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In Recognition of the 32nd Anniversary of the Americans with Disabilities Act (ADA)

By Daniel S. Elkus



On July 26, 1990, President George H.W. Bush signed the Americans with Disabilities Act (the “ADA”) on the South Lawn of the White House. During his remarks, President Bush stated: “I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down.”¹

The ADA bans discrimination against individuals with disabilities in employment, communication, transportation, education and all public and private places open to the general public.² ADA regulations by the Department of Justice recognize the importance of accessibility of historic structures and require historic structures be brought into ADA compliance to the maximum extent feasible, while maintaining the property’s historic characteristics.³

Over 30 years after the ADA’s passage, on March 12, 2021, IRS Advice Memorandum 2021-001 stated a taxpayer may add an ADA-required accessibility ramp to a Certified Historic Structure (“CHS”) to meet the accessibility requirements of the ADA.⁴ The IRS Chief Counsel stated in AM 2021-001 that making this ADA-required modification would not jeopardize the donor’s charitable contribution tax deduction for contributing the CHS to charity nor did it violate the tax code’s historic preservation requirements for CHS of Section 170(h)(4)(B).

The following article, written to coincide with the ADA’s 32nd anniversary on July 26, 2022 discusses AM 2021-001 in detail and its practical impacts supporting greater accessibility of CHS. AM 2021-001 embodies the ADA’s intent stating installing the ramp does not violate the Code’s prohibition on any change to the CHS’s exterior inconsistent with its historical character.

ENDNOTES

- 1 Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act, July 26, 1990, available at: https://www.ada.gov/ghw_bush_ada_remarks.html. (Website last accessed July 2, 2022.)
- 2 What is the Americans With Disabilities Act (ADA)?, ADA National Network, available at: <https://adata.org/learn-about-ada>. (Website last accessed July 2, 2022.)
- 3 28 C.F.R. 35.150; 28 C.F.R. 35.151; See also 28 C.F.R. 36.405.
- 4 I.R.S. A.M. 2021-001 (March 12, 2021) A CHS is a structure which is either: [1] listed in the National Register of Historic Places; or [2] located in a Registered Historic District and deemed historically significant by the Secretary of the Interior). See I.R.C. §§ 170(h)(4)(C), 170(h)(4)(B).

IRS Allows Conservation Easement Donors to Add ADA Accessibility Ramp to Certified Historic Structure

By Daniel S. Elkus

“I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down.”¹

In an Advice Memorandum released March 12, 2021 (“AM 2021-001”), the Internal Revenue Service (the “IRS”) released guidance that further realizes President George H. W. Bush’s vision of inclusiveness under the Americans with Disabilities Act (the “ADA”), as expressed above, by advising that a taxpayer could add an accessibility ramp to a Certified Historic Structure (“CHS”) in order for the CHS to comply with the ADA without jeopardizing a charitable contribution for the donation of a façade easement on the CHS. The IRS advised that such a modification was permissible upkeep of the CHS that did not violate the historic preservation restrictions of Section 170(h)(4)(B)(i) of the Internal Revenue Code of 1986 (the “Code”), which prohibits changes to the exterior of a historic structure that are inconsistent with the historical character of the CHS.² Although the Advice Memorandum is not precedential in nature,³ it does provide a basis for a donor to take a tax reporting position that installing an accessibility ramp – and potentially other ADA-required modifications – to bring a CHS into compliance with the ADA does not disqualify the donor from claiming a charitable contribution deduction. The ability to make such modifications in turn will have the benefits of broadening opportunities to increase ADA accessibility, increasing access to CHS both for individuals with disabilities and others who experience the same or similar access difficulties, and potentially widening the donor base of CHS contributors. This has been an area of uncertainty without direct guidance under applicable income tax laws and the IRS has now itself assisted in removing a brick in the wall of exclusion by removing a barrier to implementing ADA-required accessibility modifications to CHS.

This article first discusses the technical requirements for a taxpayer to obtain a charitable contribution tax deduction for the donation of a façade easement preserving a CHS to a qualified recipient organization. The article then discusses AM 2021-001 and explains the legal and public policy considerations that support the conclusions reached therein. Following this discussion, the potential for the Advice Memorandum to increase charitable contributions of CHS and improve physical ADA accessibility of CHS through this public policy-driven guidance is addressed.

