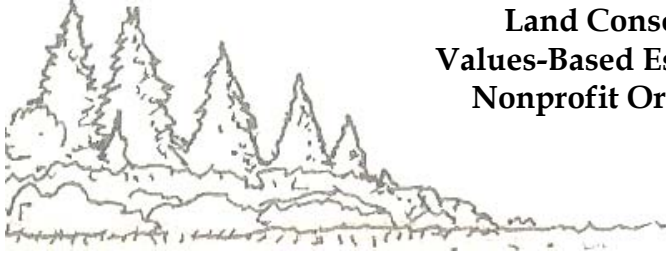


## Robert H. Levin - Attorney at Law



Land Conservation  
Values-Based Estate Planning  
Nonprofit Organizations

94 Beckett Street, 2<sup>nd</sup> Floor  
Portland, Maine 04101  
Phone and Fax: 207-774-8026  
[rob@roblevin.net](mailto:rob@roblevin.net)  
[www.roblevin.net](http://www.roblevin.net)

### Memorandum

TO: Russ Shay, Director of Public Policy, Land Trust Alliance

FROM: Robert H. Levin

RE: Legal Arguments in Glass v. Commissioner

DATE: July 16, 2007

---

### Background

You have asked me to prepare a comprehensive memo analyzing all of the habitat-related legal arguments raised before the Tax Court and the Sixth Circuit in *Glass v. Commissioner*, 124 T.C. No. 16; No. 17878-99 (2005), affd. 471 F.3d 698 (6<sup>th</sup> Cir., 2006), with a particular focus on how the two courts did (or did not) dispose of those arguments. One purpose of this Memorandum is to anticipate how *Glass* may be useful to both taxpayers and the Internal Revenue Service (IRS) in pending and future litigation IRS might bring against other conservation easement donors. A second purpose is to distill lessons learned from *Glass* so that the Land Trust Alliance may better inform its members how to prevent future challenges from IRS.

In preparing this Memorandum, I have reviewed all of the Tax Court and Sixth Circuit briefs, the Sixth Circuit oral arguments, the Tax Court transcript, and the two opinions. Although I was the principal author of *Glass*' appellate brief, I have attempted to remain as objective and dispassionate as possible in evaluating the arguments posed by myself and the other parties.

## **General Reflections**

Neither the Tax Court opinion nor the Sixth Circuit opinion delve deep into a nuanced analysis of the habitat issues. For the most part, the Sixth Circuit simply pointed to the Tax Court's conclusions and deemed them to be legally sound and factually well-supported. Both courts treated *Glass* as an easy case, in which deep parsing and discernment were not required. The terms of the conservation easements and the trial testimony demonstrated clearly that the easements met the "significant relatively natural habitat" standard, and detailed analysis was not considered necessary. This is not to say that the discussion sections of the opinions were superficial or absent, but neither were they exhaustive, especially the Sixth Circuit's.

In some ways, the easy win for the taxpayers in *Glass* is helpful for future taxpayers litigating habitat issues against IRS, as the courts held soundly for the Glasses on less-than-ideal facts (a small parcel with significant reserved rights). On the other hand, the *Glass* case had almost ideal facts in terms of the threatened and endangered species documented on the protected property. The protected property was host to at least three and potentially four different endangered or threatened species (bald eagle, pitcher's thistle, Lake Huron tansy, and possibly piping plover). The testimony on these species was credible and copious, and not seriously challenged by IRS. However, there are many conservation easements that recite habitat protection as a purpose of the easement, but where no rare, endangered, or threatened species can be, or in fact are, identified on the protected property. Because the Tax Court and the Sixth Circuit could pick from the low-hanging endangered and threatened species fruit in *Glass*, they did not have to resolve many of the secondary and tertiary habitat issues, as discussed below. In other words, *Glass* was such an easy case for the two courts that it might not be all that useful as precedent for a taxpayer with a more ambiguous set of habitat facts.

It is helpful to keep in mind from the outset that the habitat issues did not play a leading role in the Tax Court trial. In fact, the Glasses' and IRS' attention prior to and throughout the trial was focused on the open space issues, not the habitat issues. At the end of the trial, Judge Laro had to ask the Glasses to confirm in a post-trial brief that they were relying on the habitat test as well as the open space test. Transcript at 630. Each party's post-trial briefs, limited to 20 substantive pages, discussed the habitat test, but on an equal footing with the open space test. It is probably fair to say that Judge Laro surprised both parties when his opinion addressed only the habitat test and not the open space test.

What this indicates is that IRS did not pick a fight over habitat. Rather, it picked a fight over open space and wound up in a fight over habitat. Having lost that fight so decisively before both the Tax Court and the Sixth Circuit, it is curious as to why IRS is continuing to invoke the habitat issues in pending cases in Colorado and other states. In any event, I would advise all taxpayer litigants to prepare to claim qualification under both the habitat and open space conservation purposes test of I.R.C. § 170(h) (and the public recreation or historic preservation tests, of course, if applicable). To prepare an open space claim, one should carefully read *Turner v. Commissioner*, 126 T.C. No. 16 (May 16, 2006), as well as the relevant treasury regulations and the various IRS Private Letter Rulings concerning the open space test.<sup>1</sup>

---

<sup>1</sup> Those PLR's known to this author are: PLR 8140002; PLR 8233025; PLR 8243125; PLR 8248069; PLR 8302085; PLR 8313123; PLR 8418032; PLR 8422064; PLR 8428034; PLR 8428037; PLR 8450065; PLR 8518024; PLR

## **(1) Habitat Arguments**

### **(a) “Significant” habitat**

*Argument posed by Glass, Government, and amici: Habitat must be significant to qualify under I.R.C. § 170(h)(4)(A)(ii).*

*Disposition: Held by the Tax Court and affirmed by Sixth Circuit.*

There really was no argument between IRS and the Glasses as to whether habitat must be “significant” in order to meet the habitat conservation purposes test of I.R.C. § 170(h)(4)(A)(ii). IRS emphatically claimed that the Tax Court effectively had read the word “significant” out of its reading of the regulations, and held that any “relatively natural habitat” is significant. In fact, this claim was one of the main arguments of its appellate briefs. During the appeal period and even now, I find it difficult to understand how IRS reached this conclusion. IRS focused on an ambiguous footnote in the Tax Court Opinion, and appeared to read much more into it than was meant.

In any event, the Glasses conceded in their Tax Court post-trial brief and in his Appellee Brief that qualifying habitat indeed had to be significant, for the regulation on this point is undeniable: “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. *Treas. Reg. § 1.170A-14(d)(3)(i)*(emphasis added). Glass Post-Trial Brief at 7; Appellee Brief at 25. Amici Little Traverse Conservancy and Land Trust Alliance also agreed on this point. *Amici Brief at 26*. Thus, everyone was in agreement that, regardless of what the Tax Court had intended to say, habitat must be significant in order to meet the habitat conservation purposes test.

