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The Shifting Use of the So-Remote-as-to-be-Negligible Standard for Qualified Conservation Contributions

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The Shifting Use of the So-Remote-as-to-be-Negligible Standard for Qualified Conservation Contributions

Ashley H. Waterbury*

Abstract

Qualified conservation contributions, also known as conservation easements, have become a subject of close scrutiny under the Internal Revenue Service within the past decade. One reason for such scrutiny is that conditions are being imposed on these contributions, testing the perpetuity requirement for conservation easement deductions. In order for a condition on the donation to survive, the condition must be "so remote as to be negligible." The judicial interpretation of the so-remote-as-to-be-negligible standard has fluctuated since its addition to the Treasury Regulations in 1939. Most recently, the Tax Court in *Graev v. Commissioner*, explored the meaning of the so-remote-as-to-be-negligible standard outside of the traditional grantor/grantee relationship by assessing the likelihood of IRS action. By denying the deduction in *Graev*, the Tax Court highlighted that a condition based on IRS action, namely the allowance of a deduction, should not be a permissible condition for qualified conservation contributions. This Note will argue that further clarification of the so-remote-as-to-be-negligible standard should be included in the Treasury Regulations. In particular, conditions based on the IRS allowance of a deduction should be explicitly barred from consideration under the so-remote-as-to-be-negligible standard.

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I. Introduction

In 1980, Congress passed section 170(h) of the Internal Revenue Code ("Code"), creating the current qualified conservation contribution structure.[1] A qualified conservation contribution is defined as "a qualified real property interest to a qualified organization exclusively for conservation purposes," and is commonly known as a conservation easement.[2] In allowing

1. *See* Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204 (codified as amended at 26 U.S.C. § 170(h) (2014)) (allowing qualified conservation easement deductions, but only if the easements meet one of three exceptions).

2. *See* STAFF OF THE JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES, JCS-2-05,

deductions for donations of conservation easements, Congress wanted to create incentives for landowners to preserve environmentally and historically important property.[3] Since then, conservation easements have become a source of donations resulting in large deductions.[4] For example, from 2003–2006, the average value of a donated conservation easement was $491,068, making conservation easements the highest valued per-donation value by over $300,000.[5] As conservation easements amounted to such large deductions, the Internal Revenue Service ("IRS") raised concerns over conservation easement deductions.[6] IRS Notice 2004-41 alerted donors that the IRS might issue penalties for improper use of the deduction.[7] Improper uses have included inflated valuation of the easement, not creating an easement in perpetuity, and requests to return easements after the donation has already been made.[8]

This Note will specifically address one aspect of the perpetuity requirement for conservation easements. While

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at 277 (Comm. Print 2005) [hereinafter OPTIONS TO IMPROVE TAX COMPLIANCE], *available at* http://www.jct.gov/s-2-05.pdf (defining qualified conservation contribution) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

3. *See* S. REP. NO. 96-1007, at 9 (1980) (explaining that the Senate wanted to expand deductions for conservation easements in recognition of the "important role" easements play to further conservation goals).

4. *See* Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47, 48 (2011) ("Americans give away easements in enormously valuable chunks in comparison to other kinds of real and personal property.").

5. *See id.* at 49 (providing a graph which illustrates the contrast between the high value of qualified conservation easement donations and other donations).

6. *See* I.R.S. Notice 2004-41, 2004-28 I.R.B. 31, *available at* http://www.irs.gov/pub/irs-tege/n2004_41.pdf (addressing awareness of the improper use of charitable contribution deductions for conservation easements and an intention to penalties for such improper deductions) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

7. *See id.* ("[I]n appropriate cases, the Service intends to disallow such deductions and may impose penalties and excise taxes.").

8. *See* Steven T. Miller, Comm'r, Tax Exempt and Government Entities, Internal Revenue Serv., Remarks Before the Land Trust Alliance Public Spring Public Lands Conference (March 28, 2006), *available at* http://www.landtrustalliance.org/policy/tax-matters/rules/remarks-of-steven-t.-miller-march-2006 (addressing the current issues with charitable contributions of conservation easements) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

conservation easements generally must exist in perpetuity, the Treasury Regulations allow for the consideration of a remote future event in conservation easement deeds.[9] These remote future events will not violate the perpetuity requirement so long as the likelihood of the event occurring is "so remote as to be negligible."[10] This standard originated in the estate tax provisions, but it has been applied in federal income tax law since 1959.[11] The regulations themselves do not further clarify the standard.[12] Hence, the task of articulating the level of remoteness requisite for the standard has been left to case law.[13]

A recent Tax Court case, *Graev v. Comissioner*, interpreted the so-remote-as-to-be-negligible standard in the context of a façade easement.[14] In *Graev*, the grantee provided a side letter separate from the conservation easement agreement whereby it agreed to refund the easement to the taxpayer grantor if the IRS disallowed a deduction for the grantor.[15] The Tax Court held that this side letter created a condition of a remote future event on the easement and that the likelihood of this event was

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9. *See, e.g.*, Treas. Reg. §§ 1.170A-1(e), -7(a)(3), -14(g)(3) (2014) (addressing the issue of conditions based on the occurrence of future events).

10. *See* Treas. Reg. §§ 1.170A-1(e), -7(a)(3), -14(g)(3) (2014) (allowing deductions for conservation easements which have conditions on remote future events as long as these future events are "so remote as to be negligible").

11. *See* Graev v. Comm'r, 140 T.C. 377, 389 (2013) (providing a history of Treas. Reg. §1.170A-1(e)).

12. *See* Satullo v. Comm'r, 66 T.C.M. (CCH) 1697, 6 (1993) ("The regulations offer no specific guidance for determining whether a possibility of occurrence is so remote as to be negligible . . . .").

13. *See id.* (explaining that the regulations do not define the so-remote-as-to-be-negligible standard, so the standard is defined through case law).

14. *See Graev*, 140 T.C. at 377–78 ("The question now before the Court is whether deductions for Mr. Graev's contributions of cash and the easement to NAT [National Architectural Trust] should be disallowed because they were conditional gifts. The answer depends on whether . . . the chance that the condition would occur was 'so remote as to be negligible.'"). Façade easements are a type of conservation easement which preserve historic properties. INTERNAL REVENUE SERV., FAÇADE EASEMENT CONTRIBUTIONS, FAÇADE EASEMENT BRIEF (Aug. 2009).

15. *See Graev,* 140 T.C. at 383 (describing the contents of the side letter).

more than negligible.[16] This holding raises questions as to how the so-remote-as-to-be-negligible standard should be applied, as well as how taxpayers are to prepare for successful conservation easement deductions.[17]

The goal of this Note is to evaluate the evolution of the so-remote-as-to-be-negligible standard, particularly as a result of its use in *Graev*. To begin, Part II will discuss the details of the Internal Revenue Code and Treasury Regulations, which allow for conservation easements. Following that, Part III will examine prior case law using the so-remote-as-to-be-negligible standard and address how its definition has changed. With that background, Part IV will then address the *Graev* case in detail, discussing the oddities of the case. In particular, it will highlight the grantor's use of a condition solely for tax purposes. Lastly, Part V will discuss the future of the so-remote-as-to-be-negligible standard in light of *Graev*.

This Note recommends that the Treasury promulgate regulations to further define the so-remote-as-to-be-negligible standard. The current definitions developed by case law are overly broad and allow for conditions that do not primarily serve the purpose of conservation.[18] Grantors of qualified conservation easements should not be permitted to include "tax insurance" clauses along with their donations.[19] Rather, these donations should be irrevocable on tax deductibility grounds. The ability to

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16. *See id.* at 398 (explaining that the issuance of the side letter "implies a non-negligible risk").

17. *See* Michelle L. Vesole, *Listen to the Warnings: Contingent Charitable Contribution Deduction is Disallowed*, BLOOMBERG BNA ESTATE TAX BLOG (July 18, 2013), http://www.bna.com/listen-warnings-contingent-b17179875304/ (highlighting the tension between the *Graev* holding and the application of the so-remote-as-to-be-negligible standard) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

18. *See* Timothy L. Jacobs, *Kaufman—Another Sad Chapter in the Service's Assault on Façade Easements*, TAXATION OF EXEMPTS, July/August 2014, at 16 (2014), http://www.hunton.com/files/Publication/8956f103-d3ea-4468-b4d5-a6ecba26f4b7/Presentation/PublicationAttachment/cd2aa9de-5188-470a-8e2b-780e318ec2df/Kaufman_Another_Sad-Chapter_In_The_Services_Assault_On_Facade_Easements.pdf (illustrating how cases in the area of façade easements are unpredictable in the wake of *Graev* and subsequent cases) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

19. I would like to thank Professor Brant Hellwig for the suggestion to use the term "tax insurance."

refund conservation easement donations suggests that the donation is being made solely for tax benefits, as opposed to conservation purposes.[20] These tax driven donations are the ones most likely to lead to aggressive valuation, one of the biggest issues with conservation easements today.[21] Disqualifying conditions that allow refunds upon a denial of a deduction attack what could be considered the most aggressive conservation easement transactions.[22]

II. The Code and Regulations on the Qualified Conservation Easement Deduction

A. The Code

Section 170(a) of the Code provides a deduction for any charitable contribution.[23] Yet, this general rule of allowance is subject to a host of conditions.[24] One such restriction, section 170(f)(3), applies to partial interests in property.[25] Initially, one would think that a conservation easement would be disallowed because it is a partial interest in property; it is an agreement between the landowner and the holder of the easement to restrict use on the property, and it does not provide any other ownership

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20. *See* Remarks of Steven T. Miller, *supra* note 8 (highlighting situations where taxpayers petition for the return of the easement they donated upon discovering that the tax credit they received was not marketable).

21. *See* Theodore S. Sims, *Qualified Conservation Restrictions: Recollections of and Reflections on the Origins of Section 170(h)*, 33 UTAH ENVTL. L. REV. 41, 57 (2013) (explaining the widespread propensity for conservation easements to be valued "aggressively").

22. *See id.* at 58 (illustrating a proposed system that makes disclosure of the deduction amount a prerequisite to claiming a deduction and acknowledging that such a system "could by itself function as a deterrent to the most egregiously aggressive positions, by substantially simplifying the process of detection and reducing the costs of enforcement.")

23. *See* I.R.C. § 170(a)(1) (2014) ("There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year.").

24. *See* I.R.C. § 170(f) (2014) (providing for "disallowance of deductions in certain cases," as well as providing other "special rules").

