

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

901 SOUTH BROADWAY LIMITED)
PARTNERSHIP, STANDARD)
DEVELOPMENT, LLC, TAX MATTERS)
PARTNER,)
)
)
Petitioner(s),)
)
v.) Docket No. 14179-17.
)
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

In this case, we review a notice of final partnership administrative adjustment (FPAA) in which respondent denied a deduction reported by 901 South Broadway Limited (partnership), a California partnership, for its contribution to the Los Angeles Conservancy (Conservancy) of a facade easement on a building located at 901 South Broadway Avenue, Los Angeles, California (Building).

On June 26, 2017, we received a petition for readjustment of partnership items in which petitioner assigns error to each of the FPAA's determinations. Respondent has moved for summary judgment on the ground that the easement fails to satisfy the requirements of section 170(h)(5)(A).¹ (All section references are to the Internal Revenue Code in effect for 2007, the year in issue, unless otherwise indicated.)

¹Petitioner filed its own motion for summary judgment asking us to rule that the easement satisfies the requirements of not only sec. 170(h)(5)(A) but also those of sec. 170(h)(2)(C). We will address petitioner's motion separately.

Summary Adjudication

Summary judgment expedites litigation. It is intended to avoid unnecessary and expensive trials. It is not, however, a substitute for trial and should not be used to resolve genuine disputes over issues of material facts. E.g., RERI Holdings I, LLC v. Commissioner, 143 T.C. 41, 46-47 (2014). The moving party has the burden of showing the absence of a genuine dispute as to any material fact. Id. For these purposes, we afford the party opposing the motion the benefit of all reasonable doubt, and we view the material submitted by both sides in the light most favorable to the opposing party. That is, we resolve all doubts as to the existence of an issue of material fact against the movant. E.g., Estate of Sommers v. Commissioner, 149 T.C. 209, 215 (2017).

Applicable Statutes

Section 170(a)(1) allows a deduction for "any charitable contribution * * * payment of which is made within the taxable year." Section 170(c) defines the term "charitable contribution" to mean "a contribution or gift to or for the use of" a specified organization. As a general rule, a taxpayer is not allowed a deduction for a contribution of part of the taxpayer's interest in a property. See sec. 170(f)(3). That general rule does not apply, however, to "a qualified conservation contribution." Sec. 170(f)(3)(B)(iii).

Section 170(h)(1) defines "qualified conservation contribution" to mean "a contribution--(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes." The term "qualified real property interest" includes "a restriction (granted in perpetuity) on the use which may be made of * * * real property." Under section 170(h)(5)(A), the contribution of a qualified real property interest will not be treated as having been made exclusively for conservation purposes "unless the conservation purpose is protected in perpetuity." Sec. 170(h)(5)(A).

Section 170(h)(4)(A)(iv) includes within the definition of "conservation purpose" "the preservation of an historically important land area or certified historic structure." Section 170(h)(4)(C) defines "certified historic structure" to mean "(i) any building, structure, or land area which is listed in the National Register, or (ii) any building which is located in a registered historic district * * *

and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district."²

Under amendments to section 170(h)(4)(B) enacted in 2006, a facade easement on a building not listed in the National Register (that is, a building described in section 170(h)(4)(C)(ii)) has to meet additional requirements for a contribution of the easement to be treated as having been made exclusively for conservation purposes.³ Among other things, the easement must "include[] a restriction which preserves the entire exterior of the building (including the front, sides, rear, and height of the building)". Sec. 170(h)(4)(B)(i)(I). In addition, the easement has to "prohibit[] any change in the exterior of the building which is inconsistent with the historical character of such exterior." Sec. 170(h)(4)(B)(i)(II).

The Parties' Arguments

In his motion for summary judgment, respondent alleges: "The Easement fails to satisfy the perpetuity requirements of I.R.C. § 170(h)(2)(C) and § 170(h)(5)(A) for the tax year in issue." As respondent reads the deed of easement (Deed), it allows the partnership to change the Building's exterior in a manner inconsistent with its historical character if the Conservancy fails to act within 30 days of the partnership's request to make the change. On the premise that "the Easement allows the LA Conservancy only a 30-day period to prevent a use inconsistent with the Easement's purpose," respondent contends that the easement "fail[s] the perpetuity requirement."

Respondent bases his argument on section 3.2(c) of the Deed. Section 3.1 prohibits the partnership, as Grantor, from making changes to the Building without the Conservancy's "prior express written approval". That same section allows the Conservancy, as Grantee, to withhold or condition its approval in its "sole discretion". Section 3.2(c), however, provides: "All approval rights of the Grantee shall be exercised in the reasonable discretion of Grantee. Grantee further agrees

²The classification of a district as a registered historic district can be made under either Federal law or a State or local law approved by the Secretary of the Interior. See secs. 170(h)(4)(C), 47(c)(3)(B).

