

Trying Times:

Conservation Easements and Federal Tax Law



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- Pine Mountain v. Comm'r
 - Movable building areas and amendments
- PBBM-Rose Hill v. Comm'r
 - Noncompliant proceeds clauses
- Belair Woods v. Comm'r
 - IRS Form 8283
- Final Substantiation and Valuation Regulations
- Syndicated Donation Transactions

Belk v. Comm'r

774 F.3d 221 (4th Cir. 2014)



Treas. Regs offer a single—and exceedingly narrow—exception to the requirement that a CE impose a perpetual use restriction:

- Extinguishment in a judicial proceeding upon impossibility/impracticality

Absent these “unexpected and extraordinary circumstances,” real property placed under easement must remain there in perpetuity for the donor to claim a deduction.

Bosque Canyon Ranch v. Comm'r

867 F.3d 547 (5th Cir. 2017)



Bosque Canyon Ranch v. Comm'r

867 F.3d 547 (5th Cir. 2017)



Bosque Canyon Ranch v. Comm'r

867 F.3d 547 (5th Cir. 2017)

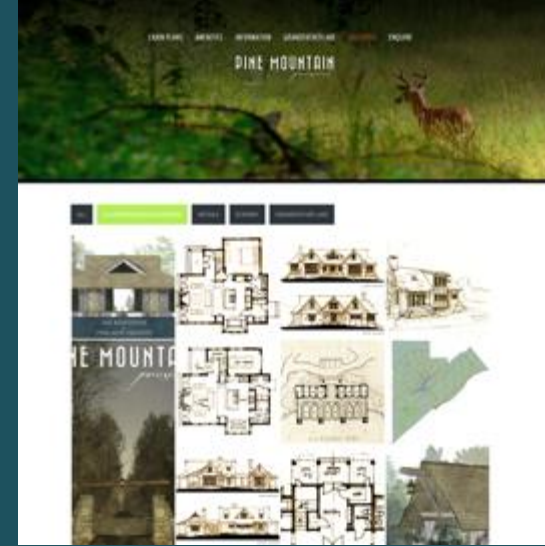
Dissent: Congress did not intend for possibly enormous tax deductions to be based on the likelihood of continued agreement between the donor and donee as to the land subject to the easement; rather, it specifically and unequivocally required that a qualified conservation easement be perpetual.



Pine Mountain v. Comm'r

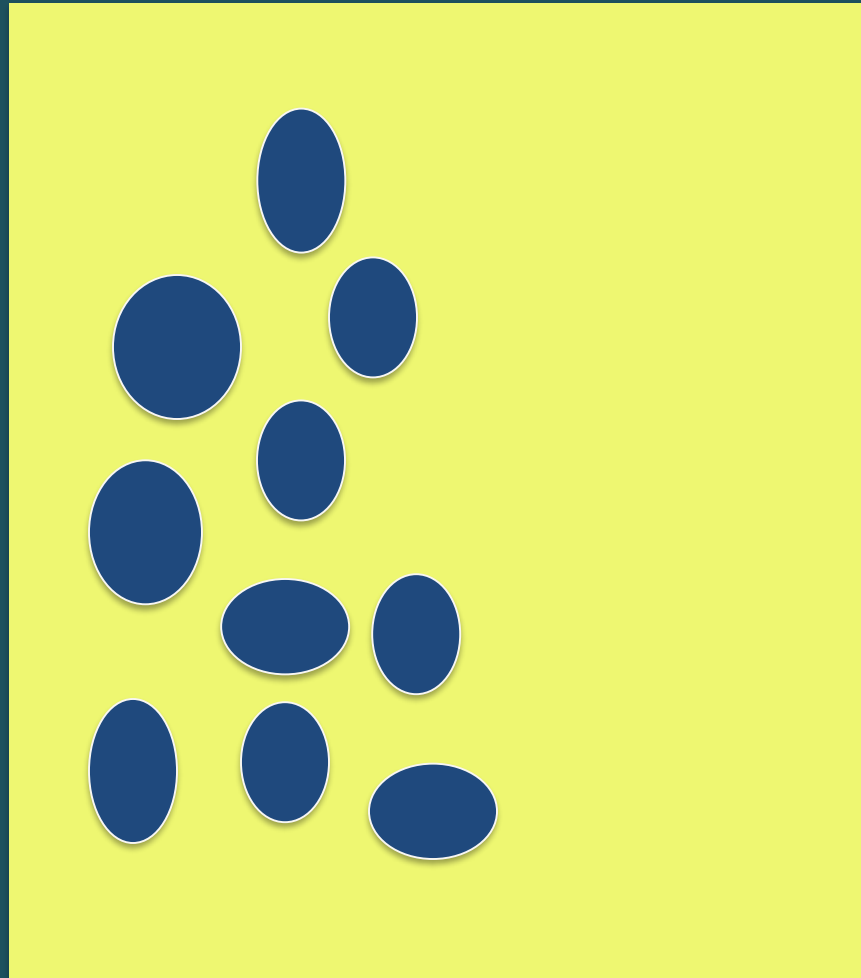
151 T.C. No. 14 (2018)

