

# IRS Releases Notice 2023-30 with Guidance on Correcting Conservation Easement Deeds

## Dentons Federal Tax Controversy Insights

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### KEY CONTACTS

Ronald Levitt

Emily Ellis

For years the IRS has been heavily litigating conservation easement transactions, attacking many technical issues. Two of the technical issues under attack by the IRS over the years include challenges to proceeds and extinguishment clauses in conservation easement deeds and clauses dealing with boundary line adjustments. Despite many requests for guidance in these technical areas, the IRS has failed to provide such guidance.

In connection with the enactment of the Secure 2.0 Act of 2022 (the “Act”), in addition to imposing severe limitations on so-called syndicated conservation easement transactions, Congress tossed a bone to a small number of conservation easement transactions by creating a safe harbor that allows certain conservation easement deeds to be corrected.

### Limitations of the Safe Harbor

By enacting the new safe harbor, the new law follows typical government speak language by appearing to provide donors of conservation easements the opportunity to amend an easement deed to adopt safe harbor language, approved by the IRS in the newly issued regulations. However, the carveouts and exceptions included with the safe harbor prevent many, if not most, outstanding conservation easement deeds from taking advantage of the safe harbor. Specifically, the following described conservation easement deeds will not be allowed to take advantage of the safe harbor:

- any deed that was part of a syndicated conservation easement transaction or described in Notice 2017-10;
- any deed currently the subject of a dispute in Tax Court;
- any deed subject to the provisions of I.R.C. § 170(h)(7) for easements granted on or after December 29, 2022<sup>1</sup> which disallows deductions to pass through entities that are more than 2.5 times the taxpayer's basis unless the pass-through entity is a family partnership, satisfies a 3 year holding period test, or is part of a facade easement;
- any deed that was part of a transaction that received an accuracy related or fraud penalty that has either a final administrative determination or has been upheld in Tax Court.

These exceptions are so broad, that the exceptions swallow the rule, and few will be able to take advantage of the so called safe harbor.

### **What the Safe Harbor Does**

Congress directed the Commissioner to provide guidance to taxpayers wanting to reform their deeds consistent with the Act. In response, last week, the IRS issued Notice 2023-30 to provide the mandated guidance on correcting conservation easement deeds.

### **The Safe Harbor Deadline**

The corrective deed must be signed by both the donor and the donee and have an effective date as of the date of the original donation. It also must be recorded in the county of donation by July 24, 2023. However, it is an open question whether the deed must be signed by the original donor or the new owner if the land covered by the easement deed was subsequently sold or the interest was otherwise transferred.

### **What the Safe Harbor Can Fix**

The specific provisions that are allowed to be remedied are the extinguishment and proceeds clause as well as the boundary line adjustment clause. The correct language for the extinguishment clause requires that for a donation to be in perpetuity, it can only be extinguished judicially and on extinguishment, the donee must receive a portion of the proceeds. The proceeds clause requires that upon judicial extinguishment, the donee must receive a proportion of the proceeds equal to the fair market value of the easement at the time of donation. This proportion must stay the same from the time of donation through extinguishment and cannot be less any improvements, as has been litigated extensively. The boundary clause must provide that a boundary line can only be adjusted pursuant to a judicial proceeding intended to remedy a boundary line dispute.

The new guidance is helpful to those few conservation easement deeds to which it applies, but for most taxpayers involved in conservation easement transactions, such as so-called syndicated conservation easement transactions, it is not worth the paper it is written on. For those who will benefit from the new safe harbor language, the amendments to the conservation easement deeds in question must be properly signed by both the donor and donee and have an effective date the same as the date of the original donation and must be recorded by July 24, 2023.

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<sup>1</sup> The Secure 2.0 Act of 2022 became effective December 29, 2022, meaning I.R.C. § 170(h)(7) applies to transactions in which the deed was recorded on or after that date.

## FEDERAL TAX CONTROVERSY TEAM

### Alabama



**Michelle Abrams Levin**  
Shareholder  
Huntsville  
michelle.levin@dentons.com



**Ronald Levitt**  
Shareholder  
Birmingham  
ronald.levitt@dentons.com



**Gregory Rhodes**  
Shareholder  
Birmingham  
gregory.rhodes@dentons.com



**David Wooldridge**  
Shareholder  
Birmingham  
david.wooldridge@dentons.com



**Logan Chaney Abernathy**  
Senior Managing Associate  
Huntsville  
logan.abernathy@dentons.com



**Sidney W. Jackson, IV**  
Senior Managing Associate  
Birmingham  
sidney.jackson@dentons.com



**J.R. Davidson**  
Managing Associate  
Birmingham  
john.davidson@dentons.com



**Sarah Green**  
Managing Associate  
Huntsville  
sarah.green@dentons.com



**Kristin Martin**  
Managing Associate  
Birmingham  
kristin.martin@dentons.com



**Emily C. Ellis**  
Associate  
Birmingham  
emily.ellis@dentons.com



**Sarah Ray**  
Of Counsel  
Huntsville  
sarah.ray@dentons.com

### Indiana



**Stephanie Bruns**  
Senior Managing Associate  
Indianapolis  
stephanie.bruns@dentons.com



**Brett Miller**  
Counsel  
Indianapolis  
brett.miller@dentons.com

## Iowa



**Michael Gilmer**  
Special Counsel  
Des Moines  
[michael.gilmer@dentons.com](mailto:michael.gilmer@dentons.com)

## Kentucky



**Chaz Lavelle**  
Partner  
Louisville  
[charles.lavelle@dentons.com](mailto:charles.lavelle@dentons.com)



**Mark Loyd**  
Partner & Co-Leader,  
Tax National Practice Group  
Louisville  
[mark.loyd@dentons.com](mailto:mark.loyd@dentons.com)



**Bailey Roese**  
Partner  
Louisville  
[bailey.roese@dentons.com](mailto:bailey.roese@dentons.com)

## Pennsylvania



**Frank Marano**  
Shareholder  
Pittsburgh  
[frank.marano@dentons.com](mailto:frank.marano@dentons.com)



**Michael Silverman**  
Shareholder  
Pittsburgh  
[michael.silverman@dentons.com](mailto:michael.silverman@dentons.com)

## Utah



**Gary Thorup**  
Shareholder  
Salt Lake City  
[gary.thorup@dentons.com](mailto:gary.thorup@dentons.com)