# BIRDIES, BOGEYS, AND BOGUS DEDUCTIONS: AN ARGUMENT FOR A SIMPLER APPROACH TO CONSERVATION EASEMENT VALUATIONS

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## INTRODUCTION

Golf courses and their owners, like most people, do not like paying taxes. In fact, golf courses and their owners are pretty good at not paying taxes. How else is it that a 200+ acre, privately-owned golf course in an expensive and densely populated city, for example, can withstand what would otherwise be the crippling weight of its property taxes? Would it not be in the city's (and public's) best interest to develop that land into residential or commercial lots?

On his podcast, "Revisionist History," Malcolm Gladwell explains that in California, at least, golf courses have historically found creative (or not-so-creative) solutions for keeping their tax bills low.[1]

1. Malcolm Gladwell, *A Good Walk Spoiled*, REVISIONIST HISTORY (June 15, 2017) (downloaded using Spotify).

In the world of tax law, there is a principle called "highest and best use."[2] One of the ways California, among other states, determines how much to tax a piece of property is to estimate what its highest and best use might be.[3] When it comes to a golf course in the middle of an expensive neighborhood, for example, the highest and best use of that land is very likely not as a golf course.

In the 1960s, in order to avoid this "highest and best use" trap that would result in exorbitantly high property tax bills, country clubs in California, led by celebrities such as Bob Hope, joined together to propose an amendment to the California constitution.[4] This amendment, which easily passed due to the support of golf-loving celebrities and congressmen, permanently exempted golf courses from the "highest and best use" standard and remains in place today.[5] As a result, most privately owned golf courses in California benefit from paying very little in property taxes year after year, while the vast majority of Californians pay a comparatively high effective property tax rate.[6]

In addition to the numerous ways golf courses have reduced their state tax bills, golf courses have also been successful at reducing their federal tax bills. One common strategy that golf courses have used to do this—and the strategy on which this Comment will focus—is through the donation of conservation easements.

Congress first authorized a charitable contribution tax deduction for the donation of a conservation easement in the Tax Reform Act of 1976.[7] Over the last several decades, however, the Internal Revenue Service ("IRS") has continuously expressed concern that taxpayers are grossly overvaluing conservation easements and then claiming excessive tax deductions upon donating them to qualified organizations.[8] For example, in a 2017 bulletin, the IRS alleged that taxpayers were obtaining "greatly inflated" valuations and appraisals due to "unreasonable conclusions about the development potential of the real property."[9] Additional evidence of the IRS's concern with conservation easement deductions lies in the fact that these deductions consistently rank among the top ten most litigated issues between taxpayers and the IRS.[10]

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1520; I.R.C. § 170(a)(1), (h).
8. *See* I.R.S. Notice 2017-10, 2017-4 I.R.B. 544–45.
9. *Id.*
10. TAXPAYER ADVOCATE SERVICE, ANNUAL REPORT TO CONGRESS 2020 162, 216 (2020).

In litigating issues related to conservation easement deductions, the IRS aims to police taxpayer abuse in the overvaluation of easements and subsequent claiming of excessive deductions.[11] However, the IRS has historically had difficulty attacking deductions on valuation grounds due to the nature of the valuation methods permitted in the Internal Revenue Code (the "Code").[12] Instead, the IRS and U.S. Tax Court have had to look elsewhere, such as to deed technicalities, to invalidate inappropriately large deductions.[13] When attacking a deduction based on a technicality like imprecise deed language rather than on valuation grounds, the IRS often disallows the entire deduction rather than simply limiting its size.[14] This approach completely negates Congress's intent to allow conservation easement deductions in the first place.[15]

Donated conservation easements over golf courses are particularly illustrative of the valuation questions these deductions raise. Golf courses are not typically known for having conservation goals or being particularly environmentally friendly due to their excessive water and pesticide usage. However, courts have recently held that donated conservation easements over golf courses can be deducted under the Code so long as a valid conservation purpose exists.[16] Since courts have established that golf courses are able to deduct the value of their donated conservation easements, the IRS

11. Nancy O. Kuhn, *Insight: Charitable Conservation Easements—IRS and Tax Court Act to Shut Them Down*, BLOOMBERG TAX (July 22, 2020), https://news.bloombergtax.com/daily-tax-report/insight-charitable-conservation-easements-irs-and-tax-court-act-to-shut-them-down.

12. *See* Nancy O. Kuhn, *The Eleventh Circuit Court of Appeals: The Current Focus for Conservation Easements*, BLOOMBERG TAX (July 22, 2020), https://news.bloombergtax.com/daily-tax-report/the-eleventh-circuit-court-of-appeals-the-current-focus-for-conservation-easements.

13. *Id.* ("When the easement is perpetual, it is very difficult to evaluate what that easement is worth. It is a negative limitation on the property, so that the underlying property owner gives up the right to develop the property and cannot make money off prospective development. What is that worth? Perhaps as a result of this very real uncertainty, the U.S. Tax Court has now decided multiple conservation easement cases by relying upon a technicality that appears in many of the standard easement documents.").

