AMENDING
MASSACHUSETTS CONSERVATION AND PRESERVATION RESTRICTIONS

by Jonathan Bockian, Esq.*

1. **Overview**: This paper reviews many of the laws affecting the amendment of a Massachusetts perpetual conservation or historic preservation restriction.[1] The focus here is on laws an attorney[2] should be aware of when asked about amending an existing conservation restriction (CR) or historic preservation restriction (HPR) and when drafting a new restriction. This is an area of the law with some clear statutory requirements but with many unanswered questions about the practical application of the statutes and related common law. This paper does not discuss amendment policies and practices that are advisable for restriction holders to adopt even though the policies and practices may be as important as the laws.[3] Apart from a few comments, the subject here is what the law is, not what it ought to be.

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[1] These are two of the several perpetually enforceable restrictions that may be created pursuant to G.L. c. 184, §§ 31-33, which are one of the family of real estate restrictions that may be created under Massachusetts laws. Other than some mentions of agricultural preservation restrictions, this paper will not discuss restrictions other than conservation and historic preservation restrictions.

[2] A restriction holder should always consult counsel about any particular restriction amendment being contemplated.

[3] See Massachusetts Easement Defense Subcommittee, *Model Conservation Restriction Amendment Policy Guidelines*, March 6, 2007, available at https://ag.umass.edu/sites/ag.umass.edu/files/interest-topic-pdfs/MODEL_CONSERVATION_RESTRICTION_AMENDMENT_2_27_07.pdf (as of September 7, 2016). There is a wealth of materials about policies and practices available to Land Trust Alliance members, at

Section 2 below defines certain words and phrases as they are used in this paper. Section 3 highlights some things to look for in the restriction instrument itself while considering the other issues presented in the subsequent sections of this paper. Sections 4 through 9 survey Massachusetts "black letter" and common law applicable to the amendments discussed here. Section 10 offers an abbreviated tour of federal tax law to keep in mind in this context. Putting Massachusetts law and regulations before federal tax law in this paper should not obscure the fact that federal tax law is of great importance to this subject, even if no federal tax deduction was claimed for the restriction being amended. Conveyancing practices applicable to amendments are the subject of Section 11. Section 12 briefly considers how the information in the preceding sections might be applied to drafting a new restriction. The last section identifies some questions that have yet to be addressed by legislation or court decisions about the law reviewed in this paper.

2. **Definitions**: In this paper, "Restriction" (capitalized) refers to a CR, HPR or agricultural preservation restriction (APR) that meets or seeks to meet the requirements of Massachusetts General Laws (G.L.) chapter 184, sections 31 – 33 (referred to here as the "Restriction Act," although that name is not in common usage). (In this paper, a restriction under another state's laws and the federal tax laws generally is called an "Easement".) "Amendment" refers to any change in a Restriction, including its exhibits. Such changes may range from correction of scrivener's error, to a change of administrative procedure (e.g., dispute resolution, notice requirements), change of land area boundary (increase, decrease, swap), change of the forbidden, conditional or allowed activities (increase, decrease, swap), up to and including a change of purpose.[4] None of the statutes discussed here use the word "amendment." Instead, they refer to a release[5] or disposition[6] in whole or in part. Not every amendment of a Restriction is necessarily a partial release or disposition. The clearest example of an amendment that is not a partial release or disposition is an amendment that does nothing other than add property subject to the Restriction. There is, however, no generally accepted bright line boundary in the spectrum of other possible amendments to a Restriction to make clear the outer limits of partial release and partial disposition. Therefore, the safer course of action is to start from the presumption that an amendment is a partial release or partial disposition and then to do a thorough and objective analysis to see if that presumption holds up. Three types of actions that this paper excludes from the definition of amendment are a Restriction holder's enforcement decision, a holder's approval of an activity for which the Restriction requires the holder's consent[7] (e.g., consent to a

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http://learningcenter.lta.org/, including a Legal Risk Spectrum table in Land Trust Alliance, Amending Conservation Easements: Evolving Practices and Legal Principles, 2nd edition, 2017 ("*Amending CEs 2017*") pp. 55-56, and interesting and informative discussions on the Land Trust Alliance listserv LANDTRUST-L@LISTSERV.INDIANA.EDU.

[4] See Gerald Korngold, Semida Munteanu, Lauren Elizabeth Smith, *An Empirical Study of Modification and Termination of Conservation Easements: What The Data Suggest About Appropriate Legal Rules*, 24 N.Y.U. Environmental Law Journal 1, 17 (2016), ("Empirical Study"), available at http://www.nyuelj.org/wp-content/uploads/2016/09/24.1-Korngold_Final.pdf (as of October 13, 2017), for a variety of "Scenarios for Modification of Conservation Easements."

[5] The Restriction Act.

[6] Amendments to the Massachusetts Constitution, Article XCVII ("Article 97").

[7] But see text *infra* at fns. 111 and 205.

landowner's conditionally reserved power to build or alter a building), and a complete release or extinguishment of a Restriction.

