

# Conservation Easement Deductions and a Practical Approach to the Mortgage Subordination and Proceeds Requirements

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	THE MORTGAGE SUBORDINATION AND PROCEEDS REQUIREMENTS AND INTRODUCTION TO THE CASE LAW .....	3
	A. <i>The Mortgage Subordination and Proceeds Requirements</i> .....	4
	B. <i>Interpretations of the Mortgage Subordination and Proceeds Requirements</i> .....	5
	1. <i>The First Circuit Approach in Kaufman III</i> .....	6
	2. <i>The Strict Approach in Palmolive</i> .....	7
III.	COURTS AND THE IRS SHOULD EMBRACE THE PRACTICALITY OF THE KAUFMAN III APPROACH.....	9
	A. <i>The Kaufman III Approach is Preferable Because It Maintains Proper Incentives, Upholds the Aims of § 170(h), and Ultimately Reflects a Broader Trend Towards Flexibility</i> .....	9
	1. <i>The Kaufman III Approach Maintains Proper Incentives</i> .....	9
	2. <i>Relying on the Donor-Donee Relationship Still Comports with the Legislative Aims of § 170(h)</i> .....	13
	3. <i>More Flexibility is Being Introduced Outside the First Circuit</i> .....	14
	B. <i>The IRS Should Focus on Conservation and Valuation Issues Rather Than Technical Requirements</i> .....	15
IV.	CONCLUSION .....	17

## I. INTRODUCTION

Conservation easements have emerged as an important tool in the constant struggle to balance economic advancement with environmental and historic protection, and have even been utilized for community development.<sup>1</sup> A

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<sup>1</sup> See Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . And Should It Be?*, 52 UIC J. MARSHALL L. REV. 677, 679 (2019);

conservation easement, also known as a historic preservation easement in the context of historic properties, is a legal agreement between a landowner or building owner and another entity (often a land trust) that limits the use of the property to protect its conservation value (e.g., habitat protection or historic significance).<sup>2</sup> Despite granting away this partial property interest, the land or building owner can still retain many of its rights, such as the right to own, use, or sell the property—some or all of which could be subject to limitations in the easement.<sup>3</sup>

In 1980, Congress permanently codified an income tax deduction for the charitable donation of certain conservation easements through § 170(h) of the Internal Revenue Code.<sup>4</sup> Codification of the deduction was the result of congressional desire to preserve the natural and historic heritage of the United States.<sup>5</sup> The insufficiency of traditional land use controls, coupled with the new tax benefit, has led to increased numbers of qualifying charitable organizations and qualified donations,<sup>6</sup> and the inclusion of historic structures in the statute has enabled owners of historic homes and commercial properties to take advantage of the deduction.<sup>7</sup>

Amongst other things, to qualify for a deduction under § 170(h) a donor must comply with the Mortgage Subordination requirement, which states any mortgagee of a property subject to a donated easement must subordinate its rights in the property to those of the donee,<sup>8</sup> and the Proceeds requirement, which states in the event the easement is extinguished, the donee is entitled to a certain portion of the proceeds based on the value of the easement.<sup>9</sup> Courts have

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*Frequently Asked Questions*, LAND TR. ALL., <https://www.landtrustalliance.org/what-you-can-do/conserves-your-land/questions> [<https://perma.cc/SSM7-D7YM>] [hereinafter LAND TR. ALL.]; Jenny Johnson Ware, *INSIGHT: Reverse Loophole Exploited by IRS Threatens Economic Revitalization*, BLOOMBERG TAX (May 12, 2020), <https://news.bloombergtax.com/daily-tax-report/insight-reverse-loophole-exploited-by-irs-threatens-economic-revitalization> [<https://perma.cc/3QA7-X3MV>].

<sup>2</sup> LAND TR. ALL., *supra* note 1; NAT'L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 4–5 (2010), <https://www.nps.gov/orgs/1739/upload/brochure-easements-historic-properties.pdf> [<https://perma.cc/L2EM-SSZD>]. An easement specifically protecting the façade of a building can also be referred to as a “façade easement.” Roddewig, *supra* note 1, at 687. Although “conservation easement,” “preservation easement,” and “façade easement” may refer to different easement scenarios, “conservation easement” is used primarily in this Note for the sake of uniformity, unless preservation easements are being specifically discussed.

<sup>3</sup> LAND TR. ALL., *supra* note 1.

<sup>4</sup> I.R.C. § 170(h); Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 1: The Standards*, 45 REAL PROP., TR. & EST. L.J. 473, 476–79 (2010).

<sup>5</sup> See Roddewig, *supra* note 1, at 681–83.

<sup>6</sup> *Id.* at 679, 683–84.

<sup>7</sup> *Id.* at 682; I.R.C. § 170(h)(4)(A)(iv); NAT'L PARK SERV., *supra* note 2, at 3.

<sup>8</sup> Treas. Reg. § 1.170A-14(g)(2) (as amended in 2018).

<sup>9</sup> Treas. Reg. § 1.170A-14(g)(6)(ii) (as amended in 2018). Extinguishment is discussed further below. See *infra* notes 26–28 and accompanying text.

struggled to consistently interpret the regulatory provisions setting forth these requirements.<sup>10</sup> In *Kaufman v. Shulman* (“*Kaufman III*”), the First Circuit determined that the requirements were satisfied even though the mortgagee maintained priority rights over the donee for certain insurance and condemnation proceeds.<sup>11</sup> But in *Palmolive Building Invs. v. Commissioner* (“*Palmolive*”), a Tax Court outside of the First Circuit maintained that in order for an easement deduction to be valid the donee must have priority rights to its share of proceeds over all others.<sup>12</sup>

The analysis in *Kaufman III* represents an important step towards viewing the regulations surrounding § 170(h) through a more practical and flexible lens.<sup>13</sup> Part II of this Note will highlight some of the details of the Mortgage Subordination and Proceeds requirements and the varying interpretations associated with each.<sup>14</sup> Part III will argue that a more practical approach to interpreting the regulations is preferable because it maintains beneficial community development incentives that support the aims of the statute, and ultimately signals that more effective methods of policing the deduction should be prioritized.<sup>15</sup>

## II. THE MORTGAGE SUBORDINATION AND PROCEEDS REQUIREMENTS AND INTRODUCTION TO THE CASE LAW

The deduction in § 170(h) is aimed at increasing the protection of natural and historic spaces, but also includes limitations to reduce the potential for abuse.<sup>16</sup> The general rule is that there should be no tax deduction for charitable contributions of partial interests in property, but an exception is made for qualified conservation contributions.<sup>17</sup> Section 170(h) defines a qualified conservation contribution as a contribution of a qualified property interest, to a

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<sup>10</sup> See generally *Kaufman v. Shulman* (*Kaufman III*), 687 F.3d 21 (1st Cir. 2012) (determining that the Proceeds requirement was satisfied where a lender retained priority rights to certain proceeds); *Palmolive Bldg. Invs., LLC v. Comm’r of Internal Revenue*, 149 T.C. 380 (2017) (determining that the Mortgage Subordination and Proceeds requirements were not satisfied where a lender retained priority rights to certain proceeds); Roddewig, *supra* note 1, at 701–03.