14. Kuhn, *supra* note 11.

15. *Id.* ("By disallowing conservation easements in total, along with imposing significant penalties, the IRS and the Tax Court are not carrying out the legislative intent behind Congress' enactment of the legislation that supports conservation easements[.] Frequently, the reason for the disallowance is not the lack of a charitable conservation purpose or effect, but a very technical (and fixable) problem with document drafting.").

16. Champions Retreat Golf Founders, LLC v. Comm'r., 959 F.3d 1033, 1034 (11th Cir. 2020).

has become hypercritical of the valuation of these easements.[17] Golf courses, by necessity, take up a lot of acreage and are often located in high-income neighborhoods across the country. As a result, a donated conservation easement over a privately-held golf course has the potential to cover a lot of land (and expensive land, at that). A report on conservation easement deductions from 2017 stated that "[a]bout 10 percent of the acreage under easement claims about 69 percent of all tax benefits, largely because the valuation of the easements (per transaction or on a per-acre basis) is unusually high."[18] The report then explained that of the two dozen transactions related to conservation easements over golf courses examined by the IRS in 2017, the average value of the deduction claimed by the golf course owners was $19 million.[19] The astronomical size of these deductions puts golf course owners in a unique position to drastically decrease their tax liability in a way that many lower-income taxpayers cannot. In addition to the IRS's obvious concern with the potential to significantly overvalue these deductions and subsequently underpay taxes, the ability for wealthy taxpayers to uniquely benefit from inordinately large deductions also calls into question principles of equity and fairness.

One example of an attack on conservation easement valuations in the context of golf courses has recently received media attention due to the fame of the defendants and the properties at issue. In September 2022, the Attorney General of the State of New York filed a civil complaint against Donald Trump and various members of his family.[20] The complaint alleges fraud in the valuation of numerous conservation easements donated over Trump's golf course properties.[21] Whether or not it intends to do so, the complaint perfectly illustrates the problematic imprecision of permissible methods for conservation easement valuation. Given the public nature of this complaint and the prominence of the defendants involved, critiques of conservation easement valuations will likely become more common and continue to gain traction with the media.

Overall, the inability of the IRS to attack inappropriately large conservation easement deductions on valuation grounds suggests that the valuation methods permitted by the Code allow for significant taxpayer abuse without the possibility of effective regulation. Instead, the Code should provide a more conservative and straightforward method for determining the value of these

17. ADAM LOONEY, THE BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3 (2017).

18. *Id.* at 4.

19. *Id.*

20. Complaint at 5, People v. Trump, No. DNYMANHATTAN01020020921110347 (N.Y. Sup. Ct. Sept. 21, 2022), 2022 WL 4378517.

21. *Id.* at 8, 14.

conservation easements, as it would allow the IRS to audit the deductions and assess them for reasonableness and accuracy without completely disallowing them.

This Comment begins by discussing the relevant laws and congressional intent behind the authorization of charitable contribution deductions. The Comment then walks through the requirements for a donated conservation easement to be deductible under the Code. Specifically, the Comment will focus on the requirements related to the valuation of conservation easements and illustrate how the IRS and courts generally have difficulty invalidating these deductions due to inappropriate valuations. These illustrations will include an analysis of the Tax Court's recent opinion regarding valuation in *Champions Retreat Golf Founders, LLC v. Commissioner*,[22] as well as an exploration of the allegations made in New York's recent complaint against Donald Trump and his family.[23] Ultimately, this Comment will argue that the current valuation methods authorized by the Code with respect to conservation easements provide far too much deference to taxpayers and open the door for significant abuse. This Comment will propose that a more conservative method of valuation, such as a method comparable to that used in eminent domain or takings valuations, should be adopted for the purpose of calculating these charitable contribution deductions. To support the argument for the adoption of a more conservative valuation method, this Comment will discuss the wealth distribution implications of the current tax law and various policy arguments supporting a less deferential valuation standard.

## I. CHARITABLE CONTRIBUTION DEDUCTIONS

### *A. Congress Promotes Charitable Contributions.*

In I.R.C. § 170, Congress authorizes a tax deduction for a charitable contribution,[24] which is "a contribution or gift to or for the use of a qualifying organization. It is a transfer of money or property made with charitable intent and without receipt of adequate consideration."[25] "Charitable intent" requires that a charitable contribution be made voluntarily and without receipt, or the expectation of receipt, of anything of economic value.[26] A transfer of money or property is not voluntary if it is made with the expectation

22. 959 F.3d 1033 (11th Cir. 2020).
23. Complaint, People v. Trump, *supra* note 20.
24. I.R.C. § 170(a)(1).
25. I.R.S., CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE 18 (2021), https://www.irs.gov/pub/irs-pdf/p5464.pdf (citing I.R.C. § 170(c); Treas. Reg. 1.170A-1(h)) [hereinafter TECHNIQUE GUIDE].
26. *Id.*

of a direct or indirect benefit because such a transfer would merely be a quid pro quo.[27]

It would seem that receiving a substantial tax benefit in exchange for a conservation easement donation would negate the "charitable intent" element required for a charitable contribution. However, courts have been hesitant to attack conservation easement deductions on these grounds. Although courts have rarely invalidated deductions due to a lack of charitable intent, there remains a strong possibility and argument that a transfer of a conservation easement could constitute a mere quid pro quo. As this Comment will argue, the adoption of a more conservative valuation method for these deductions might help mitigate some of the damage (such as severe underpayment of taxes) resulting from a donated easement lacking charitable intent.

