Real Estate Taxation
Second Quarter, 2014

The Whitehouse Trilogy

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CONSERVATION EASEMENT CONFUSION IN THE TAX COURT AND FIFTH CIRCUIT

The *Whitehouse* trilogy of decisions illustrates differences in approach and interpretation that have that have made planning conservation easements difficult.

***129** The Tax Court (Judge James Halpern presiding) not long ago issued a third opinion in the ongoing conservation easement litigation between Whitehouse Hotel Ltd. Partnership ('Whitehouse') and the IRS. [FN1] The *Whitehouse* trilogy of opinions provides unique insight into important valuation issues pertinent to conservation easements. The third and most recent opinion largely involves the valuation of a façade preservation easement and the application of penalties under Section 6662. The three cases discussed herein (and there may be more, given who the taxpayer is and how much is at issue), illustrates significant differences in approach relating to conservation easement cases being played out in the Tax Court and in several of the Courts of Appeals. This inconsistency in approach makes planning difficult for taxpayers and practitioners. [FN2]

Factual overview

Whitehouse was formed in 1995 for the purpose of acquiring and renovating an historic New Orleans building known as the Maison Blanche Building (the 'Maison Blanche'). [FN3] The Maison Blanche is located within the Vieux Carre National Historic District and the Canal Street Historic District. It is categorized as a building of major architectural importance; the U.S. National Park Service has determined that it is a certified historical structure.

Whitehouse intended to renovate the Maison Blanche to create a mixed-use hotel/retail building operated under the Ritz-Carlton brand. In February 1997, Whitehouse and Ritz-Carlton reached agreements, pursuant to which Whitehouse agreed to renovate the Maison Blanche and the adjacent—but as-yet-unacquired—Kress Building, while Ritz-Carlton agreed to operate a hotel in the newly renovated buildings. In October 1997, Whitehouse acquired additional properties in New Orleans, including the Kress Building. [FN4]

The easement (façade preservation).

On 12/29/97 (the 'valuation date'), Whitehouse conveyed a preservation easement in the Maison Blanche to the Preservation Alliance of New Orleans, Inc., d/b/a Preservation Resource Center of New Orleans (PRC). [FN5]

The easement provided that the owner intended to convert the Maison Blanche into a hotel. It restricted changes to the exterior surfaces of the Maison Blanche ('the façade'), and required the owner maintain the façade in a good and sound state of repair. Without ***130** permission, the owner was to do nothing to the façade

that would alter its appearance, and PRC had the right to require the owner to maintain the façade. The easement did not directly mention the neighboring Kress Building, but did grant to PRC the right to approve the development plans (‘the plans‘) for the Maison Blanche and contiguous buildings (including the Kress Building). The plans pre-dated Whitehouse's acquisition of the Kress Building but contained references to the Kress Building (labeled as ‘Future Donation‘ or ‘To Be Acquired at a Later Date ‘). [FN6] According to the Fifth Circuit, it was critical that the plans *did not* include construction in the air space above the Kress Building. [FN7]

On the day after it executed and recorded the easement, Whitehouse finalized and recorded its plans for converting the Maison Blanche and the Kress Building into a single, indivisible condominium unit. [FN8] Effectively, this condominium regime legally combined the Maison Blanche and Kress Building into a single unit of property. [FN9]

The deduction and notice.

Whitehouse claimed a charitable contribution deduction of $7.445 million on its 1997 Form 1065, based on an easement appraisal (‘the Cohen Appraisal‘) prepared by M. Richard Cohen, a qualified appraiser. [FN10] The deduction was reported on the requisite Form 8283.

In 2003, the IRS issued a Notice of Final Partnership Administrative Adjustment (FPAA) in which it disallowed all but $1.15 million of the $7.445 million charitable deduction claimed by Whitehouse. The IRS also imposed an accuracy-related penalty under Section 6662. Whitehouse filed a petition for redetermination with the Tax Court.

Whitehouse-I

The initial Tax Court proceeding, *Whitehouse-I*, [FN11] was a classic ‘battle of valuation experts.‘ Whitehouse challenged the qualifications of the Service's expert as well as his methodology and valuation, and the IRS challenged Whitehouse's expert's methodology and particularly the property that he considered in his easement (i.e., the Maison Blanche *and* the Kress Building). [FN12] Whitehouse further challenged the imposition of the accuracy-related penalty by asserting the correctness of its valuation and, alternatively, the Section 6664(c)(1) reasonable-cause exception.

The Tax Court disregarded much of the valuation testimony presented by Whitehouse's expert and concluded that the value of the easement was $1,792,301, as compared to the $7.445 million claimed by Whitehouse. As a result, the Tax Court applied a 40% gross valuation misstatement penalty under Section 6662(h). A discussion of the valuation testimony presented during trial and the Tax Court's treatment of that testimony is instructive.

Whitehouse's expert and valuation.

At trial, Whitehouse offered the expert testimony of Richard J. Roddewig with respect to the value of the easement. Mr. Roddewig applied the ‘before and after‘ approach to determine the value of the easement. Under this approach, the fair market value of the subject property is determined both before and after encumbrance by the easement. The difference between these values is deemed to be the value of the easement itself and, thus, the amount of the deduction. [FN13] After considering valuation under three different methods (discussed below), Roddewig opined that the easement reduced the value of the Maison Blanche *and associated properties* (i.e., the Maison Blanche, the Kress Building and each of their underlying parcels) by $10 million. [FN14]

In determining the 'highest/best use' of the property before the easement, Roddewig looked to both the Maison Blanche (to which the easement applied) as well as the contiguous Kress Building. He determined that the highest/best use of the combined property was a mixed-use development including a Ritz-Carlton Hotel (a luxury hotel) with 512 rooms (60 of which could be built on top of the Kress Building), an additional all-suites hotel with about 268 rooms, and retail space on the first two floors and mezzanine of the Maison Blanche Building. After the conveyance of the easement, Roddewig determined that additional floors could no longer be constructed on top of the Kress Building because those floors would block the view of the façade of the Maison Blanche (thereby violating the easement terms).

The Service's expert and valuation.

The Service's expert valuation witness was Richard Dunbar Argote, who opined that the conveyance of the easement to PRC did not reduce the value of the Maison Blanche. Argote did not consider the ***131** Kress Building in his valuation. The IRS, however, did not ask that the Tax Court find that the value of the easement was any less than determined in the examination: $1.15 million. [FN15]

The Tax Court noted Argote's more than 25 years of experience in appraising real estate in Louisiana, including between 50 and 70 buildings between 1990 and 2000 in and around New Orleans that were converted into or to be used as hotels. Notably, 85% of those buildings were located within the Central Business District or the Vieux Carre. The court also noted that Argote appraised the Maison Blanche itself on three prior occasions.

