DOWN THE RABBIT HOLE WITH THE IRS' CHALLENGE TO PERPETUAL CONSERVATION EASEMENTS, PART ONE

by Jessica E. Jay

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SUMMARY

When the Internal Revenue Service began disallowing gifts of perpetual conservation easements for claimed failures of perpetuity requirements, it tumbled land trusts, landowners, and the U.S. Tax Court down the rabbit hole to a baffling land below. The Service's drop into matters beyond valuation and into elements intended and necessary for easement durability and flexibility has caused a confusing array of Tax Court decisions. Part One of this two-part Article examines how the Service lures the land conservation community and the Tax Court into Wonderland distortions, and the precarious tower of cards upon which its legal theories rest. Part Two, in the next issue, will identify the fundamental elements of law and the process of law to topple the Service's card construct, and awaken and return everyone to the world above ground.

> [B]urning with curiosity, she ran across the field after it, and was just in time to see it pop down a large rabbit-hole under the hedge. In another moment down went Alice after it, never once considering how in the world she was to get out again.
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[1]

When Alice tumbled down the rabbit hole after the White Rabbit in *Alice's Adventures in Wonderland*, she had no idea of the topsy-turvy world that lay below, inhabited by the Mad Hatter, grinning Cheshire Cat, inconsolable Mock Turtle, contrarian Caterpillar, recalcitrant King and impetuous Queen of Hearts—nor of the strange consequences of her actions therein and thereafter. When the Internal Revenue Service (the Service) began disallowing gifts of perpetual conservation easements for claimed failures of perpetuity requirements under the Internal Revenue Code (the Code) and attendant U.S. Treasury regulation (the Regulation), it tumbled land trusts, landowners, and the U.S. Tax Court down the rabbit hole to a baffling land below. There, long-held rules of law are turned inside-out and on their head—a misadventure that continues today, with each disallowance, legal challenge, and judicial ruling seemingly based on manufactured exigencies.

The Service's drop into matters beyond valuation and into elements intended and necessary for conservation easement durability and flexibility over perpetuity has caused a confusing array of Tax Court decisions culminating in, among other things, a perplexing discussion of Swiss cheese in the *Pine Mountain Preserve* case.[2] Part One of this two-part Article, presented here, examines how the Service lures

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1. Lewis Carroll, *Alice's Adventures in Wonderland* 8 (London, Macmillan 1865) [hereinafter Wonderland].
2. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 247 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev'd in part, aff'd in part,*

the land conservation community and the Tax Court into Wonderland distortions of perpetual land conservation law, and the precarious tower of cards upon which its legal theories rest. Part Two, in next month's issue, will identify the fundamental elements of law—plain language, statutory construction, legal application, congressional intent, and precedent—and the process of law—legislative grace, burden of proof, standard of review, and deference—to topple the Service's card construct, and awaken and return everyone to the world above ground. There, the Service can properly focus on abusive overvaluation and wrongdoing via syndicated conservation tax deduction transactions.[3]

Beginning with the background, history, and case law summaries leading to the Service's assertions regarding perpetual conservation easement donations, this part's Section I explores how the conservation community and Tax Court came to be caught down a rabbit hole with the Service. Section II examines how being caught down a rabbit hole adversely affects the practice of land conservation.

Next issue, Part Two will set forth the straightforward framework of Code §170(h)(2)(C) and (h)(5)(A) and the mechanism for perpetuating conservation purposes over time. This framework leads to the exposition of the intent behind the Code and Regulations, and of the procedural implementation of that intent. The final section of the Article will extricate the land conservation community, Service, and Tax Court from the rabbit hole and recommend using new and existing procedural tools and policy to refocus the Service instead on valuation. This will free the conservation community to continue its essential work of perpetual land conservation and achieving increasingly important conservation goals, such as community conservation, environmental justice, and climate resilience.

I. Down the Rabbit Hole and How We Got to Be Here

> The White Rabbit put on his spectacles.
>
> "Where shall I begin, please your Majesty?" he asked.
>
> "Begin at the beginning," the King said gravely, "and go on till you come to the end: then stop."
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[4]

To begin at the beginning is with the codification of the final form of the tax deduction for conservation easements in 1980, followed by the attendant regulation in 1986. After passage of Code §170(h) and promulgation of Regulation §1.170A-14, the Service effected its role as enforcer of the laws protecting the Treasury by consistently challenging the valuation (and, later, the validity) of conservation easement gifts.[5] In the initial years after drafting of Regulation §1.170A-14, the Service seemed satisfied to primarily address the valuation of a conservation easement gift. A successful challenge would range from reduced value to zero value, complete disallowance of tax deduction, and the potential for penalties for underpayment of taxes.[6]

A. *Hurtling Down the Rabbit Hole: Beyond Valuation*

> Alice: "It's no use going back to yesterday, because I was a different person then."
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[7]

By the 1990s, the Service began to expand its conservation easement challenges beyond those based on valuation to include technical and procedural errors and oversights, such as the failure to receive gift acknowledgment letters, the misdating of appraisals substantiating value, the untimeliness of mortgage subordination agreements, and the improper execution of Form 8283.[8] Success on such claims in the tax and federal district courts seemingly encouraged the Service to regularly include technical, pro-

vacated and remanded, No. 19-11795, 2020 WL 6193897 (11th Cir. Oct. 22, 2020).

3. The news release issued by the Service on November 12, 2019, informs: "The Internal Revenue Service announced today a significant increase in enforcement actions for syndicated conservation easement transactions, a priority compliance area for the agency." News Release, Internal Revenue Service (IRS), IRS Increases Enforcement Action on Syndicated Conservation Easements, IR-2019-182, (Nov. 12, 2019).
4. Wonderland, *supra* note 1, at 66.
5. Charitable, etc., contributions and gifts, I.R.C. §170(h) (2006); Qualified conservation contributions, Treas. Reg. §1.170A-14 (1986); IRS, *The Agency, Its Mission, and Statutory Authority*, https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority (last updated Sept. 28, 2020). In this Article, the terms "Code" or "I.R.C." refer to the Internal Revenue Code, Title 26 of the U.S. Code, unless otherwise specified, and "Treasury Regulation," "Regulation," or "Treas. Reg." refer to the regulation promulgated under the Code, unless otherwise specified.
6. Jenny L. Johnson Ware, *New Executive Orders Shift Conservation Easement Battleground*, Tax Notes, Nov. 4, 2019 [hereinafter *CE Battleground*], *available at* https://www.taxnotes.com/tax-notes-federal/charitable-giving/new-executive-orders-shift-conservation-easement-battleground/2019/11/04/2b2np. Rare today is the conservation easement disallowance made solely on the basis of valuation, *see* Johnson v. Commissioner, T.C.M. (CCH) 2020-79 (2020) (Service disallows deduction for reasons of easement valuation; Tax Court affirms on same grounds); rarer still is a disallowance based at least in part on valuation overturned by the Tax Court, *see* Kumar v. Commissioner, No. 21575-11 (U.S.T.C. Sept. 19, 2011), T.C.M. (CCH) 2020-159 (2020) (Service disallows easement deduction arguing easement nonperpetual due to presence of amendment clause and substantially overvalued requiring penalties; Tax Court upholds taxpayer valuation and, separately, amendment clause legitimacy, citing its own opinion in *Pine Mountain Preserve, LLLP v. Commissioner*, 151 T.C. 247, 280-81 (2018), *aff'd in part, rev'd in part, vacated and remanded*, No. 19-11795, 2020 WL 6193897 (11th Cir. Oct. 22, 2020)).

   The last is an opinion penned by Judge Mark Holmes, opening with a literary allusion to conservation easements possessing cloven hooves in the eyes of the Service, closing with a bear, bull, and pig moneymaking aphorism, and utilizing a vivid metaphor of the property's value being at the frothiest of the housing market bubble:

   > The [taxpayers] benefit from timing their donation at what turned out to be very nearly the frothiest point on a local real-estate bubble that was even bubblier than it was in most parts of the nation. In valuing that donation, they get the benefit of the bubble. . . . they get to keep their deductions in full and owe no penalty.

   Id.
7. Wonderland, *supra* note 1, at 57.
8. *CE Battleground*, *supra* note 6, at 4.

cedural aspects as part of perpetual conservation easement deduction disallowances, and, in some cases, to focus on such technicalities exclusively.

1. Technical, Procedural Deficiencies as the Bases of Service Challenges

> The Queen had only one way of settling all difficulties, great or small.
>
> "Off with his head!" she said, without even looking round.
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[9]

The Service, like the Queen of Hearts, treats all conservation easement challenges, great or small, with the same resolution—the "off with their heads" complete denial and disallowance of tax deduction, whether on issues of valuation, technical noncompliance, or substance. When the Service began asserting technical deficiencies to completely deny and disallow conservation easement tax deductions, it employed the same approach as if it were dealing with substantive or valuation issues, thereby inexorably equating the most benign technical transgressions with the most profound substantive concerns.

The Service's early technical denials and disallowances included issues surrounding substantiation of the conservation transaction itself. Such denials included that the easement donor did not timely receive a gift acknowledgment letter, also known as a contemporaneous written acknowledgment, from the easement holder indicating receipt of the gift or statement of exchange for goods and services, or both, as required by Code §170(f)(8).[10] Code §170(f)(8) requires that for gifts over $250, the easement holder shall provide a contemporaneous written acknowledgment of the gift.

The written acknowledgement includes a description (but not value) of any property other than cash donated; whether the easement holder provided any goods or services in consideration, in whole or in part, for any gift; and a description and good-faith estimate of the value of any goods or services.[11] Such acknowledgment is to be received by the taxpayer on or before the earlier of the date the taxpayer files a return for the taxable year in which the gift was made, or the due date (including extensions) for filing the return (*Bruzewicz*, *Simmons*, *Schrimsher*, *Averyt*, *15 West 17th Street*, *French*, *310 Retail*, *RP Golf*).[12]

The Service also disallowed easement deductions because a qualified appraisal was technically troubled, as opposed to substantively wrong (though error in substance was often also simultaneously asserted), including that it was untimely due to an incorrect effective date or date of valuation as required by Code §170(f)(11) and Regulation §1.170A-13.[13] Code §170(f)(11) and Regulation §1.170A-13 both state that substantiation for gifts of more than $5,000 require a qualified appraisal of such property. The appraisal is to be made no earlier than 60 days prior to the date of the gift of the appraised property, and no later than the due date (including extensions) of the return or amended return on which a deduction is first claimed (*Ney*, *1982 East*, *Schultz*, *Zarlengo*, *Mecox*).[14]

The Service further disallowed perpetual conservation easement deductions because the easement was untimely recorded, usually by virtue of being recorded after the year of the claimed deduction, in contravention of Regulation

9. Wonderland, *supra* note 1, at 47.
10. I.R.C. §170(f)(8)(A), (B), (C) (1997).
11. *Id.*
12. *Id.*; *see also* Treas. Reg. §1.170A-13(f), (i) (as amended in 2009); RP Golf, LLC v. Commissioner, T.C.M. 2012-282 (2012), T.C.M. 2016-80 (2016), *aff'd*, 860 F.3d 1096 (8th Cir. 2017) (Service challenges deduction for lack of contemporaneous written acknowledgment when thank-you letter from easement holder including statement of no goods or services in exchange for easement is sent five years after easement donation; Tax Court follows *Simmons* and *Averyt*, finding easement itself meets requirements of contemporaneous written acknowledgment); Commissioner v. Simmons, 646 F.3d 6 (D.C. Cir. 2011), *aff'g* T.C.M. 2009-208 (2009) (Service disallows for lack of contemporaneous written acknowledgement; Tax Court rejects argument because easement deeds suffice for substantial compliance as signed by donee and describe donated properties; U.S. Court of Appeals for the District of Columbia (D.C.) Circuit affirms on appeal); Bruzewicz v. United States, 604 F. Supp. 2d 1197 (N.D. Ill. 2009) (Service denies deduction for failure of contemporaneous written acknowledgement to properly substantiate easement donation through thank-you letters without mention of easement gift, or statement of goods or services; district court rules for Service on summary judgment, holding failure to comply with Code §170(f)(8) is fatal to the deduction claim, and rejecting substantial compliance); 310 Retail, LLC v. Commissioner, T.C.M. 2017-164 (2017) (Service disallows deduction for contemporaneous written acknowledgement letter; Tax Court reverses, holding easement deed qualifies as contemporary written acknowledgment because easement stated it was an unconditional gift constituting entire agreement between parties); French v. Commissioner, T.C.M. (CCH) 2016-53 (2016) (Service disallows deduction for failure of contemporaneous written acknowledgment because letter issued after tax return filed, easement did not state whether holder provided goods or services in exchange for charitable contribution, and did not state preservation of land was only consideration); 15 W. 17th St. LLC v. Commissioner, 147 T.C. No. 19 (2016) (Service disallows for failure of contemporaneous written acknowledgement; Tax Court affirms, rejecting claim that amended Service Form 990 by easement holder qualifies as contemporary written acknowledgment); Averyt v. Commissioner, T.C.M. (CCH) 2012-198 (2012) (Service denies easement deduction for lack of contemporaneous written acknowledgement even with thank-you letters identifying conservation easement but not discussing whether donors received any goods or services in exchange for contribution; Tax Court holds conservation easement itself is contemporaneous written acknowledgment, following its holding in *Simmons v. Commissioner*, T.C.M. (CCH) 2009-208 (2009), distinguishing easement from document in *Schrimsher v. Commissioner*, T.C.M. (CCH) 2011-71 (2011), because stated contribution was a gift and not for any consideration, whereas Schrimsher easement referred to "ten dollars and other . . . consideration"); Schrimsher v. Commissioner, T.C.M. (CCH) 2011-71 (2011), *reconsideration denied* (U.S.T.C. June 17, 2011) (Service issues a notice of deficiency for absence of contemporaneous acknowledgment; defense argues easement itself is acknowledgment; Tax Court disallows entire deduction for failure to comply with Code §170(f)(8)).
13. I.R.C. §170(f)(11) (2006); Treas. Reg. §1.170A-13(c)(3)(i)(A), (iv)(B) (1988).
14. Mecox Partners v. United States, No. 1:11cv08157, 2016 U.S. Dist. LEXIS 11511 (S.D.N.Y. Feb. 1, 2016) (district court holds appraisal is disqualified because completed more than 60 days prior to easement contribution); 1982 E., LLC v. Commissioner, T.C.M. (CCH) 2011-84 (2011) (Tax Court holds none of taxpayer's appraisals are qualified appraisals due to timing flaws and failure to attach appraisal to tax return, as required by Code §170(f)(11)(D)); Ney v. Commissioner, T.C. Summ. Op. 2006-154 (2006) (Tax Court holds failure to meet timing provisions for qualified appraisal performed not earlier than 60 days prior to date of contribution of appraised property nor later than due date of tax return; Tax Court denies taxpayers' summary judgment motions on similar grounds in *Schultz v. Commissioner*, No. 24388-09 (U.S.T.C. July 19, 2011) (order), and *Zarlengo v. Commissioner*, No. 3701-10 (U.S.T.C. Aug. 10, 2011) (order)).

§1.170A-14(g)(i).[15] Regulation §1.170A-14(g)(i) requires that a conservation easement be subject to legally enforceable restrictions, such as being recorded in the land records of the jurisdiction in which the property is located, which restrictions will prevent uses of the retained interest that are inconsistent with the conservation purposes of the donation (*Mecox*, *Schultz*, *Zarlengo*).[16] The Service similarly denied deductions when a subordination of debt, lien, or mortgage agreement was not timely recorded prior to the easement's grant, or itself possessed deficiencies or errors according to Regulation §1.170A-14(g)(ii).[17] Regulation §1.170A-14(g)(ii) requires that mortgagees, lender, or lienholder subordinate their rights in the property to the right of the easement's holder to enforce the conservation purposes of the conservation easement in perpetuity (*Satullo*, *Mitchell*, *RP Golf*, *Minnick*).[18] And as recently as 2019, the Service disallowed a conservation easement deduction, and the Tax Court upheld the same, because the information reported on tax return Form 8283 about the conservation easement was incomplete or incorrect (*Belair Woods*, *Cottonwood Place*, *Oakhill Woods*).[19]

Success with such technical missteps in the Tax Court and federal district court no doubt encouraged the Service to seek out other technical bases for denying deductions. This approach allows the Service to avoid litigating over the valuation of conservation easements, which task can be complex, time-consuming, and subjective.[20] In furtherance of its one-size-fits-all, off-with-their-heads approach, the Service has also turned to the substantive characteristics of conservation easements, including components intrinsic to their perpetual nature, in disallowing easement deductions.

2. Substantive Deficiencies as the Bases of Service Challenges

> [I]n a very short time the Queen was in a furious passion, and went stamping about, and shouting "Off with his head!" or "Off with her head!" about once in a minute.
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[21]

When it came to challenging the substance of conservation easements and easement transactions, the Service doubted the charitable character of easement gifts and easement transactions. Substantive attacks of charitable character range from the complete nullification of a gift effected by quid pro quo, lack of donative intent, and preexisting protection of conservation purposes, to the disproportionate balance of landowner uses against conservation protections, with too many rights reserved, too many inconsistent uses permitted, or insufficient conservation-purpose protections. The Service even avers that specific easement terms defy the perpetual nature of conservation protections, including clauses relating to holder approval, proceeds apportionment, amendment, and termination.

