

Updated: Integrity Act's Safe Harbor Provisions: Frequently Asked Questions

The [Charitable Conservation Easement Program Integrity Act](#) provides easement donors the opportunity to amend certain conservation easement deeds to potentially safeguard their federal tax deductions from possible IRS audits *with respect to two clauses only: extinguishment and boundary line adjustments*. Donors can substitute “safe harbor” language drafted by the IRS for corresponding language in the original deed that the IRS interprets as violating the Internal Revenue Code and Treasury Regulations. The amendment then fixes the problematic language and must state explicitly that it dates back to the original date of the easement donation. The IRS published the safe harbor language formally on April 24 in Notice 2023-30 included in the Internal Revenue Bulletin 2023-17.

The following are frequently asked questions by the land trust community. ***This FAQ is provided for educational purposes only and does not constitute nor should be relied on as legal, tax or other advice. Please consult qualified legal counsel.***

Why are the safe harbor clauses relevant? The inclusion of easement deed language that the IRS has found impermissible could expose the donor's deduction to possible IRS challenge. The safe harbors provide the option to remove that IRS-impermissible language and substitute it with IRS-permissible language thereby safeguarding the donor's deduction from possible IRS audit, at least with respect to the two clauses. Other clauses in the conservation easement might cause an audit and disallowance. The safe harbor amendments are intended to date back to the original donation thereby curing the defects.

Is the substitution mandatory? No, the Integrity Act says it is an opportunity, not an obligation, and the Notice states “Donors are not required to make the amendments described in this notice.” (*Notice Section 1.02*)

What is the timeframe? Donors can amend their easements and record the safe harbor amendments starting April 24 and ending July 24. (*Notice Section 2.06*) Donors can amend outside this cure period but are not guaranteed that the IRS will accept that the amendment is effective to cure defects.

Can other deed language be amended at the same time as the safe harbor amendments? Amendments can include other revised easement clauses in addition to the safe harbor substitutions but do not assume that the additional amended provisions will date back for federal tax purposes.

Will the IRS challenge easements that include “savings clauses”--provisions stating boundary line adjustments and extinguishments “must comply with the current IRS rules, regulations, and caselaw?” Historically, the IRS has challenged the use of savings clauses. Many easement

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deductions have failed using this tactic--the Tax Court has held that clauses that attempt to retroactively reform a deed to comply with the regulation in the event of an adverse determination are unenforceable savings clauses.

What easement donations does this apply to? The ability to cure easement deeds applies to easements that have been recorded for which the donor has taken a federal tax deduction. (*Section 605(d)(2) and Notice Section 3.03*)

What easement donations does this not apply to?

- Transactions expressly listed as ineligible to cure (*Section 605(d)(2)*) and *Notice Section 3.02*)
- Deductions outside of the IRS audit period (and any extensions)
- Easement deeds that are silent as to boundary line adjustments
- Easement deeds that do not have any of the prohibited language in the extinguishment and proceeds clause (See Appendix A)
- Easement deeds that comply with the IRC, Treasury regulations, Notice 2023-30

What is the safe harbor language? What language can be substituted? Section 605(d)(1) directs the IRS to publish safe harbor language exclusively for extinguishment and proceeds clause and boundary line adjustment clauses. The safe harbor language may be found in Notice 2023-30 Section 4. The Notice does not address any other deed amendments. (*Notice Section 1.02*) Donors may substitute the safe harbor language for the *corresponding* language in their easements.

What language does the IRS consider as defects? See the Appendix for examples of language that has been challenged by the IRS for extinguishment and proceeds clauses and boundary line adjustment clauses.

Who can amend? The Act and the Notice state that the donor has the opportunity to amend and sets out the process a donor may use to amend. (*Notice Section 1*)

Who must sign the amendment? The Act and the Notice require the amended deed to be signed by the donor and donee. (*Notice Section 3.01.1*) Be sure to address any co-holders. The Notice does not address what occurs if the original donor has conveyed the eased property or if the easement was donated via will or estate or if the original holder assigned the easement.

How does the amendment date back? Generally, the IRS does not recognize “curing” an easement deed due to a tax-deduction-related defect. Even if under state law the amendment relates back to the original date of the gift, for IRS purposes, it does not relate back and therefore does not fix the problem. But the Act and the Notice instruct the IRS to treat the amendment, if done correctly, as effective as of the date of the recording of the original easement deed.