In valuing the easement, Argote also applied the 'before and after' approach. He determined, however, that the highest and best use of the Maison Blanche was as a mixed-use, *non*-luxury hotel and retail space, both before and after the easement. [FN16] In his opinions the easement had no impact on the highest and best use or on the value of the Maison Blanche.

The Tax Court's analysis.

The Tax Court noted Argote's extensive and relevant real estate easement experience and the fact that he was a qualified expert. Argote lacked experience in valuing façade preservation easements, but the court noted that the 'before and after' approach involved traditional real estate valuation principles, with the only difference being the use of two valuations instead of one (i.e., a valuation before and a valuation after an encumbrance). [FN17] Since the easement at issue was an encumbrance on real property, the court found that it made little difference whether Argote had extensive experience with respect to this particular type of restriction. Accordingly, the court found that valuation of the easement was within Argote's qualifications. [FN18]

The Tax Court next addressed whether the methods employed by Argote failed to comply with certain provisions of the regulations ***132** or otherwise conform to the Uniform Standards of Professional Appraisal Practice (USPAP). [FN19] The court determined that the Federal Rules of Evidence governed the admissibility and reliability of expert testimony, [FN20] and that failure to comply with USPAP or the regulations only affected the weight accorded to the testimony (i.e., its credibility or reliability). [FN21] Determining that Argote's testimony was admissible, the Tax Court largely accepted his before-easement comparable sales analysis. The Tax Court disregarded Roddewig's before-easement comparable sales analysis based, in part, on the grounds that it over-utilized nonlocal sales.

Ultimately, the Tax Court derived the before-easement value of the Maison Blanche (on an adjusted price per squate foot basis) by selecting four properties mentioned by both Argote and Roddewig in their before-easement

valuation under the comparable sales method. [FN22] After applying adjustments to each of these four properties' valuation (on a price per square footage basis), the Tax Court averaged the square footage of the Maison Blanche Building (as presented by Argote and Roddewig) to arrive at a before-easement value of $12,092,301 for Maison Blanche.

The Tax Court next turned to the after-easement value of Maison Blanche. It rejected Roddewig's after-easement analysis, in part because it was derived, not under the comparable sales method, but only through the modified income and reproduction cost methods, which the court found unpersuasive. [FN23] The Tax Court essentially adopted Argote's after-easement comparable sales valuation of $10.3 million for Maison Blanche.

The Tax Court determined that the value of the easement was $1,792,301 by subtracting the after-easement value ($10,300,000) from the before-easement value. Whitehouse's claimed valuation (of $7.445 million) was about 415% greater than the value determined by the court.

The valuation misstatement penalty.

As a result of its determination that Whitehouse overstated the value of the easement by more than 415%, [FN24] the Tax Court found that a 40% accuracy-related penalty under Section 6662(h) would be applicable unless Whitehouse could establish ‘reasonable cause‘ under Section 6664(c)(1). Since the IRS conceded that Whitehouse obtained a ‘qualified easement‘ (the Cohen Appraisal) from a ‘qualified appraiser‘ (Mr. Cohen) for purposes of claiming the deduction, the reasonable-cause exception hinged on the Tax Court's determining ***133** that Whitehouse made a good-faith investigation of the value of the contributed property. [FN25]

Whitehouse relied principally on the testimony of an employee of its tax matters partner and manager, QHR Holdings-New Orleans Ltd. (QHR), to establish its good faith investigation of the value of the easement. Unfortunately, the Tax Court determined that the employee, Robert Drawbridge, had no direct knowledge of any efforts made by Whitehouse to investigate the value of the easement because QHR did not become Whitehouse's manager until 9/15/00—well after the conveyance of the easement. The Tax Court also rejected Whitehouse's assertion that it relied as well on another appraisal (‘the Revac Appraisal ‘). [FN26] In rejecting the relevance of the Revac Appraisal, the Tax Court focused on the fact that it addressed only the before-easement value of the property, and not the value of the easement itself, concluding that a taxpayer must investigate the value of the contributed property (i.e., the easement) in order to qualify for the reasonable-cause exception. [FN27] Furthermore, the Tax Court noted Whitehouse failed to present any evidence relating to professional tax advice that it received from its accountants or legal counsel in filing its 1997 Form 1065. Having found that Whitehouse failed to establish the availability of the reasonable-cause exception, the Tax Court sustained application of the Section 6662(a) accuracy related penalty on the basis of a gross valuation misstatement (i.e., 40% of the underpayment attributable to such misstatement).

Whitehouse-II

In its appeal to the Fifth Circuit, Whitehouse reasserted its arguments that Argote was not qualified to provide expert testimony, that he failed to conform to USPAP, and that this rendered his report inadmissible. Whitehouse also appealed the Tax Court's valuation of the easement and its imposition of the accuracy-related penalty on the basis of a gross valuation misstatement. The Fifth Circuit found that the primary issue on appeal was whether the Tax Court properly considered the easement's effect on Whitehouse's opportunity to build on top of a building that it owned (the Kress Building), contiguous to the building to which the easement applied (the Maison Blanche). Ultimately, the Fifth Circuit vacated the Tax Court's rulings regarding valuation and remanded

the case for further proceedings.

Before moving to its opinion, the Fifth Circuit highlighted certain facts that shed light on its concerns on appeal. It noted that the experts disagreed on two threshold issues: (1) which property should be valued and (2) the nature of the property's ‘highest and best use‘ (a key factor in determining fair market value). [FN28]

The Fifth Circuit highlighted Roddewig's determination that the relevant property consisted of the Maison Blanche (including annexes) as well as the contiguous Kress Building, but not the Kress parking garage. In so doing, Roddewig determined that the before-easement highest and best use of the properties was as a mixed-use luxury hotel and retail space, with an additional 60 rooms constructed on top of the Kress Building. [FN29] Conversely, Argote valued *only* the Maison Blanche Building, as specifically directed by the IRS. [FN30] The Fifth Circuit determined that the failure to consider the impact of the easement on the value of the contiguous and commonly owned Kress Building violated the regulations concerning the valuation of conservation easements. [FN31]

The Fifth Circuit further observed that Roddewig's report addressed three ‘recognized‘ methods to reach the before-donation valuation, although he did not employ the ‘comparable sales‘ method for determining the after-donation valuation. On the other hand, the Fifth Circuit called attention to the fact that Argote employed only the comparable sales method and, in so doing, found no difference in the before-easement value and after-easement value of Maison Blanche (thus, in the court's characterization, ‘extraordinarily‘ assigning a value of zero to the easement). [FN32]

Initial matters—Partnership challenges to the Service's expert.

