of $7.91 million a year for local residents).

[7] *See What You Can Do*, *supra* note 4.

[8] *See Income Tax Incentives for Land Conservation*, LAND TRUST ALLIANCE, https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation (last visited Sept. 9, 2020) [hereinafter *Income Tax Incentives for Land Conservation*].

[9] *See Conservation Easements and Total Acres Conserved*, NATIONAL CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us (last visited Sept. 14, 2020).

[10] *See* 26 U.S.C. § 170(h)(4)(A) (2018); S. REP. NO. 96-1007, at 4-5, 18-34 (1980).

[11] *See* Robert H. Levin, Presentation on Federal Tax Issues: The Latest and Greatest at the Land Trust Alliance Rally 2018 (Oct. 12, 2018).

[12] *See* Konish, *supra* note 2. For example, President Trump received a federal income tax deduction of $39 million in 2005 for a conservation easement he placed on his Bedminster, New Jersey golf club where he pledged not to build houses on the property. *See* Rubin, *supra* note 2.

[13] *See* Larry Hirsh, *Golf Course Conservation Easements & the New Tax Bill*, GOLF PROP. ANALYSTS (Dec. 7, 2017), https://golfprop.com/blog/golf-course-conservation-easements-the-new-tax-bill/.

[14] *See* 26 U.S.C. § 170(h)(4)(A) (2018).

[15] Conservation easement tax deductions are often abused leading to threats by Congress to remove the deductions altogether. *See Conservation Easements*, INTERNAL REVENUE SERV. (last updated Feb. 13, 2020), https://www.irs.gov/charities-non-profits/conservation-easements [hereinafter *Conservation Easements*]. However, removing tax deductions for conservation easements entirely

The Treasury regulations should more clearly define the conservation purpose of outdoor recreation to ensure only landowners who convey easements that provide substantial, tangible, and meaningful public benefit receive the deduction. Part II of this Article explains the legal background of conservation easements and the conservation purpose of outdoor recreation. Part III analyzes the importance of properly defining "general public" and access to fulfill the purpose of conservation. Part IV proposes amending the Treasury regulations to better interpret the topic of access for the conservation purpose of outdoor recreation. The regulations should be clarified by (1) defining general public as "public at large," (2) preventing limitations on access unless such limitation is for the health and safety of the general public, and (3) including an example of a recreational property where access is limited along with an interpretation of whether the property qualifies for a deduction.

II. Conservation Easements Basics

A conservation easement is a legal agreement between a landowner (donor) and qualified organization (donee) that permanently limits the land's uses to protect its conservation value.[16] While conservation easements limit uses of land, landowners still retain many rights, such as ownership.[17] Generally, when a landowner grants a conservation easement to a qualified organization,[18] they give up their right to significantly build upon or improve the land in order to promote conservation.[19] The qualified organization—usually a land trust or government agency—receiving a conservation easement must monitor and enforce the

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will threaten conservation of private land thereby putting ecosystems and natural landscapes in the U.S. at risk. *See Income Tax Incentives for Land Conservation*, *supra* note 8. Instead, the IRS has recently increased enforcement on conservation easements, focusing specifically on syndicated easements which exist across all conservation purposes where people are claiming donations of conservation easements for a tax deduction at a value much higher than the actual value or than the amount of money invested in a syndication scheme. *See* INTERNAL REVENUE SERV., IR-2019-213, IRS CONTINUES ENFORCEMENT EFFORTS IN CONSERVATION EASEMENT CASES FOLLOWING LATEST TAX COURT DECISION (2019); G. Michelle Ferreira et al., *Syndicated Conservation Easements: Under New Fire as IRS Enforcement Action Increases*, NAT'L LAW REV. (Nov. 14, 2019), https://www.natlawreview.com/article/syndicated-conservation-easements-under-new-fire-irs-enforcement-action-increases. Given having a valid conservation purpose is a preliminary requirement to receiving a conservation easement tax deduction, focusing enforcement on having a valid conservation purpose as the first step might efficiently address situations of overlap where a syndicator may not have a valid conservation purpose since syndication may be much harder to target. *See id*. While syndication should be addressed, this paper offers a solution to a preliminary issue that may cut down the work later on as syndication is tackled.

[16] *See* 26 U.S.C. § 170(h)(4)(A) (2018); *What You Can Do*, *supra* note 4.

[17] *Id.*

[18] *See* Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 DENVER J. L., PROP. & SOC'Y 108, 108–09 (2015).

[19] Some easements properly allow unsubstantial improvements that do not conflict with the conservation purpose of the easement (for example, an easement for wilderness area might allow for construction of a trail and small bathrooms to meet the needs of public access). *See* Lindstrom, *supra* note 3, at 456.

easement's terms according to the agreement.[20] Conservation easements often protect lands that include natural habitat, historic sites, outdoor recreation areas, and open space including ranches, farms, and forests.[21] To compensate the landowner for the limitations on land use, which decrease the landowner's property value, the government provides estate tax incentives,[22] decreased property taxes,[23] and sometimes state income tax deductions if the easement meets the requirements enumerated by the state authority.[24] Most notably, the United States government provides federal income tax deductions to landowners who grant conservation easements that qualify.[25]

A. Federal Income Tax Benefits Behind Conservation Easements Under the Internal Revenue Code

Through the Internal Revenue Code, Congress created federal income tax deductions for qualifying conservation easements to preserve American heritage by conserving private property.[26] Easements that are "qualified conservation contribution[s]" are eligible for federal income tax deductions.[27] A conservation easement meets this criterion if it (1) is an entire interest, a remainder interest, or a perpetual restriction; (2) is granted to a qualified organization, such as government agencies or § 501(c)(3) charities, that has both a commitment to conservation and the resources to enforce the restrictions of the easement; (3) is granted in

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[20] *Id.* For example, if a land trust receives a conservation easement on private land and the landowner subsequently develops the land, going against the terms of the conservation easement agreement, the land trust is responsible for enforcing the agreement and must take appropriate action to prevent such development. *Id.*

[21] *See Conservation Easements*, BRANDYWINE CONSERVANCY, https://www.brandywine.org/conservancy/resources/conservation-easements (last visited Sept. 9, 2020); *see also* Deepti Bansal Gage, *Filling in the Gaps of Public Land Protection*, PLANET FORWARD (Oct. 2, 2019), https://www.planetforward.org/idea/filling-in-the-gaps-of-land-protection (citing Interview with Philip Tabas, Special Counsel, The Nature Conservancy, in Arlington, Va. (Mar. 7, 2019)).

[22] *See* 26 U.S.C. § 2031(c) (2018); *see also* STEPHEN J. SMALL, PRESERVING FAMILY LAND: BOOK III (2002) (citing Taxpayer Relief Act of 1997, H.R. 2014 (August 5, 1997)); *Estate Tax Incentives for Land Conservation*, LAND TRUST ALL., https://www.landtrustalliance.org/topics/taxes/estate-tax-incentives-land-conservation (last visited Sept. 9, 2020).