### *B. The Donation of a Conservation Easement Can Be Deductible as a Charitable Contribution.*

The partial interest rule disallows a charitable contribution deduction for a transfer of property of less than the taxpayer's entire interest in the property.[28] Qualified conservation contributions, however, are an exception to the partial interest rule, and a deduction is permitted for the donation of qualified conservation contributions.[29] A qualified conservation contribution is a contribution of a qualified real property interest (i.e., a restriction granted in perpetuity on the use which may be made of the real property) to a qualified organization exclusively for conservation purposes.[30]

The Code specifies four conservation purposes for which a qualified conservation contribution can be made: (1) preservation of land areas for outdoor recreation by, or the education of, the general public; (2) protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; (3) preservation of open space, where such preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state, or local governmental conservation policy and, for both purposes, will yield a significant public benefit; and (4) preservation of a historically important land area or a certified historic structure.[31] A conservation easement over a private golf course, due to the private nature of the golf course, is therefore only eligible to satisfy one of the above conservation purposes that does not require benefit to the general public.

The Code and accompanying regulations impose significant substantiation and documentation requirements for charitable

27. *Id.*
28. I.R.C. § 170(f)(3).
29. I.R.C. § 170(f)(3)(B)(iii).
30. I.R.C. § 170(h)(1).
31. I.R.C. § 170(h)(4)(A).

contribution deductions.[32] "The donation of a conservation easement that meets all statutory and regulatory requirements, including specific substantiation requirements, can be claimed as a charitable contribution deduction."[33] Due to the complex and comprehensive nature of these requirements, the IRS is often able to invalidate a deduction due to documentation or substantiation noncompliance rather than by assessing the appropriateness of the valuation. "To be deductible, donated conservation easements must be legally binding, permanent restrictions on the use, modification and development of property such as farmland, forest land, scenic areas, historic land or historic structures."[34] The restrictions imposed by the conservation easement must be in perpetuity, meaning that current and future owners of the easement and underlying property must be bound by the terms of the conservation easement deed.[35]

### *C. Congress Intended to Reward Taxpayers for Donating Conservation Easements.*

According to the IRS, Congress allows donations of conservation easements to be deductible in recognition of a need to preserve heritage, land, and buildings for future generations.[36] When taxpayers voluntarily give up certain rights of ownership on their property in a way that promotes or is consistent with Congress's policy goals, Congress believes they should be rewarded by taking a tax deduction.

Despite Congress's intent behind authorizing conservation easement deductions, many of the donations of conservation easements appear unrelated, or only loosely related, to conservation efforts or the preservation of heritage, land, or buildings. For example, part of a golf course might serve a very specific conservation purpose, such as protecting a particular plant or animal species' habitat, but this arguably does not make up for the overwhelmingly negative impact that maintenance of a golf course has on land and the environment. Adopting a more conservative valuation method for conservation easements would appropriately restrict the amount an otherwise environmentally unfriendly taxpayer, such as a golf course owner, could take advantage of these deductions. By limiting the amount of the allowable deduction rather than eliminating it

32. TECHNIQUE GUIDE, *supra* note 25, at 20–21 (For a conservation easement, the following documents are required: "[c]ontemporaneous written acknowledgment from the donee organization," "Form 8283, Section B, with supplemental statement," "[d]eed (should be stamped with the recording date)," "[q]ualified appraisal (for contributions of more than $5,000)," and a "[b]aseline study.").

33. *Id.* at 14.

34. *Id.* at 13.

35. *Id.*

36. *Id.* at 14.

altogether, Congress could reduce the cumulative effects of inappropriate deductions while still providing an incentive for taxpayers to preserve heritage, land, or buildings.

## II. TAXPAYER ABUSE OF THE 170(h) DEDUCTION

The valuation methods permitted by the Code provide too much taxpayer discretion and allow for widespread taxpayer abuse of the 170(h) deduction. Recently, the IRS has seen taxpayers taking inappropriately large conservation easement deductions and has attempted to crack down on these abuses through more stringent audit techniques.[37] In its Conservation Easement Audit Technique Guide, the IRS discusses four common forms of abuse.[38] The first form of abuse relates to taxpayers claiming a deduction when not entitled to any deduction at all (i.e. when a taxpayer fails to comply with the laws and regulations governing deductions for contributions of conservation easements).[39] The second form of abuse cited by the IRS is related to taxpayers using or developing properties in a manner inconsistent with section 501(c)(3).[40] The third form of abuse cited is when the charity, or qualified organization, allows the taxpayer to modify the easement or develop land in a manner inconsistent with the easement's restrictions.[41] Lastly, the IRS discusses abuse associated with conservation easements agreeing to do or not do something that zoning ordinances already require.[42] In these situations, the IRS emphasizes that a taxpayer cannot benefit from giving up a right that he or she does not even have.[43]

In each "form" of 170(h) deduction abuse observed by the IRS, the primary concern is that taxpayers are either not entitled to take a deduction or are taking too large of a deduction and thus inappropriately reducing their tax liability. At its core, the issue thus boils down to a concern about valuation and deciding if an easement donation is worth either nothing at all or some other determinable amount. The ability for the IRS to review these valuations and decisions for reasonableness is complicated by the fact that the taxpayer herself is responsible for obtaining the valuation and determining the amount of the deduction. While the Code provides rules a taxpayer must follow to determine the value of a conservation easement, these rules leave a lot of discretion in the hands of the taxpayer, who clearly has an incentive to come up with the highest valuation number possible.