Initially, Whitehouse argued that the Tax Court erred in admitting the report of the Service's expert because Argote lacked experience with this particular type of easement (of a façade), and because his report, by failing to conform to USPAP, lacked reliability. In examining—and rejecting—Whitehouse's challenges to the admissibility of Argote's report, the Fifth Circuit observed that the trial court's role as a ‘gatekeeper‘ for expert testimony is diminished in bench trials (as occur in Tax Court) because there is no risk of exposing a jury to unreliable evidence. [FN33] The Fifth Circuit therefore reviewed the Tax Court's admissibility determination as respects to Argote's report, as well its assessment of his qualifications ***134** and reliability, under the ‘abuse of discretion‘ standard. [FN34] Noting Argote's qualifications as an appraiser of real estate (particularly for property located in New Orleans), the Fifth Circuit rejected Whitehouse's assertion that Argote lacked experience with historic preservation façade easements. It found that the Tax Court had not made a manifestly erroneous abuse of discretion by determining that Argote was qualified to provide expert testimony.

Responding to Whitehouse's argument that Argote's report should be rejected as unreliable (and, therefore, inadmissible) because it failed to comply with USPAP, the Fifth Circuit noted that Whitehouse was arguing, in essence, that compliance with USPAP was a prerequisite for admissibility, as opposed to credibility. The Fifth Circuit upheld the Tax Court's determination that any differences between Argote's methods and USPAP spoke to the *credibility* of the report, not to its *admissibility*. [FN35]

Proper valuation methods.

Whitehouse also appealed the Tax Court's disregard of Roddewig's income and replacement-cost valuation methods in favor of reliance solely on the comparable-sales method. The Fifth Circuit began by noting that valuation is a mixed question of law and fact (with the factual premises subject to review on a clearly-erroneous

standard, and the legal conclusions subject to de novo review). At the same time, however, the court observed that the Tax Court's determination of the proper *method* to use for determining fair market value is a conclusion of *law*, subject to *de novo* review. [FN36] Noting the dearth of evidence of sales of easements comparable to the easement donated by Whitehouse, the Fifth Circuit observed that in such situations there are three commonly recognized valuation methods: (1) comparable sales, (2) income, and (3) replacement cost. [FN37] Unfortunately, since the Fifth Circuit remanded the case for redetermination by the Tax Court, it did not rule on whether the Tax Court erred by rejecting the other methods in favor of the comparable-sales method alone. However, the Fifth Circuit directed the Tax Court to reconsider all three methods on remand, including which of them may be applicable in determining the value of the easement. [FN38]

Valuation—Highest and best use.

The Fifth Circuit then turned its attention to Whitehouse's contention that the highest and best use of the Maison Blanche and Kress Building (combined) was as a *luxury* hotel (like the Ritz-Carlton), instead of a non-luxury hotel, and, that the easement prohibited constructing space for 60 additional hotel rooms on top of the Kress Building. [FN39] The Fifth Circuit observed that, in ascertaining a property's ‘highest and best use‘ for purposes of valuation, the applicable ‘use‘ is the ‘*reasonable* and *probable* use that supports the *highest present value.*‘ [FN40] To this end, it noted that the key inquiry concerns the information a hypothetical willing buyer would consider in deciding how much to pay for the property. [FN41] Thus, if a reasonable buyer would consider a potential use in deciding whether to purchase the property, that potential use should also be considered in valuing the property. [FN42]

The Fifth Circuit found that the Tax Court did not explicitly determine the ‘highest and best use‘ of the property but simply rejected Roddewig's opinion of highest and best use. Consequently, the Fifth Circuit directed the Tax Court, on remand, to determine the highest and best use of the property for purposes of valuation.

Valuation—Impact on contiguous property.

Next, the Fifth Circuit addressed Whitehouse's contention that the Tax Court erred in failing to consider the impact of the easement on the Kress Building (in combination with the Maison Blanche). It noted that while the Tax Court considered whether the easement itself *burdened* the Kress Building, it failed to consider the impact of the easement (as well as the planned condominium declaration) on the *value* of the Kress Building. [FN43] Since the easement's impact on any property rights in the contiguous Kress Building would constitute a question of law, the Fifth Circuit observed that this issue is subject to *de novo* review; and furthermore, that Louisiana state law would apply in ascertaining such property rights. [FN44] In looking to both Louisiana state law and practical considerations related to a hypothetical sale of the subject property, the Fifth Circuit found that the Maison Blanche and the Kress Building constituted a single, indivisible unit of property both functionally (as a result of the renovation plans) and legally (as a result of recordation of the condominium declaration). [FN45] Furthermore, since any potential buyer would have been aware of this functional and legal unity as of the easement date, a hypothetical buyer would have considered such facts in deciding whether to buy the property (i.e., whether to buy either *both* buildings or neither) and in arriving at a price. [FN46] Accordingly, the Fifth Circuit disagreed with the Tax Court's determination that the Kress Building was irrelevant for purposes of valuing the easement. [FN47]

***135** In light of the imminent legal and functional combination of the buildings on the date of the easement, the Fifth Circuit instructed the Tax Court to consider the easement's impact on the highest and best use of the

combined Maison Blanche and the Kress Building (both before and after the recording of the easement).

The penalty.