3. **Individual Restriction's Text**: Although it seems obvious, the Restriction should first be reviewed to determine if it is subject to the Restriction Act.[8] The next step is to see if the provisions of the Restriction establish limits, guidelines or procedures for the grantee and grantor or their respective successors and assigns to amend the Restriction. Many such amendment provisions will at least limit amendments to those that do not conflict with (or words to that effect) the purpose(s) of the Restriction, conflict with applicable law or adversely affect the qualification of the Restriction or the grantee of the Restriction under applicable tax law.[9] Even if the amendment provision does not so limit amendments, the Restriction's statement of purpose(s) and conservation or preservation value(s) or interest(s) should be examined to determine whether the contemplated amendment does conflict with them. As with any other restriction, the agreement of the Restriction holder and property owner normally will be prerequisite for an amendment unless specifically provided otherwise. [10] The broader questions of whether an amendment provision or court approval is necessary for an amendment are discussed in greater detail below in section 7 of this paper, "Charitable Trust Law." A provision in a Restriction allowing amendments is not required in Massachusetts for the holder and landowner to amend the Restriction, assuming the Restriction is not a charitable trust, but it would be foolish not to include an amendment clause in a new Restriction.[11]

4. **G.L. c. 184, § 32**[12]: The Restriction Act governs the Restrictions discussed here. Section 32 requires governmental approval for "release, in whole or in part" of a CR, HPR or APR. This statute does not explicitly refer to "*amendments*."[13] Section 31 of G.L. c. 184 differentiates

[8] See, e.g., *Bennett v. Commissioner of Food and Agriculture*, 411 Mass. 1, 4 (1991) ("The Bennetts' assertion that the restriction described in the instrument … is not in all respects an APR, as defined in G.L. c. 184, § 31, is not frivolous.")

[9] See section 0, *infra*, "Internal Revenue Code".

[10] But see *infra* section 4.6.

[11] But see *infra* section 10 regarding Tax Code requirements.

[12] First inserted in the General Laws as 1969 MA Acts c. 666, with subsequent amendments. G.L. C. 184, §32, second paragraph, reads, "The restriction may be *released, in whole or in part* [emphasis added], by the holder … in the same manner as the holder may dispose of land or other interests in land, but only after a public hearing upon reasonable public notice, by the governmental body holding the restriction or if held by a charitable corporation or trust, by the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town, whose approval shall be required, and in case of a restriction requiring approval by the secretary of environmental affairs, the Massachusetts historical commission, the director of the division of water supply protection of the department of conservation and recreation, the commissioner of food and agriculture, or the director of housing and community development, only with like approval of the release."

Third paragraph: "No restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be *released* [emphasis added] unless it is repurchased by the land owner at its then current fair market value. … Agricultural preservation restrictions shall be released by the holder only if the land is no longer deemed suitable for agricultural or horticultural purposes or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good. …"

[13] Black's Law Dictionary, Rev. 4th Ed. (West), defines "release" as, "The relinquishment, concession or giving up of a right, claim or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." (Cited in *Melo v. National Fuse and Powder Company*, 267 F. Supp. 611, 612 (1967).) Black's defines "amend" as, "To improve. To change for the better by removing defects or faults," and

among CRs, HPRs and APRs by their different purposes, and the benefits of Section 32 are limited to Restrictions held by a "governmental body" or by a "a charitable corporation or trust" whose purposes match up with the type of Restriction being held.[14] The appropriate governmental entity whose approval is required for a partial release depends on the type of entity which holds the Restriction and the type of Restriction it is (conservation, historic preservation, etc.). Every partial release of a CR, HPR or APR must be approved by the state agency that approved the Restriction when it was created -- CRs by the Secretary of Energy and Environmental Affairs (EEA), HPRs by the Massachusetts Historical Commission (MHC), and APRs by the Commissioner of Food and Agriculture.[15] A partial release of a Restriction held by a "governmental body" (undefined) must also be approved by that same governmental body, while a partial release of a Restriction held by a charitable corporation or trust must also be approved by "the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town" in addition to the state-level approval. Each of these approvals must be done following a public hearing by the approving authority. This author found no case law interpreting these partial release procedural provisions.[16]

4.1. The standard mandated by the statute when these governmental entities consider a release (which presumably applies to a partial release as well) is to "take into consideration the public interest in such conservation, preservation … [or] agricultural preservation … and any national, state, regional and local program in furtherance thereof, and also any public state, regional or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for use of the land."[17]

4.2. Though not stated as a factor to weigh, an APR may be released only "if the land is no longer deemed suitable for agricultural or horticultural purposes or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good."[18] The statute does not say, but implies, that it is the approving body that determines suitability. This requirement seems

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defines "amendment" as, "A change, ordinarily for the better… Any writing made or proposed as an improvement of some principal writing." Merriam-Webster OnLine at www.merriam-webster.com defines release as "1: to set free from restraint, confinement, or servitude; *also*: to let go **:** dismiss ; 2**:** to relieve from something that confines, burdens, or oppresses; 3**:** to give up in favor of another **:** relinquish." It defines "amend" as, "to change some of the words and often the meaning of (a law, document, etc.)." In *Marine Polymer Technologies, Inc. v. HemCon, Inc.*, 672 F. 3d 1350, 1374 (2012) the United States Court of Appeals for the Federal Circuit noted that "amend" is defined in *Webster's Third New International Dictionary* 57 (2000) as "to change or alter in any way esp. in phraseology." See Section 6, *infra*, for the possibly analogous meaning of "dispose" in Article 97 of the Massachusetts Constitution.

[14] Under G.L. c. 184, §32, second paragraph, to be perpetually enforceable a Restriction must be held by a "governmental body" or by a "a charitable corporation or trust" whose purposes include, for a CR or APR, "conservation of land or water areas or of a particular such area," or for an HPR, "preservation of buildings or sites of historical significance or of a particular such building or site."

[15] G.L. c. 184, § 32, second paragraph.

[16] There are court decisions involving Restrictions under G.L. c. 184, §§ 31-33, but not that interpret the statute's release requirements.

[17] G.L. c. 184, § 32, fifth paragraph. Neither the statute nor the courts have given guidance on what "take into consideration" means here or whether the items the statute lists for consideration are the only items that may be taken into consideration.

[18] G.L. c. 184, §32, third paragraph.

applicable to a partial release that takes a portion of land out of the APR, but it is questionable whether or how it is meant to apply to partial releases or amendments that don't change Restriction boundaries or allow use of the land for other purposes.