<sup>11</sup> *Kaufman III*, 687 F.3d at 26–28.

<sup>12</sup> *Palmolive*, 149 T.C. at 396–404.

<sup>13</sup> Others have also advocated for more flexibility in interpreting the regulations, and courts seem to be increasingly willing to entertain this approach. See, e.g., Victoria Wolfe, Note, *BC Ranch II v. Commissioner: A Flexible Approach to Perpetual Conservation Easements*, 94 IND. L.J. 331, 339–43 (2019) (arguing for more flexibility in the context of modification of conservation easements and the perpetuity requirements in general); see also *infra* Part III.A.3.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> Roddewig, *supra* note 1, at 681–83; McLaughlin, *supra* note 4, at 478.

<sup>17</sup> I.R.C. § 170(f)(3)(B)(iii); McLaughlin, *supra* note 4, at 477–78.

qualified organization, made exclusively for conservation purposes.<sup>18</sup> Conservation purposes include the preservation of land for use by the general public, protection of habitat, the preservation of certain open spaces, and the preservation of historically important land and/or certified historic structures.<sup>19</sup> To be considered “exclusively for conservation purposes,” the conservation purpose must be *protected in perpetuity*.<sup>20</sup>

To further ensure the conservation purpose of any given donated easement is protected in perpetuity and abuse is minimized, the Treasury promulgated regulations providing additional guidance for the implementation of § 170(h).<sup>21</sup> While the regulations have provided a stronger framework for the deduction, they have also been the subject of controversy and varying interpretation.<sup>22</sup> The Mortgage Subordination and Proceeds requirements are no exception, with some courts opting for a more practical approach, but a majority of other courts adhering to strict interpretations.<sup>23</sup>

### A. *The Mortgage Subordination and Proceeds Requirements*

The Mortgage Subordination requirement and the Proceeds requirement involve two regulations, amongst others, concerned with protection of the conservation purpose in perpetuity.<sup>24</sup> The Mortgage Subordination requirement dictates that for a conservation easement to be deductible, any outstanding mortgages on the subject property at the time of the gift must be subordinated to the rights of the donee to enforce the conservation purposes of the gift in perpetuity.<sup>25</sup> The Proceeds requirement addresses the handling of proceeds in the event the easement is judicially extinguished.<sup>26</sup> An easement’s restrictions

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<sup>18</sup> I.R.C. § 170(h)(1). Qualified property interests can be restrictions on the use of property, which includes conservation easements. I.R.C. § 170(h)(2)(C); LAND TR. ALL., *supra* note 1. Qualified organizations can be certain governmental units and publicly supported charities, which includes many non-profits and land trusts. *See* McLaughlin, *supra* note 4, at 478–79; I.R.C. § 170(h)(3).

<sup>19</sup> McLaughlin, *supra* note 4, at 479; I.R.C. § 170(h)(4)(A).

<sup>20</sup> I.R.C. § 170(h)(5)(A). Protection in *perpetuity* is meant to ensure the restrictions represented in the donation are permanent. *See* McLaughlin, *supra* note 4, at 475–76.

<sup>21</sup> *See* McLaughlin, *supra* note 4, at 486–87, 512–13.

<sup>22</sup> *See infra* Part II.B; Roddewig, *supra* note 1, at 701–03; Wolfe, *supra* note 13, at 335–36.

<sup>23</sup> *See infra* Part II.B; *see also* Wolfe, *supra* note 13, at 335–36 (discussing how many courts interpret perpetuity requirements strictly, while others opt for a flexible approach).

<sup>24</sup> Treas. Reg. § 1.170A-14(g)(2) (as amended in 2018); Treas. Reg. § 1.170A-14(g)(6) (as amended in 2018).

<sup>25</sup> W. William Weeks et al., *ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law*, 53 REAL PROP., TR. & EST. L.J. 245, 345 (2018); Treas. Reg. § 1.170A-14(g)(2) (as amended in 2018). The relevant text reads: “no deduction will be permitted under this Section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.” Treas. Reg. § 1.170A-14(g)(2) (as amended in 2018).

<sup>26</sup> Treas. Reg. § 1.170A-14(g)(6) (as amended in 2018).

may be extinguished in a judicial proceeding determining that continued use of the property for conservation purposes is impossible or impractical.<sup>27</sup> The donee's share of proceeds from the extinguishment are to be used by the donee in a manner consistent with the conservation purposes of the original contribution, thus perpetually protecting the original public investment (the deduction) in the conservation purpose.<sup>28</sup> The Proceeds requirement aims to ensure that in the event of an extinguishment the donee receives "at least its proportionate share of proceeds."<sup>29</sup> Although efforts to protect the public investment in conservation easements may seem simple, these regulations have given rise to controversy and a range of interpretations.

### *B. Interpretations of the Mortgage Subordination and Proceeds Requirements*

A conservation easement binds three parties, all with potentially conflicting interests: the owner of the property, the donee/holder of the easement, and the public, which invested in, and benefits from, the easement's protections.<sup>30</sup> Complex regulations have resulted in disparities in the manner in which easement deeds are drafted, which in turn has led to problematic differences in the interpretation and enforcement of requirements like those related to Mortgage Subordination and Proceeds.<sup>31</sup>

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<sup>27</sup> Weeks et al., *supra* note 25, at 346; Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 2018). For example, full or partial extinguishments can arise in the event adjustments to the easement boundaries must be made, or in the event of a condemnation of all or part of the land or structure, all of which would cause the easement to change in nature or cease to exist entirely. See Weeks et al., *supra* note 25, at 295–300.