Having vacated the Tax Court's holdings in *Whitehouse-I* and remanded the case for revaluation of the easement, Whitehouse's appeal of the gross undervaluation penalty became moot. The Fifth Circuit nevertheless addressed it in dicta, [FN48] discussing the applicable standards of the Section 6662 accuracy-related penalty and Whitehouse's burden of proof with respect to the Section 6664(c)(1) reasonable-cause exception (including what evidence the Tax Court should consider). In so doing, the Fifth Circuit implied that the Tax Court inappropriately applied the law to the facts before it by (1) disregarding the testimony of Robert Drawbridge, an employee of Whitehouse's manager (QHR), as lacking credibility because QHR was not the manager of Whitehouse at the time of the easement, and (2) finding that Whitehouse did not provide adequate evidence that it sought review from tax advisors. [FN49]

In summary, the Fifth Circuit noted that the regulations provide that a taxpayer demonstrates reasonable cause by showing that he or she exercised ordinary business care and prudence. [FN50] Furthermore, it pointed out that when an accountant or attorney advises a taxpayer on a matter of tax law, it is reasonable for the taxpayer to rely on that advice. [FN51] With these criteria and observations in mind, the Fifth Circuit directed the Tax Court to reconsider the penalty, should it even be an issue on remand. [FN52]

Whitehouse-III

On remand, in *Whitehouse-III*, the Tax Court revised its analysis and opinion to comply with the directions and framework established by the Fifth Circuit in *Whitehouse-II*. Specifically, the Tax Court addressed: (1) whether the before and after values of the encumbered property are best determined under the comparable-sales method, rather than the cost or income methods; (2) an explanation of its conclusion that the easement did ***136** not deprive Whitehouse of the ability to add stories above the Kress Building; [FN53] and (3) the accuracy-related penalty and reasonable-cause exception thereto. The Tax Court, however, seemed to lack enthusiasm for this review. [FN54]

The proper valuation method.

Just as in *Whitehouse-I*, the Tax Court soundly rejected the use of any method other than comparable-sales in determining its before-easement and after-easement valuations of the subject property. Moreover, the Tax Court again disregarded nearly all assumptions, judgments, and opinions offered by Whitehouse's expert (Roddewig) as unreliable or inappropriate. [FN55] The Tax Court's ‘revised analysis‘ of the valuation method essentially mirrored *Whitehouse-I*, with the exception that Tax Court slightly modified its valuation of the easement by including the square footage of the Kress Building in its valuation analysis. [FN56] Furthermore, just as in *Whitehouse-I*, the Tax Court determined that Roddewig's reliance on non-local sales and a ‘national marketplace‘ for luxury hotels was improper and unsupportable. As a result, the Tax Court used its own before-easement comparable-sales analysis but accepted the comparable-sales analysis of the service's expert's for the after-easement valuation. Effectively, the Tax Court arrived at the same conclusions as in *Whitehouse-I* but by a different route.

Comparable sales—'Highest and best' or 'second-best.'

As noted, the Fifth Circuit directed the Tax Court to make a clearer ruling on the highest and best use of the relevant property (i.e., the combined Maison Blanche and Kress buildings). [FN57] Specifically, in valuing the

impact of the easement on these combined properties, the Fifth Circuit directed the Tax Court to consider the impact of the easement as well as the pending condominium regime and renovation plans. [FN58] Similarly, the Fifth Circuit directed the Tax Court to consider the factual question of the easement's impact on the property's fair market value, such as any effect stemming from Whitehouse's inability to add 60 hotel rooms on top of the Kress Building. [FN59]

On remand, however, the Tax Court concluded that the 'highest and best use' presented by each expert did not matter because the 'highest and best use' of the property (e.g., luxury vs non-luxury hotel), would have no impact on the value of the easement itself. [FN60] In arriving at this conclusion, the Tax Court ***137** discussed an alternative approach utilized by the Seventh Circuit's 1996 opinion in *Van Zelst*, [FN61] in which that court opined that the valuation of the property should be determined with reference to the 'second-best use' of the property. [FN62]

Under this 'second-best use' analysis, the Tax Court found an additional reason to reject Roddewig's use of non-local, luxury hotel comparables. The Tax Court noted that, even if it agreed with Roddewig's opinion that the highest and best use of the property was as a luxury hotel, the fair market value of the subject property would not be any greater than that determined by its 'second-best use' (i.e., as a non-luxury hotel). [FN63]

The Tax Court further observed that because on the date of the easement the Maison Blanche Building was a 'shell' that had '*potential* for hotel development (luxury or not),' it did not matter whether, for purposes of its comparable-sales analysis, it considered properties that ultimately became luxury or non-luxury hotels. [FN64] According to the Tax Court, the relevant 'comparable' was a 'shell' building that could *possibly* be developed into a hotel, whether or not it ultimately was developed into a luxury or non-luxury hotel. [FN65] Since the Tax Court found that Whitehouse failed to show any difference between the Maison Blanche 'shell' and any other 'shell' building that could potentially become a hotel, it concluded that valuation would be determined, once again, under the comparable-sales method it had used in *Whitehouse-I*. [FN66]

The easement's impact on the value of the property.

Just as in *Whitehouse-I*, the Tax Court concluded that the easement did not affect Whitehouse's right to build additional hotel rooms on top of the Kress Building. [FN67] Applying Louisiana law, the Tax Court determined that 'a servitude of view' was 'a predial servitude' (i.e., one created by title or judicial act) [FN68] and that it could not be created by implication. [FN69] Under this alternative analysis (not addressed in *Whitehouse-I* or *Whitehouse-II*), the Tax Court concluded that any prohibition from building on top of the Kress Building was personal to Whitehouse and would not bind subsequent owners of the Maison Blanche. [FN70] Based on this analysis of state law, the Tax Court determined that the value of the easement would not be affected by Whitehouse's inability to build on top of the Kress Building, if such a restriction in fact existed. [FN71]

Despite the Tax Court's conclusions as to state law, it reluctantly complied with the Fifth Circuit's instructions to include the Kress Building in its final valuation analysis. The change in analysis, however, was only superficial because the Tax Court never accepted the possibility that development of the Kress Building was prohibited. [FN72]

***138** The accuracy-related penalty and reasonable-cause exception.

Having determined the value of the easement, the Tax Court turned to the accuracy-related penalty. Even after adding the square footage of the Kress Building in its formula for determining the before-easement and after-

easement valuation of the subject property, the Tax Court increased the value of the easement by a mere 3.6%, to $1.857 million, compared to $7.445 million claimed by Whitehouse. [FN73] As a result, the Section 6662(a) penalty would remain 40% under Section 6662(h), on the basis of a gross valuation misstatement, unless Whitehouse could show that the Section 6664(c) reasonable cause exception applied. [FN74] The Tax Court (just as it had in *Whitehouse-I*) found that Whitehouse failed to show that it made a good-faith investigation of the value of the easement, and so did not qualify for the Section 6664(c)(1) exception). [FN75]

Following the principles set forth by the Fifth Circuit in *Whitehouse-II,* the Tax Court revisited the testimony of Drawbridge, the employee of Whitehouse's manager (QHR). Having noted that the Cohen Appraisal (on which Whitehouse based its easement valuation) valued only the Maison Blanche, the Tax Court found it unbelievable that Whitehouse could reasonably believe, without further investigation, that thebuilding it purchased in 1995 for $8.98 million (i.e., just the Maison Blanche) would be valued by its appraiser just two years later for $96 million, or that an easement on that building would be found to devalue the property by $7.445 million. [FN76] Given the vast differences in these valuations in such a short period, the Tax Court found that the lack of further investigation was counter-indicative of a ‘good-faith‘ investigation of the easement's value. Additionally, the Tax Court rejected Drawbridge's testimony regarding the Revac Appraisal. Just as in *Whitehouse-I*, the Tax Court found that the Revac Appraisal could not be relied upon for showing a good-faith investigation of the value of the easement because that appraisal valued only the Maison Blanche itself (not its reduction in value on account of the easement).

