

**PERPETUITY AIN'T WHAT IT USED TO BE:  
DRAFTING TO MINIMIZE THE NEED FOR FUTURE AMENDMENTS**

Joel Russell, Esq.

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In the “good old days” we thought that the CR was a flexible enough tool to respond to changes in circumstances. The perpetual effectiveness of a CR could be ensured by carefully amending it when necessary. The IRS now says that amendments can threaten the perpetual character of CRs. Ironically, this approach makes it *more* difficult to maintain conservation purposes in perpetuity. Should the original CR be considered sacrosanct in all its details, or should it be able to be tweaked to ensure greater effectiveness over time?

The IRS approach has been that any amendment of a tax-deductible CR, even if it results in a significant conservation benefit, could run afoul of the perpetuity requirement. Is the ability to amend a *threat* to perpetual land protection, or is it *essential* to such protection? How do we maintain flexibility on the specifics while implementing important conservation purposes in perpetuity amid changing conditions? The IRS presumes that amendments are likely to *violate* perpetuity requirements while land trusts realize that amendments are sometimes necessary to *ensure* perpetual protection.

The IRS approach significantly changes how we draft. The original CR now takes on much greater importance since it has become much more difficult to amend. An original CR now must be able to function as drafted even when circumstances change, since useful and innocuous amendments will now come under closer IRS scrutiny, as will CR provisions allowing amendments to occur.

Here are some practical pointers to consider in drafting CRs given the IRS position on amendments:

1. **Once protected, always protected, even for land unworthy of protection.** For example, you can't relocate a building envelope even if the proposed new location is much better than the original one from a conservation standpoint. You can't “unprotect” land, even if the net result is a huge conservation gain.
2. **More focus on the land, less on the landowner.** Putting a restriction in a CR because the landowner “wants” it can be problematic. It is more important to ensure that the restrictions in a CR respond to the land and the CR's conservation purposes and do not simply represent the landowner's wishes. A thorough “conservation analysis” of the land should precede drafting CR terms. While you want to be responsive to the landowner's wishes, they should not be dispositive.
3. **Avoid unnecessary detail.** Don't put in details that are not critical to achieving conservation purposes. The IRS may say that changes to those details can threaten the perpetual character of the CR. For example, a detailed enumeration of permitted accessory structures may omit a type of structure that could be permitted without affecting conservation values. If the easement is amended to allow a new type of structure, the IRS may take the position that this minor change violates the perpetuity requirement. Keep restrictions general so that they can cover changing circumstances.
4. **Be less restrictive where possible.** You can always amend a CR to make it more restrictive or to cover more land, but you can't go in the opposite direction. In general, protection of conservation values should be rigorous but use restrictions can be flexible (avoid the “zoning mindset”).
5. **Draft for the long-term.** Don't just do what the landowner wants today or you'll be stuck with that decision in perpetuity. Ask yourself “will someone understand and be willing to enforce this in 100 years?”
6. **Remember that most of this does not apply to CRs that are not intended to be tax-deductible.** Drafters of non-deductible CRs are generally free to do the right thing.