Therefore, it is no surprise that the Sixth Circuit confirmed that qualifying habitat must be significant, stating “While it is true that the relatively natural habitat where a wildlife or plant community normally lives must be significant to meet the “conservation purposes” test...” 471 F.3d 698, 708. The Sixth Circuit did not dwell on this point, or seriously engage IRS’ argument that the Tax Court had ignored the significance requirement. Rather the Sixth Circuit simply made the point in passing.

### **(b) Legal standard for “significance”**

*Argument posed by amici: Habitat may be significant even though not host to endangered, threatened, or rare species.*

---

8544036; PLR 8546112; PLR 8605008; PLR 8623037; PLR 8626075; PLR 8638012; PLR 8652013; PLR 8711054; PLR 8713016; PLR 8722047; PLR 8810024; PLR 9052028; PLR 9603018; PLR 9736016; PLR 199952037 (also released as PLR 20002020); PLR 200418005. Many of these are discussed in *The Federal Tax Law of Conservation Easements*, Stephen J. Small (Land Trust Alliance, 1986) and its three supplements.

*Argument supposedly posed by Government: Only habitat for endangered, threatened, or rare species qualifies as significant.*

*Disposition: None.*

The regulations are clear that habitat for “rare, threatened, or endangered species” is but one example of significant habitat. § 1.170A-14(d)(3)(ii). In its appellate briefs, in the course of advancing other arguments, IRS included several statements that could be read to suggest that the only way for habitat to be significant is if it hosts rare, threatened, or endangered species. For example, at one point IRS writes 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,’” IRS Appellant Brief at 41. IRS also states that a qualifying habitat easement “must protect property that actually is the home to endangered species of flora and fauna.” IRS Appellant Brief at 25. It is not clear to this author whether IRS was simply using these terms as shorthand, or whether they were intentionally attempting to tighten the standard for significant habitat more narrowly than as stated in the regulations. Even under the more charitable interpretation, however, IRS’ statements could have set up the Sixth Circuit to mis-quote the correct standard.

The amicus brief directly challenged IRS on this purported sleight-of-hand. Amicus Brief at 22-26. Amici emphasized that there are many kinds of wildlife habitat that are not “rare, threatened, or endangered” but that still merits significance. For example, elk and waterfowl species are not necessarily federally listed, but for various policy reasons their habitat is worthy of protection and therefore should meet the conservation easement significance standard.

The Sixth Circuit did not expressly dispose of this argument one way or the other. Instead, the Sixth Circuit (following the Tax Court) focused on the evidence showing that specific threatened and endangered species did in fact exist on the protected property. However, the opinion did note that habitat for rare, threatened, or endangered species was only one example of significant habitat under the regulations, suggesting that other kinds of habitat could also qualify. 471 F.3d at 708. In any event, I would be surprised if IRS attempts to make this argument again, and it seemed to signal as much by its December 18, 2006 letter to the Land Trust Alliance.

(c) “High quality examples of terrestrial community or aquatic community”

*Argument posed by Glass on appeal: Old growth white pine community is a high-quality example of a terrestrial community.*

*Disposition: None.*

One of the specific examples of significant habitat mentioned in the regulations are “natural areas that represent high quality examples of a terrestrial or aquatic community.” Treas. Reg. § 1.170A-14(d)(3)(ii). In their post-trial brief, the Glasses argued that the vegetation on the bluff was a “relatively intact forested ecosystem,” and the easements themselves used this same language. Glass Post-Trial Brief at 10. Nevertheless, the Tax Court focused on the specific

endangered and threatened plant and animal species in concluding that the easements protected significant habitat. On appeal, the Glasses developed their argument a bit further by specifically mentioning the trial testimony's references to old growth white pine trees on the protected property. In particular, they claimed that the old-growth community of white pines was a "high quality example of a terrestrial community." Appellee Brief at 28. They posed this argument primarily as a backup to the rare, threatened, and endangered species argument, and did not invest a great deal of time or energy in it. IRS argued in its reply brief that there was no evidence that these trees were on the protected property, as opposed to the unencumbered part of the Glasses' property. IRS Reply Brief at 8. The Sixth Circuit did not rule on this argument, and, following the Tax Court, focused on the endangered and threatened plant and animal species.

In future cases, the "high quality" example in the regulations is perhaps the best way to argue that significant habitat exists if there are no rare, endangered or threatened species on the protected property, especially if there is no nearby park or preserve land, which is the other example listed in the regulations. Although by definition these examples are not exhaustive, a taxpayer litigant nevertheless will have to come up with some rationale for explaining why a given habitat is significant. The high-quality example seems sufficiently broad as to encompass a variety of different kinds of habitat, including those mentioned in the amicus brief, such as elk habitat and waterfowl habitat. It would appear to be much easier to argue that a certain habitat is a high-quality example of a terrestrial or aquatic community, than to try to establish a new category of significant habitat that is not mentioned in the regulations. For example, taking up the elk habitat example, rather than argue that a property that hosts an elk herd has significant habitat simply because of the elk's existence, it might be better to look to the particular plant communities that make for good elk grazing, and describe the property as a "high quality example" of one or more of these "communities." The fact that elk graze on the property is evidence of the high quality of the plant community. To reiterate, this argument might stand on more solid ground (no pun intended) than an argument that elk habitat is significant habitat because of public policies in favor of elk hunting, which is the direction in which the amicus brief seemed to be heading.

It seems that a stand of old-growth white pine trees would be exactly what the regulations have in mind when they speak of a "high-quality" example. White pine is one of the most common kinds of trees in the United States; it's about as far as one could get from a rare, threatened, or endangered species. But an old growth stand of such trees is relatively rare, and would seem to fit this regulatory "high-quality" framework. Perhaps another example of a high-quality community would be one in which invasives are minimal or non-existent. Or, to hone in on the "community" aspect, a group of plants or animals, none of which in themselves are rare, threatened or endangered, but which together form a high-quality example.

#### (d) Definition of "habitat"

*Argument posed on appeal by Glass and amici: The term "habitat" includes both land where a particular species has been observed directly, and land where a particular species is likely to or normally would occur. In other words, habitat includes both actual habitat (based on direct evidence) and potential habitat (based on circumstantial evidence).*

*Argument posed on appeal by the Government: The term “habitat” includes only to land on which a particular species has been observed directly.*

*Disposition: The Sixth Circuit held that habitat includes both actual and potential habitat.*

Although it was not dispositive of the overall qualification holding, the definition of “habitat” was a key issue in the case, and will likely play a role in future cases. Whether significant habitat exists in many cases depends on how broadly one defines “habitat.” At the heart of the issue is what sort of evidence the taxpayer must proffer in order to demonstrate significant habitat.