Beyond the Cohen and Revac Appraisals, the Tax Court found that Drawbridge did not provide additional testimony regarding any material actions taken by Whitehouse or its legal/accounting advisors with respect to the value of the easement. [FN77] The court found that Whitehouse failed to provide evidence on the content of any professional advice or opinions with respect to the charitable contribution claimed on its 1997 Form 1065. It further ***139** found that Whitehouse failed to provide it with any authority that its auditor had a duty to evaluate the reasonableness of the stated value of the charitable contribution. Thus, though it was possible that Whitehouse's legal and tax advisors provided it with an opinion or advice that constituted part of an investigation of the value of the easement, Whitehouse failed to present any such evidence that such advice met its burden in establishing the reasonable-cause exception. [FN78]

It is difficult to square the Tax Court's treatment of reasonable cause in *Whitehouse-III* with the Tax Court's treatment of the analogous issue in *Crimi,* TCM 2013-51. The *Crimi* court dealt with the reasonable cause exception relating to qualified appraisals in Reg. 1.170A-13(c)(3). Finding no law under this particular provision, the court indicated ‘it is instructive to look at our other cases interpreting 'reasonable cause.’‘ The other cases examined related to the penalty provisions in Section 6664, the same area addressed in *Whitehouse-III.* Seemingly without evidence of the specific activities of the taxpayer's long-term tax advisor, the *Crimi* court appears to have found that the full reliance on such professionals, when they are deemed competent and fully informed, was sufficient to satisfy the reliance requirement. As the court related, ‘Mr. Crimi put it at trial, 'I rely on them heavily to tell me what to do.’‘ [FN79]

Conclusion.

The pattern of the *Whitehouse* trilogy has similarities to the opinions in *Scheidelman,* TCM 2010-151, *vacated and remanded* 682 F3d 189, 109 AFTR2d 2012-2536 (CA-2, 2012), TCM 2013-018. [FN80] The initial decision of the Tax Court was adverse to the taxpayer and made on technical grounds. It was reversed by an appellate court critical of the Tax Court's restrictive interpretations. On remand to the Tax Court, however, the taxpayer

lost, though on grounds based more on factual determinations. The detailed and technical analysis of the Tax Court contrasted with the more practical approach by the appellate court. The Tax Court appeared to be undeterred in its approach. The analytical thought process of the Tax Court judge was highlighted by the give-and-take of the appeal process. A battle of wills is on display. Unfortunately, this battle of wills does little to inform on how the law is this area will develop, and makes planning conservation easements difficult for taxpayers and practitioners.

Whitehouse-I was a classic 'battle of valuation experts.'

The Fifth Circuit found the primary issue to be the easement's effect on Whitehouse's opportunity to build on top of a building contiguous to that burdened by the easement.

The Fifth Circuit observed that the Tax Court's determination of the proper *method* for ascertaining fair market value is a conclusion of *law*, subject to *de novo* review.

The Tax Court did not explicitly determine the 'highest and best use.'

On remand, the Tax Court concluded that the 'highest and best use' presented by each expert did not matter.

The Tax Court further observed that because on the date of the easement the Maison Blanche Building was a 'shell' suitable for hotel development (luxury or not).

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[FN1]. Whitehouse Hotel Ltd. Partnership, 131 TC 112 (2008) (‘Whitehouse-I‘), *vacated and remanded*, 615 F.3d 321, 106 AFTR2d 2010-5759 (CA-5, 2010) (‘Whitehouse-II‘), 139 TC No. 13 (2012) (‘Whitehouse-III‘).

[FN2]. See ‘Circuit Court Speaks on Conservation Easements, But is the IRS Listening?‘ 24 Exempts 4, page 35 (Jan/Feb, 2013).

[FN3]. Whitehouse paid $6 million for the property in December 1995 and just over an additional $4 million in September 1996 for release of certain commitments and early termination of the current tenant's lease. The Tax Court ‘deemed‘ Whitehouse to have paid $10 million for the Maison Blanche in December 1995. Whitehouse-I at 149.

[FN4]. Of the $3.4 million purchase price for these additional properties, the Tax Court accepted an allocation of $1 million to the Kress Building and assumed that this would have been the cost of the building had Whitehouse purchased it in 1995 (when it purchased the Maison Blanche). See Whitehouse-I at 149.

[FN5]. The IRS did not dispute that PRC was a ‘qualified organization‘ for purposes of Section 170(h).

[FN6]. See Whitehouse-III, at 24 (the Tax Court, however, determined that PRC's consent would not be required

for modification of the plans as respects to the Kress Building because the plans involved only renovating the Maison Blanche).

[FN7]. Whitehouse-II at 325.

[FN8]. Through the renovation plans, the Maison Blanche and Kress Buildings would also be a single *functional* unit in addition to being a single *legal* unit under the condominium regime. For instance, the *porte-cochere* (portico, in essence) and the air conditioning supply units required for operating the Maison Blanche would be contained in the Kress Building. This led the Fifth Circuit, as discussed later, to determine that as a practical matter the buildings would remain functional only while under common control and, thus, any future owner of the Kress Building would also be the owner of the Maison Blanche (and vice-versa). See Whitehouse-II at 339.

[FN9]. The facts contained in this paragraph are derived from Whitehouse-I and Whitehouse-II. In Whitehouse-I, the Tax Court declined to find that, on 12/30/97, Whitehouse established a condominium regime by which the Maison Blanche and Kress Building were established as a single condominium unit. Part of the reason why the Tax Court would not make this finding is that Whitehouse recorded the condominium declaration the day after the conveyance (which contained the casement). As a result, the Tax Court determined that such a finding would have little, if any, relevance to the valuation date issues (i.e., valuation of the easement). Whitehouse-I at fn. 9. The Fifth Circuit, however, concluded that the legal combination of the properties should have been considered by the Tax Court when valuing the easement. See Whitehouse-II at 338-39. That being said, the Tax Court again failed to mention the condominium regime declaration on remand, in Whitehouse-III.

