ENFORCEABLE IN PERPETUITY: SOME CONSERVATION RESTRICTION PROVISIONS THAT LAND TRUSTS SHOULD PAY CAREFUL ATTENTION TO, ANYWAY, BUT ALSO BECAUSE IRS IS*

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VERY COMMON MISTAKE:

"We have been doing it this way for years and we have never been audited, so it must be ok."

WHAT ABOUT:

"We were very careful to use the language in the MA Model CR, so it must be ok with IRS."

Do any of you know of any situation where the IRS has challenged MA Model language? If not, does that mean IRS never will? To my knowledge, IRS has always made it clear they do not defer to any other agency at any level. IRS makes its own decisions about whether or not something is "right".

Compare: Boilerplate "Proceeds" language used by NRCS, other federal agencies, and many state and local government agencies. THE LANGUAGE IS NOT THE SAME AS THE REQUIRED IRS "PROCEEDS" LANGUAGE.

Will the consequences of this "difference" ever result in "deduction denied" by the IRS? Avoid the question if at all possible.

 The emphasis here is on conservation restrictions that are DEDUCTIBLE under Section 170(h) of the Code, including bargain sales, but much of the advice is still relevant and important in the case of non-deductible restrictions. And with continuing tax litigation, mostly because of abusive syndications, some of these "rules" keep changing and might change in the future.

AMENDING CONSERVATION RESTRICTIONS*******

EVERY SINGLE RESTRICTION HOLDER MUST HAVE ITS OWN CRITERIA FOR DEALING WITH PROPOSED AMENDMENTS. Huge issue going forward as property changes hands and as environmental conditions change. Even the "best possible" amendment language (whatever that means) does NOT answer many of the tricky amendment issues that arise. Courts have taken different positions.

MA Model language appears "good enough", but I would add "(1) no adverse impact to any of the Conservation Values [as defined in the CR], *as determined by an independent person selected by Grantee*; and (2) no private economic benefit [I prefer this general term to the specific Code terms of private inurement, impermissible private benefit] to Grantor, *as determined by an appraiser selected by Grantee*."

Massachusetts rule appears to ("appears to") require legislative approval for CR amendments, per Article 97, even for CRs held by NGO land trusts. It would be nice for EOEEA/DCS formally to adopt a position that certain amendments with *de minimis* impacts do not require legislative approval. I would include this on a list of "things to consider" along with other good faith useful important edits to the MA Model CR.

RESERVED FUTURE RESIDENTIAL DEVELOPMENT RIGHTS IN C.R.

IRS doesn't like these. Court opinions have been mixed on appropriate language in a CR to reserve future development rights yet not have any adverse impact on the Conservation Values.

What we know for sure, at least as of 3/23/24:

1. **NO** FLOATING BUILDING RIGHTS ("Grantor reserves the right to put a new residence and appurtenant structures anywhere on the Property")
2. Courts are mixed on this next one, but the IRS is not: location subject to Grantee approval, i.e., "Grantor reserves the right to put a new residence and appurtenant structures anywhere on the Property, subject to Grantee's approval of the location". This used to be ok AND the

Regulations say this is ok, but IRS doesn't like it, so, MY ADVICE (this is not legal advice) is, don't do it this way.

3. Preferred method for some: Grantor wants to build two more residences and appropriate appurtenant structures on the Property. Grantor and Grantee identify, say, three 5-acre Limited Improvement Areas on the Property, as shown on an exhibit to the CR, and the text of the Restriction says, "Grantor reserves the right to build two additional single-family residences on the Property, and Associated Improvements (as hereinafter defined) with respect to each Residence, so long as both Residences and Associated Improvements are within a two-acre Building Envelope, which Building Envelope is contained entirely within any of the Limited Improvement Areas."
4. THIS IS JUST AN EXAMPLE AND NOT LEGAL ADVICE. It could be a fatal flaw (i.e., "deduction denied") if future construction in one of the Limited Improvement Areas would, for example, destroy a scenic view across the Property, or destroy important habitat. The Baseline Documentation Report should explain that the Limited Improvement Areas have been carefully evaluated and chosen because exercise of those reserved rights in those locations will NOT have an adverse impact on the Conservation Values.

BASELINE DOCUMENTATION REPORT

Must be thorough and must be completed, and so certified by Grantor and Grantee, not later than when the CR is recorded.

AUTHORITY TO ACT

Can be a sleeper. Who is the Grantor? Susan and Robert Smith? The Susan and Robert Smith Family LLC (have all the members of the LLC consented)? A trust? What kind of trust? A Massachusetts "nominee" trust? The Susan and Robert Smith Irrevocable Trust? If the latter, probably will NOT be able to gift a CR; this discussion is for another workshop. Very very important due diligence for Grantee.