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Eleventh Circuit Gives Developers a Mulligan: Golf Courses Eligible for Conservation Easement Tax Deductions

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In a lengthy opinion discussing the true value of protecting sixty-one threatened bird species, the elusive denseflower knotweed and the regionally declining southern fox squirrel, a panel of judges sitting on the federal 11th Circuit handed developers a win. In *Champions Retreat Golf Founders, LLC v. Commissioner of IRS*, No. 18-14817 (11th Cir. May 13, 2020), a Georgia golf course prevailed in a saga that started in 2010 when it contributed a “conservation easement” to a Section 501(c)(3) organization that qualified as a land trust established for conservation purposes as defined in Section 170(h) of the Internal Revenue Code (the “Code”), including the protection of natural habitats across the country.

The Internal Revenue Service (“IRS”) recognizes these conservation easement deductions as provided in Section 170(h) of the Code and tax regulations at 26 C.F.R. § 1.170A-14. At their core, conservation easement donations qualify as charitable deductions based upon the donation of the easement to a qualifying entity which protects the land from future development in perpetuity. Under a three-part test, the IRS will only recognize a deduction “(A) of a qualified real property interest, (B) to a qualified organization, (C) [which is] exclusively for conservation purposes.” I.R.C. § 170(h)(1).

In *Champions*, the IRS Commissioner did not take issue with the first two prongs of the conservation easement test, but rather the case focused on whether the contribution of a conservation easement over a golf course and a small portion of undeveloped land adjacent to the course satisfied the requirement that the property be protected “exclusively for conservation purposes.”

The Code recognizes legitimate conservation purposes as those that promote:

- i. The preservation of land areas for outdoor recreation by, or the education of, the general public;
- ii. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem
- iii. the preservation of open space (including farmland and forest land) where such preservation is—
 - I. for the scenic enjoyment of the general public, or
 - II. pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- iv. the preservation of an historically important land area or certified historic structure.

I.R.C. § 170(h)(4)(A). The panel dug down on whether the proposed conservation easement over roughly 348 acres met the requirement of preserving the property as a “natural habitat” or as open space providing scenic enjoyment of the general public.

The 11th Circuit panel of judges cut through most of the noise in the case by rejecting the Tax Court’s notion that (A) because both of tax payers’ experts did not see the same bird, the bird could not qualify as threatened, (B) the use of chemicals on the golf course would destroy the endangered denseflower knotweed, and (C) the property could not be viewed as open space providing scenic enjoyment to the general public.

The 11th Circuit determined the proposed conservation easement would, despite past efforts by the IRS Commissioner to oppose the recognition of areas on or adjacent to golf courses as qualifying conservation easement property, easily have met all of the requirements for such an easement but for its use as a golf course. Finding valuable conservation values and attributes in protecting the sixty-one bird species, southern fox squirrel and denseflower knotweed species, the appellate court found that the property qualified for purposes of the deduction under Section 170(h) of the Code.

All things being equal, the use of land subject to a proposed conservation easement covering a golf course is no longer fatal within the 11th Circuit (which includes Alabama, Florida, and Georgia). A developer who owns land that might be a strong candidate for a conservation easement now has a green light (or a caution light, at worst) to contribute a conservation easement with respect to such property.

This case is a breath of fresh air to encourage the protection of valuable property (even golf course property) from development, which serves the Congressional purpose in enacting Section 170(h) of the Code.

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