37. *Id.* at 14–15.
38. TECHNIQUE GUIDE, *supra* note 25, at 15.
39. *Id.* at 14–15.
40. *Id.* at 15.
41. *Id.*
42. *Id.*
43. *Id.*

### *A. Valuation of Conservation Easements per I.R.C. § 170*

According to the Code, the value of a conservation easement must be determined through a qualified appraisal by a qualified appraiser.[44] The value of the donated conservation easement should be its fair market value ("FMV") at the time of the contribution.[45] If there is a record of a comparable conservation easement sale, then the FMV determination is based off of the sales price of any comparables.[46] However, there is typically no such comparable sales price available. Instead, the FMV is usually calculated as the difference between the "FMV of the underlying property before and after the easement is granted to the donee."[47] This is commonly referred to as the "before-and-after" method of valuation.[48]

There are inherent problems with the "before-and-after" valuation method. Most significantly, the "before-and-after" method allows for an extraordinary amount of taxpayer discretion due to its utilization of a "highest and best use" determination. Under the "before-and-after" method, a taxpayer utilizes an independent appraiser to determine the highest and best use of a property and its corresponding FMV in two separate scenarios.[49] First, the appraiser determines the FMV as if the property had been put to its highest and best use, which generates the "before" value in the "before-and-after" calculation.[50] Next, the appraiser determines the FMV of the property with the restrictions imposed by the conservation easement, which creates the "after" value in the "before-and-after" calculation.[51] The difference between these "before" and "after" values typically results in the amount of the deduction.[52]

To determine the "highest and best use" of a property, an appraiser inevitably must deal in hypotheticals. The "before-and-after" valuation method requires the appraiser to value the property *as if* it had been put to its highest and best use when, in reality, most property has not been put to such use. From the public's perspective, the highest and best use of hundreds of acres of land in an expensive neighborhood would likely not be as a private, members-only golf course. Instead, the golf course property's highest and best use would probably be as some form of residential or commercial development that would theoretically promote economic growth and generate the most tax revenue. Because the properties on which golf courses are

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44. TECHNIQUE GUIDE, *supra* note 25, at 14.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. Hale E. Sheppard, *Valuation, Highest and Best Use, and Easements: New IRS Attacks*, 175 TAX NOTES FED. 1061, 1062 (2022).
50. *Id.*
51. *Id.*
52. *Id.* at 1062–63.

built are not typically put to their highest and best use, a golf course owner benefits significantly from a "highest and best use" valuation method. A residential lot loses a significant amount of value by granting an easement with development restrictions, whereas a golf course would not lose much value under the same restrictions. A golf course granting a conservation easement with development restrictions over one of its fairways is not, practically speaking, suffering from not being able to develop that property because it was not planning on developing that property anyway.

These hypothetical "highest and best use" determinations allow for significant variation in calculated valuation amounts between appraisers. A property's "highest and best use" is therefore highly subjective and highly contestable. Because the valuation of an easement is directly related to the amount the taxpayer can take as a deduction, there is an incentive for taxpayers to obtain inflated valuations. Theoretically, a taxpayer could "shop around" between appraisers to determine which will provide her with the highest valuation and therefore largest deduction.

### *B. Illustrations of Issues with the Code's Current Valuation Method*

#### *1.* Champions Retreat Golf Founders, LLC v. Comm'r of I.R.S.[53]

*Champions* was remanded to the U.S. Tax Court from the U.S. Court of Appeals for the Eleventh Circuit.[54] The Eleventh Circuit reversed a previous decision by the Tax Court which disallowed Champions Retreat Golf Founders, LLC ("Champions") from taking a charitable contribution deduction under § 170 of the Code.[55] After concluding that the deduction should be allowed, the Eleventh Circuit tasked the Tax Court with determining the proper amount of the deduction.[56] This case is significant because it illustrates that, even if a donated easement satisfies all the elements required to qualify for a tax deduction, the IRS, Tax Court, or some other governmental body will still ultimately have to spend significant time and resources determining the proper value of the deduction. It would be much more efficient if the appropriate value of a donated conservation easement could be determined simply and quickly to avoid unnecessary litigation costs such as those likely incurred due to the remand in *Champions*.

In *Champions*, a golf course experiencing financial difficulties during the 2008-2009 recession contributed a conservation easement

53. 124 T.C.M. (CCH) 267 (2022).