25. *See* I.R.C. § 170(f)(3) (2014) (allowing deductions for contributions of partial interests in property "only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust").

rights.[26] Section 170(f)(3)(B)(iii), however, provides an exception to the partial interest rule, allowing a deduction for "a qualified conservation contribution."[27] Conservation easements fall into this category.[28]

The Code provides a definition in section 170(h) for a qualified conservation contribution: it must be a contribution of (1) a "qualified real property interest," 2) "to a qualified organization," and (3) "exclusively for conservation purposes."[29] A "qualified property interest" includes a conservation easement because it is "a restriction (granted in perpetuity) on the use which may be made on the real property."[30] Common grantees of conservation easements, charities and non-profit organizations, meet the requirements for a "qualified organization."[31] Conservation easements will meet the "exclusively for conservation purposes" requirement as long as the "conservation purpose is protected in perpetuity."[32] Thus, in order to qualify for a deduction on one's conservation easement, two perpetuity requirements must be met: (1) the easement must be granted in perpetuity, and (2) the purpose of the easement must remain in perpetuity.[33] This dual requirement highlights the priority of

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26. *See* Eagle, *supra* note 4, at 53 (quoting Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 453 (2002)) (defining conservation easements).

27. *See* I.R.C. § 170(f)(3)(B)(iii) (2014) (allowing an exception to the general rule for deductions for qualified conservation contributions).

28. *See* OPTIONS TO IMPROVE TAX COMPLIANCE, *supra* note 2, at 277 (placing conservation easements into the category of qualified conservation contributions).

29. I.R.C. § 170(h)(1)(A)–(C) (2014).

30. *See* I.R.C. § 170(h)(2)(C) (2014) (defining qualified real property interests).

31. *See* OPTIONS TO IMPROVE TAX COMPLIANCE, *supra* note 2, at 277 ("Qualified organizations include certain governmental units, public charities that meet certain public support tests, and certain supporting organizations."); I.R.C. § 170(h)(3) (2014) (defining "qualified organization"); I.R.C. § 170(b)(1)(A) (2014) (outlining types of organizations to which individuals may make deductible charitable contributions).

32. *See* I.R.C. § 170(h)(5)(A) (2014) (requiring the conservation easement to be protected in perpetuity in order to qualify as "exclusively for conservation purposes").

33. *See* Ann Taylor Schwing, *Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 221 (2013) (explaining the perpetuity requirements for qualified conservation easements).

perpetuity when seeking to qualify for a deductible conservation contribution.[34] Perpetuity is crucial for donations of conservation easements because it makes the easement holder's use restriction enforceable against others.[35] Without perpetuity, the use and purpose of the property could change easily, giving no value to the easement itself.[36]

B. Treasury Regulations

The statute does not address how perpetuity is defined for charitable contributions.[37] Rather, that issue is left to administrative guidance.[38] The Treasury Regulations do not insist on absolute perpetuity.[39] Instead, the regulations allow for consideration of a remote future event in the conservation agreement, so long as that remote future event is so remote as to be negligible.[40] The regulations use this terminology three times:

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34. *See id.* at 243 (explaining that "[t]he whole purpose of a conservation easement is to remain binding despite changes in circumstances, such as enhanced profitability of land for development.").

35. *See* Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part I: The Standards*, 45 REAL PROP., TR. & EST. L. J. 473, 482 (2010) (noting that the perpetuity requirement allows the conservation purpose to be protected against all other parties in interest, including successors in interest).

36. *See* Jessica E. Jay, *When Perpetual is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1, 3 (2012) (explaining that perpetual conditions restricting the use of land "protect[s] conservation values").

37. *See* Treas. Reg. §§ 1.170A-1(e), -7(a)(3), -14(g)(3) (2014) (requiring the use of the so-remote-as-to-be-negligible standard, but not defining it).

38. *See* Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment after Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 290–92 (2012) (noting the IRS's "helpful", but still inadequate, guidance of the perpetuity standard through the issuance of information letters).

39. *See* Treas. Reg. §§ 1.170A-14(g)(1)–(3) (2014) (indicating that the possibility of a so-remote-as-to-be-negligible standard contemplates the fact that absolute perpetuity is not required).

40. *See* Treas. Reg. § 1.170A-1(e) (describing situations when conditions dependent upon future events are allowed).

(1) to apply to conditional transfers,[41] (2) to apply to contributions of partial interests in property,[42] and (3) to apply to conservation easements specifically.[43] All three regulations require that the standard be applied at the time the gift is made.[44] Outside of this, there is no other guidance from the regulations on how to apply this standard or how it is defined.[45] Because of this, the courts' application and definition of the standard have changed over time.[46] It also allowed for the grantor in *Graev v. Commissioner* to attempt to include a refund condition dependent on the allowance of a tax deduction.[47]

III. The Case Law Development of the So-Remote-as-to-be-Negligible Standard

A. Estate Tax Origins

Use of the so-remote-as-to-be-negligible standard first appeared in the estate tax regulations in 1939 for conditional

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41. *See* Treas. Reg. § 1.170A-1(e) (2014) ("If as of the date of a gift a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event . . . *no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible*." (emphasis added)).

42. *See* Treas. Reg. § 1.170A-7(a)(3) (2014) ("A deduction shall not be disallowed under section 170(f)(3)(A) and this section" because of an event happening so long as "if on the date of the gift it appears that that the possibility that such act or event will occur is so remote as to be negligible").

43. *See* Treas. Reg. § 1.170A-14(g)(3) (2014) ("A deduction shall not be disallowed under section 170(f)(3)(B)(iii) and this section merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act of the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible.").

44. *See* Treas. Reg. §§ 1.170A-1(e), -7(a)(3), -14(g)(3) (2014) (requiring that the condition be assessed on the "date of the gift").

45. *See* Satullo v. Comm'r, 66 T.C.M. (CCH) 1697, 6 (1993) (acknowledging no guidance exists for the application of the standard, but also noting that there is no need for the court to provide any at this time because it is clear from the facts that likelihood of event was more than negligible).

46. *See* McLaughlin, *supra* note 38, at 225–29 (2012) (outlining various courts' struggle to determine the standard and implications of the so-remote-as-to-be-negligible standard).

47. *See* Graev v. Comm'r, 140 T.C. 377, 385 (2013) (quoting the conditions of the easement set forth by the grantor in the conservation deed).

charitable deductions.[48] Early cases interpreted the regulations to state that a deduction would be disallowed if the possibility the charity would not take was more than so remote as to be negligible.[49] These regulations shifted the focus of evaluation onto the likelihood of the charity taking in light of the other facts and circumstances, including each devise related to the condition.[50] The ultimate decision of whether the condition would be allowed rested on whether the charity would be able to take upon operation of the condition.[51]

1. Commissioner v. Estate of Sternberger

The Supreme Court first interpreted the so-remote-as-to-be-negligible standard in 1955 in *Commissioner v. Estate of Sternberger*.[52] In *Sternberger*, the decedent left a wife (62 years old) and daughter (27 years old) surviving him.[53] Under the terms of his will, if his daughter died without descendants surviving her or her mother, then a charitable bequest would be made.[54] At the time of decedent's death, the daughter was divorced and had no

48. *See* Treas. Reg. § 81.46(a) (1949) (stating that for estate tax purposes, if there is a conditional transfer to a charity, "no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible"); s*ee also* Treas. Reg. § 20.2055-2(b)(1) (2014) (stating that deductions for charitable transfers are not "allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible"); Hamilton Nat'l Bank of Chattanooga v. United States, 236 F. Supp. 1005, 1012 (E.D. Tenn. 1965) (explaining the adoption of the 1949 regulation into the current regulations).

49. *See Hamilton Nat'l Bank*, 236 F. Supp. 1005, 1012 ("To be entitled to a charitable deduction prior to 1939 in the case of a transfer to a charity subject to a condition, the estate had to prove that it was impossible for the charity not to take.")

50. *See id.* at 1012–13 (outlining the evolution of the interpretive shift in focus).

51. *See id.* at 1010 (requiring a finding that the charity's remainder interest in a decedent's estate be capable of valuation, proving that the charity would take).

52. *See* Comm'r v. Estate of Sternberger, 348 U.S. 187, 194 (1955) (describing estate tax regulations before the allowance of conditions for remote future events under the so-remote-as-to-be-negligible standard).

53. *See id.* at 188 (providing background information on the decedent's surviving heirs).

54. *See id.* (describing the terms of the testamentary trust).

children.[55] The executor of the decedent's estate made a deduction for the charitable bequest, and assumed that the daughter would not have any children.[56] The Commissioner disallowed the deduction, and the estate petitioned the Tax Court to determine whether the possibility a charity would not take under the decedent's will was so remote as to be negligible.[57] The Tax Court reversed the Commissioner's determination.[58] The Court of Appeals for the Second Circuit affirmed, and the case then went to the Supreme Court.[59] This Supreme Court opinion was the first to define the so-remote-as-to-be-negligible standard originally promulgated in 1939.[60]

Keeping in mind that prior to 1939, the regulations did not allow for conditional donations,[61] the Court defined so remote as to be negligible to be "negligible" or "highly improbable."[62] The Court imposed this high level of scrutiny because it did not want a condition which prevented the charity from taking, but still allowed the taxpayer to get a deduction.[63] The Court in *Sternberger* focused the application of the so-remote-as-to-be-negligible standard on the grantee/charity, instead of the grantor: the grantor may be able to give, but it was important that the

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55. *See id.* (describing factors which would affect the decedent's daughter receiving the residuary estate).

56. *See id.* at 188–90 (describing the actions of the executor of the estate).

57. *See id.* at 188–93 (presenting the procedural history and issue of the case).

58. *See id.* at 189 (describing the Tax Court's treatment of the case).

59. *See id.* (describing the Second Circuit's treatment of the case).

60. *See id.* at 195–99 (noting that a similar issue arose in *Humes v. United States*, 276 U.S. 487 (1928), but it was not specifically interpreting the so-remote-as-to-be-negligible standard because it had not yet been promulgated).

61. *See id.* at 194 ("The predecessor of § 81.46 confined charitable deductions to outright, unconditional bequests to charity."); *see also* Hamilton Nat'l Bank of Chattanooga v. United States, 236 F. Supp. 1005, 1012 (E.D. Tenn. 1965) (discussing that the "so remote as to be negligible" language did not become a part of the charitable contribution deduction regulations until 1939).