[23] Property taxes can be significantly reduced through conservation easements especially if the jurisdiction assesses property tax based on the assessed market value property. *See* Daniel C. Stockford, *Property Tax Assessment of Conservation Easements*, 17 B. C. ENVTL. AFFAIRS L. REV. 823, 825–26 (1990). This is because the restrictions on improving the property implicated by the conservation easement often diminish the market value of the property. *Id.* If property taxes are assessed based on the market value of the property and the easement lowers the market value, then the easement will in turn reduce the property tax liability of the property. *Id.*

[24] *See* Lindstrom, *supra* note 3, at 486.

[25] *See Income Tax Incentives for Land Conservation*, *supra* note 8. Not all conservation easements will receive tax incentives or deductions. *See generally* Lindstrom, *supra* note 3. The easement must meet the criteria set out by the federal government in order to receive benefits. *See infra* sections II.A and II.C.

[26] *Conservation Easements*, *supra* note 15.

[27] 26 U.S.C. § 170(h)(1) (2018).

perpetuity;[28] and (4) has a qualifying conservation purpose.[29] Adequate conservation purposes are: (1) to preserve "land areas for outdoor recreation by, or the education of, the general public;" (2) to protect "a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;" (3) to preserve "open space (including farmland and forest land) where such preservation is for scenic enjoyment of the general public, or pursuant to a clearly delineated Federal, State, or local governmental conservation policy;" and (4) to preserve "[a] historically important land area or a certified historic structure."[30]

B. Treasury Regulations Interpreting the Internal Revenue Code and the Role of the Courts

Congress writes the Internal Revenue Code (Tax Code) and the Treasury Department (Treasury) writes Tax Code regulations (Treasury regulations).[31] The Internal Revenue Service (IRS), a branch of the Treasury, enforces the Tax Code and Treasury regulations.[32] To improve and develop new regulations, the Treasury solicits recommendations internally and from the public[33] which may then be included as projects in their Priority Guidance Plan (PGP).[34] The Treasury develops the PGP annually to serve as an agenda for how the agency will focus its resources for that year.[35] When selecting recommended PGP projects, the Treasury considers seven factors focused on potential: (1) significance and relevance of the issue to taxpayers, (2) reduction of cost or burden to the public or government, (3) promotion of sound tax administration, (4) improvement in ease of understanding and applying guidance, (5) improvement to outmoded or ineffective current regulation, (6) uniformity in administration, and (7) reduction of controversy.[36] A PGP project must include at least one of these factors.[37] Once the PGP includes a proposed change, the Treasury usually enacts that change through rulemaking.[38] If

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[28] *See* Lindstrom, *supra* note 3, at 449. The easement should create a restriction in perpetuity such that if the property itself is transferred, the easement and restriction also transfer to the deeds of future owners. *See id.*

[29] 26 U.S.C. § 170(h)(1) (2018).

[30] *Id.* § 170(h)(4)(A). Only one of the four enumerated conservation purposes needs to be met to qualify for a deduction. *See id.*

[31] *See id.* § 7805; Amy Fontinelle, *Making Sense of the Tax Code*, INVESTOPEDIA, https://www.investopedia.com/articles/tax/09/tax-codes-rules-regulations.asp (last visited Sept. 9, 2020) (Congress grants the power to write regulations on the Tax Code to the Treasury Department, which includes the IRS).

[32] *Id.*

[33] Exec. Order No. 13563, 3 C.F.R. § 13563 (2011).

[34] *See* IRM 32.1.1.4.1.

[35] *See id.* The PGP is not binding such that the Treasury Department can change its priorities depending on circumstances. *Id.* The current PGP can be found at *Priority Guidance Plan*, INTERNAL REVENUE SERV. (Nov. 9, 2018), https://www.irs.gov/uac/priority-guidance-plan.

[36] *See* IRM 32.1.1.4.3.

[37] *See* IRM 32.1.1.4.4.

[38] *See* IRM 32.1.1.4.3. Rulemaking consists of legislative regulations and interpretive regulations. *See* Administrative Procedures Act (APA), 5 U.S.C. § 553 (2018). Legislative regulations are required when Congress only provides an end result without guidance on achieving that result. *Id.* Legislative regulations require following the Administrative Procedure Act's ("APA's") notice-and-

a regulation is not explicit, an easement grantor can submit a request for a Private Letter Ruling (PLR)[39] as a taxpayer or may need to defend its easement deduction in court.[40]

Courts interpret and apply both the Tax Code and the Treasury regulations when there is dispute between the IRS and a taxpayer.[41] Most cases involving federal tax issues go to the Tax Court which has expertise in tax law.[42] Because the Treasury regulations are often ambiguous, courts play a crucial role in interpreting and applying the Tax Code and the Treasury regulations.[43]

C. Defining the Conservation Purposes Through the Treasury Regulations and Case Law

The Treasury regulations require a landowner grant a conservation easement exclusively for conservation purposes.[44] The four conservation purposes of (1) outdoor recreation for the general public, (2) natural habitat, (3) open space,

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comment process. *Id.* The majority of Treasury regulations are interpretive, which fill gaps in the Tax Code explaining and interpreting the underlying statute. *See* IRM 32.1.1.2.6. The APA exempts interpretive rules from notice and comment requirements. *Id.* Consequently, most of the Tax Code Treasury regulations, including those that explain the Tax Code's conservation purposes, are interpretive. *See* IRM 32.1.1.2.6; IRM 32.1.1.2.7; IRM 32.1.1.2.8.

[39] A taxpayer may request a Private Letter Ruling (PLR) from the IRS to receive a written ruling regarding their particular set of facts when there is ambiguity in the Treasury regulations prior to filing their income tax return. When a PLR is issued, if the taxpayer follows the specifications of the PLR, they will not be subject to litigation over the tax issue. However, PLRs do not serve as precedent and thus only apply to the instance in which they are sought. *See Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, INTERNAL REVENUE SERV. (Apr. 20, 2018) https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts.

[40] *See* Lindstrom, *supra* note 3, at 450–51.

[41] *See, e.g.*, Belk v. Comm'r, 774 F.3d 221 (4th Cir. 2014) (where the Fourth Circuit used the Tax Code and the Treasury regulations to determine a taxpayer's contribution of a conservation easement to a land trust did not qualify as a charitable contribution such that the taxpayer was not entitled to a deduction).

[42] There are three courts of original jurisdiction for tax issues: the Tax Court (an Article I court), the District Court with personal jurisdiction over the taxpayer, and the Court of Federal Claims. *See About the Court*, U.S. TAX CT. (Aug. 5, 2016), https://www.ustaxcourt.gov/about.htm. All appeals of the application of law are reviewed *de novo* by the Circuit Court of Appeals where there is personal jurisdiction over the taxpayer and then to the U.S. Supreme Court. *See, e.g.*, Inverworld, Ltd. v. Comm'r, 979 F.2d 868, 876 –77 (D.C. Cir. 1992); Vukasovich, Inc. v. Comm'r, 790 F.2d 1409, 1413 (9th Cir. 1986) (stating that while cases are reviewed *de novo* for issues of law, circuit courts should defer to the Tax Court when there are expertise and uniformity concerns). 95% of tax cases are heard by the Tax Court. *See* Leandra Lederman, *What Do Courts Have to Do With It?: The Judiciary's Role in Making Federal Tax Law*, 65 NAT'L TAX J. 899, 900 (2012). In the past, appellate courts have given some deference to the Tax Court due to its expertise. *See generally* Andre L. Smith, *Deferential Review of the United States Tax Court: The Chevron Doctrine*, 37 VA. TAX REV. 75 (2017). *But see* Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L. J. 1833, 1835–95 (2014); Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235 (1998).