54. *Id.*

55. Champions Retreat Golf Founders, LLC v. Comm'r., 959 F.3d 1033, 1034 (11th Cir. 2020).

56. *Id.*

to the North American Land Trust in order to obtain the financial benefit of a multi-million dollar tax deduction.[57] The contribution was admittedly made in light of a then-recent Tax Court decision allowing a charitable deduction for a conservation easement over a similar golf course property.[58] Because the easement in this case was donated in exchange for a financial incentive and partially included a golf course that the IRS argued did not serve one of the Code's required conservation purposes, the IRS Commissioner disputed that the contribution could be made "exclusively for conservation purposes" as required by I.R.C. § 170(h)(1).[59]

Given the Commissioner's disallowance of the deduction and the Tax Court's willingness to uphold the disallowance, it seems the IRS was hesitant and unwilling to allow such a sizeable deduction when there existed any uncertainty as to the charitable or conservation purpose of the contribution. Specifically, the IRS appeared disenchanted with the idea of allowing a conservation easement over a golf course in this particular case, as the intent behind the donation seemed to be more for financial purposes and less for conservation purposes.[60]

The Eleventh Circuit, however, held that the donation was deductible so long as it was made for "the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem" or "for the preservation of open space . . . for the scenic enjoyment of the general public."[61] The Court, despite a concurrence acknowledging the negative environmental impacts associated with golf courses,[62] reasoned that the easement would have easily met these criteria if it did not include a golf course and "the Code does not disqualify an easement just because it includes a golf course."[63]

On remand, the question before the Tax Court was whether the amount claimed for the deduction on Champions' tax return,

57. *Id.* at 1035.

58. *Id.* (citing Kiva Dunes Conservation, LLC v. Comm'r, 97 T.C.M. (CCH) 1818 (2009)).

59. *Id.*

60. *Champions*, 959 F.3d at 1035.

61. *Id.* at 1034 (citing I.R.C. § 170(h)(4)(A)(ii)-(iii)(I)).

62. *Id.* at 1041–42 (Grant, J., concurring) ("The man-made golf course takes up more than 80 percent of the easement. In making the course, Champions used non-native grasses, one of which requires the use of large fans to keep it cool in the hot Georgia sun. And to maintain the course, Champions pumps anywhere from 70,000 to 600,000 gallons of water a day out of the Little River. Champions also coats its golf course with chemicals—including fungicide, herbicide, insecticide, algaecide, and fertilizer. To apply these potent chemicals, Champions' staff members sometimes need gloves and respirators. The chemicals not only artificially change the habitat, but do so in ways that pose what the tax court called 'environmental hazards.'").

63. *Id.* at 1034.

$10,427,435, was proper.[64] To make its determination, the Court had to independently calculate the value of the conservation easement at the time of donation.[65] In preparing its valuation of the easement, the Court compared qualified appraisals from three separate expert witness appraisers.[66] The first appraisal concluded that the highest and best use of the property before the easement grant was as a partial residential subdivision with an 18-hole golf course, whereas the highest and best use of the property after the easement grant was as a 27-hole golf course.[67] Using the "before and after" method, this appraiser determined that the fair market value of the easement was $10,883,789.[68] The third appraisal, however, concluded that the highest and best use of the property both before and after the easement grant was as a golf course.[69] Because the highest and best use of the property remained the same before and after the grant of the conservation easement, this appraiser determined that the fair market value of the conservation easement was a mere $20,000.[70]

Without getting any further into the Tax Court's analysis, this significant difference in appraisal values from two different qualified appraisers illustrates just how much discretion a taxpayer is able to exercise over the amount of deduction they claim on their tax return. The primary reason for this significant difference in appraisal valuation was because of differing opinions as to what constituted the property's highest and best use before the grant of an easement. The Tax Court's analysis also indicates just how complex, involved, and subjective a valuation for a conservation easement can be, which further supports the need for a simplified valuation method that would promote more consistent valuation results amongst appraisers.

The procedural posture of this case is particularly interesting because it illustrates a common IRS approach to attacking what it believes to be an overvalued or inappropriate conservation easement deduction. An analysis of this approach starkly highlights the inefficiencies of the IRS's current audit approach and illustrates the need for a simpler method for valuing conservation easement deductions.

The size of the deduction in this case—over $10 million dollars—was likely a primary reason the IRS decided to audit this tax return. However, rather than assessing the valuation method used and disallowing or limiting the deduction on valuation grounds, the Commissioner initially chose to attack the purpose of the contribution

64. Champions Retreat Golf Founders, LLC v. Comm'r, 124 T.C.M. (CCH) 267, at *1–2 (2022).

65. *Id.*

66. *Id.* at *7–8.

67. *Id.* at *7.

68. *Id.*

69. *Champions*, 124 T.C.M. (CCH) at *8.

70. *Id.*

and argue it violated technicalities within the Code language.[71] When the Eleventh Circuit ultimately reversed the Tax Court and Commissioner's disallowance of the deduction, however, the question of valuation remained to be addressed. In the end, the Tax Court did have to spend time determining the proper amount of the deduction and perform a complex analysis of the taxpayer's valuation to assess it for reasonableness. Had the Commissioner been able to quickly assess the value of this deduction for reasonableness without going into the complex details required by currently acceptable valuation methods, a significant amount of time and resources would have been saved at the Tax Court level.