IRS’ proposed narrow definition of habitat was land on which a particular species has been documented to exist.<sup>2</sup> As IRS wrote in its main appellate brief, a tax deduction is not available “based upon 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” (emphasis added). IRS Appellant Brief at 25. This same phrasing pops up in another couple places in the brief. The distinction between “possible” and “actual” pertains to whether the species has been observed on the property.

In contrast, the Glasses argued on appeal that either direct or circumstantial evidence could demonstrate that a parcel is habitat for a particular species. For instance, even when a species was not documented on the protected property, the property could serve as habitat if it hosted the kinds of plants or animals on which that species fed or otherwise used, or if it hosted the types of soils or geographic terrain on which this species is often found. The Glasses conceded IRS’ rhetorical point that mere “speculative possibility” would not constitute adequate circumstantial evidence. On the other hand, they argued that credible, science-based circumstantial evidence would pass muster. Appellee Brief at 35.

The definition of “habitat” was not presented as a major issue to the Tax Court, yet Judge Laro’s opinion adopted a broad definition that included actual and potential habitat. The Tax Court wrote, “A habitat denotes ‘The area or environment where an organism or ecological community *normally* lives or occurs’ or ‘The place where a person or thing is *most likely* to be found.’ American Heritage Dictionary of the English Language 786 (4th ed. 2000)” T.C. Opinion at 38 (emphasis added). The “normally lives” phrase in the first definition is also adopted by the regulations. Treas. Reg. §1.170A-14(d)(3)(i), (ii). By using the modifiers “normally” and “most likely,” these definitions point towards a broad definition of habitat, one that includes both actual, documented species, as well as the characteristics that make the existence of such species possible or probable. The Tax Court did not elaborate on the nuance of this distinction, but did reach a result clearly consistent with this broader definition, in

---

<sup>2</sup> In its reply brief, IRS suggested that even direct observation might not suffice in certain circumstances, e.g., where it appears that the species is only found on the parcel “on occasion” and not “normally.” Reply Brief at 12-13. Perhaps IRS had in mind some sort of unusual occurrence of an endangered species outside of its normal habitat. Nevertheless, the Sixth Circuit didn’t pay any attention to this brief argument, and presumably it would be a non-issue in most cases. For the purposes of this Memorandum, I shall assume that IRS’ position is that direct observation of a species will suffice to show that a parcel of land is habitat for that species.

concluding that “Both 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.” T.C. Opinion at 39 (emphasis added). In other words, even if the tansy and the eagle could not be found on the protected property at any point, the shoreline had the characteristics of good tansy and eagle habitat.<sup>3</sup>

The Sixth Circuit followed the Tax Court’s lead in this respect, resolving the issue squarely in favor of Glass:

The Commissioner first argues that, absent testimony that Lake Huron tansy, pitcher's thistle, or bald eagles were actually sighted living on the encumbered property at the time of the donation, the Tax Court erred when it found *I.R.C. § 170(h)(4)(A)(ii)* satisfied. This argument fails for two reasons. First, it ignores Ms. Glass's testimony that she had observed bald eagles and Lake Huron tansy on the encumbered property. Second, neither the plain language of the regulations nor the plain meaning of the words "habitat" or "community" support the Commissioner's argument. Although under *I.R.C. § 6110(k)(3)*, a Private Letter Ruling cannot be used as precedent, a recent ruling provides persuasive authority for refuting the Commissioner's argument. *See I.R.S. P.L.R. 200403044 at 9, 2004 WL 69088 (Oct. 9, 2003)*(observing that, similar to the Conservation Easements at issue here, the conservation easement there "is the actual habitat for numerous plants and animal species, . . . and is potentially the habitat for several endangered, threatened or rare plant and animal species" and thus qualified "as a donation for the protection of an environmental system under § 170(h)(4)(A)(ii)").

471 F.3d at 709. It would have been ideal if the Sixth Circuit had elaborated upon the actual-potential distinction, but there is enough context here to conclude that the court held that credible circumstantial evidence can demonstrate significant habitat and likewise that habitat is both actual and potential.

On a somewhat related note, an aggressive parsing of the Tax Court’s opinion could lead to the conclusion that even marginal habitat for rare, threatened or endangered species could qualify as significant habitat. At the trial, Thomas Bailey testified that “The beach was wider than normal back then, which lent it to the possibility of growing, you know, Lake Huron tansy, Pitcher's thistle, a potential piping plover nesting place. It wouldn't have been ideal habitat, but it would have been a possible place.” Transcript at 67. Based on this statement, the Tax Court stated in its findings of fact that “The property is not an ideal habitat for Lake Huron tansy or pitcher’s thistle, another threatened species of plant, but the property, in its natural state, allows for the creation or promotion of the habitat of those species as well as the habitat of bald eagles and piping plovers” T.C. Opinion at 8. Later in the opinion, the Tax Court found that the protected property was a “proper place for the growth and existence of Lake Huron tansy and

---

<sup>3</sup> Reading this sentence expansively, one could argue that the “create or promote” diction supports a finding that a parcel could be significant habitat for an endangered species that is currently not present in the region but could be at some point in the future. That is, habitat for a species that might one day find its way to the protected property. However, this approach edges along the slippery slope towards IRS’ “speculative possibility,” and it will always be a difficult argument to make.

pitcher's thistle." In other words, a less-than-ideal habitat for these species is nevertheless sufficient for it to constitute significant habitat. This implicit conclusion could very well serve as a useful response if IRS claims in the future that habitat for rare, threatened or endangered species has to be especially high quality for it to constitute significant habitat.

Another important aspect of the Sixth Circuit's opinion was its citation of IRS Private Letter Rulings. In writing the appellee brief, Glass cited PLR 200403044 in order to show IRS' inconsistency on the actual-vs.-potential habitat issue, and PLR 8546112 on the size issue, as discussed below. It was unclear, given the provision of the Internal Revenue Code stating that private letter rulings may not be cited as precedent (I.R.C. § 6110(k)(3)), whether the court would afford these rulings any weight. However, the Sixth Circuit's opinion accepted the use of both of them as "persuasive authority." This willingness to consider private letter rulings sets a useful precedent for future conservation easement tax cases, as the vast majority of the private letter rulings dealing with conservation easements rule in favor of the taxpayer (perhaps because many taxpayers withdraw their request for a ruling if IRS' initial response is unfavorable). Litigating taxpayers would be well advised to comb through the ten different PLRs<sup>4</sup> known to this author that deal with the habitat conservation purposes test. The rulings were written at a time when IRS was not overly concerned about conservation easement abuses, and it is likely that they contain analysis that contradicts the more radical arguments that IRS is currently posing, as was the case in *Glass*.