The Service asserts that certain easements are not charitable gifts because they have not been made with the proper donative intent, disinterested generosity, or without the expectation of something (of value) in return.[22] The Service alleges such charitable failures for easements given in a quid pro quo exchange wherein the landowner received, or

15. Treas. Reg. §1.170A-14(g)(i) (1986).
16. *Mecox Partners*, 2016 U.S. Dist. LEXIS 11511 (Service disqualifies November 2005 recording of easement with June 2005 appraisal date in 2004 easement deduction; district court grants summary judgment to Service, holding under New York's conservation easement enabling statute easement is not effective until recorded, citing *Zarlengo v. Commissioner*, 108 T.C.M. (CCH) 155 (2014), in which Tax Court held easement not legally effective under New York law, not protected in perpetuity, until recording in January 2005 based on New York conservation easement enabling statute); Rothman v. Commissioner, 103 T.C.M. (CCH) 1864 (2012) (Service disallows for appraisal completed outside 60-day advance window set forth in Regulation §1.170A-13(c)(3)(i)(A); Tax Court upholds 60-day advance window beginning to run on date easement is complete under New York State law, on date of recording).
17. Treas. Reg. §1.170A-14(g)(ii) (1986).
18. Minnick v. Commissioner, 796 F.3d 1156 (9th Cir. 2015), *aff'g* T.C.M. 2012-345 (2012) (Service challenges easement deductions for failure to obtain subordination of mortgage until two years after easement grant; U.S. Court of Appeals for the Ninth Circuit affirms, citing U.S. Court of Appeals for the Tenth Circuit's decision in *Mitchell II*, finding plain meaning of Regulation §1.170A-14(g)(2) requires mortgage subordination at the time of easement conveyance, noting that even if the regulation were ambiguous, the Service's interpretation of it was reasonable and thus merited judicial deference); Mitchell v. Commissioner, 775 F.3d 1243 (10th Cir. 2015) (*Mitchell III*), *aff'g* 138 T.C. No. 16 (2012) (*Mitchell I*); T.C.M. (CCH) 2013-204 (2013) (*Mitchell II*) (Service challenges easement deduction based on failure to subordinate at time of donation; Tax Court holds Regulation is silent as to when subordination must occur, in order for easement to be protected in perpetuity, subordination must take place concurrently with or previous to easement's donation. Showing deference to Service's interpretation of its own regulations, Tenth Circuit affirms, holding that Regulation §1.170A-14(g)(2) unambiguously provides subordination is prerequisite to deduction, and cannot occur after donation); RP Golf, LLC v. Commissioner, T.C.M. 2012-282 (2012), T.C.M. 2016-80 (2016), *aff'd*, 860 F.3d 1096 (8th Cir. 2017) (Service challenges deduction for subordination one day after easements recorded; Tax Court upholds, rejecting oral subordination under Missouri law requiring written agreement where land is involved, finding insufficiencies in consents instead of subordinations and without details about how much subordinated; U.S. Court of Appeals for the Eighth Circuit affirms, finding mortgage subordination must occur by the time of easement donation for easement to be protected in perpetuity under Code §170(h)(5) or Regulation §1.170A-14(g)(2)); Satullo v. Commissioner, T.C.M. 1993-614 (1993) (Service denies easement deduction for failure to subordinate mortgage; Tax Court upholds denial based on failure to record easement until long after recording of mortgage, failing under Regulation §1.170A-14(g), and therefore not granted exclusively for conservation purposes under Code §170(h)(1)(c) and (h)(5)).
19. I.R.C. §170(h) (2006); Treas. Reg. §§1.170A-13(c)(2)(i)(B) (1988), 1.170A-14(i) (1986); Oakhill Woods, LLC v. Commissioner, T.C.M. (CCH) 2020-24 (2020) (Service disallows entire deduction because basis information not entered on Form 8283; Tax Court upholds, citing *Belair Woods* failure to strictly or substantially comply with regulatory requirements); Belair Woods, LLC v. Commissioner, T.C.M. (CCH) 2018-159 (2018) (Service disallows entire deduction because Form 8283 missing basis information; Tax Court upholds as donor not strictly complied with Regulation §1.170A-13(c)(2)(i)(B) because Form 8283 incomplete as to basis, and Service not required to look elsewhere by "sift[ing] through dozens or hundreds of pages of complex returns looking for clues about what the taxpayer's cost basis might be." *Id*. at 20); Cottonwood Place, LLC v. Commissioner, No. 14076-17 (U.S.T.C. Oct. 1, 2018) (order granting motion for partial summary judgment); *but cf*. PBBM-Rose Hill, Ltd. v. Commissioner, No. 26096-14 (U.S.T.C. Sept. 9, 2016) (bench op.) (unpublished), *aff'd*, 900 F.3d 193 (5th Cir. 2018) (Service argues Form 8283 fatally flawed because of missing information; Tax Court holds donor substantially complied because missing information could be found elsewhere on tax return and because form is unclear as to how to be completed for a conservation easement contribution).
20. *CE Battleground*, *supra* note 6, at 5.
21. Wonderland, *supra* note 1, at 46.
22. *Id*.

reasonably expected to receive, financial or economic benefits in return for the easement grant, as described under Code §170(c)(1), (h)(1)(A) and Regulation §1.170A-14(h)(1), (2), (3)(i).[23] The Service argues that a grant of easement in exchange for something of value such as zoning or planning approvals defeats the donative intent, and therefore, by extension, the charitable deduction (*Minnick*, *Wendell Falls*, *Seventeen Seventy Sherman*, *Pollard*).[24]

The Service also disqualifies deductions because easements are not protective of conservation purposes described under Code §170(h)(4) and Regulation §1.170A-14(h)(3)(ii), given that existing zoning, land use regulations, or historic preservation designations, certifications, or districts already protect the claimed conservation purposes.[25] The Service successfully argues that the existing zoning, land conservation, or historic requirements defeat any protections created by a grant of conservation easement, ignoring any additive benefits afforded by perpetual conservation easements' permanent protections (*1982 East*, *Dunlap*, *Herman*, *Turner*).[26]

The Service additionally disqualifies easements for permitting too many inconsistent uses under Regulation §1.170A-14(e), or allowing the landowner to reserve too many rights under Regulation §1.170A-14(g)(5), thereby impairing the perpetual protection of the conservation values under Code §170(h)(4) (Glass, Butler).[27] The Service also alleges that certain easements do not actually exclusively protect conservation purposes such as scenic open space, relatively natural wildlife habitat, or public recreation as required by Code §170(h)(1)(C), especially when such conservation purposes are associated with golf course easements (*Champions Retreat*, *PBBM-Rose Hill*, *Atkinson*, *Kiva Dunes*).[28]

3. Perpetuity as the Basis of Service Challenges

The King . . . read out from his book,

23. I.R.C. §170(c)(1), (h)(1)(A) (2006); Treas. Reg. §1.170A-14(h)(1), (2), (3)(i) (1986).
24. Minnick v. Commissioner, 796 F.3d 1156 (9th Cir. 2015) (*Minnick II*), *aff'g* T.C.M. (CCH) 2012-345 (2012) (*Minnick I*) (Tax Court affirms Service disallowance of easement as quid pro quo condition of receiving permission from county to subdivide land); Wendell Falls Dev., LLC v. Commissioner, T.C.M. (CCH) 2018-45 (2018) (*Wendell Falls I*), T.C.M. (CCH) 2018-193 (2018) (*Wendell Falls II*) (Tax Court affirms Service denial, finding increased value to residential lots located near conserved land to uphold disallowance); Costello v. Commissioner, T.C.M. (CCH) 2015-87 (2015) (Service disallows easement deduction for lack of donative intent due to quid pro quo sale of development rights; Tax Court affirms donor lack of donative intent in exchange for sale of development rights); Seventeen Seventy Sherman St., LLC v. Commissioner, T.C.M. (CCH) 2014-124 (2014) (Tax Court upholds Service challenge of consideration received in quid pro quo exchange for city staff recommendation on zoning and likely planning board approvals); Pollard v. Commissioner, T.C.M. (CCH) 2013-28 (2013) (Service challenges easement deduction for quid pro quo arrangement for exemption approval; Tax Court agrees, applying *Hernandez v. Commissioner*, 490 U.S. 680, 690 (1989), holding that easement was given for subdivision exemption approval, not for detached and disinterested motives); *but cf*. Emanouil v. Commissioner, T.C.M. (CCH) 2020-120 (2020) (Service challenges developer contribution of fee land as quid pro quo in exchange for development approvals, citing *Pollard*; Tax Court disagrees, citing *Hernandez* and lack of evidence that not donating land would have resulted in denial of permits or approvals); *cf*. McGrady v. Commissioner, T.C.M. (CCH) 2016-33 (2016) (Service denies fee and easement deductions for lack of donative intent as quid pro quo for subdivision layout control; Tax Court rejects, finding that even though fee and easement transactions were interrelated and interdependent on subdivision process, they were made freely without expectation of benefits in return).
25. I.R.C. §170(h)(4) (2006); Treas. Reg. §1.170A-14(h)(3)(ii) (1986).
26. Dunlap v. Commissioner, T.C.M. (CCH) 2012-126 (2012); 1982 E., LLC v. Commissioner, T.C.M. (CCH) 2011-84 (2011); Herman v. Commissioner, T.C.M. (CCH) 2009-205 (2009), T.C.M. (CCH) 14005-07 (2011) (Service disallows and Tax Court affirms both *Dunlap* and *Herman*, finding these façade and building easements to be no more restrictive than New York City's applicable Landmarks Law); Turner v. Commissioner, 126 T.C.M. (CCH) 16 (2006) (Service disallows conservation easement allowing 30 building lots on 29 acres for failing open space conservation purpose definition of Code §170(h)(A)(4)(iii) and the historic preservation conservation purposes definition of Code §170(h)(4)(A)(iv) due to failure to protect open space and existing zoning); *cf*. Gorra v. Commissioner, T.C.M. (CCH) 2013-254 (2013) (Service disallows for failure to meet conservation purposes definition of §170(h)(4)(B) because easement did not preserve building beyond New York City's applicable Landmarks Law; Tax Court denies disallowance for easement complying with Code §170(h)(4)(B) as more restrictive than Landmarks Law with holder unlimited discretion to deny changes to building's exterior, proactive monitoring and enforcement, and protection of sides and rear of building, not just front).
27. Glass v. Commissioner, 471 F.3d 698 (6th Cir. 2006), *aff'g* 124 T.C.M. (CCH) 16 (2005) (as in *Butler*, Service disallows easements for failing to protect habitat or open space and allowing too many reserved rights; Tax Court holds easements were granted "exclusively for conservation purposes" within the meaning of Code §170(h)(5) as perpetual and legally enforceable, and recognizing holder's commitment and financial resources to enforce easement; U.S. Court of Appeals for the Sixth Circuit affirms, also holding easements' reserved rights not inconsistent with habitat protection purposes and exclusively for conservation purposes under Code §170(h)(5)); Butler v. Commissioner, T.C.M. (CCH) 2012-72 (2012) (Service disallows based on extent of reserved rights the exercise of which would permit destruction of "other significant conservation interests," under Regulation §1.170A-14(e)(2), for 11 two-acre building areas on one 393-acre property, other structures and surface alterations, permitted at holder's discretion; Tax Court denies disallowance for no evidence holder would fail to enforce its rights or otherwise permit landowners to use land in manner inconsistent with the conservation purpose).
28. Champions Retreat Golf Founders, LLC v. Commissioner, T.C.M. (CCH) 2018-146 (2018), *rev'd*, No. 18-14817, 959 F.3d 1033 (11th Cir. 2020) (Service disallows golf course easement deduction for failure to protect habitat or scenic and governmental policy open space conservation purposes, and excessive number of reserved rights to build, and use pesticides and fertilizers; Tax Court affirms because easement does not protect federally rare, endangered, or threatened species, does not provide scenic enjoyment to public in gated community not visible from outside or nearby rivers of questionable access, land not natural because of vegetation management, and no clearly delineated governmental policy beyond generic natural resources protection law and county greenspace program; U.S. Court of Appeals for the Eleventh Circuit reverses and remands to Tax Court to reevaluate natural habitat and scenic qualities pointing out that but for golf course, land unquestionably qualifies as natural habitat); PBBM-Rose Hill, Ltd. v. Commissioner, No. 26096-14 (U.S.T.C. Sept. 9, 2016) (bench op.) (unpublished), *aff'd*, 900 F.3d 193 (5th Cir. 2018) (Service disallows easement for reserved rights inconsistent with protection of conservation purposes, and insufficient protection of any conservation purposes including conflicting terms for public recreational access; Tax Court agrees, finding insufficient public access, little habitat on a golf course with non-native grasses and heavy use of pesticides; U.S. Court of Appeals for the Fifth Circuit affirms on other grounds, reverses on public recreation with provision granting access more specific than denial of same); Atkinson v. Commissioner, T.C.M. (CCH) 2015-236 (2015) (Service disallows golf course easements for failure to protect natural wildlife habitat or open space conservation purposes; Tax Court affirms based on lack of management plan, control of pesticide use, and rare, threatened, or endangered species protection; public visual or physical access to noncontiguous portions of land on and adjacent to golf course in gated residential community fails to protect habitat or open space conservation purposes); Kiva Dunes Conservation, LLC v. Commissioner, T.C.M. (CCH) 2009-145 (2009) (Service disallows golf course easement deduction on qualification under Code §170(h) as failing to protect significant wildlife habitat or scenic views, then concedes qualification at Tax Court trial; Tax Court holds for taxpayers on valuation issues).

> "Rule Forty-two. ALL PERSONS MORE THAN A MILE HIGH TO LEAVE THE COURT." . . .
>
> "I'M not a mile high," said Alice. . . . "besides, that's not a regular rule: you invented it just now."
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[29]

In perhaps the most distorted and troubling substantive attack to date, the Service has begun disallowing easement deductions for alleged failures of perpetuity because of the specific configuration of essential easement terms including termination and proceeds, and due to the mere presence of an amendment clause. The Service cloaks these assertions with the substance of failing perpetuity under Code §170(h)(2)(C) and (5)(A), and Regulation §1.170A-14(a) and (b), by arguing that specific easement terms undermine or defy the perpetual nature of conservation easements as a matter of law under the Code and Regulations.[30]

Adding to the unprecedented and unsettling nature of this tactic is the means by which the Service proclaims illegitimacy of easement terms. Rather than release publicly vetted guidance or rules articulating its view of specific perpetuity-offending aspects of easement terms, the Service reveals its apparent rulemaking only through its litigation strategy. Promulgating rules revealed only through documents filed in litigation mimics the King and Queen of Hearts' ad hoc "Rule Forty-Two" in Wonderland's courtroom proclaiming that Alice is too tall and must leave. Alice promptly and properly dismisses the injudicious rule as invented purely in response to her actual size, at that time, in the courtroom.[31]

Using perpetuity as its "Rule Forty-Two" enables the Service to disallow easement deductions on a perplexing interpretation of a broad array of easement terms. The Service began its foray with perpetuity by challenging easement deductions based on the processes for extinguishment and termination, such as by mutual agreement (*Carpenter*),[32] or by abandonment through a holder's failure to enforce (*Simmons*).[33] In the latter case, the Service argued an abandonment clause defied perpetuity by not using the required judicial proceedings set out in Regulation §1.170A-14(g)(6)(i) for the extinguishment of perpetual conservation easements based on impossibility or impracticality of accomplishing conservation purposes.[34]

The Service has argued that an easement's proceeds mechanism fails perpetuity under Regulation §1.170A-14(g)(6)(ii) by undermining the allocation to an easement holder in proportion to the easement's value at the time of the grant.[35] Specifically, the Service disallowed easements with proceeds clauses apportioning proceeds between third parties and the easement holder (*Kaufman*, *Palmolive Building Investors*)[36] by improperly calculating the allocation formula for proceeds (*Carroll*)[37]; by excluding after-donation, built improvements from proceed-valuation determinations (*Glade Creek Partners*, *Red Oak Estates*, *Cottonwood Place*, *Belair Woods*, *Smith Lake*, *Habitat Green Investments*, *Harris*, *Hewitt*, *Oakbrook*, *TOT Property Holdings*, *Coal Property Holdings*, *PBBM-Rose Hill*, *Lumpkin HC*, *Lumpkin One*

29. Wonderland, *supra* note 1, at 65.
30. I.R.C. §170(h)(2)(C), (h)(5)(A) (2006); Treas. Reg. §1.170A-14(a), (b) (1986). The Service has successfully denied an easement deduction containing an "automatic approval without holder review" provision because such approval could permit inconsistent uses that contravene protection of conservation purposes in perpetuity under Regulation §1.170A-14(e). *See* Hoffman Properties II, L.P. v. Commissioner, No. 14130-15 (U.S.T.C. July 12, 2017) (order granting motion for partial summary judgment) (unpublished), (U.S.T.C. Mar. 14, 2018) (order denying motion for reconsideration) (unpublished), (U.S.T.C. Mar. 14, 2018) (order granting motion for partial summary judgment) (unpublished); Hoffman Properties II, L.P. v. Commissioner, No. 19-1831 (6th Cir. Apr. 14, 2020) (Service argues default approval provision when holder does not respond to landowner request within 45 days and request deemed automatically approved is violation of Treas. Reg. §1.170A-14(e)(2) because it strips holder of ability to protect conservation values in perpetuity as required by Treas. Reg. §1.170A-14(g)(1); Tax Court finds in pretrial order on summary judgment (dated March 14, 2018) default approval provision violates "exclusively for conservation purposes" requirement of §170(h)(5); Sixth Circuit affirms and adds that reserved right to alter easement contrary to U.S. Department of the Interior standards with holder approval could be inconsistent with conservation purposes of the donation); *see also* Glade Creek Partners, LLC v. Commissioner, T.C.M. (CCH) 2020-148 (2020) (Service disallows deduction as nonperpetual due to after-built improvement subtraction from proceeds calculation and holder's deemed approval after 30 days' silence; Tax Court affirms principally because easement not protected in perpetuity per Code §170(h)(5)(A) for proceeds clause but also references failure of approval clause).
31. Wonderland, *supra* note 1, at 64-65.
32. Carpenter v. Commissioner, T.C.M. (CCH) 2012-1 (2012) (*Carpenter I*), T.C.M. (CCH) 2013-172 (2013) (*Carpenter II*) (Service challenges deductions with extinguishment clauses allowing termination by mutual written agreement of both parties, claiming language fails requirements of Regulation §1.170A-14(g)(6)(i); Tax Court holds because easements could be terminated by mutual consent of parties without judicial oversight, they fail protected-in-perpetuity requirements of judicial proceedings).
33. Commissioner v. Simmons, 646 F.3d 6 (D.C. Cir. 2011), *aff'g* T.C.M. (CCH) 2009-208 (2009) (Service disallows, claiming provision of easement allowing holder to consent to changes or abandon some or all of enforcement rights violates perpetuity requirement of Code §1.170A-14(g)(1); Tax Court rejects consent and abandonment arguments; D.C. Circuit affirms, noting that if a holder did abandon its enforcement rights, it would be accountable to the Service under its Code §501(c)(3) obligation to operate exclusively for charitable purposes).
34. Treas. Reg. §1.170A-14(g)(i) (1986).
35. *Id.* §1.170A-14(g)(6)(ii).
36. Kaufman v. Shulman, 687 F.3d 21 (1st Cir. 2012), *aff'g in part, vacating and remanding in part*, 134 T.C. 9 (2010), 136 T.C. 13 (2011); Kaufman v. Commissioner, 774 F.3d 56 (1st Cir. 2015), *aff'g* T.C. 2014-52 (2014) (Service disallows and Tax Court upholds as a matter of law taxpayers' façade easement fails perpetuity requirement of Regulation §1.170A-14(g)(6) because holder not absolutely guaranteed its proportionate share of extinguishment proceeds where mortgage lender agreement gives mortgagee prior claim to any condemnation or insurance proceeds; U.S. Court of Appeals for the First Circuit vacates Tax Court's decision because "Service's reading of its regulation would appear to doom practically all donations of easements, which is surely contrary to the purpose of Congress." *Kaufman*, 687 F.3d at 27); Palmolive Bldg. Investors, LLC v. Commissioner, 149 T.C. 19 (2017), 152 T.C. No. 4 (2019) (Service denies deduction for subordination of mortgages allowing mortgagee's prior claim to insurance and condemnation proceeds; Tax Court declines to follow First Circuit's decision in *Kaufman* stating instead that Regulation §1.170A-14(g)(2) subordination section must be read in tandem with Regulation §1.170A-14(g)6)(ii) extinguishment proceeds).
37. Carroll v. Commissioner, 146 T.C. 196 (2016), *appeal docketed*, No. 16-2417 (4th Cir. Dec. 15, 2016) (Service disallows deduction for extinguishment clause that does not precisely track Regulation §1.170A-14(g)(6)(ii) proceeds allocation formula as failing to protect conservation purposes in perpetuity; Tax Court affirms that extinguishment clause did not comply with the requirements in Regulation §1.170A-14(g)(6)(ii) because holders entitled to share of proceeds equal to the percentage determined by deduction for federal income tax purposes allowable over fair market value of property on date of gift, explaining if the Service disallows deduction and easement is later extinguished in a judicial proceeding, the numerator in the formula would be zero and the exempt organization would not receive minimum proportionate share of proceeds required by Regulations).

