

**IN THE UNITED STATES COURT OF APPEALS
FOR THE 6TH CIRCUIT**

No. 06-1398

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

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant.

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

BRIEF OF APPELLEES

**CHARLES F. GLASS
SUSAN G. GLASS**
Pro Se

**3445 Lake Shore N.
Harbor Springs, MI 49740
(231) 526-9563**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	5
STATEMENT IN SUPPORT OF ORAL ARGUMENT	7
STATEMENT OF THE ISSUE	7
STATEMENT OF THE CASE	7
STATEMENT OF FACTS	9
1. Petitioners’ Property And The Natural Resources On And Around The Property.	9
2. Development Pressures On And Around Petitioners’ Property	11
3. Little Traverse Conservancy.	13
4. The 1990 Conservation Easement.	15
5. The 1992 and 1993 Conservation Easements.	16
SUMMARY OF ARGUMENT	20
ARGUMENT	20
Standard of Review.	20
A. Introduction.	21
B. The Tax Court Correctly Concluded That The Conservation Easements Met The Conservation Purpose Of “The Protection Of A Relatively Natural Habitat Of Fish, Wildlife, or Plants Or Similar Ecosystem.”	25

1. The Conservation Easements Protected Significant Wildlife Habitat Because Several Endangered and Threatened Species Were Identified on the Protected Properties.	25
2. The Protected Property’s Wildlife Habitat Was Significant Even If Particular Rare, Endangered or Threatened Species Had Not Been Identified on the Protected Properties.	29
3. Events Occurring Outside of the Easement Boundaries Are Not Factors In Determining Whether The Easements Protected Significant Wildlife Habitat.	36
4. The Size Of The Parcels Is Not A Factor In Determining Whether The Easements Protected Significant Wildlife Habitat.	38
5. The Easements’ Reserved Rights Were Consistent With The Protection Of Significant Wildlife Habitat.	41
C. The Tax Court Correctly Ruled That The Conservation Easements Were Donated “Exclusively For Conservation Purposes”	46
1. The Tax Court Properly Interpreted “Exclusively For Conservation Purposes” To Refer To The Perpetual Enforceability Of The Easement.	46
2. Earlier Case Law Interpreted The Term “Exclusively For Conservation Purposes” To Refer To The Donor’s Donative Intent.	50
3. Even If The Conservation Easements Were Not Donated “Exclusively For Conservation	

Purposes” With Respect To Protecting Significant Wildlife Habitat, The Case Should Be Remanded To Determine Whether The Easements Qualify As Protecting Open Space.	52
CONCLUSION	53
CERTIFICATE OF COMPLIANCE	53
ADDENDUM	54

TABLE OF AUTHORITIES

Cases:

<u>Davis v United States</u> , 495 U.S. 472 (1990)	24
<u>Duffy v Milder</u> , 2006 R.I. LEXIS 48 (R.I. 2006)	43
<u>Ekman v Commr</u> , 184 F3d 522, 524 (CA 6, 1999)	20
<u>Friedman v Commr</u> , 216 F3d 537 (CA6, 2000)	21
<u>McLennan v United States</u> , 23 Cl. Ct. 99 (Cl. Ct. 1991)	50, 51
<u>McLennan v United States</u> , 24 Cl. Ct. 102 (Cl. Ct., 1991)	50, 51
<u>McLennan v United States</u> , 994 F2d 839 (Fed. Cir. 1992)	50, 51
<u>Morganbesser v Aquarion Water Co of Connecticut</u> , 276 Conn. 825 (2006)	43
<u>New Hampshire v Rattee</u> , 761 A.2d 1076 (N.H. 2000)	43
<u>Ottawa Silica Co v United States</u> , 699 F.2d 1124 (Fed. Cir. 1983)	51
<u>Turner v Commr</u> , 126 T.C. No. 16, 2006 WL 1330084 (May 15, 2006)	40
<u>United States v Blackman</u> , 2005 U.S. Dist. LEXIS 25622 (W.D. Va. 2005)	43
<u>Weingarden v United States</u> , 825 F2d 1027 (6 th Cir. 1987)	23

Statutes & Regulations:

I.R.C. § 170(c)	51
I.R.C. § 170(f)	21
I.R.C. § 170(h)	8, 21, 22, 23, 24, 25, 29, 30, 32, 34, 35, 40, 46, 48, 49, 50, 52
I.R.C. § 6110(k)	34
MCL 324.241 et seq	19
Tax Reduction and Simplification Act of 1977,	

Pub. L. 95-30	47
Tax Reform Act of 1976, Pub. L. No. 94-455	21, 23
Tax Treatment Extension Act of 1980, Pub. L. 96-541	21
Treas. Reg. § 1.170A-14	22, 23, 25, 28, 29, 33, 44, 47

Other Authorities:

American Heritage Dictionary of the English Language (4th ed. 2000)	33, 51
H. R. Conf. Rept. 95-263 (1977)	24, 30, 40, 48
H.R. Rept. No. 96-1278 (1980)	22, 48
IRS P. L. R. 200403044	34
IRS P. L. R. 8546112	40
<i>Note: Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors, Ronny Millen and Christopher L. Burdett, Minnesota Journal of Law, Science & Technology, 7 Minn. J.L. Sci. & Tech. 227 (2005)</i>	32
S. Rept. No. 96-1007 (1980)	22, 30, 33, 48
<i>What Lawmakers Can Learn From Large-Scale Ecology, Fred Bosselman, Florida State University Journal of Land Use & Environmental Law, 17 J. Land Use & Env'tl. Law 207 (2002)</i>	31, 39

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Respondent has stated that “oral argument is necessary because of the importance of the issue presented to the proper administration of federal tax laws.” Petitioner does not agree; this case simply involves review of the Tax Court’s findings of fact. Nevertheless, if the Court grants Respondent’s request for oral argument, Petitioners ought to be granted oral argument as well, in the interests of a balanced presentation.

STATEMENT OF THE ISSUE

Did the Tax Court commit clear error by determining that the easements at issue were “for the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,” and were “exclusively for conservation purposes” so that the taxpayers were entitled to charitable deductions for “qualified conservation contributions?”

STATEMENT OF THE CASE

This matter was tried before the Honorable David Laro of the United States Tax Court on August 18 and 19, 2004 in the Ira Levin U. S. Courthouse at Detroit, Michigan. Both the issue of qualification of the

conservation easement pursuant to I.R.C. § 170(h) and the value of the easement were tried to the Court.

At the conclusion of trial Judge Laro ruled that he was not closing the record on the proceedings but was directing the parties to first brief the issue of whether or not the Petitioners were entitled to a charitable deduction under I.R.C. § 170(h) (TR 620; Apx ____). If he ruled in favor of the Petitioners then it was his likely intention to conduct further proceedings regarding the value of such easements since the testimony presented at trial was not adequate to enable him to make a reasoned judgment as to value. (TR at 621; Apx____). The Petitioners' appraiser had died (TR 4; Apx ____) and the respondent's appraiser had issued opinions with which the Court was not comfortable (TR 620; Apx ____).

The parties submitted their briefs on December 6 and 9, 2004. (Docket Entries; Apx ____). The Tax Court Opinion was issued on May 25, 2005 finding that the Petitioners' easements in fact qualified under I.R.C. § 170(h)(1). The Court set October 17, 2005 (adjourned to November 7, 2005) as the date for continued proceedings in Detroit on the valuation issue. (Docket Entries, Apx ____). The parties then settled the valuation issue and submitted an Agreed Computation to the Court on December 19, 2005 and on December 28, 2005 the Tax Court's Decision was entered consistent with

the stipulated settlement of the parties as to value and the Court's May 25, 2005 opinion as to qualification. Despite the final resolution of this matter by stipulated settlement, the Commissioner filed this appeal on March 23, 2006. (Docket Entries, Apx ____).