Another sub-issue related to the definition of habitat is whether a parcel has to meet all of the life-cycle needs of a species, or only one of those needs. In their post-trial brief to the Tax Court, the Glasses looked to definitions of habitat found in endangered species and other federal regulations. One of the quoted definitions was from the United States Fish and Wildlife's Wildlife Habitat Improvement Program regulations, and provides, "Wildlife habitat means the aquatic and terrestrial environments required for wildlife to complete their life cycles, including air, food, cover, water, and spatial requirements." 7 C.F.R. § 636.3 (2002). The Tax Court quoted this definition in addition to the dictionary definitions already mentioned above. T.C. Opinion at 38. In its appellate brief, IRS argued that to constitute habitat, a conservation easement property would have to meet *all* of these different life-cycle needs. Appellant Brief at 48-49. In other words, a species theoretically would have to be able to live out its entire life on the parcel in order for the parcel to constitute habitat. The Glasses challenged IRS on this cramped definition, and instead argued that a property only has to meet at least one of these needs, not all of them. Appellee Brief at 39. For example, the protected property in the Glass easements were known to be favored roosting grounds for the bald eagle. But there were no eagle nests on the protected property, and the eagle (a primarily fish-eating species) would obtain its food from the lake.

Neither the Tax Court nor the Sixth Circuit expressly addresses this question, but it is clear from the dictionary definitions that the Glasses' interpretation prevailed. In particular, both courts quoted the definition of habitat as "The area or environment where an organism or ecological community normally lives *or occurs*" and "The place where a person or thing is most likely to be *found*" (emphasis added). By the use of the words "occurs" and "found," the

---

<sup>4</sup> PLR 8630056, PLR 8721017, PLR 9218071, PLR 9318017, PLR 9407005, PLR 9420008, PLR 9537018, PLR 9736016; PLR 200208019, PLR 200403044

implication is that a conservation easement protected property is habitat for a species as long as that species is normally observed on those sorts of properties, for whatever reason. That is, the animal need not complete its entire life cycle or live on the protected property.

## **(2) Size of Protected Property Arguments**

### **(a) Size of protected property as a factor in conservation purposes test**

*Argument posed by IRS before Sixth Circuit: Conservation easements encumbering small properties must meet a higher bar to qualify as protecting significant habitat.*

*Argument posed by Glass before Sixth Circuit: The size of a conservation easement's protected property is completely irrelevant in determining qualification under the habitat conservation purposes test.*

*Disposition: The Sixth Circuit held for Glass.*

Before the Tax Court, IRS did not expressly make the argument that a small conservation easement protected property would have difficulty qualifying under the habitat prong of the conservation purposes test. The relatively small size of the easements was a background issue, and to the extent habitat issues were discussed at all, IRS focused on the alleged lack of significant habitat. In its opinion, therefore, the Tax Court did not discuss the small size of the easement property as an issue.<sup>5</sup>

On appeal, IRS repeatedly emphasized the small size of the protected property in claiming that the conservation easements did not qualify as protecting significant habitat. Although IRS' arguments were not clearly defined in the main appellate brief, the reply brief was more precise, breaking down the arguments along three separate tracks: First, IRS argued that a small parcel is much less likely to contain significant habitat.<sup>6</sup> IRS Reply Brief at 5-6. IRS presented this as a common-sense, self-evident statement, but in truth it depends entirely on one's definition of "habitat." The section of the reply brief in which this statement is made is somewhat confusing, but there appears to be an unspoken premise that in order to qualify as significant habitat for a species, a parcel must contain enough habitat for that species to fulfill its complete life cycle. For example, IRS suggests that a protected property must be large enough to permit "internal relocation if the organisms are disturbed by [nearby] development." IRS Reply Brief at 11. This issue is discussed above in Section 1(d) as part of the definition of "habitat." If one accepts this narrow definition of habitat then it quite clear that the smaller the parcel, the less likely it is to have significant habitat. But if one rejects this narrow definition in favor of a broader definition that habitat has to meet only one of a species' life-cycle needs (as did the Sixth Circuit), then the IRS' size-based premise becomes unsupportable. In other words, a 25-acre parcel is just as

---

<sup>5</sup> Footnote 20 on page 42 mentions the small size of the protected property, but only relative to donor's overall parcel. This related but distinct issue is discussed below in section 2(b).

<sup>6</sup> It is important to recognize that even IRS was not arguing that a small parcel was categorically disqualified under § 170(h), but rather that smallness was a negative factor in evaluating qualification. This is made clear in footnote 3 on page 6 of the reply brief.

likely to contain endangered species habitat as a 50-acre parcel, it would simply contain less of that habitat, on average.

Second, IRS contended that even if significant habitat does exist on a small parcel, the small size makes that habitat much more vulnerable to disturbances from outside of the easement boundaries, rendering the easement ineffective and thus falling short of the § 170(h) standard. In line with this approach, IRS claims that the only way a small parcel can qualify as protecting significant habitat is if it meets the regulatory example of “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.” Treas. Reg. § 1.170A-14(d)(3)(ii). To a large extent, this argument overlaps with IRS’ claim that development occurring outside of the protected property is a proper consideration in whether an easement qualifies under § 170(h), an issue that is discussed separately in Section 2(b) below.

Third, IRS posited that a donor’s inconsistent reserved rights are more fatal to conservation purposes on small parcels, because the impact on habitat is relatively greater. Although Section 3 discusses inconsistent reserved rights in greater detail, for the time being it is sufficient to quote the following: “To be sure, the matter might be different if a large area was covered by the easements. In such a case, construction of, for example, a building or footpath, may have only a minimal effect on the protected habitat.” IRS Reply Brief at 16.

The Glasses, in turn, argued that the size of a protected property was not a factor in determining whether an easement protects significant habitat. They, along with the amici, begin with the observation that neither the statute nor the regulations contain any minimum size qualification, or even a suggestion that small parcels have a higher threshold to qualification under § 170(h). Appellee Brief at 38-39. The Glasses also use IRS’ past words against itself, citing Private Letter Ruling 8546112, in which IRS held that an easement encumbering three-quarters of an acre qualified under the open space conservation purpose test. The Glasses then point to the scientific and policy arguments in favor of small parcels, referencing ecological research showing that small parcels can constitute significant habitat, both in isolation and as part of an aggregation of other small parcels. Appellee Brief at 39.