OVERVIEW OF THE INCOME TAX DEDUCTION FOR CHARITABLE CONTRIBUTIONS

Section 170 of the Code generally provides that a taxpayer’s contributions of money or property to, among other recipients, a charitable organization are deductible for federal income tax purposes, subject to certain exceptions and limitations.⁴ One such limitation, Section 170(f)(3), provides that donors are generally prohibited from any deduction with respect to the contribution of a partial interest in property donated to charity if the partial interest is not in trust, unless a specified exception applies.⁵ The purpose of this limitation is to prevent a taxpayer from retaining an interest in property donated to a charity while also qualifying for a charitable contribution deduction. As discussed in greater detail below, there is an exception to the partial interest rules that permits taxpayers to claim an income tax deduction for the fair market value of a donated partial interest in property that meets the “qualified conservation contribution” (“QCC”) exception.⁶

THE QUALIFIED CONSERVATION CONTRIBUTION EXCEPTION

The QCC exception permits a charitable contribution deduction for donations of property that meet the following three requirements: (1) the contributed property must be a “qualified real property interest” (“QRPI”),⁷ (2) the donee must be a “qualified organization” (“QO”),⁸ and (3) the contribution must be exclusively made and perpetually preserved for “conservation purposes.”⁹

WHAT QUALIFIES AS A QUALIFIED REAL PROPERTY INTEREST?

A QRPI includes a restriction granted in perpetuity on the use of real property.¹⁰ The restriction is required to be protected in perpetuity by legally enforceable means, such as recording of the easement deed to prevent the interest in the property being used for purposes not in compliance with the conservation purposes of the contribution.¹¹ The conservation restriction must be in effect when the property is donated to a QO.¹²

WHICH ORGANIZATIONS ARE ELIGIBLE QUALIFIED ORGANIZATIONS?

Only certain entities may qualify as a QO: (1) a governmental unit,¹³ (2) a publicly-supported charitable organization as defined in Sections 170(b)(1)(A)(vi) or 509(a)(2),¹⁴ and (3) a supporting organization as described in Section 509(a)(3) that is controlled by a publicly-supported charitable organization or governmental unit.¹⁵ The Treasury Regulations additionally specify that in order to meet the requirements for a QO, such an organization must also operate primarily or substantially for a conservation purpose and have sufficient resources to enforce the restrictions necessary to preserve the historic nature of the contributed property.¹⁶

WHICH CHARITABLE CONTRIBUTIONS MEET THE CONSERVATION PURPOSES REQUIREMENT?

Conservation purposes under Section 170(h)(4)(A)(iv) include, among other items, “the preservation of ... a certified historic structure [CHS].”¹⁷ A CHS is defined in Section 170(h)(4)(C) as “(1) any building, structure or land area that is listed in the National Register [of Historic Places] or (2) any building that is located in a Registered Historic District (defined in Section 47(c)(3)(B)) and certified by the Secretary of the Interior to the Secretary [of Treasury] as being of historic significance to the district.”¹⁸ Flush language in Section 170(h)(4)(C) provides that “[a] building, structure, or land area satisfies the preceding sentence if it satisfies” [the requirements of a CHS] either: (1) when transferred to a QO or (2) ... on the due date (including extensions) for filing the transferor’s income tax return for the tax year when the transfer is made.”¹⁹ The public must have some visual access to the property to be able to view its historic characteristics.²⁰

Section 170(h)(4)(B) provides special rules applicable to contributions of QRPIs that restrict modifications to the exteriors of CHSs commonly known as “façade easements” to ensure the historical character of the exterior of the building is preserved.²¹

There has been some consideration of the rules governing QRPIs by the courts. The Tax Court has ruled that both the grant of a QRPI to a QO and the requirement of the QO to protect the QRPI by prohibiting modifications that alter its historic character must both be in perpetuity. In the Tax Court cases of *Caroll v. Commissioner* and *Belk v. Commissioner*, the Tax Court held the restrictions to grant a QRPI to a charitable organization and the separate requirement on that organization to protect the historic nature of the QRPI are each assessed separately.²² Further, each restriction is required to be met in order for the QRPI to be valid.²³ Additionally, in assessing if an interest in real property meets the requirements of a QRPI, the donor must relinquish control of the donated property.²⁴ The Tax Court has generally not upheld claimed deductions of donated property where donors continue to have the ability to control aspects of the property after the donation, although the Circuit Courts of Appeal have often been more lenient in their review of Tax Court determinations of QRPI qualification.²⁵

