TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Number: **201048045**
Release Date: 12/3/2010

Date: September 8, 2010

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:

Tax Years:

UIL: 501.03-30

Dear :

This is our final determination that you do not qualify for exemption from Federal income tax under Internal Revenue Code section 501(a) as an organization described in Code section 501(c)(3).

We made this determination for the following reason(s):

You are not operated exclusively for an exempt purpose described in section 501(c)(3). You have failed to establish that you engage primarily in activities that accomplish one or more of the exempt purposes specified in section 501(c)(3). Further, you have failed to establish that you are not organized or operated for the benefit of private interests or that you do not otherwise operate for a substantial nonexempt purpose. Even if you had met the requirements of section 501(c)(3), we have determined that you would be a private foundation under section 509(a).

Because you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

If you decide to contest this determination under the declaratory judgment provisions of Code section 7428, you must initiate a suit in the United States Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia before the 91st day after the date that we mailed this letter to you. Contact the clerk of the appropriate court for rules for initiating suits for declaratory judgment. Filing a declaratory judgment suit under Code section 7428 does not stay the requirement to file returns and pay taxes.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose,* and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, you should follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at 1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Robert Choi
Director, Exempt Organizations
Rulings & Agreements

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Date: March 16, 2010

Contact Person:

Identification Number:

UIL 501.03-30

Telephone Number:

Employer Identification Number:

Legend:

M
N =
D =
P =
T =
U =
V =

Dear :

We have considered your application for recognition of exemption from Federal income tax under section 501(a) of the Internal Revenue Code ("Code").[1] Based on the information provided, we have concluded that you do not qualify for exemption under section 501(c)(3). The basis for our conclusion is set forth below.

Even assuming you could qualify for exemption under section 501(c)(3), we have determined that you are a private foundation within the meaning of section 509(a).

FACTS

M was incorporated on December , 20 in T by D, its sole incorporator. Since its incorporation, D and his wife have operated M as its only officers and trustees. A week after M's incorporation, an easement on a acre parcel of land in N was conveyed to M by P, a limited liability company organized by D on the same day as he organized M. D signed the easement deed on the parcel on behalf of both P and M, as trustees of both.

[1] Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended (the "Code"). All regulatory references are to the regulations promulgated under the Code.

Roughly six months later, on May , 20 , P conveyed a second easement to M on a acre parcel of land in N, adjacent to the first parcel of land on which P granted an easement.

Based on the copies of P's Forms 8283, Noncash Charitable Contributions, the donee acknowledgment sections of which D on behalf of M, the first easement was allegedly appraised at a value of $ and the second easement at an alleged value of $. By participating in these easement transactions in 20 and 20 and by substantiating the transactions as charitable contributions, M enabled P's members to claim charitable contribution deductions under section 170 totaling nearly $ million over two years. D was employed with the law firm that prepared P's income tax returns on which it claimed these charitable contribution deductions.

M has represented that if the two parcels on which it holds easements are sold in the future, D and his wife have an indirect interest of up to percent in the proceeds of the sale of the properties. M did not provide any further details about the nature of this "indirect interest."

On March , 20 , M applied for recognition of exemption under section 501(c)(3) by filing Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code

The Articles of Incorporation state the following purposes for which M is formed:

> . . . conservation purposes under Section 170(h) of the Internal Revenue Code, as amended from time to time, or the corresponding section of any future federal tax code, in addition for the purpose of charitable, educational, and scientific purposes . . .

M's application materials describe its activities as follows: "Past, Present and Plan[n]ed Activities are the same. Activity is to receive and hold conservation easements to preserve land in its natural state as near as possible."

From its incorporation to the present, the only easements M has received are the two easements granted by P, described above. Both easement deeds contain the following provisions:

- WHEREAS, Grantor intend[s] that the conservation values of the Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those related to farming, ranching, timber production, hunting, or fishing existing at the time of this grant, that do not significantly impair or interfere with those values.

. . . .

- 1. Purpose. It is the purpose of this Easement to assure that the Property will be retained forever [predominantly] in its natural, scenic, agricultural, forested, and/or open space condition to prevent any use of the Property that will significantly impair or interfere with the conservation of the values of the Property.

. . . .

- 3. Prohibited Uses. Any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited. . . .
- 4. Reserved Rights. .....[Without limiting the generality of the foregoing, the following rights are expressly reserved:]
  (a) To reside on the Property on the designated building envelope;
  (b) To mutually agree with Grantee, his successors and assigns to designate additional building envelopes;
  (c) To engage in any and all agricultural uses of the Property in accordance with sound, generally accepted agricultural practices.
  (d) To engage in and permit other to engage in recreational uses of the property, including without limitation, hunting and fishing.
  (e) Any restriction on subsurface mining of minerals or restriction of right of the proprietor of a vein or lode to extract and remove his ore there from should same be found to penetrate or intersect the Property...
- 5. Access. No right of access by the general public to any portion of the Property is conveyed by this Easement.