[43] *See* Leandra Lederman, *What Do Courts Have to Do With It?: The Judiciary's Role in Making Federal Tax Law*, 65 NAT'L TAX J. 899, 899–900 (2012).

[44] *See* 26 C.F.R. § 1.170A-14(e)(1) (2019).

and (4) historic preservation are further defined throughout the Treasury Regulations.[45] However, the regulations allow a deduction even if an incidental benefit occurs from the easement.[46] If an easement allows for inconsistent use on the property that goes against a significant conservation interest, no deduction is permitted[47] unless protecting the conservation interests subject to the easement requires inconsistent use.[48] Therefore, an easement must be granted exclusively for at least one of the four conservation purposes and inconsistent use might prevent a deduction.[49]

1. Outdoor Recreation or Education

A conservation easement meets the conservation purpose requirement if it preserves land for "outdoor recreation of the general public or for the education of the general public."[50] The Treasury regulations provide two examples of a recreation area: (1) a publicly accessible water area for fishing or boating and (2) a nature or hiking trail to be used by the public.[51] Such recreation or education must be accessible "for the substantial and regular use of the general public" to satisfy this purpose.[52] Despite the examples the Treasury regulations provide, ambiguity still exists, which raises practical concerns in contexts like golf courses.[53]

Previously, many cases dealing with golf courses or similar recreation areas that may restrict access and allow for unnatural land management practices failed to meet the perpetuity requirement for conservation easements.[54] Consequently, it

[45] See 26 U.S.C. § 170(h)(4)(A); 26 C.F.R. § 1.170A-14(d).

[46] *Id.* An example of an incidental benefit could include increased property value of properties surrounding the area protected by a conservation easement. *See Study Details Economic Benefit of Protecting Space in Beaufort County*, THE TRUST FOR PUBLIC LAND (Jan. 22, 2018), https://www.tpl.org/media-room/study-details-economic-benefit-protecting-space-beaufort-county#sm.0000pklmhdqw2dgqubx1muvx4g1ai.

[47] *See* 26 C.F.R. § 1.170A-14(e)(2). The regulation provides an example where an easement on a farmland pursuant to a state flood prevention program would not qualify for a deduction if the easement allowed for use of pesticides on the farm thereby significantly affecting a nearby naturally occurring ecosystem. Basically, if an easement could avoid inconsistent use to still meet the designated conservation purpose, a deduction is not allowed.

[48] *Id.* § 1.170A-14(e)(3). The regulation provides an example where an easement on an archaeological site listed on the National Register of Historic Places would still receive a deduction even if site excavation would impair a scenic view.

[49] *See* 26 C.F.R. § 1.170A-14(e).

[50] 26 C.F.R. § 1.170A-14(d)(2)(i).

[51] *See id.*

[52] 26 C.F.R. § 1.170A-14(d)(2)(ii).

[53] *See generally* RP Golf v. Comm'r, 860 F.3d 1096 (8th Cir. 2017); Belk v. Comm'r, 774 F.3d 221 (4th Cir. 2014); Butler v. Comm'r, 2012 T.C. 74 (U.S.T.C. Mar. 19, 2012); Atkinson v. Comm'r, T.C. Memo 2015-236 (U.S.T.C. Dec. 9, 2015); Champions Retreat Golf Founders, T.C. Memo 2018-146 (U.S.T.C. Sept. 10, 2018); PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193 (5th Cir. 2018).

[54] *See, e.g.*, *RP Golf*, 860 F.3d at 1099 (where meeting the conservation purpose requirement to receive a deduction for a conservation easement was not discussed given a conservation easement on a golf course did not meet the requisite in perpetuity requirement); *Belk*, 774 F.3d at 225–227 (where whether the conservation purpose requirement was met was not discussed given a conservation easement on a golf course did not meet the requisite in perpetuity requirement).

remains unclear if areas like golf courses satisfy the conservation purpose requirement.[55]

However, in *PBBM-Rose Hill, Ltd. v. Commissioner*, the Fifth Circuit analyzed an easement on a golf course under the outdoor recreation conservation purpose.[56] The North American Land Trust (NALT) received the conservation easement on the golf course in *PBBM-Rose Hill* and has been involved in numerous other cases regarding the validity of conservation easements.[57] The court determined in *dicta* that a golf course met the purpose of outdoor recreation by the general public for the first time, despite the Tax Court's ruling that it did not meet any conservation purpose.[58] The golf course limited access in this case because a gatehouse restricted who could enter the course and some portions of the property were off limits to public visitors.[59] The Fifth Circuit held the degree of public access should be evaluated not by the actions of the landowner, as the Tax Court did, but rather by the four corners of the conservation easement agreement at the time of the gift.[60] Upon analyzing the agreement, the court noted it contained conflicting provisions regarding public access.[61] The court held the provision allowing public access was more specific than the provisions precluding public access, so the more specific provision should prevail.[62] Additionally, the agreement permitted charging fees as long as the fees did not prevent the property from being open for "substantial and regular use [by] the general public" and did not cause the property to be a private club.[63] Although the court *in dicta* determined the requisite conservation purpose was met, it concluded the conservation easement was not entitled to a deduction because the easement did not meet the perpetuity requirement.[64] The *PBBM-Rose Hill* case suggests that the conservation purpose of outdoor recreation requires substantial and regular access to the property

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[55] *Id.*
[56] *See PBBM-Rose Hill*, 900 F.3d 193.
[57] *See Atkinson*, T.C. Memo 2015-236; Balsam Mountain Invs., LLC v. Comm'r, 2015 T.C. 48 (U.S.T.C. Mar. 12, 2015); BC Ranch II, L.P. v. Comm'r, 867 F.3d 547 (5th Cir. 2017); *Champions Retreat Golf Founders*, T.C. Memo 2018-146; Kiva Dunes Conservation, LLC v. Comm'r, T.C. Memo. 2009-145 (U.S.T.C. June 22, 2009); Pine Mountain Pres., LLLP v. Comm'r, 2018 T.C. 57 (U.S.T.C. Dec. 27, 2018); *PBBM-Rose Hill*, 900 F.3d 193. NALT is a land trust that receives conservation easements and as the land trust in charge of the easements, it is responsible for enforcing the terms of the easement agreements. *Id.* NALT has been involved in at least seven federal tax cases as of January 1, 2019 concerning conservation easements properties it receives, advises, surveys, or monitors, many of which are golf courses. *Id.*
[58] *See PBBM-Rose Hill*, 900 F.3d 193.
[59] *Id.* at 202 A road sign to the property states, "[p]roperty owners, residents & guests only beyond this point."
[60] *Id.* at 203.
[61] *Id.* One paragraph of the conservation easement agreement states, "'[t]he Property is and shall continue to be and remain open for substantial and regular use by the general public for outdoor recreation'" and that fees charged by the golf course do not defeat the public access or "'result in the operation of the Property as a private membership club'" while another paragraph states the easement does not create "any" right of public access and another states that the owner reserves the right to post "no trespassing signs" and put up fences on the property.
[62] *Id.* at 204.
[63] *Id.* at 205 (declining to comment on whether charging fees would limit substantial and regular use by the public).
[64] *See id.* at 215; *supra* Section II.A.