<sup>28</sup> See Weeks et al., *supra* note 25, at 346; McLaughlin, *supra* note 4, at 503; Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 2018).

<sup>29</sup> Weeks et al., *supra* note 25, at 346–47. The relevant text reads:

[A]t the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time. . . . Accordingly, when a change in conditions give rise to the extinguishment of a perpetual conservation restriction . . . the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction . . . .

Treas. Reg. § 1.170A-14(g)(6)(ii) (as amended in 2018).

<sup>30</sup> Weeks et al., *supra* note 25, at 253. The owner of the property may or may not be the original easement donor. *Id.*

<sup>31</sup> See *id.* at 254.

### 1. *The First Circuit Approach in Kaufman III*

In *Kaufman III*, the First Circuit found the Proceeds requirement was satisfied where the easement deed granted the mortgagee priority to certain insurance and condemnation proceeds over the donee.<sup>32</sup> The Kaufmans donated a preservation easement protecting the façade of their historic home to a non-profit trust.<sup>33</sup> The Kaufmans secured an agreement with their lender (the mortgagee) to subordinate the mortgagee's rights in the property to the rights of the trust (the donee).<sup>34</sup> However, the agreement included a provision reserving the rights of the mortgagee to a priority claim on certain insurance proceeds, as well as all proceeds in the event of a condemnation of the property, until the mortgage was paid off.<sup>35</sup>

The IRS challenged the deduction, claiming, amongst other things, that the Kaufmans had failed to comply with the Proceeds requirement.<sup>36</sup> After multiple lower court decisions,<sup>37</sup> the First Circuit observed that the Proceeds requirement was apparently designed to prevent taxpayers from receiving a windfall, and to ensure the donee receives its share of the value of the donation to be put towards further conservation purposes.<sup>38</sup> The IRS position was that although the easement deed did grant the donee an entitlement to certain proceeds, the mortgagee's priority rights to certain insurance and condemnation proceeds threatened the ability of the donee to recover its share, thus violating the requirements in the statute and regulations.<sup>39</sup> The IRS read the statute as giving the donee the first cut of any proceeds as "against the rest of the world."<sup>40</sup> The court, however, noted that the Kaufmans were powerless to make the mortgagee give up all of its own protections, and that a grant entitling the donee to recover proceeds from the donor was just as effective.<sup>41</sup> The court determined that because the donee could recover from the donor, the Proceeds requirement had not been violated, further explaining that the IRS' reading of the statute would

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<sup>32</sup> *Kaufman III*, 687 F.3d 21, 24–30 (1st Cir. 2012).

<sup>33</sup> *Id.* at 23–24. Easements protecting historic structures often seek to preserve the structural integrity and/or façade of the building because it is historically or culturally significant. See NAT'L PARK SERV., *supra* note 2, at 4–5.

<sup>34</sup> *Kaufman III*, 687 F.3d at 24.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 24–26. The IRS usually mounts challenges based on multiple provisions of the regulations, with common ones being valuation, timing, and subordination/proceeds. See *id.*

<sup>37</sup> See generally *Kaufman v. Comm'r (Kaufman I)*, 134 T.C. 182 (2010) (holding that the perpetuity requirements, including the Proceeds requirement, were not satisfied with respect to the façade easement donation); *Kaufman v. Comm'r (Kaufman II)*, 136 T.C. 294 (2011) (affirming the grant of partial summary judgment in *Kaufman I*).

<sup>38</sup> *Kaufman III*, 687 F.3d at 26. A windfall in this context would be if the taxpayer received a tax deduction and then also received a portion of the value they were supposed to have donated away, resulting in a double benefit. See *id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 27.

<sup>41</sup> *Id.* at 26–27.

doom practically all easement donations because in certain circumstances (tax liens, for example) absolute priority rights are impossible to obtain.<sup>42</sup>

Notably, the First Circuit specifically avoided making any finding as to the Mortgage Subordination requirement.<sup>43</sup> The Kaufmans had argued that the rights to the property were subordinated and that it was improper for the IRS to demand other rights of the mortgagee (such as insurance protections) be subordinated as well.<sup>44</sup> The court noted that the Mortgage Subordination requirement could potentially be read broadly to require the mortgagee to subordinate other rights, but did not rule on this issue because the IRS had not raised it directly.<sup>45</sup> In doing so, the court implicitly treated the Mortgage Subordination and Proceeds requirements as separate and distinct.<sup>46</sup> It remains unclear in the First Circuit whether the Mortgage Subordination requirement demands that mortgagees subordinate *all* rights to proceeds, not just rights in the property, to the rights of the donee.<sup>47</sup> As to the Proceeds requirement after *Kaufman III*, the First Circuit established that some mortgagee rights may remain unsubordinated in the context of extinguishment proceeds without jeopardizing the validity of the easement deduction.<sup>48</sup>

## 2. *The Strict Approach in Palmolive*

In *Palmolive*, a Tax Court within the Seventh Circuit declined to follow the approach in *Kaufman III*.<sup>49</sup> In this case, Palmolive Building Investors, LLC (Palmolive) sought a tax deduction after donating a preservation easement protecting the façade of a historic building to a qualified non-profit organization.<sup>50</sup> Palmolive obtained agreements from both of its mortgagees subordinating their rights to those of the donee.<sup>51</sup> The IRS challenged the deduction because, like the deed in *Kaufman III*, the deed contained a provision

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<sup>42</sup> *Id.* at 27. Tax liens are claims against the assets of an owner that is deficient in tax payments and are usually superior to most prior claims. Julia Kagan, *Tax Lien: Meaning, How to Resolve with IRS*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/taxlien.asp> [<https://perma.cc/8QG5-8XX9>] (July 29, 2022); see *Kaufman III*, 687 F.3d at 26–27.

<sup>43</sup> *Kaufman III*, 687 F.3d at 27 n.5.