. . . .

- 8. Extinguishment. If circumstances arise in the future such as render the purpose of the Easement impossible to accomplish the Grantee is granted the right to terminate or extinguish this easement by conveying same to the Grantor, their successors and assigns.

M's response to a letter from this office dated September , 20 indicates that the "*current parcels are being used the same as they were before the gifts – to cattle grazing on a limited and part time basis. It is anticipated in the future that even this permitted agricultural use will be discontinue[d].*"

In response to a letter from this office dated June , 20 , M provided a number of specific items of information. In response to a question regarding whether M performed a baseline study of the property subject to the easement, M responded that "*a baseline study was preferment prior to the gift of the current easement. Personnel with the V Department of Wildlife reviewed the property. The land received was raw land and the conservation easement preserves the land in its natural state for wildlife habitat and prevent development.*" Thus M never clearly stated that a baseline study was performed, nor did it provide the Service with a description of a baseline study or an actual copy of such a study. M also did not state the significance of or describe in any further detail any review by the V Department of Wildlife. Moreover, M never described any particular conservation value or ecological significance of the "raw land" that easements preserved in "its natural state."

In response to a question as to how M monitors the easement, M responded as follows:

Currently we have contacts in the area that periodically inspect the property to make sure the easement is being complied with. These are people from the general public who are interested in maintaining the property in its natural state. In addition, we require the

donors on an annual basis to provide us with a statement that the restrictions are not being violated. Currently with only one property to inspect the fund has the ability to monitor the easement restrictions either by local contacts and/or by the trustees. In addition, landowners for the property that adjoins the conservation easement property have also agreed to monitor the property for any violations of the easement restrictions. Future easements taken will require a contribution(s) to be made that will be placed in separate fund for purpose of monitoring easements."

M did provide any further detail about who these "contacts in the area" and neighboring landowners are, nor did it provide any information about how they would monitor the land or about what background or expertise they possess to credibly judge the scientific ecological condition or merits of the property.

In a letter dated September , 20 , we asked M to explain its officers' (i.e., D and his wife's) backgrounds and expertise in the area of conservation. M responded, in essence, that D is a licensed attorney, CPA, and real estate broker. His wife was formerly licensed as a securities broker. M did not explain how these backgrounds relate at all to conservation, nor did it provide any other information about D and his wife's backgrounds or expertise that would suggest they can credibly process, evaluate, or inspect easement property.

In question 2 of that same letter, we asked M to explain whether and how the easement property was used as a wildlife refuge and M responded as follows:

The main purpose of conservation easements is to preserve parcels in their natural state as near as possible. . . . The easement will prevent development of the property in to high density living area. Wildlife uses the property year round.

The Forms 990 that M has submitted indicate revenue (not including the value of the easements contributed by P), expenses, and non-easement end-of-the-year assets as follows:

	20	20	20
Revenue (other than contributed easements)	$	$	$
Expenses	$	$	$
Non-easement, end-of-the year assets	$	$	$

M categorized its expenses on the Forms 990 as legal and accounting fees.

The Form 1023 that M submitted indicates revenue (not included the value of the easements contributed by P), expenses, and non-easement end-of-the-year assets as follows:

	20	20
Revenue (other than contributed easements)	$0	$
Expenses	$	$
Non-easement, end-of-the year assets	n/a	$

M categorized its expenses on the Form 1023 as "fundraising expenses."

M originally applied to be classified as a private foundation. After this office pointed out that private foundations are not eligible to receive deductible contributions described in section 170(h), M amended its Form 1023, to apply for classification as a public charity described in sections 509(a)(1) and 170(b)(1)(A)(vi) or section 509(a)(2). M claims the two easement contributions, both donated by P, are grounds for satisfying the sections' public support tests.

LAW

A. Conservation as a Charitable Purpose

Section 501(c)(3) provides exemption from federal income tax for organizations that are organized and operated exclusively for educational, scientific, charitable or other exempt purposes. An organization operates "exclusively" for exempt purposes if it engages "primarily" in activities that accomplish one or more exempt purposes and if not more than an insubstantial amount of its activities further nonexempt purposes. Treas. Reg. §1.501(c)(3)-1(c)(1).

