DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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The Honorable Edward Kennedy
United States Senator
2400 JFK Federal Building
Government Center
Boston, MA 02203

Attention:

Dear Senator Kennedy:

Thank you for your letter dated April 28, 2009, on behalf of your constituent,
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I am pleased to provide you with the following general information about historic easement deductions, valuation, and substantiation requirements. This letter is intended for informational purposes only and does not constitute a ruling (see Rev. Proc. 2009-1, 2009-1 I.R.B. 1).

HISTORIC EASEMENTS

Generally, the law permits no deduction for a contribution of an interest in property that is less than the taxpayer's entire interest in the property (section 170(f)(3) of the Internal Revenue Code). However, an exception exists for a qualified conservation contribution in which the taxpayer (1) contributes a qualified real property interest (2) to a qualified organization (3) exclusively for conservation purposes (section 170(f)(3)(B)(iii) and 170(h)(1) of the Code and section 1.170A-14(a) of the Treasury Regulations).

A "qualified real property interest" is a restriction granted in perpetuity on the use that the taxpayer can make of the real property, including an easement or similar interest under state law (section 170(h)(2) and section 1.170A-14(b)(2)).

A "qualified organization" is an organization described in section 170(h)(3) that has a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions (section 170(h)(3) and section 1.170A-14(c)).

One permissible "conservation purpose" is the preservation of an historically important land area or certified historic structure (section 170(h)(4)(A) and section 1.170A-14(d)(5)). To be considered "exclusively for conservation purposes," the conservation purpose must be enforceable in perpetuity, and the easement generally may not permit a use that is destructive of other significant conservation interests (section 170(h)(5) and section 1.170A-14(e) and (g)).

In 2006, the Congress enacted legislation that imposed additional requirements for charitable contributions of historic easements on buildings in registered historic districts (see section 170(h)(4)(B)).

EASEMENT VALUATION

The deduction for a gift of an historic easement generally is equal to the fair market value of the easement at the time of the contribution. If a substantial record of sales of comparable easements exists, the fair market value of the donated easement is based on those sale prices. If no record of easement sales is available, then as a general rule the fair market value equals the difference between the fair market value of the underlying property before the granting of the easement and the fair market value of the underlying property after the granting of the easement (section 1.170A-14(h)(3)(i)).

If a taxpayer's appraisal employs a "before and after" valuation, the fair market value of the property "before" contribution of an historic easement must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's highest and best use. "After" valuation must take into account the amount of access permitted by the terms of the easement and the effect that the particular restrictions in the easement will have on the value of the property subject to the easement (section 1.170A-14(h)(3)(ii)).

SUBSTANTIATION

In 1984, the Congress required taxpayers claiming deductions for noncash charitable contributions in excess of $5,000 to substantiate their contributions by obtaining qualified appraisals (section 155(a) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 691 (1984) (section 155(a))). Section 155(a) contained detailed requirements for substantiation of charitable contribution deductions and required the Secretary to prescribe regulations implementing these requirements. Under this legislative mandate, the IRS and the Treasury Department promulgated regulations providing that a taxpayer cannot take a deduction for a noncash contribution in excess of $5,000, unless the taxpayer obtains a qualified appraisal as defined by the regulations and attaches a fully-completed appraisal summary to the tax return on which the taxpayer first claims a deduction for the contribution (section 1.170A-13(c)(2) and (c)(3)).

In 1993, the Congress enacted section 170(f)(8), providing that a taxpayer cannot take a deduction for contributions of $250 or more unless the taxpayer obtains a contemporaneous written acknowledgment (see section 1.170A-13(f)). In 2004, the Congress added section 170(f)(11) to the Internal Revenue Code, effective for contributions made after June 3, 2004 (section 883 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004)). This legislation codified some of the requirements in section 155(a) and in the substantiation regulations (see section 170(f)(11)). In 2006, the Congress again added significant new requirements to the substantiation rules for appraisals prepared with respect to returns filed after August 17, 2006 (see section 1219 of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006)).

In 2008, the IRS and the Treasury Department issued proposed regulations implementing all of the substantiation and reporting rules (Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions, 73 Fed. Reg. 45908 (proposed August 7, 2008)). The IRS and the Treasury Department 2008-2009 Priority Guidance Plan contains a project for finalizing these proposed regulations. Notice 2006-96 (copy enclosed) gives transitional guidance that applies until we issue the final regulations.

I hope this information is helpful. I also have enclosed Publication 526, *Charitable Contributions*, and Publication 561, *Determining the Value of Donated Property*. Please contact me, , or at if we can be of further assistance.

Sincerely,

John P. Moriarty
Branch Chief, Branch 1
(Income Tax and Accounting)

Enclosures (3)