- 6,200-acre tract
 - 2005 CE (560 mostly contiguous acres)
 - 10 residential building areas
 - Sites depicted around man-made lake in Exhibit to CE
 - But building areas can be relocated anywhere on the 560 acres with NALT's approval
 - Additional reserved rights
 - 2006 CE (7 noncontiguous plots; total of 500 acres)
 - 6 residential building areas
 - Sites not identified and can be located anywhere on 500 acres with NALT's approval
 - Additional reserved rights



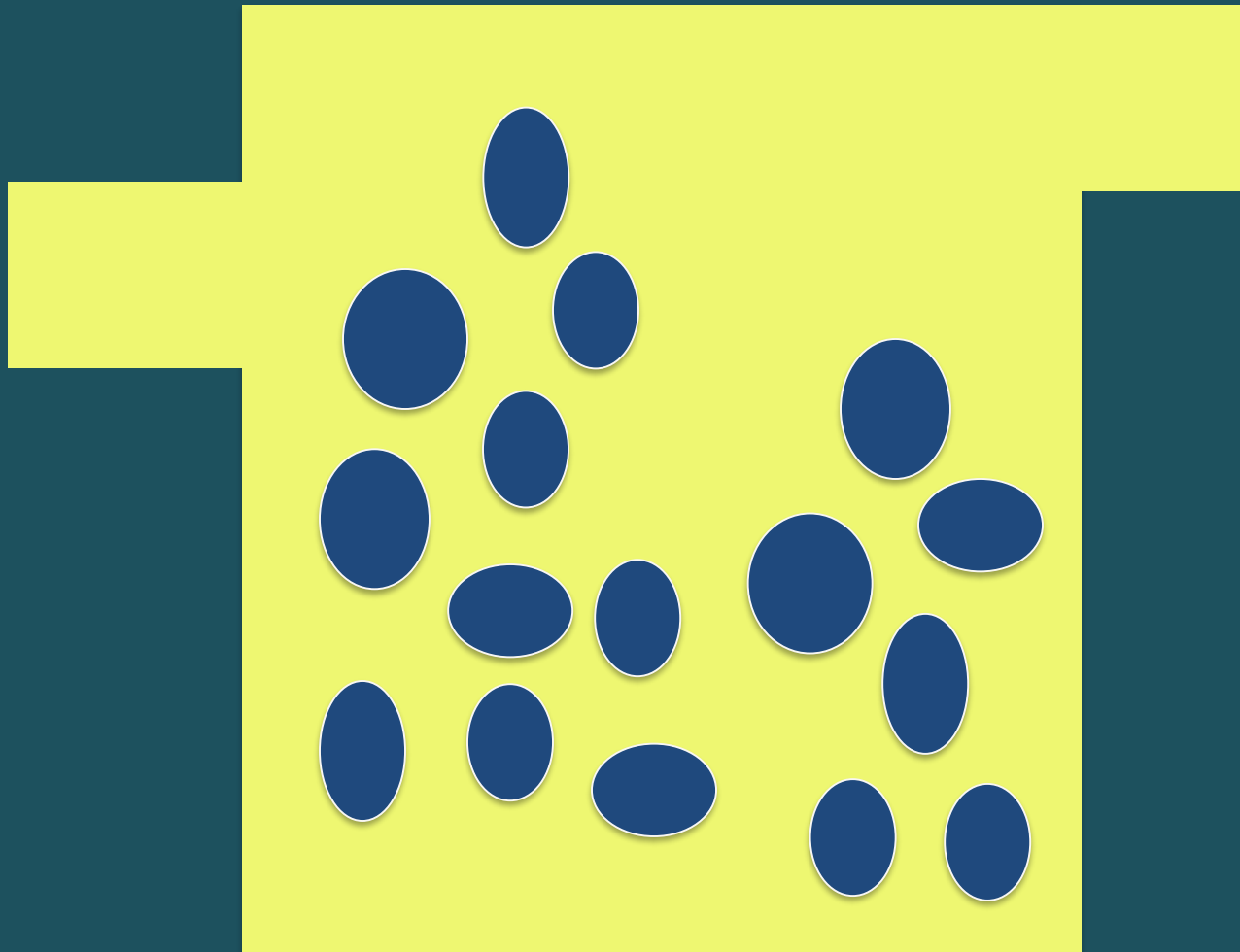
Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)