[FN10]. Due to a serious illness, Mr. Cohen was unable to participate in the trial. Whitehouse-II at 325. As a result, Whitehouse retained Richard J. Roddewig to prepare a valuation report for the easement and to provide expert testimony at trial. Whitehouse-I at 119.

[FN11]. See note 1, *supra.*

[FN12]. See note 10, *supra.*

[FN13]. See Reg. 1.170A-14(h)(3) (use of the before and after valuation approach for purposes of deductions for donations of perpetual conservation easements).

[FN14]. As noted, Whitehouse used the Cohen Appraisal for purposes of claiming the $7.445 million charitable deduction on its 1997 Form 1065. The Cohen Appraisal valued the easement by appraising the before- and after-easement valuation of only the Maison Blanche Building. Whitehouse-I at 118. At trial, however, Roddewig looked to the diminution in value caused by the easement on the Maison Blanche *and associated properties*. *Id.* In so doing, Roddewig determined that the value of the easement was $10 million.

[FN15]. Whitehouse-I at 129.

[FN16]. Critically, for purposes of appeal on the valuation issue, the IRS asked Argote to value only the Maison Blanche and to ignore the contiguous Kress Building. In fact, the Fifth Circuit noted that Argote was not even aware that the Treasury regulations called for valuation of the contribution based on its impact on contiguous property owned by the taxpayer/donor that was not subject to the restrictions. See Whitehouse-II at 327, 337-38.

[FN17]. Whitehouse-I at 123 (citing Thayer, TCM 1977-370).

[FN18]. Whitehouse-I at 123. It is worth noting that IRS Notice 2006-96, 2006-2 CB 902, and Prop. Regs. 1.170A-16 and -17, may alter the analysis with respect to a taxpayer's appraiser for purposes of the ‘qualified appraiser‘ and ‘qualified easement‘ substantiation requirements for qualified conservation contributions. The Notice and proposed regulations say that experience with conservation easement easements is relevant. As to Argote's valuation, however, the Tax Court noted that the ‘qualified easement‘ requirement only applied to taxpayers (not the IRS). See Whitehouse-I at 125.

[FN19]. The USPAP is maintained by The Appraisal Foundation via a congressional grant of authority.

[FN20]. Whitehouse-I at 124 (noting that reliability is a prerequisite to expert testimony under Rule 702 of the Federal Rules of Evidence).

[FN21]. Whitehouse-I at at 128.

[FN22]. Roddewig's ‘before‘ valuation under the comparable sales analysis identified five comparable properties, while Argote identified nine. After determining that four of these properties were similar to each expert's analysis, the Tax Court used the four properties in its own before-easement comparable sales valuation of Maison Blanche. The Tax Court applied its own adjusted price per square foot value to the average square footage for Maison Blanche presented by the experts. See Whitehouse-I at 161-62.

[FN23]. The Tax Court found that the reproduction method and the income method were not adequate for purposes of valuing the façade preservation easement at issue, at least with respect to the testimony presented by Roddewig. Whitehouse-I at 152, 156.

[FN24]. Section 6662(a) mandates a 20% accuracy-related penalty for any portion of an underpayment of tax attributable to a substantial valuation misstatement. See Sections 6662(b)(3), (e)(1)(A). The penalty is increased to 40% for a ‘gross‘ valuation misstatement under Section 6662(h). For the period in issue, a gross valuation misstatement occurred if the valuation claimed was 400% or more of the ultimately determined correct value. See Section 6662(h)(2)(A)(i).

[FN25]. Section 6664(c)(2) sets out the requirements for the ‘reasonable cause‘ exception to the Section 6662 accuracy penalty. The Tax Court noted that this determination is made at the partnership level and that partnership bears the burden of proof. See Whitehouse-I at 173 (citing Reg. 301.6221-1T(d) (partnership-level determ-

ination) and Santa Monica Pictures, LLC, TCM 2005-104 (burden of proof)).

[FN26]. The Revac Appraisal was conducted for purposes unrelated to donation of the easement.

[FN27]. Whitehouse-I at 175 (noting that Whitehouse's investigation must have been into the value of the ‘servitude‘ as opposed to the Maison Blanche).

[FN28]. Whitehouse-II at 326 (citing Stanley Works & Subsidiaries, 87 TC 389 (1986)).

[FN29]. Roddewig based his after-donation valuation, in part, on his understanding that the easement precluded the possibility of building the additional 60 rooms on top of the Kress Building. Whitehouse-II at 327.

[FN30]. The Fifth Circuit made note that the IRS did not ask Argote to opine on any potential reduction to the value of the contiguous Kress Building as a result of the easement. Whitehouse-II at 326.

[FN31]. See Whitehouse-II at 326 (citing Reg. 1.170A-14(h)(3)(i)). The Fifth Circuit continued by noting that Argote had not even read Reg. 1.170A-14 when he opined that the easement had no effect on Whitehouse's rights to construct additional rooms on top of the Kress Building. It found this particularly troublesome in light of the requirement set forth in Reg. 1.170A-14(h)(3) that in valuing the easement, consideration must also be given to its impact on the fair market value of any applicable contiguous property. *Id.* at 327.

[FN32]. *Id.* at 327. In its amicus brief, the National Trust for Historic Preservation in the United States (National Trust) stated that valuation of preservation easements is a fundamentally important issue to National Trust because, if such easements are determined to have little or no value, the tax incentives Congress has established to encourage preservation would be severely weakened. Thus, National Trust challenged Argote's appraisal and noted that the Tax Court's decision, if allowed to stand, would obscure the proper method for easement appraisals. *Id.* at 328.

[FN33]. Whitehouse-II at 330 (citing Gibbs v. Gibbs, 210 F.3d 491 (CA-5, 2000)).

[FN34]. See *id.* (referring to various cases for the proposition that the trial judge has wide latitude and broad discretion in making such determinations and his or her decision will not be disturbed absent a manifestly erroneous abuse of discretion).

[FN35]. Whitehouse-II at 332.