The Service has long recognized that environmental conservation for the benefit of the public can constitute a charitable purpose under section 501(c)(3). In Rev. Rul. 67-292, 1967-2 C.B. 184, for example, the Service held that an organization formed for the purpose of purchasing and maintaining a large tract of forest land to be reserved as a sanctuary for wild birds and animals and to be open to the public for educational purposes qualifies as exempt under section 501(c)(3).

In Rev. Rul. 70-186, 1970-1 C.B. 129, the Service concluded that an organization formed to preserve a lake as a public recreational facility and to improve the condition of the water in the lake to enhance its recreational features furthered a charitable purpose.

In Rev. Rul. 76-204, 1976-1 C.B. 152, the Service considered an organization formed by scientists, conservationists, and other community representatives for the purpose of preserving the environment. It accomplished this purpose by acquiring and maintaining ecologically significant undeveloped land such as swamps, marshes, forests, wilderness tracts, and other natural areas. The organization worked closely with Federal, state, and local governmental agencies to identify ecologically significant land. The organization accomplished its conservation purpose by either maintaining the land itself or through a transfer to a governmental agency. The Service concluded that the organization was enhancing the accomplishment of an express national policy of conserving the nation's unique natural resources and, in this sense, was advancing education and science and benefiting the public in "a manner that the law regards as charitable."

In Rev. Rul. 78-384, 1978-2 C.B. 174, however, exemption was denied a nonprofit organization that owned farmland and restricted its use to farming or other uses the organization deemed ecologically suitable, but which did not operate for the purpose of preserving "ecologically significant" land and did not otherwise establish that its self-imposed restriction on

the land resulted in any direct or significant public benefit.

In *Dumaine Farms v. Commissioner*, 73 T.C. 650 (1980), the Tax Court considered a trust that operated a model farm as a demonstration conservation project. The farm tested experimental farming methods, soil restoration techniques, and developed new strains of crops. It also made the results of its work available to area farmers. The court noted that the organization's goal was "to test and demonstrate the restoration of overcultivated, exhausted land to a working ecological balance" and that for "this reason it [was] essential to the [organization's] purpose that the land be generally representative of the surrounding farmland." *Id.* at 653. Based on these specific facts, the court concluded that the trust furthered scientific and educational purposes within the meaning of section 501(c)(3) and thus found it unnecessary to determine whether the trust also furthered charitable conservation purposes. *Id.* at 668.

Section 170(h) allows charitable deductions for conservation easements, but only if they are made to a "qualified organization" exclusively for "conservation purposes."

The term "qualified organization" means either a governmental unit described in 170(c)(1); a publicly supported charity described in section 170(b)(1)(A)(vi); a section 501(c)(3) organization that meets the requirements of section 509(a)(2); or a section 501(c)(3) organization that meets the requirements of section 509(a)(3) and that is controlled by any of the other three aforementioned types of qualified organization. I.R.C. § 170(h)(3). Thus, a private foundation that does not meet the requirements of section 170(b)(1)(A)(vi), 509(a)(2), or 509(a)(3) cannot be a "qualified organization." As a result, transfers of conservation easements to such private foundations cannot qualify for charitable contribution deductions under section 170(h).

In addition, Treas. Reg. § 1.170A-14(c) provides that to be considered an eligible donee under this section, an organization must be a qualified organization, have a "commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions."

The term "conservation purposes" means:

1. the preservation of land areas for outdoor recreation by, or the education of, the general public;
2. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;
3. the preservation of open space (including farmland and forest land) where such preservation is: i) for the scenic enjoyment of the general public, or ii) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit; or
4. the preservation of a historically important land area or a certified historic structure.

IRC § 170(h)(4)(A).

The legislative history for the predecessor of section 170(h), section 170(f), illustrates that a charitable organization could accept and maintain qualified conservation easements without risking its exempt status under § 501(c)(3).[2] The House Conference Report accompanying the Tax Reduction and Simplification Act of 1977, P.L. No. 95-30, § 309(a) (1977), which amended former § 170(f)(3)(B)(iii), explicitly links the conservation purposes in § 170(h)(4)(A) to the exempt purposes under § 501(c)(3):

> ...it is intended that contribution of an easement or remainder interest qualify for the deduction only if holding of the easement (or, in the case of a remainder interest, the property) is related to the purpose or function constituting the donee's purpose for exemption (organizations such as nature conservancies, environmental, and historic trusts, State and local governments, etc.) and the donee is able to enforce its rights as holder of the easement or remainder interest and protect the conservation purposes which the contribution is intended to advance.
>
> H.R. Conf. Rep. No. 95-263, *reprinted in* 1977 U.S.C.C.A.N. 287, 295.