A contribution of a façade easement on the side of a CHS either located in a registered historic district or listed in the National Register of Historic Places is not considered to be made exclusively for conservation purposes unless it meets the following statutory requirements: the restriction (1) “preserves the entire exterior of the building (including the front, sides, rear, and height of the building)” and (2) “prohibits any change to that exterior that is inconsistent with the historical character of such exterior”.²⁶ The donor and the recipient entity must enter into a written agreement certifying under penalty of perjury that the recipient entity: (i) qualifies as a QO with a purpose of, among other purposes, historic preservation²⁷ and (ii) has sufficient resources to manage and enforce the restrictions and has committed to doing so.²⁸ When accepting a QCC, a QO must ensure that the written agreement conveying the QRPI to the QO prohibits transfer of the QRPI unless the QO mandates that the donor’s original purposes be carried out as a required condition to a subsequent transfer of the interest.²⁹ In order to claim the deduction, the taxpayer must include documentation meeting certain statutory substantiation requirements of Section 170(h)(4)(B)(iii) with their income tax return claiming the contribution deduction.³⁰ Further, the Treasury Regulations require that if future development of such property is permitted under the terms of the deed transferring the property, such development must comply with the relevant governmental authority’s construction and rehabilitation codes, rules and regulations applicable to the particular historic district where the CHS is located.³¹

AM 2021-001 AND PERMISSIBLE UPKEEP OF A CHS

AM 2021-001 addresses whether the donor of a facade easement on a CHS who installs an accessibility ramp to comply with the ADA made a permitted modification of the CHS in accordance with Section 170(h)(4)(B)(i). As described above, this Code provision disallows a charitable contribution deduction for a QCC if there is “any change in the exterior of the building which is inconsistent with the historical character of such exterior.”³² Before the release of AM 2021-001, no authority had addressed whether a taxpayer would be permitted to add an accessibility ramp to bring a CHS into compliance with the ADA and also continue to qualify for the charitable contribution deduction by not violating the historic preservation requirements under Section 170(h)(4)(B)(i). In the Advice Memorandum, the IRS Chief Counsel reviewed the relevant statutory and regulatory provisions applicable to charitable contributions of façade easements and CHS. The IRS Chief Counsel first concluded that upkeep of a CHS is an essential activity that supports the historic preservation goals underlying the QCC exception. The Chief Counsel then concluded that the installation of an accessibility

ramp to a CHS, if required to comply with the ADA, is similar to such upkeep. Accordingly, the installation would not jeopardize the donor of a façade easement's charitable contribution deduction under Section 170(h)(4)(B).

INITIAL THOUGHTS ON AM 2021-001

The IRS has adopted what appears to be a permissive interpretation of the intent of the relevant Code provisions and Treasury Regulations by treating upkeep of a CHS as an essential activity and interpreted “upkeep” broadly to include the addition of an ADA-required accessibility ramp. In reaching its conclusions, the Chief Counsel acknowledged that “upkeep” (however construed) is not squarely addressed by Section 170(h)(4)(B) or corresponding Treasury Regulations. Nevertheless, the IRS reached a conclusion that appears eminently reasonable, since adding an ADA-required accessibility ramp removes an exclusionary barrier from and promotes increased access to the CHS for individuals with disabilities and achieves the aims of historic preservation by facilitating public access to CHS. Given the regulatory requirement of Treasury Regulation § 1.170A-14(d)(5)(iv)(B) to ensure public access of CHS, AM 2021-001 is welcome guidance which supports this requirement by effectuating access for individuals with disabilities (and other members of the general public who benefit from the easier access to the CHS facilitated by the ramp).³³ As a secondary benefit, the addition of an ADA-required accessibility ramp indirectly supports via the “curb-cut effect” (where accessibility modifications benefit not only individuals with disabilities but also society at large). Here, one form of upkeep of a CHS (installing the ramp) will even expand the ability to perform other forms of upkeep of the CHS: in addition to primarily providing for accessibility, the ramp also improves ease of access for physical upkeep of the CHS by QOs seeking to preserve the historic characteristics of the exterior of the CHS, consistent with the QO's legal obligation as recipient of the QCC.³⁴

Notably, the guidance within AM 2021-001 does not discuss whether the modification occurred before or after the donation. However, AM 2021-001 provided that ADA compliance modifications are permissible as “similar to upkeep” and in order for a CHS encumbered by a façade easement to be preserved, upkeep of the CHS is essential for its historic preservation. This suggests that a CHS subject to a façade easement is able to be modified for future ADA compliance purposes in the event that those compliance requirements change at a later time.