Five Six, *Plateau Holdings*)[38]; and by limiting the allocation to the fair market value of the easement at the time of its grant or the difference between the fair market value at the time of the grant and at the time of termination (*Woodland Property*, *Rock Creek Property Holdings*, *Railroad Holdings*), or both excluding after-built improvements and requirement of limit to fair market value (*Oakbrook*).[39]

The Service's success on the substantive issue of proceeds clause variations under the perpetual-protection-of-conservation purpose in Code §170(h)(5)(A) and Regulation §1.170A-14(g)(6), from what it claims through litigation assertions to be the rule, has turned out to be the ace in the hole needed to defeat myriad conservation easement deductions. Rather than prove lack of actual perpetual-protection-of-conservation purposes or overvaluation, the Service merely points out any deviation from the proceeds language of the Regulation, and cries "off with their head!" To date, with few to no exceptions, this unregulated and unauthorized rulemaking by the Service to disallow conservation easement deductions based solely on the language of the proceeds clause, without any further examination of the conservation easement, has proven irreproachable in the view of the Tax Court.

There is one exception to the Rule 42 approach to proceeds taken by the Tax Court, and that is *Oconee Landing Property* in which the Tax Court, rather than granting summary judgment in favor of the Service on the after-built improvements exclusion from the proceeds calculation, instead denied summary judgment.[40] The Tax Court reasoned that because the easement prohibited all but modest recreational improvements of less than 150 square feet "such as deer stands, hunting blinds, emergency shelters, [and] play structures for children," petitioner could plausibly argue at trial negligible to no impact to the proceeds distribution by the after-built exclusion.[41] This, the Tax Court concluded, presented material facts in dispute sufficient to overcome the Service's motion for summary judgment.[42] Such close examination into the substantive terms and details of the easement deed to determine whether perpetuity is actually being threatened may be the White Rabbit's call to the Service that the proceeds clause tea party is out of time.

38. Glade Creek Partners, LLC v. Commissioner, T.C.M. (CCH) 2020-148 (2020) (Service disallows deduction as nonperpetual due to after-built improvement subtraction from proceeds calculation and holder's deemed approval after 30 days' silence; Tax Court affirms principally because easement not protected in perpetuity per Code §170(h)(5)(A) for proceeds clause but also references failure of approval clause); Red Oak Estates v. Commissioner, T.C.M. (CCH) 2020-116 (2020) (Service denies deduction for perpetuity violation of proceeds clause with exclusion of after-built improvements; Tax Court affirms, citing *PBBM-Rose Hill* and *Coal Properties*, and *Oakbrook* for proper deference to proceeds regulation); Cottonwood Place v. Commissioner, T.C.M. (CCH) 2020-115 (2020) (Service denies deduction as nonperpetual for exclusion of after-donation improvements from proceeds; Tax Court agrees, citing *PBBM-Rose Hill* and *Coal Properties*, and *Oakbrook* for appropriate deference to proceeds regulation); Belair Woods, LLC v. Commissioner, T.C.M. 2020-112 (2020) (Service disallows for nonperpetual proceeds clause allowing exclusion of after-built improvements and reduction for satisfaction of all prior claims; Tax Court grants summary judgment on same basis after visiting case three times); Smith Lake LLC v. Commissioner, T.C.M. (CCH) 2020-107 (2020) (Service disallows deduction for nonperpetual, after-built improvement exclusion from proceeds clause; Tax Court upholds, citing *Oakbrook*); Habitat Green Invs., LLC v. Commissioner, Nos. 14433-17, 14434-17, 14435-17 (U.S.T.C. June 30, 2020) (Service disallows deduction for nonperpetual, after-built improvement exclusion from proceeds clause; Tax Court upholds, citing *Hewitt* and *Oakbrook*); Harris v. Commissioner, No. 24201-15 (U.S.T.C. June 30, 2020) (Service disallows for nonperpetual proceeds clause allowing exclusion of after-built improvements; Tax Court grants summary judgment, citing *Hewitt* and *Oakbrook*); Hewitt v. Commissioner, T.C.M. (CCH) 2020-89 (2020) (Service disallows deduction for nonperpetual, after-built improvement exclusion from proceeds clause; Tax Court upholds, citing *Coal Property Holdings*); Oakbrook Land Holdings, LLC v. Commissioner, 154 T.C. No. 10 (2020) (Service challenges for reduction in proceeds clause by value of improvements made after grant of easement and fair market value limit; Tax Court upholds after review of legislative history of proceeds clause, stating clause violates protection in perpetuity clause of Code §170(h)(5) as interpreted by Regulation §1.170A-14(g)(6), which Regulation Tax Court also states is properly promulgated under the Administrative Procedure Act, 5 U.S.C. §553, and valid under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984) (see procedural concepts of promulgation and validity discussed further in Part Two, Section III); TOT Prop. Holdings, LLC v. Commissioner, No. 005600-17 (U.S.T.C. Dec. 13, 2019) (Service denied deduction due to failing perpetuity requirement by excluding after-built improvement from proceeds, and states commercial forestry is inconsistent with protection of conservation purposes; Tax Court upholds disallowance of proceeds provision as nonperpetual based on *Coal Property Holdings*); Coal Prop. Holdings, LLC v. Commissioner, 153 T.C. 126 (2019) (Service claims among other bases that easement's termination proceeds provision fails to comply with Regulation §1.170A-14(g)(ii) because proceeds subtracted value of after-easement improvements and were calculated after satisfaction of prior claims; Tax Court agrees, noting earlier decision in *Carroll*, holding that proceeds provision of Regulation §1.170A-14(g)(6)(ii) must be strictly construed, and Fifth Circuit's decision in *PBBM-Rose Hill*, holding that easement failed proceeds requirement of Regulation §1.170A-14(g)(6)(ii) by allowing after-built improvements to be subtracted from proceeds); PBBM-Rose Hill, Ltd. v. Commissioner, No. 26096-14 (U.S.T.C. Sept. 9, 2016) (bench op.) (unpublished), *aff'd*, 900 F.3d 193 (5th Cir. 2018) (Service claims easement's proceeds provision did not comply with Regulation §1.170A-14(g)(ii) because allows grantor to keep portion of proceeds attributable to improvements constructed after grant of easement as reserved rights; Tax Court agrees because proceeds formula would under certain circumstances deny holder minimum amount required by Regulation; Fifth Circuit affirms because easement failed to protect property in perpetuity under Code §170(h)(5)(A) because proceeds formula subtracted value attributable to allowed improvements constructed after easement donation and conflicted with the plain meaning of Regulation §1.170A-14(g)(6)(ii)); Lumpkin HC, LLC, v. Commissioner, T.C.M. (CCH) 2020-95 (2020) (Service challenges for proceeds provision allowing exclusion of after-built improvements; Tax Court affirms, citing *PBBM-Rose Hill* and *Coal Property*); Lumpkin One Five Six, LLC v. Commissioner, T.C.M. (CCH) 2020-94 (2020) (Service challenges for nonperpetual proceeds clause with reduction in value for improvements; Tax Court affirms, citing *PBBM-Rose Hill* and *Coal Property* for proceeds and *Oakbrook* and *Chevron* for validity of proceeds regulation); Plateau Holdings, LLC v. Commissioner, T.C.M. (CCH) 2020-93 (2020) (Service denies deduction for proceeds clause, subtracting value of all improvements (not just after-built) and satisfaction of prior claims; Tax Court affirms, citing *PBBM-Rose Hill* and *Coal Property*).

39. Woodland Prop. Holdings, LLC v. Commissioner, T.C.M. (CCH) 2020-55 (2020) (Service disallows for proceeds clause not based on constant proportionate value; Tax Court grants summary judgment for proceeds restricted to date-of-gift value that excludes subsequent appreciation, citing *Railroad Holdings*); Rock Creek Prop. Holdings, LLC v. Commissioner, No. 5599-17 (U.S.T.C. Feb. 10, 2020) (Service disallows for fair market value limit in proceeds clause; Tax Court upholds disallowance, citing *Railroad Holdings*); Railroad Holdings, LLC v. Commissioner, T.C.M. 2020-22 (2020) (Service claims the proceeds provision failed mathematical formula because it used fixed historic fair market value instead of proportionate value, which could change over time based on changes in land values; Tax Court upholds that proceeds provision violates perpetuity requirements).

40. Oconee Landing Prop. v. Commissioner, No. 11814-19, at 6-7 (U.S.T.C. Aug. 18, 2020) (Service denies donation for after-built improvement exclusion from proceeds calculation; Tax Court denies summary judgment because landowner could prove there will never be after-built improvements on the property and proceeds will conform with the Regulation).

41. *Id.* at 6 & 6-7.

42. *Id.* at 6-7.

The Service furthers its ad hoc rulemaking in the absence of any legal or regulatory authority in attacking amendment clauses, particularly given that the Code and Regulations are completely silent on the matter of easement modification.[43] The Service has asserted that the mere existence of an amendment clause permitting modifications consistent with the protection of conservation purposes in a perpetual conservation easement renders it nonperpetual (*Pine Mountain Preserve*, *Sells*, *Kumar*).[44] As discussed in detail in Section I.B, the Service's position regarding amendments not only contradicts its own private letter rulings (PLRs) and several preexisting Tax Court cases (*Butler*, *Strasburg*, PLR 200014013),[45] it also defies its own holding in *Pine Mountain Preserve*.

The Tax Court in *Pine Mountain Preserve* expressly states that the inclusion of an amendment clause in an easement cannot and should not be grounds for denying a deduction for an easement donation.[46] As will be discussed next issue in Part Two, Section I, the Service's apparent litigation-based rulemaking strategy also now defies Executive Order No. 13892's command that administrative enforcement action take place only "in a manner that would not cause unfair surprise."[47]

The Service's arguments going to easements' perpetual nature foreshadow its eventual invocation and false equivalency of the perpetual-grant (as opposed to a term of years) requirement of Code §170(h)(2)(C) with the perpetual-protection-of-purpose requirement of Code §170(h)(5)(A). The conflation of grant in perpetuity with perpetual-protection-of-purpose requirements expands the bases by which the Service disallows conservation easement gifts, an approach the Service employs in earnest today.[48] As further discussed below, the Service's attacks on perpetuity confound the ability of conservation easements to endure and respond to change over time. These attacks do so by marking as deficient not only the ability to amend easements, but also the ability to adjust land under an easement and the boundaries internal or external to an easement, and to locate easement building envelopes inside or outside of an easement.

Taken together, the Service's focus on technical, procedural perceptions of noncompliance, and on substantive, functional easement terms intrinsic to their perpetual protection, threatens to undermine the sustainability of easements over time. Such wide-ranging and all-inclusive attack is reminiscent of the Wonderland cook's approach of lobbing everything-not-nailed-down at Alice: "throwing everything within her reach . . . the fire-irons came first; then followed a shower of saucepans, plates, and dishes," in order to increase the likelihood of befuddling landowners and land trusts endeavoring to protect land using perpetual conservation easements.[49] The Service began this multitudinous assault of perpetuity in earnest when first it attacked the substance of an easement as nonperpetual in *Belk v. Commissioner*, which easement the Service asserted floated impermissibly above the ground, unattached to any land mass, not unlike the Cheshire Cat's unattached grin.[50]

B. *In the New Normal:* Belk *and Its Progeny: Floating Easements, Floating Building Envelopes, and Land of Swiss Cheese*

"Curiouser and curiouser!" cried Alice.

—Lewis Carroll, *Alice's Adventures in Wonderland*[51]

Most recently, the Service has been striking at the physical parameters of conservation easement gifts under the guise of failing Code §170(h)(2)(C)'s definition of a qualified real

43. *See* Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 Harv. Env't L. Rev. 1, 16 (2012) [hereinafter *When Perpetual Is Not Forever*]; Jessica E. Jay, *Understanding* When Perpetual Is Not Forever: *An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and a Response to Ann Taylor Schwing*, 37 Harv. Env't L. Rev. 247 (2013) [hereinafter *Understanding* When Perpetual Is Not Forever].

44. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14 (2018), *rev'd in part, aff'd in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020) (Service disallows three easements containing standard amendment provision allowing for amendments that are not inconsistent with the conservation purposes; Tax Court denies, stating that inclusion of amendment clause in easement cannot and should not be grounds for denying a tax deduction, and amendment provisions in three conservation easements entirely consistent with perpetuity requirements of Code §170(h) and Regulation; Eleventh Circuit affirms validity of amendment provisions); Sells v. Commissioner, No. 6267-12 (U.S.T.C. Mar. 6, 2012) (Service disallows easement containing standard amendment provision allowing for amendments that are not inconsistent with the conservation purposes); Kumar v. Commissioner, No. 21575-11 (U.S.T.C. Sept. 19, 2011), T.C.M. (CCH) 2020-159 (2020) (Service disallows easement deduction, arguing easement nonperpetual due to presence of amendment clause allowing for amendments not inconsistent with conservation purposes; Tax Court endorses amendment clause legitimacy, citing its own opinion in *Pine Mountain Preserve, LLLP v. Commissioner*, 151 T.C. 247, 280-81 (2018), *aff'd in part, rev'd in part, vacated and remanded*, No. 19-11795, 2020 WL 6193897 (11th Cir. Oct. 22, 2020), and adding that "[t]he Commissioner argues that this [amendment clause] deprives the easement of the required perpetuity. We expressly rejected this argument in Pine Mountain, 151 T.C. at 280-81, and will follow that opinion here, as we must." *Id*. [*Kumar*] at 11-12).

45. Butler v. Commissioner, T.C.M. (CCH) 2012-72 (2012) (Tax Court upholds deduction for an amendment that expanded protected acreage in a conservation easement: "The 2004 conservation deed amends several portions of the 2003 conservation deed, enlarging the portion of the property encumbered by the easement and permitting the encumbered property to be subdivided into 15 tracts instead of only 5"; *id*. at 9, 39); Strasburg v. Commissioner, 79 T.C.M. 1697 (2000) (Tax Court upholds charitable deduction for amendment that released building rights reserved to landowner under original conservation easement); Priv. Ltr. Rul. 200014013 (Dec. 22, 1999) (Service determines that conservation easement could be amended to strengthen conservation protections by releasing reserved rights, therefore ensuring its qualification for an estate tax incentive).

46. *See* Pine Mountain Preserve, LLLP v. Commissioner, 151 T.C. at 56-57, for the Tax Court's statement that an amendment clause that specifically protects conservation purposes "did not prevent that easement from satisfying the granted-in-perpetuity requirement" of the Code and the standard amendment provision in the easements did not violate the protected-in-perpetuity requirements of Code §170(h). *Id*. at 2. See also *Pine Mountain Preserve, LLLP v. Commissioner*, No. 19-11795, at 21, 25 (11th Cir. Oct. 22, 2020), for the Eleventh Circuit's affirmation of the validity of amendment clauses in deductible conservation easements, and in particular that they do not cause easements to violate Code §170(h)(5)(A)'s protected-in-perpetuity requirement. *Id*. at 21, 25.

47. Exec. Order No. 13892, 84 Fed. Reg. 55239, 55241 (Oct. 15, 2019); *see also CE Battleground*, *supra* note 6, at 7-8.

48. *CE Battleground*, *supra* note 6, at 9.

49. Wonderland, *supra* note 1, at 33.

50. 774 F.3d 221 (4th Cir. 2014) (*Belk III*), *aff'g* 140 T.C. 1 (2013) (*Belk I*), and T.C.M. 2013-154 (2013) (*Belk II*).

51. Wonderland, *supra* note 1, at 33.

property interest as "a restriction (granted in perpetuity) on the use which may be made of the real property."[52] In so doing, the Service disallows easements that permit changes to internal or external boundaries or to building sites inside or outside of easements, or both, as nonperpetual.

As the case in point, in *Pine Mountain Preserve*, the majority of the Tax Court upheld the Service's position that the common practice of reserving within a conservation easement the right to build within a building envelope or outside a no-building area will invalidate an otherwise legitimate conservation easement under Code §170(h)(2)(C) (a holding, it is important to note, that the U.S. Court of Appeals for the Eleventh Circuit roundly rejected).[53] The court extended its *Pine Mountain Preserve* reasoning to the *Carter* case, holding that reserved but unfixed building areas also disqualify a perpetual conservation easement gift for tax benefits.[54] But the journey of the Tax Court down the rabbit hole in *Pine Mountain Preserve* began with the Service's careful baking of cake several years before, in the *Belk*, *Balsam Mountain*, and *Bosque Canyon* cases.[55]

1. Beginning With *Belk*

> "But I don't want to go among mad people," Alice remarked.
>
> "Oh, you can't help that," said the Cat: "we're all mad here. I'm mad. You're mad."
>
> "How do you know I'm mad?" said Alice.
>
> "You must be," said the Cat, "or you wouldn't have come here."
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[56]

In *Belk*, the Tax Court held (and the U.S. Court of Appeals for the Fourth Circuit affirmed) the Service's disallowance of a deduction for a conservation easement, the terms of which included the potential for a substitution of land under easement with unencumbered land under Code §170(h)(2)(C).[57]

The Belks donated a conservation easement in 2004 on their 185-acre golf course as a portion of their 410-acre residential development in North Carolina to the Smoky Mountains National Land Trust (SMNLT).[58] The easement contained a clause reserving to landowners the right to substitute land contiguous with, but outside, the easement's protection for equal or smaller portions of the easement-protected land. Such a substitution required SMNLT's approval, not to be unreasonably withheld, with reasonable good-faith efforts by SMNLT to help identify property appropriate for substitution, and with no adverse effect on the easement's conservation purposes or any environmental features of the property.[59] Additionally, an amendment clause (together with a clause prohibiting acts contrary to the law) barred SMNLT from agreeing to any amendment that would disqualify the easement under Code §170(h) and applicable regulations.[60]

The Service, in furtherance of its hyper-technical and relatively new substantive bases for disallowance, challenged the deduction for its valuation and for the alleged disqualifying substitution provision.[61] The Service posited that the exchange provision created a floating easement of sorts, which failed to constitute a "qualified real property interest" under Code §170(h)(2)(C) because the ability to move the easement meant it was *not* a restriction "granted in perpetuity" on the use of the real property.[62]

The Tax Court agreed with the Service in its first *Belk* opinion (*Belk I*), noting that the case was one of first impression to determine whether a conservation easement deduction could fail to qualify as a qualified real property interest under Code §170(h)(2)(C) by not identifying "real property subject to a use restriction in perpetuity."[63] The Tax Court carefully distinguished the restriction on use "granted in perpetuity" provision of Code §170(h)(2)(C) from the conservation purposes "protected in perpetuity" provision in Code §170(h)(5), determining that it could analyze the use restriction without examining the conservation-purpose protection.[64] In contrast to previous Tax Court opinions and to the Service's own arguments, the court concluded that although the language of the substitution clause might pass muster under Code §170(h)(5) because substitutions that would adversely affect the conservation purposes would be prohibited, it found the easement still did not meet the requirements of Code §170(h)(2)(C).[65] The Tax Court also sidestepped any amendment issues by stating plainly that it was not opining on the conditions under which a land trust might later review a request to amend the conservation easement boundaries.[66]