The House Conference report demonstrates that Congress expected the donees of conservation easements to conduct substantial conservation activities. The expectation is consistent with the regulations under section 501(c)(3), which require an organization to actually engage primarily in activities that accomplish an exempt purpose. *See* Treas. Reg. §1.501(c)(3)-1(c)(1); *see also* Christian Manner International v. Commissioner, 71 T.C. 661, 668 (1979) ("[E]ven if there was no nonexempt purpose for the organization . . . , it must actually engage primarily in activities which accomplish one of the exempt purposes . . . "). In addition, as noted above, Treas. Reg. § 1.170A-14(c) contemplates that an organization that receives conservation easement contributions must have a "commitment to protect the conservation purposes of the donation and have the resources to enforce the restrictions."

B. Inurement and Private Benefit

Section 501(c)(3) and Treas. Reg. § 1.501(c)(3)-1(c)(2) provide that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. Treas. Reg. § 1.501(a)-1(c) defines "private shareholder or individual" as an individual having a personal and private interest in the activities of the organization.

Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest. To meet this requirement, it is necessary for the organization to establish that it is not operated

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[2] *See, e.g.*, § 170(f)(3)(B)(iii) (1976) (allowing for conservation easement contributions to organizations described in § 170(b)(1)(A)); H.R. Rep. No. 94-15, *reprinted in* 1976 U.S.C.C.A.N. 4117, 4208; *see also* 121 Cong. Rec. 3,004-3,008 (February 12, 1975) and 122 Cong. Rec. 24,317-24,323 (July 28, 1976).

for the benefit of private individuals, such as "the creator or his family." Treas. Reg. § 1.501(c)(1)-1(d)(1)(ii).

The Tax Court, in *American Campaign Academy v. Commissioner*, 92 T.C. 1053, 1069 (1989), provided a good working definition of private benefit that is inconsistent with exemption under section 501(c)(3): "nonincidental benefits conferred on disinterested person [that] serve private interests." The Service recognizes that although small levels of private benefit are sometimes necessary, private benefit must be qualitatively and quantitatively incidental. Applying the principle articulated by the Supreme Court in *Better Business Bureau of Washington, D.C. v. United States*, 326 U.S. 279, 283 (1945) that a "single non-[exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes," it is clear that the presence of substantial private benefit will destroy an organization's exemption, regardless of other charitable purposes or activities.

As explained by the Tax Court in *Bubbling Well Church of Universal Love v. Commissioner*, 74 T.C. 531, 534 (1980) *aff'd*, 670 F.2d 104 (9th Cir. 1980), an organization that is closely-controlled by family members must clearly demonstrate that private interests will not be served and that net earnings will not inure to the benefit of insiders. The court in *Bubbling Well Church* noted that the petitioner organization "was completely dominated by [one] family--a father, mother, and son"--who were "in a position to perpetuate th[eir] control of petitioner's operations and activities indefinitely" because they composed and were the only voting members on its board of directors. In part due to this domination by one family, the court could not conclude "from the information in the administrative record that part of the net earnings did not inure to the benefit of the [controlling] family or, stated another way, that petitioner was not operated for the [family's] private benefit." In reaching this conclusion, the court noted:

> While this domination of petitioner by the three [family members], alone may not necessarily disqualify it for exemption, it provides an obvious opportunity for abuse of the claimed tax-exempt status. It calls for open and candid disclosure of all facts bearing upon petitioner's organization, operations, and finances so that the Court, should it uphold the claimed exemption, can be assured that it is not sanctioning an abuse of the revenue laws. If such disclosure is not made, the logical inference is that the facts, if disclosed, would show that petitioner fails to meet the requirements of section 501(c)(3).

Applying the principle set forth in *Bubbling Well Church*, the Tax Court in *Ohio Disability Ass'n v. Comm'r*, T.C. Memo. 2009-261, determined that the administrative record did not permit the court to conclude that no part of the net earnings of the organization at issue would inure to the benefit of the one individual who was the organization's sole director, officer, employee, and member when the record did not demonstrate sufficient oversight to prevent the organization from being operated to benefit that individual or his legal and accounting practices.

C. Facilitating Improper Charitable Deductions

Organizations that facilitate tax avoidance schemes do not qualify for exemption

under § 501(a) as organizations described in § 501(c)(3). See *Church of World Peace, Inc. v. Commissioner*, T.C. Memo 1994-87 (1994), *aff'd*, 52 F.3d 337 (10th Cir. 1995). In *Church of World Peace*, the church used its tax-exempt status to create a circular tax-avoidance scheme. Individuals made tax-deductible charitable donations to the church. The church then returned the money to the individuals in the form of tax-free "housing allowances" and also reimbursed the individuals for "church expenses" that were in fact unrelated to church operations. The Church emphasized tax advice in connection with this tax-avoidance scheme. The Tax Court held, and the Tenth Circuit affirmed, that the church did not comply with the requirements of section 501(c)(3) because, by promoting a circular flow of funds from donors to the church and back to the donors and facilitating improper charitable contribution deductions, the church did not operate exclusively for exempt purposes enumerated in section 501(c)(3).

