

Alternatives to Conservation Restrictions to qualify for new 170(h) tax incentives

Attorney Advisory Panel of the Mass Land Trust Coalition

Conclusions:

- Sec. 170(h) pertains to three conveyance types: CRs, deeds with remainder interests, deeds with reserved mineral rights.
- Establishing significant public benefit and preserving land worthy of conservation is the standard for all three types of conveyances.
- Exclusive reliance on CRs in Massachusetts could create a serious backlog in 2007, particularly during this limited time opportunity (the next 12 months only) for expanded tax incentives.
- CRs take much longer to process and record in Mass. than in any other state, owing to local and state reviews.
- Owners of some important lands who might be motivated to preserve them, owing to the new tax treatment, might be shut out if they start too late in 2007 to complete a 4 – 6 month CR process.
- Fee simple land gifts with reserved mineral rights are probably not applicable (for IRS deduction purposes) in Massachusetts, owing to generally-recognized lack of oil, gas and subsurface minerals.
- A fee simple land gift with a reserved life estate, or remainder interest, is a practical alternative to CRs in Massachusetts for landowners who want to give title entirely to a land trust.
- For most landowners considering a fee simple gift of land, who would be using the 30% limit of adjusted gross income and the 6-year deduction period, a fee simple gift of land with remainder interest, using the new 50% limit and 16-year period, would provide a more generous tax-saving result (but you have to run the numbers for each situation).
- Remainder interest deeds must meet Sec. 170(h) tests, just as CRs do, to get the expanded tax benefits. If the land is not significant, the deduction could still be allowed under Sec. 170(f)(3)b, as non-conservation donation, using the typical 30%, 6-year rules.
- The remainder interest property does not have to be part of the donor's residence; it could be a vacant lot across town.
- The donor would reserve the exclusive right to use the remainder interest property for uses compatible with conservation purposes.
- The deed should contain "CR-like" prohibitions intended to preserve the resources identified on the site. These prohibitions, needed to satisfy Sec. 170(h)

provisions, can be recited within the deed without devaluing the gift. (In other words, Rev. Rul. 85-99 would not apply.)¹.

- The donor could use the property for either his or her lifetime or a term of years. The deed could specify the number of years.
- The donor could extinguish his remainder interest sometime after the original donation and still qualify under Sec. 170(h). A waiting period of 5-10 years is probably acceptable.
- Extinguishment of the life estate before its term could generate a second charitable gift.
- The donor and the donee (land trust) should cooperate in preparing a baseline document for the files, establishing the conservation benefits of the remainder interest conveyance.
- Advantages of remainder interest deeds over CRs in Mass: more timely processing, owing to lack of local and state reviews needed; land trust ends up with title, precluding the need for CR monitoring and enforcement.
- Advantages of remainder interest deeds over fee simple gifts: better tax deductions under 2006 tax law.
- Drawbacks of remainder interest deeds:
 - There is practically no guidance on what needs to be included in a remainder interest donation for "conservation purposes." Very thin law on the subject.
 - For the donor, a remainder donation is a far greater commitment than a CR donation; the land will not be available to heirs after the death of the life tenant or the termination of the life estate.
 - There are often differences arising between the life tenant and the charitable remainderman (land trust), some of which have led to litigation.

"The deed provides for the Property to be held for conservation purposes in perpetuity and that the restrictions in the deed may be enforced by both Taxpayer and Donee. Should a subsequent change in the conditions surrounding the property make impossible or impractical the continued use of the Property for conservation purposes, the deed provides that all proceeds from a subsequent sale or exchange of the Property will be used in a manner consistent with the conservation purposes of the deed. The facts submitted further indicate that any removal or extraction of retained subsurface oil, gas, and other minerals will have a temporary, localized impact on the Property and will not be destructive of other significant conservation interests." IRS Ruling LTR 9318027 (1993) allowing qualified conservation contribution with reserved mineral rights.

**Attorney Advisory Panel of the Massachusetts Land Trust Coalition
Notes, December 5, 2006**

Attorneys Present: Greg Bialecki, (Chr.), William Constable, Margaret Wheeler, Richard Evans, Elizabeth Wroblecka, Doug Muir, Greg Peterson, Stefan Nagel, Stephen J. Small, Irene Del Bono (via teleconference), Robert Levite, Gordon Bell
MLTC Present: Bernie McHugh, Mark Robinson (Sec.)