STATEMENT OF FACTS

1. Petitioners' Property And The Natural Resources On And Around The Property

In 1988, the Petitioners, Charles F. and Susan G. Glass, purchased a ten-acre parcel of land consisting of approximately 460 linear feet of Lake Michigan shore frontage extending approximately 1,055 feet east to highway M 119 in Emmet County, Michigan, between Harbor Springs and Cross Village. (R 53, Op. at 4-5, Apx ____). The ten-acre parcel contains two areas, the shore frontage and the scenic highway frontage, that comprise valuable conservation land in the eyes of the region's land conservation organization, Little Traverse Conservancy (Thomas Bailey TR at 51; Apx ____). In between the shore frontage and the highway frontage, the parcel contains a small home, two outbuildings, a cultivated lawn, some trees, and a driveway. (R 53, Op. at 5-7; Apx ____).

On its west side the parcel features a high bluff that drops approximately 100 feet to the beach and then terminates at the Lake

Michigan shoreline. (R 53, Op. At 5-6; Apx ____). The bluff is frequently referred to as the Algonquin Bluff and runs almost continuously from Harbor Springs to Cross Village, a distance of some 21 miles. The bluffs are delicate structures that, subsequent to the easement donations at issue in this case, were protected by a Steep Slope Zoning Ordinance of Emmet County (Thomas Bailey TR at 72; Max Putters TR at 403; Apx ____).

The bluff and the adjoining beach are natural habitat for several endangered species including Pitchers thistle, Lake Huron tansy, piping plovers and bald eagles (R 53, Op. at 7-8; Thomas Bailey TR at 78-80; Apx ____). The bluff was originally created by glaciers and ancient lakes and became vegetated by hardwoods and populated by native populations before European settlement and has been kept in its natural state since with nothing but a few footpaths on it. (Max Putters TR at 469; Apx ____). As a result there are hundred-foot White Pines growing right on the bluff. (Thomas Bailey TR at 116; Susan Glass TR at 366; Apx ____).

A second important conservation area on Petitioners' parcel was along state highway M 119. Because the home and outbuildings were set well back from the road, the parcel presents an unbroken forested view along M 119, a scenic highway known as the "tunnel of trees" for its narrow shoulders and dense forest canopy. (R 53, Op. at 6, n. 3; Apx ____).

Subsequent to the events in this case, a 20-mile section of M 119, including that portion along Petitioners' parcel, was designated by the Michigan Department of Transportation as a Scenic Heritage Route in recognition of its outstanding natural beauty.

2. Development Pressures On And Around Petitioners' Property

The wildlife habitat and scenery found on Petitioners' shore frontage and road frontage was vulnerable to development, for the Lake Michigan shoreline in Emmet County was under "rapid and drastic" development pressure in the early 1990's. (Thomas Bailey TR at 51; Apx ____). Property values were skyrocketing, as property was being subdivided, thereby destroying the scenery and driving out wildlife. (Thomas Bailey TR at 63; Apx ____).

As of 1992 and 1993, the Glasses' parcel was located in two different land use zones under the Emmet County zoning ordinances. The easternmost 400 feet along highway M 119 were classified as SR-2, allowing for single-family homes with a minimum lot size of 30,000 square feet. This zone also included a 40-foot setback from M 119 in which buildings and vegetation cutting were restricted. The rest of the Glasses' parcel was classified as RR-2, which required a minimum lot size of 22,000

square feet and 100 feet of frontage. There was also a 60-foot setback from the high water mark of the lake in which building was restricted.

Development in the nearby area was characterized by both single family homes and densely platted subdivisions on the lakefront. (R 53, Op. at 8; Apx ____). Lake lots in such subdivisions bring premium prices while multiple back lots sell for considerably less. (Charles Timothy Grimm TR at 177; Apx ____). The Sequoia Yacht Club just a mile down the road is an example of such a densely platted subdivision. (Charles Timothy Grimm TR at 164; Apx ____).¹ Other nearby dense developments that have been built either before or since the early 1990's include Blisswood and Old Trail Inn (R 53, Op. at 9; Apx ____), as well as Harbor Point, Wequetonsing, L'Arbre Croche, Bay Harbor, and Chippewa Cove. (Charles Timothy Grimm TR 159-160; Max Putters TR at 460; Apx ____).

Furthermore, this development pressure had led to the construction of homes on the face of the Algonquin Bluff. (R 53, Op. at 12; Apx ____). Many of these homes were built on areas of the bluff that previously had been considered unbuildable. Examples include the so-called "bluff-hangers" of Neff, Upjohn, and Angott, among others. (Charles Glass TR at

¹ Despite Respondents' attempts to portray Petitioner Charles F. Glass as a real estate developer, Mr. Glass' sole involvement in real estate development was to perform limited legal work in the late 1960's in connection with the Sequoia Yacht Club subdivision.

220-221, 361-364; Apx ____). Some of these projects resulted in veritable destruction of the bluff in order to access the building site. In 1992 and 1993, such homes were perfectly legal under Emmet County zoning ordinances, although they have since been restricted by the enactment of a bluff protection overlay district. (Max Putters TR at 407; Thomas Bailey TR at 60; Apx ____). This new ordinance followed the collapse of various sections of the bluff due to over-development. (Max Putters TR at 407; Apx ____).

Land that is subdivided and developed destroys scenic views and drives out wildlife. (Thomas Bailey TR at 63; Apx ____). In contrast, offsetting increased development with conservation easements renders the shoreline more hospitable for bald eagles, Lake Huron Tansy and Pitchers Thistle. (Thomas Bailey TR at 63; Apx. ____). Respondent essentially conceded that when the shoreline and bluff areas are developed, their natural habitat is destroyed. (Respondent's Counsel TR at 115; Apx ____). Likewise, the Executive Director and the Land Protection Specialist of Little Traverse Conservancy spoke of the damage that development brings to the bluffs. (Thomas Bailey TR at 118; Sally Churchill TR at 205; Apx ____).

3. Little Traverse Conservancy

Little Traverse Conservancy (“LTC”) is a Michigan nonprofit corporation established in 1972 for the purpose of preserving conservation land in northern Michigan. (R 53, Op. at 26; Apx ____). LTC protects scenic areas and wildlife havens from the effects of rapid and drastic development. (Thomas Bailey TR at 61; Apx ____). By the early 1990’s, LTC had experienced rapid growth and had amassed an endowment fund substantially over \$1,000,000, and its current endowment is approximately \$4,000,000. (R 53, Op. at 26; Apx ____). As of 2004, LTC had the largest membership supported nonprofit in northern Michigan with over 4,200 individuals and families. (R 53, Op. at 26; Apx ____). Charity Navigator.org rated LTC a top charity because of its efficient use of funds. (Thomas Bailey TR at 45-46; Apx ____).

LTC protects land by two different mechanisms: acquiring property outright and accepting conservation easements. (R 53, Op. at 26; Apx ____). A conservation easement is an agreement between a landowner and a land conservation organization whereby the landowner extinguishes certain development rights and the holder agrees to monitor and enforce the terms of the easement in perpetuity. Conservation easements are viewed by LTC as a cost-effective tool to protect land without having to own it outright. (Thomas Bailey TR at 52; Apx ____).