ANALYSIS

A. *M does not qualify for exemption under section 501(c)(3) because it failed to establish that it will engage in activities that accomplish charitable conservation purposes.*

To establish that it operates exclusively for charitable conservation purposes under section 501(c)(3), an organization must do more than merely accept and hold easements for which donors are claiming charitable contribution deductions under section 170(h). The organization must establish that any accepted easements actually serve a conservation purpose. The organization must also operate as an effective steward to ensure that the easement continues to further a conservation purpose. The easement is a set of legal rights. It can serve conservation purposes only if enforced where necessary. The need for enforcement can be determined only through monitoring. The extent of an organization's due diligence and monitoring activities, combined with its capacity for and commitment to enforcement when necessary, becomes highly significant in determining whether accepting and holding easements actually furthers a charitable conservation purpose and thus whether an organization with the primary purpose of accepting and holding easements qualifies for exemption under section 501(c)(3). *See* Treas. Reg. § 1.501(c)(3)-1(c)(1) (noting that an organization qualifies for exemption under section 501(c)(3) "only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)"); *see also Christian Manner International Inc. v. Comm'r*, 71 T.C. 661, 668 (1979); *cf.* Treas. Reg. § 1.170A-14(c)(1) (to be an eligible donee of a conservation easement, an organization must have a commitment to protect the conservation purposes of the donation, and the resources to enforce the restrictions); H. Conf. Rept. 95-263, at 30-31 (noting Congressional intent that the donee of charitable conservation easements have the capacity to enforce the easements).

M has failed to demonstrate that it can and will actually make any credible efforts to evaluate, monitor, and enforce the conservation easements it receives and thus has failed to establish that it qualifies for exemption under section 501(c)(3). For one, M's processing of the easements has been inadequate to ensure that they serve a charitable conservation purpose.

In response to the question of the Service as to whether a baseline study of the easement property it received had been performed by a qualified expert to determine and record the scientific ecological merit of the easement (or recreational or educational benefit of the property), M responded that "a baseline study was a preferment prior to the gift of the current easement. Personnel with the V Department of Wildlife reviewed the property." We interpret this response to mean that M did not perform a baseline study on the easements. Additionally, M did not state the significance of any review by the V Department of Wildlife or present any of its findings. M has also failed to establish that any of its own officers, trustees, or employees (whether D and his wife or others) have backgrounds or expertise in botany, biology, ecological sciences or other fields that would enable them to credibly process or evaluate the property. Thus, M has failed to establish that its evaluation of the easements it has received has been sufficient to ensure these easements further charitable conservation purposes

M has also failed to establish that it adequately monitors the property to enforce the easements. M, a corporation organized under the law of T and located in U, apparently where D resides, accepted as its first two conservation easements, property located in V, which is some distance from where D and his wife live. Monitoring property from such a geographic distance clearly presents significant practical challenges. In explaining how it will monitor the property, notwithstanding the geographic distance, M has stated only that it uses "contacts in the area" to periodically inspect the property, that adjoining landowners have also agreed to inspect the property, and that it asks the donor on an annual basis to provide a statement that the restrictions are not being violated. This response is insufficient. M has not provided any reports or other documents evidencing that such monitoring has ever occurred. Moreover, M has not identified who any of these alleged "contacts" or adjoining landowners are, nor has it provided any information regarding how these parties are conducting or will conduct "inspections" or whether such persons have the background or expertise to judge the scientific ecological condition or merits of the property or have any particular commitment or incentive to perform a thorough examination. Indeed, the interests of the adjoining landowners (whose own property might increase in value if development were to occur) may be inconsistent with the conservation purposes for the two easements. The interests of the donor are even more likely to be inconsistent with the conservation purposes, rendering its mere statement that the terms of the easement have not been violated of little to no evidentiary value. And even if M's own trustees and officers (i.e., D and his wife) could overcome the significant geographic barriers to inspecting the property, M has not shown that they have backgrounds or expertise that would enable them to credibly conduct such inspections nor has he represented that M will recruit employees, trustees, or officers with such capabilities. Furthermore, the simple fact that M failed to perform a baseline study of the property will render subsequent monitoring very difficult, if not impossible, because any inspector would not know the benchmark for the property against which to gauge whether ecological conditions are stable, improving, or declining.