4.3. When a Restriction has been "purchased with state funds or … granted in consideration of a loan or grant made with state funds" it is not to be *released* "unless it is repurchased by the land owner at its then current fair market value."[19] It is common for APRs to have been purchased with state funds. As of this writing, other state funding programs that would also come under this statutory provision include grants from the EEA's Conservation Partnership Program, Massachusetts Parkland Acquisitions and Renovations for Communities (PARC) Program, and Massachusetts Local Acquisitions for Natural Diversity (LAND) Program,[20] and the Massachusetts Preservation Projects Fund grant program of the Massachusetts Historical Commission.[21] Restrictions acquired pursuant to the Community Preservation Act (CPA) may also be affected.[22] Again, this repurchase requirement may fit with a partial release that takes a portion of land out of the Restriction or other amendments that enhance the market value of restricted property, but seems awkward to apply to many other types of amendments that might be characterized as partial releases.

4.4. The statute also requires that "releases shall be evidenced by certificates" of the approval authorities and "duly recorded or registered," [23] and presumably this applies to partial releases. Regardless of the statutory requirement, recording evidence of the approvals is good conveyancing practice. (See section 11 below.)

4.5. Administrative Policies of State Approval Agencies:

4.5.1. The Conservation Restriction Application Form[24] published by the Executive Office of Energy and Environmental Affairs ("EEA") Division of Conservation Services ("DCS") notes that "The applicant is highly advised to follow the Model Conservation Restriction…." The DCS publishes a so-called Lock-Down Model of Conservation Restriction[25] and an annotated version of the document.[26] The model includes an amendments clause which the notes say is optional.

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[19] G.L. c. 184, §32, third paragraph, which goes on to say, "Funds so received shall revert to the fund sources from which the original purchase, loan, or grant was made, or, lacking such source, shall be made available to acquire similar interests in other land."

[20] Described at the EEA Division of Conservation Resources (DCR) website at http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/conservation-partnership-grant.html, http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/grant-programs/massachusetts-parkland-acquisitions-and.html, and http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs/grant-programs/massachusetts-local-acquisitions-for-natural.html, respectively (as of September 7, 2016).

[21] Pursuant to 1994 MA Acts 85, section 2, and 950 C.M.R. 73 and as described at the MHC website at http://www.sec.state.ma.us/mhc/mhcmppf/mppfidx.htm (as of September 7, 2016)

[22] Most of the third paragraph of G.L. c. 184, § 32, regarding a "restriction that has been purchased with state funds" was added by 1977 MA Acts 780, which created agricultural preservation restrictions. The subsequently enacted CPA, G.L. c. 44B, § 12(a), states in part, "A real property interest that is purchased with monies from the Community Preservation Fund shall be bound by a permanent deed restriction that meets the requirements of chapter 184…." There is not necessarily any payment for such deed restriction *per se*, but arguably if the CPA Restriction only exists because of a purchase with funds from the state Community Preservation Trust Fund (established by §9 of the CPA), then a release of a CPA Restriction might be subject to the repurchase requirement.

[23] G.L. c. 184, § 32, fourth paragraph.

[24] http://www.mass.gov/eea/docs/eea/dcs/cr-app-form-revised-may08.doc (as of September 7, 2016).

[25] http://www.mass.gov/eea/docs/eea/dcs/fixed-model-cr.docx (as of September 7, 2016).

[26] http://www.mass.gov/eea/docs/eea/dcs/model-cr-commentary.docx (as of September 7, 2016).

4.5.2. The EEA formerly published an Amendment Review policy (not regulations) regarding partial release of CRs ("Former EEA Policy").[27] The Former EEA Policy said, "[I]t is *strongly suggested* [emphasis added] that amendments be treated as something less than releases but subject to the approvals of the grantor, grantee, municipality, and the Secretary."[28]

4.5.3. The Former EEA Policy articulated a guideline as to which amendments EEA would or would not approve. It said, "The Secretary's policy shall be to approve amendments to conservation restrictions only if they serve to strengthen the original conservation restriction or will have a neutral effect upon the provisions of the conservation restriction. No amendment will be approved which will affect the qualification of the conservation restriction or status of the grantee under any applicable laws, including Section 170(h) of the Internal Revenue Code, as amended, Article 97 of the Massachusetts Constitution, including EEA's Article 97 Land Disposition Policy,[29] or Sections 31-33 of Chapter 184 of the General Laws of Massachusetts."[30] The Former EEA Policy implies that this oversight of qualification of the Restriction and status of the grantee is an exercise in taking into consideration the public interest.[31]

CR Amendments, at least those which have been brought to the attention of EEA, have been rare. According to EEA records shared with the author, approximately 4,400 CRs were approved by EEA between 1970 and 2011, while in that time, only 87 "amendments," partial releases or releases had been approved.

4.5.4. The Massachusetts Historical Commission has not published any guidance as to whether it follows any procedures or policy for partial release of historic preservation Restrictions. In telephone conversations with Michael Steinitz,[32] Director of the MHC's Preservation Planning Division, he reported that in the period of which he was aware (since 2001) there had been extremely few partial releases to come to MHC for approval and perhaps two amendments a year that MHC approved that were not necessarily partial releases (e.g., when an owner has gotten a National Park Service grant and the HPR has to be amended to conform to

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[27] EEA policy had been set out in Commonwealth of Massachusetts Executive Office of Energy and Environmental Affairs Division of Conservation Services, *The Massachusetts Conservation Restriction Handbook*, 1991 ed. rev. 2008, ("EEA CR Handbook") which as of January 2013 could no longer be found at the EEA website. It is available at http://atfiles.org/files/pdf/MAconsrestrict08.pdf (as of September 7, 2016). Some EEA publications still refer to the EEA CR Handbook.