<sup>44</sup> *Id.* Under this reading, Mortgage Subordination would simply ensure the easement restrictions continued in event of default, while the rights to proceeds would be treated as a separate perpetuity issue. See *id.*; *Palmolive Bldg. Invs., LLC v. Comm’r of Internal Revenue*, 149 T.C. 380, 395–97 (2017). However, in *Palmolive*, that court viewed the requirements as intertwined—that the mortgage could not be considered fully subordinated if the mortgagee had prior rights to certain proceeds. *Id.*

<sup>45</sup> *Kaufman III*, 687 F.3d at 27 n.5.

<sup>46</sup> See *id.* at 27–28, 27 n.5.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 26–27.

<sup>49</sup> *Palmolive Bldg. Invs., LLC*, 149 T.C. at 399–400.

<sup>50</sup> *Id.* at 383.

<sup>51</sup> *Id.* at 384.

allowing the mortgagees to maintain priority rights to certain insurance and condemnation proceeds.<sup>52</sup>

The Tax Court determined that the deed failed to satisfy both the Mortgage Subordination and Proceeds requirements.<sup>53</sup> As to the Mortgage Subordination requirement, the court rejected Palmolive's contention that the purpose of mortgage subordination was simply to ensure that mortgagees could not extinguish the easement through foreclosure, and instead agreed with the IRS that in order to comply with the statute, *all* of the mortgagee's rights must be subordinate to those of the donee.<sup>54</sup> Otherwise, under certain circumstances, the donee would only have access to proceeds after the satisfaction of the mortgages and could be left with nothing, which would threaten the perpetual protection of the conservation interest.<sup>55</sup>

As to the Proceeds requirement, the Tax Court specifically noted that because it was within a different circuit, it was not bound by the decision in *Kaufman III*.<sup>56</sup> The court reiterated the critical nature of the Proceeds requirement with regards to protecting the conservation purpose and ultimately disagreed with the determination of the First Circuit that an absolute right in the donee to proceeds was unrealistic and unnecessary.<sup>57</sup> According to the court, a hypothetical future tax lien is different than mortgages and property rights that exist at the time of the creation of the easement, and the rights contemplated in the regulation are those of the donee against the donor and mortgagee.<sup>58</sup> Further, the court also cited to the legislative history of § 170(h), which states that the "committee intends that the perpetual restrictions must be enforceable by the donee organization . . . against all other parties in interest . . ." <sup>59</sup> As such, and despite *Kaufman III*, the court deemed the Proceeds requirement unsatisfied.<sup>60</sup>

These cases illustrate the controversial nature of both the Mortgage Subordination and Proceeds requirements, with the court in *Kaufman III* allowing the mortgagee to retain certain rights, and the court in *Palmolive* determining that all of the mortgagee's rights must be subordinated.<sup>61</sup> While both of these interpretations have their merits, it is ultimately the First Circuit's approach in *Kaufman III* that is preferable.

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<sup>52</sup> *Id.* at 384–89.

<sup>53</sup> *Id.* at 393–402.

<sup>54</sup> *Id.* at 394–98.

<sup>55</sup> See *Palmolive Bldg. Invs., LLC*, 149 T.C. at 394–98.

<sup>56</sup> *Id.* at 399.

<sup>57</sup> *Id.* at 398–403.

<sup>58</sup> *Id.* (citing *Minnick v. Comm'r*, 796 F.3d 1156 (9th Cir. 2015); *Mitchell v. Comm'r*, 775 F.3d 1243 (10th Cir. 2015)).

<sup>59</sup> *Id.* at 402 (quoting S. REP. NO. 96-1007, at 14 (1980)).

<sup>60</sup> *Id.* at 401–02. The court also determined the fact that it is highly unlikely the building will be destroyed by fire or condemned does not save the deed from being invalid in this context. *Id.* at 402–06; Treas. Reg. § 1.170A-14(g)(3) (as amended in 2018).

<sup>61</sup> See *supra* Parts II.B.1 and II.B.2.



### III. COURTS AND THE IRS SHOULD EMBRACE THE PRACTICALITY OF THE *KAUFMAN III* APPROACH

*Kaufman III*<sup>62</sup> and *Palmolive*<sup>63</sup> represent the differing outcomes that can occur when dealing with complex and, at times, vague regulations. Although some of this complexity may be necessary to police the deduction,<sup>64</sup> the preferable approach is to adopt the degree of practicality embraced in *Kaufman III* because it maintains important development incentives that uphold the aims of the statute, and suggests the IRS should focus on more high-risk areas of abuse.

#### A. *The Kaufman III Approach is Preferable Because It Maintains Proper Incentives, Upholds the Aims of § 170(h), and Ultimately Reflects a Broader Trend Towards Flexibility*

The approach in *Kaufman III* is preferable because it fosters strong incentives for the protection and development of important property, and anticipates a growing trend that pushes back against the rigidity of the regulations.

##### 1. *The Kaufman III Approach Maintains Proper Incentives*

The approach of the First Circuit in *Kaufman III* protects donation and community development incentives by embracing practicality and allowing for more flexibility in the donation process.<sup>65</sup> The Mortgage Subordination requirement and the Proceeds requirement have complicated the donation of many conservation easements, with many lenders resisting the idea of subordinating their contractual protections to the easement holder.<sup>66</sup> This problem is especially prevalent in the donation of easements protecting historic buildings (preservation easements).<sup>67</sup> *Kaufman III* is important because it suggests lenders may be able to retain certain protections under the regulations, which in turn may ease some of the current complications involved with donating a conservation or preservation easement.<sup>68</sup> To embrace the *Palmolive*

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<sup>62</sup> Holding that the Proceeds requirement was satisfied where a lender retained priority rights to certain proceeds. *See supra* Part II.B.1.

<sup>63</sup> Holding that the Mortgage Subordination and Proceeds requirements were not satisfied where a lender retained priority rights to certain proceeds. *See supra* Part II.B.2.

<sup>64</sup> *See infra* Part III.B.; *infra* notes 73–79 and accompanying text.

<sup>65</sup> *See Kaufman III*, 687 F.3d 21, 26–28 (1st Cir. 2012).

<sup>66</sup> *See* Roddewig, *supra* note 1, at 701–02.

<sup>67</sup> *Id.*; *see also* Brief of GBX Group LLC as Amicus Curiae in Support of Petitioner at 10–11, *Oakbrook Land Holdings, LLC v. Comm’r of Internal Revenue*, No. 22-323 (U.S. dismissed Jan. 9, 2023) [hereinafter GBX Brief].

