**TIPS FOR GETTING IT RIGHT**

**AND STAYING OUT OF TROUBLE WITH THE IRS,**

**AND MORE**

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**2018 MASS LAND CONSERVATION CONFERENCE**

**Worcester Technical High School**

**Worcester, Massachusetts**

**March 24, 2018**

1. **A FEW\* CONSERVATION RESTRICTION PROVISIONS…**

**THIS GRANT DEED OF CONSERVATION RESTRICTION** is made as a gift, for nominal consideration, in perpetuity and for conservation purposes, by Sally M. Brown and Robert B. Brown, wife and husband, both with an address at 184 Pickwick Road, West Hilltop, MA 10561, Brown Orchard LLC, a Delaware limited liability company, and Maryjolisa Brown, Trustee of the Brown Family 1999 Irrevocable Trust, all as equal tenants in common], who with their successors and assigns in title to all or any portion of the Property as hereinafter defined are herein collectively referred to as “Grantor,” to the Woodland Land Trust, Inc., a Massachusetts not-for-profit corporation in good standing and qualified to do business in the Commonwealth of Massachusetts

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\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\*Use any of these provisions at your own risk. This is not legal advice. There may be errors in this document. This document does not follow the MA model.

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**[Tell the IRS what you are doing. My preference in the recitals is to group the various conservation values, and then follow each group with an affirmative statement, as follows. And where else is it important to repeat the conservation values?]**

**WHEREAS**, accordingly, this Restriction protects a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, and therefore this Restriction meets the requirements of Section 170(h)(4)(A)(ii) of the Internal Revenue Code of 1986, as amended, and the regulations thereunder (the “Code”); and ……….

**WHEREAS,** protection of the Property will accomplish a number of the factors determining “significant public benefit” under Treas. Reg. Section 1.170A-14(d)(4)(iv); and

**WHEREAS**, accordingly, protection of the Property is for the scenic enjoyment of the general public and will yield a significant public benefit, and therefore this Restriction meets the requirements of Section 170(h)(4)(A)(iii)(I) of the Code; and …….

**WHEREAS**, accordingly, protection of the Property is pursuant to clearly delineated federal, state, and local governmental conservation policies and will yield a significant public benefit, and therefore this Restriction meets the requirements of Section 170(h)(4)(A)(iii)(II) of the Code; and …..

**WHEREAS**, the Conservation Values are further documented in the Baseline Documentation Report (the “Baseline Documentation”), a copy of which is on file at the offices of Grantor and Grantee, and Grantor and Grantee have therein acknowledged **and hereby acknowledge** said Baseline Documentation memorializes the condition of the Property as of the effective date of this grant; and

**WHEREAS**, Grantee has received and there remains in full force and effect a determination letter from the Internal Revenue Service, dated July 10, 1998, a copy of which has been provided to Grantor, to the effect that Grantee is a “publicly-supported” organization described in Section 509(a)(1) and Section 170(b)(1)(A)(vi) of the Code, and is not a private foundation within the meaning of Section 509(a) of the Code; and

**WHEREAS**, Grantee warrants and represents that Grantee is a “qualified organization,” as that term is defined in Section 170(h)(3) of the Code; and

**WHEREAS,** Grantee warrants and represents that Grantee has the commitment and resources to enforce, and will enforce, the terms of this Restriction; and

……….

4. **Reserved Rights.** Notwithstanding any other provision of this Restriction, the following rights, uses, and activities on the Property shall be permittedby this Restriction, provided they do not materially impair the Conservation Values or purpose of this Restriction:

(a) the right to engage in all acts or uses not expressly prohibited herein that are

not inconsistent with the purpose of this Restriction and that do not materially impair the Conservation Values **[see 4(r)]**;

……….

(r) subject to Grantee’s written approval pursuant to the provisions of paragraph 12.2, Grantor may engage in an unanticipated use or activity on or at the Property so long as such use or activity is necessary for the protection of the Conservation Values that are the subject of this Restriction, or is consistent Grantor and Grantee’s original intentions with respect to the perpetual protection of the Conservation Values and the purpose of this Restriction and the prohibitions and limitations included herein but is not clearly permitted by the provisions of this Restriction.

……….

