

# **Understanding the Conservation Easement Controversy: Latest Regulations, Laws, and IRS Actions**

**UT Law 71st Annual Taxation Conference**

by

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## **ABOUT THE SPEAKER**

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**Cases and Rulings.** Hale has participated in over 150 tax cases before the Tax Court, Courts of Appeal, District Courts, and various State Tax Tribunals. In addition to resolving issues through tax litigation, Hale has obtained dozens of favorable Private Letter Rulings for clients from the IRS National Office on procedural, tax, and international issues.

**Education.** Hale holds five college degrees. At the University of Kansas, he earned a B.S., with distinction, M.A., with honors, and J.D. He later received an LL.M. degree in international law, with highest distinction, from the Universidad de Chile in South America. Finally, he obtained an LL.M. degree in tax from the University of Florida, where he was a graduate tax scholar.

**Awards and Recognitions.** During his studies, Hale received several awards for academic excellence, including the prestigious Harry S. Truman Foundation Scholarship, Janice Dawson Quinn Tax Scholarship, Tinker Foundation Scholarship, and Senator James B. Pearson International Fellowship. Hale also served as a graduate editor of the Florida Tax Review and member of the Kansas Journal of Law & Public Policy. Chambers USA, Legal 500, Super Lawyers, Best Lawyers in America, and other groups have recognized Hale as a leader in tax litigation for many years. He has also been inducted into the American College of Tax Counsel.

**Publications.** Hale ranks among the most active tax writers in the country. He has published over 230 major articles in top tax journals, including Journal of Taxation, International Tax Journal, The Tax Adviser, Journal of International Taxation, Journal of Tax Practice and Procedure, Taxes Magazine, Journal of Corporate Taxation, Practical Tax Lawyer, Journal of Passthrough Entities, Tax Management International Journal, Journal of Multistate Tax & Incentives, Tax Notes International, Taxation of Exempts, Practical Tax Strategies, Corporate Business Taxation, Trust and Estates Journal, Journal of Taxation of Financial Products, Real Estate Taxation, and others. He has also published major articles in more than 20 university law reviews, both in the United States and abroad.

**Activities and Affiliations.** Hale has held leadership positions in many professional and civic organizations, including: (i) Journal of Taxation, Editorial Board Member, (ii) IRS-Practitioner Liaison Committee, state bar representative, (iii) Journal of Tax Practice & Procedure, Editorial Board Member, (iv) Georgia Bar Tax Section, President, (v) Georgia Bar Journal, Editorial Board Member, (vi) GSU Low-Income Taxpayer Clinic, Advisory Committee Member, and (vii) Atlanta Bar Tax Section Board Member.

## SOURCES FOR THIS OUTLINE

This outline derives from the following articles written by Hale. If you would like a copy of any of the articles, please send Hale an e-mail at [hale.sheppard@chamberlainlaw.com](mailto:hale.sheppard@chamberlainlaw.com) or call him at 404-658-5441. He would be glad to send you the articles.

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## **I. Introduction**

- There is so much misinformation, hyperbole, distortion, chest-thumping and other “noise” surrounding conservation easement disputes it is difficult to get to the truth.
- In an effort to provide some clarity, this presentation explains the relevant rules for donations, noteworthy enforcement actions, and the very latest in the world of easements, including new regulations, laws and IRS pronouncements.

## **II. Overview of Easement Donations**

### **A. Common Options for Undeveloped Land**

1. Taxpayers with undeveloped real property have several choices, including:
  - a. holding the property for investment, selling it when it appreciates,
  - b. determining how to maximize profitability from the property and do that, regardless of negative effects on the local environment, community, or economy, or
  - c. voluntarily restricting certain future uses of the property, such that it is protected forever for the benefit of society.
2. The third option, known as donating a “conservation easement,” not only achieves the goal of environmental protection, but might also trigger another benefit, tax deductions for donors.<sup>1</sup>

### **B. Conservation Purposes**

1. Taxpayers cannot donate an easement on any old property and claim a tax deduction; they must demonstrate that the property is worth protecting.
2. A donation has an acceptable “conservation purpose” if it meets at least one of the following requirements:
  - a. It preserves land for outdoor recreation by, or the education of, the general public;
  - b. It preserves a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem;

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<sup>1</sup> Section 170(f)(3)(B)(iii); Treas. Reg. § 1.170A-7(a)(5); Section 170(h)(1); Section 170(h)(2); Treas. Reg. § 1.170A-14(a); Treas. Reg. § 1.170A-14(b)(2).

- c. It preserves open space (including farmland and forest land) for the scenic enjoyment of the general public and will yield a significant public benefit;
- d. It preserves open space (including farmland and forest land) pursuant to a federal, state, or local governmental conservation policy and will yield a significant public benefit; or
- e. It preserves historically important land area or a certified structure.<sup>2</sup>

C. Reserved Rights

- 1. Taxpayers memorialize the donation to charity by filing a Deed of Conservation Easement (“Deed”) or similar document.
- 2. In preparing the Deed, taxpayers often coordinate with the land trust to identify certain limited activities that can continue on the property *after* the donation, without interfering with the Deed, prejudicing the conservation purposes, or jeopardizing the tax deduction.<sup>3</sup> These activities are called “Reserved Rights.”

D. Baseline Report

- 1. The IRS will not allow the tax deduction stemming from a conservation easement, unless the taxpayer obtains, before making the donation, “documentation sufficient to establish the condition of the property at the time of the gift.”<sup>4</sup> This is called the “Baseline Report.”
- 2. The Baseline Report may feature several things, including, but not limited to, (i) survey maps identifying the property lines and other contiguous or nearby protected areas, (ii) a map of the area drawn to scale showing existing man-made improvements or incursions, vegetation, flora and fauna, animal breeding and roosting areas, migration routes, land use history, and distinct natural features, (iii) an aerial photograph of the property taken as close as possible to the date of the donation, and (iv) on-site photographs taken at various locations on the property.<sup>5</sup>

E. Value of the Conservation Easement

- 1. The value of the conservation easement is the fair market value (“FMV”) of the property at the time of the donation.<sup>6</sup>

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<sup>2</sup> Section 170(h)(4)(A); Treas. Reg. § 170A-14(d)(1); S. Rept. 96-1007, at 10 (1980).

<sup>3</sup> Treas. Reg. § 1.170A-14(b)(2).

<sup>4</sup> Treas. Reg. § 1.170A-14(g)(5)(i).

<sup>5</sup> Treas. Reg. § 1.170A-14(g)(5)(i).

<sup>6</sup> Section 170(a)(1); Treas. Reg. § 1.170A-1(c)(1).

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