<sup>68</sup> *See Kaufman III*, 687 F.3d at 24, 26–28.

court's view and require mortgagees to give up *all* priority rights will only continue to frustrate the already difficult subordination process.<sup>69</sup>

During the notice and comment period prior to the promulgation of the Proceeds regulation, certain qualified organizations expressed concerns about the practicality of the requirement, including as it relates to historic buildings.<sup>70</sup> Some even questioned the ability of the IRS to enforce the regulation against anyone other than the donor in the first place, noting that other existing tax doctrines could prevent the donor from unduly benefitting in the event of extinguishment.<sup>71</sup> But those who support the stricter approach in *Palmolive* have discounted such concerns, contending that protecting the public investment is the priority and that donors have other options such as paying down their mortgage, finding new lenders willing to fully subordinate, or making the donation without receiving the tax benefit.<sup>72</sup> Although these points may be valid, they likely are not realistic responses to practical concerns about the overcomplication of the incentive.

It is true the number of conservation easement deductions has been increasing despite concerns about overly strict regulations.<sup>73</sup> This is due in large part to a smaller group of donors that insist on taking advantage of the deduction for abusive purposes.<sup>74</sup> Much of the abuse is occurring in a concentrated number of high dollar transactions that often see conservation easements placed on land

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<sup>69</sup> See *Mortgage Subordination Fact Sheet—RIM Easement Programs*, MINN. BD. OF WATER & SOIL RES. (Oct. 2022), [https://bwsr.state.mn.us/sites/default/files/2018-12/Mortgage\\_Subordination\\_Fact\\_Sheet.pdf](https://bwsr.state.mn.us/sites/default/files/2018-12/Mortgage_Subordination_Fact_Sheet.pdf) [<https://perma.cc/R72E-NDC4>] [hereinafter *Mortgage Subordination*]; *Pre-Existing Mortgages in Easement Transactions*, WE CONSERVE PA, <https://conservationtools.org/guides/55-pre-existing-mortgages-in-easement-transactions> [<https://perma.cc/NV34-JCGJ>]. Asking lenders to subordinate mortgages is already a challenge because there is a lack of financial incentive to yield the priority position. *Mortgage Subordination*, *supra*.

<sup>70</sup> *Hewitt v. Comm'r of IRS*, 21 F.4th 1336, 1345–46 (11th Cir. 2021); GBX Brief, *supra* note 67, at 12–13.

<sup>71</sup> *Hewitt*, 21 F.4th at 1346–47. For example, the tax benefit rule says that if a deduction taken in a previous year is recovered in a later year it must be included in gross income, and therefore taxed. See Rev. Rul. 2019-11, 2019-17 I.R.B. 1041.

<sup>72</sup> Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 272–73 (2012). Professor McLaughlin does suggest that the practicality of obtaining mortgages subordinate to easements should be studied further in order to make a clear assessment. *Id.* at 297.

<sup>73</sup> See MOLLY F. SHERLOCK, CONG. RSCH. SERV., IN11141, CHARITABLE CONSERVATION CONTRIBUTIONS: POTENTIAL FOR ABUSE? 2–3 (2019); ADAM LOONEY, BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3, 9 (2017), [https://www.brookings.edu/wp-content/uploads/2017/05/looney\\_conservationeasements.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf) [<https://perma.cc/X23U-ULTK>].

<sup>74</sup> See LOONEY, *supra* note 73, at 9; see also Haisten Willis, *Wealthy Investors Seem to Be Exploiting Land-Conservation Tax Breaks, and the Senate is Taking Notice* (Oct. 23, 2020), <https://www.washingtonpost.com/business/2020/10/23/land-conservation-tax-break-deals/> [<https://perma.cc/3QHE-SBE3>].

that has questionable conservation value, such as golf courses and housing developments.<sup>75</sup> Even a Senate report focusing on abusive conservation easement transactions focused almost exclusively on easements protecting land.<sup>76</sup> The IRS has insisted on using technical regulations, especially the Mortgage Subordination and Proceeds requirements, to crack down on such abuse.<sup>77</sup> But such a strategy unfairly hampers historic structures because lending, and therefore mortgage subordination and proceeds, is much more relevant to historic buildings than to open land.<sup>78</sup> For this reason, the IRS' focus on the Mortgage Subordination and Proceeds requirements, although perhaps well intentioned, may disproportionately impact donors seeking to protect historic buildings through preservation easements, an area where there is seemingly less abuse and more opportunity for meaningful community development.<sup>79</sup> Increased practicality and flexibility with regards to the Mortgage Subordination and Proceeds requirements will only help ease the pressure in this area, where the incentive to donate is particularly important.

It is important to maintain strong incentives to donate preservation easements specifically because easements can play a significant role in community development and redevelopment.<sup>80</sup> The deduction was not necessarily meant to be a development tool, but often the preservation of historic structures goes hand in hand with commercial and residential development in urban areas.<sup>81</sup> The investment syndication of preservation easement deductions has helped cities across the country revitalize old and deteriorating

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<sup>75</sup> LOONEY, *supra* note 73, at 3, 9, 17–20; Roddewig, *supra* note 1, at 687.

<sup>76</sup> See generally S. COMM. ON FINANCE, 116TH CONG., REP. ON SYNDICATED CONSERVATION-EASEMENT TRANSACTIONS (Comm. Print 2020); *Finance Committee Releases Report on Conservation Easements*, TAX NOTES (Aug. 5, 2020), <https://www.taxnotes.com/research/federal/legislative-documents/congressional-committee-reports/finance-committee-releases-report-on-conservation-easements/2cwfm> [<https://perma.cc/S4CN-57KK>].

<sup>77</sup> GBX Brief, *supra* note 67, at 9–10; HALE E. SHEPPARD, THREE NEW IRS CHALLENGES TO TAX INSURANCE IN CONSERVATION EASEMENT DISPUTES 19–20 (2021), <https://www.chamberlainlaw.com/assets/htmldocuments/Three%20New%20IRS%20Challenges%20to%20Tax%20Insurance.pdf> [<https://perma.cc/K2XS-UMF8>]; see also Wolfe, *supra* note 13, at 350.

<sup>78</sup> See GBX Brief, *supra* note 67, at 10–11; Roddewig, *supra* note 1, at 701–02.