62. *See* Comm'r v. Estate of Sternberger, 348 U.S. 187, 194 (1955) ("Section 81.46(a) today yields to no condition unless the possibility that charity will not take is 'negligible' or 'highly improbable.'").

63. *See id.* (reiterating that the encouragement of bequests to charity is one of the main reasons why a charitable deduction is allowed).

grantee had the opportunity to take.[64] The Court evaluated the ability of the charity to take based on the self-interest of the daughter to remarry.[65] If the daughter did remarry, then the condition affording the charity the opportunity to take would not occur.[66] The Court calculated that she would have a "$2,000,000 inducement to remarry."[67] The Court deviated from evaluating satisfaction of the condition solely through actuarial tables, suggesting that the so-remote-as-to-be-negligible standard should be evaluated through more subjective factors related to the parties involved in the transaction.[68]

Sternberger also emphasized that the charity must take fully in order to get the deduction; the amount of the deduction cannot be based on the proportional likelihood of the charity taking.[69] The so-remote-as-to-be-negligible standard is an all or nothing requirement.[70] If a condition's occurrence would inhibit the grantee's ability to take but is nonetheless so remote as to be negligible, then the deduction is still allowed.[71] Ultimately, the deduction in *Sternberger* was disallowed because the possibility that the charity would not take was more than negligible.[72]

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64. *See id.* at 193 (emphasizing that the focus of the so-remote-as-to-be-negligible test is on whether the charity is truly assured the grantor's bequest).

65. *See id.* at 198 (noting under the terms of the will, the daughter had a $2,000,000 incentive to remarry and have children).

66. *See id.* at 188 (providing the terms of the trust).

67. *See id.* at 198 (explaining the daughter's incentive to remarry, illustrating that the chances the charity won't take are not very remote).

68. *See id.* (noting that the actuarial tables become less dependable to the extent a person can defeat a condition of the charity taking).

69. *See id.* at 199 ("This Court finds no statutory authority for the deduction from a gross estate of any percentage of a conditional bequest to charity where there is no assurance that charity will receive the bequest or some determinable part of it.").

70. *See id.* ("Where the amount of a bequest to charity has not been determinable, the deduction properly has been denied.").

71. *See id.* ("Where the amount has been determinable, the deduction has, with equal propriety, been allowed where the designated charity has been sure to benefit from it.").

72. *See id.* at 199 (disallowing the deduction because the charity had a more than negligible chance of not receiving the bequest).

This case set the stage for future definitions and applications of the so-remote-as-to-be-negligible standard.[73] Not only did it define the so-remote-as-to-be-negligible standard as "negligible" or "highly improbable", but it also addressed how and to whom the standard would be applied.[74] According to the *Sternberger* Court, the focus should be on the grantee/charity and the likelihood of the condition occurring should be evaluated through subjective factors, not just actuarial tables.[75]

2. United States v. Dean

Shortly after *Sternberger*, the Court of Appeals for the First Circuit further addressed how the so-remote-as-to-be-negligible standard should be defined.[76] In *United States v. Dean*, the decedent's estate would make bequests to charity if the decedent's sister, age 82 at the time of the decedent's death, survived the decedent's daughter, age 67, and daughter-in-law, age 68.[77] Using actuarial tables, the court provided the likelihood of the sister surviving the daughters was one in eleven.[78] Ultimately the court held the likelihood of the sister surviving was not so remote as to be negligible and disallowed the deduction.[79]

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73. *See* U.S. v. Dean, 224 F.2d 26, 29 (1st. Cir. 1955) (explaining the *Sternberger* analysis and using *Sternberger* as a basis for the Court's own analysis).

74. *See* Comm'r v. Estate of Sternberger, 348 U.S. 187, 193–94 (1955) (defining so-remote-as-to-be-negligible and explaining that the focus of the standard is on the grantee's odds of taking).

75. *See id.* at 194, 198 (explaining that the focus of the so-remote-as-to-be-negligible is on the grantee's chance of taking and placing more weight on subjective factors than less reliable actuarial tables).

76. *See Dean*, 224 F.2d at 29 (applying the so-remote-as-to-be-negligible standard).

77. *See id.* at 27 (providing the terms of the condition on the testamentary gift).

78. *See id.* (calculating the likelihood that the 82-year-old woman would survive the 67- and 68-year-old women).

79. *See id.* at 29 (deciding that one in eleven is not so remote as to be negligible).

The court in *Dean* acknowledged the difficulty of articulating when a condition is so remote as to be negligible.[80] Because of this inability to draw lines, the court suggested applying the standard on a case-by-case basis.[81] During this case-by-case evaluation, a court must only consider Congress's intent to encourage testators to give to charities.[82] Applying this suggested analysis, the *Dean* court compared the facts in *Sternberger* to those in *Dean*.[83] It found the element of volition to be the main distinction between the two conditions.[84] In *Sternberger*, the element of volition was that the donation to charity would not be made if the decedent's daughter remarried and left issue.[85] The condition in *Dean*, however, was contingent upon the longevity of a person, which the court said has no volitional element.[86] The court reasoned that this lack of volition allowed the court to rely more on statistical evidence, like actuarial tables.[87]

The *Dean* court also attempted to provide its own definition for the so-remote-as-to-be-negligible standard.[88] Warning that its definition is subjective, the court defined "so remote as to be negligible" to mean "a chance which persons generally would disregard as so highly improbable that it might

80. *See id.* ("The line between those chances which are so remote as to be negligible and those which are not lies somewhere between these extremes. We cannot say exactly where.").

81. *See id.* (endorsing the evaluation of cases individually to see whether a condition is so remote as to be negligible).

82. *See id.* ("And there is no standard to guide us except our estimate of the extent of the encouragement tax-wise which Congress wished to give testators to make gifts to charity.").

83. *See id.* at 28 (". . . the Sternberger case [does not] rule this one, for here the chance that charity will take does not depend upon the probability of anyone having issue, a matter involving an element of volition.").

84. *See id.* (comparing the evaluation of the condition in *Sternberger* with the facts in *Dean*).

85. *See id*. (distinguishing the *Dean* condition from the *Sternberger* condition); *see also* Comm'r v. Estate of Sternberger, 348 U.S. 187, 197–98 (1955) (discussing the "inducement to remarry").

86. *See Dean*, 224 F.2d at 28 ("In this case the chance that charity will benefit depends entirely upon the relative longevity of three persons, a matter unaffected by volition or personal inducement . . . .").

87. *See id.* (noting that in this case "statistical data is not subject to distortion by any individual's self-interest").

88. *See id.* at 29 (defining the so-remote-as-to-be-negligible standard).

be ignored with reasonable safety in undertaking a serious business transaction."[89] This definition does raise the question, however, of why a condition would exist in the agreement, if it could reasonably and safely be ignored in a business transaction? Despite this irony, this definition based on a propensity to ignore or dismiss is applied in several other cases dealing with the so-remote-as-to-be-negligible standard.[90]

3. Estate of Woodworth v. Commissioner

The Tax Court in *Estate of Woodworth v. Commissioner* supplied a slightly different definition of the so-remote-as-to-be-negligible standard to supplement the *Dean* definition.[91] The *Woodworth* court defined the so-remote-as-to-be-negligible standard as: "a chance which every dictate of reason and common sense would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance."[92] Like the *Dean* definition, this definition raises the question as to why the condition would exist in the agreement if it is "so highly improbable" to occur.

The decedent in *Woodworth* directed her trustees to use her estate to build a hospital in Spartanburg, South Carolina, where no hospital currently existed.[93] This term implied that she did not imagine a condition where the hospital would not exist.[94] The direct instruction to establish the hospital would create the

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89. *See id.* (emphasizing the high improbability that is required to meet the so-remote-as-to-be-negligible standard).

90. *See, e.g.*, Hamilton Nat'l Bank of Chattanooga v. United States, 236 F. Supp. 1005, 1016 (E.D. Tenn. 1965) (defining the so-remote-as-to-be negligible standard to include a chance "so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction"); Estate of Woodworth v. Comm'r, 47 T.C. 193, 197 (1966) (defining the standard based on what an intelligent person could disregard as being so highly improbable that it lacks any substance).

91. *See Woodworth*, 47 T.C. at 197 (comparing the court's definition in *Dean* to the definition provided by the Tax Court).

92. *Id.*

93. *See id.* at 195 (presenting a condition of the trust).

94. *See id.* at 196 (noting the estate transfer was a certainty upon Woodworth's death).

charity that could take the gift.[95] When the co-executors of the decedent's estate filed the estate tax return, they claimed a charitable deduction for the amount in the trust allocated for the establishment of the hospital.[96] The Commissioner filed a notice of deficiency however because "it has not been shown that there has been or will be an effective transfer of funds" to establish the hospital.[97] So in *Woodworth*, the condition depended upon whether a hospital would actually be established in Spartanburg.[98] The court found the possibility of no hospital was more than negligible, because the charity itself (the hospital) had not yet been established.[99]

The implied condition requiring the actual establishment of the hospital necessitated an application of the so-remote-as-to-be-negligible standard.[100] The previous cases examined thus far included express conditions.[101] With this introduction of implied conditions, the court provided a new definition for the so-remote-as-to-be-negligible standard, based on high improbability, and so "remote as to be lacking in reason and substance."[102] Interestingly, the court also noted "there is nothing absolute or certain with respect to the fact that a Catholic hospital might or might not come into existence and, therefore, is not so remote as to be negligible."[103] This emphasis on certainty seems to

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95 *See id.* (explaining that the donation would be an unconditional gift to help in building a Catholic hospital in Spartanburg).

96. *See id.* at 195 (discussing the executor's action in response to the terms of the trust).

97. *See id.* (explaining the reasoning of the Commissioner when he issued a notice of deficiency against the estate).

98. *See id.* at 195–96 ("[S]ince the trustees could not use the fund for purposes other than those stated in the will and until steps were taken to establish a Catholic hospital, the fund would lie idle and for the use of no one.").

99. *See id.* at 196 (discussing why the condition did not meet the so-remote-as-to-be-negligible standard).

100. *See id.* (establishing that if the bequest is conditional the so-remote-as-to-be-negligible standard is applied).

101. *See* Comm'r v. Estate of Sternberger, 348 U.S. 187, 188 (1955) (noting the express condition in the will that must be met before the charitable donation transfers); *see also* United States v. Dean, 224 F.2d 26, 27 (1st. Cir. 1955) (explaining the express condition in the decedent's will).