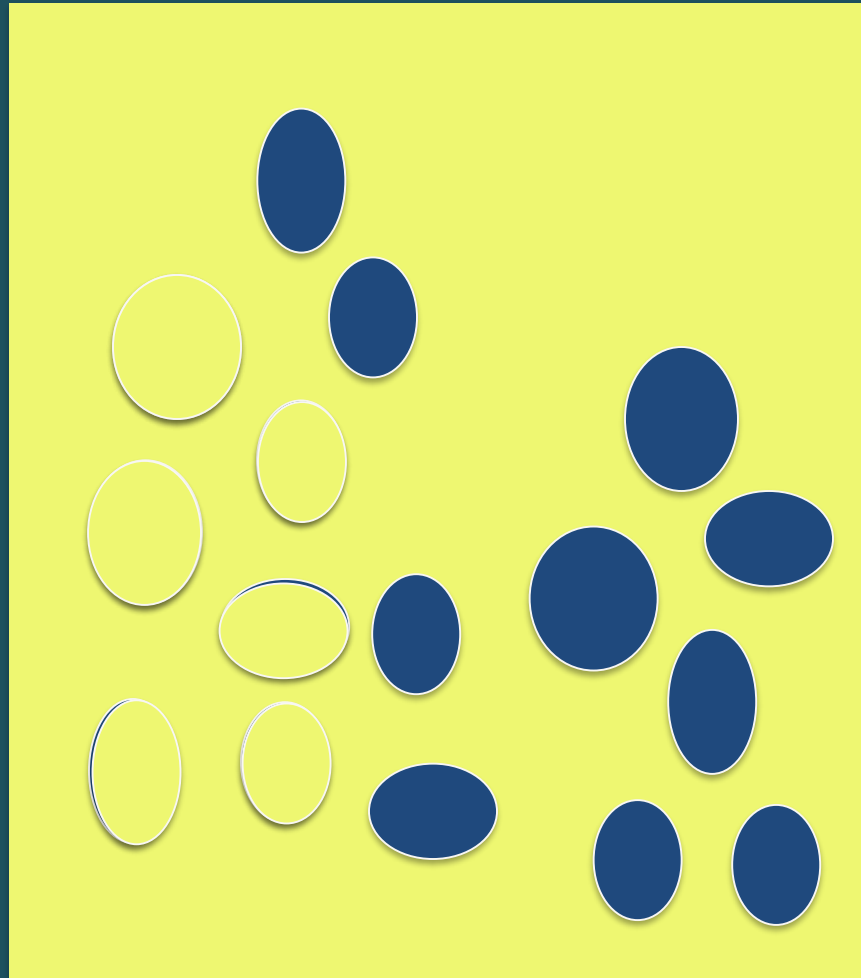
Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)



Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)

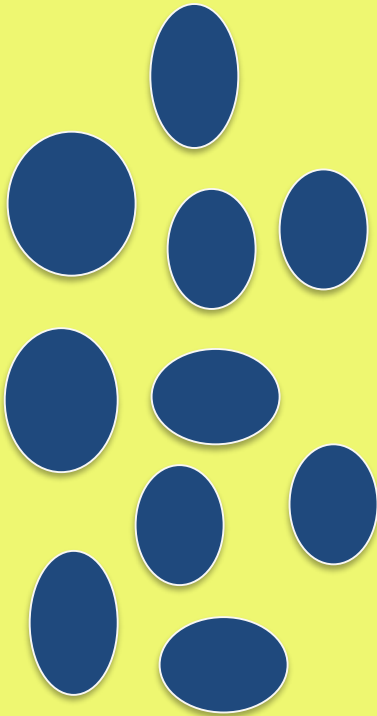


Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)

