

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 06-1398

**CHARLES F. GLASS and SUSAN GLASS,
Petitioners-Appellees**

v.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant**

**ON APPEAL FROM THE DECISION
OF THE UNITED STATES TAX COURT**

**AMICUS BRIEF ON BEHALF OF LITTLE TRAVERSE
CONSERVANCY AND LAND TRUST ALLIANCE**

**IN SUPPORT OF AFFIRMANCE OF
THE DECISION OF THE TAX COURT**

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I. THE AMICI

Amicus Little Traverse Conservancy (“LTC”) is the donee of the conservation easements in this case. LTC is a tax-exempt nonprofit organization under Internal Revenue Code (26 U.S.C.) (I.R.C.) §170(c), dedicated and committed to preserving land and wilderness in northern Michigan for future generations for conservation, recreation, and educational purposes. Amicus LTC was founded in 1972. LTC has an office at 3264 Powell Road, Harbor Springs, Michigan.

Amicus Land Trust Alliance (“LTA”) is the national umbrella organization for land conservation organizations around the country, committed to building strong land trusts and defending the permanence of conservation easements. Amicus LTA was founded in 1981. LTA represents the interests of 1,100 tax-exempt nonprofits that are its dues-paying members, approximately 70% of whom solicit and steward donations of conservation easements. LTA is a publicly-supported charity under I.R.C. §501(c)(3). LTA publishes *Land Trust Standards and Practices*, ethical and technical guidelines for the operations of organizations that solicit donations of conservation easements or otherwise pursue conservation of private lands. LTA has also published texts including *The Conservation Easement Handbook*, *The Federal Tax Law of Conservation*

Easements, and *Conservation Easement Appraisals*, that are widely used by its members and government conservation agencies. LTA is the largest provider of training to land trusts through an annual national conference, regional conferences, seminars, and through its websites. LTA's main office is at 1331 H Street, N.W. Washington, DC.

Amici LTC and LTA are recognized by their peers as leaders in the private land protection effort in this country.

Amici LTC and LTA have a strong interest in this case. They view donations of conservation easements as critically important for voluntary conservation efforts on privately-owned lands, essential for the success of their charitable purposes. They believe that some of the interpretations of law propounded by Appellant in its brief are both incorrect and potentially extremely harmful to their conservation work and private land conservation efforts around the country.

If the Court grants Appellant's request for oral argument, Amici request the opportunity to be heard as well, given the importance of the opinion of the Tax Court to such land conservation efforts.

The amici have no financial interest in the outcome of this case and are not subsidiaries or affiliates of any corporation or other entity.

II. THE AMICUS BRIEF: A SUMMARY

Our principal concerns about Appellant's brief are as follows.

Appellant's proposed new definition of "relatively natural habitat" under I.R.C. §170(h)(4)(A)(ii) is incorrect, contrary to the plain language of the statute and regulations, and not at all what Congress or the I.R.S. or the Treasury Department had in mind when the statute and regulations were drafted. Appellant misapplies the law and the facts on the question of whether the conservation easements were "exclusively for conservation purposes" under I.R.C. §170(h)(5). Appellant misconstrues the terms of the conservation easements and challenges clear determinations of fact by the trial court. Appellant fails to acknowledge the important role of LTC (and therefore of any similar donee) in its decision to seek out, accept, and monitor the subject conservation easements.

On the critical issue of whether the conservation easements were for the protection of a relatively natural habitat under I.R.C. §170(h)(4)(A)(ii), Appellant challenges the findings of the trial court, which findings are quite clear and fully supported by the record:

Respondent argues that petitioners have not satisfied any of the examples set forth in the regulations. We disagree. LTC's executive director, Thomas Bailey (Bailey), testified credibly that the property is a "famous" roosting spot for bald eagles and that the conservation easements

establish a proper place for the growth and existence of Lake Huron tansy and pitcher's thistle. Bailey also testified credibly that he has toured the property on various occasions, that the habitat on the encumbered shoreline is a proper and normal environment for Lake Huron tansy, pitcher's thistle, and bald eagles, among other species, and that the staff of LTC has seen Lake Huron tansy growing on the property. Ms. Glass testified credibly that she also has seen Lake Huron tansy growing on the property and that she has regularly seen bald eagles there as well. She also testified credibly that at least one of those eagles roosts on a tree growing on encumbered shoreline 1. We also find in the record probative evidence that both Lake Huron tansy and pitcher's thistle are considered threatened species which are worthy of special attention towards the goal of preservation and that LTC, the largest membership-supported nonprofit organization in northern Michigan, has agreed through the conservation easements to attempt to preserve those species by giving them that special attention. (Op. at 37-38, Apx. ____)

Certain matters raised in the trial court and in the government's brief on appeal are no longer at issue and should not be relevant to this appeal: the zoning rules applicable to the Glass property; the existence of other residential developments in the vicinity of the Glass property; and the valuation of the Glass conservation easements.

Three important matters apparently remain at issue and continue to be relevant: (1) the habitat on the subject property that is encumbered by the Glass conservation easements; (2) whether the Glass conservation easements

protect that habitat; and (3) I.R.C. §170(h) and the regulations thereunder, specifically with respect to protection of habitat and the matter of “exclusively for conservation purposes.” A further matter that was raised in the trial court and in the government’s brief on appeal is not at issue but it is highly relevant: the capability of Little Traverse Conservancy to monitor and enforce the Glass conservation easements and any other conservation easements LTC might hold.

We welcome the opportunity to comment on these and other matters raised by this case.

III. SOME BACKGROUND: CONSERVATION EASEMENTS IN THE UNITED STATES TODAY

Conservation easement donations by landowners to qualified charitable organizations, pursuant to the provisions of I.R.C. §170(h), are an important and particularly cost-effective part of the conservation work of a large number of conservation charities, including nationally-known organizations such as Ducks Unlimited, the Rocky Mountain Elk Foundation, and The Nature Conservancy. However, the specialized nature of this field makes it useful to present some background on these donations.