³Respondent asserts that the Building is not listed in the National Register, and petitioner makes no claim to the contrary. Respondent accepts, however, that the Building is located in a registered historic district and was certified by the National Park Service as being of historic significance to that district.

to respond to any request of Grantor not later than thirty (30) days following receipt by Grantee of Grantor's request. Failure of Grantee to respond to Grantor within the thirty (30) day period shall be deemed to constitute approval of Grantor's request."

Section 13 of the Deed includes provisions apparently intended to comply with section 170(h)(4)(B). Section 13.2 provides: "Grantor and Grantee agree that Grantor shall not undertake, and Grantee shall not permit, any change to the exterior of the Building which would be inconsistent with the historical character of such exterior." Respondent "acknowledges that Section 13 of the Easement * * * purports to bring the Easement into compliance with section 170(h)(4)(B)(i)." He contends, however, that "the mere recitation of the requirements of section 170(h)(4)(B)(i) in a general provision of the Easement does not save the Easement from failing the perpetuity requirement." Respondent views the provisions of section 13 of the Deed as "general provisions" that "must give way to the specific provisions of Section 3.2". See e.g., Rebolledo v. Tilly's Inc., 175 Cal. Rptr.3d 612, 626 (2014) ("[W]hen there are conflicting clauses the more specific clause controls the more general."). "Superficial compliance with section 170(h)(4)(B)(i) in boilerplate provisions of the Easement", respondent alleges, "are insufficient to cure th[e] defect that is fatal to the claimed charitable contribution."

Petitioner argues that section 3.2 of the Deed "cannot be given effect under California law" because it is in "in direct conflict with the provisions of Section 3.1" and "is also inconsistent with the clearly stated preservation purpose of the Deed". Petitioner's argument starts with the observation that California law generally provides that "a grant of real property interests is to be interpreted in like manner with contracts".⁴ And California law regarding the interpretation of contracts provides that "[p]articlar clauses of a contract are subordinate to its general intent." Cal. Civ. Code sec. 1650. Therefore, "[w]ords in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." Id., sec. 1653. Section 1.2 of the Deed states the easement's purpose as being "to assure that the architectural, historic, cultural, and associated open space features of the Property will be retained and maintained forever substantially in their current or better condition for conservation and preservation purposes and to prevent any use or change of the Property that will significantly

⁴Sec. 1066 of the California Civil Code provides: "Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this Article." For that purpose, the term "grant" includes any written instrument providing for the transfer of real property. See Cal. Civ. Code sec. 1053.

impair or interfere with the Property's conservation and preservation values." Petitioner argues that "[t]he approval standards set forth in Section 3.2 [of the Deed] do not align with the Deed's clearly defined Purpose of preserving the Building in accordance with historic standards."

Petitioner also relies on section 1070 of the California Civil Code, which provides: "If several parts of a grant are absolutely irreconcilable, the former part prevails." Petitioner views "the provisions of Section 3.2(c) of the Deed * * * [as] in direct conflict with the provisions of Section 3.1" "[b]ecause Section 3.1 requires prior express written consent and absolute discretion of the Grantee, and Section 3.2(c) permits reasonable discretion and a deemed approval absent such consent". From the premise that sections 3.1 and 3.2(c) are irreconcilable, petitioner concludes that section 3.1 must prevail because it appears earlier in the document than section 3.2(c).

Finally, petitioner argues that, even if section 3.2(c) must be given effect and the Conservancy failed to respond within 30 days to a request by the partnership to change the Building's exterior in a manner inconsistent with its historical character, the Conservancy could nonetheless prevent the partnership making the change. In that regard, petitioner points to section 9.4 of the Deed, which provides:

Grantee may, following reasonable written notice to Grantor, institute suit(s) to enjoin any violation of the terms of this easement by ex parte, temporary, preliminary, and/or permanent injunction, including prohibitory and/or mandatory injunctive relief, and to require the restoration of the Property and Building to the condition and appearance that existed prior to the violation complained of in the suit. Grantee shall also have available all legal and other equitable remedies to enforce Grantor's obligations contained in this instrument. Exercise by [the] Grantee of one remedy hereunder shall not have the effect of waiving or limiting any other remedy, and the failure to exercise any remedy shall not have the effect of waiving or limiting * * * the use of any other remedy or the use of such remedy at any other time.

Petitioner would apparently view the partnership's mere request to make a nonconforming change to the Building's exterior as a violation of the Deed (perhaps by reason of section 13.2, which prohibits the partnership from "undertak[ing]" a nonconforming change). As one potential "remedy" for that violation, the Conservancy could deny the partnership's request. Its failure to do so

within 30 days would not, in petitioner's view, deny the Conservancy other remedies to prevent the nonconforming change.

Respondent accuses petitioner of "effectively read[ing] Section 3 out of the Deed." He argues that, when provisions in a contract appear inconsistent, a court must reconcile them to the extent possible to give effect to the entire contract. Respondent sees no conflict between sections 3.1 and 3.2(c), viewing express written approval and deemed approval through failure to respond as two alternative means for a request by the partnership to be granted.