Addressing Building Areas in light of Pine Mtn

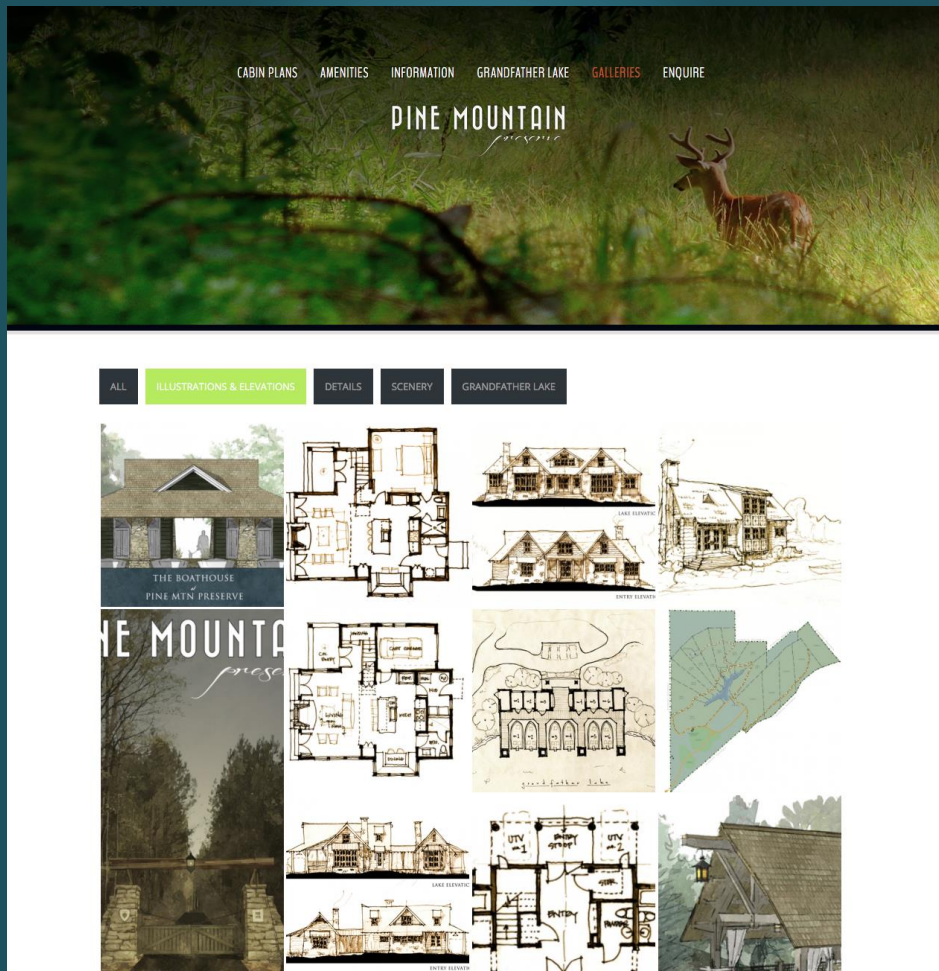
- Identify building areas in CE
- Identify more building areas than are needed
- Designate no-build areas
- Exclude building areas from CE



Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)

~Amendment Clauses ~



PBBM Rose-Hill v. Comm'r

900 F.3d 193 (5th Cir. 2018)



~ Noncompliant Proceeds Clause ~

Treasury Regulation § 1.170A-14(g)(6)

- Tax-deductible easement can be extinguished only:
 - in a judicial proceeding
 - upon a finding of “impossibility or impracticality,” and
 - The holder must be entitled to a share of proceeds from a subsequent sale or exchange of the property to be used for similar conservation purposes

Proceeds Formula in Regulations

Date of Gift

$$\frac{\text{FMV CE: } \$ 300,000}{\text{FMV property: } \$ 1,000,000} = 30\%$$

Following extinguishment, holder must be entitled to at least 30% of the proceeds from a sale or exchange of the property

Proceeds Formula in PBBM

Date of Gift

$$\frac{\text{FMV CE: } \$ 300,000}{\text{FMV property: } \$ 1,000,000} = 30\%$$

Following extinguishment, holder would be entitled to correct % of the proceeds from a sale or exchange of the property

But “proceeds” was defined to exclude the amount attributable to post-donation improvements constructed on the property by the landowner

Proceeds Formula in Regulations

Date of Gift

$$\frac{\text{FMV CE: } \$ 300,000}{\text{FMV property: } \$ 1,000,000} = 30\%$$

Following extinguishment, holder must be entitled to at least 30% of the proceeds from a sale or exchange of the property

- Treasury may have specifically chosen a brite-line rule that relies on qualified appraisal obtained at donation
- % will often benefit landowner over holder
- Formula kicks in only upon extinguishment, which should be extremely rare

PBBM Rose-Hill v. Comm'r

900 F.3d 193 (5th Cir. 2018)

Drafting Options in light of PBBM

- Exclude building area from CE
 - Drawbacks (gas station, enhancement, less flexibility)
- Donate two CEs: one nondeductible, one deductible
 - Drawback (increase expense and complexity)
- Include and identify building area in CE
 - Avoids drawbacks of other options
 - While improvements not subtracted (might benefit holder), limiting holder's share to formula % (might benefit landowner)
 - Extinguishments should be extremely rare, proceeds clause unlikely to become operative

Belair Woods, LLC v. Comm’r

T.C. Memo. 2018-159

“When a taxpayer claims a charitable...deduction for recently purchased property, a wide gap between cost basis and claimed value raises a red flag suggesting that the return merits examination.”