Over the past thirty years, caring landowners and dedicated and effective qualified charitable organizations have used conservation

easements to protect commitments to the land and the quality of life in this country, preserving millions and millions of acres of farmland, forestland, ranchland, scenic property, wildlife habitat, watershed, and other open space with significant public values.

The value of this work has been lauded by the Internal Revenue Service (“Service”), by 11 state governments that have enacted their own state tax provisions to encourage donations of conservation easements, and by the expenditure of hundreds of millions of dollars annually by federal, state, and local governments to purchase such easements from landowners.

The concept of a “conservation easement” is an unfamiliar one even to most landowners. A tax code section that relies for its success on terms such as “relatively natural habitat,” “scenic enjoyment of the general public,” and “significant public benefit” can easily remain mysterious and even bog-like to tax practitioners who do not work with these terms on a regular basis. But I.R.C. §170(h) and conservation easements work for two principal reasons: a clear and understandable body of law, and a community of responsible nonprofit land trusts that is committed to doing the job right.

Since the addition to the I.R.C. of §170(h) in 1980, we have a growing library of federal and state court decisions and private letter rulings issued by the Service construing the rules of §170(h). In spite of the fact that some

of the terms in §170(h) defy bright-line definition, a plain English reading of the law and regulations yields a very workable framework that has been enormously successful in achieving the legislative purposes of §170(h), as laid out in its legislative history. That framework requires donees to make judgments about what conservation is or is not “significant.” Those judgments are certainly subject to review by the Service and the courts. On the question of what is “significant,” however, Appellant’s brief posits novel criteria that are unsupported by the law, conservation science, or conservation practice.

There are two “ingredients” that are necessary to make a conservation easement work. The first is a well-written, clear, unambiguous document that identifies the conservation values to be protected and articulates the reserved rights and prohibited activities for the subject property. The second is a credible, strong, active donee, usually a nonprofit organization called a “land trust”, that has the commitment and the resources to enforce the terms of the conservation easement and will not shirk from doing so. Proper due diligence and care by land trust donees is a cornerstone of the conservation easement effort.

Donees accepting conservation easements also accept responsibility for monitoring the donor’s compliance with the terms of the easement, and

responsibility for enforcing those terms, by court action if necessary, against the donor or any subsequent landowner who violates them. This, too, often requires judgments by the donee. In its brief, Appellant ignores the subject easements' delegation of authority to the donee, and insists that the easements must absolutely prohibit uses which may, in fact, have no impact on the values the easements are intended to protect. There is an unworkable proposition. No matter how severe the prohibitions in an easement document, which is a contract under state law between the donee and the donor, its protections will always depend on the donee's careful monitoring, good judgment, and willingness and ability to enforce those prohibitions.

IV. THE HABITAT: THE SUBJECT PROPERTY THAT IS ENCUMBERED BY THE GLASS CONSERVATION EASEMENTS IS WORTHY OF PROTECTION.

Once again, to quote directly from the conclusions by the trier of fact:

LTC's executive director, Thomas Bailey (Bailey), testified credibly that the property is a "famous" roosting spot for bald eagles and that the conservation easements establish a proper place for the growth and existence of Lake Huron tansy and pitcher's thistle. Bailey also testified credibly that he has toured the property on various occasions, that the habitat on the encumbered shoreline is a proper and normal environment for Lake Huron tansy, pitcher's thistle, and bald eagles, among other species, and that the staff of LTC has seen Lake Huron tansy growing on the property. Ms.

Glass testified credibly that she also has seen Lake Huron tansy growing on the property and that she has regularly seen bald eagles there as well. She also testified credibly that at least one of those eagles roosts on a tree growing on encumbered shoreline 1. We also find in the record probative evidence that both Lake Huron tansy and pitcher's thistle are considered threatened species which are worthy of special attention towards the goal of preservation...(Op. at 37-38, Apx. ___)

Witness Bailey, referenced in the findings of the Tax Court, noted in his testimony that LTC consults with Michigan's leading botanist, who serves on the LTC Board, and that in the case of the Glass conservation easements an expert on piping plovers from the University of Minnesota was also consulted regarding the significance of the Glass property. The Tax Court recognized that LTC exercised its own due diligence and outside expertise was utilized to establish that the Glass conservation easements served important conservation purposes. Appellant offered no testimony and no witnesses even to suggest that this was inadequate, nor did Appellant offer any alternative standard for establishing "significance."

I.R.C. §170(h) and the regulations thereunder set standards for deductibility. The trial court found unequivocally that the property encumbered by the Glass conservation easements had important

conservation characteristics and that the Glass conservation easements protected those conservation characteristics.

V. THE EASEMENTS: THE GLASS CONSERVATION EASEMENTS PROTECT THE HABITAT.

The Glass conservation easements are clear and unambiguous and speak for themselves. The provisions of the Glass conservation easements follow a format that was not uncommon for such documents in the early 1990s and is not uncommon today, that is, stating the “Purpose,” enumerating a number of prohibited activities or restricted uses of the subject properties, and then enumerating uses of the properties that were permitted by the conservation easements, subject to their consistency with the purpose of the conservation easements.

A clear statement of the purpose of a conservation easement is important because the reserved rights must be exercised in a manner that is consistent with the purpose: “...the purpose clause is, in fact, the touchstone of the easement.” The Conservation Easement Handbook, by Janet Diehl and Thomas S. Barrett, Land Trust Alliance and the Trust for Public Land (1988), p. 174. The “Purpose” of both Glass conservation easements is identical:

“1.0 PURPOSE The purpose of this Conservation Easement is to ensure that the scenic and natural resource values of the Property will be retained forever. This Conservation Easement is intended to prevent the use or development of the Property for any purpose or in any manner which conflicts with the perpetual maintenance of these scenic and natural resource values....Grantee accepts this Conservation Easement to conserve the natural resources and scenic values of the Property for the present and future generations....” (emphasis added)

Section 2.0 of both conservation easements begins: “2.0 RESTRICTED USES OF PROPERTY Any activity on or use of the Property that is inconsistent with the purpose of this Conservation Easement is prohibited including, but not limited to. . .” (emphasis added) A comprehensive recitation (no partition or division, no driveways, signs, trash, or surface disturbance, etc.) of prohibited activities follows.