Prior to the issuance of AM 2021-001 there was an absence of direct IRS guidance on two issues: (1) whether the addition of an accessibility ramp for purposes of bringing the CHS into compliance violated the historic preservation requirements under Section 170(h)(4)(B)(i), and (2) as a consequence, if this modification could cause a retroactive disallowance of the deduction for the QCC. Prior to AM 2021-001, QOs were unable to steer prospective donors towards any direct IRS guidance on this issue. Regardless of this (prior) lack of explicit guidance, the QO is obligated by statute to protect in perpetuity the historic character of the entire exterior of a CHS and is prohibited from allowing any change to the CHS's exterior which is inconsistent with its historical character as a condition of the QO's acceptance of the contribution as a QCC.³⁵ Due to the specific statutory architectural historic preservation requirements for CHS that recipient QOs are obligated to uphold and the related statutory prohibition on modifications to the historic characteristics of the exterior of CHS, this lack of direct guidance to QOs and donors did not provide any authority directly supporting making ADA modifications to CHS. Further, in an absence of direct IRS guidance there was potential risk (prior to the release of AM 2021-001) that the deduction could be disallowed following the modification to install an ADA-required accessibility ramp and concern regarding whether installing an accessibility ramp to meet ADA requirements would violate the historic preservation requirements of Section 170(h)(4)(B). Each of these considerations are at least partially allayed as AM 2021-001 explicitly permits this ADA-required modification, stating that (i) the installation of the accessibility ramp to meet ADA compliance requirements does not run afoul of the Code's historic preservation requirements and (ii) this modification does not cause a disallowance of the contributing taxpayer's deduction under Section 170(h)(4)(B). As a result of this guidance, donors and qualified organizations should be empowered by this guidance to achieve the spirit of President George H. W. Bush's vision when signing the ADA and increase ADA physical accessibility of CHS.

IMPACT OF THE ADVICE MEMORANDUM ON TAX REPORTING

The Advice Memorandum is an important piece of guidance released by the IRS because it demonstrates the IRS's thoughtful interpretation of the charitable contribution rules in the context of ADA-required modifications to a building. Taxpayers considering such modifications should derive comfort from the IRS's reasoning and conclusions in AM 2021-001. Nevertheless, this guidance is non-precedential, meaning taxpayers are not permitted to rely on this guidance in determining how to take income tax reporting positions.³⁶ The IRS should be applauded for releasing this guidance; still better would be the IRS's issuance of formal guidance (such as a Revenue Ruling) on this issue and similar issues that taxpayers could formally rely upon for tax reporting purposes. The release of formal IRS guidance would further promote ADA accessibility by providing taxpayers guidance that can be directly relied upon to substantiate that the addition of an accessibility ramp to achieve ADA compliance does not violate the Code's historic preservation requirements of CHS. In light of the significant benefit that the addition of ADA accessibility ramps to CHS provides to individuals with disabilities, charitable organizations and society at large, Treasury would be well-served to include this issue in the Department of Treasury Priority Guidance Plan to promote the issuance of formal precedential guidance by the IRS.³⁷ Such guidance (if issued) would

lower the likelihood that taxpayers making such modifications would be subject to a deduction disallowance or being subject to tax penalties or interest on an income tax deficiency, promoting increased donations of façade easements by taxpayers and ADA accessibility of CHS. Absent such formal guidance, taxpayers in comparable situations who desire greater comfort on the availability of their charitable contribution deduction should consider whether to seek a private letter ruling (“PLR”) before making such a modification.³⁸

MEMORANDUM’S POTENTIAL IMPACT ON CHARITABLE CONTRIBUTIONS AND SOCIETY AT LARGE

The IRS’s interpretation of the charitable contribution rules applicable to donations of façade easements on CHS is favorable and should have the following positive effects. Installation of an ADA-compliant accessibility ramp increases access to CHS not only for individuals with disabilities, but also for the broader public. Others who will be positively impacted include people who, while not disabled under the ADA, have somewhat limited mobility and families using strollers who each benefit from the ramp’s ease of access. The addition of an accessibility ramp provides for greater access to a site, allowing a broader population to access a CHS.

