UNITED STATES TAX COURT
WASHINGTON, DC 20217

OAKBROOK LAND HOLDINGS, LLC, WILLIAM DUANE HORTON, TAX MATTERS PARTNER,	)	**SD**
Petitioner(s),	)	
v.	)	Docket No. 5444-13.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This conservation-easement case is set for trial during the special session of the Court during the week of October 3, 2016, in Birmingham, Alabama. There are several pending pretrial motions.

Motion for summary judgment

The Commissioner moved for partial summary judgment on August 1, 2016. (The Court will assume the parties know the background facts of the case and that their counsel know the usual rules of summary-judgment practice.) He has two grounds. The first is that the easement agreement's extinguishment clause (which governs what happens to the donee if the easement is later the subject of condemnation, disaster, or some other change that makes conservation impractical or impossible) violates the regulations that define perpetuity. This part of the regulations essentially requires a donee to get at least a proportionate share of any extinguishment proceeds. *See* 26 C.F.R. § 1.170A-14(g)(6)(ii) (1999).

The deal is a bit unusual in that it contemplates that the donor reserves a right to build a few structures on the property after the easement is granted. The extinguishment clause seems to give a credit for the value of any such structures, and the regulation doesn't seem to have this scenario in mind in setting up its rules on proportionality of the allocation of proceeds. It's also not obvious how the extinguishment clause would work in some plausible scenarios.

This is a fit subject for testimony to clarify the underlying facts.

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The Commissioner's second ground is that the area protected by the easement is not defined precisely enough. The Commissioner points us to a couple conservation-easement cases in which we held that a reserved right to amend made the easements nonperpetual. *See Bosque Canyon Ranch v. Commissioner*, 110 T.C.M. (CCH) 48, 51 (2015); *Belk v. Commissioner*, 140 T.C. 1, 14 (2013), *aff'd*, 774 F.3d 221 (4th Cir. 2014). In *Belk* the parties reserved a right to substitute different property, *Belk*, 140 T.C. at 14, and in *Bosque Canyon* they reserved the right to modify the boundaries of the property that was donated, *Bosque Canyon*, 110 T.C.M. (CCH) at 51.

The situation here is a bit different -- the imprecision here is where exactly, on a well-defined 106-acre parcel, one of the lots where a building could be erected would be. It is possible that this might affect the value of the easement; it's also possible it wouldn't; but it doesn't seem to affect the total property to which the easement would apply.

This is again a fit subject for testimony to clarify the underlying facts.

Motion for leave to file first amendment to answer

This is the Commissioner's motion to amend his answer to include -- as an additional reason for a 20-percent penalty under IRC § 6662(a) -- Oakbrook's alleged misvaluation of the conservation easement at issue here. He's already determined a penalty under that section for substantial understatement and negligence, and the new ground is not the subject of any possible new defense.

Tax Court Rule 41(a) provides that when more than 30 days have passed after an answer has been served, "a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be give freely when justice so requires."

Whether a party may amend its answer lies within the sound discretion of the Court. *Quick v. Commissioner*, 110 T.C. 172, 178 (1998) (citations omitted). In determining the justice of allowing a proposed amendment, the Court must examine the particular circumstances of the case, and consider, among other factors (a) whether an excuse for the delay exists; and (b) whether the opposing party would suffer unfair surprise, disadvantage, or prejudice. *Estate of Ravetti v. Commissioner*, T.C. Memo. 1992-697.

As Oakbrook points out, there's little reason for the delay here. But we also think that there's no prejudice. The Rule tells us to be liberal in granting these motions, so the absence of prejudice is often decisive. *See, e.g.*, *Tobias v. Commissioner*, 110 T.C.M. 222, 225 (2015). It will be here as well; and the Commissioner will bear the burden of proof on this one because it is new, *see* Rule 142(a)(1).

Motion *in limine* to exclude Gerald Barber's report

This is Oakbrook's motion to exclude an expert-witness report of the Commissioner's. Oakbrook contends that Barber impermissibly relied on hindsight in reaching his estimation of

value. Oakbrook is right that hindsight shouldn't affect an appraisal, with the important caveat that an expert may consider reasonably foreseeable events as of the date of valuation. But its objection is based on suppositions that Barber did so -- for example, that in a table of "outcomes" the outcomes must have occurred after the date of valuation or that building-permit data from 2008 wouldn't have affected values during 2008 because they would have been unknown at the time.

This is a matter for cross-examination and argument, not exclusion at the threshold. We'll deny this motion.

Motion *in limine* to exclude W. McRae Greene's report

This is the Commissioner's motion to exclude an expert-witness report of Oakbrook's. Greene is an appraiser that Oakbrook hired to testify on the value of the donated easement. The Commissioner has two reasons to exclude this report at the threshold.

The first is that Greene is apparently not licensed to do appraisals in Tennessee, where the property is located. The Commissioner doesn't cite any case law suggesting that exclusion is the right response to this, and the closest the Court could come up with is *Mast v. Commissioner*, 56 T.C.M. 1522, 1525-26 (1989) (admitting and mostly accepting unlicensed appraiser's testimony).

The second reason is that the report is so bad as to be unreliable, and therefore excludable. If the hidden assumptions that the Commissioner asserts Greene used are true, the report would be less than fully persuasive. The Commissioner likewise argues that Greene appraised the wrong property because in his report he refers to it as 127 acres, *see* Greene rpt. at 78, when it's only 106 acres that is apparently protected by the easement at issue in the case. And Greene also notes *that* in his report, *see* id. at 8, 63, 92. This suggests there may be some sloppy proofreading at work. But we'll resolve that through cross-examination at trial rather than exclusion.

The parties should also be aware that, although the Court's rules presume that an expert's report is his direct testimony, this division of the Court has had success with allowing 20 minutes or so of direct testimony to allow minor amendments to a report and to enable counsel to highlight the most important parts of the report in some concise way. It is very probable the Court will do that in this case as well.

It is therefore

ORDERED that respondent's August 1, 2016 motion for partial summary judgment is denied. It is also

ORDERED that respondent's August 19, 2016 motion for leave to file first amendment to answer is granted, and the Clerk shall file the amended answer that was lodged with the motion. It is also

ORDERED that petitioner's September 19, 2016 motion *in limine* to exclude the Barber report is denied. It is also

ORDERED that respondent's September 19, 2016 motion *in limine* to exclude the Greene report is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
September 23, 2016