The Sixth Circuit came down squarely on the Glasses’ side. Immediately after affirming the Tax Court’s conclusion that the easements contained no inconsistent reserved rights, the opinion includes the following paragraph:

The Commissioner's argument, that the relatively small size of the encumbered property changes this conclusion, is not supported by the facts or the law. The Commissioner failed to present any testimony or other evidence supporting the conclusion that, given Taxpayers' retained rights, the identified plant and wildlife habitat cannot exist in an area the size of the encumbered property or that the conservation interests the Easements were designed to protect would be impermissibly impaired. Moreover, as the Commissioner concedes, there is no provision in *I.R.C. § 170(h)* or the implementing regulations that requires a minimum size for a qualifying conservation contribution. In fact, a Private Letter Ruling from the Internal Revenue Service allowing the deduction under *I.R.C. §*

170(h) for a conservation easement on a 3/4 acre parcel with a stated conservation purpose of preserving "scenic enjoyment of the general public" provides persuasive authority to the contrary. *See I.R.S. P.L.R. 8546112 at 4-5, 1985 WL 297172 (Aug. 21, 1985)*. It is not the size of the Conservation Easement that matters; rather, it is whether any retained use undermines its stated conservation purpose.

471 F.3d at 711. Although a bit more elaboration would have been ideal, especially with respect to the public policy arguments presented by the Glasses<sup>7</sup>, one really couldn't ask for a clearer holding on the size issue. Simply put, size doesn't matter. At best, there are two very minor gaps for IRS to try to exploit in a future case involving a small parcel. First, the above passage does suggest that if IRS had done a better job presenting the size issue front and center before the Tax Court, the Sixth Circuit might have taken its appellate arguments more seriously. Second, the quoted paragraph expressly rejects the size argument only in the context of whether reserved rights impair the conservation purposes of the easement, i.e., only the third of IRS' three tracks noted above. The court does not affirmatively declare that size is irrelevant for determining whether significant habitat exists in the first place, or for evaluating development on nearby property. However, it is implicit in the context of the entire opinion that size doesn't matter for any of these purposes. It would take an exceptionally clever (or stupid) attorney to attempt to spin the Sixth Circuit's opinion as ambiguous on any aspect of the size argument.

On a side note, where size does matter is in valuing the conservation easement, but even here the matter resolves itself. Along these lines, the oral arguments provide an illuminating exchange between IRS and the Sixth Circuit. When IRS, following the size-doesn't-matter argument to its logical extreme, protests that a taxpayer could receive a deduction for a conservation easement on a single square foot of land, one of the judges wittily retorts, "Well, ok, and the tax deduction you might get for one foot square might be a dollar thirty-nine." *Glass*, Docket No. 06-1398, Sixth Circuit Oral Argument Compact Disc, 11-29-06, at 26:10 – 26:30. Thus, IRS' sputtering about taxpayer abuse of the conservation easement rules if small parcels are liberally permitted to qualify under § 170(h) amount to a non-issue in the court's eyes.

#### (b) Development outside of protected property

*Argument posed by IRS: Especially when a conservation easement encumbers a small protected property, it is necessary and proper to consider how much development might occur beyond the boundaries of the protected property (both on the grantor's property and on nearby property owned by third parties) in determining whether a conservation easement can succeed in protecting significant habitat on the protected property.*

*Argument posed by Glass: Events occurring beyond the boundaries of the protected property are completely irrelevant in determining whether a conservation easement protects the significant habitat on the protected property.*

---

<sup>7</sup> As we shall see in Section 2(b) below, in the very next paragraph of the opinion the Sixth Circuit does recognize the public policy arguments with respect to the proximity argument set forth by IRS.

*Disposition: The Tax Court and the Sixth Circuit held for Glass.*

In its post-trial brief to the Tax Court, IRS briefly presented the claim that the Glasses did not “sufficiently protect” his 10-acre property and that development on the unrestricted part of their property could damage the ecosystem on the protected property and render the conservation easements ineffective. In particular, IRS noted that the Glasses could build as many as 12 homes on the unprotected portion of their property, and portrayed this as an inconsistent reserved right within the meaning of Treasury Regulation § 1.170A-14(d)(3). IRS Post-Trial Brief at 30-31. In a footnote at the end of the opinion, the Tax Court dismissed this argument as solely relevant to valuation and not § 170(h) qualification. T.C. Opinion at 42, n. 20.

In its appellate main brief and reply brief, IRS repeated this argument about the Glasses’ ability to build on the unprotect portion of their property (IRS Appellate Brief at 47, 54-56), but it also upped the stakes by expanding their argument to include the claim that development on any property in proximity to the protected property, not just abutting property owned by the Glasses, could undermine the purposes of the conservation easement and thereby disqualify it under § 170(h).<sup>8</sup> The IRS reasoned that “every additional home built in the area would increase the number of neighbors walking along the encumbered shoreline,” which presumably would scare away the animals and trample the plants. IRS Appellate Brief at 47-48, 56-57.

The Glasses never had a chance to address the proximity argument before the Tax Court, but responded forcefully on appeal. They countered that looking to development that might occur on nearby property not owned by the donor is so speculative that it could lead to the rejection of any conservation easement. Glass Appellee Brief at 36-37. They also pointed out that requiring donors to protect all of their property would not serve any legitimate conservation purpose and would even inflate the value of the donor’s tax deduction. *Id.* at 38.

The amici parties buttressed the Glasses’ argument by pointing out that the “inconsistent uses” regulation applies only to inconsistent uses on the protected (i.e., encumbered) property, not on the donors’ entire property. Amicus Brief at 38. They also noted the many tax court cases and private letter rulings in which IRS approved or acquiesced to easements that protected only a portion of the donors’ property. Amici Brief at 40-41. IRS replied that these cases and rulings involved much bigger protected properties and therefore were inapposite. IRS Reply Brief at 16, n. 7.

The Sixth Circuit concisely but soundly rejected IRS’ proximity argument, borrowing elements from both the Glass brief and the amici brief:

The Commissioner also argues that the Tax Court erred by not considering the building rights of neighboring property owners. This argument similarly fails. There is no statutory or regulatory provision requiring consideration of neighboring property owners' building rights when determining whether a conservation easement is a "qualified conservation contribution." Congress likely recognized the common sense truth that Taxpayers/Donors cannot realistically limit building on property outside of their control. Adoption of the

---

<sup>8</sup> For shorthand, I shall hereafter refer to this argument as the “proximity argument.”

Commissioner's position would unnecessarily preclude conservation donations permitted under the Tax Code. It would also preclude larger conservation benefits achieved by aggregate donations of relatively small conservation easements, each serving their own stated conservation purpose. As discussed above, the terms of the 1992 and 1993 Conservation Easements are consistent with the conservation purpose for which they were created - the protection and preservation of threatened plant and wildlife habitats from the increased development that led to the conservation donation in the first instance.