102. *See Woodworth*, 47 T.C. at 197 (defining the so-remote-as-to-be-negligible standard).

103. *See id.* (noting the uncertainty of the hospital ever actually coming into existence).

contradict the court's earlier statements that the so-remote-as-to-be-negligible standard is associated with high improbability.[104]

The court in *Woodworth* was the first to raise the idea of certainty when evaluating with the so-remote-as-to-be-negligible standard.[105] It was the lack of certainty here which caused the denial of the deduction.[106] Yet, if an outcome is uncertain, like the establishment of a hospital, does it not create a lesser likelihood of it occurring? The court's emphasis on lack of certainty confuses the prior applications of the standard seen in *Sternberger* and *Dean*.[107] In those cases, there was not a focus on certainty, but rather a focus on the types of factors which may influence the so-remote-as-to-be-negligible evaluation, like the likelihood of the charity/grantee taking, and whether an element of volition is required in order to meet the condition.[108] The actual text of the definition of the so-remote-as-to-be-negligible standard offered in

104. *See id.* (including improbability in the definition of the so-remote-as-to-be-negligible standard).

105. *See id.* at 197–98 (evaluating the charitable deduction based on a lack of certainty that the hospital would ever be built or that a fund would ever be created to do so).

106. *See id.* at 196 ("Thus the bequest had no semblance of certainty unless action was taken to establish either a hospital or a fund to build one.").

107. *See* Comm'r v. Estate of Sternberger, 348 U.S. 187, 194 (1955) ("Section 81.46(a) today yields to no condition unless the possibility that charity will not take is 'negligible' or 'highly improbable.'"); *see also* United States v. Dean, 224 F.2d 26, 29 (1st. Cir. 1955) (defining the standard to mean "a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction").

108. *See Sternberger*, 348 U.S. at 194, 198 (explaining that the focus of the so-remote-as-to-be-negligible is on the grantee's chance of taking and other subjective factors); *see also Dean*, 224 F.2d at 28 (discussing the role of volition in evaluating the so-remote-as-to-be-negligible standard).

Woodworth,[109] however, is similar to the definition in *Dean*.[110] The application of the standard is where they differ.[111]

4. Hamilton National Bank of Chattanooga v. United States

Hamilton National Bank of Chattanooga v. United States sheds light both on the history of the definition of the so-remote-as-to-be-negligible standard and its application.[112] In contrast to *Woodworth*, it emphasized that the standard should not rely on precision or certainty.[113]

The decedent in *Hamilton* left his son a life interest in a testamentary trust.[114] Upon the son's death, one-fourth of the trust corpus was to go to the issue of his son, and the other three-fourths were to go to designated charities, and the trust would terminate.[115] The decedent's son died two years after his father with no surviving issue.[116] The trustee filed an estate tax return after the son's death, claiming a deduction for charitable contributions, but the Commissioner assessed a deficiency against the trustee, claiming the possibility of the son having issue after the death of his father did not meet the so-remote-as-to-be-negligible standard.[117] The court held in favor of the trustee,

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109. *See Woodworth*, 47 T.C. at 197 (defining the so-remote-as-to-be-negligible standard as "a likewise chance which every dictate of reason and common sense would justify an intelligent person in disregarding as so highly improbable and remotes as to be lacking in reason and substance").

110. *See Dean*, 224 F.2d at 29 (defining the so-remote-as-to-be-negligible standard as "a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction").

111. *See Woodworth*, 47 T.C. at 197–98 (denying the charitable deduction based on an analysis that focused on the certainty of a condition being met).

112. *See* Hamilton Nat'l Bank of Chattanooga v. United States, 236 F. Supp. 1005, 1012–14 (E.D. Tenn. 1965) (discussing the history and use of the so-remote-as-to-be-negligible standard).

113. *See id.* at 1014 (stating that the standard is not met by showing impossibility, but rather negligible possibility).

114. *See id.* at 1006–07 (providing the terms of the trust).

115. *See id.* at 1007 (describing the condition subsequent of the trust).

116. *See id.* (describing the absence of issue at the son's death).

117. *See id.* (describing the actions of the trustee, and the Commissioner in response, after the son's death).

stating the condition was so remote as to be negligible based on testimony from doctors who had examined the son and said that he suffered from cancer and would have a shorter life expectancy.[118]

The Government in this case tried to argue that the so-remote-as-to-be-negligible standard really meant impossibility.[119] The government argued impossibility because it was an earlier standard used before the so-remote-as-to-be-negligible standard was included in the regulations.[120] It also applied a definition from a 1935 case, where impossibility was defined as a "negligible chance of not vesting."[121] The court in *Hamilton* did not accept the Government's reasoning.[122] Considering the *Sternberger* case, the court noted that the impossibility argument did not arise in the Supreme Court.[123] Additionally, it provided its own logic to explain why impossibility and so remote as to be negligible are not the same thing: "[w]hile 'impossibility' and 'no possibility' may be accurate synonyms, and while 'impossibility' and 'possibility' may be accurate antonyms, 'negligible possibility' is not an accurate synonym of either."[124]

The Government also tried to argue that in order to meet the so-remote-as-to-be-negligible standard, there must be some "precise predictability" with the condition to determine if it is so remote as to be negligible.[125] This followed the *Woodworth*

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118. *See id.* at 1017 (explaining that the likelihood of the son having issue was so remote as to be negligible and providing reasons for this evaluation).

119. *See id.* at 1012 (contending the so-remote-as-to-be-negligible standard to be equivalent to the former impossibility test used before the so-remote-as-to-be-negligible language was included in the regulations).

120. *See id.* (citing case law decided before the so-remote-as-to-be-negligible standard was promulgated which defined impossibility as "a 'negligible' chance of not vesting").

121. *See id.* (citing City Bank Farmers' Trust Co. v. United States, 74 F.2d 692 (C.A.2d 1935), for this definition of impossibility).

122. *See id.* at 1014 (asserting that the court does not "interpret pre-1939 cases relied upon by the Government as defining 'impossibility' to mean 'possibility . . . so remote as to be negligible'").

123. *See id.* at 1013 ("This Court does not interpret the Sternberger case as holding that 'possibility . . . so remote as to be negligible' is the same as 'impossibility.'").

124. *See id.* at 1014 (explaining why impossibility and so-remote-as-to-be-negligible cannot be applied as the same standard).

125. *See id.* at 1010 (outlining the government's arguments).

emphasis on certainty about the completion of the hospital, as well as other cases that used actuarial tables to quantify the condition.[126] However, the *Hamilton* court rejected this correlation.[127] Instead it explained that the so-remote-as-to-be-negligible standard operates independently of any precise predictability because it would make the so-remote-as-to-be-negligible standard rather useless.[128] The predictability itself would negate the possibility of some condition being so remote as to be negligible.[129]

The court in *Hamilton* also presented a third possible definition for "so remote as to be negligible:"

> A negligible possibility is a possibility that would in the ordinary and reasonable affairs of men be disregarded in arriving at a present valuation of a future remainder interest in a serious business transaction, with no reduction in the value of the remainder interest being made by reason and the existence of such possibility.[130]

This definition, in comparison to the others offered in *Sternberger* and *Dean*, emphasized valuation as a factor when reviewing the condition.[131] Additionally, the *Hamilton* court clarified that impossibility does not define the so-remote-as-to-be-negligible standard.[132] All definitions provided thus far incorporated some element of reasonable dismissal from the parties involved in

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126. *See id.* (noting the other cases that the Government relied on for its argument that the so-remote-as-to-be-negligible standard had to show precise predictability).

127. *See id.* at 1011 (rejecting the use of "presently ascertainable" when evaluating under the so-remote-as-to-be-negligible standard).

128. *See id.* ("If the survival or non-survival of issue is 'precisely predictable' or even 'reliably predictable' then it is either clearly possible or clearly impossible, in which event 'negligible possibility' becomes meaningless.").

129. *See id.* (providing an additional reason as to why the use of precise predictability is not appropriate when applying the so-remote-as-to-be-negligible standard).

130. *Id.* at 1016.

131. *See id.* (noting the importance of the present valuation in defining the so-remote-as-to-be-negligible standard).

132. *See id.* at 1014 (emphasizing that impossibility is not the same as possibility so remote as to be negligible).

drafting the terms of the condition.[133] A drafting party would have no reason to include a condition if the occurrence of the condition was so remote as to be negligible. This subsequently raises the question of when an express condition would ever meet the standard. Expressing the condition implies that the drafting parties thought it was reasonable to include it in the agreement. These three definitions (*Sternberger*, *Dean/Woodworth*, and *Hamilton*) provided the background for defining the so-remote-as-to-be-negligible standard in the federal income tax context for qualified conservation contributions.[134]

B. Federal Income Tax Cases

Even though the Treasury Regulations did not allow for deductions for conservation easements until 1980,[135] they included the so-remote-as-to-be-negligible standard for other charitable donations reliant on conditions.[136] These cases, and those specifically addressing conservation easements, developed the definitions and applications of the so-remote-as-to-be-negligible standard and set the background leading into *Graev v. Commissioner*.[137]

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133. *See id.* at 1016 (defining the standard to mean a reasonable disregard of the condition in a contract or transaction because the chances of the condition happening are so remote); Estate of Woodworth v. Comm'r, 47 T.C. 193, 197 (1966) (defining the standard to mean reasonable disregard of the condition); U.S. v. Dean, 224 F.2d 26, 29 (1st. Cir. 1955) (defining the standard to mean reasonable disregard of the condition); Comm'r v. Estate of Sternberger, 348 U.S. 187, 194 (1955) (defining the standard to mean "negligible" or "highly improbable").

134. *See* Briggs v. Comm'r, 72 T.C. 646, 656–57 (1979) (citing many of these cases in the estate tax context as instructive for federal income tax cases).

135. *See* Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204 (codified as amended at 26 U.S.C. § 170(h) (2014)) (allowing deductions for conservation easements).

136. *See* Treas. Reg. § 1.170A-1(e) (1972) (utilizing the so-remote-as-to-be-negligible standard for conditional charitable donations); Treas. Reg. § 1.170A-7(a)(3) (1972) (stating that deductions are not disallowed simply because of the conditional nature of the donation because of the so-remote-as-to-be-negligible standard).

137. *See* Graev v. Comm'r, 140 T.C. 377, 390–94 (2013) (referencing cases such as *Briggs* and *Sternberger* in support of the court's analysis).