Because of its important wildlife habitat and scenic features, the shoreline and bluff areas along Lake Michigan in Emmet County were priority conservation lands for LTC in the 1980's and 1990's. (R 53, Op. at 23; Thomas Bailey TR at 63; Apx ____). Another LTC focus area was the M 119 scenic corridor, a favorite tourist route popularly known as the "tunnel of trees" for its intimate forest canopy. (Thomas Bailey TR at 51; Charles Glass at 218; Apx __). As part of its outreach efforts, LTC contacted numerous landowners with M 119 road frontage and Lake Michigan shore frontage to assess their level of interest in conserving their habitat-rich and scenic land through a conservation easement.

4. The 1990 Conservation Easement

Upon purchasing the property in 1988, the Glasses became increasingly appreciative of the important natural features along the shore frontage and road frontage. (Charles Glass TR at 217; Apx __). In 1990 the Glasses were approached by a representative of LTC and asked if they would consider donating a conservation easement on the M 119 road frontage of their property. (Charles Glass TR at 218-219; Apx __). They met with various representatives of LTC to become more familiar with the concept and were given literature to read. (Charles Glass TR at 219; Apx

___). In December 1990, the Glasses donated a greenbelt easement along the width of their property abutting highway M 119 and extending west 250 feet. (R 53, Op. at 14; Apx ___). Despite its similar size, shape, and purposes, the 1990 conservation easement was not challenged by the Commissioner as unqualified and is not relevant to these proceedings.

5. The 1992 and 1993 Conservation Easements

During the summer and fall of 1992 the Glasses began to discuss the possibility of a conservation easement along the beach and bluff with representatives of LTC. The purpose of this easement would be to protect part of the property's beach and bluff from over-development similar to what they'd seen on nearby properties by restricting the number of homes that could be built. (Charles Glass TR at 253, 255, 258; Apx ___).

The Glasses began with an easement on the northwest corner of the property which extends from Lake Michigan 120 feet east to a point just below the top of the bluff and is 150 feet from north to south along the lake. (Ex 11-J at 8; Apx ___). The easement protects the bluff and beach in perpetuity from construction of a home on the face of the bluff. With the assistance of an attorney from LTC the easement's legal description was created and the donation was completed in December 1992. In 1993, the

Glasses again considered a conservation easement to protect the south end of their bluff/beach frontage. Working with LTC's attorney, they developed a legal description for an easement that extends from Lake Michigan 120 feet east and 260 feet from north to south along the lake. (Ex. 12-J at 8; Apx ____). The second beach and bluff easement donation was completed in December 1993, at which point there were a total of three conservation easements on the Glasses' property, permanently protecting the entire road frontage and the vast majority (410 feet out of a total of 460 feet) of the shore frontage.

The 1992 and 1993 conservation easements (hereinafter collectively the "conservation easements" or "easements" or individually the "conservation easement" or "easement") both provide that "the purpose of this Conservation Easement is to ensure that the scenic and natural resource values of the Property will be retained forever." (Ex. 11-J at 2; Ex. 12-J at 2; Apx ____). The conservation easements aim to "prevent the use or development for any purpose or in any manner which conflicts with the perpetual maintenance of the scenic and natural resource values." (Ex. 11-J at 2; Ex. 12-J at 2; Apx ____). For instance, the conservation easements contain numerous restrictions that permanently prohibit development or construction of most buildings, other improvements and other disturbances to the natural condition of the protected properties. (Ex. 11-J at 3; Ex. 12-J at

3; Apx ____). First and foremost, the properties may not be subdivided and no new homes may be built on the protected properties. (Ex. 11-J at 2; Ex. 12-J at 2; Apx ____). These two prohibitions are particularly important because they essentially doubled the 60-foot setback requirement under county zoning and thereby prevented the establishment of prime lakefront lots and the construction of new homes built right onto the side of the bluff (known as “bluff-hangers”).

Furthermore, minor structures such as a storage shed, day shelter, wooden boat house, or deck could be built only “in a manner and location which minimizes interference with the scenic and natural resource values” of the protected properties. (Ex. 11-J at 3; Ex. 12-J at 3; Apx ____). The easements also established limitations on additions to and replacements of the existing residence and guest cottage. (Ex. 11-J at 3; Ex. 12-J at 3; Apx ____). Additional protections include outright prohibitions on roads, trash dumping, mining, use of all-terrain vehicles, and the alteration of natural water courses, as well as significant limitations on signs, surface disturbances (filling, excavating, removing topsoil, etc.), and vegetation cutting. (Ex. 11-J at 2-3; Ex. 12-J at 2-3; Apx ____). In particular, vegetation cutting is permitted only “selectively” and for the limited purposes of protecting views, safety, and incidental to other permitted uses, while clear-

cutting of trees is prohibited outright. (Ex. 11-J at 3; Ex. 12-J at 3; Apx ____). The landowners also reserve the right to “make wildlife habitat improvements” and in the case of the 1992 easement, to establish additional foot paths (Ex. 11-J at 3; Ex. 12-J at 4; Apx ____).

Both conservation easements have extensive provisions concerning enforcement of the specified restrictions. (Ex. 11-J at 4-5; Ex. 12-J at 4-5; Apx ____). These provisions allow for LTC as donee to enforce compliance and enjoin non-compliance by the Petitioners or others and to seek legal remedies as it deems fit. In addition, the easement was established in accordance with the Michigan Conservation and Historic Preservation Easement Act, which grants the holder certain enforcement rights. MCL 324.241 et seq. LTC is granted access by right of ingress and egress to the property generally to inspect and enforce its rights. The rights of LTC to transfer or otherwise assign each easement are restricted to permit assignments only to “a qualified conservation organization which agrees to enforce this Conservation Easement in accordance with the regulations established by the Internal Revenue Service governing such transfers in the laws of the State of Michigan.” (Ex. 11-J at 5; Ex. 12-J at 5; Apx ____). The easements only permit termination in the event of “subsequent, unexpected changes in the Property, or nearby property, ... (which) ... render the

Purpose for this Conservation Easement impossible to achieve.” (Ex. 11-J at 5; Ex. 12-J at 6; Apx __).

SUMMARY OF ARGUMENT

The Tax Court’s factual determination that the conservation easements met the required conservation purpose of protection of a significant, relatively natural habitat was not clear error. Because the easements were perpetually enforceable, by the donee, and in light of the evidence concerning the donors’ intent, the Tax Court’s factual determination that the easements were donated exclusively for conservation purposes was also not clear error.

ARGUMENT

Standard of Review

An appellate court reviews the findings of fact of the Tax Court for clear error, and reviews de novo the Tax Court’s application of the law. Ekman v Commr, 184 F3d 522, 524 (CA 6, 1999). Respondent’s arguments on appeal are largely attacks on the Tax Court’s findings of fact, although Respondent understandably, in light of the standard of review,

attempts to present his arguments as matters of statutory construction. Although Respondent cites Ekmann for the proposition that appellate courts review mixed questions of law and fact de novo, Eckmann says no such thing, and the notion of de novo review for issues like those raised by Respondent here was rejected by this Court in Friedman v Commr, 216 F3d 537 (CA6, 2000). As Friedmann holds, 216 F3d at 542:

The question of whether a particular set of facts satisfies (or fails to satisfy) the requisite burden of proof is an inseparable part of the factfinding process and as such is reviewed -- together with the facts -- for clear error.