IRS linked its proximity argument to the small size of the protected property. IRS Appellate Brief at 54, IRS Reply Brief at 14. In particular, IRS explained that development on nearby property is especially important on small protected properties because there is “no buffer between the wildlife living on the land and present and future development; no part of either easement is more than 120 feet from a possible future house, and both are quite close to existing houses.” IRS Reply Brief at 14. It is unclear if IRS would deploy this proximity argument in a case where the conservation easement encumbers a larger protected property. It would seem that the same reasoning would apply to a situation in which the protected property is large, but the significant habitat is mostly or entirely near a boundary with unprotected land.

Both the language and the rationale of the Tax Court’s and Sixth Circuit’s rejection of the proximity argument extend beyond the habitat prong of the conservation purposes test to the other prongs, most importantly open space, as well. The above-quoted passage uses broad terms such as “qualified conservation contribution,” “conservation donations” and “conservation purpose.” The only mention of habitat is with respect to the conservation purpose of the Glasses’ conservation easements. This broad language makes sense, for development in proximity to an open space conservation easement property should no more disqualify that easement than a habitat-based easement. In any event, the Sixth Circuit’s words should be broad enough to cite as strong precedent if IRS were to raise this argument again in future cases.

### **(3) Inconsistent Reserved Rights Arguments**

*Argument posed by IRS before the Sixth Circuit: The easements contained reserved rights that were inconsistent with the protected conservation interests, thereby disqualifying the easements in accordance with the Treasury regulations.*

*Argument posed by Glass and Amici Parties: The reserved rights were consistent with the easements’ conservation interests.*

*Disposition: The Sixth Circuit held for Glass.*

Like most of the habitat issues discussed above, IRS did not focus on the inconsistent reserved rights issues before the Tax Court. Its post-trial brief makes no mention of the issue at all. The Tax Court’s opinion briefly notes in passing that the easement restrictions limit any inconsistent uses of the protected properties. T.C. Opinion at 41.

On appeal, IRS presented the inconsistent reserved rights issue as one of its main arguments, honing in on Treas. Reg. § 1.170A-14(e)(2), which prohibits a grantor from retaining uses of the encumbered property that “impair significant conservation interests” of the easement. IRS claimed that the Glasses’ rights to cut vegetation for safety or view purposes were a threat to the Lake Huron tansy and pitcher’s thistle and could remove trees favorable for eagle roosting. IRS Appellant Brief at 44. It further contended that the right to construct a boathouse or other outbuilding, as well as the right to establish a footpath, were also a threat to these species, referencing the Tax Court’s finding of fact that these species require “undisturbed habitats to survive.” IRS Appellant Brief at 44. In its reply brief, IRS sharpened the argument by suggesting that the reserved rights must be considered in light of the easements’ small size. IRS Reply Brief at 16. It also claimed that the regulations’ use of the word “impair” connotes a lower threshold of damage than “destroy,” and that “merely because the exercise of a retained right would cause *less* damage to an ecosystem than would otherwise have been permitted, it does not follow that the ecosystem will be protected.”<sup>9</sup> IRS Reply Brief at 20.

The Glasses, in turn, argued that all of the reserved rights were carefully limited by the terms of the easement. In particular, they noted that cutting of vegetation could occur only in a “selective” manner, and that cutting of the tansy or thistle would not be permitted for safety or view purposes because these plants were only a few feet high and therefore would not present any safety hazards or obstruct any views. Appellee Brief at 41-42. In addition, the Glasses emphasized the easement language that restricted the construction of outbuildings to “a manner and location which minimizes interference with the scenic and natural resource values.” Appellee Brief at 42. Finally, they contended that the right to build footpaths was a way of protecting the threatened plants by channeling foot traffic to a specific area, thereby discouraging the trampling of these plants. Appellee Brief at 44, Amici Brief at 46. The Glasses and the amici also suggested that IRS and the courts should give deference to the easement holder’s determination that the reserved rights were consistent with the conservation purposes of the easement. Appellee Brief at 45, Amici Brief at 43.

The Sixth Circuit held squarely for the Glasses:

Second, each reserved right is carefully limited so as to ensure that the identified plant and wildlife habitats on the encumbered property remain protected. For example, the right to selectively prune, trim or cut trees, shrubs or vegetation is for the limited purposes of preserving the scenic view or for safety. Clear-cutting is expressly prohibited. The plant species identified as requiring habitat protection, Lake Huron tansy and pitcher's thistle, are both only a few feet high. Thus, view and safety are unlikely to require pruning or cutting that would undermine preservation of their habitat. Furthermore, the limited right to construct or maintain a shed, boathouse, or deck is required to be done in a manner and location that minimizes interference with the identified plant and wildlife habitat, and this right is subject to LTC's right to preclude any such construction if it is found to be inconsistent with the Easements' conservation purpose. Finally, the right to maintain and establish foot paths enhance rather than diminish the ability of these

---

<sup>9</sup> Note, however, that the relevant regulation uses both the terms “impair” and “destruction.” Treas. Reg. § 1.170A-14(e)(2), (3).

plant and wildlife habitats to flourish. Just as foot paths are used in State and National Parks to conserve natural habitats, they are useful on the encumbered property to stop people from trampling the very plants sought to be protected and from jeopardizing the structural integrity of the delicate Lake Michigan bluff.

Credible testimony confirmed that Taxpayers' reserved rights were consistent with the Easements' stated purpose of protecting threatened plant and wildlife habitats, and the Commissioner failed to present evidence to the contrary. As the Treasury Regulations clarify, the prohibition on inconsistent use "is not intended to prohibit uses of the property, . . . if, under the circumstances, those uses do not impair significant conservation interests." *Treas. Reg. § 1.170A-14(e)(2)*. The Tax Court properly found that the reserved rights in the 1992 and 1993 Conservation Easements do not impair the significant conservation interests they were designed to protect.

471 F.3d at 711. In other words, the Sixth Circuit accepted almost verbatim each of the Glasses' arguments about reserved rights.

The Sixth Circuit's holding represents a far-ranging victory for taxpayers, for the reserved rights in the Glasses' easements likely are more extensive, given the size of the properties, than the typical conservation easement. It is probable that if these easements were being negotiated today, LTC would have insisted on more carefully limiting the reserved building rights. At the very least, a present-day LTC might require specific size and location restrictions and notice and/or approval of new outbuildings, in order to provide some oversight of the "minimize interference with" standard of the easements. However, as shown in the above quoted paragraphs, the Sixth Circuit found the easements' catch-all language about LTC's right to prevent any uses inconsistent with the easements' purposes to be sufficiently protective. Without expressly saying so, the Sixth Circuit in effect placed a high degree of trust in the holder's ability and willingness to enforce the somewhat vague limitations on the Glasses' reserved rights.