<sup>79</sup> See LOONEY, *supra* note 73, at 3, 9, 17–20; Ware, *supra* note 1; *Org Warns of Conservation Easement Proposals' Unintended Effects*, TAX NOTES (Apr. 6, 2022), <https://www.taxnotes.com/exempt-organizations/conservation-easements/org-warns-conservation-easement-proposals-unintended-effects/2022/04/06/7dbym?highlight=kingsella> [<https://perma.cc/96LZ-N9YX>] [hereinafter *Unintended Effects*].

<sup>80</sup> See Ware, *supra* note 1; *Unintended Effects*, *supra* note 79.

<sup>81</sup> See *Tax Credits Abound for Historic Building Renovation and Land Revitalization*, MARCUM (Jun. 12, 2017), <https://www.marcumllp.com/insights/tax-credits-abound-for-historic-building-renovation-and-land-revitalization> [<https://perma.cc/PKK2-P6N5>]; *Unintended Effects*, *supra* note 79.

neighborhoods in order to create vibrant new spaces for the future.<sup>82</sup> The rehabilitation of historic buildings often enjoys bipartisan support, and many of the projects rely on historic rehabilitation tax credits<sup>83</sup> in tandem with preservation easement deductions in order to be viable.<sup>84</sup> Unlike the historic rehabilitation tax credit program, in which periodic approvals and clearer safe harbors exist throughout the course of a project, easement deductions are often challenged years after completion of a project.<sup>85</sup> The IRS insistence on attacking easement deductions through strict interpretations of regulations can do little more than add uncertainty to the reliability of the deduction.<sup>86</sup> In order to maintain incentives to not only protect land, but also to protect and develop historic properties, complexity and uncertainty should be reduced by favoring the practicality illustrated in *Kaufman III*.

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<sup>82</sup> *Tax Credits Abound for Historic Building Renovation and Land Revitalization*, *supra* note 81; *Unintended Effects*, *supra* note 79. A syndicated conservation (or preservation) easement transaction involves a group of individuals or entities forming a partnership or association for the purpose of the partners receiving, amongst other things, an allocation of a conservation easement deduction. Walter Pagano, *Syndicated Conservation Easement Transactions*, EISNERAMPER (Sept. 9, 2021), <https://www.eisneramper.com/newsletters/tax-controversy-and-dispute-resolution/conservation-easement-tcd-0921/#:~:text=In%20general%2C%20a%20syndicated%20conservation,carry%20out%20a%20particular%20transaction> [<https://perma.cc/X6WH-PU4Z>]. The IRS has increasingly viewed these types of transactions as abusive tax avoidance vehicles because the structure of these deals can sometimes allow investors to receive a deduction that is disproportional to the amount of their investment. *Id.* However, syndicated conservation easements can be used for legitimate conservation and development purposes. See Timothy Lindstrom, *A Tax Guide to Conservation Easement Syndications*, 47 REAL EST. REV. 3, 5–6 (2018); Ronald Levitt & David M. Wooldridge, *Land Trusts Should Not Assume Donations From Syndicated Partnerships Are a Problem*, LEXOLOGY (July 7, 2015), <https://www.lexology.com/library/detail.aspx?g=39a765d0-9bdd-48dd-ac93-0c797f57c3df> [<https://perma.cc/TZ8V-KRVE>]. The benefits or detriments of syndicated conservation easements are not directly within the scope of this Note, and the requirements of § 170(h) are largely the same whether the easement is ultimately syndicated or not. See Jason B. Freeman, *Charitable Conservation Easements Remain Under Attack—The Latest IRS Data*, FORBES (Sept. 28, 2020), <https://www.forbes.com/sites/jasonbfreeman/2020/09/28/charitable-conservation-easements-remain-under-attack-the-latest-irs-data/?sh=162bbfd56616> [<https://perma.cc/D8A4-M2J8>].

<sup>83</sup> Historic Tax Credits (HTCs) are another type of tax incentive that seeks to encourage and enable the redevelopment and protection of historically significant properties. *Historic Tax Credits*, NAT'L TR. FOR HISTORIC PRES., <https://savingplaces.org/historic-tax-credits#.YhT79pPMIq0> [<https://perma.cc/ZB4P-W7WJ>]. The HTC has been responsible not only for contributing to the protection of many historic properties, but has also helped to revitalize communities and spur economic growth. *Id.*

<sup>84</sup> Ware, *supra* note 1; see also LOONEY, *supra* note 73, at 3.

<sup>85</sup> Ware, *supra* note 1.

<sup>86</sup> *Id.*; *Unintended Effects*, *supra* note 79; see also *supra* notes 73–79 and accompanying text. The IRS aggression in this area has gone too far in some instances. In some cases, the IRS has denied deductions by claiming easements have failed to protect the façade where an owner added a wheelchair accessible ramp (complying with the ADA) and bricked an elevator shaft to comply with fire codes. Ware, *supra* note 1.

## 2. Relying on the Donor-Donee Relationship Still Comports with the Legislative Aims of § 170(h)

Not only does the *Kaufman III* approach reinforce important incentives, but a more practical reading of the requirements also comports with the legislative aims of the statute, or at the very least does not offend them. The court in *Palmolive* quoted the following language: “committee intends that the perpetual restrictions must be enforceable by the donee organization . . . against all other parties in interest . . . .”<sup>87</sup> But, this language only points to the enforcement of the *restrictions* in perpetuity.<sup>88</sup> The reason for priority rights to proceeds is so that in the rare event of extinguishment, and thus the complete elimination of the *restrictions*, the donee can receive equivalent value.<sup>89</sup> Congress did not directly address extinguishment in either § 170(h) or in the Senate Report cited in *Palmolive*.<sup>90</sup> The Proceeds regulation would come later, and was developed to ensure that lost conservation value is *replaced* in the event of extinguishment.<sup>91</sup> Replacement of value after extinguishment can be viewed differently than enforcing restrictions on the property pre-extinguishment.<sup>92</sup> In this light, allowing a mortgagee to retain certain rights to extinguishment proceeds would not impact the actual restrictions themselves, and replacement of the conservation value after the extinguishment of the restrictions could be satisfied between the donor and the donee, as noted by the court in *Kaufman III*.<sup>93</sup>

The regulations are often aimed at reducing opportunities for abuse, but abuse usually occurs due to the actions of donors, not their mortgagees.<sup>94</sup> Banks and other mortgagees purposely retain a myriad of rights in order to protect themselves contractually in a commercial transaction,<sup>95</sup> so the potential for abuse by the donor should not result in unnecessary burdens on these parties. As discussed above, to have this burden fall on the shoulders of mortgagees may actually deter them from associating with these transactions due to the decreased availability of protection.<sup>96</sup> The aim of § 170(h) is to encourage the protection

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<sup>87</sup> *Palmolive Bldg. Invs., LLC v. Comm’r of Internal Revenue*, 149 T.C. 380, 401–02 (2017) (quoting S. REP. NO. 96-1007, at 14 (1980)).