A. Introduction

In response to the rapid loss of natural areas throughout the country, in 1976 Congress authorized a federal income tax charitable deduction for the donation of a conservation easement. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2124(e)(1)(C) & (D); enacted as I.R.C. § 170(f)(3)(B)(iii) and (iv). Although the 1976 statute originally ran through June 14, 1981, Congress permanently extended its provisions via the Tax Treatment Extension Act of 1980, Pub. L. 96-541, § 6(a), enacted as I.R.C. § 170(h). In explaining the intent behind this permanent extension of the conservation easement deduction, the House Committee on Ways and Means expressly recognized “the increasingly important role that conservation easements have come to play in efforts to conserve and protect the country’s natural

resources and its cultural heritage.” (H.R. Rept. No. 96-1278). The Senate Finance Committee’s report included similar language. (S. Rept. No. 96-1007).

Under the 1980 statutory scheme, still applicable in 1992-93 and today, a conservation easement qualifies for an income tax deduction by meeting one of four different conservation purposes: outdoor recreation, wildlife habitat, open space, or historic preservation. See I.R.C. § 170(h)(4)(A)(i) – (iv). The only conservation purpose relevant to this appeal concerns wildlife habitat, namely, “the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.” (I.R.C. § 170(h)(4)(A)(ii)).

In 1986, the Treasury Department published final regulations implementing I.R.C. § 170(h). The section concerning wildlife habitat easements specifies that such habitat must be “significant” in order to qualify for a deduction, and proceed to list several examples of significant wildlife habitat, including habitat for “rare, endangered, or threatened species” and “high quality examples of a terrestrial community.” Treas. Reg. § 1.170A-14(d)(3)(i), (ii).

I.R.C. § 170(h) also requires that the conservation easement be “exclusively for conservation purposes.” (I.R.C. §§ 170(h)(1)(C), 170(h)(5))

The statute provides that this term means that the applicable conservation purpose must be “protected in perpetuity.” (I.R.C. § 170(h)(5)(A)) The relevant implementing regulations give teeth to the perpetuity requirement by focusing on events that could defeat the long-term enforceability of the easement, such as the failure to record the deed, foreclosure by a mortgagee, retention of mineral rights, and extinguishment of the easement. See Treas. Reg. § 1.170A-14(g)(1) - (6).

Sixth Circuit case law pertaining to charitable deductions and the legislative history applicable to I.R.C. § 170(h) require a liberal construction in favor of Petitioners. First, although it is well settled that tax deductions generally are matters of legislative grace and are therefore construed in favor of the government, this circuit has carved out an important exception for charitable deductions. In *Weingarden v. Commr*, 825 F2d 1027 (6th Cir. 1987), the court held that because charitable deductions are an expression of public policy, “provisions regarding charitable deductions should therefore be liberally construed in favor of the taxpayer.” *Id.* at 1029. Moreover, when Congress first established the deduction for the donation of conservation easements in the Tax Reform Act of 1976, its legislative history stated that it “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.” (H.R. Conf. Rept. 95-263, at 30). Respondent’s attempt to downplay *Weingarden* by pointing to *Davis v United States*, 495 U.S. 472 (1990) is inapposite for two reasons. First, *Davis* did not involve the construction of charitable deductions in general, but rather the construction of a particular phrase that was added to I.R.C. § 170(h). *Id.* at 478-484. Second, the legislative intent behind the statute adding this particular phrase suggested a narrow construction, for “Congress had a specific meaning of ‘for the use of’ in mind.” *Id.* at 479. In the instant case, we have the exact opposite situation, for Congress went out of its way to express its intent of a liberal construction of the phrase “conservation purposes.” Given the clear expression of broad legislative intent here, the logic of *Davis* supports rather than opposes a construction in favor of Petitioners.

Liberal construction or not, Petitioners’ conservation easements qualify for a federal income tax charitable deduction because they meet the qualifications of I.R.C. § 170(h). In particular, the easements protect “relatively natural wildlife habitat” in accordance with I.R.C. § 170(h)(4)(A)(ii) and are “exclusively for conservation purposes” in accordance with I.R.C. § 170(h)(5).

B. The Tax Court Correctly Concluded That The Conservation Easements Met The Conservation Purpose Of “The Protection Of A Relatively Natural Habitat Of Fish, Wildlife, Or Plants, Or Similar Ecosystem”

The Tax Court, based on the credible testimony of numerous trial witnesses, properly concluded that the conservation easements protected significant natural habitat for several endangered and threatened species, including bald eagles, Lake Huron Tansy, and Pitcher’s thistle. (R 53, Op. at 37; Apx ____). Although Respondent posits various arguments as to why said species were not found on the easement property, ultimately the facts speak for themselves and there is no “clear error.”

1. The Conservation Easements Protected Significant Wildlife Habitat Because Several Endangered and Threatened Species Were Identified on the Protected Properties.

Petitioners do not dispute that the wildlife habitat protected by a conservation easement must be “significant” in order to qualify under I.R.C. § 170(h)(4)(A)(ii), as the relevant Treasury regulation is perfectly clear on this point. § 1.170A-14(d)(3)(ii). Nor is there any doubt that habitat for rare, threatened, or endangered species meets the significance requirement, according to the same regulation. The disagreement between the parties concerns whether the property protected by the conservation easements met this significance standard.

Respondent's chief argument against "significance" boils down to the contention that no endangered or threatened species were proven to be located on the protected property. Respondent claims that all mentions of such species were in the context of Petitioners' entire 10-acre property, and not those specific areas protected by the two conservation easements. A review of the trial transcript shows this argument to be entirely without merit. For example, Susan Glass, one of the Petitioners, when asked whether she ever had observed threatened species "on the property covered by the easements," testified that she had seen bald eagles and the Lake Huron tansy and perhaps piping plovers. (Susan Glass TR at 372; Apx ____).² In direct contradiction of Respondent's claims, both the question and the answer were both carefully presented as referring specifically to the protected part of the property and not the entire 10 acres.

Likewise, the Executive Director of LTC expressly noted the easements' role in protecting the habitat of these species (Thomas Bailey TR at 64, Apx ____):

² Respondent plays up the fact that one of the roosting spots for the Bald Eagle was outside of the easement areas, when in fact the witness was merely reciting the most recent instance in which she had seen Bald Eagles in the area. As noted above, Susan Glass and other witnesses discussed viewing Bald Eagles on the protected properties on many different occasions.

From the conservancy standpoint, though, **relative to these easements**, the focus is much more not the physical use but the wildlife use. It's not a direct -- I mentioned direct physical use. The indirect use is more important. That's where the eagles live. That's where the piping plovers nest. That's where the Lake Huron tansy and the Pitcher's thistle grow [emphasis added].

At another point, he specifically mentions that the purpose of the easements was to protect the integrity of the community of species found on the bluffs along the shore of Lake Michigan, and, by implication, on the property protected by the two conservation easements. (Thomas Bailey TR at 72, Apx ____). Even when the witnesses did not affirmatively declare that the word “property” specifically meant the portion of Petitioners’ property that was protected by the easements, it is perfectly clear from the context of their testimony that they intended to mean only the protection areas. (Thomas Bailey TR at 67; Apx ____). Furthermore, the conservation easements themselves refer to the property protected by the easements simply as “the Property,” (Exs. 11-J at 1, 12-J at 1, Apx ____), so it was only natural that the parties would use the same terminology.³ The Tax

³ In light of the discussion above concerning a liberal construction of charitable deductions in general and the phrase “conservation purposes” in particular, Respondent’s argument here seems even more tenuous. Respondent’s point is reducible to the suggestion that Petitioners failed to use specific magic words that would remove any scintilla of ambiguity. Surely Petitioners met any *prima facie* burden of proof and it fell to the Respondent to offer any rebutting evidence through cross-questioning or

Court found all of the above testimony convincing and credible (R 53, Op. at 37; Apx __), and there is no clear error of fact.