Section 3.0 of both conservation easements begins: “3.0 PERMITTED USES OF THE PROPERTY The Grantors retain all rights arising from their ownership of the Property which are not prohibited by or inconsistent with the Purpose and other provisions of this Conservation Easement, including, but not limited to....” (emphasis added) Reserved rights include the right to sell or convey the property, a limited right to

prune, a limited right to plant trees and shrubs, a right to maintain the existing foot path to the beach, etc.

Section 3.0 (5) reserves “The right to construct, maintain, repair and replace a day shelter, storage shed, scenic overlook deck, patio or similar structures in a manner and location which minimizes interference with the scenic and natural resource values of the Property.” (emphasis added) (It is important to note here that just as boardwalks, shelters, and other structures are used in our National Parks and other protected areas to contain human activity and protect resources, LTC recognizes in its conservation easements that structures can sometimes be useful in protecting conservation values and resources.)

Section 3.0 (6) reserves “The right to construct, maintain, repair and replace a wooden boat house in a manner and location which minimizes interference with the scenic and natural resource values of the Property.” (emphasis added)

Section 4.0 (2) reserves to LTC “The right to prevent any activity on or use of the Property that is or may be inconsistent with the provisions of this Conservation Easement and to require restoration of all areas or features of the Property damaged by such activity or use...”

The balance of the Glass conservation easement documents includes a lengthier enumeration of the enforcement rights given to LTC, certain rules required by I.R.C. §170(h) (and not otherwise relevant to this appeal), and general rules of construction and effect. Further in that connection, Section 15.0 states that “Any general rule of construction to the contrary notwithstanding, this Conservation Easement shall be liberally construed in favor of the purpose of this Conservation Easement, the Grantee, and the Conservation and Historic Preservation Easement Act, MCL 399.251 et seq.”

In short, the Glass conservation easements are carefully drawn, clearly articulate the purpose, clearly limit any activities to activities that are consistent with that purpose, and clearly convey to LTC the right to enforce the Conservation Easements and prevent any activity that might be inconsistent with the expressed conservation goals of the easement. See a further discussion of LTC, below, at VIII.

VI. ‘RELATIVELY NATURAL HABITAT’: THE GLASS CONSERVATION EASEMENTS PROTECT RELATIVELY NATURAL HABITAT AS THAT TERM IS DEFINED IN I.R.C. §170(h) AND THE REGULATIONS THEREUNDER.

To justify its appeal, Appellant challenges the findings of fact in the Tax Court and in addition suggests new readings of I.R.C. §170(h)(4)(A)(ii) that are incorrect and fly in the face of the plain language of the statute, the regulations, and the legislative history. Further, Appellant’s new reading of I.R.C. §170(h)(4)(A)(ii) is well beyond the scope of what was covered or asserted at trial.

Appellant argues that “The regulations provide that, to fulfill the conservation purpose of habitat protection, a conservation easement must protect a habitat where a rare, endangered, or threatened animal or plant ‘normally lives,’” citing for this proposition Treas. Reg. §1.170A-14(d)(1)(ii). (Appellant’s Brief, p. 41).

Appellant also claims that under “Section 170(h) and Treas. Reg. §1.170A-14(d)(3)(i) . . . the easement must protect property that actually is the home to endangered species of flora and fauna.” (Appellant’s Brief, p. 25).

These assertions are simply incorrect. The statute and the regulations do not say this at all. Amici believe it is very important to be clear on what the law states and what the statute and regulations actually require.

Treas. Reg. §1.170A-14(d)(1)(ii) states in its entirety that one of the “conservation purposes” tests includes “The protection of a relatively natural

habitat of fish, wildlife, or plants, or similar ecosystem, within the meaning of paragraph (d)(3) of this section.”

Treas. Reg. §1.170A-14(d)(3) is more expansive. Treas. Reg. §1.170A-14(d)(3) states in relevant part:

(3) Protection of environmental system

(i) In general.

The donation of a qualified real property interest to protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives will meet the conservation purposes test of this section. The fact that the habitat or environment has been altered to some extent by human activity will not result in a deduction being denied under this section if the fish, wildlife, or plants continue to exist there in a relatively natural state. For example, the preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond were a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.

(ii) Significant habitat or ecosystem.

Significant habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial community or aquatic community,

such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact; and natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.

The regulation is an attempt by the tax-regulation writing arm of the federal government to explain terms that do not make their appearance anywhere else in the Internal Revenue Code or the regulations. The regulation is a narrative that helps the reader understand what Congress meant by the term “relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.”

The regulation does not list the only way a donation can meet this test, it lists a number of different ways by example (“Significant habitats and ecosystems include, but are not limited to....”). If Congress had wanted to limit the definition of “relatively natural habitat” to habitat on which an endangered specie of plant or animal lived, Congress could have done that, and certainly could have tied that requirement to federal or state listings of such species. In this connection, note for example the specificity of the definition of “certified historic structure” under §170(h)(4)(B):

(B) Certified historic structure

For purposes of subparagraph (A)(iv), the term "certified historic structure" means any building, structure, or land area which —

- (i) is listed in the National Register, or
- (ii) is located in a registered historic district (as defined in section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.

I.R.C. §170(h) and the regulations make it absolutely clear that “just” any easement on any piece of ground is not enough. First, as an historical matter, the language of §170(h) with respect to the requirements for deductibility of “open-space” easements represented a narrowing of the previous rules (which were clearly confusing). One of the goals of the drafters of §170(h) was to limit the deductibility of open-space easements to those that demonstrated a “significant public benefit.” (See, Small, Stephen J., The Federal Tax Law of Conservation Easements, Land Trust Alliance, 1986, Chapter 6) Second, with respect to the instant matter, the relevant regulation language is clear that a conservation easement must protect “a

significant relatively natural habitat.” The Tax Court found that the Glass conservation easements encumbered significant natural habitat for threatened species.

