

## Cell Easements are Just Easements



With the continuing expansion of cellular coverage across the United States, owners of land suitable for placement of cellular towers are being approached by cellular communications companies that desire to acquire easements, licenses or leasehold interests as a means of expanding their cellular coverage. Depending on the amount of suitable sites in the area and amount of cellular traffic, a cellular transaction can present a windfall for the property owner, but the way in which the transaction is structured can produce very different tax results for the owner.

An easement, sometimes characterized as a “communications easement”, constitutes a transfer of an interest in the real property under state law. As such, the conveyance of an easement for consideration results in a sale taxable at (currently) lower capital gain rates. The creation of a lease or the grant of a license, on the other hand, results in a contract right to receive rent or license fees over time. Rents and license fees are generally included in the owner’s income when received and are taxed as ordinary income, at rates that are generally higher. Looking at the transactions from a non-tax perspective, the grant of an easement is usually not terminable by the owner since the grantee acquires a deeded interest in the real property itself. The grant of a license or fee, on the other hand, will be terminable upon the expiration of the lease or license term. Given the greater limitations on the owner’s future use of a property subject to a perpetual easement, the grant of an easement generally commands a much greater premium than the grant of a terminable license or term lease.

If the communication easement is perpetual (e.g., runs with the land), then there is yet another structuring opportunity that sets the easement apart from the grant of a license or leasehold. In many instances, the IRS has characterized a perpetual easement as property that is like-kind to a fee interest in real property for purposes of tax deferral under Internal Revenue Code Section 1031. Accordingly, if the transaction is structured as sale of a communication easement, the property owner would likely be able to engage a qualified intermediary to facilitate a 1031 exchange of the perpetual easement for other real property to be held by the owner for investment or for use in a trade or business. There is no similar opportunity to defer the tax arising out of a license fee or rent in the case of a lease apart from the limited deferral afforded by the owner’s receipt of license or lease payments over time.

In [PLR 9621012](#), the IRS determined that a perpetual scenic conservation easement on ranch land was like-kind with timberland, farmland, and ranch land. This ruling is based on the State’s civil code, which characterized a conservation easement as an interest in real property.

In [PLR 9232030](#), the IRS ruled that an agricultural easement was like-kind to a fee simple interest in real estate.

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In [PLR 200201007](#), the IRS ruled that a taxpayer's exchange of a perpetual conservation easement on a ranch for other ranch property qualified for Section 1031 tax deferral.

In [PLR 200651018](#), the IRS determined that a perpetual stewardship easement was like-kind to a fee interest in other real property.

In [PLR 9851039](#), the IRS came to the conclusion that the exchange of an agricultural conservation easement for a fee interest in other farm property was like-kind.

In [Rev. Rul. 72-549](#), easement and right-of-way that the taxpayer granted and the real estate properties that the taxpayer acquired [fee interests] qualify as like-kind property under §1031 of the Code.

In [Rev. Rul. 59-121](#), C.B. 1959-1, 212, conveyance of easement for land. Thus, the consideration received for the easement constituted proceeds from the sale of an interest in real property.

In [Rev. Rul. 68-331](#), C.B. 1968-1, 352, conveyance of an interest in a producing oil lease for a fee interest in an improved ranch held to be an exchange of property of a like-kind under §1031(a) of the Code since both the leasehold interest and the fee interest are continuing interests in real property.

In [Rev. Rul. 55-749](#), C.B. 1955-2, 295, land exchanged for perpetual water rights considered real property rights under applicable state law. This Revenue Ruling holds that the fee interest in the land and a water right in perpetuity are sufficiently similar to constitute property of like-kind for purposes of §1031(a) of the Code.

For more information on the computation of capital gain taxes see: [Capital Gain Tax Calculation](#).

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