According to the regulations, yet another way that habitats can be “significant” is if they constitute “natural areas that represent high quality examples of a terrestrial community...” Treas. Reg. §1.170A-14(d)(3)(ii). For instance, a particular species might not be rare, threatened or endangered in a general sense but could still be worthy of protection due to particular qualitative features. The transcript and the easements are replete with references to the “large”, “hundred-foot”, “original”, “old growth” white pine trees located on the protected portions of the properties (Thomas Bailey at TR 67, 99; Susan Glass TR at 368; Sally Churchill TR at 204; Exs. 11-J at 1, 12-J at 1, Apx ____). So even if we suspend our disbelief and assume *arguendo* that no bald eagle, Pitchers thistle, Lake Huron tansy, piping plover, or other endangered or threatened species habitat is located on the protected properties, the existence of this venerable community of old growth pine trees is exactly the type of habitat that rises to the level of significance prescribed by the regulations.

Contrary to Respondent’s claims, the Tax Court conducted a searching analysis of the significance issue and concluded that the two

through its own witnesses. Issues regarding any claimed ambiguity in the testimony are properly left to the trier of fact.

conservation easements did indeed protect significant wildlife habitat because specific endangered and threatened species were located on and near the protected properties.⁴

2. The Protected Property’s Wildlife Habitat Was Significant
Even If Particular Rare, Endangered or Threatened
Species Had Not Been Identified on the Protected
Properties

Even if rare, endangered or threatened species had not been identified on the protected properties, the conservation easements still would qualify under I.R.C. § 170(h)(4)(A)(ii). As Respondent acknowledges, the examples of significant habitat contained in the regulations are non-exhaustive. Treas. Reg. § 1.170A-14(d)(2)(ii). There is no requirement in the statute, the regulations, or any ruling by the Service that the donor of a habitat protection conservation easement provide proof of the existence of rare, endangered or threatened species on the protected property. Such a requirement would be contrary to Congressional intent and public policy for several reasons.

⁴ Respondent’s claim that the Tax Court ignored the significance requirement is based on a misreading or a distortion of footnote 17 of the Opinion. (R 53, Op. 39 n. 17). This footnote occurs in the midst of a three page discussion of how the easement properties contained “significant habitat.” Via the footnote, the Tax Court simply was reiterating that significant habitat protection is one of four separate and independent means of meeting the conservation purposes requirement of I.R.C. § 170(h)(4).

First of all, as the Tax Court noted, the legislative history of the immediate precursor to I.R.C. § 170(h) states that Congress “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.” (H.R. Conf. Rept. 95-263, at 30). A liberal construction was advised because in the 1970’s, at the time this precursor statute was passed, valuable conservation land was being developed at an increasingly rapid pace. In permanently extending the conservation easement deduction in 1980, Congress expressly noted that conservation easements play an important role in the preservation of our nation’s natural resources and cultural heritage. (S. Rept. No. 96-1007 at 9).⁵ The loss of wildlife habitat had increased even further by the early 1990’s and continues to increase to this day. Respondent’s rigid interpretation of “significant” wildlife habitat flies in the face of Congress’ stated intent to liberally construe what qualifies as conservation land.

⁵ Respondent’s brief emphasizes that portion of the Congressional intent stating that “it is not in the country’s best interest to restrict or prohibit the development of all land areas and existing structures” (S. Rept. No 96-1007), as if to suggest that conservation easements dominate the shoreline of Lake Michigan. In fact, on Lake Michigan and in most parts of the nation, conservation easements protect only a miniscule fraction of the landscape, and development continues apace on the vast majority of lands.

Nor does Respondent's interpretation make sense from a scientific perspective. Over the past few decades an entire branch of biology, called "landscape ecology" or "large-scale ecology," has developed around the principle that the ranges and concentrations of plant and animal species are in constant flux. See *What Lawmakers Can Learn From Large-Scale Ecology*, Fred Bosselman, Florida State University Journal of Land Use & Environmental Law, 17 J. Land Use & Env'tl. Law 207, 221-222 (2002). In particular, "Today's ecologists have a much different view of landscape, seeing it more like a kaleidoscope of heterogeneous patches that shift into new configurations frequently." *Id.* at 241. A theory known as "patch dynamics" holds that the "boundaries of ecosystems appear and disappear in a ballet of 'patch dynamics,' through which the characteristics of natural areas change as the plants and animals adjust to changing environmental conditions. *Id.* at 241.

A rule requiring that a particular species be documented on a conservation easement property would be inconsistent with this landscape ecology approach. For example, many endangered species were at one time quite common, only to be decimated by certain natural or human-caused threats. As an endangered species population rebounds, it will by necessity re-occupy certain habitat patches before others. In fact, citing a study by the

National Research Council, one commentator states that “Because the advent of landscape ecology has focused attention on the spatial dynamics of population structure, protection of unoccupied habitat is critical to the conservation of most endangered species.” *Note: Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors*, Ronny Millen and Christopher L. Burdett, *Minnesota Journal of Law, Science & Technology*, 7 Minn. J.L. Sci. & Tech. 227, 269 (2005). If the courts were to adopt a categorical rule requiring that a specific species be documented on a particular parcel of land in order for that land to qualify for a habitat protection easement under I.R.C. § 170(h)(4)(A)(ii), it would be extremely difficult for any habitat of recovering or expanding endangered species to qualify for protection.

The instant case provides a dramatic example of this principle. The Conservancy’s Executive Director testified that in the early 1990’s LTC was attempting to create “safe havens” for species such as the bald eagle, which was “making a big come-back along the Lake Michigan shoreline in that area.” (Thomas Bailey TR at 51, 54, Apx ____). If taxpayers in this area had to prove to the Commissioner that bald eagles were already located on their property, then no easement would qualify until the eagles had already returned and taken up residence. In other words, a conservation easement

could only qualify if it was reactive and not proactive. Such a narrow interpretation of significance would defeat the purpose of protecting significant habitat.

A more generous interpretation is also supported by the precise wording of the Treasury regulations. The relevant regulation provides that if the wildlife or plant species “normally lives” in such habitat, the easement will qualify. Treas. Reg. § 1.170A-14(d)(3)(i). See also S. Rept. 96-1007. The regulatory definition of “habitat” matches the dictionary definitions of the term, namely, “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).

Even when the population fluctuations are not as dramatic as was the case for the bald eagle, the same ecological principle of patch dynamics applies. For instance, the Pitcher’s thistle or the piping plover may not have been observed on the protected property on the specific day that the donors or LTC staff walked the land, but that does not mean they were not there. And even if they were not on the property at that specific moment in time, that does not mean they were not there a few days, months or years prior to or after the date of such a visit. The key test in determining whether a

property possesses significant habitat is whether it establishes suitable and likely conditions for the occurrence of such species. Perhaps the Tax Court said it best when it wrote (R53, Op. at 39; Apx ___):

By the same token, petitioners' 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. 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.

For any number of reasons, a species might normally live or occur on a property but not be identified at any particular point in time. Respondent's approach requiring documentation of a particular species would read the word "normally" out of the regulations and the Congressional intent.

Moreover, Respondent recently ruled in a similar context that a parcel can qualify under I.R.C. § 170(h)(4)(ii) in part based on its "potential" habitat value. In Private Letter Ruling 200403044, Respondent concluded: "The Subject Tract is the actual habitat for numerous plants and animal species, including a State-listed species "of concern," and is *potentially* the habitat for several endangered, threatened or rare plant and animal species. The Easement will protect such habitat." I.R.S. P.L.R. 200403044 at 9 (emphasis added). Although under I.R.C. § 6110(k)(3) a Private Letter Ruling cannot be used or cited as controlling precedent, Petitioner offers this

ruling for its persuasive authority and to demonstrate Respondent's own inconsistency on this point.