<sup>88</sup> *Id.*

<sup>89</sup> McLaughlin, *supra* note 4, at 484–86.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*; *Kaufman III*, 687 F.3d 21, 27 (1st Cir. 2012).

<sup>94</sup> *See* LOONEY, *supra* note 73, at 3, 9, 17–20; *see also* Roddewig, *supra* note 1, at 687–90.

<sup>95</sup> *See Pre-Existing Mortgages in Easement Transactions*, *supra* note 69; FACT SHEET: MORTGAGE SUBORDINATION, LAND TR. ALL. (2008), <https://projects.sare.org/wp-content/uploads/962193appendix-4-mortgage-subordination.pdf> [<https://perma.cc/W6C8-EYJA>].

<sup>96</sup> *See Pre-Existing Mortgages in Easement Transactions*, *supra* note 69; *see supra* Part III.A.1. There is even evidence that IRS attacks are causing third party service providers, such as appraisers and tax preparers, to avoid associating with these transactions. *See* Katherine S. Jordan, *Appraisers as Collateral Damage in the Syndicated Conservation*

of land and other property,<sup>97</sup> and allowing the focus to shift away from third parties and towards the donor-donee relationship, although not a perfect solution, surely supports this goal.<sup>98</sup> So long as the Mortgage Subordination and Proceeds requirements continue to frustrate and inject uncertainty into the donation process,<sup>99</sup> any degree of practicality will help. Even outside of the First Circuit, courts have been slowly recognizing the value of approaching the perpetuity requirements with a more flexible view.

### 3. More Flexibility is Being Introduced Outside the First Circuit

Courts outside the First Circuit have increasingly been willing to bend or even outright question the regulations surrounding § 170(h). In *Hancock Cty. Land Acquisitions v. Commissioner*, the easement deed in question contained provisions allowing the donor to carve out the value of certain improvements from any extinguishment proceeds before calculating the donee's share.<sup>100</sup> The Tax Court, sitting in the Eleventh Circuit, determined that although it had disallowed deductions with similar easement deeds in the past, the fact that the improvements were inexpensive structures and would not plausibly cause the donee to receive less than its proportionate share defeated summary judgment on this issue.<sup>101</sup> While the scenario in *Hancock* does not involve a mortgagee's rights to proceeds, the fact that the court allowed the plausibility of the donee recovering its full share to become part of the analysis suggests that the requirements need not be so rigid, and that the *Kaufman III* approach is not only practical, but legally viable.

Such flexibility has also been introduced to the analysis in the context of other aspects of the perpetuity requirements, not just the Proceeds requirement. In *BC Ranch II, L.P. v. Commissioner*, the Fifth Circuit allowed an easement

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*Easement War*, TAX NOTES (Nov. 7, 2022), <https://www.taxnotes.com/tax-notes-federal/conservation-easements/appraisers-collateral-damage-syndicated-conservation-easement-war/2022/11/07/7f9bf?highlight=Appraisers%20as%20Collateral%20Damage> [<https://perma.cc/3WH3-72Q5>].

<sup>97</sup> See *supra* Part I.

<sup>98</sup> Indeed, Victoria Wolfe has also emphasized the donor-donee relationship in the context of easement modification, monitoring, and perpetuity generally. See Wolfe, *supra* note 13, at 344–47.

<sup>99</sup> Along with increasingly aggressive IRS challenges based on strict interpretations, a circuit split now exists with regards to the validity of the Proceeds regulation itself, which only increases this uncertainty. See *infra* note 104 and accompanying text.

<sup>100</sup> *Hancock Cty. Land Acquisitions, LLC v. Commissioner*, No. 12385-20, at \*2–5 (U.S.T.C. Jan. 12, 2022); Kristen A. Parillo, *Easement Litigant Survives Summary Judgment on Proceeds Clause*, TAX NOTES (Jan. 13, 2022), <https://www.taxnotes.com/tax-notes-today-federal/charitable-giving/easement-litigant-survives-summary-judgment-proceeds-clause/2022/01/13/7d312> [<https://perma.cc/NUN3-XP3A>].

<sup>101</sup> *Hancock Cty. Land Acquisitions*, No. 12385-20 at \*4–5. Proportionality, calculation, and valuation issues are also implicated here, but the important point is the court looked past an ultra-rigid reading of the Proceeds regulation, however slightly.

deed to permit modification of the boundaries of the easement (a potential violation of perpetuity requirements).<sup>102</sup> That court noted that a flexible approach to conservation easements may benefit all parties as well as the protected property, echoing the idea that adaptation and negotiation between the parties may represent the best way to protect and maintain the positive impact of conservation easements.<sup>103</sup>

In *Hewitt v. Commissioner*, the Eleventh Circuit flatly invalidated the Proceeds requirement in the context of post improvement proceeds.<sup>104</sup> A large part of this determination rested on the possibility that the Treasury failed to respond to meaningful concerns of certain organizations involved in conservation easements during the notice and comment period prior to the promulgation of the Proceeds regulation, some of which were similar to the concerns discussed above.<sup>105</sup> In light of this, the First Circuit may have been on the right track reading the regulations broadly to alleviate concerns that were potentially ignored by the Treasury.

While *Kaufman III* does not set forth a detailed analysis of how to deal with the Mortgage Subordination and Proceeds requirements, it is another prime example of a court recognizing the need for practicality under certain circumstances.<sup>106</sup> This approach should become the preferred lens through which to view the requirements for conservation and preservation easements because it will protect the incentive to donate and develop historic properties, and reflects a growing preference for more flexibility. A byproduct of this approach may be to compel the IRS to turn its attention to larger, more important problems related to conservation easements.