“Unless the taxpayer...disclose[s] his cost basis..., the Commissioner will be deprived of an essential tool that Congress intended him to have.”



IRS Form 8283

Instructions require a
Supplemental Statement

IRS Form 8283

Filling out the form correctly and
completely . . .



Example 1: Simple Donation

CE Protected Land (300 acres)

Before easement value:	\$1,000,000
<u>After easement value:</u>	<u>\$ 700,000</u>
Easement value:	\$ 300,000

Deduction is
\$300,000

Example 1: Simple Donation

Before easement value: \$1,000,000
After easement value: \$ 700,000
 Easement value: \$ 300,000

Part I Information on Donated Property —To be completed by the taxpayer and/or the appraiser.							
4 Check the box that describes the type of property donated:							
a <input type="checkbox"/>	Art* (contribution of \$20,000 or more)	d <input type="checkbox"/>	Art* (contribution of less than \$20,000)	g <input type="checkbox"/>	Collectibles**	j <input type="checkbox"/>	Other
b <input checked="" type="checkbox"/>	Qualified Conservation Contribution	e <input type="checkbox"/>	Other Real Estate	h <input type="checkbox"/>	Intellectual Property		
c <input type="checkbox"/>	Equipment	f <input type="checkbox"/>	Securities	i <input type="checkbox"/>	Vehicles		
<p>*Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects.</p> <p>**Collectibles include coins, stamps, books, gems, jewelry, sports memorabilia, dolls, etc., but not art as defined above.</p> <p>Note. In certain cases, you must attach a qualified appraisal of the property. See instructions.</p>							
5	(a) Description of donated property (if you need more space, attach a separate statement)			(b) If tangible property was donated, give a brief summary of the overall physical condition of the property at the time of the gift		(c) Appraised fair market value	
A	Conservation easement (IRC 170(h)) on 300 acres					→ \$300,000	
B	in Bath County, VA to protect open space.						
C	See attached supplemental statement and Deed						
D	of Easement						
	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, enter amount received	See instructions		
					(h) Amount claimed as a deduction	(i) Date of contribution	
A	August 2005	Purchase	\$750,000				
B	(date donor	(how donor acquired the	(pre-contrib. basis				
C	acquired the	underlying property)	in underlying prop				
D	underlying prop.)		see supp. stmt)				

Example 2: Simple Bargain Sale

CE Protected Land (300 acres)

Before easement value:	\$1,000,000
<u>After easement value:</u>	<u>\$ 700,000</u>
Easement value:	\$ 300,000

Taxpayer is paid
\$150,000 for easement

Deduction is
\$150,000

Example 2: Simple Bargain Sale

Before easement value: \$1,000,000
After easement value: \$ 700,000
 Easement value: \$ 300,000

Taxpayer is paid
 \$150,000 for easement

Part I Information on Donated Property—To be completed by the taxpayer and/or the appraiser.

4 Check the box that describes the type of property donated:

- a Art* (contribution of \$20,000 or more) d Art* (contribution of less than \$20,000) g Collectibles** j Other
 b Qualified Conservation Contribution e Other Real Estate h Intellectual Property
 c Equipment f Securities i Vehicles

*Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects.

**Collectibles include coins, stamps, books, gems, jewelry, sports memorabilia, dolls, etc., but not art as defined above.

Note. In certain cases, you must attach a qualified appraisal of the property. See instructions.

5	(a) Description of donated property (if you need more space, attach a separate statement)	(b) If tangible property was donated, give a brief summary of the overall physical condition of the property at the time of the gift	(c) Appraised fair market value			
A	Conservation easement (IRC 170(h)) on 300 acres		\$300,000			
B	in Bath County, VA to protect open space.					
C	See attached supplemental statement and Deed					
D	of Easement					
	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, enter amount received	See instructions	
					(h) Amount claimed as a deduction	(i) Date of contribution
A	August 2005	Purchase	\$750,000	\$150,000		
B	(date donor	(how donor acquired the	(pre-contrib. basis			
C	acquired the	underlying property)	in underlying prop			
D	underlying prop.)		see supp. stmt)			

Conservation Easement-Specific Valuation Rules

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Treas. Reg. § 1.170A-14(h)(3)

Rule 1: Contiguous Parcel

Treas. Reg. § 1.170A-14(h)(3)(i) - 4th sentence

If land contiguous to the land encumbered by the easement is owned by the donor or a member of the donor's family, the deduction is equal to the difference between the before-easement and after-easement values of the entire contiguous parcel.