protected by the conservation easement based on the four corners of the easement agreement.[65]

2. Protecting Natural Habitat

Under the Treasury regulations, the purpose of protecting "a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,"[66] can be met even if human activity alters an environment so long as "the fish, wildlife, or plants continue to exist there in a relatively natural state."[67] Man-made areas qualify if they serve as nature feeding areas, provide habitat for "rare, endangered, or threatened native species" communities, or support the "ecological viability" of a nearby wildlife conservation area.[68] Similar to the purpose of outdoor recreation or education, land that has the conservation purpose of protecting natural habitat requires public access.[69] However, public access can be limited to protect wildlife.[70]

3. Preserving Open Space

The purpose of preserving open space[71] occurs if the conservation easement is (1) "for scenic enjoyment of the general public" or (2) "pursuant to a clearly delineated Federal, State, or local governmental conservation policy."[72] Open space easements must yield a significant public benefit, similar to the public access requirement of the outdoor recreation conservation purpose.[73]

An open space easement generally meets the purpose of scenic enjoyment—and thus the purpose of preserving open space—when it protects a scenic landscape or panorama that can be enjoyed from an area that "is open to, or utilized by, the

[65] *See* 26 C.F.R. § 1.170A-14(d)(2) (2019); *PBBM-Rose Hill*, 900 F.3d at 203.
[66] 26 U.S.C. § 170(h)(4)(A) (2018).
[67] 26 C.F.R. § 1.170A-14(d)(3)(i).
[68] *Id.* § 1.170A-14(d)(3)(ii). *See* Glass v. Comm'r, 471 F.3d 698 (6th Cir. 2006) (defining such areas as being specific regions with relatively similar environmental conditions). Courts have also held that use of pesticides or other activities that could potentially harm a "rare, endangered, or threatened native species" on property protected by a conservation easement automatically disqualify the property from having the purpose of protecting natural habitat. *See* Champions Retreat Golf Founders, T.C. Memo 2018-146 (U.S.T.C. Sept. 10, 2018); Atkinson v. Comm'r, T.C. Memo 2015-236 (U.S.T.C. Dec. 9, 2015). Additionally, case law explains that if a species is only found to benefit from part of the area protected under the easement, a deduction is not allowed for the full area of the easement. *See Champions Retreat Golf Founders*, T.C. Memo 2018-146.
[69] 26 C.F.R. § 1.170A-14(d)(3)(iii).
[70] *Id.*
[71] Open space includes farmland and forest land. *See* 26 U.S.C. § 170(h)(4)(A).
[72] *Id.*
[73] 26 C.F.R. § 1.170A-14(d)(4)(i). Significant public benefit is further defined in the Treasury regulations by looking at eleven criteria on a case-by-case basis including criteria like "uniqueness of the property to the area" and "[t]he opportunity for the general public to use the property or to appreciate its scenic values." *See id.* at § 1.170A-14(d)(4)(iv)(A). Examples yielding significant public benefit include the preservation of: (1) a vacant lot in a developed area used as a public garden and (2) undeveloped area between a highway and the ocean preserving the scenic ocean view from the highway.

public" from areas like a road, park, trail, or land area.[74] The general public must have visual, but not necessarily physical, access to the property.[75] It is generally difficult for an easement to qualify as having a valid conservation purpose under scenic enjoyment.[76] Courts have found that while physical access to the property is not required, physical access to a viewpoint of the property that provides public benefit is required to meet the purpose of scenic enjoyment.[77] Additionally, physical access to a viewpoint of the property must be available to the "public at large."[78] In *Atkinson v. Commissioner*, the Tax Court explained that "the public at large" means there are no restrictions on who can visually access the property.[79] Visual access must be available to all who desire it in order to be considered available to the "general public" or "public at large."[80] The court thus found the existence of guards at gated entry points who limited physical access to the viewpoint, which thereby limited visual access to the property, limited access for the general public.[81]

In order for an open space easement to meet the purpose of conforming to a governmental conservation policy, it must meet a specific government policy that is not simply "[a] general declaration of conservation goals by a single official or legislative body."[82] If "a specific, identified conservation project" is furthered by a conservation easement, then the purpose of conforming to a governmental conservation policy is met.[83] Additionally, limitations on public access to the property are acceptable so long as the conservation purpose of the easement would not be "undermined or frustrated without public access."[84]

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[74] *Id.* § 1.170A-14(d)(4)(ii)(A).
[75] *See id.*; Lindstrom, *supra* note 3, at 457.
[76] *See* Lindstrom, *supra* note 3, at 456. The Treasury regulations also provide eight factors to consider when determining whether the purpose of scenic enjoyment is met such that the taxpayer has a high burden to prove the property protected meets the scenic characteristics required. *See* 26 C.F.R. § 1.170A-14(d)(4)(ii)(A).
[77] *See* Atkinson v. Comm'r, T.C. Memo 2015-236, *54 (U.S.T.C. Dec. 9, 2015).
[78] *Id.* (holding the purpose of scenic enjoyment by the general public was not met where visual access to a golf course protected by a conservation easement was restricted to those who had physical access to the surrounding area including members of the plantation area, guests of members, and residents of the town because this group of people was not considered the public at large).
[79] *Id.*
[80] *Id.*
[81] *Id.* at *53–54.
[82] 26 C.F.R. § 1.170A-14(d)(4)(iii)(A) (2019). Little case law exists for this specific conservation purpose. *See* Lindstrom, *supra* note 3 at 459. For case law that is out there, it appears recreational areas like golf courses are not "worthy of protection for conservation purposes." *See* 26 C.F.R. § 1.170A-14(d)(4)(iii)(A). *See generally* Champions Retreat Golf Founders, T.C. Memo 2018-146 (U.S.T.C. Sept. 10, 2018) (ruling a golf course did not meet the purpose of conforming to a specific government policy thereby not qualifying for a conservation easement deduction).
[83] 26 C.F.R. § 1.170A-14(d)(4)(iii)(A).
[84] *Id.* § 1.170A-14(d)(4)(iii)(C).

4. Historic Preservation

Historic preservation often requires some development.[85] The Treasury regulations allow for limited development to serve the purpose of preserving "[a] historically important land area or a certified historic structure," even if there are restrictions permitting future development of the property, as long as the restriction's terms state that the development must conform to the appropriate jurisdiction's preservation and land use standards.[86]

Historically important land areas can include places with historic resources, property in a registered historic district, or land next to a property individually listed in the National Register of Historic Places (National Register).[87] To qualify under the purpose of historic preservation, a historically important land area must provide some visual access to the public, and if there is only partial visual access, that visual access must provide public benefit.[88]

Certified historic structures include buildings, structures, or land listed in the National Register or buildings located in a registered historic district certified by the Secretary of the Interior "as being of historic significance to the district."[89] If a certified historic structure's preserved historic features and characteristics are hidden from public view, the easement must provide the general public an opportunity to view those features and characteristics on a regular basis as the property permits.[90]

III. The Value in Properly Defining "General Public" and "Access" for the Conservation Purpose of Outdoor Recreation

The Treasury regulations do not define "general public."[91] The only explicit insight provided for the conservation purpose of outdoor recreation is that

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[85] *See generally* Herman v. Comm'r, T.C. Memo 2009-205 (U.S.T.C. Sept. 14, 2009).