We also note that M does not have sufficient resources to fund effective monitoring or enforcement efforts, reporting just $ in non-easement (cash) assets at the end of 20 and never having reported more than $ in cash at the end of any year reported on the Forms 990 it has submitted. The expenses that M has reported also evidence a complete lack of monitoring or enforcement efforts; the highest level of expenditures shown on the Forms 990 submitted by M was $, and all of which was spent on legal and accounting fees. M did not

explain how it can sufficiently monitor and enforce the conservation easements despite its obvious lack of financial capacity to do so. Thus, M has failed to establish that its monitoring and enforcement of easements has been or will be sufficient to ensure these easements will further charitable conservation purposes.

In addition, M is readily distinguishable from conservation organizations that have been found to further charitable or other exempt purposes. For instance, unlike the organizations in Rev. Rul. 67-292 or Rev. Rul. 70-186, M will not open up the land it is allegedly conserving to general public use. Unlike the organization in Rev. Rul. 76-204, M does not claim that the property it alleges to preserve has any ecological significance; moreover, M was not formed by scientists or conservationists and does not work closely with Federal, state, and local governmental agencies to identify ecologically significant land. Unlike the model farm considered in *Dumaine Farms*, M does not conduct experiments or operate a demonstration project with scientific or educational value. Rather, M most resembles the organization described in Rev. Rul. 78-384, which failed to qualify as exempt under section 501(c)(3) because it preserved land that lacked any distinctive ecological significance and failed to establish that its restrictions on the land resulted in any direct or significant public benefit.

Moreover, M has failed to establish that the easements it has accepted will serve any charitable conservation purpose recognized by Congress in section 170(h)(4). These easements do not preserve land areas for outdoor recreation by, or the education of, the general public within the meaning of section 170(h)(4)(i), especially since the easement deeds do not give any right of access by the general public to any portion of the property. *See, e.g.*, Treas. Reg. § 1.170A-14(d)(2)(ii) (noting that the preservation of land areas for recreation or education will not meet the test of section 170(h)(4)(i) "unless the recreation or education is for the substantial and regular use of the general public"). Likewise, the easements cannot qualify under section 170(h)(4)(iv), as M has provided no information indicating that the easements preserve an historically important land area or a certified historic structure.

M has also not demonstrated that the easements protect a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem within the meaning of section 170(h)(4)(ii). M's Form 1023 and subsequent communications failed to establish the existence of any significant habitat on the easement property, such as habitat for endangered species, an undeveloped coastal ecosystem, or natural areas that are included in, or contribute to, the ecological viability of a local, state or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area. *See* Treas. Reg. § 1.170A-14(d)(3)(i)-(ii). While given the opportunity several times to elaborate on how the property might serve as a "wildlife refuge," as described in Treas. Reg. § 1.170A-14(d)(3)(ii), M failed to provide any details as to the how the property might serve this purpose, stating only that "wildlife uses the property year round."

Finally, M failed to establish that it will preserve open space within the meaning of section 170(h)(4)(iii). Under section 170(h)(4)(iii), the preservation of open space (including farmland and forest land) must "yield a significant public benefit" and must either (1) be for the scenic enjoyment of the general public or (2) be pursuant to a clearly delineated Federal, State, or local governmental conservation policy. M has not cited any Federal, State, or local governmental

conservation policies that its conservation easement help further. In addition, it has neither described any special scenic characteristics of the property nor indicated that the general public will have any physical or visual access to the property. *See generally* Treas. Reg. § 1.170A-14(d)(4)(ii) (describing the factors that indicate a view is "scenic" and indicating that either visual or physical access to the scenic view is necessary). Indeed, the fact that the easement deeds specifically provide that "[n]o right of access by the general public to any portion of the Property is conveyed by this Easement," and that private access to the property is limited to a gravel access drive, suggest an absence of any physical or visual access by the general public. In addition, M has failed to identify any significant pubic benefit that will result from preservation of the easement property.

Moreover, because the easements M has received authorize M to extinguish the easement, they contravene the apparent intent of Congress that qualified conservation easements be "granted in perpetuity." *See* IRC § 170(h)(2)(C).

In addition to failing to demonstrate that the easements it holds serve any conservation purpose specifically enumerated in section 170(h)(4)(A), M has also failed to present any other facts and circumstances that would support a conclusion that accepting and holding such easements further a charitable conservation purpose or any other charitable, educational, scientific, or other exempt purpose described in section 501(c)(3).

M has failed to demonstrate that it primarily engages in activities that accomplish charitable or other exempt purposes described in section 501(c)(3). Thus, M is not operated exclusively for exempt purposes within the meaning of section 501(c)(3) and Treas. Reg. § 1.501(c)(3)-1(c)(1) and, as such, fails to qualify for exemption under section 501(c)(3).

