INCLUDING AMENDMENT CLAUSES IN MASSACHUSETTS CONSERVATION RESTRICTIONS

At the last MLTC Steering Committee meeting (November 18), substantive discussions included the issue as to whether amendment clauses should be included in conservation restrictions, given the Internal Revenue service's recent efforts to reject charitable deductions where amendment provisions are included in conservation easements. This memo describes some of the issues involved, concluding that Massachusetts' land trusts may choose to delete amendment clauses in an abundance of caution about the issue, notwithstanding the Land Trust Alliance's apparent admonition that amendment clauses should be included in conservation easements as a matter of policy and practice.

The current IRS position may be summarized as considering any amendment language as violation of the perpetuity requirements of IRS regulations. In the case of *Kumar v. Commissioner of Internal Revenue* (currently before Tax Court), the IRS maintains that argument despite language in the conservation easement that the Holder may only agree to amendments "which are not inconsistent with the Conservation Purposes" of the easement, and "Holder shall have no right or power to agree to any amendments hereto that would result in this Conservation Easement failing to qualify as a valid conservation agreement under State Conservation Easement Law, as the same may be hereafter amended, or as a qualified conservation contribution under section 170(h) of the Internal Revenue Code and applicable regulations." The IRS position in *Kumar* and reportedly taken by IRS audit staff appears inconsistent with The IRS' *Conservation Easement Audit Techniques Guide (November, 2016)*, which states "An easement deed will fail the perpetuity requirements of § 170(h)(2)(C) and (h)(5)(A) if it allows any amendment or modification **that could adversely affect the perpetual duration of the restriction or conservation purposes**.(emphasis added) " The IRS position in *Kumar* would clearly jeopardize the charitable deduction associated with many of the conservation restrictions held by MLTC members.

Concerned for their donors' anticipated deductions (as well as the administrative costs of contesting an IRS denial of deduction), several Massachusetts land trusts have chosen to delete amendment clauses from CRs submitted to the state for approval. Although the Executive Office of Energy and Environmental Affairs (EEA) has approved CRs which omit amendment clauses, EEA has announced a current positon to generally require amendment clauses consistent with approved CR form. As of February 24, MLTC intends to ask EEA to reconsider this position.

The Land Trust Alliance, notably in its publication *Amending Conservation Easements: Evolving Practices and Legal Principles 2nd Edition* (November, 2016), endorses the principle that amendments are a necessary part of preserving conservation values of a property, preparing for the inevitable changes which shall occur over perpetuity. As noted in this publication:

"The occasional need to amend an easement is rooted in our inability to predict all of the circumstances that may arise in the future. Any decision to amend (or not to amend) a conservation easement must serve public interests by ensuring that conservation easements not only endure but are also robust, enforceable and fair, both to the public and to the landowners. The concept of amendment recognizes that neither original grantors nor land trusts are infallible,

that natural forces can transform a landscape in a moment or over a century and that amendments can strengthen protections as well as weaken them." The Alliance also notes that the inclusion of amendment language provides an opportunity to limit the conditions on which the parties may amend their document. Perhaps curiously, Standard 11 in the recently released Alliance "*Standards and Practices*" discusses the conditions upon which amendments should be considered, but does not address whether amendment clauses, *per se*, should be included in conservation easements. However, many believe that the Alliance's position includes that amendment clauses should continue to be included in all CRs, albeit perhaps with conditional language such as included in *Kumar*.

There is general consensus among conservation attorneys in Massachusetts that, even without an express authority, CRs are subject to amendment by the parties thereto in the same manner as other contracts and agreements, subject to approval by the same agencies which initially approve the CR. (We leave for another day whether there exists some threshold of substance under which no agency approval is warranted, such as scrivener's errors, although it is likely that any failure to receive all agency approvals jeopardizes the perpetuity protection of the statute, at least for the amended terms.) Similarly, there appears attorneys' agreement that an amendment clause which purports to condition any amendment (e.g., not reducing the conservation values of the CR) is likely binding to limit amendments only as a statement of initial intent of the parties, and perhaps important guidance for any reviewing public agencies. There is also substantial agreement that the IRS is less likely to attack a Massachusetts CR for inclusion of an amendment clause, given the authority that EEA has over the wording and the determination of public benefit (and perhaps the enforcement, although that too may await another discussion) of the restriction.

Therefore, we believe that, at least until the IRS or federal courts clarify the conditions on which conservation easements may contain amendment clauses without IRS opposition, Massachusetts land trusts may favorably consider omitting amendment clauses from conservation restrictions which they understand are anticipated to involve a federal tax deduction.

Please note that this discussion does not deal with the practices, polices, conditions or standards on which a land trust should consider actually amending a conservation restriction. Volumes have been written on that topic (including S&P Standard 11 and Chapter 3 of *Amending Conservation Easements* noted above). Note also that both IRS positions and judicial consideration of these positions appears to be in some flux, to say nothing of possible tax law changes or difficult-to-predict White House policies which may affect deductions and perhaps qualified conservation contributions.

With Hope that this is helpful. (Appreciation is also noted for several attorneys whose ideas contributed to this, but who have had no opportunity to review or endorse.)

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