Given Congress's intent to allow for these deductions, it would have been both in the taxpayer and in the Commissioner's best interest to merely limit the deduction to an easily determinable amount. A simple, straightforward valuation method would limit the possible severity of taxpayer abuse and allow the IRS to audit these deductions more efficiently without wasting its resources in superfluous litigation. Additionally, more taxpayers would be able to benefit from these deductions because the IRS's current approach to attacking these deductions (by looking at technicalities in deed language, etc.) results in a complete disallowance of the deduction rather than a mere dollar value limitation.

*2.* People v. Trump *Complaint*[72]

The Complaint filed in *People v. Trump*[73] alleged that former President Donald Trump and his family fraudulently misrepresented their financial statements by obtaining inflated appraisals for the purpose of granting conservation easements over two of Donald Trump's properties, including the well-known Mar-a-Lago Club.[74] The fact that the defendants reported different amounts related to the value of the properties on their financial statements than they did to claim the related multi-million-dollar tax deductions was an indication that the appraisal values of the easements at issue were inappropriately large.[75] It goes without saying that it is impermissible to use one valuation amount for one purpose and another valuation amount for another depending on which amount is more advantageous in preparing financial statements and calculating tax liability.

Essentially, the Complaint argued that the defendants inflated the value of their assets only when beneficial to their financial

71. *See* Champions Retreat Golf Founders, LLC v. Comm'r, 116 T.C.M. (CCH) 262, at *19 (2018), *vacated and remanded*, 959 F.3d 1033 (11th Cir. 2020).
72. Complaint, People v. Trump, *supra* note 20.
73. *Id.*
74. *Id.*
75. *Id.*

interests.[76] It alleged that, "In the same way that Mr. Trump and the Trump Organization inflated the valuations of Mr. Trump's assets for the [Financial] Statements, they manipulated the appraisals to inflate the value of the donated development rights with respect to both conservation easements."[77] The complaint cited evidence that the defendants obtained a $700,000 appraisal in 2012 but then ascribed a $23 million value to comparable property in 2013 for purposes of calculating their tax deduction,[78] suggesting they "shopped-around" for the most advantageous appraisal value.

The notoriety of the defendants in this lawsuit will likely draw significant publicity and further highlight the issues associated with the Code's currently permissible valuation methods for conservation easement deductions. The Complaint once again illustrated the problems with the currently accepted conservation easement valuation methods and associated appraisals. It is possible for a taxpayer to obtain an appraisal that is most advantageous to them to maximize their deductible amount. More concerningly, however, it can be very difficult to prove that these appraisals and deductible amounts are inappropriately large unless there are clear misuses of the valuation in an individual's financial statements, as is the case here.

Hypothetically, were the IRS to audit the tax returns associated with this Complaint without considering the overriding issue of potential fraud, it would very likely not immediately address the sticky, complex issue of valuation. Practically speaking, however, the IRS would primarily be interested in the deductions at issue here because of their sizable (multi-million-dollar) valuations. Instead of going straight to the source of its concern and critiquing the taxpayer's valuation, the IRS would probably initially attack the validity of the easement contribution on technical, procedural grounds. For example, the Complaint suggested that the rights donated via these conservation easements were similar to rights the defendants already agreed to forego in order to gain zoning approval for the property.[79] The IRS acknowledges that a taxpayer cannot give up a right that he or she does not have,[80] and it could easily argue that the deduction is disallowed for this reason. However, such an attack would completely disallow any deduction on behalf of the taxpayer and, given the significant financial loss associated with this disallowance, the taxpayer would likely appeal the Commissioner's decision. Ultimately, if the Commissioner's decision were overturned, the Tax Court or Commissioner would then have to deal with the tedious and difficult valuation assessment that it sought to avoid in

76. *Id.*
77. *Id.* at 10.
78. *Id.* at 70.
79. *Id.* at 102.
80. TECHNIQUE GUIDE, *supra* note 25, at 14–15.

the first place. Once again, this hypothetical—but not unrealistic—scenario illustrates the waste of time and resources that results from the IRS not being able to effectively audit conservation easement deductions on valuation grounds.

## III. RECOMMENDED SOLUTIONS AND RELATED POLICY ARGUMENTS

### *A. Congress should adopt a more conservative valuation method to minimize opportunities for taxpayer abuse in overvaluing conservation easements.*

Although "before-and-after" valuations and "highest and best use" determinations are used throughout the Code,[81] using these valuation methods in the specific instance of calculating conservation easement deductions opens the door to widespread and significant taxpayer abuse. Taxpayers taking these deductions are often high net worth individuals who are able to significantly decrease their effective tax rates by maximizing the value of their deductions. Without a simple, effective way for the IRS to determine the proper value of a taxpayer's deduction, the IRS is wasting unnecessary time and resources in superfluous litigation and is more likely to completely disallow a taxpayer's deduction rather than assess its value for reasonableness, despite Congress's intent to allow these deductions.