To be sure, in the absence of a documented species on the protected property, some evidential showing is required to determine that significant wildlife habitat exists. Petitioners fully agree with Respondent that a conservation easement does not qualify under I.R.C. § 170(h)(4)(ii) based on the mere "speculative possibility" that rare, threatened, or endangered wildlife species could wander onto a property. (Respondent's Brief at 42). Rather, there must be credible grounds behind the claim that significant wildlife habitat exists. In the instant case, the record contains ample evidence of such grounds. Most prominently, LTC's Executive Director stated emphatically that the Lake Michigan shoreline is prime habitat for the very species sought to be protected by the easements, noting "I have personal, first-hand knowledge that that entire shoreline is habitat for Pitcher's thistle, Lake Huron tansy, bald eagle, piping plovers." (Thomas Bailey TR at 54; Apx ____). He noted that the top botanist in the state serves on LTC's Board of Directors and is a resource for LTC in identifying significant plant habitat. (Thomas Bailey at TR 66; Apx ____). He also took the affirmative step of conferring with a noted expert on the piping plover, Dr. Francine Cuthbert of the University of Minnesota, to confirm that the

easement property provided habitat for that species. (Thomas Bailey TR at 67; Apx ____). Finally, he walked the protected property and noted the prime habitat potential of the shorefront and bluff area. (Thomas Bailey at TR 67; Apx ____). In other words, Petitioners' claim that the easements protect significant wildlife habitat does not arise from thin air, but from sound, science-based inquiry and analysis.⁶ Such analysis amounted to much more than mere speculation.

3. Events Occurring Outside of the Easement Boundaries Are Not Factors In Determining Whether The Easements Protected Significant Wildlife Habitat.

Respondent claims that the possibility that development that might some day occur beyond the four corners of the easement properties disqualify the easements from meeting the significant wildlife habitat requirement. This line of argument could be used to reject every conservation easement ever granted, for surely it is a truism that a conservation easement can only protect the property that it encumbers. Respondent seems to suggest that a conservation easement should be

⁶ Quite often, the basis for discerning that a conservation easement protects significant wildlife habitat will come from the easement holder, whose staff or volunteers will have the expertise to identify such significant habitat from "run-of-the-mill wildlife." (Thomas Bailey at TR 53; Apx ____). Here, for example, the easements were drafted by LTC and identified several of the noteworthy species that were to be protected. (Exs. 11-J at 1, 12-J at 1, Apx ____).

expected to protect not only the habitat located on the encumbered properties, but also protect any nearby habitat owned by neighbors. Although Petitioners encouraged their neighbors to consider granting conservation easements (Charles Glass TR at 260), what those neighbors ultimately chose to do has no relevance to whether Petitioners' property qualified as significant wildlife habitat.⁷

Ironically, the fact that neighbors might develop their property is all the more reason to encourage the protection of the Petitioners' land! It is even plausible that the significance of the Petitioners' property's wildlife habitat will rise if surrounding land succumbs to development and the easement properties provide a refuge for displaced birds and animals. Indeed, LTC's Executive Director discussed the critical role of conservation easements in creating wildlife "safe havens" and relieving the "crowding out" of endangered and threatened species. (Thomas Bailey TR at 51, 60; Apx ___).

⁷ In addition, the possibility of future conservation easements on neighboring properties points to a logical inconsistency in Respondent's argument. That is, Respondent only mentions the potential *development* that could occur on neighboring properties, but who's to say that these properties will not also be *protected* by future conservation easements? In any event, speculating on the possible development or protection of nearby properties is a futile endeavor and would entail extremely tenuous assumptions and predictions.

Moreover, Respondent objects that Petitioners did not place a conservation easement on their entire ten-acre property, so as to better protect the wildlife habitat located on the beach and bluff. But if the conservation purposes of the easements were to protect habitat and open space, what would be the point of extending the easement to those areas of the property that had no significant habitat, contained several buildings, and were not visible from any public vantage points? “Protecting” the Petitioners’ front lawn, cottage, and driveway would seem to be a waste of everyone’s time and could even be interpreted as an abuse of the statute, for it would surely inflate the value of the taxpayer’s deduction. On the other hand, the significant wildlife habitat and the “most dramatic and beautiful scenery, a special part of the property” was on the beach and bluff. (Susan Glass TR at 369, Apx ____).

4. The Size Of The Parcels Is Not A Factor In Determining Whether The Easements Protected Significant Wildlife Habitat.

Respondent further claims that the relatively small size of the easement properties precluded their qualification as significant wildlife habitat. Again, this argument has no basis in the law, is contrary to the liberal Congressional intent, and defies certain basic ecological principles. Neither the statute nor the regulations impose any sort of minimum size for a

conservation easement. Indeed, they are entirely silent on the issue of parcel size. Perhaps this is for the very good reason that small parcels of land can constitute crucial habitat. (*What Lawmakers Can Learn From Large-Scale Ecology*, supra, 17 J. Land Use & Envtl. Law 207 at 251-252.) The purpose of any given conservation easement is not, as Respondent suggests, to guarantee the protection of a self-sufficient population of endangered species for all time. No single easement in the world would meet this standard. And when the Tax Court cited to a regulation defining habitat with respect to a species' "life cycles," (R 53, Op. at ___, Apx ___), the clear implication was that any particular habitat parcel may serve one or several different parts of these life cycles, but need not satisfy all of them at once. A bald eagle, for example, might feed in one habitat (the lake), roost in another, and nest in a third habitat. Each kind of habitat is equally important to the long-term success of the species.

Furthermore, it is quite common for an aggregate of several small parcels of protected land to create a sum of habitat greater than its individual parts. LTC, for example, has protected over 75 miles of shoreline on various bodies of water in northern Michigan (Thomas Bailey TR at 62; Apx ___). As of this writing, LTC owns 15 different nature preserves, and counting, in Emmett County alone. Respondent's approach would be wholly

inconsistent with such a regional approach to habitat protection. Moreover, a large-parcel requirement would have the practical effect of limiting conservation easement deductions to those who are fortunate enough to own large plots of land. All of these outcomes would conflict with Congress' declaration of a liberal construction of the conservation purposes standards. (H. Conf. Rept. 95-263 at 30).

The Service itself, in Private Letter Ruling 8546112, acknowledged that a conservation easement protecting a very small parcel can indeed qualify under I.R.C. § 170(h). In this ruling, the easement was a mere three quarters of an acre, smaller than the size of the combined two easements in the instant case. Nevertheless, the Service evaluated the conservation values of the property, taking express note of its wildlife habitat, and concluded that the easement did indeed meet the requirements of I.R.C. § 170(h). (I.R.S. P.L.R. 8546112 at B-108-109). Again, although a private letter ruling does not establish binding precedent, the similarities to the instant case are persuasive.

Finally, although a portion of the protected properties did enjoy certain protections under the county's 60-foot setback requirement from the lake, the easements essentially doubled these setbacks to 120 feet. Respondent's citation to *Turner v Commr*, 126 T.C. No. 16, 2006 WL

1330084 (May 15, 2006), is inapposite, for that case involved a sham conservation easement that merely limited a 30-acre parcel to 30 building lots, the maximum permitted under the county's zoning ordinance. Thus, in *Turner*, no land was protected from development. In contrast, the easements in the instant case essentially double the setback requirements and protect the majority of the bluff from additional homes and other harmful development.

