

October 11, 2021

Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

H.R. 5376 – Conservation Easement Deduction Change Would Promote Abuse

Dear Senate Finance Committee Members,

We are teachers, scholars, and practitioners in the fields of tax law, property law, natural resource management, and land use law. We write today to express our deep concern about a provision recently added to the [Charitable Conservation Easement Program Integrity Act](#), that is now part of [H.R. 5376](#), the “Build Back Better Act” (the reconciliation bill). This provision, if enacted into law, would open the door to widespread abuse of the charitable deduction for conservation easements and lead to a massive waste of taxpayer dollars. We urge you to omit the same or comparable language from a Senate bill and to work to ensure that it is not included in the final legislation.

The objectionable provision, which would amend Internal Revenue Code §170(h), states:

(A) In general. –If a donor is found by the Secretary to have failed to meet the requirement that a qualified conservation contribution shall be granted and protected in perpetuity by reason of defective language in the deed relating to property line adjustments or extinguishment clauses, the donor shall have 90 days from the written notice by the Secretary to correct such failure, unless the Secretary can demonstrate that the donor's failure to meet those requirements was intentional. [H.R. 5376](#), Sec. 138403(a)(8)(A).

This “ability to correct” provision would allow—indeed encourage—donors of conservation easements to include liberal termination provisions without consequence and to gamble that they might never be caught. The liberal termination of easements runs directly counter to the Internal Revenue Code’s requirements that taxpayers can deduct conservation easements only if they are granted and protected “in perpetuity.” IRC §170(h)(2)(C), (5)(A).

For the last thirty-five years, §170(h) has required that deductible perpetual conservation easements be subject to extinguishment only in a judicial proceeding upon a finding by the court that continued use of the property for conservation purposes has become impossible or impractical. [Treas. Reg. §1.170A-14\(g\)\(6\)\(i\)](#). This permanent protection of land is the hallmark of deductible conservation easements.

If the “ability to correct” provision were to become law, it would effectively create a license for taxpayers to violate §170(h)’s perpetuity requirements. Taxpayers could donate conservation easements that include liberal termination provisions, knowing that the IRS cannot possibly review each of the thousands of conservation easement donations made annually and, even on the off chance that their conservation easement was reviewed, there would be no sanction for noncompliance—they would merely be required to “correct” the deed. Although the “ability to correct” provision would not apply if the Secretary could demonstrate that the noncompliance was “intentional,” in all but the most egregious of cases it would be impossible for the IRS to prove a taxpayer’s subjective state of mind.

The end result of the “ability to correct” provision would be billions of dollars wasted annually on conservation easements that do not provide permanent protection of important conservation values.

The “ability to correct” provision is also unnecessary. The IRS has published guidance regarding property line adjustments (swaps) and sample conservation easement deed language relating to extinguishment, so law-abiding and reasonably well-informed taxpayers face no danger they will innocently transgress the extinguishment requirements.

In addition, while [H.R. 5376](#) properly addresses the separate issue of syndicated conservation easement donations (see Sec. 138403(a)(7)), the potential for abuse in the easement donation context is much broader. The large body of case law that has built up in this area since 2005 illustrates the prevalence of a variety of forms of noncompliance and abuse outside of the syndication context, including failures to comply with §170(h)’s perpetuity requirements. *See, e.g., Burnett et al., Building Better Conservation Easements for America the Beautiful, Harvard Environmental Law Review* (Sept. 15, 2021).

The “ability to correct” provision is also founded on a misunderstanding of state property law and would build a flawed procedure into the Internal Revenue Code. The provision would be completely unworkable in many circumstances. Easement donors could not unilaterally “correct” defective conservation easement deeds after their donation—the donee and any lender holding a mortgage on the subject property would have to agree. If the underlying property were sold or passed by inheritance to a new owner before the Secretary discovered the noncompliance, the holder and new owner could not be compelled to “correct” the easement deed. And if land were swapped out of the easement or the easement were extinguished in whole or in part or before the Secretary discovered the noncompliance, any attempted correction to the easement deed would come too late.

Finally, protecting the perpetuity requirement is particularly important at this point in time. President Biden’s 30x30 (“America the Beautiful”) initiative is expected to significantly accelerate the pace of conservation easement donations (see, e.g., [Nathan Rott, To Conserve Vast Areas of Land, Biden Needs Help From Private Landowners NPR Morning Edition \(Sept. 21, 2021, 5:07am\)](#)). The goal of the America the Beautiful initiative is to achieve *durable* conservation outcomes that meaningfully improve the lives of Americans. If enacted into law, the “ability to correct” provision would very severely undermine this initiative. Instead of investing in durable conservation easements, American taxpayers would be investing billions to encourage the creation

of conservation easements that the parties could later freely modify or extinguish to make way for lucrative development.

We strongly urge that the “ability-to-correct” provision not be included in the Senate bill or the final legislation.

We would be happy to answer any questions you might have.

Sincerely,

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