The ability to provide upkeep, operation of and maintenance of a CHS is also improved under the Advice Memorandum’s guidance and provides an example of the “curb-cut effect.” As noted above, this occurs when the addition of accessibility modifications benefits society at large in addition to providing accessibility for people with disabilities.³⁹ Installing an accessibility ramp also provides the ancillary benefits to society (in addition to principally providing for accessibility) of allowing for greater ease of access to the CHS and an increased ability to perform maintenance allowing the CHS to be accessed for a longer period of time without interruption and supporting upkeep of the CHS, the bases of the decision of AM 2021-001 which directly supports this ADA modification. As this IRS guidance has the potential to increase the prevalence of physical ADA modifications of CHS, AM 2021-001 may create significant positive externalities for society at large even beyond its stated direct purpose to increase accessibility for individuals with physical disabilities. Further, the conclusion reached in AM 2021-001 directly substantiates that ADA modifications are not secondary to the Code’s charitable contribution and historic preservation provisions. As a further instance of AM 2021-001’s potential to provide for greater accessibility of CHS, this guidance may be submitted as part of the Secretary of the Interior’s public comment advisory process (which regulates ADA modifications to CHS) to determine whether a proposed ADA modification meets the advisory guidelines for historic preservation.⁴⁰ This guidance may be submitted as persuasive (non-binding) authority of a Federal regulatory bureau (the IRS) substantiating that adding an accessibility ramp to the exterior of a CHS to achieve ADA compliance does not violate the Code’s historic preservation requirements and is not inconsistent with the historical character of the CHS which supports the addition of this ADA-required accessibility ramp and additional ADA modifications to CHS.

CONCLUSION

Advice Memorandum 2021-001 provides helpful guidance allowing an ADA-required accessibility ramp to be added to a CHS as permitted upkeep that does not violate the historic preservation requirements under Section 170(h)(4)(B)(i). The IRS Chief Counsel stated that the modification is permitted and will not invalidate the donor’s federal income tax deduction for the contribution of a façade easement on a CHS. This Advice Memorandum has the potential to greatly improve ADA accessibility of CHS by increasing opportunities for donors of façade easements and QOs to make required physical ADA-compliance modifications. These modifications provide greater physical access to CHS, allowing a wider range of individuals to independently access the structure, including individuals with physical, visual, intellectual and other disabilities. Further, the CHS and public at large both benefit from the increased ease of access and ability to perform upkeep of the CHS because of the installation of an ADA-compliant accessibility ramp. AM 2021-001 may increase the donation of façade easements on a CHS and the ADA-accessibility of a CHS due to this guidance upholding the income tax deduction when an ADA accessibility ramp was added to the CHS to achieve ADA compliance. This Advice Memorandum has the opportunity to combine architectural accessibility with income tax planning to promote greater access to CHS providing a significant public benefit to historic structures, individuals with disabilities and society at large.

ABOUT THE AUTHOR

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ENDNOTES

- 1 Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act, July 26, 1990, available at: https://www.ada.gov/ghw_bush_ada_remarks.html (website last accessed July 2, 2022).
- 2 I.R.S. A.M. 2021-001 (March 12, 2021).