“Family”: brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

Rule 2: Enhancement

Treas. Reg. § 1.170A-14(h)(3)(i) - 5th sentence

If the easement enhances the value of any other property owned by the donor or a “related person,” the donor’s deduction must be reduced by an amount equal to the value of any such enhancement, whether or not such other property is contiguous.


“Related person”: family members and certain entities.

IRS Chief Counsel
Memo. 201334039
released Aug. 23, 2012

(contiguous parcel and
enhancement rules)

<http://www.irs.gov/pub/irs-wd/1334039.pdf>

Example 3: Rule 1 Contiguous Parcel



Parcel 1
CE Protected Land
(300 acres)

Parcel 2
(250 acres)

Before-easement value of entire contiguous parcel:	\$1,500,000
After-easement value of entire contiguous parcel:	\$ 900,000
Easement value:	\$ 600,000

Deduction is
\$600,000

Example 3: Rule 1 Contiguous Parcel

Before easement value of entire contiguous parcel: \$1,500,000

After easement value of entire contiguous parcel: \$ 900,000

Easement value: \$ 600,000

Part I Information on Donated Property—To be completed by the taxpayer and/or the appraiser.

4 Check the box that describes the type of property donated:

- a Art* (contribution of \$20,000 or more)
 d Art* (contribution of less than \$20,000)
 g Collectibles**
 j Other
 b Qualified Conservation Contribution
 e Other Real Estate
 h Intellectual Property
 c Equipment
 f Securities
 i Vehicles

*Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects.

**Collectibles include coins, stamps, books, gems, jewelry, sports memorabilia, dolls, etc., but not art as defined above.

Note. In certain cases, you must attach a qualified appraisal of the property. See instructions.

5 (a) Description of donated property (if you need more space, attach a separate statement)		(b) If tangible property was donated, give a brief summary of the overall physical condition of the property at the time of the gift		(c) Appraised fair market value		
A	Conservation easement (IRC 170(h)) on 300 acres				\$600,000	
B	in Bath County, VA to protect open space.					
C	See attached supplemental statement and Deed					
D	of Easement					
	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, enter amount received	See instructions	
					(h) Amount claimed as a deduction	(i) Date of contribution
A	August 2005	Purchase	\$750,000			
B	(date donor	(how donor acquired the	(pre-contrib. basis			
C	acquired the	underlying property)	in underlying prop			
D	underlying prop.)		see supp. stmnt)			

Example 3: Rule 1 Contiguous Parcel

Parcel 1
CE Protected Land
(300 acres)



Parcel 2
(250 acres)



Before-easement value of entire contiguous parcel:	\$1,500,000
After-easement value of entire contiguous parcel:	\$ 900,000
Easement value:	\$ 600,000

Deduction is
\$600,000

Example 4: Rule 2 Enhancement

CE Protected Land (300 acres)

Before easement value:	\$1,000,000
<u>After easement value:</u>	<u>\$ 700,000</u>
Easement value:	\$ 300,000



Noncontiguous Parcel

value enhanced
\$50,000 by
donation



Deduction is
\$250,000

Example 4: Rule 2 Enhancement

Before easement value: \$1,000,000
 After easement value: \$ 700,000
 Easement value: \$ 300,000

CE enhances value of noncontiguous parcel by \$50,000

***Address \$50,000 enhancement in Supp. Statement**

Part I Information on Donated Property—To be completed by the taxpayer and/or the appraiser.

4 Check the box that describes the type of property donated:

a Art* (contribution of \$20,000 or more) d Art* (contribution of less than \$20,000) g Collectibles** j Other
 b Qualified Conservation Contribution e Other Real Estate h Intellectual Property
 c Equipment f Securities i Vehicles

*Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects.
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Note. In certain cases, you must attach a qualified appraisal of the property. See instructions.

5	(a) Description of donated property (if you need more space, attach a separate statement)	(b) If tangible property was donated, give a brief summary of the overall physical condition of the property at the time of the gift	(c) Appraised fair market value
A	Conservation easement (IRC 170(h)) on 300 acres		\$300,000
B	in Bath County, VA to protect open space.		
C	See attached supplemental statement and Deed		
D	of Easement		

	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, enter amount received	See instructions	
					(h) Amount claimed as a deduction	(i) Date of contribution
A	August 2005	Purchase	\$750,000			
B	(date donor	(how donor acquired the	(pre-contrib. basis			
C	acquired the	underlying property)	in underlying prop			
D	underlying prop.)		see supp. stmt)			

Noncash Charitable Contributions

Treas. Reg. §1.170A-16

Contributions made after July 30, 2018

- Deduction > \$5,000
 - Contemporaneous Written Acknowledgment*
 - Qualified Appraisal from Qualified Appraiser
 - Attach IRS Form 8283 (appraisal summary) to return
- Deduction > \$500,000
 - All of the above
 - and attach Qualified Appraisal to return
- Carryover year substantiation
 - Same as for year of contribution

*Contemporaneous Written Acknowledgment need not be attached to return.