5. The Easements' Reserved Rights Were Consistent With The
Protection Of Significant Wildlife Habitat.

The conservation easements contained limited, carefully constructed, reserved rights that were entirely consistent with the protection of the protected property's significant wildlife habitat. Respondent implies that in order to qualify as protecting habitat, virtually all uses of the property must be extinguished. Respondent goes so far as to suggest that even allowing walking on the property would disqualify the easement. Such a radical interpretation of the statute and regulations would invalidate virtually every easement ever granted.

Every single right reserved by the Petitioners is carefully limited so as to ensure that the significant wildlife habitat remained protected. First, the easements permit pruning or cutting of vegetation for the limited purposes of safety or view maintenance and only in a "selective" manner. In any event,

“clear-cutting” is strictly prohibited. (Exs. 11-J at 3, 12-J at 3; Apx ____). Moreover, when considered in the context of the two most notable endangered plant species that were being protected, the Lake Huron Tansy and the Pitcher’s Thistle, both merely a few feet high, it becomes evident that neither of these species would interfere with any views nor present any safety concerns, so no cutting of them would be permitted.⁸

The next reserved right to which Respondent objects is the right to construct limited minor buildings such as a day shelter or storage shed. Respondent completely fails to mention that under the terms of the easements such structures could only be built “in a manner and location which minimizes interference with the scenic and natural resource values of the Property.” (Exs. 11-J at 3, 12-J at 3, Apx ____). In other words, these structures could not be built on the bluff or on a sensitive part of the beach. If Petitioners did attempt to build in a sensitive location, LTC could exercise its rights under paragraphs 4.0 and 5.0 of the easements and block such construction or order its removal. (Exs. 11-J at 4, 12-J at 4, Apx ____). As a general matter, conservation easement holders have not hesitated to enforce their rights through litigation, often seeking and obtaining injunctive

⁸ Lest there be any confusion on this point between future landowners and LTC, the easements contain construction clauses providing that the easements are to be liberally construed in favor of the conservation purposes of the easements. (Exs. 11-J at 6, 12-J at 6, Apx ____).

relief to prevent or cure violations. See, e.g., *Duffy v Milder*, 2006 R.I. LEXIS 48 (R.I. 2006); *Morganbesser v Aquarion Water Co of Connecticut*, 276 Conn. 825 (2006); *United States v Blackman*, 2005 U.S. Dist. LEXIS 25622 (W.D. Va. 2005); *New Hampshire v Rattee*, 761 A.2d 1076 (N.H. 2000).

In addition, the minor structures allowed under these easements pale in comparison to the large mansions that could be built in the absence of an easement. LTC's Executive Director testified that "large buildings" would have the ability to destroy the conservation values of the property, and further stated that the all of the reserved rights allowed under the easement (including, one presumes, the minor buildings) were consistent with protecting these values. (Thomas Bailey TR at 59, 74-75; Apx. p. ____). The major concern of both Petitioners and LTC was to prevent the construction of "bluff-hangers," large homes that are built right on the bluff and that cause irreparable damage due to their size and location. (Charles Glass TR at 220-221; Thomas Bailey TR at 59; Apx ____). It was a finding of fact by the Tax Court that such homes were being built in the nearby area along this bluff. (R 53, Op. at 12; Apx ____).

Respondent also posits that the right to establish foot paths on the protected properties is in derogation of habitat protection purposes. Quite to

the contrary, the right to maintain foot paths can also be seen as essential to such conservation purposes, for otherwise people could trample all over the very plants that are being protected. Moreover, foot paths help to maintain the structural integrity of the bluff by keeping people confined to specific areas rather than traipsing all over the place. Respondent cannot have it both ways by complaining about the right to walk on the protected properties and also objecting to the establishment of foot paths.

Tellingly, Respondent fails to mention another reserved right that is found in both easements, namely, the right to “make wildlife habitat improvements.” (Exs. 11-J at 3, 12-J at 4, Apx ____). Therefore, in the unlikely event that any other reserved rights might minimally interfere with wildlife habitat, the Petitioners have expressly reserved the right to make sure that such habitat is not only protected but enhanced and improved.

Virtually all conservation easements contain reserved rights that one could argue interfere with the easement’s conservation purposes. In order to address this sort of the challenge, the regulations provide that inconsistent uses are not permissible but attach the caveat that “this requirement 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). In other words, encumbering a property with a conservation

easement does not require that all uses of the property be extinguished. The statute and the regulations seek a balanced approach between protection and reserved rights.

With respect to such a balance, it behooves the parties and the courts to grant a certain degree of deference to the determination of the easement donee. After all, this donee will be responsible for enforcing the easement in perpetuity. It simply would not make sense for a donee to accept a fundamentally flawed easement that does not accomplish the stated conservation purposes. In this case, LTC's Executive Director expressly stated that none of the reserved rights contained in these easements impaired the conservation purposes of the donation. (Thomas Bailey TR at 74-75; Apx ____). Likewise, LTC's employee who was most intimately involved in negotiating the transactions stated that the easements were consistent with the goals and purposes of LTC. (Sally Churchill TR at 200; Apx ____). At no point did Respondent challenge these assertions during cross-questioning or present its own witnesses to offer competing evidence. Although a conservation easement donor is responsible for ensuring that the document meets the statutory requirements, donors typically rely, as was the case here, on the easement holder's determination that the reserved rights are

consistent with the overall purpose of the easement and are therefore in compliance with the statute.

Finally, as the Tax Court pointed out, Respondent's argument about reserved rights is more properly viewed as a valuation issue. (R 53, Op. at 42, n. 20). As previously discussed, the parties have settled all valuation issues and thus the only matters for consideration before this Court concern the qualification of the easements under I.R.C. § 170(h).

C. The Tax Court Correctly Ruled That The Conservation Easements Were Donated “Exclusively For Conservation Purposes”

1. The Tax Court Properly Interpreted “Exclusively For Conservation Purposes” To Refer To The Perpetual Enforceability Of The Easement.

As with the wildlife habitat issues, the Tax Court presented a thorough and convincing analysis of the term “exclusively for conservation purposes” that is found in I.R.C. §§ 170(h)(1)(C) and 170(h)(5). As the Tax Court noted, the statute, the regulations, and the legislative history demonstrate that this term focuses on the easement holder's ability and willingness to enforce the easement in perpetuity.

The statute provides that the term “exclusively for conservation purposes” term has a very particular focus on perpetuity. I.R.C. § 170(h)(5)(A) provides: “A contribution shall not be treated as exclusively

for conservation purposes unless the conservation purpose is protected in perpetuity.” Furthermore, the very first sentence of the regulations interpreting this provision directs the reader to other parts of the regulations that address perpetual enforceability issues. Treas. Reg. §1.170A-14(e)(1)(referencing §1.170A-14(g)(1)-(6)). For example, §1.170A-14(g)(1) requires that the easement be recorded, so that all future landowners will have notice of the easement. Section 1.170A-14(g)(2) provides that prior mortgages on the protected property must be subordinated to the easement, so that a foreclosure would not extinguish the easement. Section 1.170A-14(g)(3) concerns future remote events that could defeat the conservation purposes. All of these regulations ensure that what is written in the easement will in actuality be enforceable in perpetuity.