1. Early Cases Addressing the So-Remote-as-to-be-Negligible Standard

a) Briggs v. Commissioner

One of the earliest federal income tax cases to address the so-remote-as-to-be-negligible standard was *Briggs v. Commissioner*.[138] This 1979 case did not deal specifically with conservation easements, but rather with a donation of land in fee simple subject to a condition subsequent.[139] If the condition was not met, the original landowner would have right of reentry or the power to terminate the donation.[140] The condition was that property would be donated to a group of Native Americans to be used for establishment of a cultural, educational, and medical center.[141]

The *Briggs* court evaluated the donation of the land under the so-remote-as-to-be-negligible standard used in section 1.170A-1(e).[142] It defined the standard with the definitions seen in the estate tax cases above, including both the *Dean* and *Sternberger* definitions.[143] The court evaluated the condition based on the reasonableness of the grantor and grantee's actions.[144]

In this case especially, the court examined possibility of satisfying the condition through the grantor and grantee's interests and their ability to sustain the goal of the condition: to

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138. *See Briggs*, 72 T.C. at 656–57 (1979) (considering the so-remote-as-to-be-negligible standard in the federal income tax context)).

139. *See id.* at 655 (explaining that the petitioner's gift contained a condition subsequent).

140. *See id.* ("Petitioner has the right of reentry or power of termination if the condition is broken.").

141. *See id.* at 649 (explaining the terms of the condition).

142. *See id.* at 653 (applying the so-remote-as-to-be-negligible standard found in section 1.170A-1(e)).

143. *See id.* at 656–57 (providing estate tax background on the so-remote-as-to-be-negligible standard).

144. *See id.* at 657–58 (applying the *Dean* and *Woodworth* definition to the grantor's and grantee's reasonable ability to maintain and protect the easement).

build a cultural, educational, and medical center.[145] With respect to the grantor, the court emphasized that the grantor did little to ensure that the center would be built on the property: it provided no funds for the creation of the center, and when the gift was made, no form of financing was available.[146] Turning to the grantees, the court found they possessed no experience in fundraising or receiving grants.[147] With this review, the court held that the likelihood of the condition being left unsatisfied was more than so remote as to be negligible.[148] Along with both parties lacking the business acumen to establish a center, the court asserted that the petitioner had the intention to take back the property if the condition was not satisfied.[149] It also predicted that the grantee would easily dissolve if it had difficulty satisfying the condition.[150] So the court, in reviewing the likelihood of the condition, looked at the financial and managerial acumen of the parties, as well as their intentions.[151]

b) 885 Investment Co. v. Commissioner

Another major Tax Court case to address charitable contribution deductions was *885 Investment Co. v.*

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145. *See id.* at 656–59 (addressing the terms of the condition and the grantor and grantee's ability to fulfill the request to establish a cultural, educational, and medical center).

146. *See id.* at 657 ("[P]etitioner did not provide funds for the establishment of the center, and at the time the gift was made, no financing . . . was readily available. . . . Petitioner failed to produce any new evidence that funds to establish the center were forthcoming; there was a good chance that the center might never come into existence.").

147. *See id.* at 658 (describing the lack of business and managerial experience for the individuals acting on behalf of the grantee).

148. *See id.* ("We conclude, however, that on the date of the gift there was more than a negligible possibility that the desires of the board of directors [for the grantee] might become frustrated by the conditions imposed . . . .").

149. *See id.* at 656 ("If ANIOFI [grantee] failed to use the ranch for the establishment of the center, petitioner [grantor] intended to retake the land and hold out for another group which was willing and able to establish the center.").

150. *See id.* at 658 (predicting the ANIOFI board of directions may dissolve if unable to carry out condition).

151. *See id.* at 656–59 (assessing both the grantor's and grantee's ability to fulfill the condition).

Commissioner.[152] The taxpayer wanted to donate a portion of its property to the city of Sacramento to develop a scenic corridor.[153] It donated with the expectation that it would not have to maintain or develop the property.[154] Aware of this expectation, the city included a condition into the agreement.[155] If the city were unable to get the funding from the state to maintain and develop the highway, the property would be returned to taxpayer.[156] The fact that the grantee, rather than the grantor imposed the condition is unique.[157] The Tax Court found the grantee-imposed condition significant.[158]

Like the *Briggs* case, the court applied the so-remote-as-to-be-negligible definitions from *Dean* and *Woodworth*.[159] Ultimately, the court held that the condition was not so remote as to be negligible.[160] Resting its reasoning on the fact that the grantee had asked for the condition,[161] the court saw this as evidence of a "realistic possibility" that the property would be

152. *See* 885 Inv. Co. v. Comm'r, 95 T.C. 156 (1990) (considering the so-remote-as-to-be-negligible standard in the context of a charitable contribution).

153. *See id.* at 158 (presenting the facts of the case).

154. *See id.* ("885 offered to donate to the city that portion of land within its scenic corridor; the donation was based upon 885's understanding that it would not have the responsibility for developing and maintaining the scenic corridor.").

155. *See id.* at 159 (describing the condition which the grantee requested to have in the agreement).

156. *See id.* at 159, 161 (describing how the condition allows for the grantee to revert the property back to the owner if the property is not used for a scenic corridor).

157. *See id.* at 159 (explaining that the city required the provision to potentially deed the property back to the grantor).

158. *See id*. at 162 (placing weight in the fact that the city put in this provision as an indication that the return of the property wasn't so remote as to be negligible).

159. *See id.* at 161–62 (defining the so-remote-as-to-be-negligible standard as they were used in *Dean* and *Woodworth*).

160. *See id.* at 162 (asserting the possibility of the property being returned to the grantors was not so remote as to be negligible).

161. *See id.* ("The city insisted that 885 accept the return of the property if the city could not use it as a scenic corridor. . . [I]n light of the financial and legal uncertainties the city harbored, [this] is a clear indication that the return of the donated property to 885 was not so remote as to be negligible.").

returned.[162] As addressed earlier in the *Dean* case, the insertion of these conditions, which are cautionary of future events, ultimately provide a tipping point for the "so remote as to be negligible" analysis.[163] Because the standard is defined as "highly improbable," the fact alone that a condition was included based on a future event seems to set up the conditional contribution deduction for failure.[164]

Both *Briggs and 885 Investment Co.* introduce new approaches to applying the so-remote-as-to-be-negligible standard.[165] The *Briggs* court not only evaluated whether the grantee would be able to take, but also whether the grantor was committed to carrying out the condition.[166] This deviates from the original purpose for the standard seen in the estate tax cases; the so-remote-as-to-be-negligible standard was implemented to prevent grantors from receiving deductions even if the grantee/charity did not take.[167] The *885 Investment Co.* court highlighted that the grantee asked for the condition.[168] This request, in comparison to a grantor's inclusion of a condition, seemed to further sway the court into finding that the condition did not meet the so-remote-as-to-be-negligible standard.[169] The

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162. *See id.* (analyzing the city's lack of funds in addition to its request for the condition to establish that the likelihood of the property being returned to 855 was more than negligible).

163. *See id.* at 162 (saying that the fact that the city was dependent on funding and included these provisions proved that the reversion was not "remote").

164. *See id.* at 161 (defining "highly improbable" as a circumstance in which the ordinary businessperson would not consider the occurrence as a possibility of the deal).

165. *See id.* at 162 (evaluating the intent of the grantee in adding a condition in order to determine whether the standard is met); *see also* Briggs v. Comm'r, 72 T.C. 646, 656–59 (1979) (looking at financial and managerial acumen of the parties, as well as their intentions).

166. *See Briggs*, 72 T.C. at 654 (evaluating whether the grantor's ability to take a reversionary interest in the donated property was actually "so remote so as to be negligible").

167. *See supra* notes 48–51 and accompanying text (explaining the original purpose behind the so-remote-as-to-be-negligible standard).

168. *See* 885 Inv. Co. v. Comm'r, 95 T.C. 156, 161 (1990) (stating that the "so remote as to be negligible" standard could not be applied if a reversion to the grantor was not actually remote).

169. *See id.* at 162 (stating that the grantee's request that the reversion clause be included meant that the grantee could foresee the donation being returned to the grantor).

grantee's act represented a more intentional desire to include the condition.[170] This pulled the condition further away from the so-remote-as-to-be-negligible requirement that a future event be so improbable that no reasonable party would consider it.[171]

2. Case Law on Conservation Easements and the So-Remote-as-to-be-Negligible Standard

a) Commissioner v. Simmons

Unlike what was seen in *Briggs* and *885 Investment Co.*, in *Commissioner v. Simmons*, the D.C. Circuit Court of Appeals found that the conditional qualified conservation easement deduction met the so-remote-as-to-be-negligible standard, and allowed the deduction.[172] In this case, the grantor donated two façade easements to L'Enfant Trust (grantee), a tax-exempt organization in Washington, D.C. dedicated to historic preservation.[173] The easement agreements included a clause allowing the grantee to abandon or make changes to the easements.[174] The Commissioner argued this clause violated the perpetuity requirement under section 170(h)(5).[175] The D.C. Circuit rejected the Commissioner's position.[176]

The court held the change and abandonment clause did not violate the perpetuity requirement, but rather created a

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170. *See id.* (providing the fact that the grantee may have foreseen the property reverting back to the grantor when they requested the condition's inclusion).

171. *See id.* (explaining that the fact that the condition was included by the grantee made the reversion possible).

172. *See* Comm'r v. Simmons, 646 F.3d 6, 10–11 (D.C. Cir. 2011) (explaining why the right to abandon does not obviate the satisfaction of perpetuity and still allows the easement to stand up against the so-remote-as-to-be-negligible standard).

173. *See id.* at 8 (providing factual background).

174. *See id.* ("The deeds allow L'Enfant 'to give its consent—e.g., to changes in a Façade—or to abandon some or all of its rights thereunder.").

175. *See id.* at 9 (describing the Commissioner's arguments).