[FN36]. *Id.* at 333 (citing In re Stembridge, 394 F.3d 383 (CA-5, 2004) (valuation is a mixed question of law and fact) and Cook, 349 F.3d 850, 88 AFTR2d 2001-6485 (CA-5, 2002) (selection of the proper valuation *method* is a conclusion of law)).

[FN37]. Whitehouse-II at 333 (citing Reg. 1.170A-14(h)(3)(i), Hilborn, 85 TC 677 (1985), and USPAP Standards Rule 1-4).

[FN38]. Whitehouse-II at 334-35.

[FN39]. The Fifth Circuit found that Argote, for the IRS, opined that the highest and best use of the Maison Blanche was as a 'non-luxury' hotel with retail space. Additionally, Argote ignored the contiguous Kress Building when he valued the easement and, as a result, did not consider the economic impact of the easement possibly restricting Whitehouse from building additional hotel rooms on top of the Kress Building.

[FN40]. Whitehouse-II at 335 (citing Frazee, 98 TC 554 (1992) (emphasis added)).

[FN41]. Whitehouse-II at 335 (citing U.S. v. 320.0 Acres of Land, 605 F.2d 762 (CA-5,1979)).

[FN42]. Whitehouse-II at 335.

[FN43]. As noted, Whitehouse owned both the Maison Blanche and Kress Building when it donated the easement. Furthermore, at the time of granting the easement, Whitehouse planned to make a condominium declaration that would effectively combine the Maison Blanche and Kress Buildings, functionally and legally. This declaration was recorded the day after the easement was conveyed. The Fifth Circuit thus observed (and directed the Tax Court accordingly) that the value of the easement should be determined with reference to the before-easement and after-easement valuations of both the Maison Blanche and the Kress Building (i.e., a determination of the easement's impact on the value of the buildings combined). The Fifth Circuit's directions to the Tax Court on this issue stem from its observation that, in practical terms, the Maison Blanche and Kress Building were not likely to be separately owned due to the renovation plans and condominium declaration. Though Whitehouse recorded the condominiumdeclaration after it recorded the easement, the Fifth Circuit observed that any potential buyer would have been aware of it and, thus, would have considered whether to purchase either property (as well as what price to pay) with the condominium declaration in mind. Thus, the Fifth Circuit concluded that these facts must be considered, not only in determining the highest and best use of the buildings, but also for purposes of valuing the easement. Whitehouse-II at 338-40.

[FN44]. Whitehouse-II at 337 (citing Succession of McCord, 461 F.3d 614, 98 AFTR2d 2006-6147 (CA-5, 2006)).

[FN45]. See Whitehouse-II at 337. It does not appear that the Tax Court, in Whitehouse-III, afforded much consideration, if any, to these 'clear' threshold matters set forth by the Fifth Circuit.

[FN46]. See notes 43 and 45, *supra*.

[FN47]. See Whitehouse-II at 337 (citing Reg. 1.170A-14(h)(3)(i), noting that the regulation directs that valu-

ation of the easement must be determined by the difference in the fair market value of the *entire contiguous parcel* of property before and after the granting of the easement).

[FN48]. Whitehouse-II at 341-43. In a concurring opinion, Circuit Judge Emilio Garza refused to take part in certain aspects of the Whitehouse-II opinion that he felt addressed moot issues not properly before the court. He noted that such portions of the opinion (including the court's discussion of the penalty issue) constituted impermissible advisory opinion. *Id.* at 343 (Garza, J., concurring).

[FN49]. To this end, the Fifth Circuit went so far as to specifically note that Whitehouse offered evidence that it relied on its accountants' and attorneys' opinions of the Cohen Appraisal. As such, the Fifth Circuit mentioned that a ‘possible‘ issue on remand would be whether Whitehouse needed to prove more to show reasonable cause. Whitehouse-II at 342.

[FN50]. Whitehouse-II at 342 (citing Reg. 301.6651-1(c)(1)).

[FN51]. Whitehouse-II at 342 (citing Boyle, 469 U.S. 241, 55 AFTR2d 85-1535 (1985)).

[FN52]. Whitehouse-II at 343.

[FN53]. The Tax Court made additional findings on the bases that (1) the servitude did deprive Whitehouse of the ability to build above the Kress Building and (2) the pending combination of the Maison Blanche and Kress buildings made unlikely separate ownership of the two buildings. Whitehouse-III at page 7.

[FN54]. It appears that the Tax Court ignored certain determinations and directions from the Fifth Circuit's opinion in Whitehouse-II. For example, rather than explicitly determining the highest and best use, the Tax Court determined: ‘We do not need to choose between the two experts' opinions of highest and best use, since ... it would make no difference.‘ Whitehouse III at page 19. In rejecting the highest and best use analysis dictated by Reg. 1.170A-14(h)(3)(ii) and the Fifth Circuit's instructions, the Tax Court applied a ‘second-best use‘ standard. See note 60, *infra* (Tax Court rejects the ‘highest and best use‘ approach for the ‘second-best use‘). Additionally, the Tax Court noted that it saw ‘some daylight‘ in a newly discovered approach under which it could address the Kress Building in valuing the easement. Whitehouse-III at page 21. ‘Because the distinction we have drawn... was not considered by the Court of Appeals, we see some daylight to again examine the [easement] to see whether it imposes an obligation on the partnership not to block views of the Maison Blanche Building‘ (i.e., not to build additional rooms on top of the adjacent Kress Building).

[FN55]. See, e.g., Whitehouse-III at page 7 (rejecting, as unreliable, Roddewig's testimony regarding the reproduction-cost approach); *id.* at page 13 (noting Roddewig's unreliable or inadequate explanations with respect to certain inputs under the income approach); *id.* at pages 18-19 (noting ‘inappropriate‘ dissimilarities in comparables found by Roddewig and testimony by Roddewig that ‘defies common sense‘ in rejecting aspects of his use of the comparable-sales approach).

[FN56]. As noted, the Tax Court effectively disregarded the Fifth Circuit's conclusion that the easement itself precluded Whitehouse from building on top of the Kress Building. See note 54, *supra*. However, having been directed by the Fifth Circuit to take into account the contiguous Kress Building in valuing the easement, the Tax Court multiplied the square footage of the Kress Building as it stood (16,210) by the court's before-easement and after-easement price value per square foot for the Maison Blanche Building (this multiple was determined in Whitehouse-I). By adding the square footage of the Kress Building to the valuation formula, the Tax Court increased the value of the easement by a mere $65,415 (about 3.6%) to $1,857,716. As a result, Whitehouse's claimed valuation of $7.445 million remained well within the 400% gross overvaluation misstatement range for purposes of imposing the 40% accuracy-related penalty. Whitehouse-III at pages 26-27.