52. 26 U.S.C. §170(h)(2)(C).
53. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14, at 2 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev'd in part, aff'd in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020).
54. Carter v. Commissioner, T.C.M. (CCH) 2020-21, at 2 (2020).
55. *Belk III*, 774 F.3d 221, *aff'g* 140 T.C. 1 (2013) (*Belk I*), and T.C.M. 2013-154 (2013) (*Belk II*); Balsam Mountain Invs., LLC v. Commissioner, T.C.M. (CCH) 2015-43 (2015); Bosque Canyon Ranch, L.P. v. Commissioner, T.C.M. 2015-130 (2015), *vacated and remanded sub nom*. 867 F.3d 547 (5th Cir. 2017).
56. Wonderland, *supra* note 1, at 36.
57. *Belk III*, 774 F.3d 221, *aff'g* 140 T.C. 1 (2013) (*Belk I*) and T.C.M. 2013-154 (2013) (*Belk II*); 26 U.S.C. §170(h)(2)(C).
58. *Belk I*, 140 T.C. at 4.
59. *Id*. at 5-6.
60. *Id*. at 7 n.8.
61. *Id*. at 2-3. *See also* IRS, Conservation Easement Audit Techniques Guide (Nov. 2020 rev. ed.), https://www.irs.gov/pub/irs-pdf/p5464.pdf.
62. *Belk I*, 140 T.C. at 15-16. Incidentally, land trusts universally agree that the potential exchange of land under easement in *Belk* should be treated as a termination of easement, *see* Land Trust Alliance, Amending Conservation Easements: Evolving Practices and Legal Principles 7-8 (2d ed. 2017) [hereinafter Amendment Report], http://s3.amazonaws.com/landtrustalliance.org/AmendingConservationEasements-2nd-Edition.pdf.
63. *Belk I*, 140 T.C. at 13, 19.
64. *Id*.
65. *Id*.; I.R.C. §170(h)(2)(C) (2006).
66. The court in *Belk I* stated:
> We also find it immaterial that SMNLT cannot agree to an amendment that would result in the conservation easement's failing to qualify as a conservation contribution under section 170(h). . . . We reject the argument that, because substitution is effected by amend-

The Tax Court did, however, weigh in on the concept of amendments substituting land as terminations, albeit potentially in dicta in footnote 16 of the opinion. The court stated that the only circumstance justifying removal of any portion of land from an easement's protection is guided by Regulation §1.170A-14(c)(2) when a "later unexpected change in the conditions surrounding the property . . . makes impossible or impractical the continued use of the property for conservation purposes."[67] The Tax Court found that the clause permitting substitution of protected land with unprotected land in a circumstance other than the changed conditions described in Regulation §1.170A-14(c)(2) failed to meet the requirement of Code §170(h)(2)(C) as a qualified real property interest subject to use restrictions granted in perpetuity. The easement, in the court's opinion, did not therefore constitute a qualified conservation contribution.[68]

The Belks' motion for reconsideration requested that the court correct errors of law in, among other things, the interpretation of Code §170(h)(2)(C) and the standard for obtaining a deduction under Code §170(h).[69] The Tax Court denied the grounds for reconsideration in the second *Belk* opinion (*Belk II*).[70] In particular, the Tax Court affirmed that it was irrelevant "whether the parties could have substituted property by mutual agreement without a substitution provision," because the conservation easement did in fact contain such a provision.[71]

The Tax Court also distinguished *Belk* from *Commissioner v. Simmons,* in which the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that a clause in a façade easement allowing its holder to agree to changes in the façade, or to abandon its rights in the easement, did not disqualify the easement for a tax deduction.[72] The D.C. Circuit found that the conservation easement itself, as well as federal and local laws, required the holder to enforce its conservation purposes over perpetuity.[73] The clause was immaterial to the conservation purposes' perpetual protection, the D.C. Circuit found, because the holder could agree to change the façade or abandon the easement with or without the existence of the clause, noting that an easement holder would only exercise such discretion at its peril, and therefore was highly unlikely to do so.[74]

While conceding that successful conservation easements are built on a foundation of trust in their holders, the Tax Court in *Belk II* nonetheless adopted the Service's argument under Code §170(h)(2)(C). The court allowed that because the land under easement could be substituted with unprotected land via the exchange clause, there was no land attached to the easement the court could trust the holder to enforce, and, therefore, no restriction in perpetuity under Code §170(h)(2)(C).[75]

The Fourth Circuit affirmed the Tax Court, holding that the substitution clause disqualified any charitable deduction.[76] With hyper-attenuated focus on individual words not unlike the Wonderland discussion of what "it" means,[77] the appellate court found that Code §170(h)(2)(C), in particular the phrase "*the* real property" with specific emphasis on the word "the," required that there must be a "specific piece of real property" identified to be subject to the easement.[78] The court noted further that the exchange clause interfered with the integrity of the appraisal and baseline documentation processes, both of which require a defined and static parcel of land to consider.[79] The court also observed that the Regulation contemplates narrow circumstances in which an exchange of land resulting in extinguishment can occur under Regulation §1.170A-14(g)(6)(i)'s termination provision, and this narrowness urges an interpretation that the original parcel be immutable in the document itself.[80]

The court distinguished *Simmons* and *Kaufman* as inapposite, because those cases turned on the interpretation of perpetuity of purpose and enforcement under Code §170(h)(5)(A) and not identification of the protected property under Code §170(h)(2)(C).[81] The court drew a further distinction between the exchange clause, which anticipates amending the protected property's boundaries from the outset, and a later amendment allowing a substitution based on changed circumstances, noting that the latter would be permissible and the former not, based on an inability to locate the property subject to the easement in the former circumstance.[82] The court justified its reasoning by pointing to the use of the word "exchange" in Regulation §1.170A-14(c)(2) as ostensibly permitting an amendment to shift a conservation easement from one protected parcel for another. Such a substitution would be permitted only in the narrow circumstances of specific changed conditions under the Regulation termination provision: "[w]hen a later unexpected change . . . makes impossible or impractical the continued use of the property for conservation purposes."[83]

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ment and the conservation easement agreement seemingly prohibits amendments not permitted by section 170(h), the conservation easement does not permit substitutions.

140 T.C. at 20.

67. *Id.* n.16; Treas. Reg. §1.170A-14(c)(2) (1986).
68. *Belk I*, 140 T.C. at 17; I.R.C. §170(h)(2)(C) (2006).
69. *Belk II*, T.C.M. 2013-154, at 7 (2013).
70. *Id.* at 8-9.
71. *Id.* at 15. An additional factor to consider in evaluating *Belk* is that golf course conservation easements have often been viewed critically, and disqualified for tax deductions, by the Service. *See*, *e.g.*, RP Golf, LLC v. Commissioner, T.C.M. 2012-282 (2012), T.C.M. 2016-80 (2016), *aff'd*, 860 F.3d 1096 (8th Cir. 2017); Kiva Dunes Conservation, LLC v. Commissioner, T.C.M. (CCH) 2009-145 (2009).
72. 646 F.3d 6 (D.C. Cir. 2011), *aff'g* T.C.M. 2009-208 (2009).
73. *Belk II*, T.C.M. 2013-154, at 16-17.
74. *Id.* at 16.
75. *Id.* at 16-17.
76. *Belk III*, 774 F.3d 221 (4th Cir. 2014).
77. For example:

> "Found what?" said the Duck. "Found *it*," the Mouse replied rather crossly: "of course you know what 'it' means." "I know what 'it' means well enough, when I find a thing," said the Duck: "it's generally a frog or a worm. The question is, what did the archbishop find?"

Wonderland, *supra* note 1, at 17.

78. *Belk III*, 774 F.3d at 225.
79. *Id.* at 11-12.
80. *Id.* at 7, 13-14.
81. *Id.* at 14-15.
82. *Id.* n.2.
83. *Id.*

The Fourth Circuit provided clarity in and after *Belk*, indisputably alerting easement drafters, donors, and holders to avoid exchange provisions without judicial termination processes. However, given that the case was one of first impression under Code §170(h)(2)(C), and that the Service, Tax Court, and circuit courts continue to invent, interpret, and rule according to that section, respectively, the overall meaning and import of the case remains to be seen. Moreover, the specific holding in *Belk* that an exchange clause absent judicial termination proceedings renders an easement ineligible under Code §170(h) is likely of minor import to the practical application of law, given that the use of such clauses is rare in modern conservation easement drafting.[84] The more relevant impact of the holding is the progression of the conservation community and Tax Court into the land below, with *Belk* shaping the discussion around what is unchangeable at the time of an easement's grant, and what may be allowed later through approval or amendment based on a holder's examination of consistency with the conservation easement's purpose.

The Fourth Circuit is careful to avoid passing judgment on amendments or other aspects of perpetual easements beyond exchanging land under easement. Still, the Fourth Circuit's decisions in *Belk* lay the foundation for future legal analysis of amendment, termination, and disposition of land under easement, recognizing amendments as an appropriate tool for easement modification, and requiring extinguishment processes for removal of land under easement. The *Belk* opinions seemingly endorse amendments when referencing them as appropriate means to exchange land using judicial termination proceedings,[85] and also peripherally address the issue of whether and under what conditions building sites can be floating when referencing two aforementioned PLRs, as distinct from the eventual *Pine Mountain Preserve* and *Carter* cases, and similar to the intervening *Balsam Mountain* and *Bosque Canyon* cases.[86]

84. Amendment Report, *supra* note 62, at 136. One impact of this holding is the extent to which the *Belk* opinion shapes the common law of when amendments are permitted to exchange land in and out of an easement, remembering that footnote 2 in *Belk III* suggests that because of the word "exchange" in Regulation §1.170A-14(c)(2), amendments used to switch land are permitted only in the narrow circumstances set forth therein (i.e., "[w]hen a later unexpected change . . . makes impossible or impractical the continued use of the property for conservation purposes." *Belk III*, 774 F.3d at 227, n.2).

Further to this point, just prior to *Belk I*, the Service's Chief Counsel's Office issued a general information letter addressing a hypothetical substitution of land under perpetual conservation easement, which revealed the Service perspective on such exchanges. The letter stated that except when a substitution meets the criteria of a permitted termination pursuant to Code §1.170A-14(g)(6), which occurs only when changed conditions make an easement's purposes impossible or impractical to accomplish, substitutions are not otherwise permitted pursuant to the Code or Regulations: "Therefore, except in the very limited situations of a swap that meets the extinguishment requirements of §1.170A-14(g)(6) of the Regulations, the contribution of an easement made subject to a swap is not deductible under §170(h) of the Code." The letter together with the *Belk* cases states the prevailing law regarding land substitutions as prudent to treat them as terminations where easement coverage is reduced or eliminated on certain parcels, even if increased or created on other parcels. Service Gen. Info. Ltr. 2012-0017 (Mar. 30, 2012), http://www.irs.gov/pub/irs-wd/12-0017.pdf.

85. *Belk III*, 774 F.3d at 225, 227, n.2, *aff'g* 140 T.C. No. 1, at 22 (2013) (*Belk I*) and T.C.M. 2013-154, at 9-10 (2013) (*Belk II*).

86. Priv. Ltr. Rul. 200403044 (Jan. 16, 2004); Priv. Ltr. Rul. 9603018 (Jan. 19, 1996).

It is laudable that the Service review conservation easement donations from a valuation standpoint to discern whether values are inflated and then syndicated among member beneficiaries. However, the Service's substitution of its essential role in examining valuation of perpetual easements for the facile proof of linguistic technical and substantive inconsistencies, including attributes undetermined at the time of grant, gives observers reason to wonder if the Service has drunk so much of its own tea that it has misapprehended the holding of *Belk*.

2. *Balsam Mountain* Builds on *Belk*

> Alice: "I know who I was when I got up this morning, but I think I must have been changed several times since then."
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[87]

Following *Belk* to join the Mad Hatter's tea party, the Tax Court ruled in *Balsam Mountain*, expanding support for the Service's nonperpetual challenges to easements with future permitted adjustments as making it impossible to fix the easement in space under Code §170(2)(C).[88] The Service and Tax Court therefore extended the *Belk* holding to apply to a conservation easement boundary adjustment clause with even more conservation conditions than *Belk*.[89]

Balsam Mountain Investments, LLC donated its conservation easement to the North American Land Trust (NALT) in 2003, to encumber a 22-acre parcel of land in North Carolina.[90] The easement included a clause allowing Balsam to make "minor" boundary changes to the property's boundary (affecting up to 5% or 1.1 acres of the 22 acres) for up to a five-year period after the easement's grant, with conditions.[91] The boundary adjustments could create no net loss of acreage to the easement's protected property. Any land added to the easement had to be contiguous to the rest of the protected property and be of equal or greater conservation value than the removed land in NALT's reasonable judgment. The aggregate land removed from the protected property could not exceed 5% (or 1.1 acres) of the original 22 acres. The adjustment must be made within five years of the easement's grant. And NALT could reject any adjustment if it resulted in a material adverse effect on any of the conservation purposes.[92]

The Service challenged the deduction as not a "qualified real property interest" under Code §170(h)(2)(C).[93] Balsam argued that the 5% limitation on the boundary changes distinguished the case from *Belk*, which allowed the entire easement property to be substituted.[94] The Tax Court

87. Wonderland, *supra* note 1, at 26.
88. Balsam Mountain Invs., LLC v. Commissioner, T.C.M. (CCH) 2015-43 (2015).
89. *Id.* at 2.
90. *Id.*
91. *Id.* at 3.
92. *Id.* at 3-4.
93. *Id.* at 7.
94. *Id.* at 8.

rejected this argument, finding that even with this limitation, the allowance of any boundary adjustment meant that there was no identifiable, specific parcel of real property protected by the easement at the time of the grant.[95] The Tax Court issued summary judgment for the Service, ruling under *Belk* that the easement did not qualify for a charitable deduction, even with additional conservation-based conditions, because the landowner could change the property subject to the easement for up to five years after the grant. Therefore, the court concluded, the easement was not a qualified real property interest under Code §170(h)(2)(C).[96]

The Tax Court accepted a third cup of tea and a muffin in deciding *Balsam Mountain*. The court also prolonged the stay in Wonderland for landowners and the conservation community by following the Service's proposition that any changes to real property subject to a perpetual conservation easement over time disqualified the easement for tax benefits.

3. *Belk* Extended Then Distinguished by *Bosque Canyon*

> "I'm afraid I can't put it more clearly," Alice replied very politely, "for I can't understand it myself to begin with; and being so many different sizes in a day is very confusing."
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[97]

The Tax Court further extended *Belk*, this time addressing building area boundaries located within a perpetual easement but excluded from its coverage.[98] In *Bosque Canyon*, the Tax Court disallowed deductions for two easements due to a clause allowing for adjustments to the boundaries of 47 five-acre "Homesite Parcels" or building envelopes, clustered within the easement property, but excluded from the easements' coverage.[99]

Bosque Canyon Ranch (BCR) granted two easements in 2005 and 2007 on 3,482 acres of land in Texas to NALT (the same holder as *Balsam Mountain*), surrounding 47 excluded, clustered, five-acre homesites on 235 acres.[100] Both easements protected endangered bird habitat, prohibited residential or commercial uses, including agriculture, and reserved recreational uses and improvements to landowners.[101] Both easements permitted the exterior boundaries of the homesites and the interior boundaries of the surrounding easements to be adjusted. Any adjustment could not, "in [NALT's] reasonable judgment, directly or indirectly result in any material adverse effect on any of the Conservation Purposes," increase the area of any homesite, alter the outer boundaries of the conservation easements, or decrease the overall amount of land subject to the easements.[102]

The Service challenged the conservation easement deductions on separate substantive and technical grounds.[103] Substantively, the Service cited *Belk* to claim that the boundary adjustment clause of the internal, excluded parcels violated the requirement in Code §170(h)(2)(C) that each easement permanently protect a specific parcel of real property.[104] The Tax Court ruled for the Service substantively because of the boundary adjustment clause, noting that it was apparent at the time of the easements' grant that the encumbered property could lose protection in the future as a result of boundary modifications.[105] As such, "the restrictions on the use of the property were not granted in perpetuity."[106] The court also cited *Belk* for the proposition that "an easement is not a qualified real property interest if the boundaries of the property subject to the easement may be modified."[107]

BCR appealed to the U.S. Court of Appeals for the Fifth Circuit, which reversed in a split 2-1 decision, finding that permitting changes to the boundaries of the homesites within the conservation easements furthered the perpetuity requirements of Code §170(h), and distinguishing internal parcel boundary changes from the wholesale substitution of protected land at issue in *Belk*.[108] The Fifth Circuit aligned *Bosque Canyon Ranch* instead with *Simmons* and *Kaufman*, which D.C. Circuit and U.S. Court of Appeals for the First Circuit opinions reversing Tax Court disallowances permitted conservation easement deductions for perpetual easements even though their holders could consent to partial lifting of restrictions, writing:

> [T]he common-sense reasoning that [*Commissioner v. Simmons* and *Kaufman v. Shulman*] espoused, i.e., that an easement may be modified to promote the underlying conservation interests, applies equally here. The need for flexibility to address changing or unforeseen conditions

95. *Id.*
96. *Id.* at 7-9.
97. Wonderland, *supra* note 1, at 26.
98. Bosque Canyon Ranch, L.P. v. Commissioner, T.C.M. 2015-130 (2015), *vacated and remanded sub nom.* 867 F.3d 547 (5th Cir. 2017).
99. *Id.* at 4.
100. *Id.* at 4, 8-9.
101. *Id.* at 4, 5, 8.
102. *Id.* at 11-12.
103. *Id.* at 11. The Service challenged the technical compliance of the easements and their supporting documentation, asserting that the baseline documentation for both easements were inadequate to meet the requirements of Regulation §1.170A-14(g)(5)(i), because the report included in the baseline for the 2005 easement was dated March 2007, 15 months after that easement closed, and the baseline for the 2007 easement was not signed until November 2008, with much of the data in the baseline documents current as of April 2004. *Id.* at 10. The Tax Court ruled for the Service, stating the 2005 and 2007 baseline documentation was "unreliable, incomplete, and insufficient to establish the condition of the relevant property on the date the respective easements were granted" in "off with their heads" edict based on minor, technical oversights in order to justify denying their tax deduction. *Id.* at 12, 15. The court not only denied BCR's substantial compliance contention for the baseline documents (that the documentation produced substantially complied with the requirements of the Regulations and Code), it also imputed the baseline documentation deficiency to the 2005 donation. It did this by deciding not to apply the reasonable-cause exception to the penalty for that donation because of the "slipshod" baseline documentation practices. *Id.* at 21-22.
104. *Id.* at 12, 15.
105. *Id.* at 12.
106. *Id.*
107. *Id.* The court also ruled the transactions between BCR and its limited partners were, in fact, disguised sales, and assessed gross valuation misstatement penalties under Code §6662(h). *Id.*
108. Bosque Canyon Ranch, L.P. v. Commissioner, No. 16-60069, at 9 (5th Cir. Aug. 11, 2017).