B. *M does not qualify for exemption under section 501(c)(3) because M failed to establish that it is operated for public purposes rather than for private purposes and because M furthered a substantial nonexempt purpose by facilitating improper charitable contribution deductions.*

D is M's sole incorporator and he and his wife control and operate M as its only officers and trustees. D also organized M's sole donor, P, and was on both sides of the transaction in which P transferred the first and largest easement (allegedly valued at nearly $) to M, signing the deed of easement on behalf of both M and P. He was also employed with the law firm that prepared P's income tax return at the time of both easement gifts -- gifts for which P's members claimed charitable deductions totaling almost $. In addition, D and his wife have an indirect interest of up to percent in the proceeds of the sale of the properties on which the easements were granted. As M's sole officers and trustees, D and his wife can also have M extinguish the easements.

This situation "provides an obvious opportunity for abuse of the claimed tax-exempt status," *Bubbling Well Church*, 74 T.C. at 534, as it is rife with the potential for private inurement and the conferral of private benefits on D and on P and P's members. P's members benefitted from substantial charitable contribution deductions as a result of the easement contributions,

which D and M facilitated by accepting the easements, substantiating the contributions as required by section 170(f)(8) and by signing the donee acknowledgment on the Forms 8283 without properly evaluating the easements' conservation value. Moreover, the easements violate the perpetuity requirement under section 170(h)(2)(C) as they were not granted in perpetuity (given M's right to extinguish the easement). M also signed the Forms 8283 despite the fact that M was not a "qualified organization" described in section 170(h)(3) because it does not and did not qualify as a public charity (as described below in section C) and did not have the capacity to commit to protecting the conservation purpose of the donation and enforcing the easement restrictions. Treas. Reg. § 1.70A-14(c).

D also benefitted from facilitating these charitable deductions because P and P's members were clients of the law firm that employed D. In addition, M and D's failure to properly evaluate, monitor, and enforce the easements could quite easily result in P and P's members (who, again, were clients of D's law firm) obtaining the benefit of charitable deductions while nonetheless using the property in any manner they please. Worse, if an opportunity to sell the easement property arises, D has an incentive (given his interest in the proceeds of the sale) to allow P to sell the property at a higher price by exercising M's right to extinguish the easements, thereby benefiting both D and P and its members. The easement also grants M the right to agree with P to designate additional building envelopes on the easement property, providing further opportunity for M to confer private benefits on P.

The potential for private benefit and/or inurement is greatly increased by the fact that M's operations are dominated by only two related individuals, D and his wife, who have significant connections to M's sole donor and the owner of the easement property, P. Because M is dominated by just D and his wife and because of D's connections to P, M's failure to disclose facts sufficient to show that its operations will serve public rather than private interests, we have determined that M has failed to establish that is operated exclusively for exempt purposes and/or that no part of M's net earnings will inure to the benefit of a private shareholder or individual. *See Bubbling Well Church*, 74 T.C. at 534; *Ohio Disability Ass'n*, T.C. Memo. 2009-261.

In addition to conferring private benefit on P and, potentially, D and D's law firm, M's signing the donee acknowledgment on P's Forms 8283 also furthered the nonexempt purpose of facilitating a tax avoidance scheme by allowing improper charitable contribution deductions. *See Church of World Peace, Inc.*, T.C. Memo 1994-87. As noted above, M signed the donee acknowledgment on P's Forms 8283 without ever having properly evaluated the easements' conservation value and despite the easements not having been granted in perpetuity (given M's right to extinguish the easement) as required under section 170(h)(2)(C). In addition, for a contribution of an easement to qualify as a deductible charitable contribution under section 170, the recipient of the easement must be a public charity rather than a private foundation, *see* section 170(h)(3), and must have a commitment to protect the conservation purposes of the donation and enforce the easement's restrictions, *see* Treas. Reg. § 1.70A-14(c). As discussed below in section "C," M never qualified as a public charity, and consequently, M was never a "qualified organization" under section 170(h)(3). In addition, M's lack of resources dedicated to enforcing the easements makes clear that it never had a commitment to enforce their restrictions. Despite this lack of commitment and despite being a private foundation, D, in his

capacity as trustee of M, signed the donee acknowledgement on P's Forms 8283, thereby helping P and its members to claim improper charitable contribution deductions totaling almost $2.74 million. In so doing, M facilitated tax avoidance by allowing improper charitable contribution deductions, a nonexempt purpose that was substantial given that receiving and holding the two easements has been M's only activity since its incorporation. Therefore, M is not operated exclusively for exempt purposes enumerated in section 501(c)(3) and, as such, does not qualify for exemption as an organization described in section 501(c)(3). *See Church of World Peace, Inc.*, T.C. Memo 1994-87.