5.7 **Modification or Relocation of Limited Building Areas**. **[is this ok? Does someone have a better suggestion?]** The parties acknowledge that the boundaries of the Limited Building Areas may have to be adjusted from that configuration shown on the Map (i) to accommodate the requirements of applicable zoning and regulatory land use controls, or (ii) to moderate the effect of **changing ocean levels** and/or erosion of the Property. The parties agree to cooperate in such boundary adjustments, provided said adjustments do not result in an increase or (without Grantor’s approval) in a decrease in the number of Residences or lots permitted hereunder, or limit Associated Improvements which otherwise would be permitted under this Restriction. To the extent the boundaries of Limited Building Area A are relocated pursuant to the provisions of this paragraph 5.7, construction of any replacement residence may occur anywhere within such revised area, without regard to the limitation in paragraph 5.2 of construction substantially within the existing footprint.

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8. **Eligibility for Conservation Programs**. Grantor reserves the right to participate in conservation, preservation, or mitigation programs existing now or permitted in the future for any activity or use permitted (or restricted, as the case may be) on the Property under this Restriction, including but not limited to carbon sequestration credits and greenhouse gas credits.

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12.1 **Notice to Grantee.** Following the receipt of Grantee’s approval when required under paragraph 12.2, and not less than thirty (30) days prior to [**list ALL activities requiring notice, if any, with cross-references to relevant Restriction provisions]**;(ii) . . . . . . etc.; or (iii) ……., Grantor agrees to notify Grantee in writing ….. At Grantee’s sole discretion, Grantee may permit commencement of the activity less than thirty (30) days after receiving Grantor’s written notice. See also paragraph 14, with respect to Grantor’s written notice to Grantee concerning a transfer of any interest in all or a portion of the Property.

12.2 **Approval by Grantee of Sites or Activities.** The exercise of any right to engage in any activity permitted by the provisions of \_\_\_\_\_\_\_\_\_ **[list here ALL activities requiring approval, if any, with cross-reference to the relevant provisions in the Restriction; see Notice, below]** shall be subject to the prior approval .....

12.3 **Grantee’s Approval or Withholding of Approval.** When Grantee’s Approval is required, Grantee shall grant or withhold its Approval in writing within sixty (60) days…. Failure of Grantee to respond in writing within such sixty (60) days shall be deemed to constitute **denial** by Grantee of any such request submitted for Approval.

**AMENDMENT\*\*\*\*\*\*READER BEWARE DO NOT USE THIS OR ANY VERSION THEREOF WITHOUT CAREFUL CONSIDERATION\*\*\*\*\*\*\*AT THE MOMENT I AM *NOT INCLUDING ANY AMENDMENT PROVISIONS* IN MY CURRENT EASEMENT/RESTRICTION DOCUMENTS BECAUSE OF THE IRS POSITION. NOTE THAT MY POSITION IS NOT THE SAME AS LTA’S POSITION ON THIS ISSUE**

15. **Limitations on Amendment**

15.1 **Background; Acting in Good Faith**. Grantor and Grantee have been informed that the Internal Revenue Service has challenged the deductibility of conservation restriction donations based solely on the inclusion of an amendment clause in certain deeds of conservation restriction. The future is uncertain. As of the effective date of this Restriction, the eventual outcome of this legal issue is unknown. Therefore, Grantor and Grantee, acting in good faith, have included provisions in this paragraph 15 to address the current uncertainty of the law on this issue.

15.2 **In General.** Grantor and Grantee recognize that natural conditions, landscapes, and technologies change over time (including best practices of open space maintenance techniques), and, in an abundance of caution, have determined, in good faith, to articulate herein the limited parameters of any permissible amendment hereto. The intent of Grantor and Grantee is that any such amendment would be consistent with and true to the perpetual protection of the Conservation Values, and consistent with the goals and provisions of the law of the Commonwealth of Massachusetts and the goals and provisions of Section 170(h) of the Code. Further, it may be necessary at some point to amend this Restriction in response to changes over time specifically to ensure the perpetual protection of the Conservation Values of the Property. This paragraph 15 is accordingly carefully limited so as to ensure (i) that the Conservation Values of the Property are protected in perpetuity, (ii) that any amendment shall not in any way impair the perpetual protection of the Conservation Values of the Property, and (iii) that any amendment shall in all respects be consistent with the purpose of this Restriction and the provisions of Section 170(h) of the Code. Pursuant to and consistent with the provisions of paragraph 17.5, if an amendment will only affect a portion of the Property encumbered by this Restriction, the term Grantor shall mean each and all holders of an ownership interest in that portion of the Property. Nothing in this paragraph 15 shall require Grantor or Grantee to agree to any amendment or to consult or negotiate regarding any amendment.