> on or under property subject to a conservation easement clearly benefits all parties, and ultimately the flora and fauna that are their true beneficiaries.[109]

The court found on the substantive arguments that allowing limited changes to the internal boundaries of the homesites furthered the perpetuity requirements of Code §170(h).[110] It arrived at this conclusion after disposing of the procedural arguments of legislative grace and the usual strict construction of intentionally adopted tax loopholes, and instead applied the ordinary standard of statutory review for conservation easement deductions (discussed further in Part Two, Section III).[111] Foreshadowing a similar discussion in the forthcoming *Pine Mountain Preserve*, the Fifth Circuit also noted favorably that the homesites were "tightly clustered, largely contiguous," shared common boundaries with each other, and were located in close proximity to the only road within the easements.[112] These characteristics made it highly unlikely that the boundary adjustment clause could be used to permit the homesites to be scattered throughout the easement land, the court reasoned.[113]

Judge James Dennis, one of the three-judge panel, filed a separate opinion dissenting in part and concurring in part, rejecting as an initial procedural matter the majority's "impermissibly lax standard" for statutory interpretation, which he posited should ascribe legislative grace by evaluating tax deductions using strict scrutiny.[114] Judge Dennis failed to see any material distinction between boundary adjustments to the easements' exterior and those made to the homesites on the interior of the conservation easements.[115] The judge reverted instead to the *Belk* position that the BCR conservation easements failed "*the* real property" test that "a conservation easement must govern a defined and static parcel" because of the use of the word "the" in the real property definition of Code §170(h)(2)(A).[116]

Judge Dennis further applied the *Balsam Mountain* statement of only 5% change to the exterior boundary of the easement being too much change.[117] He commented that the effect of allowing changes to the boundaries of the homesites inside the conservation easements in BCR was more than de minimis as to the property protected overall, and, therefore, not perpetually protected.[118] The dissent also adopted BCR's metaphor of the 47 homesites being holes in a slice of conservation easement Swiss cheese. It equated punching new holes in the conservation easement cheese by moving homesites to substituting land out from under easement in *Belk*, which it therefore found did not amount to perpetual protection of that land or cohesive cheese, as it were.[119]

The relationship between changes to internal and external easement boundaries, wholesale exchanges of land, and Code §170(h)(2)(A)'s definition of qualified real property interest become even more tenuous and strained as the Tax Court accepts the Service's tea and crumpets as ever more fanciful assertions of permissible and impermissible alterations to easements as defying perpetuity in *Pine Mountain Preserve*.[120] The Service continues its mad tea service in Wonderland, adding to it a main course of Swiss cheese sandwiches.

4. Where We Are Today: *Pine Mountain Preserve* and Beyond

> Mock Turtle said: "no wise fish would go anywhere without a porpoise."
>
> "Wouldn't it really?" said Alice in a tone of great surprise.
>
> "Of course not," said the Mock Turtle: "why, if a fish came to me, and told me he was going a journey, I should say 'With what porpoise?'"
>
> "Don't you mean 'purpose'?" said Alice.
>
> "I mean what I say," the Mock Turtle replied in an offended tone.
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[121]

In the Tax Court's review of *Pine Mountain Preserve*, the majority opinion authored by Judge Albert Lauber and joined by 10 other Tax Court judges embraced and expanded upon its earlier rulings in *Belk*, *Balsam Mountain*, and *Bosque Canyon*.[122] The Tax Court wholly endorsed easement holders' discretion to make amendment decisions, and notably rejected the Fifth Circuit's distinction between changes to the exterior boundaries of an easement in *Belk* and *Balsam Mountain* and changes to the interior boundaries within an easement in *Bosque Canyon*.[123] The

109. *Id.* at 10-11 (internal citations omitted).
110. *Id.*
111. *Id.*
112. *Id.* at 11.
113. *Id.* As for the technical issues of the baseline inventory documentation, the court noted that the Regulation's permissive language for what might be included in a baseline indicated an intent to be "flexible and illustrative rather than rigid." *Id.* at 13. The court determined that the plethora of maps, photos, and habitat reports included with the baselines was "more than sufficient to establish the condition of the property prior to the donation." *Id.* at 14. The court also derided the Tax Court's "hyper-technical requirements for baseline documentation," which, "if allowed to stand, would create uncertainty by imposing ambiguous and subjective standards for such documentation and are contrary to the very purpose of the statute. If left in place, that holding would undoubtedly discourage and hinder future conservation easements." *Id.* at 15.
114. *Id.* at 25.
115. *Id.* at 27.
116. *Id.*
117. *Id.* at 28.
118. *Id.*
119. *Id.* at 29.
120. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14 (2018) (*Pine Mountain I*), T.C.M. (CCH) 2018-214 (2018) (*Pine Mountain II*), *rev'd in part, aff'd in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020) (*Pine Mountain III*).
121. Wonderland, *supra* note 1, at 57.
122. *See Pine Mountain Pres.*, 151 T.C. 14.
123. *Id.* Simultaneously with the full Tax Court opinion, the Tax Court issued a memorandum opinion of the valuation of the 2007 easement in *Pine Mountain Preserve, LLLP v. Commissioner*, T.C.M. (CCH) 2018-214 (2018), wherein Pine Mountain claimed deductions of $16.6 million, $12.7

Eleventh Circuit affirmed the Tax Court's holding, stating unequivocally that the existence of an amendment clause in a perpetual easement does not violate Code §170(h)(5)(A)'s protected-in-perpetuity requirement.[124]

Pine Mountain Preserve LLLP purchased 10 contiguous parcels of land containing 6,224 acres in Alabama, upon which it conveyed three conservation easements to NALT, the same holder as in *Balsam Mountain* and *Bosque Canyon*, in 2005 (of 559 acres), in 2006 (of 499 acres), and in 2007 (of 240 acres).[125] The 2005 easement allowed for 10 one-acre building areas within the protected property, while the 2006 easement allowed for six one-acre building areas, and the 2007 easement allowed no building areas at all.[126]

The 2005 easement protected three natural communities of trees, riparian areas as a watershed drainage, plant and bird habitats for named species, and a scenic woodland view; permitted recreational and agricultural activity; and prohibited residential, commercial, and industrial development of the conservation area.[127] The 2006 conservation easement protected the same conservation values as the 2005 easement, with one addition, the preservation of the conservation area "as open space that will advance a clearly delineated Federal, State, or local government conservation policy," and the same permitted and prohibited uses.[128] The 2007 easement protected the same conservation purposes as the 2005 easement, with the same permitted and prohibited uses.[129]

The 2005 easement building areas were designated on a map attached to the easement, with a residence and accessory structures permitted within each, and boundaries modified only by mutual agreement of the landowner and NALT, if the size of a building area was not increased and modification did not adversely affect the easement's conservation purposes, in NALT's "reasonable judgment."[130] The 2006 easement did not specify location of any building areas but made their location subject to NALT's advance approval, which approval NALT could withhold if it believed a proposed building area would result in "any material adverse effect on any of the Conservation Values or Conservation Purposes."[131] The 2007 easement contained no building areas.[132]

In addition to the reserved rights within each building area of the 2005 and 2006 easements, both easements also allowed for a variety of other improvements, including barns, riding stables, boat storage buildings, piers, scenic overlooks, wells, and water pipelines to service the building areas and abutting land not protected by the conservation easements.[133] The 2006 easement specifically prevented scenic overlooks, riding stables, ponds, boat storage buildings, or piers in the 2006 conservation area.[134] The 2007 easement did not allow any building areas, nor most of the other rights reserved in the other two easements, although it did, like the 2006 easement, allow for a water tower and underground water pipelines.[135]

❑ *Pine Mountain Preserve*: Amendments.

> "Dear, dear! How queer everything is to-day! And yesterday things went on just as usual. I wonder if I've been changed in the night? Let me think: was I the same when I got up this morning? I almost think I can remember feeling a little different. But if I'm not the same, the next question is, Who in the world am I? Ah, that's the great puzzle!"
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[136]

All three easements in *Pine Mountain Preserve* contained an amendment provision recognizing that circumstances could arise justifying the modification of certain of the restrictions in the conservation easements, to be granted in landowners' and NALT's sole discretion. The amendment clause required that (1) such amendments were "not inconsistent with the conservation purposes"; and (2) NALT would not have the "right or power to agree to any amendments . . . that would result in [a] Conservation Easement failing to qualify . . . as a qualified conservation contribution under section 170(h) of the Internal Revenue Code and applicable regulations."[137]

In a fine (albeit somewhat startling) display of logic and reason befitting Alice in her clearest moments in Wonderland, the Tax Court in *Pine Mountain Preserve* restored common sense with regard to easement amendments, by wholly validating easement holders' discretion to make amendment decisions consistent with a standard of doing no harm to conservation purposes. This is in stark contrast to that portion of the majority opinion disallowing modifications to building areas completely excluded from the easement. Further, the standard amendment provision used in the easements was not found to violate the protected-in-perpetuity requirements of Code §170(h).[138] In the Tax Court majority's characterization, the Service appears to contend that the easement's restrictions should be deemed "nonperpetual" at the outset of the grant when evaluating under Code §170(h)(2)(C) because of "the risk

million, and $4.1 million, respectively, for its donation of the three easements; at trial, the Service's appraiser found respective values of $1,119,000, $998,000, and $449,000. The Tax Court found the taxpayer's expert overvalued the potential development of the property in determining the value of the easement but that the Service expert undervalued the easement by ignoring the development potential of the property. The Tax Court valued the 2007 easement based on 50% of the value determined by both experts yielding a $4.8 million charitable contribution, likely subject to penalties.

124. Pine Mountain Pres., LLLP v. Commissioner, No. 19-11795, at 25 (11th Cir. Oct. 22, 2020).
125. *Pine Mountain Pres.*, 151 T.C. at 4.
126. *Id.* at 13, 19, 22.
127. *Id.* at 13.
128. *Id.* at 19.
129. *Id.* at 21.
130. *Id.* at 14.
131. *Id.* at 20.
132. *Id.* at 22.
133. *Id.* at 14-18, 20.
134. *Id.* at 20.
135. *Id.* at 22.
136. Wonderland, *supra* note 1, at 13.
137. *Pine Mountain Pres.*, 151 T.C. at 18, 20, 23.
138. *Id.*

that the qualified organization might be unfaithful to the charitable purposes on which its exemption rests."[139]

The majority Tax Court opinion instead cites *Simmons v. Commissioner* in support of the amendment clauses, noting that the Tax Court itself and D.C. Circuit rejected similar arguments about permitted changes to easements over time when an easement reserved to its holder the right to consent to changes in the protected property and to abandon certain rights under the easement.[140] The Tax Court there held that these powers did not disqualify the easement under Code §170(h),[141] and the D.C. Circuit affirmed, holding that "[t]he clauses permitting consent and abandonment, upon which the Commissioner so heavily relies, have no discrete effect upon the perpetuity of the easements."[142] As the Tax Court favorably quoted what the D.C. Circuit noted, "[a]ny donee might fail to enforce a conservation easement, with or without a clause stating that it may consent or abandon its rights, and a tax-exempt organization would do so at its peril."[143]

As the majority Tax Court opinion also points out, the amendment provisions are compliant with the Regulation because they include the all-important requirement that any amendment not be inconsistent with the easement's conservation purposes, as such would be determined by the easement's holder.[144] The majority opinion deems this a limiting factor, reliant on a holder's responsibility to always protect an easement's conservation purposes.[145] It properly disposes of the Service's argument that the amendment provisions could allow a shrinking of the area under easement or expand residential building rights while under the holder's protection, observing: "It is hard to imagine how NALT could conscientiously find such amendments to be 'consistent with the conservation purposes' set forth in the easement.[146]

The majority of the Tax Court notes further that the *Belk* easement included an amendment provision virtually identical to that involved in *Pine Mountain Preserve*, which the Tax Court did not then find to be problematic.[147] Instead, the majority opinion observes that the clause narrowing amendments to those that would not be "inconsistent with the Conservation Purposes" aligns with Regulation §1.170A-14(g)(1)'s governance of the "enforceable in perpetuity" requirement.[148] The "enforceable in perpetuity" requirement provides that any retained interest "must be subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation."[149]

As the majority rightly states, Code §170(h)(5)(A) requires that in order to qualify for a deduction, the conservation purpose of a conservation easement must be "protected in perpetuity."[150] The "protected in perpetuity" requirement developed in Regulation §1.170A-14(g)(1) provides, in relevant part:

> In general. In the case of any donation under this section, any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.[151]

Regulation §1.170A-14(g)(1) therefore ensures that conservation purposes are protected in perpetuity by easement holders enforcing legal restrictions that prevent uses inconsistent with the conservation purposes of the easement.[152] The majority Tax Court opinion ultimately rejects the Service's argument regarding amendments in reliance on holders' responsibilities for conservation protection, because the Service "would apparently prevent the donor of any easement from qualifying for a charitable contribution deduction under Code §170(h) if the easement permitted amendments."[153]

The Eleventh Circuit similarly summarily disposes of the Service's argument on appeal, that the amendment clause(s) permit so much holder discretion as to defeat the perpetuity standards of Code §170(h)(2)(C) and §170(h)(5)(A).[154] The court rejects this argument by disabusing the Service of its false equivalency of perpetuity to ever-unchanging: "to the extent that the Commissioner's position equates 'perpetuity' with inalienability, unreleasability, or unamendability, we reject it."[155] In support of the reality-based majority Tax Court opinion, the Eleventh Circuit cites "(literally) hornbook" contract law (Williston on Contracts), contract and servitudes doctrine (Restatement (Third) of Property (Servitudes)), and model statutory law (Uniform Conservation Easement Act) for the common knowledge that as a matter of law contracts and servitudes can be amended by their parties.[156]

To underscore the ludicrousness of preventing amendments in conservation easements as contracts, servi-

139. *Id.* at 55.
140. *Id.* (citing *Commissioner v. Simmons,* 646 F.3d 6 (D.C. Cir. 2011), *aff'g* T.C.M. (CCH) 2009-208 (2009), 98 T.C.M. (CCH) 211 (2009)).
141. *Id.*; Simmons v. Commissioner, 98 T.C.M. (CCH) 211, 214 (2009).
142. *Simmons*, 646 F.3d at 10.
143. *Pine Mountain Pres.*, 151 T.C. at 55 (citing *Simmons*, 98 T.C.M. (CCH) at 214).
144. *Id.* at 56.
145. *Id.*
146. *Id.* at 54. The majority opinion further cites *Kaufman v. Shulman*, 687 F.3d 21, 27-28 (1st Cir. 2012), *vacating in part*, 134 T.C. 182 (2010) and 136 T.C. 294 (2011), and *Friedberg v. Commissioner*, T.C.M. (CCH) 2011-238 (2011), 102 T.C.M. (CCH) 356, 372-73 (2011), *supplemented by* T.C.M. (CCH) 2013-224 (2013), and acknowledges *Butler v. Commissioner*, 103 T.C.M. (CCH) 1359, 1381, 1384 (2012) (holding that a 2003 conservation easement qualified for deduction under §170(h) even though it had actually been amended).
147. *Pine Mountain Pres.*, 151 T.C. at 56 (citing *Belk I*, 140 T.C. 1, 4 n.8 (2013)).
148. *Id.* (citing Treas. Reg. §1.170A-14(g)(1) (1986)).
149. Treas. Reg. §1.170A-14(g)(1) (1986).
150. *Pine Mountain Pres.*, 151 T.C. at 53 (citing I.R.C. §170(h)(5) (2006)).
151. Treas. Reg. §1.170A-14(g)(1) (1986); *see also* Brief of Land Trust Alliance, Inc. as Amicus Curiae for Petitioners-Appellants, Pine Mountain Pres. LLLP v. Commissioner, No. 19-11795FF (11th Cir. Nov. 11, 2019) [hereinafter *Pine Mountain Preserve* Amendment Amicus Brief].
152. Treas. Reg. §1.170A-14(g)(1) (1986).
153. *Pine Mountain Pres.*, 151 T.C. at 56 (citing I.R.C. §170(h) (2006)).
154. Pine Mountain Pres., LLLP v. Commissioner, No. 19-11795, nn.4, 6 (11th Cir. Oct. 22, 2020).
155. *Id.*
156. *Id.* at 20-21.

tudes, statutory constructs, and tax-deductible gifts, the court declares: "If the possibility of amendment were a deal-killer, then there could be no such thing as a tax-deductible conservation easement."[157] The Eleventh Circuit concludes in support of the Tax Court's holding that the amendment provision at issue does not, in fact or in law, cause the conservation easement to violate Code §170(h)(5)(A)'s protected-in-perpetuity requirement, and, as such, is entirely permissible.[158]

Consistent with the majority of the Tax Court and the Eleventh Circuit opinions, an amendment provision requiring conservation-purpose protection exercised by the holder in its sole discretion meets the perpetuity requirements of both Code §170(h)(2)(C) and (h)(5)(A). This is because it tracks the language of Regulation §1.170A-14(g)(1), and provides essential guidance to easement holders endeavoring to honor the promise of perpetual-protection-of conservation values.[159] Such an amendment clause would also comport with *Land Trust Standards and Practices*, Practice 11.H, which similarly bakes in holder protection of conservation purposes by enforcing legal restrictions that prevent inconsistent or harmful uses, and also folds in the Amendment Principles guiding much of easement holder decisionmaking regarding perpetual easement amendment.[160] Both conservation-purpose protection and holder discretion during amendment considerations are also featured prominently in the Land Trust Alliance's (the Alliance's) revised 2017 *Amendment Report*.[161]

The Eleventh Circuit's affirmation of the Tax Court's holding is perfectly appropriate, given that amendments with a conservation protection standard enforced by holders do not negate Code §170(h)(2)(C)'s requirement of "a restriction (granted in perpetuity) on the use that may be made of the real property."[162] The Eleventh Circuit makes this plain, even without the Tax Court reaching the issue squarely itself, in response to the Service's argument on appeal that the amendment provision causes the 2007 easement to violate Code §170(h)(2)(C)'s granted-in-perpetuity requirement because it gives the parties too much discretion[163]: "We reject that contention for essentially the same reasons that we have concluded that the moveable-homesite provisions of the 2005 and 2006 easements don't run afoul of §170(h)(2)(C). Amendment clause or no, the 2007 easement embodies 'a restriction' on land use that is 'granted in perpetuity.'"[164] The court's conclusion that amendment clauses are not illegitimate, under Code §170(h)(2)(C) or otherwise, extends the non-Wonderland reasoning begun by the Tax Court regarding amendment of perpetual conservation easements.

Nor do amendments defy Code §170(h)(5)(A)'s definition that an easement granted exclusively for conservation purposes means "the purpose must be protected in perpetuity."[165] Rather, as the Eleventh Circuit points out, amendments employing conservation-protective standards exercised with holder discretion are wholly unrelated to the Code §170(h)(2)(C) perpetuity standard, and likely fulfill the more rigorous requirement of the Code §170(h)(5)(A) perpetuity standard.[166] Read consistently with the Eleventh Circuit's affirmation of the majority Tax Court's holding on amendment clauses, if parties to a perpetual easement later amend that easement to remove conservation protections or restrictions on use, they risk consequences such as loss of tax-exempt status, or excess benefit transaction penalties, at that time.[167]

In the same way that a holder does not reject an easement donation because the landowner or a successor might one day violate the easement and trigger the enforcement clause, or might try to have the easement extinguished using the easement's termination clause, the Service should not disqualify an easement merely because the easement contains an amendment clause. Doing so could only assume that such a clause will be misused to remove restrictions or protections. The presence of amendment, enforcement, and termination clauses in perpetual conservation easements assist with the protection of conservation purposes over perpetuity, and any other interpretation or representation of their presence or utility sorely misunderstands and distorts their basic meaning and purpose.

157. *Id.* at 20.
158. *Id.* at 21.
159. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14, 56 (2018), No. 19-11795, at 19 (11th Cir. Oct. 22, 2020).
160. Land Trust Alliance, Land Trust Standards and Practices: Ethical and Technical Guidelines for the Responsible Operation of a Land Trust 20, 23 (rev. 2017) [hereinafter Standards and Practices]. Standard 11, Conservation Easement Stewardship, Practice H, Amendments, provides:
> 1. Adopt and follow a written policy or procedure addressing conservation easement amendments that is consistent with the Land Trust Alliance Amendment Principles
> 2. Evaluate all conservation easement amendment proposals with due diligence sufficient to satisfy the Amendment Principles
> 3. If an amendment is used to adjust conservation easement boundaries (such as to remedy disputes or encroachment) and results in a de minimis extinguishment, document how the land trust's actions address the terms of J.1. below.