We agree with the Appellant that interpretation of Treas. Reg. §1.170A-14(d)(3) requires judging whether a habitat is “significant.” We believe that the Tax Court clearly did make such a judgment, based on “credible testimony” on the presence of threatened species on the property.

We agree with Appellant that “not every relatively natural habitat of wildlife or plants is necessarily significant.” But the Tax Court made a perfectly reasonable judgment that the subject easement included habitat that was significant.

It is quite evident in federal law and the conservation practice of federal agencies, including the U.S. Fish and Wildlife Service, the National Park Service, the Environmental Protection Agency, and the Corps of Engineers, that there are many different forms of wildlife habitat that clearly meet a test of significance, even though they may not be habitats for endangered or threatened species. Conservation easements are being used to protect many wildlife resources that need and merit conservation, but which are not by any means “endangered” or “threatened” as defined in the Endangered Species Act. Important elk habitat, important waterfowl habitat,

and many other wildlife habitats can have significant public values. Often, these are habitats for species that urgently need conservation, though they are not “endangered” or “threatened.” The federal government has large and important conservation programs to conserve species neither “endangered” nor “threatened”, including programs pursuant to the Endangered Species Act, 16 U.S.C. §1500 et seq., Fish and Wildlife Conservation Act, 16 U.S.C. §2901-2911, 94 Stat. 1322, Pittman-Robertson Act, 16 U.S.C. §669-669i, 50 Stat. 917, The Duck Stamp Act, 16 U.S.C. §718-718j, Neotropical Migratory Bird Conservation Act, 16 U.S.C. §6101, to name but a few.

These public efforts make it clear that Appellant’s proposal to substitute “unique” for “significant” as the standard for what property qualifies as worthy of protection under 170(h) is misguided.

“Conservation” does not imply, as Appellant asserts on page 40 of its brief, that “the thing to be conserved is unique, rare, endangered or threatened.” We conserve energy; we conserve water, we conserve forestland. None are rare or unique -- but they are “significant”, and their conservation serves important public purposes.

Appellant asserts that “The Tax Court’s interpretation of the regulation’s requirement would permit a tax deduction for any easement, no matter how small, that protected an area in which any animal or plant, no

matter how common, resided.” (Appellant’s Brief, p. 40) We disagree. The Tax Court clearly considered the significance of the property as habitat, discussed it in detail on pages 36-39 of its opinion, and clearly decided it was significant. Appellant’s assertion seems to disregard completely how rare it is for a single property to be habitat for one threatened or endangered species, let alone four.

Appellant further asserts that under “Section 170(h) and Treas. Reg. §1.170A-14(d)(3)(i) . . . the easement must protect property that actually is the home to endangered species of flora and fauna.” (Appellant’s Brief, p. 25) Appellant implies that proof of the physical presence of the species on the property should be required to show that the property is, in fact, habitat for those species. Appellant asserts, “IRC 170(h) does not provide a deduction based on the speculative possibility that the land could one day serve a conservation goal. Rather, the easement must protect property that actually is the home to endangered species of flora or fauna.”

This claim does not follow from §170(h). See Treas. Reg. 1.170A-14(d)(3)(i) and (ii), cited above. Under the regulation, an easement must protect property that is a “significant relatively natural habitat...” Under the regulation, one example of such habitat is “habitats for rare, endangered, or threatened species...” Appellant’s assertion simply misstates the rule.

Further, Appellant's assertion is inconsistent with the science, practice, and law of species conservation. The Endangered Species Act defines "critical habitat" for endangered or threatened species to specifically include lands not currently occupied by those species (see 16 U.S.C. §1532(5)(A)(ii)), recognizing that survival of a species may require protecting additional habitat, beyond what is currently available to a dwindling species.

Biologists classify and recognize habitat for species by a variety of locational, physical, and biological characteristics that need not include the actual presence of the species, but which clearly indicate the habitat's suitability for use by that species. (The website for the US Fish and Wildlife Service's office of Fisheries and Wildlife Conservation states that "Habitat is a combination of environmental factors that provides food, water, cover and space that a living thing needs to survive and reproduce."). <http://www.fws.gov/Fisheries/Topics/Habitat.htm> (July 25, 2006)).

Conservation practice and the regulations under I.R.C. §170(h) recognize the need to protect "buffer zones" to protect important habitats from degradation by adjacent activities, as well as the protection of lands on which those plants or animals may not necessarily reside, but which are necessary to sustain the ecological processes on which those plants and animals depend. This is not an open invitation to the characterization of "any" land as habitat

for endangered species, nor is it open to “speculative possibility that the land could one day serve a conservation goal,” as asserted by Appellant.

No less an authority than the Treasury Department Regulations under §170(h) recognize that the protection of habitat of necessity may involve the protection of more land than where a species “lives,” and that providing a “buffer” to such habitat is important:

Example 2. A qualified conservation organization owns Greenacre in fee as a nature preserve. Greenacre contains a high quality example of a tall grass prairie ecosystem. Farmacre, an operating farm, adjoins Greenacre and is a compatible buffer to the nature preserve. Conversion of Farmacre to a more intense use, such as a housing development, would adversely affect the continued use of Greenacre as a nature preserve because of human traffic generated by the development. The owner of Farmacre donates an easement preventing any future development on Farmacre to the qualified conservation organization for conservation purposes. Normal agricultural uses will be allowed on Farmacre. Accordingly, the donation qualifies for a deduction under this section. (emphasis added) Treas. Reg. §1.170A-14(f), Example 2.

The number one reason for species becoming endangered or threatened is, in fact, loss of suitable habitat¹. The recovery of those species from imperiled status is only possible through the expansion of the territory

¹“In the United States, habitat loss threatens 85 percent of imperiled species.” May 19, 2005 Letter to US Senate Committee on Environment and Public Works from Harvard professor E.O. Wilson and 10 other distinguished biologists. See <http://www.gsenet.org/library/11gsn/2005/g050523.12.html> (July 25, 2006)

they can occupy. Curtailing land protection to encompass only those lands currently occupied by endangered species leaves little or no hope for the recovery of those species from their endangered status.