[86] 26 C.F.R. § 1.170A-14(d)(5)(i).

[87] *See id.* § 1.170A-14(d)(5)(ii). Historically important land areas are also described as being land with independent historic significance or the underlying property to a certified historic structure or area. *Herman*, T.C. Memo 2009-205, at *34. Where a conservation easement on a land area underlying a historic structure does not prevent the improvement or destruction of the historic structure, it does not protect the historical significance of the underlying land. *Id.* at *35.

[88] *See* 26 C.F.R. § 1.170A-14(d)(5)(iv)(A).

[89] *Id.* § 1.170A-14(d)(5)(iii). Such structures may include depreciable property like private residences and are considered certified historic structures at the time of transfer of the easement or at the time for filing the donor's tax return in the taxable year when the contribution was made. *See id.*

[90] *See id.* § 1.170A-14(d)(5)(iv)(A). To understand more about the factors and amount of public access please refer to 26 C.F.R. §§ 1.170A-14(d)(5)(iv)(B)-(C). To find examples of public access for historic preservation please refer to 26 C.F.R. § 1.170A-14(d)(5)(v). A taxpayer's easement must be more restrictive in its preservation than what is required by existing law to prove the easement is actually limiting the property's development potential because one cannot give up a right they do not have. *See* Gorra v. Comm'r, 2013 T.C. 254 (U.S.T.C. Nov. 12, 2013) (where the court held a conservation easement on a façade was entitled to a deduction because the easement was more restrictive than the historic preservation laws); Hilborn v. Comm'r, 85 T.C. 677 (U.S.T.C. Nov. 5, 1985).

[91] 26 C.F.R. § 1.170A-14(d)(2).

"access" must allow for "substantial and regular use [by] the general public."[92] Given the limited insight in the Treasury regulations, it is unclear who is included in the general public and how much access allows for substantial and regular use to "justify the deduction."[93]

A. "General Public" Includes Those Beyond the Local Community

The court in *Atkinson* determined visual access for the "general public" under the conservation purpose of scenic enjoyment meant visual access for the "public at large."[94] *Atkinson* defined "public at large" to include those beyond the local community given in the case the easement over a plantation only provided access to members of the plantation or invited guests.[95] The broad group intended to receive visual access for scenic enjoyment explained in *Atkinson* is likely the same group intended to receive physical access for the conservation purpose of outdoor recreation.[96] This reflects the purpose of conservation easements to protect American heritage[97] and benefit the public as depicted through statutory interpretation of each of the conservation purposes in the Tax Code.[98] Therefore, "general public" in the context of the conservation purpose of outdoor recreation is likely synonymous with "public at large," where access to anyone, even those outside the community, must be permitted.[99] Additionally, as in *Atkinson*, hindrances like gates and guards that limit entry onto a property might be seen as a barrier to access for the general public in a recreational area protected by a

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[92] *Id.* § 1.170A-14(d)(2)(ii).

[93] Scholars, including the ABA Conservation Easement Task Force, have also emphasized a need for the Treasury regulations to address public access in order "to ensure [there are] public benefits sufficient to justify the deduction." W. Weeks et. al., *ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law*, 53 REAL PROP., TRUST & ESTATE L. J. 245, 251 (2019).

[94] *See supra* Section II.C.3; Atkinson v. Comm'r, T.C. Memo 2015-236, *53-54 (U.S.T.C. Dec. 9, 2015).

[95] *See id.*

[96] *Id.* at *54.

[97] *See Conservation Easements*, *supra* note 15.

[98] *See* 26 C.F.R. § 1.170A-14(d)(2)(i) (2019) (where the conservation purpose of outdoor recreation is defined as a "donation of a qualified real property interest to preserve land areas for the outdoor recreation of the *general public*"); *Id.* § 1.170A-14(d)(3) (where the conservation purpose of protecting natural habitat is implied to benefit the public through the conservation of "a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem"); *Id.* § 1.170A-14(d)(4)(i) (where open space easements are required to "yield a significant *public benefit*" in order to qualify for a deduction and the Treasury regulations provide eleven factors to determine if public benefit exists); *Id.* § 1.170A-14(d)(5)(iv)(A) (where visual *public access* is required for the conservation purpose of historic preservation to the extent that "the *public benefit* from the donation may be insufficient to qualify for a deduction if only a small portion of the property is so visible."). *See also Income Tax Incentives for Land Conservation*, *supra* note 8 ("If a conservation easement is voluntarily donated to a land trust or government agency, and if it *benefits the public* by permanently protecting important conservation resources, it can qualify as a charitable tax deduction on the donor's federal income tax return.").

[99] *See Atkinson*, T.C. Memo 2015-236, at *53–54.

conservation easement especially where the criteria for permitting entry are not provided.[100]

B. Actual "Access" is Required for "Substantial and Regular Use by the Public"

The Treasury regulations interpret "access" or public benefit for each of the four conservations purposes.[101] Unlike the historic preservation and natural habitat conservation purposes, which provide explicit exceptions to the public access requirement, there are no such explicit exceptions to the public access requirement for the conservation purpose of outdoor recreation.[102] Historic structures may be subject to restricted access for the safety of the public and the physical integrity of the property itself.[103] They may also require restrictions to prevent disturbing structures or organisms sought to be protected through the easement.[104] Similarly, a natural habitat may restrict public access for a portion of the protected area during the mating season of a threatened species on the property to prevent the public from disturbing the species.[105] A deduction would still be acceptable because the restriction protects the conservation purpose of the easement.[106]

The regulations provide no explicit exceptions to access for the purpose of outdoor recreation, but implicit exceptions may be appropriate under the "substantial and regular use by the public" requirement of the current "access" definition.[107] Implicit exceptions may include physical and temporal restrictions on access that still allow for "substantial and regular use of the public."[108] Physical and temporal restrictions are foreseeable for the two examples of recreational

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[100] *Id.* Beyond *Atkinson*, ensuring actual public access is central to the public benefit requirement of charitable contributions under § 170 which can only be given to a government for exclusively public purposes or to a charitable organization where there is no private inurement. *See* 26 U.S.C. § 170(c) (2018). Actual public access is also crucial for the exempt purpose and private benefit analysis of tax-exempt land trusts receiving a conservation easement because tax-exempt organizations are required to serve an adequately broad charitable class. *See* 26 C.F.R. § 1.501(c)(3)-(d)(1)(ii) (2019); *see also* Zachary S. Kester, *Charitable Class: What Is It and How Can You Ensure You Are Serving One?*, CHARITABLE ALLIES, https://charitableallies.org/news/charitable-class-what-is-it-and-how-to-serve/ (last visited Sept. 9, 2020). If the charitable class is too narrow, non-incidental private benefit may be found which could threaten the tax-exempt status of the land trust receiving the conservation easement. *Id.* As such, serving a valid charitable class and avoiding non-incidental private benefit to ensure a tax-exempt purpose is met for a land trust may help guide meeting the public access requirement for conservation easements. *See* 26 U.S.C. § 170(c); 26 C.F.R. § 1.170A-14(d)(2)(ii); 26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii).

