

Office of Chief Counsel
Internal Revenue Service
memorandum

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date: November 26, 2019

to: Anita Gill
(Small Business/Self-Employed)

from: Norma C. Rotunno
(Income Tax & Accounting)

subject: Conservation Easement Deed with Constructive Denial Clause

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Is a constructive denial clause inconsistent with the perpetuity requirements of section 170(h) of the Internal Revenue Code?

BACKGROUND AND LAW

Conservation easement deeds sometimes include a clause governing uses of the land that are permitted only with the express approval of the easement holder. The clause specifies that if the easement holder does not respond within a specified period of time to a request by the property owner regarding a proposed use, then the request is considered denied ("constructive denial clause"). Such a clause may include the following language:

Constructive Denial. For activities or uses that are expressly permitted by the terms of the easement only with the easement holder's approval, the property owner's request for approval shall be in writing and shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity or use in sufficient detail to permit the easement holder to make an informed determination regarding approval or denial of the request. Such a request shall be delivered to the easement holder at least sixty (60) days prior to the anticipated start date of such activity or use.

The easement holder agrees to use reasonable diligence to respond to such a request within the sixty (60) days of delivery. The easement holder's failure to respond to such a request within the sixty (60) day period shall be deemed a constructive denial. Because a constructive denial is not a decision by the easement holder based on the merits of the property owner's request, it is not final or binding on the easement holder, and the property owner can resubmit the same or a similar request for approval.

Section 170(h)(1) allows a deduction for a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. Section 170(h)(2)(C) states that a qualified real property interest is a restriction (granted in perpetuity) on the use of the real property. Section 170(h)(5)(A) further provides that in order for a contribution to be treated as exclusively for conservation purposes, the conservation purpose must be protected in perpetuity.

CONCLUSION

No, a constructive denial clause is not inconsistent with the perpetuity requirements of section 170(h).

Nothing in this memorandum allows for a use that would permit destruction of a significant conservation interest or would be otherwise inconsistent with the requirements of section 170(h).

Please call (202) 317-7003 if you have any further questions.