176. *See id.* at 10 ("We conclude the easements meet the requirement of perpetuity in § 170(h)(5)(A).").

safety net for the grantee.[177] If a change ever arose where the grantee would need to alter the property (i.e. to have people live there), the clause would allow for those changes while still permitting the grantee to maintain as much of the conservation purpose as possible.[178] The court also noted any grantee may fail on its obligation regardless of the abandonment clause seen here.[179] The court even specifically acknowledged that the grantee (L'Enfant) could abandon its rights altogether, but based on its prior practice, it was so remote as to be negligible that the grantee would do so.[180] The court also cited D.C. historic preservation laws, stating the laws bound the grantee of the conservation easement and allowed for the grantor's easement to be protected.[181]

In addition to reaching a different conclusion, the D.C. Circuit in *Simmons* applied the so-remote-as-to-be-negligible standard in a different manner.[182] The court cited neither the *Dean* nor the *Sternberger* definition.[183] Instead it simply defined the standard as a "remote possibility."[184] In its analysis, the court put considerable weight into the reputation of the grantee, but barely discussed the grantor in the so-remote-as-to-be-negligible breakdown.[185] The fact that there was only a change and abandonment clause on the conservation easement seems to be what allowed the so-remote-as-to-be-negligible argument to

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177. *See id.* ("The clauses permitting consent and abandonment, upon which the Commissioner so heavily relies, have no discrete effect upon the perpetuity of easements . . . .").

178. *See id.* (asserting that change and abandonment clauses can aid in maintaining the overall conservation purposes).

179. *See id.* (explaining that abandonment does not just occur as a result of a clause which allows it).

180. *See id.* ("L'Enfant has been holding and monitoring easements in the District of Columbia since 1978, yet the Commissioner points to not a single instance of its having abandoned its right to enforce.").

181. *See id.* (describing the role D.C. historic preservation law plays in conservation easements).

182. *See id.* (requiring that any donated land must be subject to a perpetuity requirement for both the donor and the donee).

183. *See id.* (outlining the fact that the donated land must remain consistent with conservation purposes specified in the Code).

184. *See id.* at 10–11 (defining the so-remote-as-to-be-negligible standard).

185. *See id.* at 10–12 (upholding the deduction based on the grantee's prior practices).

succeed.[186] Both the reputation of the grantee and the supportive D.C. laws for historic preservation played a role in making any implied condition from the change and abandonment clause condition a remote possibility.[187]

V. Graev v. Commissioner, an Overview

In June 2013, the Tax Court issued its opinion on *Graev v. Commissioner*.[188] It held that a façade conservation easement donation was not tax deductible because the donation included a side letter creating a conditional gift.[189] The condition in the side letter allowed the grantee to return the grantor's easement donation if the IRS decided that the donation was not deductible.[190] The possibility of this condition arising was found to be more than so remote as to be negligible.[191]

The court applied the so-remote-as-to-be-negligible standard to the IRS, a party outside of the immediate grantor/grantee relationship.[192] The condition itself rested on the decision of the IRS, and guaranteed that the conservation easement agreement would dissolve should the deduction be denied.[193] This reliance on an outside third party, along with a condition that allows for an unraveling of the whole agreement, encourages aggressive use of qualified conservation contributions.[194] A condition centered solely around tax deductions, and allowing for a refund if the deduction is denied,

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186. *See id.* at 11 (stating that the "remote possibility" that donated property would be returned to the donee would not disallow the deduction).

187. *See id.* at 10–11 (noting the grantee's interest in preserving the easement for conservation purposes and highlighting that even if the grantee dissolved, the easements will be transferred to another conservation organization).

188. *See* Graev v. Comm'r, 140 T.C. 377 (2013).

189. *See id.* at 409 (denying the deduction because the side letter established a condition which was not so remote as to be negligible).

190. *See id.* at 383 (describing the contents of the side letter).

191. *See id.* at 409 (arguing the side letter did not meet the so-remote-as-to-be-negligible standard).

192. *See id.* at 394–95 (analyzing the likelihood of the IRS to disallow the deduction).

193. *See id.* at 383 (providing the terms of the condition).

194. *See* Sims, *supra* note 21, at 59 (stating the process of allowing "before" and "after" valuations for contributions encourages valuations that do not adequately reflect the fair market value of the donation).

encourages aggressive valuation.[195] *Graev* demonstrates that this type of "tax insurance" clause for conservation easements should not be permitted because it does not perpetuate any greater conservation purpose. These conditions only cater to the concerns of the grantor. In light of the *Graev* outcome, conservation easement donations should be irrevocable on the terms of deductibility.

A. Background

The National Architectural Trust ("NAT") reached out to Mr. Graev in the summer of 2004 and asked if he would be interested in donating a façade easement on one of his historic properties in New York City.[196] Mr. Graev responded, expressing interest, but also concern because his accountants had alerted him of a recent IRS Notice that warned of "penalties and excise taxes" to those who make improper conservation easement donations.[197] NAT assured Mr. Graev that the IRS Notice would not apply to the type[198] of conservation easement donations that NAT offered.[199] NAT even told Mr. Graev that it had been in contact with the IRS and that it had "no reasons to expect that [NAT] or any of the donations [NAT] has received (easement or cash) w[ould] be reviewed."[200]

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195. *See id.* at 58 (requiring that the deduction amount taken must match the amount of valuation on the return in order to promote the public interest).

196. *See* Graev v. Comm'r, 140 T.C. 377, 381 (2013) (describing NAT's solicitation of Mr. Graev).

197. *See id.* at 8 (describing Mr. Graev's concern as a result of the IRS Notice); *see also* IRS Notice 2004-41, s*upra* note 6 (alerting taxpayers that abusive use of qualified conservation contributions could lead to penalties and excise taxes).

198. The IRS highlights two main types of problematic qualified conservation easements: (1) those that do not serve a valid public purpose or those where donor receives a greater financial benefit from the easement than the public, and (2) easements donated to charitable organizations where there charity in turn sells the easement for profit. *See* IRS Notice 2004-41, *supra* note 6 (addressing current issues with qualified conservation contributions).

199. *See Graev*, 140 T.C. at 382 (providing NAT's assurances to Mr. Graev that his type of donation was not addressed in the IRS Notice).

200. *See id.* at 382–83 (contrasting NAT activities with those activities that usually caused IRS review).

Around this time, Mr. Graev also requested a "side letter" from NAT.[201] He had neighbors who had donated façade easements to NAT and had received these letters as a part of NAT's standard policy.[202] NAT supplied him with a side letter which guaranteed: "In the event the IRS disallows the tax deduction in their entirety, we will promptly refund your entire cash endowment contribution and join with you to immediately remove the façade conservation easement from your property's title."[203] The conservation easement deed did not include the promise made in this side letter.[204]

A few months after Mr. Graev had donated his easement to NAT, NAT contacted Mr. Graev to tell him that the Senate Committee on Finance planned to implement reforms on deductions for façade easements.[205] Several months after that, NAT wrote Mr. Graev again, telling him that the "refund offer" in the side letter might adversely impact the deductibility of his donation and that he should seek tax advice on the refund offer.[206] NAT also offered to rescind the refund offer to potentially preserve the deductibility of the easement.[207] Mr. Graev chose not to withdraw the refund.[208] The facts in the case did not elaborate as to why Mr. Graev chose not to withdraw.[209]

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201. *See id.* at 383 (highlighting when Mr. Graev submitted his façade easement application to NAT, he also requested NAT write him a side letter emphasizing the standard NAT policy that there will be a refund if the donor's deduction is disallowed).

202. *See id.* ("In a cover letter to NAT transmitting the application, Mr. Graev stated: 'I will also be looking or the NAT to issue the 'side' letter we discussed (similar to the one being issued to my neighbors across the street).'").

203. *See id.* (providing the text of NAT's side letter to Mr. Graev).

204. *See id.* at 385 ("The deed did not expressly refer to the side letter or incorporate its terms.").

205. *See id.* at 386 (describing NAT's first communication to Mr. Graev after his donation that the Senate Committee on Finance planned to look in depth at the valuation of façade easements).

206. *See id.* (describing NAT's second communication to Mr. Graev after his donation which warned him that the side letter's refund offer may "adversely affect the deductibility of the cash contribution as a charitable gift").

207. *See id.* ("Of course, if you determine that you would prefer that we withdraw the refund offer, which according to our attorney should restore the deductibility of your cash contribution, the Trust will promptly do so.").

208. *See id.* (noting that Mr. Graev chose not to withdraw the refund).

209. *See id* (showing that such evidence is not included in the record).

This case arose in the Tax Court because Mr. Graev and his wife claimed deductions on the conservation easement donation.[210] The IRS issued a notice of deficiency to the Graevs arguing "the noncash charitable contribution of a qualified conservation contribution is disallowed because it was made subject to subsequent event(s)."[211] The issue before the Tax Court was whether Mr. Graev's contributions to NAT would be deductible because they were conditional gifts.[212]

B. Tax Court's Opinion

The Tax Court found in favor of the Commissioner, holding that the side letter created a conditional gift, whose condition was more than so remote as to be negligible.[213] The court began its opinion by stating the law which qualifies Mr. Graev's donation as a conservation contribution, including the three regulations which address the so-remote-as-to-be-negligible standard.[214]

In addition to including the so-remote-as-to-be-negligible definitions seen in *Dean* and *Briggs* (citing *Woodworth*), the court also emphasized the so-remote-as-to-be-negligible analysis should be made in light of "all the facts and circumstances."[215] This suggests an expansion from what had been seen in earlier cases where the analysis rested heavily on the actions and intentions of the grantee and grantor only.[216] In fact, the *Graev* court began its

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210. *See id.* at 386–87 (explaining why the IRS issued a notice of deficiency against the Graevs).

211. *Id.* at 387.

212. *See id.* ("The question now before the Court is whether deductions for Mr. Graev's contributions of cash and the easement to NAT should be disallowed because they were conditional gifts.").

213. *See id.* at 409 ("[W]e conclude that at the time of Mr. Graev's contributions to NAT, the possibility that the IRS would disallow the Graev's deductions for the contributions and, as a result, that NAT would promptly refund Mr. Graev . . . was not 'so remote as to be negligible.'").

214. *See id.* at 387, 393 (explaining Treas. Reg. §§ 1.170A-1(e), -7(a)(3), -14(g)(3) and why they are relevant to Mr. Graev's case).

215. *See id.* at 394 (presenting prior case law definitions of the so-remote-as-to-be-negligible standard and adding that "all facts and circumstances" should be considered).