[101] *See* 26 C.F.R. §§ 1.170A-14(d)(2)(ii), 1.170A-14(d)(3)(iii), 1.170A-14(d)(4)(ii)(B), 1.170A-14(d)(4)(iii)(C), 1.170A-14(d)(5)(iv).

[102] *See id*. § 1.170A-14(d)(2)(ii); *supra* Section II.C.

[103] *See* 26 C.F.R. § 1.170A-14(d)(5)(iv)(B).

[104] *See* 26 C.F.R. §§ 1.170A-14(d)(5)(iv)(B), 1.170A-14(d)(3)(iii).

[105] *See id.* § 1.170A-14(d)(3)(iii).

[106] *Id*.

[107] *See id*. § 1.170A-14(d)(2)(ii).

[108] *Id*.

conservation easements provided in Treasury regulations: (1) a water area open for public fishing and boating or (2) a nature hiking area.[109]

1. Substantial Use: Water Area as an Example

The substantial use requirement may implicitly allow for *physical* exceptions to access for outdoor recreation conservation easements. Using the example of public boating from the Treasury regulations,[110] a reasonable physical limitation might include closing off a portion of a water area near a dam from public boat access to protect public health and safety from potential hazards of a dam while pursuing the recreational endeavor. An example like this should still qualify for a deduction as long as substantial use is still permitted. However, the easement should only cover the portion of the area where the public would have access given there is not much public benefit associated with a hazardous area near a dam, and an easement over a restricted area should not be included as part of the deduction.[111] Likewise, if a golf course area is restricted from public entry, whether in part or as a whole,[112] that restricted area should not receive a deduction because there is no public benefit of recreation in a restricted area.[113]

2. Regular Use: Hiking Area as an Example

The regular use requirement may implicitly allow for *temporal* exceptions to access for a conservation easement with the purpose of outdoor recreation. Using the example of a hiking area as listed in the Treasury regulations,[114] individual restrictions on access could include seasonal restrictions where a hiking area with a conservation easement may be closed during the winter when there is high snowfall to protect against health and safety hazards. Even with such a restriction and a very small number of visitors, the area would still meet the regular use requirement. Such use can only occur safely during certain seasons for particular geographies, and Congress did not intend to prevent areas from receiving deductions for conservation easements based on geographical constraints.[115] The hiking area example may explain why the Treasury regulations interpret access

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[109] *See id.* § 1.170A-14(d)(2)(i). Because the Treasury regulations are vague, the following two subsections discuss the two examples provided in the regulations in hypothetical scenarios to provide context. *See infra* Section III.B.1 and Section III.B.2.
[110] *Id.*
[111] *See* 26 U.S.C. § 2522(d) (2004); Glass v. Comm'r, 471 F.3d 698 (6th Cir. 2006). If only a portion of a conservation easement protects the specified conservation purpose, a deduction is not allowed for the full area of the easement. *See* Champions Retreat Golf Founders, T.C. Memo 2018-146 (U.S.T.C. Sept. 10, 2018); *see also* Lindstrom, *supra* note 3, at 455.
[112] Such restrictions might be requiring fees, limiting access, or posting no trespassing signs as seen in *PBBM-Rose Hill*, 900 F.3d 193.
[113] *See Champions Retreat Golf Founders*, T.C. Memo 2018-146; *see also* Lindstrom, *supra* note 3, at 455.
[114] *See* 26 C.F.R. § 1.170A-14(d)(2)(i) (2019).
[115] Congress intended for conservation easements deductions to serve Americans in general thereby showing it did not mean to discriminatively provide deductions for easements to those landowners with or without geographical constraints. *See Conservation Easements*, *supra* note 15.

using the phrase "regular use of the general public."[116] This suggests that, to receive a deduction, use and access may be regular but not necessarily constant depending on the circumstances of the particular land.[117]

Similarly, if a recreation area were open to the general public without restrictions on access based on security or fees, temporal limitations on access like seasonality would be adequate to protect public health and safety. However, if, for example, a ski resort only allowed access to the general public once a month without charging a fee, the line would be blurred as to whether the resort provided regular access. This lack of clarity is especially prevalent if seasonality restricted the area to only be open in the winter because access by the general public might only occur four or five days out of a year. In this case, access should not be considered regular, and the restriction does not necessarily have the purpose of protecting public health or safety. In a similar situation, where a ski resort may be open year-round and limit the general public's access to numerous days in the year without charging a fee, a court may consider this to be regular access. This is an area where the subjectivity of the "substantial and regular use by the general public" comes to light and potentially creates an issue going against Congress's intent of allowing for deductions for conservation easements for outdoor recreation.[118] The lack of clarity in the Treasury regulations has led courts to have vastly different perspectives on public access for the conservation purpose of recreation and education as seen in the Fifth Circuit's *PBBM-Rose Hill* decision.[119]

C. PBBM-Rose Hill is Divergent Dicta That Creates Confusion

PBBM-Rose Hill is a divergent case that overlooked precedent and unnecessarily interpreted the conservation purpose of outdoor recreation. In *PBBM-Rose Hill, Ltd. v. Commissioner*, the conservation easement covered a golf course and park where the golf course was spread out surrounded by houses in a gated community.[120] There was limited access to a significant portion of the property through a gatehouse entrance managed by security and had a sign to these area stating, "'[p]roperty owners, residents, and guests only beyond this point.'"[121] Under the *Atkinson* interpretation of "general public," such limitations would not be considered open to the "general public" or the "public at large" because these limitations only allow access to the local community of "[p]roperty owners,

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[116] *See* 26 C.F.R. § 1.170A-14(d)(2)(ii) (2019).
[117] *Id.*
[118] *See Conservation Easements*, *supra* note 15. In fact, Stephen, J. Small, the author of the conservation easement regulations explicitly stated, "[y]ou will probably not qualify for a deduction if there is nothing special or unusual about the land that you are protecting . . . If you are truly contributing something to the general environmental well-being of the area, then that's good (and deductible)" and where it is questionable whether an easement adheres to the regulations, one is likely not truly contributing something to the general environmental well-being of an area. Stephen J. Small, PRESERVING FAMILY LAND: BOOK III 19 (2002).
[119] *See generally PBBM-Rose Hill*, 900 F.3d 193.
[120] *See id.*; *see also* PBBM-Rose Hill, Ltd. v. Comm'r, No. 26096-14, 2016 U.S. Tax Ct. LEXIS 47 at *4 (T.C. Oct. 7, 2016).
[121] *PBBM-Rose Hill*, 900 F.3d at 202; *see also* PBBM-Rose Hill, Ltd. v. Comm'r, No. 26096-14, 2016 U.S. Tax Ct. LEXIS 47 at *11 (T.C. Oct. 7, 2016); *supra* Section II.C.1.

residents, and guests" and the criteria for permitting entry through the gatehouse is not provided.[122] Additionally, such limitations might prevent substantial and regular use by the general public depending on the criteria for entry set by the gatehouse.[123]

The court looked only at the four corners of the agreement granting the easement to determine if the conservation purpose requirement was met.[124] Even under a four-corners test, the terms of the agreement regarding public access were conflicting.[125] Enforcement of the public access requirement against NALT—who as the holder of the easement is responsible for enforcement of its terms[126]—might be incredibly difficult under this agreement and would require looking at the actions of the landowner. The court overlooked this issue and determined that although there were conflicting provisions, the more specific provision should prevail.[127] The court determined the provision granting public access was more specific without offering justification and without establishing a test for determining the relative specificity for contradicting terms.[128]