[FN57]. See notes 43 and 45, *supra*.

[FN58]. See note 43, *supra* (consideration of the impact of not only the easement but also the legal and functional combination of the buildings as a result of the condominium declaration and renovation plans, respectively).

[FN59]. See, e.g., Whitehouse-II at 338 (‘[D]etermining the easement's effect on the fair market value of the Kress building ... is crucial for determining the fair market value of the easement.‘); *Id.* at page 340 (‘The effect of the easement's impact on the property's fair market value, such as prohibiting building 60 additional rooms on top of the Kress building, is a question of fact for the tax court to decide on remand.‘).

[FN60]. See Whitehouse-III at page 19 (‘We do not need to choose between the two experts' opinions of highest and best use, since ... it would make no difference.‘) *id.* at pages 17-19 (the Tax Court found that it did not matter if the highest and best use was determined to be a luxury or non-luxury hotel, and instead concluded that the property's value should be determined by looking to its ‘second-best use,‘ as discussed in Van Zelst, 100 F.3d 1259, 78 AFTR2d 96-7106 (CA-7, 1996)). In Van Zelst, the Seventh Circuit cited McAfee and McMillan, ‘Auctions and Bidding,‘ 25 J. Econ. Lit. 699 (1987), on the subject of auction bidding, as the source of its own ‘second-best use‘ valuation analysis. See also note 61, *infra* (additional reference to the ‘second-best use‘ analysis derived from the Van Zelst case and the McAfee and McMillan article).

[FN61]. Note 60, *supra*.

[FN62]. See Whitehouse-III at page 17 (the Tax Court determined that it should disregard the ‘highest and best use‘ analysis directed by the Fifth Circuit in Whitehouse-II in favor of a ‘second-best use‘ analysis used by the Seventh Circuit in Van Zelst, *supra* note 60 (citing McAfee and McMillan, *supra* note 60)).

[FN63]. Whitehouse-III at page 18.

[FN64]. *Id.*

[FN65]. *Id.*

[FN66]. *Id*. The Tax Court did not discuss the easement's impact on the ability to add rooms on top of the Kress Building in this portion of its opinion, as it would later reject the notion that this prohibition stemmed from the easement itself, concluding that any such restriction that arose under Louisiana law was personal to Whitehouse and would not accrue a future owner of the Kress Building alone (necessarily, this required the Tax Court to discount the Fifth Circuit's determination that, practically speaking, the Maison Blanche Building and Kress Building constituted a single unit as of the date of the easement, even if not legally combined until the condominium declaration was recorded the next day).

[FN67]. Whitehouse-III at page 25 (‘We do not find in the operative terms of the [easement] any prohibition restricting Whitehouse from building atop the Kress Building.‘).

[FN68]. Whitehouse-III at page 25.

[FN69]. *Id.* (‘To accept that servitude of view (a predial servitude) is established by implication, however, is prohibited.‘) (citing Palomeque v Prudhomme, 664 So.2d 88 (La. 1995)).

[FN70]. See Whitehouse-III at pages 25-26 (‘[W]e have no assurance that a successor owner of the Maison Blanche Building (whether united with the Kress Building or not) would [agree not to block the view of the side of the Maison Blanche Building].... No one coming across the conveyance in the conveyance records ... could determine from its terms that they were prohibited (if they owned the Maison Blanche Building) from building atop the Kress Building...‘).

[FN71]. See Whitehouse-III at page 21 (‘[U]nless the obligation is, or constitutes part of, a perpetual conservation restriction, that reduction in value cannot be counted as part of [sic] qualified conservation contribution. ‘) (citing Reg. 1.170A-14(h)(3)). Interestingly, the Fifth Circuit cited the same regulation provision for the proposition that the effect of the easement on the fair market value of all contiguous property owned by Whitehouse must be determined in valuing the easement (without limitation for the easement actually burdening the contiguous property). See Whitehouse-II at 338.

[FN72]. See Whitehouse-III at page 26 (‘Notwithstanding our conclusion about the terms of the conveyance, we shall, consistent with the instruction of the Court of Appeals, reconsider the value of the servitude on the assumptions that, while it does not burden the Kress Building, it restricts Whitehouse from building atop it and that separate ownership of the Maison Blanche and Kress Buildings is unlikely (thus, in effect, making that restriction perpetual. ‘). Additionally, the Tax Court applied a price per square foot that it established under its comparable-sales method in Whitehouse-I by analyzing only the Maison Blanche Building and comparables without consideration of the additional hotel rooms on top of the Kress Building. Thus, the Tax Court (in following the Fifth Circuit's instructions) presumably should have calculated the before-easement value by also considering the additional rooms but calculating the after-easement value without the additional rooms.

[FN73]. See note 56, *supra*.

[FN74]. Section 6664(c) provides for a reasonable cause exception to the Section 6662 penalty if the taxpayer can show that he or she acted in good faith in assessing the proper tax liability. See Section 6664(c)(1). With respect to gross valuation misstatements, Section 6662(c)(2) further requires the taxpayer show that (1) the claimed value of the property was based on a qualified appraisal, and (2) the taxpayer made a good-faith investigation of the value of the contributed property. Since the IRS did not dispute whether Whitehouse obtained a qualified appraisal, the dispute over reasonable cause and good faith in Whitehouse-III principally involved the Section 6664(c)(2)(B) requirement that Whitehouse show that it made a good-faith investigation of the value of the contributed property (i.e., the easement).

[FN75]. See Whitehouse-III at page 34.

[FN76]. As noted by the Tax Court, unlike the taxpayer's expert at trial, Cohen valued only the Maison Blanche in his appraisal report. Whitehouse-III at page 29.

[FN77]. Whitehouse-III at page 31 (the Tax Court noted that the lack of evidence regarding any investigation of the substantial appreciation in value under the Cohen Appraisal indicated a failure by anyone to even consider the valuation issue and, thus, no good faith investigation was made).

[FN78]. See Whitehouse-III at page 34 (the Tax Court rejected any argument that, by hiring experienced firms in connection with filing its tax return, Whitehouse had met the requirements for the exception to the penalty).

[FN79]. Whitehouse-III at page 34.

[FN80]. See Woodridge et al, ‘Circuit Courts Speak on Conservation Easements, But Is the IRS Listening?‘ 24 Exempts 4 at page 35 (Jan/Feb 2013).

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