Along these lines, the courts' treatment of the reserved rights issues demonstrates that although any easement charitable deduction litigation is formally between IRS and the donor, the holder is an important and inevitable background party, one whose actions can rebound to the detriment or the aid of the donor, depending on the circumstances. Throughout the Tax Court and Sixth Circuit proceedings, the Glasses' position was aided by the apparent competence and professionalism of LTC. With respect to the habitat issues, LTC's executive director provided the most extensive and credible testimony of any witness at the trial. In addition, the Tax Court's interpretation of the meaning of § 170(h)(5)'s phrase "exclusively for conservation purposes" led to a focus on the credibility and capability of the easement holder. The Tax Court found this to be an easy call, stating that "LTC, is a legitimate, longstanding nature conservancy dealing at arm's length with petitioners, and LTC has agreed (and has the commitment and financial resources) to enforce the preservation-related restrictions included in deed 1 and deed 2 in perpetuity." T.C. Opinion at 41. Finally, in resolving the reserved rights matters in favor of the Glasses, the Sixth Circuit notes that "there is no evidence that LTC is unwilling or unable to

monitor and enforce compliance so as to maintain the stated conservation purpose in perpetuity.” 471 F.3d at 711.

What the opinion also demonstrates is that courts may consider each of the reserved rights on a right-by-right basis. Thus, easement drafters should not read *Glass* as a carte blanche to allow whatever reserved rights upon which the parties may agree. Given a different set of facts, especially one in which a grantor has exercised his reserved rights to the fullest extent (which was not the case with the Glasses), a court could just as easily rule in favor of IRS on inconsistent reserved rights. I would expect *Glass* to carry some precedential effect in terms of establishing what kind of reserved rights impair conservation interests, but I would not want to over-rely on *Glass* if the facts were bad. This is especially true if IRS brings the inconsistent reserved rights argument to the fore from the beginning of the litigation.

Finally, as an aside, for more insight on how IRS has interpreted inconsistent reserved rights, see PLR 9632003 and PLR 200208019.

#### **(4) Evidentiary Arguments**

This section (4) does not discuss specific legal arguments posed by the parties or resolved by the courts. Rather, it addresses how the parties dealt with presenting evidence on the various factual matters under dispute, and the courts’ reactions to that evidence.

Both the Tax Court and Sixth Circuit, following longstanding common law, held that the burden of proof rests with the taxpayers to show their eligibility for a deduction. T.C. Opinion at 28-29; 471 F.3d at 706. There was some prior Sixth Circuit case law suggesting that for charitable deductions the burden of proof could shift to IRS, but the court ignored the Glasses’ references to this case law in the opinion.

In any event, it appears that IRS relied on the burden of proof as a safety net for its arguments on the habitat issues. IRS’ litigation strategy essentially was to denounce the Glasses’ witnesses’ testimony as self-serving and unreliable, without actually countering their points on the merits. IRS Post-Trial Brief at 28; IRS Appellant Brief at 42-43. IRS suggested that the taxpayers had a duty to provide expert witnesses such as landscape engineers or botanists or at least disinterested non-expert witnesses, to show that significant habitat existed on the protected properties. IRS Post-Trial Brief at 27, 29. However, at no time did IRS challenge Susan Glass’ or Thomas Bailey’s statements about observing the various species. IRS’ cross-examination of Bailey, for example, focused on tangential issues such as the lack of photographs of the protected property, the brochures that LTC distributed to prospective easement donors, and the boat traffic on Lake Michigan. Transcript at 78-110. Based on the judges’ comments at the oral arguments, the Sixth Circuit was not impressed with IRS’ failure to raise the size argument, among others, at the trial or in the post-trial briefs. For instance, one judge asked, “But wouldn’t it be incumbent, if the Commissioner thought the size of the easement was such that it could not protect habitat, wouldn’t it be incumbent on the Commissioner to present some testimony concerning that?” *Glass*, Docket No. 06-1398, Sixth Circuit Oral Argument Compact Disc, 11-29-06, at 26:33 – 27:02.

The Tax Court judge was thoroughly persuaded by the witnesses' testimony as to significant habitat, specifically citing Ms. Glass and Bailey as "credible" witnesses. T.C. Opinion at 37. Given the appellate court's "clear error" standard of review of the Tax Court's factual findings, it is not surprising that the Sixth Circuit upheld these findings without much discussion. 471 F.3d at 709.

IRS devoted much effort to the pettifogging argument that because the trial testimony referred to the eagles, piping plovers, and plants as located on the "property" (i.e., all 10 acres owned by the Glasses) instead of the "protected property" (i.e., the specific areas encumbered by the conservation easements), the Glasses had failed to provide sufficient evidence of significant habitat.<sup>10</sup> IRS Post-Trial Brief at 27, 30. IRS Appellant Brief at 42, 43. Again, this appears to be an example of taking the burden of proof standard to an extreme. Neither the Tax Court nor the Sixth Circuit seriously engaged the parties on this issue, both implicitly rejecting it in summary fashion.

Even though the Glasses prevailed without any expert witnesses, they did so primarily because there was ample evidence that at least three and perhaps four endangered or threatened species inhabited the protected properties. Many conservation easements that purport to protect significant habitat cannot produce evidence of any rare, threatened or endangered species. Under these circumstances, the taxpayer would have to resort to backup arguments, to wit, that the protected property is potential habitat for such species, that the habitat is a "high quality example of a terrestrial community," that the protected property is close to already protected conservation land, or that the habitat is significant in some other way that is not spelled out as an example in the regulations. Except for the nearby conservation land prong, which would be relatively easy to prove, it would seem that expert testimony would be useful, if not essential, in substantiating these arguments. Moreover, citations to third-party authorities such as state or federal agency official publications about habitat types and particular species, were not presented by the Glasses but would be very useful in future cases. Given IRS' loss in *Glass*, one would expect it to come much better prepared with its own expert witnesses if it attempts to challenge another easement on habitat grounds.

Significantly, as pointed out by the Tax Court, for all IRS examinations or taxable events occurring after July 1998, a taxpayer can under certain circumstances shift the burden of proof on any factual issue to IRS. This new rule was established as part of the Internal Revenue Service Restructuring and Reform Act of 1998. T.C. Opinion at 28, n. 14. Specifically, the burden of proof shifts to IRS if the taxpayer first introduces credible evidence with respect to the factual issue and satisfies four conditions:

- The taxpayer has complied with any current requirements to substantiate any item;
- The taxpayer has maintained all records in accordance with then current requirements;
- The taxpayer has cooperated with reasonable requests by IRS for witnesses, information, documents, meetings and interviews; and

---

<sup>10</sup> At the time of the easement donations, the Glasses and LTC erroneously measured the distance from the shoreline and therefore did not protect the entire bluff. This mistake was highlighted by IRS before both the Tax Court and the Sixth Circuit, but it only played a minor role in those sections of the briefs where IRS sought to assert an evidentiary distinction between the "property" and the "protected property."