Id. at 20. The Amendment Principles referenced in the *Standards and Practices* provide:
> An amendment should meet all of the following: (1) clearly serve the public interest and be consistent with the land trust's mission; (2) comply with all applicable federal, state and local laws; (3) not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal law; (4) not result in private inurement or confer impermissible private benefit; (5) be consistent with the conservation purpose(s) and intent of the easement; (6) be consistent with the documented intent of the donor, grantor and any funding source; and (7) have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

Id. at 23.
161. *See generally* Amendment Report, *supra* note 62, at 51-59. The *Amendment Report* lays out considerations and factors surrounding conservation easement amendment clauses, including Service attacks of the same, as well as provides a risk spectrum for holders to consult when analyzing whether to grant an amendment request. *Id.*
162. I.R.C. §170(h)(2)(C) (2006).
163. *Pine Mountain Pres.*, No. 19-11795, at 19.
164. *Id.* at 21.
165. I.R.C. §170(h)(5)(A) (2006).
166. *Pine Mountain Pres.*, No. 19-11795, n.4. "[Code §170(h)(5)(A)], it seems to us, is likely where the Congress envisioned the heavy lifting—the more rigorous analysis of the degree to which the grant protects conservation purposes—should occur." *Id.*
167. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14, 55 (2018), No. 19-11795, n.6. If a conservation easement amendment is an excess benefit transaction, then the landowner must repay any excess benefit as well as a 25% excise tax per Code §4958(f)(1), and any land trust manager facilitating an excess benefit transaction is subject to an excise tax equal to 10% of the excess benefit per Code §4958(a)(2). I.R.C. §4958 (2006).

Because conservation easements cannot be drafted to anticipate all future events over perpetuity, holder discretion in exercising conservation-purpose protective decisions is the standard required by many conservation easements for administrative and stewardship decisions over time, including amendment decisions.[168] Moreover, amendment provisions like the ones used in *Pine Mountain Preserve* may also contain limiting standards beyond those described in the Code and Regulations, such as incorporating any substantive or procedural requirements of the respective state conservation easement enabling statutes or the federal Code and Regulations. While some state enabling statutes contain substantive or procedural restrictions on amendments and others do not, by requiring compliance with state statutes, such an amendment clause automatically incorporates any current or future statutory restrictions applied to conservation easements.[169] And by referencing the then-current Code §170(h) and Regulations, amendment provisions adopt future limitations imposed by statutory changes, relevant regulations, or case law to determine whether any given amendment is permitted under an easement.

Further, in several aspects overlooked by the Eleventh Circuit opinion and the majority and dissenting Tax Court opinions, amendments in at least three Tax Court opinions and Service rulings to date have passed muster, and are found consistent with the Code and Regulations. In *Strasburg v. Commissioner*,[170] the Tax Court upheld a charitable deduction for an amendment that released building rights reserved to the landowner under the original conservation easement. *Strasburg* demonstrated two important principles: (1) that amendments to conservation easement deeds can occur and be consistent with the Code and Regulations; and (2) that amendments giving up value can create new charitable gifts and qualify for additional tax benefits.[171] In *Butler v. Commissioner*,[172] the Tax Court upheld a deduction for an amendment that expanded a conservation easement's protected acreage; and, in PLR 200014013, the Service determined that a conservation easement could be amended to strengthen the conservation protections by releasing reserved rights, similar to *Strasburg*, therefore ensuring its qualification for an estate tax incentive.[173]

Given the emphasis on conservation-purpose protection administered by easement holders throughout the Code and the Regulation (as discussed next issue in Part Two, Section II), and the recognition by the majority of the Tax Court and Eleventh Circuit, respectively, in *Pine Mountain Preserve* that amendment clauses are appropriate limiting standards, and that parties to perpetual conservation easements can *always* amend them regardless of whether such right is stated in writing, it constrains logic that the Service would continue to assert that the mere presence of an amendment clause in a conservation easement is fatal to a tax deduction.[174] And, in a turnabout befitting a Mad Hatter's tea party where logic and continuity of thought are strained at best, the Service released a guidance memo stating that an amendment clause in a conservation easement does not necessarily cause the easement to fail to satisfy the requirements of Code §170(h).[175]

In response to the question of whether a conservation easement fails to satisfy the requirements of Code §170(h) as a matter of law if it contains an amendment clause, the Service memo responds "No."[176] The Service notes that an amendment clause must be considered in the context of the deed as a whole and the surrounding facts and circumstances to determine the parties' rights, powers, obligations, and duties, and that this determination requires a case-by-case analysis.[177] However, the Service then sets the tea table at this Mad Hatter's tea party, and serves a "compliant" sample amendment clause permitting only those amendments that enhance conservation values or add acres to a conservation easement, together with a side of inflexible and inedible prohibitions:

> [N]o amendment shall (i) affect this Easement's perpetual duration, (ii) permit development, improvements, or uses prohibited by this Easement on its effective date, (iii) conflict with or be contrary to or inconsistent with the conservation purposes of this Easement, (iv) reduce the protection of the conservation values, (v) affect the qualification of this Easement as a "qualified conservation contribution" or "interest in land," (vi) affect the status of Grantee as a "qualified organization" or "eligible done," or (vii) create an impermissible private benefit or private inurement in violation of federal tax law.[178]

The key ingredients missing from this amendment clause are those featured by the Tax Court and Eleventh Circuit in *Pine Mountain Preserve*: holder discretion and the analysis of perpetual conservation protections. This means that there can be no holder consideration for neutrality of impacts or net benefits to the public, concepts intrinsic to the *Land Trust Standard and Practices*, Practice 11.H, required of the members of the Alliance, and featured in the *Amendment Report* and the Amendment Principles upon which both the *Practices* and *Report* rely.[179] Should there be any doubt of the indigestibility of this clause, just try to cook up a corrective amendment using its recipe.

Imagine, for example, land trust and landowner discover subsequent to landowner's grant of her perpetual conserva-

168. Amendment Report, *supra* note 62, at 21, 48, 52, 76.
169. Robert H. Levin, Land Trust Alliance, A Guided Tour of the Conservation Easement Enabling Statutes app. A (Jan. 2014 update).
170. T.C.M. 2000-94 (2000); *Pine Mountain Preserve* Amendment Amicus Brief, *supra* note 151, at 29.
171. *When Perpetual Is Not Forever*, *supra* note 43, at 16.
172. T.C.M. 2012-72 (2012).
173. Priv. Ltr. Rul. 200014013 (Dec. 22, 1999).
174. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14, 56 (2018), No. 19-11795, at 20 (11th Cir. Oct. 22, 2020).
175. Memorandum from John Moriarty, Associate Chief Counsel, IRS Office of Chief Counsel, to James C. Fee Jr., Senior Level Counsel, and Robert W. Dillard, Area Counsel 1 (Mar. 27, 2020) (Memorandum No. AM 2020-001). It is important to note that such a memo is not legal authority, nor does it constitute the law, *see Understanding* When Perpetual Is Not Forever, *supra* note 43, at 253.
176. Memorandum from John Moriarty, *supra* note 175.
177. *Id.* at 2.
178. *Id.* at 2-3.
179. *See* Standards and Practices, *supra* note 160, at 20, 23, Practice 11.H (citing the Amendment Principles, which states in relevant part: "(7) have a net beneficial or neutral effect on the relevant conservation values protected by the easement." *Id.*).

tion easement, that there is an error in the easement's legal description that improperly allocates the land under easement, by including land owned by landowner's neighbor. By the language of the Service's "compliant" amendment clause, this error could not be corrected because the only amendments allowed to an easement are those that add conservation value or acres to the easement.

Further, any attempt to correct by an amendment subtracting out the erroneously described land could and likely would be construed as reducing the conservation values protected by the easement under (iv) of the clause, and be prohibited, despite the fact that such protection is in error and in need of correction. Even if the landowner's property were correctly described, but she later endeavored to double the number of acres under easement while making a slight shift in her building envelope location to accommodate a required utility configuration, this enhancement of conservation values likely would still be rejected due to the building envelope shift as permitting development prohibited by the easement on its effective date, under (ii) of the clause.

The Service's attempt to forever fix all easements to their original boundaries, in their original configuration, without any consideration for changes occurring on, over, or surrounding the land, or of easement holders' discretion to evaluate benefits and detriments to conservation purposes, private individuals, and the public, illustrates that approach's fatal shortcoming. Easements are not static, unmoving entities, and easement holders do have discretion to make decisions for conservation-purpose protection. Instead of acknowledging and confronting this reality head-on, the Service instead engages in complex misdirection to further subvert the truth.

While the Tax Court and Eleventh Circuit in *Pine Mountain Preserve* recognize the consistency of the disputed amendment clause with the Code, Regulations, and, by extension, *Land Trust Standards and Practices*, the Amendment Principles, and the *Amendment Report*, the Service engages in a deliberate sleight of hand. With attention misdirected at its purported safe-harbor amendment clause card, the Service tucks the hidden card away with the nonsensical practical result that no amendments shall be permitted, even those that enhance conservation values or add acres, if one of the Service's listed prohibitions is transgressed. If it is not careful, the Tax Court could be taken in by this deception in coming cases.

❑ *Pine Mountain Preserve:* Building envelopes.

> She had not gone much farther before she came in sight of the house of the March Hare: she thought it must be the right house, because the chimneys were shaped like ears and the roof was thatched with fur. It was so large a house, that she did not like to go nearer till she had nibbled some more of the left-hand bit of mushroom, and raised herself to about two feet high . . .
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[180]

In contrast to its measured reasoning on amendment clauses, the majority of the Tax Court in *Pine Mountain Preserve* arrived at several confounding conclusions regarding reserved building areas, inconsistent uses, and permitted activities. Despite the widely differing facts of the cases, the Tax Court relied on *Belk* to reject the deductibility of the 2006 easement because the six building area locations were not fixed, and relied on its own opinion in *Bosque Canyon* to reject the deductibility of the 2005 easement because NALT could approve changes to the building areas.[181] The Tax Court rejected the Fifth Circuit's distinction in *Bosque Canyon Ranch II* between modifications to land under easement, outer boundaries of an easement, and interior boundaries of excluded building areas (as in *Belk*, *Balsam Mountain*, and *Bosque Canyon*, respectively), and changes to building areas included within an easement.[182] And it declined to follow the Fifth Circuit opinion in *Bosque Canyon* based on the *Golsen* rule,[183] because *Pine Mountain Preserve* is not appealable to the Fifth Circuit, and therefore not beholden to the precedent of that circuit, as discussed in Part Two, Section II.[184]

The Tax Court is beholden to the precedent of the Eleventh Circuit, however, to which the taxpayer and the Service each appealed the Tax Court's holdings in *Pine Mountain Preserve*.[185] The taxpayer appealed the alteration of building envelopes disqualifying the 2005 and 2006 conservation easements holding, while the Service appealed both the amendment holding and the disqualification of the 2007 conservation easement for a tax deduction holding, with all of the appeals complemented by various amici briefs.[186] The Eleventh Circuit took a "deep breath" and dived into the rabbit hole, reemerging with the taxpayer, easement holder, and Tax Court in tow, at least for those disputes within their circuit.[187]

A majority of the Tax Court followed the Service's assertions and the dissent in *Bosque Canyon* to determine that because the improvements permitted within and around the building areas were so extensive and without sufficient restrictions, there was no substantive distinction between building areas excluded from or included within an easement.[188] The majority opinion instructed, "What matters is whether there is a perpetual use restriction on 'the real property' covered by the easement at the time the easement is granted."[189] The Tax Court reasoned that "[b]y permitting the [building envelopes] to be relocated to other sec-

180. Wonderland, *supra* note 1, at 37.

181. *Belk I*, 140 T.C. 1 (2013), *supplemented by* T.C.M. 2013-154 (*Belk II*), *aff'd*, 774 F.3d 221 (4th Cir. 2014) (*Belk III*); Bosque Canyon Ranch, L.P. v. Commissioner, T.C.M. 2015-130 (2015), *vacated and remanded sub nom.* 867 F.3d 547 (5th Cir. 2017).

182. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14, 38-40, 43 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev'd in part, aff'd in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020).

183. Golsen v. Commissioner, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir.).

184. *Id.* at 41.

185. Pine Mountain Pres., LLLP v. Commissioner, No. 19-11795, at 3, 10, 18 (11th Cir. Oct. 22, 2020).

186. *Id.*

187. *Id.* at 5.

188. *Pine Mountain Pres.*, 151 T.C. at 43.

189. *Id.*

tions of the conservation area, the deed allows the developer to subject to . . . development land that was supposed to be protected in perpetuity from any form of development."[190]

In making its determination about changes to the building areas, the Tax Court misappropriated and then misapplied the Swiss cheese metaphor from the dissent in *Bosque Canyon*. It stated that the slice of cheese represented the real property initially restricted by the conservation easement, and that the holes represented the zones reserved for commercial or residential development. Then it leapt to the conclusion that because Code §170(h)(2)(C) requires that the land restricted by the conservation easement be protected from development in perpetuity, the Code thus bars the developer from putting any new holes in the cheese.[191] The Tax Court posited that the landowner could put new holes in the cheese and either add back an equal amount of previously unprotected land to the conservation area in contradiction of *Belk*, or plug the same number of holes elsewhere in the conservation area in concert with *Bosque Canyon*.[192]

This topsy-turvy misinterpretation that conservation easements by law cannot validly permit reserved rights and consistent uses for building and other purposes without poking holes in metaphorical cheese, is a gross misunderstanding of the metaphor as well as the law. The scenario in *Bosque Canyon* was that the holes represented excluded areas in the conservation easement cheese, not conserved areas that could be used for reserved rights under the conservation easement, as a part of the slice of cheese.[193] Because the Tax Court followed the Service's misdirection, it found the totality of the other permitted improvements and surface impacts inside and outside of the building areas combined with the ability to adjust boundaries and move building areas prevented the 2005 and 2006 easements from constituting a "qualified real property interest" under Code §170(h)(2).[194] By contrast, the Tax Court found the 2007 easement to be made "exclusively for conservation purposes," likely because the Service did not present any contrary evidence that the reserved rights there would impair the easement's purposes.[195]

As the Eleventh Circuit details, the Tax Court used the Swiss-cheese metaphor to assert the building sites on the 2005 easement represented "holes" in the conservation area, such that the easement's restrictions did not attach to a "defined parcel of real property."[196] As repeatedly pointed out by the dissent and affirmed by the Eleventh Circuit, however, the building areas in the 2005 easement are not excluded from the easement but are, in fact, included within the easement and subject to its restrictions.[197] The easement includes those typical restrictions on uses within building envelopes put in place to ensure that uses inconsistent with protection of conservation purposes cannot be located there, such as industrial or commercial development, multifamily uses, or other intensive uses that may otherwise be allowed by zoning in the future.[198] Additional restrictions by the easement include prohibitions on manufacture, storage, assembly or sale of anything including hazardous or dangerous materials, commercial offices, signs, billboards and advertising structures, mining or selling minerals, topsoil and other materials, dumping any materials, groundwater removal, watercourse alterations, the introduction of non-native plant species, and use of the development rights to support development on any other piece of land.[199]

These restrictions are important to the collective overall achievement of the conservation purposes. The Tax Court dissent and Eleventh Circuit rightly point out that disregarding them, as did the majority of the Tax Court, represented a fundamental misunderstanding of the terms and the purposes of the easement, resulting in the erroneous application of the principles enunciated in *Belk*.[200] The right contested in *Belk*, the majority of the Tax Court held, was "the ability of the parties to modify the real property subject to the easement," as opposed to a shift in the boundary of the easement.[201] The Eleventh Circuit instructs to the contrary:

> [T]he 2005 and 2006 easements here bear no resemblance to the one at issue in the *Belk* litigation. The easements that Pine Mountain granted only allow building areas to be moved around within the fixed boundaries of the easement—they don't permit outside-territory swapping. Pine

190. *Id.* n.6.
191. *Id.* at 48.
192. *Id.* at 42.
193. *Id.*
194. *Id.* at 45, 48.
195. *Id.* at 52-53.
196. Pine Mountain Pres., LLLP v. Commissioner, No. 19-11795, at 11 (11th Cir. Oct. 22, 2020).
197. *Pine Mountain Pres.*, 151 T.C. at 59, No. 19-11795, at 14. "Here, the reserved rights don't introduce holes into the conservation-easement slice, because the entire slice remains subject to 'a restriction'—i.e., the conservation easement. Instead, the reserved rights are embedded pepper flakes, and, so long as they don't alter the actual boundaries of the easement, §170(h)(2)(C) is satisfied." *Pine Mountain Pres.*, No. 19-11795, at 14.
198. *Pine Mountain Pres.*, 151 T.C. at 59.
199. *Id.* at 93. The taxpayer's brief in this matter included an even more detailed itemization of the prohibited acts and restrictions on the landowner:
> (1) the manufacture, assembly, or sale of any products, goods, equipment, chemicals, materials, or substances of any kind or nature; (2) the storage of any products, goods, equipment, chemicals, materials, or substances of any kind or nature, except if stored for use upon the property in connection with activities not prohibited by the easement; (3) offices for persons involved in the sale, manufacture, or assembly of goods or services or for the performance of services; (4) recreational activities (except for recreational activities that, by their nature, are likely not to have a material adverse effect on the listed conservation values); (5) the removal of ground or surface water for any purpose or use outside of the boundaries of the tract or for any prohibited purpose or use within the tract; (6) signs, billboards, or outdoor advertising structures; (7) filling, excavating, dredging, surface mining, drilling, or any removal of topsoil, sand, gravel, rock, peat, minerals, or other materials; (8) dumping of ashes, trash, garbage, or any other unsightly or offensive materials; (9) creating a material change in the topography of the tract; (10) dredging, channelizing, or other manipulation of natural water courses or any water courses existing within the tract; (11) the introduction of new plant species (except those that are native to the area or that are recognized as non-invasive horticultural specimens or fruit orchard trees); and (12) using the land as open space for purposes of obtaining or qualifying for governmental approval of any subdivision or development on other land.

Brief of Petitioners-Appellants at 12-13, Pine Mountain Pres. LLLP v. Commissioner, No. 19-11795FF (11th Cir. July 1, 2019).
200. *Pine Mountain Pres.*, 151 T.C. at 95.
201. *Id.*

> Mountain's easements more closely resemble those in *BC Ranch II v. C.I.R.*, 867 F.3d 547 (5th Cir. 2017).[202]

Correcting the misapplied cheese metaphor, the taxpayer on appeal and the Eleventh Circuit both point out that the building areas in the 2005 easement, and the exercise of reserved rights and balancing of consistent uses within any easement, are not holes in the conservation easement cheese, but rather different ingredients within the cheese, such as pepper flakes—distinct components of the cheese, yet inseparable from the cheese itself.[203]

As the Tax Court dissent and Eleventh Circuit also correctly point out, the majority Tax Court opinion misconceives the nature of conservation easements, landowners' reserved rights, and consistent and inconsistent uses in the context of impacts to protected conservation values. It also conflates the concept of genuine wholesale exchanges illustrated by *Belk I* with that of exercising reserved rights and consistent uses within conservation easements.[204] The Service would have the Tax Court and Eleventh Circuit believe that *Belk* extends beyond the actual determination of an easement's boundaries as fixed in space at the time of the grant, to intrude into the interior of the easement itself, the uses within, and the rights reserved to the landowner therein. It does not. The sole premise of *Belk* is that under Code §170(h)(2)(C), the location of an easement needs to be readily identifiable at the time of its granting, and to achieve such clarity, the land proposed to be under easement may not be allowed to be substituted with other land at a later time.

