

Conservation easement regulations update



“Don’t it always seem to go / That you don’t know what you’ve got ‘til it’s gone / They paved paradise, put up a parking lot.”

Joni Mitchell’s keen observation in the chorus of her song, “Big Yellow Taxi” can apply to conservation easements, which were designed to help protect a property for future generations by limiting how the land is used. These voluntary legal agreements are between a land owner and a qualified organization. Currently, you can still be granted a conservation easement despite recent government regulations.

What you need to know about conservation easement

Congress initially addressed some of the conservation easement concerns in 1980 when they added Section (h) to Section 170 of the Internal Revenue Code to allow a charitable deduction for gifting with the following parameters:

(A) A qualified real property interest, which are defined as the entire interest of the donor other than a qualified mineral interest, or could be defined as a remainder interest and a restriction granted in perpetuity on the use of the real property.

(B) To a qualified organization, which would be a public charity or private foundation.

(C) Exclusively for conservation purposes, which could be for the preservation of lands for outdoor recreation or the education of the general public, or it could preserve a natural habitat of fish, wildlife, or plants. This preservation would be for the scenic enjoyment of the general public or pursuant to governmental conservation policy. It could also preserve a historically important land area or certified historic structure.

The intent was to give incentives to landowners to preserve what is already there. The win-win strategy of giving an income tax break for limiting the use of property to preserve the natural habitat or history was to prevent the abuse of this tax incentive.

But many taxpayers were doing just that—abusing the purpose of the deduction by taking large deductions for easements even when they were not entitled to them, or changing an easement to develop the land in a way that was inconsistent with the conservation easement’s restrictions, for example.

To address the deduction abuses, the 2006 Pension Protection Act limited the amount of the total charitable deduction of all gifts to 50% of Adjusted Gross Income. Cash and other contributions would be counted first, but the carry forward would be up to 15 years. There was a special limitation of 100% for farmers and ranchers. However, these deductibility rules have not been successful in preventing all abuses.

Since 2016, the IRS has identified certain syndicated conservation easement transactions involving pass-through entities as “listed transactions,” carrying a high potential for abusive tax avoidance.¹ To address the concern, as well as raise revenue for the latest omnibus legislation,² Congress included a provision disallowing a deduction exceeding 2½ times (250%) of each partner’s relevant basis in the contributing partnership. But there are three exceptions to the rule:

- The contribution meets a 3-year holding test.
- Substantially all of the contribution partnership is owned by members of a family.
- The contribution relates to the preservation of a certified historic structure.



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Looking ahead

So, what does this all mean for those interested in granting a conservation easement? You still can, but the donation should be created for charitable goals, rather than a transactional income tax deduction. Creating a conservation easement also can reduce the appraised value of the property at death. The limitation restricts the usage of those inheriting the land, which in turn reduces the value for estate tax purposes.

In addition, qualified appraisals are of great importance. Valuations are coming into greater scrutiny, so it is important to have written verification of the value of the land and the value of the easement granted.

To determine whether this strategy makes sense for you and your family, please consult with your [BMO Family Office Private Wealth Advisor](#).



¹ Federal Register "Syndicated Conservation Easement Transactions as Listed Transactions," December 8, 2022."

² Consolidated Appropriations Act, 2023.

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