Accordingly, M's request for exemption under section 501(c)(3) is denied.

C. *M failed to qualify as a public charity and is therefore a private foundation.*

Section 509(a) provides that any organization described in section 501(c)(3) and not described in paragraph (1), (2), (3), or (4) of section 509(a) is classified as a private foundation. Chapter 42 of the Code contains several penalty excise taxes that apply only to private foundations.

As stated previously, M originally filed its application as a private foundation. After the Service pointed out that contributions to private foundations are not deductible under section 170(h), M amended its Form 1023 seeking to a definitive ruling that it qualified as a public charity. M claims the two easement contributions, both from one donor, P, are grounds for satisfying the public support test under sections 509(a)(1) and 170(b)(1)(A)(vi) and/or section 509(a)(2).

Financial information provided by M on its Form 990 for 20 , 20 , 20 , and 20 shows the following:

20 - Indirect Public Support: $

20 - Direct Public Support: $
Indirect Public Support: $

20 - Direct Public Support: $

20 – Direct Public Support: $.

The "indirect public support" represents the two easements contributed by P, discussed above. Thus, P provided at least 99.9 percent of M's support from 20 to 20 .

Section 509(a)(1) describes an organization described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)). Organizations described in section 170(b)(1)(A)(vi) normally receive a substantial part of their support from a governmental unit or from direct or indirect contributions from the general public.

Section 1.170A-9(f)(6)(i) provides that, for purposes of determining whether or not an

organization is described in section 170(b)(1)(A)(vi), contributions from a person other than a governmental unit or a publicly supported charity is taken into account as "support" from the general public only to the extent that the total amount of the contributions from that person over the relevant measurement period does not exceed percent of the organization's total support over that period.

To qualify as a publicly supported charity described in section 170(b)(1)(A)(vi), an organization must normally receive at least 10 percent of its support from governmental units, from contributions made directly or indirectly by the general public, or from a combination of these sources (henceforth, "public support"), in addition to meeting other requirements. Treas. Reg. § 1.170A-9(f)(3)(i).

Section 509(a)(2), in part, describes an organization that normally receives more than one-third of its support in each taxable year from any combination of gifts, grants, contributions, or membership fees and gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity that is not an unrelated trade or business within the meaning of section 513, from persons other than disqualified persons (as defined in section 4946) with respect to the organization.

Section 4946(a)(1) provides that a "disqualified person" includes a substantial contributor to the organization and section 4946(a)(2) defines a "substantial contributor," by cross-reference to section 507(d)(2), to include any person who contributed or bequeathed an aggregate amount of more than $5,000, if such amount is more than percent of the total contributions and bequests received by the recipient organization before the close of the taxable year in which the contribution or bequest is received from such person.

The financial information provided by M shows that from its incorporation in 2002 to 2005, it achieved a public support percentage for purposes of section 170(b)(1)(A)(vi) of, at best, 2 percent, well below the percent minimum required under Treas. Reg. § 1.170A-9(f)(3)(i). Because P is a substantial contributor to, and therefore a disqualified person with respect to, M, P's contributions are excluded altogether from the numerator of the public support calculation under section 509(a)(2). As a result, M's public support percentage under section 509(a)(2) from 2002 to 2005 is just .05 percent, obviously well below the $33^1/_3$ percent required. Accordingly, M fails to meet the public support tests under both section 170(b)(1)(A)(vi) and section 509(a)(2). As a result, if M were determined to qualify for exemption under section 501(c)(3), it would be classified as a private foundation under section 509(a) and not as a public charity.

This ruling will be made available for public inspection under section 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose.* A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination.

Your protest statement should be accompanied by the following declaration:

Under penalties of perjury, I declare that I have examined this protest statement, including accompanying documents, and, to the best of my knowledge and belief, the statement contains all the relevant facts, and such facts are true, correct, and complete.

You also have a right to request a conference to discuss your protest. This request should be made when you file your protest statement. An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you. If you want representation during the conference procedures, you must file a proper power of attorney, Form 2848, Power of Attorney and Declaration of Representative, if you have not already done so. For more information about representation, see Publication 947, Practice before the IRS and Power of Attorney. All forms and publications mentioned in this letter can be found at www.irs.gov, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to protest as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848 and any supporting documents to this address:

Internal Revenue Service
Richard McCray, Sr., 3P5
1111 Constitution Ave, N.W.
Washington, DC 20224

You may also fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Robert Choi
Director, Exempt Organizations
Rulings & Agreements

Enclosure
Notice 437