Further to the meaning of the statute and the regulations, Appellant further asserts that “The Tax Court’s interpretation of the regulation’s requirement would permit a tax deduction for any easement, no matter how small, that protected an area in which any animal or plant, no matter how common, resided.” (Appellant’s Brief, p. 40) Appellant’s assertion is nothing more than a misrepresentation of both the Regulation and the Tax Court’s interpretation thereof.

To the extent any further discussion of what I.R.C. §170(h)(4)(A)(ii) “means” may be helpful, such a discussion does not involve parsing the Internal Revenue Code. The federal tax rules do not care whether the encumbered property is 1 acre or 10 acres or 100 acres or 1,000 acres; the issue is whether protection of the encumbered property will satisfy one of the conservation purposes tests of the statute. In that connection, see Private Letter Ruling 8546112 (conservation easement on $\frac{3}{4}$ acre preserves “scenic enjoyment”); although under I.R.C. §6110(k)(3) a Private Letter Ruling cannot be used or cited as precedent, we offer this as an example. The language “the protection of a relatively natural habitat of fish, wildlife, or

plants, or similar ecosystem” is without precedent in the tax code², but certainly is not without precedent in the world of biology. Credible evidence was presented to the finder of fact that the encumbered property is habitat to significant and important species, and there has been no assertion by Appellant, either at trial or on appeal, that such evidence was not credible. Further, there has been absolutely no evidence presented by Appellant, either at trial or on appeal, to support a claim that no such habitat existed on the protected property.

Finally, Appellant’s own brief, without more, hits all the relevant nails on the head and provides sufficient grounds for the decision of the Tax Court to be affirmed.

The Tax Court next observed that, under Treas. Reg. §170A-14(d)(3)(i), an easement is donated for a qualified conservation purpose only if it is contributed “to protect a significant relatively natural habitat in

² The legislative history on the 1976 and 1977 amendments was virtually non-existent and between 1976 and 1980 the Service was left with regulations to write on the 1976 amendments with absolutely no guidance from Congress, beyond the terms of the statute, about what Congress had in mind.

A good example of the kind of problem this can create was the use in the 1976 statute of the term “natural environmental systems.” Nowhere in any of the limited legislative history is there the slightest explanation of what Congress meant by the term, although “natural environmental systems” is used repeatedly. The true story has been waiting to be told.

According to one of the draftsmen of the 1976 statute (which was first introduced in Congress as part of the proposed Environmental Protection Tax Act of 1972), a joint Treasury Department – Council on Environmental Quality Task Force had been meeting in the early 1970’s to discuss new tax incentives for conservation. Late one afternoon, it is understood, the Treasury Department called and insisted that it receive from the task force a draft of legislation to be introduced the next day (or shortly thereafter). The term “natural environmental systems” was written into the proposed statute with some vague feeling about what it meant but with no explanation, under the assumption that at some later date “someone would explain it.” The amendment, with “natural environmental systems” in it, unexplained, passed the Senate by a 94-2 vote. Small, The Federal Tax Law of Conservation Easements, Land Trust Alliance (1986), p. 4-3.

which a fish, wildlife, or plant community, or similar ecosystem, normally lives.” (R. 58 Opinion at 36, Apx. p.____.) The court stated that it “read sec. 170(h)(4)(A)(ii) to mean that the protection of a relatively natural habitat of wildlife or plants, in and of itself, is a significant conservation purpose within the intent of the statute.” (*Id.* At 39 n. 17, Apx. p.____.) The court held that taxpayers satisfied Treas. Reg. §1.170A-14(d)(3)(i), observing that, according to LTC’s executive director, Thomas Bailey, “the property is a ‘famous’ roosting spot for bald eagles and that the conservation easements establish a proper place for the growth and existence of Lake Huron tansy and pitcher’s thistle.” (*Id.* at 37, Apx. p.____.) The court further observed that both Bailey and Ms. Glass testified that she saw bald eagles there, and that “at least one of those eagles roosts on a tree growing on encumbered shoreline 1.” (*Id.*) The court concluded that “[i]n its natural undeveloped state, [the encumbered shoreline is a ‘relatively natural habitat’ for a community of Lake Huron tansy, of pitcher’s thistle, and of bald eagles,” and that “[e]ach of the conservation easements will therefore protect and preserve significant natural habitats by limiting the development or use of the encumbered shoreline.” (*Id.* at 39, Apx. p. ____.) The court further held that the “contributions of the conservation easements operate to protect or enhance the viability of an area or environment in which a wildlife community and a plant community normally live or occur” in that “[b]oth portions of encumbered shoreline also have natural values that make them possible places to create or promote the habitat of Lake Huron tansy as well as the habitat of bald eagles.” (*Id.* at 39, Apx. p.____.) (Appellant’s Brief, p. 20-21).

**VII. “EXCLUSIVELY FOR CONSERVATION PURPOSES”:
THE GLASS CONSERVATION EASEMENTS ARE
EXCLUSIVELY FOR CONSERVATION PURPOSES
UNDER I.R.C. §170(h) AND THE REGULATIONS
THEREUNDER.**

Appellant asserts that the Glass conservation easements do not protect the conservation values on the encumbered property in perpetuity because of some of the reserved rights in the Glass conservation easements. As noted above, the reserved rights in the Glass conservation easements were fully consistent with the protection of the habitat in perpetuity, and the fact that adjacent property owned by Mr. and Mrs. Glass was not under easement is irrelevant under I.R.C. §170(h).