Should my land trust notify its easement donors of this option to cure? This is a decision to be made by the land trust’s board and staff in consultation with legal counsel. Ultimately this is a donor issue—land trusts are not responsible for their donors’ tax deduction. At the same time, it

is a donor relations issue – some land trusts have decided to notify donors of this option while being careful to avoid giving tax or legal advice. Each land trust should make its own determination about its course of action in consultation with legal counsel.

What is the statute of limitations for possible IRS audit? Typically, the audit period is three years following the tax filing for the deduction. If the donor claims any carryforward deductions, it could extend up to 15 years beyond the original easement recording date. If land trusts decide to notify donors then legal counsel with the land trusts, in their risk analysis, determine the appropriate timeframe for notifications. Ultimately this is a donor risk issue regarding each donor’s financial position and audit risk.

What happens if an easement deed contains similar but not exact language? The Notice allows for similar terms with the same meaning to be used. (*Notice Section 4.03*) If the deed’s language deviates substantially from the safe harbor language, then the bigger the risk. An even larger risk is if IRS-impermissible language remains in the easement deed opening the deduction to possible IRS challenge. Remember that deeds complying with the IRC, Treasury regulations, and Notice 2023-30 would not have defects to cure. It is for donors and their counsel to request the amendment.

What happens if a government agency needs to approve any amendments? This can be a possible impediment due to the length of time needed for government approval. Some state and federal agencies have acknowledged the possible impediments and delays and provided expedited amendment request and approval processes. For example, the Natural Resources Conservation Service announced a streamlined and expedited process for [safe harbor amendment requests](#) (applying only to boundary line adjustments) accompanied by an [amendment checklist](#). As another example, the Virginia Outdoors Foundation board [adopted a resolution](#) authorizing staff to work with landowners and their attorneys, who request safe harbor amendments.

Donors must consult counsel, understand the possible delays and contact the government agency as soon as possible.

What happens if there is a pre-existing subordinated mortgage or a post-easement mortgage? It is the donor’s responsibility to subordinate any mortgage to the easement or amendments to the easement to ensure the easement survives foreclosure. This is also true of all other liens that might extinguish the amendment.

What form of deed should be used to amend the easement and to date back? Legal counsel should determine under state law what type of deed would be effective. Often restating and amending the conservation easement in full is the preferred form. But, in this instance, time is so compressed that there are practical and legal considerations. For example, consider if the new safe harbor clauses were found to be void or any discrepancies developed that could endanger the easement. Also, mistakes are more likely in a compressed time frame, without full title work, mortgage and all other lien subordination (the donor’s obligation), the chance of a

fatal defect or an extinguishment for an intervening lien could result in the easement being terminated. Putting only the two safe harbor clauses at risk of extinguishment in a simple amendment at least leaves the original easement intact and surviving any foreclosure or fatal error due to rushing.

Are there other requirements for the land trust? If the donor requests an amendment, be sure to follow the land trust's amendment policy. Consult Practice 11H1 on amendments and the Alliance's *Amending Conservation Easements: Evolving Practices and Legal Principles 2017*. Remember that amendments must be included on the annual Form 990. There is always a risk that the IRS in its review of the 990 will flag those amendments for further review.

Should the land trust utilize the safe harbor language in not-yet-recorded conservation easements where the donor plans to take a federal tax deduction? Nothing in the Act or Notice states that the language can be relied on past the 90-day cure period. But knowing the IRS position on these two clauses is instructive. The extinguishment safe harbor language is largely consistent with what has been used for the past few years. The boundary line adjustment language, on the other hand, is extremely restrictive and debatable. If this is the IRS position, one option is to omit reference to boundary line adjustments. Consult legal counsel to determine how to approach current and future easement deed drafting as well as stewardship administration policies and procedures.