12.1 Contemporaneous Written Acknowledgment. Pursuant to the requirements of IRC § 170(f)(8), Grantor and Grantee acknowledge that no goods or services or other consideration have been provided by Grantee to Grantor as consideration for this Easement, and Grantee will provide Grantor with a separate letter so stating before the earlier of (i) the date on which the Grantor files a return for the taxable year in which the contribution of this Easement was made or (ii) the due date (including extensions) for the filing of such return.

Form 8283 CANNOT serve as the
Contemporaneous Written Acknowledgment

Qualified Appraisal

Treas. Reg. §1.170A-17(a)

Contributions made on or after Jan. 1, 2019

An appraisal document that is prepared by a qualified appraiser in accordance with the substance and principles of the *Uniform Standards of Professional Appraisal Practice* (USPAP), as developed by the Appraisal Standards Board of the Appraisal Foundation.

Qualified Appraiser

Treas. Reg. §1.170A-17(b)

Contributions made on or after Jan. 1, 2019

- An individual with verifiable education and experience in valuing the type of property for which the appraisal is performed...
- An individual is treated as having education and experience in valuing the type of property ... if, as of the date the individual signs the appraisal,
 - the individual has successfully completed professional or college-level coursework in valuing the type of property, and has two or more years of experience in valuing the type of property

Qualified Appraiser

Treas. Reg. §1.170A-17(b)

Contributions made on or after Jan. 1, 2019

- Coursework must be obtained from an educational organization, generally recognized professional trade or appraiser organization, or employer educational program.
 - OR –
- The individual has earned a “recognized appraiser designation.”
 - A recognized appraiser designation means a designation awarded by a generally recognized professional appraiser organization on the basis of demonstrated competency for the type of property being valued.

Qualified Appraiser

Treas. Reg. §1.170A-17(b)

Contributions made on or after Jan. 1, 2019

Education and Experience is Verifiable:

- if the appraiser specifies in the appraisal the appraiser's education and experience in valuing the type of property, and
- if the appraiser makes a declaration in the appraisal that, because of the appraiser's education and experience, the appraiser is qualified to make appraisals of the type of property being valued.

Other Requirements

- Timely “valuation effective date”
 - For an appraisal report dated before the date of the contribution, the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution.
 - For an appraisal report dated on or after the date of the contribution, the valuation effective date must be the date of the contribution.

Other Requirements

■ Two or More Signing Appraisers

- Form 8283 (appraisal summary) must be signed by all appraisers who signed the appraisal report.