The reserved rights in the Glass conservation easements were fully consistent with the protection of the habitat in perpetuity. Appellant claims that the easements were “riddled with retained rights that allow for development inconsistent with the asserted conservation purpose.” (Appellant’s Brief, p. 51-52) Appellant fails to mention, however, that the exercise of the reserved rights it complains of was clearly restricted, by the terms of the easements, to “a manner and location which minimizes interference with the scenic and natural resource values of the Property.” It is the job of LTC to see to it that any reserved rights are carefully exercised. Appellant also takes the position that the easements produced no net

conservation benefit when the donors' reserved rights are taken into consideration. (Appellant's Brief, pp. 53-54) The Tax Court held to the contrary. In addition to the implausibility of the government's assertion, the Regulations recognize that it is inherent in the nature of a limited or partial interest, such as a conservation easement, that substantive rights are retained by the grantor. Treas. Reg. §1.170A-14(b)(2). See I.R.C. §2031(c)(5)(B), clearly recognizing this point by virtue of its rule that certain "retained development rights" in a conservation easement may be terminated in connection with estate tax valuation of the encumbered property.

Limiting the exercise of certain reserved rights in a conservation easement is not uncommon and certainly is appropriate and acceptable. Further, while Private Letter Rulings issued by the Service may not be cited or used as precedent, it is instructive on this general point to see PLR 9632003 (conservation easement on a ranch; "Where Donee approval is not required, such as the reserved rights to construct additional associated improvements and to engage in limited commercial activities on the Ranch premises, the deed of easement provides that these activities must be compatible with the protection of the conservation values of the Property, have a low level of impact and intrusion on the Property, be environmentally sound, and not be inconsistent with the purpose of the easement."); and PLR

9537018 (numerous reserved rights; “Taxpayer’s timber harvesting and other potential activities (constructing buildings or roads) will in some cases result in dislocation of wildlife. However, the property will contain enough forested areas so that wildlife dislocation resulting from Taxpayer’s activities will be temporary.... Consequently, despite the dislocation of wildlife that such activities entail, we conclude that the activities do not impair significant conservation interests.”)

Under I.R.C. §170(h)(1)(c), the “contribution” of a conservation easement must be “exclusively for conservation purposes.” The contribution to LTC had conservation as its sole purpose. Compatible non-conservation uses on the encumbered property are not ruled out by that provision, as Appellant appears to maintain. Reported conservation easement cases are replete with reserved “non-conservation” rights. See, i.e., Johnston v. Commissioner, T.C. Memo 1997-475 (reserved rights to carry on extensive ranching activities), Fannon v. Commissioner, T.C. Memo 1989-136 (reserved rights to carry on agricultural activities).

Another court has squarely addressed the issue of “exclusively for conservation purposes.” In this connection, see the following:

Plaintiff transferred the scenic easement to the Conservancy to preserve the scenic quality of the subject property. The easement instrument conveyed by plaintiff grants the Conservancy the right to "enforce by

proceedings at law or in equity the covenants [of the instrument], including, but not limited to, the right to require the restoration of the Protected Property to its condition at the time of the grant. . . ." The easement also grants the Conservancy "[t]he right to enter the protective property at all reasonable times for the purpose of inspecting the Protected Property to determine if the Grantors are complying with the covenants and the purposes of this grant." . . . Further, plaintiff conveyed the easement to a charitable organization whose principle purpose is to preserve and protect land which has scenic and aesthetic value. /10/ [footnote omitted] . . . The Conservancy acquired plaintiff's scenic easement in furtherance of established preservation goals. The Court, therefore, determines that the scenic easement conveyance served an exclusive conservation purpose. McClennan v. Commissioner, 24 Cl. Ct. 102, 107 (Cl. Ct. 1991); *aff'd.*, 994 F2d 839 (Fed. Cir. 1992).

In the context of a different but related tax code section, we note that I.R.C. §501(c) states that, for an organization to be exempt from tax, it must be organized and operated "exclusively" for an exempt purpose.

Exclusively does not, however, mean "solely". For example, the organizational test for exempt organizations at Treas. Reg. §1.501(c)(3)-1(b)(1)(iii) expressly recognizes that an organization may be empowered through its organizational documents to carry on non-exempt purpose activities as long as they are an "insubstantial part of its activities".

Similarly, under the Regulations' operational test at §1.501(c)(3)-1(c)(1), "an organization will be regarded as 'operated exclusively' for one or more exempt purposes only if it engages primarily in activities which accomplish

one or of such exempt purposes specified in section 501(c)(3).” Emphasis added. As noted by Bruce Hopkins, “It is clear that the term exclusively as employed in this context does not mean solely, but rather primarily. . . . [T]he law could not reasonably be interpreted in any other way,” citing by example the conduct of unrelated business activities. Bruce Hopkins, The Law of Tax Exempt Organizations, Eighth Edition, pp. 76 - 77. The concept of “private benefit”, in which some collateral, incidental, non-exempt benefit may be accorded others, is another example of deviation from a brightline construction of “exclusivity”.

In addition, in spite of Appellant’s assertion to the contrary, the fact that the Glasses owned other property not encumbered by the conservation easements is simply not relevant to the determination of whether or not the conservation easements qualified under I.R.C. §170(h).

Appellant cites Treas. Reg. §1.170A-14(g)(1) for the proposition that the deductibility of a conservation easement must take into consideration the possible future development of the neighboring land. In this connection, citing this regulation section, Appellant claims, “Contrary to the Tax Court’s reading, for an easement to *protect* a conservation purpose in perpetuity, ‘any interest in the property retained by the donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions (...)

that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.” (Appellant’s Brief, p. 55-56)

Appellant once again has taken snippets of a larger rule in the regulations and has misstated that rule. Here is Treas. Reg. §1.170A-14(g)(1) in its entirety:

g) Enforceable in perpetuity.

(1) 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. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution. (emphasis added)

The rule in the regulation clearly refers to “legally enforceable restrictions” on the property that is encumbered by the conservation easement, not other property, whether or not such other property is owned by the donor. The regulation gives the example of recording to illustrate what is meant by the term “legally enforceable restrictions”; clearly, the example of recording would be meaningless if the regulations referred to

other property unencumbered by the easement. See Satullo v. Commissioner, T.C. Memo 1993-614 (easement not enforceable in perpetuity because other security interests were recorded prior to the conservation easement, citing Treas. Reg. 1.170A-14(g)(1)).