216. *See id.* (adding "all facts and circumstances" to the analysis of whether the grantee's reception of the easement would be defeated).

so-remote-as-to-be-negligible analysis with the IRS's likelihood of disallowing the deduction and its intention to scrutinize conservation easements more closely.[217] By beginning its analysis with the IRS's actions and intentions, the court suggested the grantor and grantee are not the only parties who influence the determination of whether a condition is so remote as to be negligible.[218]

The court quickly noted that "it is self-evident that the risk of IRS disallowance was not negligible."[219] The court explained that Mr. Graev clearly foresaw the issue of deductibility, and that is why he requested the side letter.[220] Mr. Graev's actions did not fit in to the traditional definition of so-remote-as-to-be-negligible that establishes a standard of disregarding or ignoring the possibility of the condition occurring.[221] Mr. Graev foresaw this issue of deductibility because he was aware of the increased IRS scrutiny on conservation easement contributions, from both the IRS Notice and the letters from NAT.[222] While the IRS Notice did not specifically address the type of contribution Mr. Graev made, the court explained that the notice served to alert all grantors and grantees of qualified conservation contributions of the IRS's heightened scrutiny.[223] Mr. Graev's initial email to NAT about the notice also supported the assertion that the IRS Notice applied to others outside of the specific examples the IRS cited.[224]

The side letter, instead of the conservation easement agreement, ended up being what activated the application of the

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217. *See id.* (discussing the possibility that the IRS will disallow the deduction).

218. *See id.* (highlighting the potential for the IRS to disallow the deduction and for NAT to return the easement was not so remote as to be negligible).

219. *Id.* at 394.

220. *See id.* at 394–95 (explaining how Mr. Graev's insistence on the side letter showed his ability to foresee the IRS denying deductibility).

221. *See id.* at 395 ("[Mr. Graev] did not 'disregard' or 'ignore' it, . . . but rather went out of his way to address it and hedge against it.").

222. *See id.* (asserting that the IRS Notice indicated increased IRS scrutiny to all conservation easements).

223. *See id.* (emphasizing that the IRS Notice was a general warning against "improperly claiming charitable contribution deductions").

224. *See id.* at 395–96 (asserting Mr. Graev's email to NAT requesting a side letter indicates Mr. Graev's understanding that the deduction could be disallowed).

so-remote-as-to-be-negligible standard.[225] It also simultaneously destroyed Mr. Graev's chances at meeting the so-remote-as-to-be-negligible standard.[226] Mr. Graev wanted the side letter to ensure that he would not be harmed as a result of his transaction with NAT.[227] At the same time, the fact that he wanted this letter shows that IRS disallowance of the deduction was a possibility.[228] "[T]he risk that his corresponding deductions might be disallowed could not be (and was not) 'ignored with reasonable safety in undertaking a serious business transaction.'"[229] The fact that NAT issued these side letters as a matter of standard policy also shows that the grantee, not just the grantor, saw the disallowance of the deduction as a non-negligible risk.[230]

After establishing the disallowance of the deduction was more than so remote as to be negligible, the court then addressed NAT's reliability to its promise if the condition was satisfied.[231] Essentially, the court then asked if NAT could be expected to promptly refund Mr. Graev in light of a disallowance.[232] The court believed that NAT would refund because along with the promise made in the side letter, the easement deed included a clause which allowed for NAT to abandon the easement.[233] This is similar to the language seen in *Simmons*.[234] Because the side letter represented an ability to act upon that right to abandon, the letter itself could be included as a part of the conservation

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225. *See id.* at 404–05 (discussing the role of the side letter in triggering the application of the standard).

226. *See id.* (noting that "the possibility that NAT would actually abandon its rights was more than negligible").

227. *See id.* at 398 (discussing the motives behind the side letter and its purposes).

228. *See id.* ("The very essence of a comfort letter implies a non-negligible risk.").

229. *Id.* (citing 885 Inv. Co. v. Comm'r, 95 T.C. 156, 161 (1990)).

230. *See id.* (highlighting that it was standard policy for NAT to issue comfort letters to its donors).

231. *See id.* at 401 (assessing whether NAT would uphold the terms of its side letter to Mr. Graev).

232. *See id.* (analyzing whether or not the refund could be anticipated if the IRS disallowed the deduction).

233. *See id.* at 404 (holding that NAT would uphold the terms of the side letter because the "subscribed and recorded deed . . . reserved for NAT the power to do so").

234. *See* Comm'r v. Simmons, 646 F.3d 6, 10 (D.C. Cir. 2011) (discussing the importance of clauses permitting abandonment).

easement.[235] The court even argued that NAT would uphold its promise to refund if the side letter was found to be unenforceable.[236] Regardless of this letter's enforceability, NAT would voluntarily return the easement in the case of disallowance, and Mr. Graev would not have to make any affirmative actions to get his property returned to him as fee simple interest.[237] The court found that there was no "non-negligible possibility" that NAT would fail to uphold its promises to Mr. Graev.[238] According to the Tax Court, both the chance of disallowance and the chance of NAT upholding its promises was more than negligible, preventing the conditional contribution from meeting the so-remote-as-to-be-negligible requirement.[239]

Mr. Graev did try to mitigate the strength of the side letter by relying on *Commissioner v. Procter*.[240] He attempted to argue that the side letter was unenforceable as a result of *Procter*.[241] On its face, this 1944 case from the Court of Appeals for the Fourth Circuit appears to be a corollary to *Graev*.[242] The donor in *Procter* assigned his children remainder interests in two trusts, and these children were to receive their interests upon the death of the donor's grandmother.[243] The condition at issue in *Procter* was if a "federal court of last resort" determined that any part of the transfer in trust was subject to the gift tax, then that

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235. *See* Graev v. Comm'r, 140 T.C. 377, 405–06 (explaining why the side letter can be considered a part of the conservation easement agreement).

236. *See id.* at 408–09 (describing NAT's willingness to voluntarily remove the easement and interest in upholding its professional reputation).

237. *See id.* at 409 ("To decide that there was *no* non-negligible possibility that NAT would voluntarily extinguish the easement and return the cash would require us to find that, in order to induce Mr. Graev to make his contributions, NAT made cynical promises that it fully intended to break. Our record will not support such a finding . . . .").

238. *See id.* (evaluating NAT's ability to uphold the easement).

239. *See id.* (explaining how the actions of NAT and the side letter itself establish that the condition did not meet the so-remote-as-to-be-negligible standard).

240. *See id.* at 406 (discussing Mr. Graev's use of Comm'r v. Procter, 142 F.2d 824 (4th Cir. 1944)).

241. *See id*. (noting how Mr. Graev attempts to use *Procter* to invalidate the side letter).

242. *See* Comm'r v. Procter, 142 F.2d 824, 827 (4th Cir. 1944) (discussing why the terms of the transfer could not avoid the gift tax).

243. *See id.* at 825 (explaining the terms of the trust).

transfer would not occur.[244] This case is similar to *Graev* in that both conditions require the actions of parties outside of the grantor/grantee relationship and hinge on tax consequences.[245] The *Procter* court rejected this condition for three different public policy reasons: (1) it discouraged the collection of the gift tax because attempts to enforce the tax would only inhibit collection of the tax; (2) it would "obstruct the administration of justice by requiring the courts to pass upon a moot case" in order to maintain the gift tax; and (3) the final judgment of the court under this condition would merely undo the gifts and subsequently, the judgment of the court itself to assess gift tax.[246]

The *Graev* court specifically defeated all three of these policy reasons in the context of Mr. Graev's condition.[247] Addressing the first reason, the court stated that the conditions in the NAT side letter would not prevent the collection of tax.[248] Instead, the side letter allowed for a restoration to status quo, hardly creating a discouragement for the grantor.[249] The court defeated the second reason by noting the reversion to the grantor would not defeat the court's holding like it would in *Procter*.[250] Mr. Graev was merely prevented from taking the deduction.[251] He would not be able to escape tax liability altogether as a result of the IRS's decision.[252] Similarly, the *Graev* court defeated the third *Procter* reason by stating the reversion of the property as a result of the side letter would not inherently reverse the judgment of

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244. *See id.* at 827 (describing the condition provided in the trust).

245. *Compare* Graev v. Comm'r, 140 T.C. 397, 394–95 (2013) (outlining the role of a potential disallowance of the deduction in determining the outcome) *with Procter*, 142 F.2d at 825 (4th Cir. 1944) (commenting on the role of the court as a third-party in determining the validity of the transaction).

246. *See Procter*, 142 F.2d at 827–28 (asserting why the condition is invalid on public policy grounds).

247. *See Graev*, 140 T.C. at 406–08 (providing an explanation as to why the *Procter* reasoning does not apply the side letter).

248. *See id.* at 406–407 (arguing that the side letter would not prevent the collection of tax).

249. *See id.* at 407 (explaining how the side letter's condition would not contradict a holding to either allow or disallow a deduction).

250. *See id.* ("However, in this case, unlike *Procter*, the reversion to the donor would not be inconsistent with the court's holding . . . .").

251. *See id.* at 409 (explaining that the deduction was disallowed).

252. *See id.* (advising that the IRS would challenge the Graevs' deduction).

the IRS.[253] The IRS denial of a deduction would still operate regardless of the reversion of the façade easement to Mr. Graev.[254]

Mr. Graev's use of *Procter* to argue the side letter was unenforceable is puzzling. He initially insisted on the side letter.[255] Even after NAT offered to withdraw the offer of the side letter to potentially preserve the deduction, Mr. Graev chose to keep the side letter as a part of the agreement.[256] His about-face arguing the letter unenforceable eliminates any reasoning as to why he insisted on the side letter in the first place.[257] This switch appears to highlight Mr. Graev's sole concern of tax deductibility.[258] If the side letter were rendered unenforceable, it would eliminate the tax deduction condition evaluated under the so-remote-as-to-be-negligible standard.[259] But by drawing a corollary between *Procter* and his own case, he only highlights that his motivations were similar to the grantors in *Procter*: he wanted the best tax situation possible.[260]

With this *Procter* corollary denied, the court concluded that "there was a substantial possibility that the IRS would challenge Graev's conservation easement deductions."[261] This denial of deductions was likely because the IRS was on

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253. *See id.* at 408 (explaining why the situation in *Graev* does not match up with the third policy rationale from *Procter*).

254. *See id.* (noting the return of the easement "would have no effect on the Graevs' tax liabilities").

255. *See id.* at 383 (requesting the side letter).

256. *See id.* at 386 (noting that Mr. Graev chose to keep the side letter after NAT offered to rescind it).

257. *See id.* at 401 ("The Graevs argue, however, that as a matter of law NAT could not be held to the promises it made in its side letter").

258. *See id.* (suggesting that Mr. Graev is principally concerned with the tax consequences of the transaction).

259. *See id.* at 402–03 (explaining Graev's argument, which was that the side letter was unenforceable and his contributions were not conditional as a result).