- 3 See Mitchell Rogovin & Donald L Korb, *The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, TAXES - THE TAX MAGAZINE, August 2009, at 31. An Advice Memorandum ("AM") is legal advice issued by the national office of IRS Chief Counsel to IRS Chief Counsel personnel in the field interpreting or discussing a Code provision. An AM may provide insight into the reasoning of the IRS Office of Chief Counsel on analysis of particular issues. However, AM are to be viewed with caution by taxpayers and practitioners as the AM is non-binding and the IRS is not required to apply the result reached by the AM in matters other than explicitly stated in the AM. As such, taxpayers and practitioners are not to rely on an AM as precedent, in determining how to structure transactions or take tax return positions.
- 4 All "I.R.C. §" or "Reg. §" references are to sections of the Code or the Department of Treasury Regulations promulgated thereunder, unless otherwise specified. See I.R.C. § 170.
- 5 I.R.C. § 170(f)(3)(A). Under I.R.C. § 170(f)(3)(B)(iii), the prohibition on a taxpayer's ability to deduct that taxpayer's transfer of a partial interest to charity specifically excludes taxpayers transferring a QCC of a QRPI to a QO exclusively for conservation purposes. See also I.R.C. § 170(h)(1)(A-C).
- 6 I.R.C. § 170(h). See also Reg. § 1.170A-14(a). If the requirements of this partial interest exception are met, then the permitted deduction for the contribution of the partial interest is limited to 50% of the donor's adjusted gross income minus the total value of any other charitable contributions the donor made in the same tax year. See I.R.C. § 170(b)(1)(E)(i).
- 7 I.R.C. § 170(h)(1)(A).
- 8 I.R.C. § 170(h)(1)(B).
- 9 I.R.C. § 170(h)(1)(C).
- 10 A donation of a façade easement meets this third category as a donation of real property subject to a perpetual conservation restriction which restricts the permitted uses of the property. See I.R.C. § 170(h)(2) and Reg. § 1.170A-14(b). Other QRPIs include (1) the donor's entire interest in real property (except if the donor is donating a qualified mineral interest where donation of a partial interest may be permissible) and (2) donation of a donor's remainder interest. See also I.R.C. § 170(h)(2)(A) and (B).
- 11 *Zarlengo v. Commissioner* 108 T.C.M. (CCH) 155, 159; See also Reg. § 1.170A-14(g)(1).
- 12 Reg. § 1.170A-14(c)(2).
- 13 I.R.C. § 170(h)(3)(A). See also Reg. § 1.170A-14(c)(1)(i).
- 14 I.R.C. § 170(h)(3)(B). See also Reg. § 1.170A-14(c)(1)(ii) and (iii).
- 15 I.R.C. § 170(h)(3)(C), See also Reg. § 1.170A-14(c)(1)(iv).
- 16 Reg. § 1.170A-14(c)(1).
- 17 I.R.C. § 170(h)(4)(A)(iv).
- 18 I.R.C. § 170(h)(4)(C), See also Reg. § 1.170A-14(d)(5)(iii).
- 19 I.R.C. § 170(h)(4)(C)
- 20 Reg. § 1.170A-14(d)(5)(iv)(B).
- 21 See also Reg. § 1.170A-14(b)(2) ; C.C.A. 2009-43-033 (October 23, 2009); See also Reg. § 1.170A-14(h)(3)(iii), Ex. (12).
- 22 See *Carroll v. Commissioner*, 146 T.C. 196, 226; *Belk v. Commissioner* 140 T.C. 1, 12.
- 23 See *Zarlengo v. Commissioner*, *supra* at 159.
- 24 I.R.C. § 170(h)(2)(A). See also Reg. § 1.170A-14(b)(ii).
- 25 See *Pine Mountain Preserve, LLLP v. Commissioner*, 978 F.3d 1200, 1208 (11th Cir. 2020).
- 26 I.R.C. § 170(h)(4)(B)(i).
- 27 I.R.C. § 170(h)(4)(B)(ii)(I).
- 28 I.R.C. § 170(h)(4)(B)(II).
- 29 Reg. § 1.170A-14(c)(2).
- 30 The statutory substantiation requirements of I.R.C. § 170(h)(4)(B)(iii) include: (1) a qualified appraisal of the QRPI in accordance with I.R.C. § 170(f)(11)(E), (2) photographs of the building's entire exterior, and (3) a description of all restrictions on the development of the building. I.R.C. § 170(h)(4)(B)(iii)(I)-(III).
- 31 Reg. § 1.170A-14(d)(5)(i).