Further in this connection, see Clemens v. Commissioner, T.C. Memo 1992-436, in which the donors owned 140 acres, developed the bulk of the property, and conveyed a conservation restriction on 40 acres. Despite the residential development on the immediately abutting non-conserved 100 acres, the IRS acknowledged that the easement met all requirements under I.R.C. §170(h). Furthermore, in Johnston v. Commissioner, T.C. Memo 1997-475, a landowner donated a conservation easement on 4,898 acres of an almost 9,000-acre ranch. Again, there was no discussion whatsoever of unencumbered property in the context of qualification under I.R.C. §170(h). See also PLR 9218071, concerning a conservation easement on an approximately 500-acre tract. This ruling notes that “The taxpayer has transferred a restrictive covenant to X in perpetuity that largely restricts future development, but permits the taxpayer and his successors to make residential use of several small tracts that are excluded from the covenant,” but has no further discussion of this point. Similarly, PLR 9318017

involved a partnership that conveyed a conservation easement on 485 out of a total of 535 acres the partnership owned.

The regulations do in fact clearly contemplate that an easement might encumber only a portion of the property owned by the easement donor, but treat the matter solely as a valuation issue. Treas. Reg. §1.170A-14(h)(3) states, in relevant part, “The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor and the donor's family (as defined in section 267(c)(4)) is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction.” Put another way, the point of the rule is this: if a donor encumbers only a portion of the donor’s property, the deduction must reflect value actually given up by that donor. This rule implicitly recognizes that contiguous unencumbered property owned by the easement donor could have additional value if developed; that is dealt with not as a qualification issue but as a valuation issue.

Finally, Appellant suggests that whether the donation of a conservation easement meets the requirements of I.R.C. §170(h) should depend on what activities are happening on other property, in the vicinity of the donor’s property, that is not owned by the donor! (Appellant’s Brief, pp.

47-48). There is not a word in I.R.C. §170(h) and the regulations, and there is not a hint of a suggestion, to support this astounding claim. I.R.C. §170(h), and its predecessor, were added to the tax code to encourage the protection of property with important conservation values. The authorities are clear that qualification under I.R.C. §170(h) is determined by whether the conservation easement on the encumbered property meets the relevant rules, without regard to any activities on adjacent or other property owned by the donor. See, i.e., Clemens v. Commissioner and Johnston v. Commissioner, cited above. Appellant’s suggested new rule would mean, for example, that a conservation easement on habitat for endangered species would not qualify for a deduction if there were a subdivision or shopping mall next door, failing to recognize that such habitat existed in spite of the fact of abutting development! Perhaps this is why we have been unable to find any relevant authority that supports the strained interpretation suggested by Appellant.

VIII. THE DONEE: LITTLE TRAVERSE CONSERVANCY IS A “QUALIFIED ORGANIZATION” THAT MEETS AND EXCEEDS THE RULES OF I.R.C. §170(h)(3) AND THE REGULATIONS THEREUNDER.

The requirement that the donee of a “qualified conservation contribution” be a “qualified organization” is found in I.R.C. §170(h)(1)(B)

and §170(h)(3). This requirement that the organization be classified as a certain type of non-private tax-exempt entity is amplified in Treas. Reg. §1.170A-14(c). There it is stated that the organization must have a commitment to protect the conservation purposes of a donation and have the resources to enforce restrictions. We submit that if an organization such as LTC satisfies those requirements and accepts the role of donee-holder of a conservation easement, it is fair and reasonable for a reviewing court to grant some degree of deference to the organization's evaluation of the donation as having conservation values worthy of protection. That is consistent with what the statutory requirement of a "qualified organization" is intended to accomplish.

It is not disputed that LTC has the commitment and the resources to accept, monitor, and enforce conservation easements. The Tax Court noted that LTC "is the largest membership-supported nonprofit organization in northern Michigan," and that "LTC's endowment fund from 1992 through 1995 was between \$1.25 and \$2.5 million." LTC does in fact monitor and enforce every easement every year. The matter of monitoring the Glass conservation easements was discussed at trial; although Mr. Bailey did concede that written reports for all such visits were not in the LTC files, he

noted a number of times that all easements were monitored annually.

(Thomas Bailey TR at 53, 57, 65, 84, 94)

LTC takes its responsibility very seriously and works to ensure that its conservation easements comply with the law. LTC notes the following:

Staff expertise: LTC employs professional staff knowledgeable in their fields. In connection with the Glass conservation easements, Land Protection Specialist Sally Churchill (who testified in Tax Court) was an attorney with a degree from University of Michigan Law School, and also had a master's degree in the field of land conservation from Tufts University. Mr. Bailey is a former Ranger with the U.S. National Park Service, served six years with the Michigan Department of Natural Resources, and had been executive director of LTC for eight years at the time the Glass conservation easements were donated. Mr. Bailey has a Bachelor of Science degree from Michigan State University in Park and Recreation Resources and pursued graduate studies (no degree) in land use, resources economics and environmental law.

Board expertise and oversight: LTC's Land Protection Committee and Board of Trustees, which review LTC projects, include people who have considerable expertise in their fields. At the time of the Glass conservation easements, the Board included Dr. Edward G. Voss, author of the Michigan

Flora (published by Cranbrook Institute of Science and University of Michigan Herbarium, First Edition 1972) and the foremost botanist in the state. Mr. Bailey referred to his consultation with Dr. Voss in his tax court testimony. (Thomas Bailey TR at 79, Apx. ___)

Outside experts: LTC consults with other experts when appropriate. In the instant case, LTC conferred with Dr. Francine Cuthbert of the University of Minnesota who was the foremost authority doing work with Piping Plovers in the area. This consultation was referenced by Mr. Bailey in his tax court testimony. (Thomas Bailey TR at 80, Apx. ___)

Cooperation with local authorities: At the time of the Glass conservation easements, LTC had been working cooperatively with Readmond Township and Emmet County on public access and land conservation issues and helped to create public parks that protected resources and provided recreational opportunities. Mr. Bailey referred to the Readmond Township park during his Tax Court testimony. (Thomas Bailey TR at 76, Apx. ___)

Collaboration with State Programs: LTC played a key role in working with the Michigan Department of Transportation to create Michigan's Heritage Route Program and provided the resource inventory which was used to designate M119 as a Heritage Route in Michigan. (Part of the Glass

property is directly adjacent to M119 and protected along this scenic corridor, as noted in Mr. Bailey's Tax Court testimony. (Thomas Bailey TR at 61, Apx. ____, and TR at 87, Apx. ____)

Structures and reserved rights: LTC carefully considers the allowance of structures in protected areas. As noted above, boardwalks, shelters, and other structures are used in our National Parks and other protected areas to contain human activity and protect resources, and LTC recognizes that structures can sometimes be useful in protecting conservation values and resources. Also as noted above, the Glass conservation easements include limiting language in the sections allowing structures requires that these minimize interference with the natural values of the Glass property.