260. *See* Wendy C. Gerzog, *Graev: Conditional Façade Easement*, 140 TAX NOTES 1607, 1609 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333211 ("It is ironic that the taxpayers in *Graev* cited to *Procter* to sustain their position. If anything, the facts in *Graev* reflect the very behavior so repugnant to the *Procter* court.") (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

261. *See* Graev v. Comm'r, 140 T.C. 377, 409 (2013) (opining on the likely IRS treatment of the deduction).

heightened notice of abusive claims for conservation easement deductions, the condition was solely dependent upon tax consequences, and the court found that NAT was very likely to satisfy the condition of the side letter if the deduction was denied.[262]

VI. Lessons from Graev v. Commissioner

Within the scope of the existing cases that examine the so-remote-as-to-be-negligible standard, *Graev* was the only case which used a document outside of the conservation easement agreement to establish the condition, and the condition itself focused solely on tax consequences.[263] Ironically, the side letter was meant to protect against disallowance of a deduction, not establish a greater likelihood of it occurring.[264] This irony raises the question of what should a taxpayer do if it wants to get a deduction for a conservation easement? This paper argues that in order to justify a deduction for the high value conservation easements, these donations should be irrevocable based on tax consequences. Instead of failing to meet the so-remote-as-to-be-negligible standard, these conditions should be explicitly disallowed in the Treasury Regulations. The possibility of the IRS denying a deduction should not be considered a "remote future event."[265]

Yet, insisting on irrevocability could weaken the incentive system of conservation easements altogether.[266] Mr. Graev was trying to ensure that his donation was deductible; otherwise it seems he would have been unlikely to part with some of his ownership rights in the façade.[267] Mr. Graev's extensive efforts to

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262. *See* Gerzog, *supra* note 260, at 1609 (discussing why the IRS disallowed the deduction).

263. *See Graev*, 140 T.C. at 383 (outlining the contents of the side letter).

264. *See* Gerzog, *supra* note 260, at 1609 (noting the purpose of the side letter).

265. *See* Treas. Reg. §§ 1.170A-1(e), -7(a)(3), -14(g)(3) (2014) (explaining that the so-remote-as-to-be-negligible standard is applied when conditions rely on future events).

266. *See* Gerzog, *supra* note 260, at 1609 (discussing the implications of factoring motive into allowing charitable deductions).

267. *See Graev*, 140 T.C. at 384–85 (detailing the structure of Mr. Graev's contribution).

get the deduction raise the issue of whether blatantly seeking out tax deductions is a sound policy for making charitable contributions.[268] Laura Gerzog's review of *Graev* acknowledges that most people donate to charity in hopes that their donation creates a deduction.[269] This desire encourages taxpayers like Mr. Graev to seek out opportunities for revocable donations based on deductibility.[270] This revocability creates "tax insurance" for the grantor.[271] A "tax insurance" system for qualified conservation contributions would encourage grantors to place aggressive valuations on their easements because they would only be returned to the status quo if the deductions were denied.[272] This low risk of loss would encourage grantors to make qualified conservation contributions, but this low risk of loss would only continue to perpetuate the problems with conservation easements today including overvaluation.[273]

An allowance for revocable donations based on deductibility would create further inefficiencies to the charitable contribution system.[274] If there were a surge of these conditional donations, charities would be subject to the decisions of the IRS and unable to fully utilize the property until the IRS had decided on the deduction or the statute of limitations period ran out.[275] If deductibility were contested, then the charitable organizations may also feel obligated to support the taxpayer in litigation in order to preserve the charitable gift they now hold.[276] Lastly, to

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268. *See* Gerzog, *supra* note 260, at 1609 (questioning the prudence of the current policy on charitable deductions).

269. *See id.* (explaining the policy rationale behind conditioning donations based on deductibility).

270. *See* Remarks of Steven T. Miller, *supra* note 8 (commenting on the misuse of revocable donations).

271. *See supra* note 19 and accompanying text.

272. *See* Remarks of Steven T. Miller, *supra* note 8 (discussing the propensity of taxpayers to overvalue easements).

273. *See id.* (highlighting valuation as one of the problems with qualified conservation contributions).

274. *See* Gerzog, *supra* note 260, at 1609 (implying that allowing donors to alter donations after the IRS disallowed a deduction would be undesirable).

275. *See id.* (explaining that charities "would not know if they were receiving funds and could not rely on using those 'donations' until several years into the future").

276. *See id.* ("If all charitable gifts were conditional on receiving a tax deduction, that limitation would place a heavy burden on charities.").

allow revocability based on tax deductions for conservation easements would continue to expand the perpetuity issues surrounding conservation easements.[277] The easement would be unable to exist in perpetuity until the issue of deductibility was resolved, and the original legislative purpose of conserving land for the public benefit would be diminished.[278] Instead, the private benefit of the taxpayer would surpass the public benefit.[279]

Irrevocability on the other hand would force qualified conservation contributions subject to deductibility conditions to focus on conditions related to conservation in perpetuity. In establishing the risk that the contribution may not be deductible, grantors would be less aggressive in valuation and would be more likely to have the "donative intent . . . central to allowing a charitable deduction."[280] The burden on the taxpayer as a result of overvalued conservation easements may decrease with less aggressive transactions.[281] The insistence upon irrevocability for tax purposes would also allow for a more concise definition of the so-remote-as-to-be-negligible standard.[282] The *Graev* case highlighted the circular nature of a tax dependent condition: by focusing solely on deductibility, the issue became more than negligible thereby eliminating the possibility for a deduction.[283] Excluding revocable, tax dependent conditions would help bring the focus so-remote-as-to-be-negligible analysis back to the ability

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277. *See generally* Jay, *supra* note 36 (addressing the perpetuity issues with conservation easements particularly related to subsequent changes to the easement).

278. *See* S. REP. NO. 96-1007, at 9 (1980) (explaining the importance of conservation U.S. "natural resources and cultural heritage").

279. *See* Sims, *supra* note 21, at 753 (acknowledging that many conservation easements benefit the grantor more than the public).

280. *See* Gerzog, *supra* note 260 at 1609 (citing United States v. American Bar Endowment, 477 U.S. 105, 117–18 (1986)) (explaining the key component of a charitable deduction).

281. *See* Sims, *supra* note 21, at 729 (noting that the taxpaying public suffers the costs from overvalued conservation easements).

282. *See id.* at 764 (commenting on the requirements for perpetual conservation restrictions).

283. *See* Graev v. Comm'r, 140 T.C. 377, 401 (2013) ("Given that non-negligible risk, Mr. Graev's contributions fell afoul of the section 170 regulations implementing the statutory requirements that a gift be effectively 'made', that it consist of an 'entire interest', and that it be a 'qualified conservation contribution'").

of the grantee charity to maintain the conservation easement in perpetuity.[284]

VII. Conclusion

The so-remote-as-to-be-negligible standard applied to qualified conservation contributions is only defined by case law, and as a result, has been applied broadly and inconsistently.[285] Its original use in estate tax issues emphasized that reviewing courts should focus on whether the grantee charity will be able to take as a result of the condition.[286] If the possibility of the charity not taking was so remote as to be negligible, then a deduction would be allowed for the charitable contribution.[287]

While federal income tax cases used the definitions of the so-remote-as-to-be-negligible standard supplied from its estate tax predecessors, the courts also began evaluating the role of the grantor under the standard.[288] Deductibility not only depended on the grantee's ability to maintain the easement.[289] It also depended upon the grantor's donative commitment to the easement.[290] Evidence of a grantor seeking an easy refund, as opposed to a commitment to conservation, convinced courts to deny deductions.[291]

Graev v. Commissioner confused things because the condition subject to the so-remote-as-to-be-negligible standard

284. *See* Comm'r v. Estate of Sternberger, 348 U.S. 187, 194 (1955) (discussing the underlying purpose of the so-remote-as-to-be-negligible standard is to ensure that if a taxpayer gets a deduction, the charity will take also).

285. *See Graev,* 140 T.C. at 393–94 (outlining precedent relevant to the so-remote-as-to-be-negligible standard).

286. *See id.* ("The "so remote as to be negligible" phrase is the familiar term first used in the 1949 estate tax regulations . . . .").

287. *See id.* (explaining how the so-remote-as-to-be-negligible standard developed).

288. *See* Briggs v. Comm'r, 72 T.C. 646, 659 (1979) (noting the importance of the grantor's desire in making the gift).

289. *See id.* at 657–58 (discussing the grantee's ability to comply with the conditions of the gift).

290. *See id.* at 659 (looking to the donor's ultimate intent in determining the allowance of the deduction).

291. *See generally id.* (explaining the grantor's intention to take back the property if the grantee failed to carry out the condition); *Graev*, 140 T.C. 377 (2013) (emphasizing Mr. Graev's primary desire to have a tax deduction).

related solely to deductibility.[292] The court did not even address the grantor or grantee's ability to maintain the easement because the condition had nothing to do with the property itself.[293] The Tax Court found that the deduction should be denied under the so-remote-as-to-be-negligible standard.[294] Because of heightened IRS scrutiny, the court reasoned the denial of the deduction to be more than negligible.[295] Also, the grantor's efforts to preserve the deduction only highlighted that his concern about a greater than negligible chance that the deduction for the easement would be denied.[296]

The situation present in *Graev* raises the issue as to whether the so-remote-as-to-be-negligible standard and conditions for remote future events should be permitted when the condition is focused solely on deductibility.[297] These conditions seem to benefit the grantor taxpayer, not to the public.[298] Because these tax insurance conditions seem to extract any sort of altruistic donative intent from the transaction, the Treasury should promulgate regulations that prohibit revocability of the donations on the grounds of a denial of deduction.

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292. *See Graev*, 140 T.C. at 401–02 (2013) (analyzing the possibility of a return of the contribution).

293. *See id.* at 408 (reviewing the terms of the easement).

294. *See id.* at 409 (explaining the court's conclusions).

295. *See id.* at 397 (discussing the increased IRS scrutiny of these transactions).

296. *See id.* (commenting on Mr. Graev's concerns with the deductibility of the easement and his subsequent actions).

297. *See id.* at 394 ("What is determinative under the section 170 'remote' regulations is the possibility, after considering all the facts and circumstances, that NAT's reception and retention of the easement and cash would be defeated").

298. *See* Gerzog, *supra* note 260, at 1609 (implying that permitting gifts to be conditioned on deductibility is not sound public policy).