Some might argue that the use of a "highest and best use" valuation method in other areas of tax law is evidence that the IRS should continue to permit this valuation method for the purpose of conservation easement deductions. However, "highest and best use" determinations in other areas of tax law are distinguishable from the use at issue here, which opens a door for widespread taxpayer abuse. In the estate tax context, for example, a taxpayer can, in certain circumstances, elect to value property at something other than its highest and best use if advantageous for estate tax purposes.[82] The legislative intent behind this valuation election was so estates would not be forced to sell properties solely to cover the large estate tax bills that would result from valuing properties at their highest and best uses.[83] While the use of a taxpayer-friendly "highest and best use" valuation decision in the estate tax context is specifically intended to

81. *See, e.g.*, I.R.C. §§ 15(e), 4965(f) (using "before and after" valuations); 26 C.F.R. § 1.170A-14(h)(3)(ii) (2023) (using "highest and best" determinations); *id.* § 20.2032A-3 (2021) (same).

82. *See* C.F.R. § 20.2032A-3 (2021); Bradley D. Holtorf, *An Analysis of the "Actual Use" Valuation Procedure of Section 2032A*, 56 NEB. L. REV. 860, 860 (1977) (explaining that the general rule would require farm and some other property to be valued at its highest and best use "even though the valuation cannot be justified because of the lack of profitability of the farm or small business").

83. *See In re* Estate of Lucas, 97 F.3d 1401, 1404 (11th Cir. 1996).

benefit the taxpayer herself, Congress's intention in allowing conservation easement deductions was to "preserve our heritage, . . . their land or buildings for future generations," not just benefit the individual taxpayer.[84] Usage of a "highest and best use" valuation method in the conservation easement deduction context, therefore, does little to support the legislative intent behind authorizing these deductions in the first place.

Rather than use a "before-and-after" valuation method that requires a determination of "highest and best use," the Code should adopt a more straightforward, conservative valuation method for determining the value of conservation easement deductions. While the selection of a new, permissible valuation method would be tedious and ultimately left up to Congress, the adoption of a new method would be worth the trouble in order to save the IRS from wasting significant time and resources going forward. Both taxpayers and the IRS alike would benefit from the ability to efficiently determine a conservation easement deduction amount that could be easily and consistently recalculated in an audit setting. This would reassure ethical taxpayers that their deductions are not unreasonably large before filing their tax returns and also allow the IRS to more easily identify abuses of these deductions.

While this Comment is not intended to recommend a specific, more favorable valuation method for Congress to adopt, it is worthwhile to point out that the government already engages itself in the business of performing valuations in areas of law other than tax law. Consideration of any of these various, alternative valuation approaches might prove useful in Congress's search for a new valuation method.

For example, the government already has methods in place for determining hypothetical valuations of properties in situations involving government takings or eminent domain.[85] The values assigned to properties in situations of eminent domain are oftentimes conservative estimates based on fair market value, and property owners are frequently unsatisfied with the amount the government pays in exchange for taking their property. There is a strong argument to be made that the value attributed to a property right when that right is voluntarily donated (in the case of a conservation easement donation) should be either the same as or less than the value attributed to that same property right when it is voluntarily taken from an individual by the government (in the case of a taking). Acknowledging this disparity, Congress might consider adopting a valuation method for conservation easement deductions that results in valuation amounts either comparable to or less than the valuation amounts determined in eminent domain situations.

84. TECHNIQUE GUIDE, *supra* note 25, at 14.
85. *See, e.g.*, 33 U.S.C. § 595a; 42 U.S.C. § 4652(b)(1).

*B. Alternatively, Congress should provide a more stringent limit on the deductibility of qualified conservation easement contributions.*

In the absence of a willingness or ability to change the required valuation method for conservation easement deductions, Congress could elect to further restrict the deductibility of conservation easement contributions. While the Code already includes limitations for charitable contribution deductions, the nature and potentially significant size of conservation easement deductions necessitates a more stringent limitation than other charitable contribution deductions. Compared to other charitable contribution deductions, wealthy taxpayers are more likely to benefit from conservation easement deductions because they are more likely to be landowners with the ability to donate conservation easements. Additionally, as illustrated in the examples previously discussed, charitable contribution deductions have the potential to be quite large, often exceeding a million dollars. Such a large deduction has the ability to drastically decrease a wealthy taxpayer's effective tax rate which could result in significantly less tax revenue for the federal government. For this reason alone, it is important that conservation easement deductions are not abused and can be appropriately monitored and audited by the IRS.

Apart from negatively affecting Congress's ability to collect necessary tax revenue from taxpayers, the ability for wealthy taxpayers to substantially reduce their effective tax rates could also have serious wealth disparity implications. For the most part, the average American taxpayer does not have the ability to exercise much discretion when it comes to calculating her own tax liability.[86] Instead, the average taxpayer today will likely take the standard deduction to reduce her tax liability by a specified, set dollar amount determined by simple considerations such as filing status and age.[87] As a result, this taxpayer does not have the same ability to drastically decrease her effective tax rate in the way that a wealthy taxpayer might be able to by taking a massive conservation easement deduction. By enabling wealthy taxpayers to pay a substantially lower effective tax rate than the average taxpayer, the current valuation approach for conservation easement deductions further opens the door for criticism from those who argue that the current federal tax laws unfairly favor the wealthy at the expense of the poor.