By applying *Belk* to the landowner's uses, activities, and reserved rights to build in areas inside the literal boundaries and figurative constraints of the conservation easement in *Pine Mountain Preserve*, the Service successfully duped the Tax Court into misapplying the plain rule of Code §170(h)(2)(C). Instead of identifying with specificity the land granted under the conservation easement, the Tax Court in *Pine Mountain Preserve* instead applied the promise to protect conservation purposes in perpetuity preserved under Code §170(h)(5)(A) to the landowner's uses, activities, and rights reserved within the conservation easement. This mistake subverts the meaning of both sections of the Code and hopelessly muddles the common law thereafter, as evidenced by the succeeding *Carter* case.[205]

The Eleventh Circuit's opinion does much to distinguish the two separate statutory rules for the Service and Tax Court in the meantime. It defines the "granted in perpetuity" requirement of Code §170(h)(2)(C) as being met because an easement constitutes:

> "a restriction" on "the use . . . of the real property" because it burdens what would otherwise be the landowner's fee-simple enjoyment of—and absolute discretion over—the use of its property. And it does so "in perpetuity" because nothing in the grant envisions a reversion of the easement interest to the landowner, its heirs, or assigns.[206]

This definition dispossesses the Service of its argument that because the grant is in perpetuity, even a limited reservation of development rights in an easement violates the granted-in-perpetuity requirement.[207] It even focuses on the minutest of word choice, in the nature of the Fourth Circuit in *Belk*, which it cites, by focusing on the use of the word "a" before "restriction" in Code §170(h)(2)(C) as evidence that only one singular restriction is required under the statutory rule.[208] The court redirects the parties to examine the quality, substance, and merits of the Pine Mountain easements under the "protected in perpetuity" requirement of Code §170(h)(5)(A), which it remands to the Tax Court to reexamine.[209]

The Tax Court opinion even directly overturns the two PLRs cited by itself in *Belk II* to deny the motion for reconsideration, and six other PLRs.[210] The PLRs allowed the landowners to reserve the limited right to establish

202. *Pine Mountain Pres.*, No. 19-11795, at 16.

203. *Id.* at 14, 17. *See also* Brief of Petitioners-Appellants at 37-38, Pine Mountain Pres. LLLP v. Commissioner, No. 19-11795FF (11th Cir. July 1, 2019). As a necessary accompaniment to the cheese and its ingredients, the holder's role is essential in the long-term protection of conservation purposes where rights are reserved or uses proposed. It entails evaluating and balancing the use and placement of "ingredients" within the conservation "cheese" to ensure that the cheese retains its conservation character, and is not overwhelmed by the additional uses or exercise of rights represented by the incorporation of ingredients throughout the cheese.

204. Brief of Petitioners-Appellants at 37-38, Pine Mountain Pres. LLLP v. Commissioner, No. 19-11795FF (11th Cir. July 1, 2019).

205. Carter v. Commissioner, T.C.M. (CCH) 2020-21 (2020).

206. *Pine Mountain Pres.*, No. 19-11795, at 11-12.

207. *Id.* at 12.

208. *Id.* at 12, 17. The Eleventh Circuit points to the Fourth Circuit's focus on the article "the" in much the way it focuses on the article "a" in Code §170(h)(2)(C): "As the Fourth Circuit interpreted that provision, '[t]he placement of the article "the" before "real property" makes clear that a perpetual use restriction must attach to a defined parcel of real property rather than simply some or any (or interchangeable parcels of) real property.'" *Id.* at 14-15.

209. *Id.* at 14, 18.

210. Pine Mountain Pres., LLLP v. Commissioner, 151 T.C. 14, 76 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev'd in part, aff'd in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020); Priv. Ltr. Rul. 200836014 (Sept. 5, 2008) (conservation easement allowed an unspecified number of additional residences subject to an overall impervious surface cap; ruling expressly cited Regulation §1.170A-14(e) and noted the existence of the conservation protection standard); Priv. Ltr. Rul. 200403044 (Jan. 16, 2004) (conservation easement allowed an unspecified number of building areas in unspecified locations, subject to approval by the holder based on a conservation-purposes standard; ruling expressly referenced Examples 3 and 4 of Regulation §1.170A-14(f) and, because of the standard, likened the easement to Example 4); Priv. Ltr. Rul. 9603018 (Jan. 19, 1996) (conservation easement allowed five additional residences to be built within building areas; locations of the building areas were specified in the easement, but could be moved with permission of the holder, based on a conservation-purposes standard); Priv. Ltr. Rul. 8810024 (Dec. 8, 1988) (conservation easement allowed five additional residences, four at the locations of existing nonresidential buildings, and the fifth in a new clearing that was not precisely specified but somewhere "on the edge of" the protected property, and all subject to the holder's prior approval based on a conservation-purposes standard); Priv. Ltr. Rul. 8626075 (July 7, 1986) (conservation easement allowed the landowner to divide and sell a parcel for construction of a single-family residence subject to the holder's prior approval with respect to the location, based on the conservation-purposes standard); Priv. Ltr. Rul. 8450065 (Sept. 13, 1984) (conservation easement protected 5,367 acres and allowed up to three residences per 100 acres, in sizes and locations approved by the holder based on the conservation-purposes standard); Priv. Ltr. Rul. 8248069 (Aug. 30, 1982) (conservation easement protected 223 acres and allowed two separate two-acre building areas in locations subject to the holder's prior approval); Priv. Ltr. Rul. 8233025 (Aug. 30, 1982) (conservation easement allowed two residential building

building areas within an easement in the future, subject to the holders' written approval and consistency with conservation purposes.[211] The Service therefore permitted floating building sites subject to certain protections and limitations, likely because the sites remained within the conservation easement protected property. The court in *Belk II* distanced *Belk I* from the PLRs by distinguishing between the ability to identify an easement's location on the ground at the time of the grant from changes made to an easement after its grant. "*Belk I* does not speak to the ability of parties to modify the real property subject to the conservation easement; it simply requires that there be a specific piece of real property subject to the use restriction granted in perpetuity."[212]

The PLRs are equally distinct from the situation in *Pine Mountain Preserve* where the Tax Court did not (and cannot seem to) distinguish between the included, allowed building areas within an easement and excluded building areas outside an easement, and instead deemed them all nondeductible attributes. Although PLRs do not carry precedential weight under Code §6110(k)(3), they can and have been cited as persuasive authority in appellate conservation easement cases, and as such ought to be accorded weight in favor of flexibility in reserving building areas for future improvements within perpetual conservation easements.[213]

As the Tax Court dissent and the Eleventh Circuit further point out, the Service and majority of the Tax Court also both ignored Example 4 of Regulation §1.170A-14(f), which has procedural as well as substantive consequences discussed in Part Two, Section II.[214] In Example 4, a conservation easement that allows for limited clustered development of several building areas that do not detract from scenic views, and with exact site and building plans to be approved by the holder, is deemed to qualify for a deduction.[215] The clustered nature of the building areas is emphasized as a contrast to the "random" placement of building areas in Example 3 of the Regulations.[216] Although more building areas are permitted in Example 4 than in Example 3, because the siting in Example 3 is random and not subject to any holder oversight using a conservation standard to do no harm to the protected conservation purposes, the easement in Example 3 does not qualify for a deduction.[217]

Example 4 of the Regulations is also instructive as to the intensity of development that is acceptable for a deductible easement. The easement in the example covers 900 acres of land, and within those 900 acres are allowed five nine-acre clusters (with four houses on each cluster), for a total of 20 residences on 45 acres. Although the example does not detail all of the other permitted uses, this level of development is almost double that of the 2005 easement's level of development, and yet the Service and majority of the Tax Court found the facts of the 2005 easement to be noncompliant.[218] On appeal, the Eleventh Circuit conversely considered Example 4 to prove the easement to be compliant.[219]

Neither the Service nor the Tax Court is at liberty to ignore the express and specific words of limitation that follow more general words of authorization in a conservation easement. The Service's interpretation would render the words requiring consistency with conservation purposes mere surplusage. As addressed in more detail below, the Service's position does not explain the fact that holders, as qualified organizations under Code §170(h)(3), are legally presumed to have a commitment to perpetually protect the very conservation purposes that the Service alleges it will ignore.

The reversal by the Eleventh Circuit of the Tax Court's building area holdings in *Pine Mountain Preserve* will be precedential in that circuit and beyond, to the extent the Tax Court, taxpayers, and easement holders are either bound through jurisdiction, or elect to follow this precedent. Of particular interest will be how the Tax Court determines whether the 2005 and 2006 easements satisfy Code §170(h)(5)(A)'s protected-in-perpetuity requirement on remand, given the court's description of that inquiry as an examination of "the quality—the substance, or merits—of Pine Mountain's easements" as perpetually protected under that section of the Code.[220]

For those outside the jurisdiction of the Eleventh Circuit and unwilling to follow its precedent, which may include the Tax Court itself if *Bosque Canyon* is an indication, taxpayer-landowners and easement holders shall continue to be trapped in the rabbit hole in a confounding world where land is cheese, and the Service and Tax Court behead long-held rules of law. Nowhere is this more apparent than in the *Carter* case following closely on the heels of *Pine Mountain Preserve*, wherein the Tax Court further expands that case's illogical application of law to floating building envelopes, possibly even fixed building envelopes, and buildings per se.[221] Given the Eleventh Circuit's holding in *Pine Mountain Preserve*, *Carter* is likely to be overturned by the same court, but until then remains an even more extreme example of misinterpretation of reserved building areas in perpetual conservation easements.

In *Carter*, the Service disallowed a conservation easement conveyed by Dover Hall Plantation (DHP) to

areas of unfixed size in waterfront locations). *See also* Treas. Reg. §1.170A-14(f), exs. 3, 4 (1986).

211. Moreover, conveyances of conservation easements are transfers of real property interests, and it would behoove the Tax Court to evaluate them from the legal perspective as in the nature of real property interests retained, reserved, or relinquished, with uses permitted or prohibited within the conservation easement, as opposed to as lying in contract, a distinction apparently consistently lost on the Tax Court in *Belk* and all of its progeny.

212. *Belk II*, T.C.M. 2013-154, at 9 (2013).

213. I.R.C. §6110(k)(3) (2000); *see also* Glass v. Commissioner, 471 F.3d 698, 709 (6th Cir. 2006) (regarding persuasive authority of PLRs); Priv. Ltr. Rul. 201405018 (Jan. 31, 2014); Priv. Ltr. Rul. 201110020 (Dec. 17, 2010); Priv. Ltr. Rul. 2011090030 (Dec. 8, 2010); Priv. Ltr. Rul. 201048045 (Sept. 8, 2010).

214. Treas. Reg. §1.170A-14(f), ex. 4 (1986); *Pine Mountain Pres.*, No. 19-11795, n.3.

215. Treas. Reg. §1.170A-14(f), ex. 4 (1986).

216. *Id.* ex. 3.

217. *Id.* exs. 3, 4.

218. *Id.* ex. 4.

219. *Pine Mountain Pres.*, No. 19-11795, n.3.

220. *Id.* at 14, 18.

221. Carter v. Commissioner, T.C.M. (CCH) 2020-21, at 2 (2020).

NALT in 2011 over 500 acres of property.[222] The easement restricted the use of the property but reserved the right to DHP to build single-family homes in 11 "building areas" of up to two acres each, the locations of which were to be determined in the future, subject to NALT's approval.[223] The easement's protected conservation purposes were the preservation of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem and scenic open space also advancing a clearly delineated governmental conservation policy, with significant public benefit.[224]

As in *Pine Mountain Preserve*, the Tax Court again agreed with the Service that the easement was not deductible, although precisely why is unclear. Citing its own opinion in *Belk*, the court begins by misstating the required perpetuity characteristics for tax deductibility as "[t]he use of the property in question must be restricted in perpetuity and the conservation purposes must be protected in perpetuity."[225] This is in contrast to the true perpetuity requirement under Code §170(h)(2)(C) being shown to be "*granted* in perpetuity,"[226] as contrasted with granted for a term of years. The Eleventh Circuit likely will apply the same reasoning to dispose of this argument as it did in *Pine Mountain Preserve*, which is that the easement qualifies under Code §170(h)(2)(C) because it is a non-reverting restriction on the use of real property impairing what would otherwise be the landowner's fee-simple enjoyment thereof and absolute discretion thereover.[227]

The Tax Court then vacillates between the bases for nondeductibility as the building areas being unfixed at the time of easement grant in contradiction of Code §170(h)(2)(C), and the uses within the building areas defying perpetual protection of the conservation purposes of the easement under Regulation §1.170A-14(e) and Code §170(h)(5)(A).[228] To the former, the court cites "*Belk* and its progeny" as establishing that if the boundaries building areas are not fixed at the outset, this violates Code §170(h)(2)'s perpetuity requirement because "[w]hen the boundaries of the building areas are indeterminate, there may be no defined parcel of property that is subject to a perpetual use restriction."[229] (As in *Pine Mountain Preserve*, the Tax Court once again hopelessly blurs the important distinction between exterior and interior easement boundaries and included and excluded building areas.) To the latter, the court cites *Pine Mountain Preserve* for the proposition that the permitted uses within the building areas are "antithetical to the easement's conservation purposes," and, therefore, any building restrictions are disregarded in determining whether the easement is included in the definition of "qualified real property interest" under Code §170(h)(2)(C).[230]

Although the court cites Code §170(h)(2)(C) here, the reasoning that permitted uses conflict with protecting easement purposes in perpetuity derives from Regulation §1.170A-14(e) regarding inconsistent uses defeating conservation-purpose protection, and Code §170(h)(5)(A) regarding protecting conservation purposes in perpetuity.[231] The Eleventh Circuit is certain to point out, as it did in *Pine Mountain Preserve*, that the Tax Court once again erroneously conflated the two statutory standards, and impermissibly grafted elements of Code §170(h)(5)(A)'s "protected in perpetuity" test onto Code §170(h)(2)(C)'s "granted in perpetuity" test, which would make moot any test under the later provision.[232] "Not only does the Tax Court's interpretation of §170(h)(2)(C) defy the provision's straightforward language, but it also renders §170(h)(5)(A) superfluous."[233]

The court attempts to closely align *Carter* with *Pine Mountain Preserve* by upholding the Service's disallowance for the 11 floating building sites in *Carter*, much like the 2006 easement in *Pine Mountain Preserve*, where that easement also did not initially fix the location of its six permitted building areas.[234] The court in *Carter* therefore extends and expands the holding that fully floating building areas are inconsistent with perpetuity under Code §170(h)(2)(C).[235] This likely will not bode well for interpretation under the Eleventh Circuit's *Pine Mountain Preserve* opinion, given that the Eleventh Circuit makes clear that such determinations are made under Code §170(h)(5)(A), and are not relevant to any inquiry under Code §170(h)(2)(C): "whether exceptions to restrictions in a conservation easement poke holes in the [easement] slice runs, we think, to whether the easement adequately protects the conservation purposes, which is a question to be answered by reference to §170(h)(5)(A), not §170(h)(2)(C)."[236]

The Tax Court's opinion in *Carter*, as distinct from that of *Pine Mountain Preserve*, acknowledges then rejects reliance on Example 4 of Regulation §1.170A-14(f), as well as the PLRs. The *Carter* opinion attempts to distinguish Example 4 by pointing out that it does not state explicitly whether the building sites were fixed at the outset or to be selected later.[237] It also points out that the purpose for Example 4 is to illustrate that purposes can be protected in perpetuity under Code §170(h)(5)(A), and is not, therefore, relevant to any inquiry under Code §170(h)(2)(C).[238] The court's assertion that Example 4 does not identify whether or not the building areas are fixed at the time of the easement's grant is a gross misrepresentation of the actual language of that example. It is likely to be rejected by the Eleventh Circuit, which embraced the example as illustrative of permitted, mov-

222. *Id.* at 4.
223. *Id.* at 4-5.
224. *Id.* at 21, 25.
225. *Id.* at 10.
226. *Id.*
227. Pine Mountain Pres., LLLP v. Commissioner, No. 19-11795, at 11 (11th Cir. Oct. 22, 2020).
228. *Id.*
229. *Id.*
230. *Id.* at 25.
231. *Id.*; Treas. Reg. §1.170A-14(e) (1986), I.R.C. §170(h)(5)(A) (2006).
232. *Pine Mountain Pres.*, No. 19-11795, at 13.
233. *Id.*
234. Carter v. Commissioner, T.C.M. (CCH) 2020-21, at 5 (2020).
235. *Id.* at 23.
236. *Pine Mountain Pres.*, No. 19-11795, at 14.
237. *Carter*, T.C.M. (CCH) 2020-21, at 23.
238. *Id.*

able building areas in *Pine Mountain Preserve* not disqualifying an easement for a tax deduction.[239]

Example 4 discusses building areas that are "subject to site and building plan approval by the donee organization."[240] If, as the Tax Court contends, the building areas were in fact fixed at the time of the easement's grant, there would be no need for holder approval of the site. Instead, Example 4 illustrates the exact situations of the 2006 easement in *Pine Mountain Preserve* and the easement at issue in *Carter*, where building areas are permitted to be approved after the grant of easement.[241] Example 4 therefore not only anticipates the use of floating residential building areas, it endorses them. Moreover, there is nothing in Example 4 to suggest that such building area locations to be determined after the grant of easement are governed solely or at any time by Code §170(h)(2)(C).

The Service itself has approved floating building envelopes in no less than six PLRs.[242] While the court in *Carter* dismisses the use of PLRs as non-precedential under Code §6110(k)(3), PLRs have been cited as persuasive authority by the U.S. Court of Appeals for the Sixth Circuit in *Glass v. Commissioner*, an appeal of a conservation easement disallowance by the Service.[243] The Tax Court's rejection of Example 4 as analogous, and the PLRs as persuasive authority, only adds to the confusion created by the *Carter* opinion with regard to building areas in general, and floating building areas in particular. While the taxpayer-landowner appeals the decision in *Carter* to the Eleventh Circuit, landowners and easement holders are left to try to reconcile the current state of the law with its practical application in what can only be described as nonsensical approaches to perpetual conservation easement drafting, stewardship, and enforcement.

II. Chaos Reigns: What Can Easement Drafters Do (and Not Do) as a Result of *Pine Mountain Preserve* and *Carter*?

> Alice said nothing; she had sat down with her face in her hands, wondering if anything would ever happen in a natural way again.
>
> —Lewis Carroll, *Alice's Adventures in Wonderland*[244]

The Tax Court's approach to *Belk* progeny *Pine Mountain Preserve* and *Carter* has profound impacts on the practical day-to-day business of protecting land using perpetual conservation easements. This is especially true for those unable, for being out of circuit, or unwilling, for fear of inciting the Service or Tax Court's ire, to apply the Eleventh Circuit's holding in *Pine Mountain Preserve*. Under the Tax Court regime for building within easements, no more can landowners work with easement holders to locate building envelopes on their protected properties after the grant of easement, or possibly even allow building areas or building at all, depending on the interpretation of *Carter*. Under the Tax Court's rulings in *Pine Mountain Preserve* and *Carter*, any degree of a floating building area is arguably disallowable, and the *Carter* opinion by itself causes additional uncertainty because it is unclear as to whether the opinion is limited to fully floating building areas or all building areas or even all buildings, if one is attempting to fully follow the Mad Hatter.