[28] EEA CR Handbook, 4th page. It goes on to say, as a comment about the extinguishment provision of the model CR in the Handbook (23rd page), "If amendment, release or termination is under consideration, counsel should examine section 32 of Chapter 184 of the General Laws, Article 97 of the Amendments to the Massachusetts Constitution, EEA's Article 97 Land Disposition Policy, and the common law of charitable uses, and also consult with the Executive Office of Energy and Environmental Affairs for compliance with the Massachusetts Environmental Policy Act and for further information on this issue. (See: 301 C.M.R. 11.26, Clause 5.)"

[29] Dated February 19, 1998, available at http://www.mass.gov/eea/docs/eea/dcs/dcsarticle97.pdf (as of September 7, 2016).

[30] EEA CR Handbook, 5th page. This standard is similar to that recommended by the Massachusetts Land Trust Coalition's Easement Defense Subcommittee, *Model Conservation Restriction Amendment Policy Guideline,* and the Land Trust Alliance's Standards and Practices, Standard 11 I. "Amendments."

[31] This author does not know how strictly this policy was adhered to in the past or whether it still guides EEA decision making, but one could question whether it would be appropriate for EEA to refuse to approve an amendment in order to enforce a non-Restriction Act "qualification" or "status" requirement as interpreted by EEA.

[32] February 7, 2011, and February 11, 2015.

NPS requirements). He reported that in his view, as long as the Restriction's purposes are not changed, there is no removal of real estate from the Restriction, and the Restriction itself allows amendments if agreed between the holder and landowner, MHC approval is probably not needed. At the municipal level, local historical commissions reportedly often advocate for the approval or disapproval of a Restriction, and may do likewise for an amendment brought to the municipality for review.

4.5.5. The Massachusetts Agricultural Preservation Restriction Program in the Department of Agricultural Resources (DAR) operates pursuant to 330 C.M.R. 22, et seq., including 330 C.M.R. 22.12 regulating release of APRs. DAR regulations do not address "amendment." An APR may be released in whole or part only in "extraordinary circumstances, and where the release clearly yields a substantial benefit to the agricultural resources of the Commonwealth," only in accordance with Article 97 of the Massachusetts Constitution,[33] the EEA Land Disposition Policy and DAR's "no net loss policies," and "only where the Commissioner [of DAR] finds that the land to be released is no longer suitable for agriculture or horticulture."[34] The No Net Loss Policy requires granting an APR on substitute land or, at the Commissioner's discretion, a cash payment.[35] An Article 97 vote is explicitly required.[36] As noted above regarding parts of G.L. c. 184, § 32, third paragraph,[37] these regulations are more easy to apply to a change of purpose or boundary partial release than various non-boundary change amendments.

4.6. May the holder of a Restriction grant a partial release without the consent of the landowner? Taken literally, G.L. c. 184, § 32, allows a partial release amendment of a Restriction to be granted by the holder acting alone, without the assent of the landowner. The Restriction Act states a Restriction "may be released in whole or in part *by the holder*," (emphasis added) subject to the approvals process described above in section 4 above. If "release" exclusively means giving back to the landowner and nothing more — that is, if "release" does not include any of the many other possible alterations in a Restriction — then it makes sense that the holder may act unilaterally. But any amendment which includes, but is not purely, a giving back to the landowner surely must require the landowner's agreement. Further, if the provisions of a Restriction require mutual action by the holder and landowner, that would almost certainly trump the statute in this case.

4.7. Local approvals: Each municipality may have its own de facto practices or formal policies regarding amendments. For example, the Town of Brookline adopted a Conservation Restriction Policy December 2, 2008, which includes provisions about the release of conservation Restrictions granted to the Town.[38]

5. Municipal Law Relevant to Amendment of Municipally Held Restriction:

[33] Discussed at greater length *infra*, section 5.
[34] 330 C.M.R. 22.12.
[35] 330 C.M.R. 22.12(5).
[36] 330 C.M.R. 22.12(7).
[37] At fns. 18 and 19.
[38] Available online at http://www.brooklinema.gov/DocumentCenter/View/2328 (as of September 7, 2016).

5.1. A Restriction is an interest in real estate that may be conveyed to a municipality "acting by and through" its conservation commission[39] or historical commission,[40] or to the municipality itself in the absence of such commission.[41] The amendment or partial release of a Restriction held by a municipality is governed by G.L. chapter 40, *in addition* to the Restriction Act and Massachusetts Constitution Article 97.[42] As noted above, pursuant to G.L. c. 184, §32, when a Restriction is "held by any governmental body," a partial release must be approved by *that body* after a public hearing.

5.2. Because a Restriction is an interest in land held for a particular purpose,[43] a partial release of a Restriction is subject to the rule articulated in *Harris v. Wayland,*[44] at 240-243: "If land is held for a particular municipal purpose, the provisions of G.L. c. 40, §3, that '[a] town ... may convey [real estate] by a deed of its selectmen ... duly authorized,' is not applicable until something else has been done: until it has been determined, in accordance with G.L. c. 40, §15A, that the land is no longer needed by the particular board or for the particular purpose… Once the transfer for the purpose of sale has been authorized pursuant to G.L. c. 40, §15A, the selectmen, duly authorized, may consummate the sale by a deed, pursuant to G.L. c. 40, §3. The language of G.L. c. 40, §15A, makes it clear that this two-step procedure applies even if the land was in the charge of the selectmen rather than another board or officer."