Analysis

Respondent's motion for summary judgment rests on the premise that, under section 3.2(c) of the Deed, a request by the partnership to change the Building's exterior in a manner inconsistent with its historical character would be deemed to have been approved by the Conservancy if the Conservancy failed to respond to the request within 30 days. Because we reject that premise, we will deny respondent's motion.

Rejecting the premise of respondent's motion does not require that we go as far as petitioner suggests and read section 3.2(c) out of the Deed altogether. Section 1641 of the California Civil Code requires that "[t]he whole of a contract * * * be taken together, so as to give effect to every part, if reasonably practicable, [allowing] each clause [to] help[] to interpret the other." A "repugnancy" in a contract (that is, an inconsistency or contradiction) "must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." Cal. Civ. Code sec. 1652.

We see no clear conflict between sections 3.1 and 3.2(c) of the Deed germane to the case before us. As petitioner notes, section 3.1 allows the Conservancy to withhold or condition in its "sole discretion" its approval of requests made by the partnership, while section 3.2(c) requires the Conservancy to use "reasonable discretion" in exercising its approval rights. But respondent is also correct in noting that the scope of the Conservancy's discretion would be irrelevant when its approval is imputed through its failure to respond timely to a request by the partnership. (The question of whether the Conservancy was reasonable in exercising its discretion to deny a request can arise only when the denial was advertent.) And the prospect raised by section 3.2(c) of deemed consent by inaction need not be viewed as conflicting with section 3.1's requirement that the

Conservancy's approval be express and written. Consent deemed to be given can be deemed to take whatever form is required for express consent.

Moreover, the approval of a request of the partnership by reason of the Conservancy's inaction would not necessarily frustrate the easement's stated purpose. Section 3.1(a) of the Deed prohibits the partnership from making any change to the Building's facade without the Conservancy's approval. The deemed approval of a request to change the facade in a manner that would not "significantly impair or interfere with the Property's conservation and preservation values" would not contravene the Deed's purpose as stated in section 1.2. A conflict between section 3.2(c)'s deemed approval provision and the Deed's stated purpose would arise only if that provision were read to apply to requests to alter the Building's exterior in a manner inconsistent with its historical character. And that potential conflict can be resolved simply by reading section 3.2(c) as inapplicable to any such request. That is, section 13.2 can be read to limit the scope of section 3.2(c) to prevent requests to change the Building's facade in ways that would alter its historical character from being approved by the Conservancy's failure to deny them within 30 days. Harmonizing sections 3.2(c) and 13.2 in that manner makes perfect sense: The Conservancy cannot be deemed to approve requests to which it lacks the authority to give its actual approval. And section 13.2(c) prohibits the Conservancy from "permit[ting] * * * any change to the exterior of the Building which would be inconsistent with * * * [its] historical character". Simple logic requires that requests that the Conservancy is not allowed to approve be carved out from section 3.2(c)'s deemed approval provision.

Our reading of sections 3.2(c) and 13.2 is consistent with California law governing the interpretation of contracts and deeds in that it gives effect to both provisions to the extent possible. By contrast, respondent would read section 13.2 out of the Deed, violating the very principle he rightly claims prevents section 3.2(c) from being disregarded altogether. We are not persuaded that the general rule giving priority to specific over general provisions requires us to read section 3.2(c) as encompassing requests to change the Building's exterior in such a manner as would alter its historical character. Respondent's characterization of section 3.2(c) as specific and section 13.2 as general strikes us as backwards. Section 3.2(c) potentially deals with all requests requiring permission under section 3.1, including requests to change the Building's exterior in any manner, regardless of the effect of the change on the facade's historical character. By contrast, section 13.2 addresses (and prohibits) only those changes to the Building's exterior that "would be inconsistent with * * * [its] historical character". It is precisely the narrower scope of section 13.2, in comparison to section 3.2(c), that allows us to

read the former as carving out a limited exception to the latter, thereby resolving any potential inconsistency between the two provisions by giving each as much effect as possible.

Because we read section 3.2(c) of the Deed as inapplicable to requests to change the Building's exterior in a manner that would alter its historical character, we need not address petitioner's argument that, should such a request be deemed to have been approved under section 3.2(c) by reason of the Conservancy's failure to deny it within the time specified, the Conservancy would nonetheless be able to prevent petitioner from making the change. The deemed approval provision of section 3.2(c) does not prevent the protection in perpetuity of the easement's stated purpose of assuring the retention and maintenance of the Building's "architectural, historic, cultural, and associated open space features" and preventing uses of or changes to the Building that would "significantly impair or interfere with * * * [its] conservation and preservation values." Respondent makes no argument that the partnership's contribution of the easement fails section 170(h)(5)(A)'s perpetual protection requirement for reasons other than the deemed approval provision. We will therefore deny respondent's motion.

On the premises stated, it is

ORDERED that respondent's motion for summary adjudication is denied.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
November 19, 2020