### *B. The IRS Should Focus on Conservation and Valuation Issues Rather Than Technical Requirements*

For the reasons discussed in Part III.A, the *Kaufman III* approach should be the preferred analysis going forward.<sup>107</sup> However, simply saying that courts should be more lenient in the interpretation of § 170(h) and related regulations, while a start, does not necessarily address all possible incentive and abuse issues, including those related to conservation purpose and valuation.

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<sup>102</sup> *BC Ranch II, L.P. v. Comm’r of Internal Revenue*, 867 F.3d 547, 547–54 (5th Cir. 2017); Wolfe, *supra* note 13, at 339–43.

<sup>103</sup> *BC Ranch II, L.P.*, 867 F.3d at 553; Wolfe, *supra* note 13, at 343–46.

<sup>104</sup> *Hewitt v. Comm’r of IRS*, 21 F.4th 1336, 1353 (11th Cir. 2021). However, the Sixth Circuit disagreed with *Hewitt* and upheld the validity of the Proceeds regulation, thus magnifying the uncertainty surrounding the requirement. See generally *Oakbrook Land Holdings, LLC v. Comm’r of Internal Revenue*, 28 F.4th 700 (6th Cir. 2022) (upholding the procedural and substantive validity of the Proceeds regulation); GBX Brief, *supra* note 67.

<sup>105</sup> *Hewitt*, 21 F.4th at 1345–46, 1353; see *supra* Part III.A.1.

<sup>106</sup> See *supra* Part III.A.1; *supra* notes 101–03 and accompanying text.

<sup>107</sup> See *supra* Part III.A.

Determining the value of a conservation easement is a complex exercise<sup>108</sup> and is largely outside the scope of this Note. Suffice it to say generally that the value of an easement is the difference between the fair market value of the property if developed to its “highest and best use” without the easement restrictions and the fair market value of the property if it were subject to the easement restrictions.<sup>109</sup> Therefore, if a taxpayer can inflate the value of the highest and best use (often done through dubious appraisals), they can often increase the resulting tax benefit.<sup>110</sup>

The IRS has consistently acknowledged that inflated valuation lies at the heart of abuse when it comes to conservation easement deductions, and there is evidence that properties with little conservation value are constantly qualifying.<sup>111</sup> Despite this understanding, the IRS has often focused its challenges on technical flaws in easement deeds, including those related to mortgage subordination and proceeds.<sup>112</sup> These technical aspects may be important in terms of attempting to reduce opportunity to receive a double benefit from the donation of an easement,<sup>113</sup> but allowing for more practicality in their application hardly increases this risk, especially when the donee still maintains the ability to recover proceeds directly from the donor.<sup>114</sup> If the IRS itself understands there are other keys to the abuse problem, then its resources would be better spent focusing on inflated appraisals and suspect conservation purposes, rather than on technical areas less susceptible to abuse.<sup>115</sup>

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<sup>108</sup> See SHEPPARD, *supra* note 77, at 19–20.

<sup>109</sup> *Id.*

<sup>110</sup> *See id.*

<sup>111</sup> SHEPPARD, *supra* note 77, at 20; Wolfe, *supra* note 13, at 335 n.19; Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 L. & CONTEMP. PROBS. 29, 45 n.89 (2011); LOONEY, *supra* note 73, at 3, 9, 17–20; Roddewig, *supra* note 1, at 687.

<sup>112</sup> SHEPPARD, *supra* note 77, at 20; Wolfe, *supra* note 13, at 350; *see also supra* notes 73–79 and accompanying text.

<sup>113</sup> McLaughlin, *supra* note 72, at 276.

<sup>114</sup> *See Kaufman III*, 687 F.3d 21, 27 (1st Cir. 2012) (noting that “a grant that is absolute against the owner-donor is also an entitlement . . . and almost the same as an absolute one where third-party claims . . . are contingent and unlikely”); *see also* Wolfe, *supra* note 13, at 344–46 (emphasizing the donor-easement holder relationship).

<sup>115</sup> Ronald Levitt & David Wooldridge, *An Unwelcome Gift from the IRS on Conservation Easements*, LAW360 (Jan. 9, 2017), <https://www.law360.com/articles/879088/an-unwelcome-gift-from-the-irs-on-conservation-easements> [https://perma.cc/R4YQ-NE4Z]; Hale E. Sheppard, *Reasonable IRS Appraisal Triggers Conservation Easement Settlement*, TAX NOTES (Jan. 24, 2022), <https://www.taxnotes.com/taxpractice/conservation-easements/reasonable-irs-appraisal-triggers-conservation-easement-settlement/2022/01/24/7cpx2?highlight=hale%20sheppard#7cpx2-0000028> [https://perma.cc/2DA3-F6K3]. Indeed, in *Kaufman v. Commissioner (Kaufman IV)*, the Tax Court, on remand from the First Circuit (*Kaufman III*), ultimately disallowed the Kaufman’s deduction based on flawed valuation. *See generally* *Kaufman v. Comm’r of Internal Revenue*, 107 T.C.M. (CCH) 1262 (2014), *aff’d*, 784 F.3d 56 (1st Cir. 2015).



## IV. CONCLUSION

Despite many controversies, the conservation easement deduction is still supported by Congress.<sup>116</sup> Yet courts, donors, and the IRS consistently struggle to interpret certain aspects of the statute and regulations, especially the Mortgage Subordination and Proceeds requirements.<sup>117</sup> Although most courts, and the IRS, favor interpreting the regulations to require full and complete subordination of mortgagees, the First Circuit in *Kaufman III* introduced a measure of practicality to its approach.<sup>118</sup> Because this approach comports with the aims of Congress by maintaining the incentive to protect and redevelop historically significant properties, and reflects an increasing trend towards flexibility, courts and the IRS should embrace it and instead focus on other core sources of abuse.<sup>119</sup>

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<sup>116</sup> Ware, *supra* note 1; Mclaughlin, *supra* note 72, at 298.

<sup>117</sup> See *supra* Part II.

<sup>118</sup> See *supra* Part II.

<sup>119</sup> See *supra* Part III; Wolfe, *supra* note 13, at 350–51, 354; Sheppard, *supra* note 115.