5.3. "The grant of an easement constitutes the transfer of an interest in land (which in this case, because a town is involved, would require a town meeting vote). See *Oliver* v. *Mattapoisett*, 17 Mass. App. Ct. 286, 288 (1983)."[45] Logically, the same rule would apply to a release by amendment of an interest in a Restriction. "Except as qualified by other statutes, a majority vote of a town [meeting] is sufficient to grant an easement or

[39] G.L. c. 40, §8C.
[40] G.L. c. 40, §8D.
[41] Irene DelBono, former Director of the EEA Conservation Restriction Review Program, stated that she did not allow Selectmen or Town or City Managers to hold CRs (unless the municipality does not have a conservation commission) because municipalities themselves are not eligible holders under the Restriction Act. G.L. c. 184, section 32, first paragraph, provides in part that to get the benefit of the Act, a CR must be held by "any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area." Ms. DelBono is of the view that the qualifier "whose purposes include the conservation of land or water areas" applies to government holders as well as charitable organizations and trusts, implying that municipalities, per se, do not have such purposes, while their conservation commissions do have such purposes. (Email to the author, February 6, 2015.) She supports her view further with a June 20, 1995, Massachusetts Department of Revenue guidance letter to the Town Accountant of Gay Head, DOR File No. 95-586, which states in part, "In our opinion, the town had no authority to empower the selectmen to purchase lands for conservation purposes where, as here, the statute [G.L. Ch. 40 §8C] expressly confers such powers solely on the conservation commission." This position raises several questions, but as this paper focuses on amendments and not the creation of Restrictions, this is not the place to delve into this further. Municipal law (as distinct from the Restriction Act) does not preclude a municipality from holding a Restriction. ("The relevant statutes indicate that there are several ways municipal land can be held. G.L. c. 40, §§ 3, 14, 15, and 15A. It can be in the charge of a particular board or officer, or the selectmen for a particular municipal purpose, or the selectmen as part of the town's general corporate undeveloped property." *Harris v. Wayland*, 392 Mass. 237, 240 (1984). See also G.L. c. 40, § 1.)
[42] Discussed in section 5.6 *infra*.
[43] Although G.L. c. 40, § 15A, is written in terms of "land… constituting the whole or any part of an estate," it applies to easements. *Zoning Board of Appeals of Groton v. Housing Appeals Committee* [hereinafter "*Groton*"], 451 Mass. 35 (2008).
[44] *Supra*, fn. 41.
[45] *Groton*, at 39.

convey any other interest in land. G.L. c. 40, § 3." *Oliver v. Mattapoisett*, 17 Mass. App. Ct. 286, 288 (1983), citing *Harris v. Wayland.*

5.4. If the Restriction was acquired by a taking by eminent domain, an Appeals Court decision has held that G.L. c. 40, §15 requires, first, that the "officer… having charge" of the Restriction "notifies the city council or the selectmen that, in his opinion" the part of the Restriction being released is "no longer required for public purposes," and second, by a 2/3rds vote the city council or town meeting authorizes the partial release and "specif[ies] the minimum amount to be paid" therefor, then "the mayor or the selectmen may, for such amount or a larger amount, and upon such other terms as the mayor or selectmen shall consider proper, … declare said easement or right, or part thereof, to be abandoned."[46]

5.5. To recap, if a Restriction not acquired by a taking is held by the city or town, and not by the conservation or historical commission in the name of the city or town or otherwise in the "charge" of a board or officer of the municipality, the vote required is a legislative vote — of the city council or board of alderman or the town selectmen authorized by a majority of town meeting. If such Restriction is held by the conservation or historical commission in the name of the municipality, or is otherwise in the "charge" of a board or officer of the municipality, that commission, board or officer must first formally decide (the "commission vote") that the aspect of the Restriction to be released is no longer needed by the particular board or for the *particular* purpose of the Restriction, and then approved by the legislative vote. If the Restriction was acquired by a taking, then the commission vote must state that the portion of the Restriction to be released is no longer needed for *any* public purpose, and the municipal legislative vote must be by a 2/3 super majority.

5.6. One caveat is that if a Restriction were deemed to be held for park purposes, G.L. c. 40, §15 would not apply, and G.L. c. 45 should be consulted.[47] Another caveat is that these statutes, while establishing necessary votes for partial releases, do not supersede the "public trust" common law doctrine.

6. **Article 97**[48]: Article 97 of the Amendments to the Massachusetts Constitution ("Article 97") is the environmental protection provision of the Massachusetts Constitution. It states, in part, that "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources" is a "public purpose" (hereinafter, "Article 97 purposes"). Article 97 then goes on to say, in part, "Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court [the Massachusetts legislature]." The interpretation of Article 97 for the purposes of this paper focuses on the words "easement," "such purposes," "other purposes," and "otherwise disposed of."

[46] *Muir v. Leominster*, 2 Mass. App. Ct. 587 (1974).
[47] Note the EEA CR Handbook (*supra*, fn. 27). "[I]t is the opinion of the Secretary [of EEA] that once acquired, conservation restrictions become subject to the same restraints on alienation applicable to parkland open spaces." And note EEA Article 97 Land Disposition Policy, (*supra*, fn. 29). ("…, "[M]unicipalities that seek to dispose of any Article 97 land must: …2. obtain a unanimous vote of the municipal Park Commission if the land proposed for disposition is parkland…." The municipal Park Commission vote is presumably required under G.L. c. 40, §15A.
[48] Ratified on November 7, 1972. For a comparison of the public trust doctrine and Article 97, see Heather J. Wilson, *The Public Trust Doctrine In Massachusetts Land Law*, 11 Env. Aff. L. Rev. 839 (1984).

6.1. An easement[49] held by a state or municipal entity for an Article 97 purpose is subject to Article 97.[50] There is little doubt that a Restriction is, for the purposes of Article 97, an easement, although there is no reported appellate decision explicitly so stating (probably because the idea is beyond challenge).[51] The 2013 *Mahajan v. Department of Environmental Protection* decision made clear that recording of a Restriction held by a municipality is sufficient to subject the land so restricted to Article 97.[52] A Restriction held by a non-governmental entity and not acquired using governmental funds generally is not considered to be subject to Article 97.[53]

6.2. An amendment to a Restriction subject to Article 97 requires a two thirds vote, taken by yeas and nays, of each branch of the legislature (a "super-majority") if the amendment

[49] Art. 97 explicitly refers to easements. See also *Opinions Of The Justices To The Senate*, 383 Mass. 895 (1981).