Related resources:

- Land Trust Alliance [Charitable Conservation Easement Program Act Advisory](#)
- [Section 605 \(d\)](#) of the Consolidated Appropriations Act, 2023
- Internal Revenue Service [Notice 2023-30](#)
- [Internal Revenue Bulletin 2023-17](#)
- [Pointers for Drafting the Proceeds Clause in Conservation Easements - Land Trust Alliance](#)
- [What You Need to Know from Tax Cases \(Shorn of Nuance\) - Land Trust Alliance](#)

Contact us:

- Leslie Ratley-Beach (802) 262-6051 | lrbeach@lta.org
- Diana Norris (202) 816-0221 | dnorris@lta.org

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APPENDIX: EXAMPLES OF CLAUSES CHALLENGED BY THE IRS

EXTINGUISHMENT AND PROCEEDS CLAUSES

- if any cause or circumstance gives rise to the extinguishment of [the easement] ... then Grantee, on any subsequent sale, exchange or involuntary conversion of the Conservation Area, shall be entitled to a portion of the proceeds of sale equal to the greater of the fair market value of the easement around the date of the deed, or a defined share of the amount of proceeds remaining after both the actual bona fide expenses of the sale and the **“amount attributable to improvements constructed upon the Conservation Area pursuant to” the reserved rights**, if any, are deducted. (PBBM-Rose Hill, Ltd. v. Commissioner, No. 26096-14 (U.S.T.C. 2016)(Sept. 9, 2016 Bench Opinion)(Unpublished), affirmed 900 F.3d 193 (5th Cir. 2018))
- This Easement constitutes a real property interest immediately vested in Grantee, which * * * the parties stipulate to have a fair market value determined by multiplying (a) the fair market value of the Property unencumbered by this Easement (**minus any increase in value after the date of this grant attributable to improvements**) by (b) a fraction, the numerator of which is the value of this Easement at the time of the grant and the denominator of which is the value of the Property without deduction of the value of this Easement at the time of this grant. (Coal Property Holdings, LLC v. Commissioner, 153 T.C. No. 7 (U.S.T.C. Oct. 28, 2019))
- Grantee’s proportionate share must “remain constant, **except that (if and to the extent only such is not prohibited by Treas. Reg. 1.170A-14(g)(6)) the value of any improvements made by Grantor after the Recording Date is reserved to Grantor.**” (SN Worthington Holdings, LLC v. Commissioner Docket No. 13248-20, Order 2/8/23)
- the amount of the proceeds to which the Grantee shall be entitled * * * shall be the amount determined under section 9.2," but only **"after the satisfaction of prior claims."** (Coal Property)
- Unless otherwise required by applicable law at the time, in the event of any sale of all or a portion of the Property (or any other property received in connection with an exchange or involuntary conversion of the Property) after such termination or extinguishment, and **after the satisfaction of prior claims** and any costs or expenses associated with such sale, Grantor and Grantee shall share in any net proceeds resulting from such sale in accordance with their respective percentage interests in the fair market value of the Property, as such interests are determined under the provisions of Section 11.1, adjusted, if necessary, to reflect a partial termination or extinguishment of this Easement. (901 South Broadway Ltd. Partnership v. Commissioner, No. 14179-17, T.C. Memo 2021-132 (U.S.T.C. Nov. 23, 2021))

- The value on the effective date of this grant shall be **the deduction for federal income tax purposes** allowable by reason of this grant, pursuant to Section 170(h) of the Code. (Carroll v. Commissioner, 146 T.C. No. 13 (U.S.T.C. April 27, 2016))
- Upon such proceeding” and “upon a subsequent sale . . . of the Conservation Area, Grantee shall be entitled to a portion of the proceeds **at least equal to the fair market value of the Conservation Easement** as provided above.” (Railroad Holdings, LLC v. Commissioner T.C. Memo 2020-22)
- The easement gave rise to a vested property right in the donee, the value of which shall remain constant. **The value of the donee’s property right was defined as the difference between (a) the fair market value (FMV) of the conservation area as if unburdened by the easement and (b) the FMV of the conservation area as burdened by the easement, with both values being determined as of the date of this Conservation Easement.** The deed provided, in other words, that the donee’s property right was equal to the historical value of the easement on the date it was granted. (Woodland Property Holdings, LLC v. Commissioner T.C. Memo. 2020-55)

BOUNDARY LINE ADJUSTMENT CLAUSES

- substitute an area of land owned by Grantor which is contiguous to the Conservation Area for an equal or lesser area of land comprising a portion of the Conservation Area ([Belk v. Commissioner](#), 774 F.3d 221 (4th Cir. 2014)([Belk III](#)), affirming 140 T.C. No. 1 (U.S.T.C. 2013)([Belk I](#)) and T.C. Memo. 2013-154 (U.S.T.C. 2013)([Belk II](#)))