Landowners who want to reserve rights to construct improvements such as agricultural buildings and single-family homes, facilities appurtenant to those structures such as barns, shade shelters, livestock water stations, recreation structures, gazebos, fences, and roads, or a building envelope within which to place such structures, now have to reconsider whether such reservation of rights renders their easement nonperpetual, and nondeductible. This is so even with the easement holder's prior approval, which according to the Service and Tax Court will render an easement nonperpetual. The mere reservation of the right to place a picnic table on one's own property under a perpetual conservation easement may violate the rule of law the Service is postulating, without administrative review, from its throne of cards.

When the majority of the Tax Court in *Pine Mountain Preserve* and *Carter* misapplied the reasoning of *Belk* to rule that the common practice of reserving the rights within a building envelope or outside of a no-build zone will invalidate an otherwise legitimate conservation easement, it erased the important distinction between building areas included in and excluded from conservation easements. It also rendered impossible the adjustmemt of any of those areas as necessary in the future.[245]

Such reasoning turns perpetual easement protection on its head. Easements are perpetuated not in spite of but

239. *Pine Mountain Pres.*, No. 19-11795, n.3. The court stated:

> The Treasury Department's own regulations indicate that the mere presence of movable building sites does not render a conservation easement non-deductible. 26 C.F.R. §1.170A-14(f)'s Example 4 depicts a conservation easement that allows for "limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) . . . subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park."

Id.

240. Treas. Reg. §1.170A-14(f), ex. 4 (1986).

241. *Id.*

242. Priv. Ltr. Rul. 200403044 (Jan. 16, 2004) (conservation easement allowed unspecified number of building areas in unspecified locations, subject to approval by holder; ruling expressly referenced Examples 3 and 4 of Regulation §1.170A-14(f) and likened easement to Example 4); Priv. Ltr. Rul. 9603018 (Jan. 19, 1996) (conservation easement allowed five additional residences to be built within specified building areas the location of which could be moved with permission of holder); Priv. Ltr. Rul. 8810024 (Dec. 8, 1988) (conservation easement allowed five additional residences, four at locations of existing nonresidential buildings, and fifth in new clearing "on the edge of" the protected property, subject to holder's approval); Priv. Ltr. Rul. 8626075 (Apr. 1, 1986) (conservation easement allowed landowner to divide and sell a parcel for construction of single-family residence, subject to holder's approval with respect to the location); Priv. Ltr. Rul. 8450065 (Sept. 13, 1984) (conservation easement protected 5,367 acres and allowed up to three residences per 100 acres, in sizes and locations approved by holder); Priv. Ltr. Rul. 8248069 (Aug. 30, 1982) (conservation easement protected 223 acres and allowed two separate two-acre building areas in locations subject to holder's approval).

243. I.R.C. §6110(k)(3) (2000); 471 F.3d 698, 709 (6th Cir. 2006).

244. Wonderland, *supra* note 1, at 58.

245. *Id.*

because of their holders' discretion and decisionmaking during and after an easement's grant, to evaluate the best protection of an easement and its conservation purposes over time, using a conservation-protection standard. As evidenced by the previous case discussions, throughout the duration of a perpetual easement, its holder is charged with protecting purposes through a whole host of evaluations. This includes permitted and prohibited uses, enforcing violations, overseeing the exercise of reserved rights, adapting and modifying due to changed circumstances, and eventually determining impracticality or impossibility of accomplishing purposes, and, if so, extinguishing an easement using judicial proceedings with dedication of proceeds to the original purposes, before starting all over again.

Moreover, in light of *Belk* and its progeny up to and including the Tax Court opinions in *Pine Mountain Preserve* and *Carter*, the Alliance, the umbrella organization of charitable land trusts across the United States, is now recommending drafting approaches to avoid audit or disallowance for conservation practitioners and professionals.[246] By failing to recognize holder discretion in conservation-purpose protection, and by treating building areas included in and excluded from a conservation easement the same, the Tax Court holdings in *Pine Mountain Preserve* and *Carter* not only make it impossible to adjust such areas or uses as future needs arise, but will also lead to a host of unintended consequences.

Such consequences include easements reserving larger and more numerous building areas, because if the boundaries of an included building area can never be adjusted in the future, then it is likely that landowners will negotiate for larger and more numerous building areas, leaving less land protected. Also, as noted previously, landowners will likely exclude more buildings and building areas from easements, rather than risk the Service's disapproval, thus reducing the holder's ability to control inconsistent uses.[247] And there likely will be more expensive and unnecessary litigation when defending conservation purposes, due to the reduced ability to reach decisions with easement holders that would further protect conservation purposes.[248]

The Service's world below belies land conservation with no rights reserved to the landowner to build or otherwise improve, and arguably no balance of consistent and inconsistent uses permitted. The Service's Wonderland conservation world is a wilderness-only landscape under a glass case, bound by an inflexible, immutable deed of easement, which accepts no substitutes, allows no uses, anticipates no needs, and responds to no changes or challenges over time. This might be acceptable if the supporting law required such a rigid environment for land protection, but it does not. The Code and its Regulation allow a landowner to reserve rights to build and to actively use the conserved land, provided that the conservation purposes are protected by the terms of the easement and enforced by the easement's holder. The Tax Court taking up the Service's unsupported and unsubstantiated view of land conservation leaves the conservation community of landowners and easement holders no choice but to draft deeds of conservation easement to suit the current whims of the Service, or risk summary beheading.

The Alliance guides its member land trusts to this effect. In an attempt to draft conservation easements consistent with the recent Tax Court outcomes, which constrain easement flexibility, responsiveness, and adaptability, and, in so doing, likely impair their durability over time, the Alliance puts forth practical pointers for avoiding floating components, boundary adjustment, building area relocation, or land exchange in a conservation easement.[249] The Alliance suggests using fixed excluded areas or fixed included building areas with no potential for adjustment, given that the Tax Court rulings in *Pine Mountain Preserve* and *Carter* appear to increase the risk of an easement being disallowed for a fully or partially floating building area even when included in the easement.[250]

The Alliance advises to consider including alternative building areas to avoid large partially floating building areas where, when one of the building areas is selected, the others automatically expire, thereby removing floating or movable aspects of building areas.[251] Because clustering building areas, buildings, and other structures inside or outside of an easement has been identified as good conservation practice not only by Example 4 of Regulation §1.170A-14(f), but also by the Fifth Circuit in deciding to allow deductions in *Bosque Canyon*, and the Eleventh Circuit in *Pine Mountain Preserve*, the Alliance recommends clustering as well.[252]

From a practical standpoint, this means that when negotiating the terms of a prospective conservation easement, the landowner and easement holder will now be likely to consider including permanently fixed building areas in the easement, with no opportunity for adjustment in the future, or excluding the same entirely from the easement. If the landowner and easement holder cannot decide on permanently fixed locations within an easement, they can consider listing several alternative building areas with fixed locations to select from later, and extinguish the remainder at that time.

Imagining this world ruled by nonsense, where no changes to permitted uses or reserved rights are ever allowed

246. Land Trust Alliance Conservation Defense Initiative, Pointers for Balancing Risk on Conservation Easement Permitted Structures Following the Full Tax Court Decision in *Pine Mountain Preserve v. Commissioner* (Oct. 28, 2020 update).

247. Timothy C. Lindstrom, *Tax Court Takes an Ax to Conservation Easement Deductions*, Tax Notes Fed., Aug. 24, 2020, at 1410, 1418. *See id.* for the beheading of holders by the Service and Tax Court-inspired distrust of their discretion and oversight, even though the entire statutory and regulatory frameworks of Code §170(h) and Regulation §1.170A-14 are built in reliance on the foundation of holder discretion and oversight:

> By interpreting section 170(h)(2)(C) as it did, the court precludes any flexibility in the location of building envelopes, regardless of the nature and extent of oversight of that location by the easement holder, and regardless of what conditions may be discovered in the future that prevent the use of the initially selected locations.

Id. at 1418.

248. *See* Land Trust Alliance Conservation Defense Initiative, *supra* note 246.

249. *Id.* at 1.

250. *Id.*

251. *Id.*

252. *Id.*

within perpetual conservation easements, and where all potential building rights and areas have to be precisely plotted at the time of the perpetual easement grant, raises a host of constraints and challenges. What if the initial siting of an easement's building area could not take into account the physical attributes of the property, soil stability, water availability, architectural and engineering specifications, or local zoning regulation changes that would later render that site unusable, or usable only with modifications?[253] The Service would likely disallow an easement that permitted adjustments to the original building location based on such constraints, as a violation of perpetuity. Thus, the building area would have to be relinquished by the landowner, a factor not considered by their appraisal, or their estate and family planning. The commonsense, realistic, and practical approach permits adjustment or modification to the original siting *only* with the easement holder's sole discretion examination of impacts to the protected conservation purposes.

What if new information about the property's protected conservation purposes gained from ecological inventories or studies performed after the easement's grant reveals that the permanently fixed building area is on or near sensitive habitat and species, such that the use of the area will contravene protection of the conservation purposes, species perhaps that have moved into a new area to escape climate change?[254] Instead of adjusting the building area or moving it away from the species or habitat to protect the very purposes for which the easement was given, the Service would have the landowners build in the harmful area, or, once again, relinquish the building area in contravention of the easement appraisal and estate and land planning. This again would be in lieu of collective and collaborative review by the landowner and easement holder of possible alternative locations, with the easement holder reserving sole discretion to evaluate and approve an alternate location or adjustment that would not be harmful to the protected conservation purposes.

Nature is dynamic and ever changing. Rivers alter course. New wetlands emerge. Mudslides move mountains. Fires char forests. Water tables drop. Sea levels rise. What if a fixed building area that was once a nonsensitive location becomes host to a newly arrived community of threatened or endangered plant or animal species? Or, what if sea-level rise in coastal areas would cause septic systems to fail, and salt water intrusion into wells would require relocation, what then?[255]

In the land of real and practical application of law above the Service's underworld of contradiction and irrationality, the holder would work with the landowner using its sole discretion to approve adjustments to the building area as necessary to avoid the species or relocate to higher ground without sensitive habit or other protected conservation values. The Service would have the landowner relinquish the site negotiated in good faith and that reduced the value of the taxpayer's donation, or somehow attempt to live with the uninhabitable conditions, instead of permitting appropriate adjustments to allow humans to live in concert with the conservation purposes *as those purposes exist at the time of exercise of reserved rights*. Such adaptability is especially important today, given the national priority of reducing impacts from natural hazards by increasing the resiliency of human communities.[256] Moreover, planning for flexibility and responsiveness in the implementation of the human-built environment within the context of the natural environment acknowledges the vulnerability of each, while striving to protect both.[257]

What if statutory and regulatory changes to the laws and regulations impacting a reserved building site in a fixed area expand a 50-foot floodplain setback at the time of an easement's conveyance to 100 feet in the future, leaving the fixed building area noncompliant with the easement terms and perhaps even the law existing at the time of exercise of the reserved rights?[258] In this case, the Service would not allow shifting of the location of the building area to comply with the relevant laws and regulations based on the easement holder's approval, in its sole discretion, of a new, *compliant* and conservation purpose-consistent location. The result, again, would likely be forced relinquishment of the building site, and complete loss of the value that the donor negotiated in good faith.

What if the physical limitations of the building area dictate relocation based on the discovery that the original site is not buildable or is more intrusive on conservation purposes than originally anticipated, such as by requiring a more intrusive route than expected for access or utility services?[259] If the newly proposed location is more harmful to the protected conservation purposes, then the holder would reject the request, making that determination in its sole discretion. If the newly proposed location was more favorable to the conservation purposes' protection, the holder will eagerly grant this request. Under the Service's no-build, no-alteration, no-adjustment Queen of Hearts regime, either decision would be fatal, regardless of the beneficial impacts to conservation protections resulting from both instances.

What happens if a landowner accidentally builds slightly outside of the prescribed building area, in what amounts to a minor error or transgression with zero conservation impact? The easement holder would have the right to insist that the landowner relocate the building, which may be the best course of action to protect the conservation purposes. On the other hand, courts in equity are generally reluctant to order expensive injunctive remedies if simpler solutions are available.[260] If the location has no impact on conservation purposes, the holder might permit in its sole discretion

253. *Pine Mountain Preserve* Amendment Amicus Brief, *supra* note 151, at 15.
254. *Id.* at 15-16.
255. *Id.* at 16.
256. Patty Glick et al., The Protective Value of Nature: A Review of the Effectiveness of Natural Infrastructure for Hazard Risk Reduction 2 (2020).
257. *Id.* at 7.
258. *Id.*
259. *Pine Mountain Preserve* Amendment Amicus Brief, *supra* note 151, at 16-17.
260. *Id.* at 17.

the building to remain, in concert with a more significant conservation gain.

The conservation gain could be an overall reduction in the size of the building area, a reduction in the height or footprint of the building, or greater protections for a sensitive area elsewhere on the property that demonstrably benefits the public.[261] The resolution of a minor error by the holder using its sole discretion could instead benefit the conservation purposes. The ability to adjust and perhaps shrink a building area, so long as it is consistent with the conservation-purposes standard, is within the easement holder's limited discretion, but likely prohibited by the Service's own rulemaking regarding modifications.

If the Service and the courts prevent landowners and easement holders from even considering the possibility of adjusting or accommodating a building area, this will make the administration of conservation easements problematic, and likely diminish or constrain the continuous protection of conservation purposes over time.[262] Further, the consequences of landowners and easement holders attempting to comply with the Service's arbitrary "Rule 42" approach is just as deleterious and destructive to protected conservation purposes as the examples above. A landowner intending to comply with Tax Court holdings in *Pine Mountain Preserve* and *Carter* and thereby avoid the Service's ire might elect to completely exclude any building areas or buildings from their easement-protected parcel. As one tax practitioner and scholar noted, this turns conservation law and its practical application on its head: "[re]asonable flexibility, allowed by the consistency rules of the Code and Regulations, has been replaced by a new and draconian interpretation of the Code that reservation of development potential violates the perpetuity requirement."[263]

Future development surrounding the protected property will increase the pressure for that parcel to support infrastructure such as utilities, roads, and other attributes of developed properties, of which courts or condemning authorities might avail neighbors or successor owners, out of necessity, such as firebreaks and fire escape routes, or new flood control structures mandated or installed by governments. In this case, the attempt to expunge the protected property of any allowable building causes the no-build parcel to have increased external (and possibly internal, successor owner) pressure for development than it would have had if it had allowed consistent, "non-harmful to protected purposes" building with holder oversight and approval, in its sole discretion.

Instead of operating in a land of reason and plain reading of the law, the Service's mischaracterizations of the Code and Regulations cause the conservation community and Tax Court to find themselves instead in this bewildering world of nonsense rules where the Queen of Hearts indiscriminately orders decapitation over the slightest transgression. This realm permits no Code §170(h)(5)(A)-consistent flexibility in movement of boundaries or building envelopes or buildings, no deviation in proceeds wording even if accomplishing the same result, no amendment clauses of any practical applicability, and no trust in easement holders' decisionmaking in the administration, enforcement, and stewardship of perpetual conservation easements. This is even though such flexibility, adaptation, modification, and decisionmaking embody many necessary components of easement management over perpetuity, and is sanctioned expressly by the U.S. Congress, as discussed in Part Two, Section II in the next issue.

Moreover, boundary adjustment, building area and building modification, and amendment clauses overseen by holders in their sole discretion, using the "no harm to conservation purpose" standard, do not in any way threaten or undermine the duration of an easement, nor detract from its perpetual, qualifying nature. These clauses are no different than enforcement or termination clauses in an easement, which no one argues undermine or detract from its perpetual, qualifying nature. Further, there is nothing in the Code or Regulations to say there cannot be adjustment, modification, or amendment clauses in perpetual conservation easements, or that such clauses must have arbitrary requirements that make conservation-purpose protection *more* difficult.[264]

As long as holders thoughtfully employ modifications in their sole discretion using a conservation-purpose protection standard, adjustment, modification, and amendment clauses should be given the same accord as enforcement, transfer, and extinguishment clauses in easements — that is, acknowledgement that they are there necessarily to guide uses and decisionmaking in the future and over perpetuity. Holders' enforcement, amendment, and use decisions exercised applying the conservation standard of doing no harm, ensure, rather than defy, perpetual-protection-of-conservation purposes. And, as will be shown in Part Two, Section II, Congress vests explicitly such decisionmaking authority in easement holders, to adhere to in the exercise of their best judgment on the public's behalf subject to tax-exempt enforcement based on all the facts and circumstances present at the time that a decision is called for. As the D.C. Circuit points out in *Commissioner v. Simmons,* easement holders who contravene, abuse, or ignore such clauses, and the conservation standard of care, do so at their own peril.[265]

While the Service, conservation community, and Tax Court are trapped in the land below, trying to swallow the Mad Hatter's logic in *Belk* and its progeny, fighting over teacups and cake, real crimes are being committed above ground in syndicated conservation transactions.[266] If the Service and Tax Court would instead follow the plain

261. Riparian or other habitat buffers, public access, view protections, and forest and agricultural land restrictions are a few such benefits that are immediately obvious. *Id.*

262. *Id.* at 18.

263. Lindstrom, *supra* note 247, at 1410, 1415. Lindstrom's stinging rebuke of the Tax Court's erroneous interpretation and application of Code §170(h)(2)(C) in *Carter* and *Pine Mountain Preserve* posits that the Tax Court's "draconian interpretation" has resulted in "unreasonable and unnecessary injustices." *Id.* at 1422.

264. *See generally When Perpetual Is Not Forever*, *supra* note 43; *Understanding* When Perpetual Is Not Forever, *supra* note 43.

265. 646 F.3d 6, 10 (D.C. Cir. 2011).

266. S. Rep. No. 116-44, at 105 (2020).

language and construction of the Code and Regulations, understand the intent behind that language, and practically apply the law as written, they can be freed to end actual abuse that is costing taxpayers billions of dollars.[267]

The Service can be confident that perpetual conservation is being effected and stewarded by holders whose limited discretion is seamlessly bound to their obligation to protect conservation values in perpetuity.[268]

267. *Id.* The Senate Finance Committee concludes in its examination of syndicated conservation transactions that the stability and liquidity of the tax system is being threatened by these costly acts of fraud:

> These types of abusive tax shelters erode the Nation's tax base and sow pessimism among all Americans about the fairness of our tax laws. Our tax system is a self-reporting one . . . In order for this self-reporting system to work and not devolve into a culture of duplicity as the norm, it is critical for taxpayers to generally believe the system is fair—even if a taxpayer does not like paying over his or her hard-earned money to the government, he or she knows his or her neighbors must do so as well. If this understanding breaks down, so too could a culture of compliance in our self-reporting system. If syndicated conservation-easement transactions continue to exist in the form they have over the past decade, they risk not only depriving the government of billions of dollars of revenue but also degrading the general understanding that our Nation's tax laws apply equally to us all.

Id.

268. Lindstrom, *supra* note 247, at 1410.