[50] *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, (D. Mass. 1991) ("Thus, art. 97 … requires that lands acquired by a municipality for purposes of water may not be used for other purposes except by two-thirds vote of each branch of the state legislature. *See generally Opinions of the Justices*, 383 Mass. 895, 917-18, 424 N.E.2d 1092 (1981).") (That Opinion doesn't mention municipalities per se.) Article 97 employs the passive voice when establishing that the supermajority vote is required for "lands and easements taken or acquired" but it does not identify by whom the taking or acquisition must have been done except in the preceding sentence, which affirms the general court's "power to provide for the taking… or for the acquisition by purchase or otherwise…." Accordingly, any taking or acquisition done by virtue of the general court's exercise of that power would be subject to the supermajority vote requirement for disposition. Municipal acquisitions and takings are empowered by statutes enacted by the legislature.

[51] *Selectmen of Hanson v. Lindsay*, 444 Mass. 502, 509 (2005) (Town vote to accept land for conservation purposes, without any other action, "evidenced an intent by the town to impose a conservation restriction on the locus" but did not create an enforceable restriction because no restriction instrument was recorded, and therefore "[b]ecause the locus was not held for a specific purpose, namely conservation, compliance with the provisions of art. 97 and G. L. c. 40, §15A, was not required.") In footnote 14 in the Land Court decision in *Wolfe v. Gormally*, 14 LCR 629, 633-34 (2006) (Misc. Case No. 274368), a case about restrictions "for the benefit of the public as represented presently by the Massachusetts Department of Environmental Quality Engineering [now DEP] and [which] may be altered or amended only by said Department or its successors," the judge wrote, "Article 97 is inapposite because this case does not involve land taken or acquired by the Commonwealth." The decision says the restrictions "fall squarely within [c. 184] Section 31's broad definition of 'conservation restriction'" although it also analyzes them in the alternative as coming under G.L. c. 184, §§ 26-30. In this author's opinion the footnote dictum errs to the extent this it is saying that a Restriction (i.e., a restriction under the Restriction Act) held by a state agency is not subject to Article 97.

[52] In *Mahajan v. Department of Environmental Protection*, 464 Mass. 604, 616 (2013), the SJC wrote, "In *Selectmen of Hanson v. Lindsay* [*supra*, note 51] … we held that a town meeting vote to designate for conservation purposes land that had originally been taken for tax purposes did not subject that land to art. 97 protections absent recordation of a restriction on the title…. where the property had indisputably been acquired as a tax forfeiture and held as general corporate property, the town had to deed the land to itself for conservation purposes -- or record an equivalent restriction on the deed -- in order for art. 97 to apply to subsequent dispositions or use for other purposes." But see *Smith v. Westfield*, ____ Mass ___ , SJC 12243, October 2, 2017, which, while not affirming that recording of a conservation or historic preservation restriction establishes that the land so restricted is subject to Article 97, clarifies that real estate acquired by the state or a municipality is subject to Art. 97 where there is a clear and unequivocal intent to dedicate real estate permanently as for an Art. 97 purpose (such as a public park) and where the public accepts such use by actually using the land for that purpose, even if there has been no eminent domain taking or a recorded instrument limiting use to such Art. 97 purpose.

[53] In an email to the author February 10, 2011, Irene Del Bono, Director of the EEA Conservation Restriction Review Program, wrote that in her personal opinion (not speaking for the agency) an Art. 97 vote is required only if the CR is held by a governmental entity.

allows use of the Restriction or land for a non-Article 97 purpose[54] or when it disposes of the Restriction. The meaning of "dispose" in Article 97 has been the subject of court decisions and Opinions of the Attorney General, although none are explicitly about a Restriction amendment.

The SJC has decided that issuance by the Commonwealth of a so-called chapter 91 waterways license affecting land subject to Article 97 is not a disposition requiring an Article 97 vote, reasoning that the Commonwealth's license is not itself a change of use even if it facilitates a change of use by another entity or person.[55] By implication, this reasoning applies to many other state permits and approvals, including the approval by MHC or EEA of a partial release of a Restriction, but would not apply to the agreement by a governmental holder of a Restriction to amend some aspect of the Restriction.

The SJC, while deciding whether a town conservation commission may lease property held in its control without a town meeting vote authorizing the lease, has explicitly noted that it has not decided whether a lease of town property is or is not a disposition subject to Article 97, while favorably citing an Appeals Court decision to the effect that a "[g]rant of a one-year seasonal permit, revocable at will, for conducting a program under the supervision of the Department of Environmental Management was not a disposition of land subject to art. 97."[56]

The Office of Attorney General takes what might be called a broad view of the scope of Article 97. An Attorney General's opinion asserts that a ". . . 'disposition' includes *any change of legal or physical control*, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting or taking of easements [emphasis added]."[57] It should be noted, however, that the Supreme Judicial Court has said that although this opinion is entitled to careful judicial consideration, "its interpretation … is not binding in its particulars, and we are hesitant to afford it too much weight due to the generalized nature of the inquiry and the hypothetical nature of the [opinion's] response."[58] A subsequent AG's opinion asserts,

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[54] It is not clear whether the vote requirement is triggered when use of land (or a Restriction) acquired for one Article 97 purpose, e.g., conservation, is to be changed to a different Article 97 purpose, e.g. "development and utilization of the agricultural, mineral, forest, water, air and other natural resources," or only when the use is to change to a purpose not described in Article 97.