15.3 **Limitations on Amendment**. This Restriction shall be amended, only in rare and unusual circumstances, and then only upon the written agreement of Grantee and Grantor, at Grantee’s sole and absolute discretion, but only if such amendment: (a) does not constitute private inurement or give rise to an impermissible private benefit under Section 501(c)(3) and other applicable provisions of the Code or the law of the Commonwealth of Massachusetts, based on an appraisal of the economic impact of the proposed amendment by an appraiser selected by Grantee; (b) has a neutral or positive effect on the Conservation Values of the Property, based on an evaluation of the effect of the proposed amendment on the Conservation Values by an independent qualified **[**expert] **[person?]** selected by Grantee; (c) is consistent with the purpose of this Restriction and the perpetual protection of the Conservation Values of the Property; (d) does not affect the perpetual nature of this Restriction; (e) complies with the law of the Commonwealth of Massachusetts and Section 170(h) of the Code; and (f) does not reduce the fair market value of the restrictions imposed on the Property by this Restriction at the time of such amendment. Further, no amendment shall be permitted that does not comply with the provisions of this paragraph 15 or (i) would involve the removal of any of the Property from the Restriction, (ii) would alter or remove the restrictions on assignment of this Restriction under the provisions of paragraph 13, or the provisions on extinguishment, percentage interests, or condemnation under the provisions of paragraphs 16, 16.1, and 16.2 , or (iii) **[note this; see paragraph 15.7]** in any way would cause the provisions of this paragraph 15 to be less restrictive. All of these requirements and restrictions in this paragraph 15.3 must be satisfied. Any amendment that does not comply with the provisions of this paragraph 15 shall be invalid.

15.4 **Updated Baseline Documentation Report**. In the event Grantor and Grantee agree to an amendment pursuant to the provisions of this paragraph 15, a new Baseline Documentation Report shall be prepared and shall be acknowledged by Grantor and Grantee as memorializing the condition of the Property as of the date the amendment is delivered for recording to the Registry of Deeds for Woodland County, Massachusetts.

15.5 **Costs**. If Grantor is the party requesting an amendment of this Restriction, Grantor shall be responsible for all reasonable and customary costs related to Grantee’s evaluation of said request and the amendment’s execution and, if applicable, any judicial proceeding of the sort referred to in paragraphs 15.6 or 15.7, including reasonable attorney’s fees actually incurred and staff, contractor, legal, and consultant costs actually incurred by Grantee, and any costs associated with the preparation of the updated Baseline Documentation Report prepared pursuant to the provisions of paragraph 15.4.

15.6 **Void *ab initio***.Notwithstanding anything in this Restriction to the contrary, Grantor and Grantee agree that should the consistency of this paragraph 15 with the provisions of Section 170(h) of the Code or the laws of the Commonwealth of Massachusetts be challenged by any government agency, including but not limited to the Internal Revenue Service or any agency of the Commonwealth of Massachusetts, and should that challenge ultimately be upheld, either between or among the parties to the challenge or in a court of competent jurisdiction, this paragraph 15 shall be null and void *ab initio*, as of the effective date of this Restriction. Thereafter this paragraph 15 shall be eliminated from this Restriction as though this paragraph 15 had never existed and the Restriction shall be otherwise modified in accordance with such agreement or judgment as determined, and the parties hereto shall at such time duly sign and re-record this Restriction as so modified in the Registry of Deeds for Woodland County, Massachusetts, and the effective date of such re-recorded Restriction shall relate back and be effective as of the effective date of this Restriction. If paragraph 15 is eliminated from the Restriction, such recorded Restriction shall entirely omit the provisions of this paragraph 15, and replace it with “Intentionally Omitted”, and shall delete any internal references to this paragraph 15 or its provisions.

15.7 **Court Approval Required.** A proposed amendment that is agreed to by Grantor and Grantee but nevertheless exceeds the scope of the limited discretion granted under this paragraph 15 is not permitted except by order of a court having jurisdiction in a proceeding to which the Attorney General of the Commonwealth of Massachusetts was given written notice and an opportunity to participate to represent the public interest in ensuring the continued perpetual protection of the Conservation Values of the Property and the conservation purpose of this Restriction.