Looking at the conservation easement agreement in *PBBM-Rose Hill* still does not provide clarity whether actual "substantial and regular use for the general public" exists.[129] The agreement permits charging fees as long as such fees do not prevent the property from being open for "substantial and regular use [by] the general public"[130] and do not cause the property to be a private club.[131] Here, the agreement seems to mirror the wording of the Treasury regulations to avoid confronting the reality that charging potentially large fees could amount to making a significant profit, which inherently does limit use by the general public. A four corners interpretation could thus incentivize landowners to create conservation easements through vague agreements that mirror any Treasury regulation because then it would be difficult to hold landowners accountable for the reality of their actions.[132] Given the lack of clarity and vagueness in the Treasury regulations, a court facing conservation easement agreement language like the terms at issue in *PBBM-Rose Hill* which mirror the regulations would need to look at the fees actually charged[133] and subjectively determine if such fee inhibited "substantial and

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[122] *See* Atkinson v. Comm'r, T.C. Memo 2015-236, *54 (U.S.T.C. Dec. 9, 2015); *supra* Section II.C.3.
[123] *See id.* at *53–54.
[124] *Id.*
[125] *Id.*; *supra* note 61 and accompanying text.
[126] *See* Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 DENVER J. L., PROP. & SOC'Y 108, 108–09 (2015).
[127] *See* PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193, 203 (5th Cir. 2018).
[128] *Id.*
[129] *See* 26 C.F.R. § 1.170A-14(d)(2)(ii) (2019); *PBBM-Rose Hill*, 900 F.3d at 199.
[130] *See* 26 C.F.R. § 1.170A-14(d)(2)(ii).
[131] *See supra* note 63 and accompanying text.
[132] *See* 26 C.F.R. § 1.170A-14(d)(2)(ii).
[133] In this case and in the case of most agreements for conservation easements, the exact fee the landowner will charge is generally not provided within the agreement. *See PBBM-Rose Hill*, 900 F.3d 193.

regular use [by] the general public."[134] Therefore, looking solely at the four corners of the agreement is insufficient to determine if the property protected by the easement was sufficiently accessible according to the regulatory requirements to receive a deduction.

While issues of law are reviewed *de novo*, such situations on appeal are highly unlikely to favor taxpayers in allowing the deduction because the Tax Court—which specializes in tax issues—is skeptical of granting tax deductions.[135] NALT, who was the donee and enforcer of the easement at issue in *PBBM-Rose Hill*, previously served as donee in multiple cases brought by the IRS Commissioner for very similar properties, including a number of golf courses.[136] The many cases brought against NALT may show that the IRS, which is consulted in the making of the Treasury regulations, is skeptical that such properties meet a conservation purpose. Regardless, the court's determination that the easement met the conservation purpose of outdoor recreation is *dicta* and cannot be considered precedent because the court held the conservation easement failed to meet a different requirement and therefore did not qualify for a deduction.[137]

D. Resolving Ambiguity in the Internal Revenue Code and the Relevant Treasury Regulations Meets All PGP Factors

The Treasury's annual PGP serves as an agenda guiding the agency's focus and resources.[138] The issue of ambiguity in the Treasury regulations regarding what constitutes "the general public" and adequate access for the conservation purpose of outdoor recreation meets all of the seven PGP factors when only one factor is required to be met for inclusion in the PGP.[139] Given the number of recent court cases involving conservation easements on recreational land which limit access, like golf courses and resorts,[140] resolving the ambiguity regarding access for § 170(h)(4)(A)(i) is (1) significant and relevant to taxpayers and would also (2) significantly reduce the cost and burden on the public as a whole and the

[134] *See* 26 C.F.R. § 1.170A-14(d)(2)(ii).
[135] *See supra* note 43 and accompanying text. Issues of fact are reviewed for clear error. *Id.*
[136] *See supra* note 57and accompanying text. *See PBBM-Rose Hill*, 900 F.3d 193.
[137] *PBBM-Rose Hill*, 900 F.3d at 215. Cases have historically not discussed conservation purpose when an easement fails to meet a different requirement for receiving a federal income tax deduction because discussion of conservation purpose is a moot point and would be judicial overreaching. *See* RP Golf v. Comm'r, 860 F.3d 1096, 1099 (8th Cir. 2017).
[138] *See supra* Section II.B.
[139] *Id.*
[140] At least six cases regarding conservation easements on golf course resorts alone have come forward in the past few years. For a case to be brought, the IRS must have performed an audit on the taxpayer. The IRS cannot audit every taxpayer and not every taxpayer audited and questioned by the IRS leads to a case. *See* Atkinson v. Comm'r, T.C. Memo 2015-236 (U.S.T.C. Dec. 9, 2015) (where $7.9 million in deductions was sought); Belk v. Comm'r, 774 F.3d 221, 223 (4th Cir. 2014) (where a $10.5 million deduction was sought); Champions Retreat Golf Founders, T.C. Memo 2018-146, *1 (U.S.T.C. Sept. 10, 2018) (where a $10.4 million deduction was sought); Kiva Dunes Conservation, LLC v. Comm'r, T.C. Memo. 2009-145, *10 (U.S.T.C. June 22, 2009) (where a $28.7 million deduction was sought); *PBBM-Rose Hill*, 900 F.3d at 197 (where a $15.2 million deduction was sought); *RP Golf*, 860 F.3d at 1098 (where a $16.4 million deduction was sought).

government.[141] Resolving the access ambiguity serves the first two PGP purposes because it puts into question whether at least $89.1 million in deductions should have been granted.[142] Similarly, every time a tax deduction for a conservation easement is erroneously granted the government loses tax revenue which then must be offset by reducing government spending or increasing the deficit—a cost and burden ultimately borne by the government and the general public.[143] Furthermore, clarifying ambiguity in the Treasury regulations related to public benefit and access (3) promotes sound tax administration; (4) makes the law easier to understand; and (5) improves ineffective current regulation,[144] because the Treasury, IRS, courts, and other government entities will have a clearer guide in administering conservation easement law and the public will also have a better understanding of how the law applies to it. There will also be (6) uniformity in administration and (7) reduction in controversy[145] such that situations where courts may fill gaps using their own interpretation, like in *PBBM Rose-Hill,*[146] will not occur as often. The issue of ambiguity in the Treasury regulations regarding public benefit and access for the conservation purpose of outdoor recreation therefore meets all seven of the PGP factors such that the next PGP should include the issue.[147] Once the PGP includes the issue, the Treasury regulations should be amended to interpret whether an area with limitations on access, like a golf course or a resort, meets the conservation purpose of outdoor recreation.

IV. Resolving the Ambiguity Exposed by PBBM-Rose Hill

The Treasury regulations should be amended in three ways. The regulations should be amended to (1) define "general public," (2) limit what exceptions to access are permitted to meet "substantial and regular use by the public," and (3) provide an explicit example to show how the agency interprets whether the conservation purpose of outdoor recreation is met. Incorporating these three recommendations individually, partially, or collectively while amending the Treasury regulations will help resolve existing ambiguity regarding access for the conservation purpose of outdoor recreation.