- If the taxpayer is not an individual, it does not have a net worth in excess of \$7 million.

Pub. L. 105-206, sec. 3001(c)(2), 112 Stat. 726; 26 U.S.C. § 7491. Thus, as poorly as IRS fared in *Glass*, its evidentiary challenges will be even greater for current and future conservation easement cases.

### **(5) Comparisons to *Turner***

*Argument posed by IRS before the Sixth Circuit: The easements did not conserve any land because the protected property was already protected by local zoning laws.*

*Argument posed by Glass and Amici Parties: The easements expanded the land protections beyond those in place under local zoning.*

*Disposition: The Sixth Circuit held for the Glasses.*

While the Sixth Circuit was considering the *Glass* appeal, the Tax Court issued its opinion in *Turner v. Commissioner*, 126 T.C. No. 16 (May 16, 2006). *Turner* dealt with the qualification of a conservation easement under the open space and historic preservation prongs of the conservation purposes test of § 170(h). The *Turner* opinion notes that the Tax Court's opinion and analysis in *Glass* was inapposite because *Glass* dealt solely with habitat issues and not open space or historic preservation. *Turner* at 23. In any event, the Tax Court delivered a resounding victory to IRS in *Turner*, holding that the easement in question did not qualify under § 170(h). There is widespread agreement in the land trust community that this was the proper outcome, for the easement appeared to be a sham because its sole restriction was to limit a 30-acre property to no more than 30 subdivision lots, which was the maximum allowed under the county zoning ordinances.

On appeal in *Glass*, IRS sought to portray these easements as similar to the sham easement in *Turner* by claiming that the county's 60-foot setback requirement prevented development on over half of the protected property.<sup>11</sup> The Glasses countered that their easements essentially doubled the zoning setbacks, rather than simply mirroring them, as was the case in *Turner*. Appellee Brief at 40.

The Sixth Circuit sided with the Glasses, noting that the doubling of the county zoning setback was considerably different from the facts in *Turner*. 471 F.3d at 711. This part of the opinion represents an important development in conservation easement case law, for the issue of an easement's protections vis a vis already existing land use statutory protections is bound to arise in future cases. We now know from *Turner* that simply reinforcing, but not expanding, the statutory protections is likely insufficient to justify a conservation easement tax deduction. Now we know from *Glass* that even when there are substantial restrictions already in place due to statutory protections, an easement does serve conservation purposes as long as it significantly (in this case doubling) extends those protections.

---

<sup>11</sup> The county setback was measured from the 1986 high water mark, whereas the easement extended 120 feet from the ordinary high water mark.

Another noteworthy aspect of the *Glass* opinion is that it reinforces the conceptual separation of the four different conservation purposes tests. The Sixth Circuit stated:

In *Turner*, the Tax Court expressly distinguished the decision in *Glass* because in *Turner* the issue was whether the taxpayers had satisfied the open space requirement of *section 170(h)*. ‘Satisfaction of this requirement requires both the preservation of open space and the incurrence of a significant public benefit.’ *Id.* at 313 (citing *I.R.C. §170(h)(4)(A)(iii)*). As the *Turner* Court observed, these requirements are different than those that had to be satisfied in *Glass*. *Id.*

471 F.3d at 711. This conceptual separation suggests that an easement might very well fail one of the tests but meet another. At the same time, there will inevitably be some overlap in the case law, as many of the issues are not distinct to habitat or open space. For example, the size arguments discussed above would appear to be equally applicable to an open space easement, especially in light of the fact that the private letter ruling cited by the court dealt with an open space easement. Likewise, the court’s analysis with respect to inconsistent reserved rights would seem to transfer equally to an open space context.

#### **(6) Legislative Intent Arguments**

*Argument posed by IRS before the Tax Court and the Sixth Circuit: Congress intended the conservation easement tax deduction to be narrowly construed to apply to only especially worthy properties, so as to prevent taxpayer abuse.*

*Argument posed by Glass and Amici Parties: Congress intended the conservation easement tax deduction to be liberally construed so as to fulfill the conservation purposes of the legislation.*

*Disposition: No clear holdings by the Tax Court or the Sixth Circuit, but arguably subtle recognition of a liberal construction by both courts.*

One minor issue not directly addressed by the Sixth Circuit or the Tax Court was whether Congress intended that the conservation purposes qualifications of § 170(h) be liberally construed. However, to the extent that the courts indirectly mentioned legislative intent, they were suggestive of a liberal construction. The Tax Court wrote extensively about the legislative history of § 170(h), but mostly with an eye toward interpreting the “exclusively for conservation purposes” language of § 170(h)(5). After a thorough recitation of this legislative history, the Tax Court concluded:

Congress through the enactment of section 170(h) intended in relevant part to encourage preservation of our country’s natural resources through the contribution of easements such as the conservation easements, see S. Rept. 96-1007, *supra* at 9, 1980-2 C.B. at 603, and petitioners’ contributions of the

conservation easements, which serve to preserve this Nation's natural resources of bald eagles, Lake Huron tansy, and the bluff, among other things, are consistent with the statute's objective.

T.C. Opinion at 41. Although the court doesn't come right out and say it, the inference here is that Congress aimed to protect conservation land and that IRS and the courts shouldn't be too exacting in determining qualification. Unfortunately, the reference in the above quote is to the more ambiguous Senate 1980 report, which contains both expansive and narrow language as to what sorts of properties might qualify. Ideally, the Tax Court or the Sixth Circuit specifically would have cited an earlier House report, which contains the statement: "While it is intended that the term 'conservation purposes' be liberally construed with regard to the types of property with respect to which deductible conservation easements \* \* \* may be granted, it is also intended that contributions of perpetual easements \*\*\* qualify for the deduction only in situations where the conservation purposes of protecting or preserving the property will in practice be carried out." H. Conf. Rept. 95-263, at 30-31 (1977), 1977-1 C.B. 519, 523. Although the second part of this sentence does qualify the first part with respect to inconsistent reserved rights and legal formalities to ensure that the easement is complied with, the first part stands as strong evidence of Congress' express legislative intent for a liberal construction of what kinds of properties may qualify.

As for the Sixth Circuit, its sole reference to legislative intent came in the context of rejecting IRS' proximity argument. The Court wrote: "Congress likely recognized the common sense truth that Taxpayers/Donors cannot realistically limit building on property outside of their control. Adoption of the Commissioner's position would unnecessarily preclude conservation donations permitted under the Tax Code." Again, the inference is that Congress intended to allow many properties to qualify under the conservation purposes test, and did not support IRS' invoking tangential issues in order to justify a disqualification.