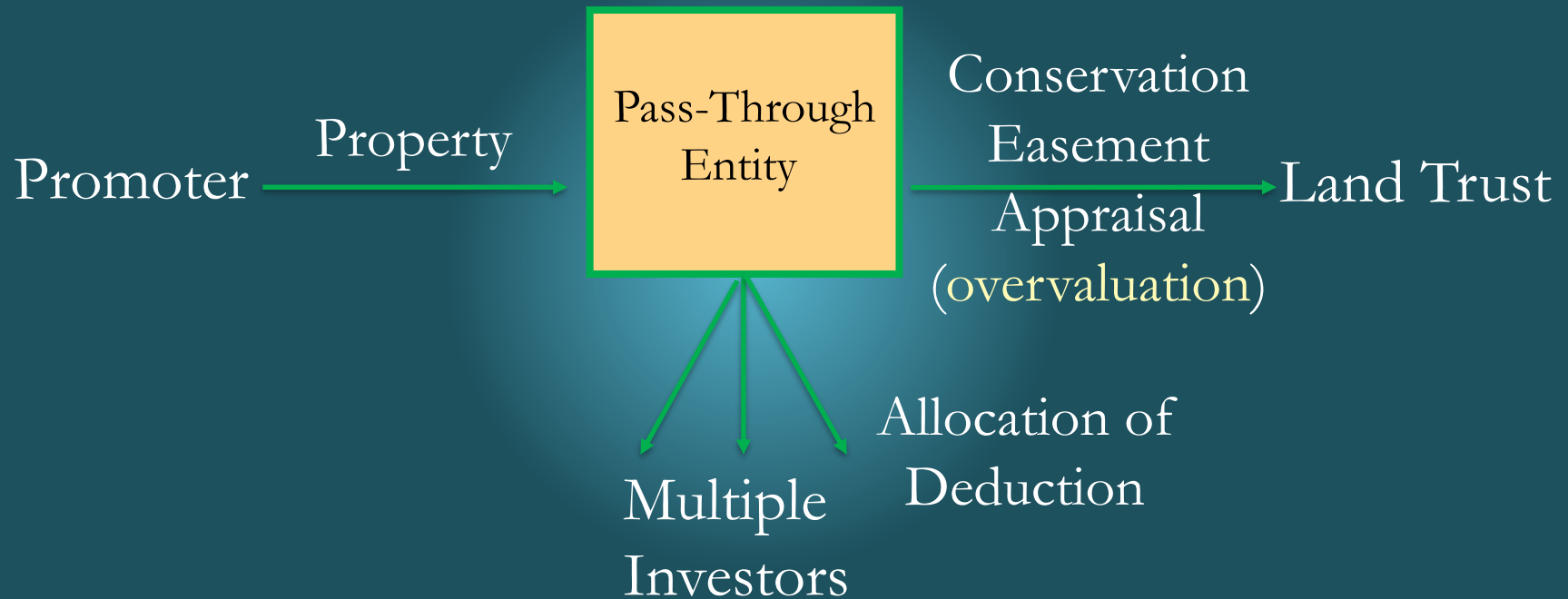
■ Retention of Qualified Appraisal

- Donor must keep the qualified appraisal for so long as it may be relevant in the administration of any internal revenue law. Treas. Reg. § 1.170A-17(a)(10).

■ Retention of Form 8283 (Appraisal Summary)

- Donee must keep the Form 8283 for so long as it may be relevant in the administration of any internal revenue law. Treas. Reg. § 1.6050L-1(d)(2).

Syndicated CE Donation Transactions



IRS Notice 2017-10: “Listed Transactions”

Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)

2005 CE

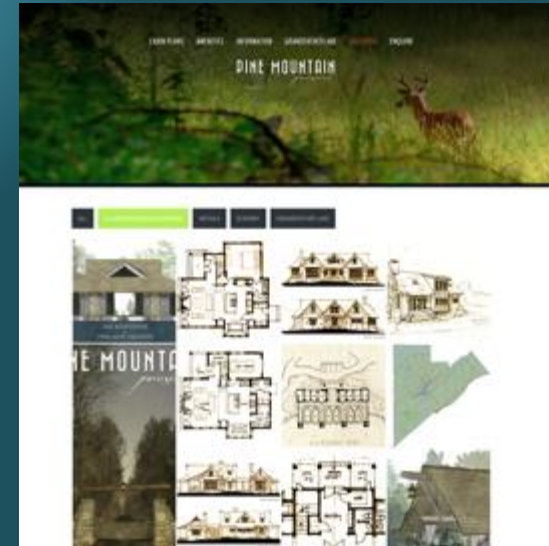
- deduction denied/movable building areas

2006 CE

- deduction denied/movable building areas

2007 CE

- deduction allowed



Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)

	Valued Claimed by TP on Tax Return	Value Claimed by TP at Trial	Value Asserted by IRS
2005 Easement	\$16,550,000	\$54,690,000	\$ 1,119,000
2006 Easement	\$12,726,000	\$33,570,000	\$ 998,000
2007 Easement	\$ 4,100,000	\$ 9,110,000	\$ 449,000
Total	\$33,376,000	\$97,370,000	

- TP paid \$37,000,000 for the entire 6,200 acres.
- The three easements encumber only approximately 20% of that property.
- Almost 80% remains available for commercial or residential develop.
- TP's original valuations presupposed a substantial increase in value over a very short time.

Pine Mountain v. Comm'r

151 T.C. No. 14 (2018)

	Valued Claimed by TP on Tax Return	Value Claimed by TP at Trial	Value Asserted by IRS
2007 Easement	\$ 4,100,000	\$ 9,110,000	\$ 449,000

How the court determined the “correct” value

- Analyzed the appraisals of the 2005 (not 2007) easement.
- Found that neither appraiser complied with regulation requirements.
- TP’s appraiser overestimated/IRS’s appraiser underestimated value.
- Because of “bilateral noncompliance,” the value of the 2007 easement should be estimated by giving equal weight to each appraiser’s asserted value:
 - 50% of \$9,110,000 = \$4,555,000
 - 50% of \$ 449,000 = \$ 224,500
 - 2007 easement value: \$4,779,5000 (more than TP originally claimed!)