86. William G. Gale & Semra Vignaux, *The Difference in How the Wealthy Make Money—and Pay Taxes*, BROOKINGS INST. (Sep. 7, 2023), https://www.brookings.edu/articles/the-difference-in-how-the-wealthy-make-money-and-pay-taxes/.

87. *See id.*; Janet Berry-Johnson, *Standard Deductions for 2023 and 2024 Tax Returns, and Extra Benefits for People Over 65*, FORBES (Updated Mar. 11, 2024, 5:01 PM), https://www.forbes.com/advisor/taxes/standard-deduction/.

Currently, a taxpayer may deduct a qualified conservation easement up to 50 percent of the taxpayer's contribution base,[88] which is typically equal to the taxpayer's adjusted gross income.[89] In the absence of an ability to adopt a preferential, simplified valuation method, Congress could further restrict the amount a taxpayer could deduct as a percentage of her contribution base. A more stringent percentage limitation (anything less than 50 percent of the taxpayer's contribution base) might reduce the ability for taxpayers to claim inappropriately large deductions in any given tax year.

Additionally, while taxpayers can carry over unused charitable contributions for up to five years,[90] taxpayers can carry over unused conservation easement contributions for up to fifteen years.[91] This lengthened period of time further incentivizes taxpayers to maximize the valuation of their conservation easement donations because the taxpayer could theoretically benefit from the donation for up to fifteen years. If a taxpayer knew there were strict limitations on deductibility for each tax year and she could only carry over any excess deduction for five years, for example, she might be less incentivized to inappropriately overvalue a conservation easement donation. Compared to establishing an entirely new valuation method, reducing the carry over period for conservation easement deductions to anything less than fifteen years would be a relatively simple change to the Code. By reducing the carry over period and eliminating some of the incentive to overvalue conservation easement deductions, Congress could mitigate some of the taxpayer abuse associated with these deductions without taking on the more laborious task of establishing a new valuation method.

88. I.R.C. § 170(b)(1)(E)(i).
89. I.R.C. § 170(b)(1)(G).
90. I.R.C. § 170(d)(1)(A).
91. I.R.C. § 170(b)(1)(E)(ii).

## CONCLUSION

As Benjamin Franklin famously observed, nothing in this world is certain with the exception of death and taxes.[92] All individuals or corporations subject to U.S. federal tax laws, including golf course owners, must operate under the assumption that they will be responsible for the payment of their fair share of taxes in any given tax year. While Congress intended to authorize a tax deduction that would preserve heritage, land, and buildings for future generations,[93] it is unlikely Congress could foresee that this deduction would allow a wealthy golf course owner to reduce her tax liability by millions of dollars in a single tax year. Because the Code's current valuation method for conservation easement deductions allows for significant taxpayer discretion, the IRS has expressed increasing concern with the potential overvaluation of these deductions.[94]

Despite this concern, the IRS is currently unable to efficiently audit and monitor the valuation of conservation easement deductions and is wasting valuable time and resources in litigation as a result. Additionally, the government is potentially losing significant amounts of tax revenue if wealthy taxpayers are inappropriately overvaluing these deductions and dramatically reducing their tax liability. Apart from the financial issues the abuse of conservation easement deductions might cause, the unchecked overvaluation of conservation easement deductions also disproportionately benefits wealthy taxpayers, which gives rise to a number of wealth disparity issues.

Many of the current issues arising from conservation easement deductions could be resolved with the adoption of a simpler, more conservative valuation method that would promote predictability and consistency in the valuation of conservation easements. A simplified valuation method would allow the IRS to more effectively crack down on taxpayer abuse and ultimately save significant time and resources by avoiding unnecessary litigation regarding these deductions. The adoption of a simplified valuation method would also benefit taxpayers because the IRS would no longer have to attack deductions on trivial technicalities that completely disallow deductions. Instead, the IRS could quickly assess the proper value of a deduction and merely limit the deduction to an appropriate amount. This would ultimately allow more taxpayers to benefit from the conservation easement deduction, which is in line with Congress' intent to authorize these deductions in the first place.

92. Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN, 1789–1790, 69 (Albert Henry Smyth ed., 1907).

93. TECHNIQUE GUIDE, *supra* note 25, at 14.

94. I.R.S. News Release IR-2022-214 (Dec. 6, 2022).

This Comment primarily argues that Congress should adopt a more uniform, straightforward valuation method for conservation easement deductions. Alternatively, if Congress is unable or unwilling to adopt an entirely new valuation method, it should restrict the amount a taxpayer is allowed to deduct related to a conservation easement contribution. To do this, Congress could either further limit the amount a taxpayer can deduct in any given tax year or decrease the current fifteen year carry over period. By reasonably restricting the ability for a taxpayer to abuse the conservation easement deduction, Congress could minimize the negative effects of the inappropriate overvaluation of these deductions while still encouraging taxpayers to donate conservation easements for the benefit of future generations.

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