The legislative history also indicates the “exclusively for conservation purposes” refers to enforceability issues. In particular, Tax Court quotes a Congressional committee report concerning the Tax Reduction and Simplification Act of 1977, Pub. L. 95-30, sec. 309(a), 91 Stat. 154, in which this term is first explained. The relevant passage states:

It is intended that a contribution of a conservation easement * *
* qualify for a deduction only if the holding of the easement * *
* is related to the purpose or function constituting the donee’s
purpose for exemption * * * and the donee is able to enforce its
rights as holder of the easement * * * and protect the
conservation purposes which the contribution is intended to

advance. The requirement that the contribution be exclusively for conservation purposes is also intended to limit deductible contributions to those transfers which require that the donee hold the easement * * * exclusively for conservation purposes (i.e., that they not be transferable by the donee in exchange for money, other property, or services). (H. Conf. Rept. 95-263, supra at 30-31, 1977-1 C.B. at 523).

In addition, later committee reports pertaining to the 1980 bill that permanently extended the easement deduction contain virtually identical language under a section heading of “exclusively for conservation purposes.” (S. Rept. No. 96-1007; H.R. Rept. No. 96-1278). These paragraphs are especially significant because they represent a clear demonstration that “exclusively for conservation purposes” was intended to refer specifically to the donee and to enforceability issues. Indeed, the very last parenthetical remark addresses the donee and directly relates back to the term “exclusively for conservation purposes.”

Based on all of this authority, the Tax Court correctly concluded (R 53, Op. at 41; Apx ___):

We read that term [“exclusively for conservation purposes”] to place a focus on the contributee's holding of a qualified real property interest and, more specifically, to require that the contributee hold such an interest in perpetuity exclusively for one or more of the conservation purposes listed in section 170(h)(4).

The Tax Court then held 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.” (R 53, Op. at 41; Apx ___). At no point has Respondent contested these conclusions.

In addition, Respondent’s interpretation of “exclusively for conservation purposes” under I.R.C. § 170(h)(5) suffers from the same flaws noted above in discussing why the easements qualify as protecting significant wildlife habitat under I.R.C. §170(h)(4)(A)(ii). Respondent simply recycles the same arguments about inconsistent uses and development potential on nearby property and now applies them to I.R.C. § 170(h)(5). Because the reserved rights in the conservation easements were consistent with protecting wildlife habitat, as discussed in section 5(B)(5) hereinabove, the conservation purposes are also protected in perpetuity within the meaning of I.R.C. § 170(h)(5)(A). Similarly, just as the potential development on nearby property is irrelevant to determining whether an easement protects significant wildlife habitat, as discussed in section 5(B)(3) hereinabove, it is equally irrelevant in determining whether the easement is “exclusively for conservation purposes.” Again there is no suggestion anywhere in the statute, the regulations, the legislative history, or previous

IRS rulings that events occurring outside of the easement property have any bearing on whether the easement qualifies under I.R.C. § 170(h).

2. Earlier Case Law Interpreted The Term “Exclusively For Conservation Purposes” To Refer To The Donor’s Donative Intent.

Not only is Respondent’s interpretation of I.R.C. § 170(h)(5) inconsistent with the statute, the regulations, and the legislative history, it also conflicts with its own earlier interpretation of this very same term. Respondent successfully argued in an earlier case that “exclusively for conservation purposes” concerns the donor’s donative intent in granting a conservation easement. *McLennan v United States*, 24 Cl. Ct. 102 (Cl. Ct. 1991); *McLennan v United States*, 23 Cl. Ct. 99 (Cl. Ct., 1991); *McLennan v United States*, 994 F2d 839 (Fed. Cir. 1992). There is no mention anywhere in these opinions of “exclusively for conservation purposes” referring to the easement’s reserved rights.

In *McLennan v United States*, 23 Cl. Ct. 99 (Cl. Ct. 1991), Respondent apparently argued in pretrial proceedings that “exclusively for conservation purposes” concerned the easement donor’s donative intent. The United States Claims Court accepted this interpretation and left the matter open pending the trial. *Id.* at 104-105. After the trial, the Court held that the donors did indeed possess the required donative intent and therefore

met the “exclusively for conservation purposes” requirement. *McLennan v United States*, 24 Cl. Ct. 102, 107 (Cl. Ct. 1991). Subsequently, the Court of Appeals for the Federal Circuit affirmed the Claims Court’s analysis and holding. *McLennan v United States*, 994 F.2d 839 (Fed. Cir. 1992).

The Claims Court’s and Federal Circuit’s conclusion that “exclusively for conservation purposes” focuses on donative intent is consistent with the word “purpose.” The plain meaning of “purpose” is “the object toward which one strives or for which something exists; an aim or a goal; a result or effect that is *intended* or desired; an *intention*.” American Heritage Dictionary of the English Language (4th Ed., 2000) (emphasis added). Along these lines, other case law interpreting a similar phrase found in I.R.C. § 170(c), “exclusively for public purposes,” also focus on the donor’s intent. See, e.g., *Ottawa Silica Co v United States*, 699 F.2d 1124, 1131 (Fed. Cir. 1983), citing numerous other cases.

The record in this case amply demonstrates that Petitioners granted the conservation easements with the intent of protecting the natural resources and beauty of the property in perpetuity. (Charles Glass TR at 217, 218, 223; Susan Glass TR at 369; Apx. ____). Respondent even conceded this point at the trial. (Respondent TR at 223; Apx ____).

3. Even If The Conservation Easements Were Not Donated “Exclusively For Conservation Purposes” With Respect To Protecting Significant Wildlife Habitat, The Case Should Be Remanded To Determine Whether The Easements Qualify As Protecting Open Space.

Respondent contends that no remand is necessary to determine the issue of whether the easements qualify under the open space provisions of I.R.C. § 170(h)(4)(A)(iii). But such a conclusion does not follow from its interpretation of “exclusively for conservation purposes” under I.R.C. § 170(h)(5). That is to say, Respondent claim that the easements were not “exclusively for conservation purposes” because the reserved rights and nearby development potential defeated the wildlife habitat purposes of the easements. But even if such a conclusion is accepted, it is another question altogether whether these very same factors would defeat the conservation easements’ open space purposes. For example, assuming *arguendo* that clearing a foot path would harm a bald eagle’s habitat, that very same path would not harm and in fact could enhance the property’s open space value. At trial, Respondent characterized the open space issue as the “principal issue” of the case. (Respondent TR at 35; Apx ____). It is curious that Respondent no longer deems this “principal issue” important enough to merit a remand, even if Respondent somehow prevails on the other issues before this Court.

CONCLUSION

The decision of the Tax Court ought to be affirmed.

Date: _____

Charles F. Glass

Date: _____

Susan G. Glass

3445 Lake Shore Dr. North
Harbor Springs, MI 49740

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of F R App P 32(a)(7)(B) because this brief contains 11,097 words.

This Brief complies with the typeface requirements of F R App P 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: _____

Charles F. Glass
3445 Lake Shore Dr. North
Harbor Springs, MI 49740

Date: _____

Susan G. Glass
3445 Lake Shore Dr. North
Harbor Springs, MI 49740

ADDENDUM

Appellee, pursuant to Sixth Circuit Rule 30(b) accepts the items designated by Appellant for inclusion in the Joint Appendix, and designates the following additional materials:

Transcript of Trial (TR):

Testimony of Thomas Bailey TR 45-138

Testimony of Sally Churchill TR 204-243

Testimony of Charles Glass TR 217-313, 317-364

Testimony of Charles Timothy Grimm TR 164

Statement of Respondent's Counsel TR 115

Note to LTA Readers: This brief was drafted principally by
Robert H. Levin
Attorney at Law
94 Beckett St., 2nd Floor
Portland, Maine, 04101
(207) 774-8026
www.roblevin.net
rob@roblevin.net