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**GENERAL PROVISIONS**

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17.3 **Severability; Liberal Construction**. If any provision of this Restriction or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Restriction shall not be affected thereby. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Restriction and **consistent with the perpetual protection** of the Conservation Values shall be favored over any interpretation that would be inconsistent therewith. This Restriction shall be construed and interpreted with the intention of conforming to the requirements of Section 170(h) of the Code and the laws of the Commonwealth of Massachusetts. Neither this Restriction nor any uncertainty or ambiguity herein shall be presumptively construed against Grantor or Grantee, whether under any rule of construction or otherwise.

……….

17.8 **Representation of Authority**.  Each signatory to this Restriction represents and warrants that he or she is duly authorized to enter into and execute the terms and conditions of this Restriction and to legally bind the party he or she represents.

17.9 **No Goods or Services**. Pursuant to the requirements of Section 170(f)(8) of the Code, Grantor and Grantee acknowledge that no goods or services or other consideration have been provided by Grantee to Grantor as consideration for this Restriction, and Grantee will provide Grantor with **a separate letter** so stating.

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**2. A FEWAPPRAISAL RULES AND QUESTIONS**

**APPRAISAL RULES**

What follows is from the Treasury Regulations under Section 170(h).

(3) Perpetual conservation restriction **[I have inserted numbers 1-4 in bold below; they do not appear in the text of the regulation. The text in bold is also not in the regulation.]**

1. In general.

The value of the contribution under section 170 in the case of a charitable contribution of a perpetual conservation restriction is the fair market value of the perpetual conservation restriction at the time of the contribution. See section 1.170A-7(c). **(1)** If there is a substantial record of **sales of easements** comparable to the donated easement (such as purchases pursuant to a governmental program), **the fair market value of the donated easement is based on the sales prices of such comparable easements**. **(2)** If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the fair market value of a perpetual conservation restriction is equal to **the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after** the granting of the restriction. **(3)** The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering **a portion of the contiguous property owned by a donor and the donor's family** (as defined in section 267(c)(4)) is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction. **(4)** If the granting of a perpetual conservation restriction after January 14, 1986, has the effect of **increasing the value of any other property owned by the donor or a related person**, the amount of the deduction for the conservation contribution shall be reduced by the amount of the increase in the value of the other property, **whether or not such property is contiguous**.

**APPRAISAL QUESTIONS**

**PART I**

|  |  |
| --- | --- |
| A | B |

Aunt Sally donates a conservation easement on Lot A. What does the appraiser need to value (before and after, enhancement, etc.) to comply with the Treasury Regulations. Assume Lots A and B are owned as follows.

1. A – Aunt Sally

B – Aunt Sally

2. A – Aunt Sally

B – Sally’s daughter Connie

3. A – Aunt Sally

B – Sally’s Family LLC #2 (Sally 34%; Connie 33%; Sally’s son Bob 33%)

4. A – Aunt Sally

B – Wentworth Family LLC #1 (Sally 60%; Cousin Alice 20%; Cousin Bertie 20%)

5. A – Aunt Sally

B – Wentworth Family LLC #2 (Sally 34%; Alice 33%; Bertie 33%)

**PART II**

|  |  |
| --- | --- |
| A | B |
| C |

Aunt Sally donates a conservation easement on Lot A. What does the appraiser need to value (before and after, enhancement, etc.) to comply with the Treasury Regulations. Assume Lots A, B, and C are owned as set forth below. Would your answer be any different if a road runs along the eastern border of Lot A? If not a road, what about a river?

1. A – Aunt Sally

B – Connie (Sally’s daughter)

C – Bob (Sally’s son)

2. A – Aunt Sally

B – Connie

C – Sally’s nephew Willie

3. A – Aunt Sally

B – Connie

C – Wentworth Family LLC #2 (Sally 34%; cousin Alice 33%; cousin Bertie 33%)

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What are some of the observations we can make (maybe) about these rules? Are these safe generalizations?

First, a **person** donor can have related family members that can trigger rule three or rule four.

Second, a **person** donor can have related entities that can trigger rule four, but not rule three.

Third, a donation by an **entity** on a portion of the contiguous property owned by that entity donor will trigger rule three.

Fourth, a donation by an **entity** could trigger rule four.

Fifth, this is really complicated stuff.

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**PRACTICE TIPS**

**Practice Tip #1:** **run the title ASAP.**

**Practice Tip #2: determine ASAP, based on ownership of abutting or nearby property, which of the appraisal rules apply.**

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