[55] *Mahajan*, *supra* fn. 52, at 622 ("For lands to which art. 97 does apply, art. 97 legislative approval is likely just one of the many approvals a project proponent will need to acquire in order to proceed with the project… [i]t would make little practical sense to condition the application for one such approval, in this case the chapter 91 license, on the successful application for another approval. The chapter 91 license facilitates the change in use in the same way the zoning variances and other necessary approvals do. A project proponent … could conceivably obtain the necessary approvals to change the use of land and, for myriad reasons, never follow through on the planned use. Article 97 requires a two-thirds vote of the Legislature prior to an actual change in use, not mere preparations for that change"). See also *Beverly Port Marina v. DEP*, 84 Mass. App. Ct. 612 (2013).

[56] *Cranberry Growers Service, Inc. v. Duxbury*, 415 Mass. 354 (1993), footnote 2, citing *Miller v. Commissioner of the Dep't of Envtl. Management*, 23 Mass. App. Ct. 968, 970 (1987).

[57] *Rep. A.G.*, Pub. Doc. No. 12, at 139, 143-144 (1973).

[58] *Mahajan*, *supra* fn. 52, 613, in the context of the scope of Article 97, but without reference to the meaning of a disposition that requires a legislative vote. The amicus brief of The Sierra Club in *Mahajan* included as an exhibit a letter of First Assistant Attorney General Thomas H. Green to Boston Redevelopment Authority Director Thomas N. O'Brien, dated December 16, 1997, taking the position that a Boston Redevelopment Authority urban development plan's designation of the use of City Hall Plaza for "public open space" was sufficient to require an Article 97 vote to change the Plaza's use. (All *Mahajan* briefs to the SJC are available at http://masscases.com/cases/sjc/464/464mass604.html, as of September 7, 2016).

"Any relinquishment of physical control over the land would be a disposition and would require a vote of two-thirds of both Legislative branches. The Department [of Environmental Management] cannot, therefore, through these permits,[59] *surrender its duty to police, conserve, preserve, and care for* the reservoir and the perimeter strip. Whether or not these exclusive land use permits transfer such control depends upon their scope" [emphasis added].[60] A third AG's opinion says, "[A]n agreement to subject the use of state land to the terms of future ordinances and by-laws of the municipalities in which that land is located is a relinquishment of control of such land and, therefore, a 'disposition' within the meaning of Article 97."[61]

There is only one Attorney General's opinion on Article 97 that did not conclude that an Article 97 vote was required for a government action, but that opinion is not applicable to a perpetual Restriction. ("[W]here the interest … is as speculative in nature as a permit, revocable … at any time, it should not be considered an acquisition within the terms of Article 97…. Where control … is acquired under circumstances known to be temporary by the acquirin*g agency and is subject to revocation* at any time, it would not in my opinion be an interest acquired 'to accomplish the purposes' of Article 97."[62])

As a matter of policy, the EEA has used the Attorney General's definitions.[63]

6.3. Amendment of a Restriction acquired by a municipality using Community Preservation Act[64] funds requires an Article 97 vote if the amendment is a disposition. It is less clear whether a disposition amendment of a Restriction acquired by a nongovernmental entity using CPA funds would require an Article 97 vote if the Restriction did not burden state or local government land.

7. **Charitable Trust Law**: There is a national debate about whether or not conservation easements and historic preservation easements (as they are known in most other jurisdictions) generally create a charitable trust (or restricted gift). This debate is exemplified by the dueling law review articles by Nancy A. McLaughlin and W. William Weeks (advocating the application of charitable trust doctrine) and C. Timothy Lindstrom (doubting the application of charitable trust doctrine) [65] and the exchange between Jessica Jay and Ann Taylor

[59] The permits referred to were issued to allow the exclusive use of a perimeter strip of land acquired by DEM by owners of property abutting the strip.
[60] *Rep. A.G.*, Pub. Doc. No. 12, at 129, 132-133 (1980).
[61] *Rep. A.G.*, Pub. Doc. No. 12, at 143, 146 (1981).
[62] Rep. A.G., Pub. Doc. No. 12 at 157, 159 (1976).
[63] EEA Article 97 Land Disposition Policy (*supra* at fn. 27).("… as a general rule, EOEA and its agencies shall not sell, transfer, lease, relinquish, release, alienate, or change the control or use of any right or interest of the Commonwealth in and to Article 97 land. … An Article 97 land disposition is defined as a) any transfer or conveyance of ownership or other interests; b) any change in physical or legal control; and c) any change in use, in and to Article 97 land or interests in Article 97 land owned or held by the Commonwealth or its political subdivisions, whether by deed, easement, lease or any other instrument effectuating such transfer, conveyance or change…")
[64] G.L. c. 44B.
[65] Their work is not particularly focused on Massachusetts. See, e.g., Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 Harv. Env. L. Rev. 421 (2005), Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U of Richmond L. Rev. 1031 (2006) ("Amending Easements"), Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to* The End of Perpetuity, 9 Wyo. L. Rev. 1 (2009) ("Defense I"), Nancy A. McLaughlin and W. William Weeks, *Hicks v. Dowd, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight* (2010). Wyo. L. Rev. 73 (2010) ("Defense II"), and C. Timothy Lindstrom, *Hicks V. Dowd:* The

Schwing.[66] If Massachusetts Restrictions were deemed to create charitable trusts, it could have a profound effect on the amendment process. This section reviews what it would mean for the purposes of amendments if a Restriction were a charitable trust and touches on whether Restrictions generally are charitable trusts. It does not give a comprehensive treatment of either of these subjects, which deserve entire papers or books of their own.

