

THE LAND USE PRACTICE GROUP

## CLIENT ALERT: Tax Oversight of Conservation Easements Continues to Evolve

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At this year's annual convention of the [Land Trust Alliance](#) in Milwaukee, Wisconsin, a pervasive topic and continuing theme from recent years was the continued scrutiny the Internal Revenue Service (IRS) is applying to the tax benefits claimed by landowners who donate a conservation easement on their land. In particular, recent reports indicate show that the IRS is increasing its challenges to donors' compliance with technical tax requirements to invalidate claimed charitable contributions

The Internal Revenue Code, as well as Colorado's tax laws, provides for income and estate tax benefits for charitable contributions of conservation easements. However, to qualify for these tax benefits, a conservation easement and the donor's supporting documentation (including the appraisal, baseline documentation, tax filings, and other documents) must satisfy strict technical requirements.

The IRS has strung together a growing number of favorable court rulings upholding the agency's denial of claimed conservation contributions. The IRS is prevailing over easement donors in United States Tax Court not just by challenging the conservation merits of these transactions, but increasingly by attacking the landowner's technical compliance with the Treasury Regulations that govern qualified conservation contributions. These requirements include:

- Qualified appraisal requirements for the appraisal that substantiates the value of the gift
- Subordination of existing mortgages
- Mineral development remoteness determinations
- Sufficient documentation of baseline property conditions
- Qualified easement holder requirements including stewardship capacity and commitment
- Charitable gift substantiation documentation from the donee organization

The IRS's increased scrutiny of conservation easements does not reflect any fundamental problem with conservation easements. Rather, the IRS has become more knowledgeable about conservation easements and is now more aggressively enforcing the letter of existing law governing their tax treatment.

Landowners considering entering into a conservation easement transaction should not shy away from a thoughtfully structured easement transaction with an established land trust donee. However, in the face of the increased scrutiny of conservation easements from the IRS, landowners are strongly encouraged to engage competent, experienced advisors and partners, including the following:

- An appraiser familiar with the federal and state tax and other requirements
- An accountant familiar with these tax requirements, which change frequently
- An attorney experienced with drafting enforceable, manageable conservation easements and navigating the due diligence process

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- An experienced, reputable land trust or government agency with the commitment and resources to steward the conservation easement for the long-term future. For a list of such organizations in Colorado, visit the [Colorado Coalition of Land Trust's member organizations page](#).

*Otten Johnson's Land Use practice group has substantial experience in conservation easement issues. For more information on this Client Alert, please contact any of the attorneys in the Land Use practice group (for a listing, [click here](#)).*

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