Endangered/Threatened Species: LTC has experience with protecting land that harbors the Pitcher's Thistle, Lake Huron Tansy, Piping Plover, and Bald Eagle along the bluffs north of Harbor Springs. LTC had undertaken a number of such projects at the time of the Glass conservation easements, and continues to protect land along this important and sensitive corridor as part of LTC's ongoing effort to protect the natural integrity of this unique Great Lakes ecosystem and fragile area. LTC has collaborated extensively with the Michigan Natural Features Inventory. These species were discussed at trial. (Thomas Bailey TR at 63, 72, 76, 77, 79, 80, Apx. ____)

LTC's good reputation and standing in the community happens because it takes very seriously its responsibility to its donors and its members and to the community at large. In the instant case LTC made a good faith judgment based on due diligence and consultation with experts that it was a good idea to ask for and accept the Glass conservation easements.

Appellant claims that "As a general matter, from a donee's perspective, the donation of any easement will further its purpose." (Appellant's Brief, p. 27). This is clearly not true. These are not donations of cash or stock, which can be used in any one of dozens of ways to further a charity's tax-exempt purposes. A conservation easement has to further those purposes by virtue of the specific properties of the land and the specific protections provided by the easement. The Tax Court rightly considered this and concluded that "LTC's holding of the conservation easements... is directly related to its tax-exempt purpose." (Tax Court opinion, page 41).

Over its history, LTC has turned down many conservation easements that were offered to it, and would not consider taking any conservation easement on any property, no matter the size of the property, that did not protect unique and important features. As the record makes clear, LTC accepted the Glass conservation easements because they involved a unique

convergence of several factors: (1) the subject property harbored actual endangered/threatened species; (2) the subject property provided habitat for additional endangered/threatened species, including the Piping Plover; and (3) the subject property included bluff structures that Emmet County has recognized as unique and worthy of protection subsequent to the donation of the Glass conservation easements. (See, Emmet County (Michigan) Zoning Ordinance: Section 2208 (High Risk Erosion and Environmental Areas) and Section 2209 (Shoreline Bluff Protection)).

The Tax Court clearly had confidence that LTC took these easements because the Glass conservation easement protected values important to LTC, and that, in carrying out LTC's mission, LTC would continue to protect those values.

IX. WE ENCOURAGE THE GOVERNMENT'S EFFORTS TO CRACK DOWN ON "BAD" CONSERVATION EASEMENTS.

In Notice 2004-41, I.R. 2004-46, regarding improper deductions for conservation easement donations, the IRS announced its intention to take a more careful look at certain conservation easement transactions. We were pleased to see this affirmative enforcement step, particularly the following from the Notice: "In addition, this notice advises promoters and appraisers

that the Service intends to review promotions of transactions involving these improper deductions, and that the promoters and appraisers may be subject to penalties.”

We were also pleased to see the result in the case of Turner v. Commissioner, 126 T.C. No. 16 (2006), in which the Tax Court appropriately denied a deduction for a purported “conservation easement” by a Northern Virginia real estate developer that failed to protect conservation values.

It is clear that there have been abuses in the conservation easement field, and we encourage the I.R.S. to continue its enforcement efforts, especially with respect to the fairly small number of “promoters and appraisers” we believe to be responsible for the vast majority of such abusive transactions. In that larger context, we have a difficult time understanding why the government is spending such an inordinate amount of time on the instant case. We think all parties to the instant case agree there is no such thing as a “good” corporate tax shelter; see., i.e., Long Term Capital Holdings v. United States, 330 F. Supp. 2d 122 (D. Conn. 2004), affirmed Sept. 27, 2005, by the U.S. Court of Appeals for the Second Circuit (Long Term Capital Holdings LP v. United States, 2d Cir., No. 04-5687-cv, 9/27/05).

But the Tax Court and the I.R.S. clearly understand that there is such a thing as a “good” conservation easement; see, i.e., Stotler v. Commissioner, T.C. Memo 1987-275; Johnston v. Commissioner, T.C. Memo 1997-475; “When conservation easements are appropriately used, they bring real and enduring benefits to the American public. They can safeguard – and have safeguarded – fragile ecosystems, critical watersheds, land bordering state and national parks, and stunning views. We value this use of conservation easements. I want to do nothing at the IRS to hinder the continued and appropriate donation of conservation easements to provide these gifts to the public.” Remarks of Steven T. Miller, Commissioner, Tax Exempt and Governmental Entities, Internal Revenue Service, before the Spring Public Lands Conference, March 28, 2006, Washington, D.C. Website of Land Trust Alliance, http://lta.org/publicpolicy/irs_miller_032806.htm (July 25, 2006).

The Glass conservation easements are “good” conservation easements: they are clearly written, protect significant habitat, and convey monitoring and enforcement rights to a donee in very good standing.

X. CONCLUSION

The decision of the Tax Court should be affirmed.

Date: _____

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CERTIFICATE OF COMPLIANCE

This brief contains 9757 words. Amici have requested permission of the court to file this brief, in excess of the limitations of FRAP 29(d), because of the importance and complexity of the issues and the fact that Amici have submitted one brief rather than two separate briefs.

This brief complies with the typeface requirements of FRAP 32(a)(5) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Date: _____

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