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[141] *See supra* Section II.B.

[142] *See supra* note 140 and accompanying text. The $89.1 million figure is the total sum of the deductions in question in the preceding golf course conservation easement cases. This does not include the number of deductions taken by taxpayers on similar recreational land that were not audited or were not litigated.

[143] "Every dollar spent by the Government must be paid for either by taxes or by more borrowing with greater debt. . . . The only other way to make more tax cuts now is to have bigger and bigger deficits and to borrow more and more money. Either we or our children will have to bear the burden of this debt. This is one kind of chicken that always comes home to roost." Address by President Dwight Eisenhower, March 15, 1954, reprinted in, 1954 U.S. CODE & CONG. ADMIN. NEWS 1667, 1669.

[144] *See supra* Section II.B.

[145] *Id.*

[146] The *PBBM-Rose Hill* decision was a divergent opinion on the topic of access for conservation easements with a recreational purpose given the lack of direction provided in the Treasury regulations. *See* PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193 (5th Cir. 2018).

[147] *See* IRM 32.1.1.4.3.

A. Defining "General Public" Using the Atkinson Interpretation

The Treasury regulations must elaborate on what constitutes the "general public" for the conservation purpose of outdoor recreation. The Treasury should apply the same interpretation of the "general public" as the *Atkinson* court, which defined "general public" as "the public at large." This interpretation indiscriminately includes those beyond the direct community of landowners, fee-paying members, and guests surrounding the easement.[148] Although the court in *Atkinson* interpreted "general public" in the context of the conservation purpose of preserving open space, the same interpretation should be used for the conservation purpose of outdoor recreation, because all conservation purposes are meant to benefit the same broad group.[149] By defining the "general public" under the *Atkinson* interpretation of "the public at large," the Treasury regulations would not consider access that was limited to members of the local community or area as access to the "general public."[150] This clarification would allow taxpayers to understand who must have access to qualify for a tax deduction under the conservation purpose of outdoor recreation.

B. Limitations on Access Only for the Purpose of Protecting the Health and Safety of the General Public

The Treasury regulations should interpret that "substantial and regular" access for the conservation purpose of outdoor recreation can only be limited for the purpose of protecting the health and safety of the general public.[151] Permitting only this limitation to access is in line with the current requirement of access for the substantial and regular use by the general public. Conservation easements allow the government to encourage public benefit on private land without having to spend money on the creation and maintenance of government-operated public lands and parks.[152]

By permitting a limitation on access only to protect the health and safety of the general public, the subjectivity issue of whether charging a fee is appropriate becomes moot. Maintaining a property to protect the health and safety of visitors likely comes at a cost such that some fee may be reasonable to mitigate the costs of maintenance. In applying this proposed standard, when fees charged to visitors exceed that which is necessary to mitigate costs of maintaining the property for public health and safety, there would be an inference that such fees limit public access. Whether or not a fee is reasonable could also be determined by comparing fees charged to access the private recreational land covered by a conservation

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[148] *See* Atkinson v. Comm'r, T.C. Memo 2015-236, *54 (U.S.T.C. Dec. 9, 2015).

[149] *See supra* note 98 and accompanying text; *see also Income Tax Incentives for Land Conservation*, *supra* note 8.

[150] *See Atkinson*, T.C. Memo 2015-236, at *53–54.

[151] For example, limiting access would be permitted to protect the health and safety of the general public in rainy weather where a property has a slippery slope and could thereby create a hazard to hikers.

[152] *See* Sepp, *supra* note 6.

easement with fees charged to access a comparable public land or park if fees of such public areas are the primary source of funding for maintenance of the area.[153]

C. An Example and Interpretation to Clarify Treatment of Golf Courses, Resorts, or Similar Types of Property Where Access is Limited

The Treasury regulations often provide examples to aid taxpayers in understanding what the IRS might find permissible or impermissible for a deduction, but no such scenario exists for recreational uses like golf courses or ski resorts. Without an example, taxpayers may be able to request a Public Letter Ruling (PLR). However, PLRs are only determinative for the requesting taxpayer and are not binding on other taxpayers.[154] If multiple taxpayers submit PLR requests on a similar topic and there are already multiple recent cases on the same topic,[155] efficiency and proper resource management are key concerns. This further necessitates an explicit example of the topic in the Treasury regulations. The Treasury should therefore provide an example involving a property where access might be limited and analyze how such a property does or does not meet the various conservation purposes, with particular focus on the conservation purpose of outdoor recreation.

Incorporating some combination of these three recommendations while amending the Treasury regulations will help resolve much of the current ambiguity regarding access for the conservation purpose of outdoor recreation. Making these changes in the Treasury regulations provides a relatively quick, simple, and effective resolution[156] that increases clarity for taxpayers and the government. These changes will require less litigation of tax issues, prevent misuse of tax benefits,[157] and increase efficiency for the Treasury, the IRS, and society.

[153] A court would be required to look beyond the four corners of the agreement for the conservation easement in order to determine whether or not a fee is reasonable in limiting public access in order to protect public health and safety. A four-corners test on a conservation easement agreement as called upon in *PBBM-Rose Hill* is not a problem because the four-corners test fails on its face in any sort of analysis of an agreement when it comes to restricting access. *See* PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193, 203 (5th Cir. 2018) (where in *dicta* the court determined an easement can only be judged by the four corners of the agreement).

[154] *See Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, INTERNAL REVENUE SERV. (Apr. 20, 2018) https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts.

[155] *See generally Atkinson*, T.C. Mem. 2015-236; Champions Retreat Golf Founders, T.C. Memo 2018-146 (U.S.T.C. Sept. 10, 2018); Kiva Dunes Conservation, LLC v. Comm'r, T.C. Memo. 2009-145 (U.S.T.C. June 22, 2009); *PBBM-Rose Hill*, 900 F.3d 193; RP Golf v. Comm'r, 860 F.3d 1096, 1099 (8th Cir. 2017).

[156] Likely no notice and comment will be required for these recommendations if considered interpretive rules given all recommendations interpret I.R.C. § 170(h)(4)(a)(i). *See supra* note 38.

[157] Preventing misuse of tax benefits, like tax avoidance through the use conservation easement deductions, prevents unnecessary loss of tax revenue, helping the government function efficiently. *See* Sepp, *supra* note 6.

V. Fulfilling the Hope of Conservation

The recent surge in federal conservation easement tax deduction cases involving properties with limitations on access, such as golf courses and resorts, suggests such properties were not intended to receive deductions or at least require more clarity in the Treasury regulations. The current Treasury regulations are ambiguous regarding the topic of access for conservation easements with the conservation purpose of outdoor recreation. The Treasury should include this issue of ambiguity in its PGP to amend the Treasury regulations pertaining to access for § 170(h)(4)(A)(i). Upon amending the Treasury regulations, the agency should consider (1) defining "general public" as "public at large," (2) limiting what exceptions to "access" are permitted to meet "substantial and regular use by the public," and (3) providing an explicit example to show how the agency interprets whether the conservation purpose of outdoor recreation is met. These considerations would resolve the ambiguity and further clarify the topic of public access for federal income tax deductions for conservation easements serving the purpose of outdoor recreation.