COMMENT

Thoughts on *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*

by Bill Sylvester

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The following brief comments on Profs. Federico Cheever's and Jessica Owley's article are from the perspective of a tax and real estate lawyer. First, a key issue to flag is the possibility of Trump Administration tax reforms that could decrease the value of the deductions for conservation easements, if the maximum federal tax rate is reduced.

Second, in reaction to their argument for statutory recognition of options to purchase conservation easements, is a tax deduction for giving an option raises valuation issues. Valuation is often the most important federal tax issue concerning conservation easements, which are covered by the deduction under Section 170(h) of the Internal Revenue Code. The Code requires a baseline report which is a recitation of the condition of a property on the date that a gift is made. In almost all cases, the baseline documentation is done by the donee, and donees very rarely find that there are not adequate conservation purposes because they hope to get a stewardship payment.

The trial associated with the Pine Mountain Preserve, in Shelby County, Alabama, near Birmingham, and in which no decision has yet been rendered, shows the challenges associated with valuation. Usually, after these types of trials occur, it might be 18 months or more before the judge issues an opinion. In most cases, IRS Form 8283 is filed and signed by the appraiser, the donor, and the donee, and in this case the original appraiser found a value of $33,000,000 for three related conservation easements at issue.

At trial, the government took the view that the aggregate value of the conservation easements was approximately $7,000,000. Meanwhile, the taxpayer presented an expert trial witness who testified to the number of around $101,000,000.

As the trial concluded, the judge reportedly called counsel to the parties into his chambers to encourage the parties to "split the difference." The government lawyer assumed that this meant the average of $7,000,000 and $33,000,000 (for an amount of $20,000,000), and expressed optimism that such a deal could be reached at that amount. The judge is said to have quickly clarified that he had been greatly impressed by the taxpayer's expert, and that the average should instead be taken between $7,000,000 and $101,000,000 (for an amount of $54,000,000)!

Third, another crucial issue is the permanence of a conservation easement. In a recent filing in the Pine Mountain Preserve case, the government argued that the easement in question was not permanent because it had a plain, rudimentary amendatory clause. Unfortunately, such a position would preclude even minor amendments to conservation easements. Instead, greater flexibility is needed in order to maintain the integrity of the conservation commitment, while allowing for realistic, beneficial adjustments. One solution could be a national panel of ecologists and other experts that could approve or disapprove a proposed amendment. Another solution might prohibit only amendments for easements that are 10 years old or less. This could help account for long-term change. Such a solution would acknowledge that tax deduction is driving the boat, but it would allow some flexibility.

This Comment is based on a transcript of a panel discussion held on Monday, March 13, 2017, at Vanderbilt University Law School in Nashville, Tennessee.