- 32 I.R.C. § 170(h)(4)(B)(i).
- 33 Reg. § 1.170A-14(d)(5)(iv)(B). *See also Supra* Endnote 2.
- 34 *See* Angela Grover Blackwell, *THE CURB-CUT EFFECT*, *STANFORD SOCIAL INNOVATION REVIEW*, Winter 2017. As discussed in this article, “the curb-cut effect” refers to the positive effect that ADA-required accessibility modifications have on the broader population in addition to the directly intended beneficiaries of individuals with disabilities under the ADA. Initially, “the curb cut effect” described the effect on society at large when curb cuts were installed on sidewalks following the passage of the ADA to meet ADA accessibility requirements. Not only did this installation benefit individuals with disabilities such as those who used wheelchairs or other mobility devices, but it also benefited individuals pushing strollers and those making maintenance deliveries or moving equipment.
- 35 The Department of Justice (“DOJ”) and Department of the Interior (“DOI”) regulate ADA accessibility modifications of historic public property (including CHS). *See* Revised by Anne E. Grimmer, *SECRETARY OF THE INTERIORS STANDARDS FOR THE TREATMENT OF HISTORIC PROPERTIES AND GUIDELINES FOR PRESERVING REHABILITATING, RESTORING AND RECONSTRUCTING HISTORIC BUILDINGS (2017)*, U.S. DEP’T OF THE INTERIOR NATIONAL PARK SERVICE TECHNICAL PRESERVATION SERVICES. *This guidance and DOJ regulations discuss the requirements to meet the statutory historic preservation requirements and effectuate ADA accessibility for CHS which are being altered as well as for CHS which are not being altered. In these regulations, the DOJ strikes a balance between the competing aims of accessibility and historic preservation. In each case, the regulations emphasize that accessibility is to be achieved to the maximum extent feasible. Despite the historic preservation requirements, DOJ regulations addressing the path of travel for historic public structures altered after January 26, 1992 support increasing accessibility by stating that historic structures “shall be altered... to the maximum extent feasible and all facilities [or portions of facilities] shall be made accessible to the extent it is not structurally impracticable.” 28 C.F.R. 35.151(a)(2). If such modifications are not impracticable, the modifications only need to be made if the modification “does not threaten or destroy the historic significance of the building or facility.” 28 C.F.R. 151(b)(3)(i) “In rare circumstances where the unique characteristics of the terrain prevent the incorporation of accessibility features, [then]... compliance is required to the extent it is not structurally impracticable”. 28 C.F.R. 35.151(b)(3)(ii). If accessibility modifications are unable to be made for reasons of structural impracticability for individuals with certain disabilities, then accessibility is to be provided to individuals with other disabilities. *See* 28 C.F.R. 35.151(b)(3)(ii) Even If modifications are not made then such buildings are to be made accessible to individuals with disabilities to the maximum extent possible while maintaining the property’s historic characteristics. *See* 28 C.F.R. 35.151(b)(3),(4). *See also* 28 C.F.R. 36.405 which states that alterations to designated historic property (including CHS) are to be made accessible to the maximum extent feasible. Similarly, supporting increased accessibility DOJ regulations provide that existing public facilities are to be made accessible to the extent that modifications need not threaten or destroy the historic property’s historic significance (for historic property, this may also include alternative means of access if physical modifications are not permissible). *See* 28 C.F.R. 35.150(a)(2),(b)(3).*
- 36 *See supra*, Endnote 3. An AM does not provide substantial authority from which a taxpayer can take a tax reporting position and be protected from a tax penalty for a substantial understatement of income. *See* Reg. § 1.6662-4(d)(3)(iii) (not including AM in the list of specific authorities upon which a taxpayer is permitted to rely for penalty protection from a substantial understatement of income).
- 37 The Priority Guidance Plan is used by the Department of Treasury and the IRS to identify and prioritize tax matters to be addressed in regulations, rulings and published administrative guidance. *See* Notice 2022-21, 2022-20 I.R.B. 1057.
- 38 *See supra* Endnote 3, at 26-28 Taxpayers considering seeking an IRS Private Letter Ruling (“PLR”) regarding a proposed ADA accessibility modification of a CHS should bear in mind that, although this issue is not barred from receiving a PLR under Rev. Proc. 2022-1 (Secs. 11.01-11.02), the IRS is declining to issue rulings for certain conservation contributions and “comfort rulings” where the IRS views the issues as adequately addressed by case law and guidance. If a taxpayer requests and receives a PLR on the requested inquiry, such taxpayer may rely upon it for taking the return positions ruled on in the PLR and is to include the PLR (with any required documentation when filing their income tax return with the IRS. PLR’s may not be used and cited as precedent. I.R.C. § 6111(k)(3). However, while PLRs are not binding precedential authority, PLRs are generally accepted as reflective of the administrative practice and viewpoint of the IRS as of the date of issue. *Hanover Bank v. Commissioner*, 369 U.S. 672, 686 (1962) (PLRs are evidence of IRS administrative practice) and *Rowan Cos. v. United States*, 452 U.S. 247, 261 n. 17 (PLRs although not precedential are reflective of the IRS’s viewpoint on the addressed issues at the time of issuance). A PLR if issued after October 31, 1976 may be considered in determining if a taxpayer’s position is supported by substantial authority (and thus a taxpayer relying on a PLR *may* be protected from an income tax penalty due to a substantial understatement of income.) *See* Reg. § 1.6662-4(d)(3)(iii). Additionally, taxpayers may also be well-served to consider the time and expense associated with seeking a PLR.
- 39 *Supra* Endnote 32.
- 40 36 C.F.R. 800.6