7.1. A trust is a fiduciary relationship with respect to property, created by a *manifest* (not subjective) intention to create it.[67] A charitable trust is an express trust in which the property is to be devoted to a specific charitable purpose.[68] Under common law, when it becomes impossible or impractical to carry out the terms of a charitable trust, court approval is required to amend the trust to change the purpose and use of the trust asset – a *cy pres* proceeding – or to change administrative provisions of the trust – an administrative (or equitable) deviation proceeding.[69]

7.2. Massachusetts recently enacted the Massachusetts Uniform Trust Code (the "MUTC").[70] It applies to all trusts created before, on or after its effective date (with exceptions not relevant here).[71] Under the MUTC a "charitable trust" is defined as "a trust, or portion of a trust, created for a charitable purpose,"[72] meaning a trust created for "governmental or municipal purposes or other purposes which are beneficial to the community" (among other purposes).[73] If there were any doubt that such purposes include land conservation and historic preservation it is dispelled by the fact that the MUTC exempts "an easement for conservation or preservation" from one of its sections,[74] evidencing that such an easement is not exempted from the MUTC's other sections (absent other factors). Sections 7.3 and 7.4 of this paper address what the MUTC says about an instrument that

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End of Perpetuity*?* 8 Wyo. L. Rev. 25 (2008) ("Perpetuity I"); C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 Wyo. L. Rev. 397 (2009) ("Perpetuity II").

[66] Jessica Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment and Termination of Conservation Easements*, 36 Harv. Env. L. Rev. 1 (2012) (Jay, Not Forever I), Ann Taylor Schwing, *Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 Harv. Env. L. Rev. 217 (2012), Jessica E. Jay, *Understanding When Perpetual Is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, 37 Harv. Env. L. Rev. 247 (2013) (Jay, Not Forever II).

[67] Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher, *Scott and Ascher on Trusts (Scott)*, § 2.1.1 (5th ed., 2006).

[68] Ibid, § 37.1.

[69] Massachusetts cases addressing administrative deviation include *Rogers v. Attorney General*, 347 Mass. 126 (1964), *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521 (1970), and *Millekin v. Littleton*, 361 Mass. 576 (1972).

[70] G.L. 203E, established by 2012 MA Acts c. 140, section 56, "An Act Further Regulating The Probate Code And Establishing A Trust Code" (hereinafter the "MUPC Amendment Act"). The MUTC is the Massachusetts adaptation of the *Uniform Trust Code* (last revised or amended in 2010), available at http://www.uniformlaws.org/shared/docs/trust_code/UTC_Final_rev2014.pdf (as of September 7, 2016) (the "UTC").

[71] Pursuant to section 66(a)(1) of the MUPC Amendment Act.

[72] MUTC, § 103.

[73] MUTC, § 405(a).

[74] MUTC, §414(d), "Modification or termination of uneconomic trust." The sections of the MUTC not applicable to charitable trusts are MUTC, §411, "Modification or termination of non-charitable irrevocable trust by consent" and MUTC §409, "Non-charitable trust without ascertainable beneficiary."

is a charitable trust, and section 7.5 discusses whether Restrictions generally are or are not charitable trusts in Massachusetts.

7.3. All charitable trusts of any kind are subject to the MUTC section entitled, "Modification or termination because of unanticipated circumstances or inability to administer trust effectively."[75] It provides that a court *may* modify "the administrative or dispositive terms" of a trust (including a charitable trust) "if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust … in accordance with the settlor's probable intent" to the extent practicable.[76] Most proceedings to modify or partially terminate a charitable trust may be commenced by the trustee (the holder, in the case of a Restriction) but not by the settlor[77] (the grantor) or a subsequent landowner, unless the instrument allows for that.[78] If an amendment of a Restriction were in a judicial *cy pres* proceeding, while the Restriction holder may ask the court to approve the amendment, only the Attorney General may intervene.[79] While a legislative vote may authorize a change of use of land subject to the public trust doctrine[80] or Article 97, a legislative vote alone cannot authorize a change of use of property subject to a charitable trust.[81]

7.4. The MUTC allows a Restriction that is a charitable trust to be amended without court approval if the Restriction's own amendment provisions say that it *may* be amended without court approval.[82] Any provision in a charitable trust that tried to say that its

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[75] MUTC, §412.

[76] MUTC, §412(a). The UTC Comment to this subsection says, "While it is necessary that there be circumstances not anticipated by the settlor … the circumstances may have been in existence when the trust was created." Note that under MUTC 412(b), modification of the *administrative* terms may also be approved "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration," a lesser standard.

[77] Settlor is defined as, "[A] person, including a testator, who creates or contributes property to a trust." MUTC §103.

[78] MUTC §410(b). Although this section only refers to a modification or "termination" the Comment to the same section of the UTC notes that a termination under subsection (a) may be in whole or in part.

[79] Pursuant to G.L. c. 12, § 8, "The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." See, e.g., *Ames v. Attorney General,* 332 Mass. 246, 124 NE 2d 511 (1955). In an email from Andrew Goldberg, Assistant Massachusetts Attorney General in the Environmental Protection Division, to Nancy McLaughlin (Mar. 22, 2006; reported as "on file with author" in McLaughlin, *Amending Easements*, fn. 65) the AAG wrote (pre-UTC), "While the Attorney General's authority to oversee public charitable trusts *may* provide an important weapon in enforcing conservation easements, we often rely on the Massachusetts easement enabling statute (which requires a public hearing and approval by a public official to release a conservation easement in whole or in part), coupled with the Attorney General's statutory authority to prevent damage to the environment, to ensure that restricted land remains protected." As noted in that article, the statutory authority referred to is presumably G.L. c. 12, § 11D.

[80] See, e.g., *Gould* v. *Greylock Reservation Commission*, 350 Mass. 410, 419, 215 NE 2d 114 (1966).

[81] *Scott*, § 39.5.6. Courts sometime refer to a "public charitable trust." See, e.g., *Dunphy* v. *Commonwealth*, 368 Mass. 376, 383, 331 N.E. 2d 883 (1975). It is sometimes (though not in *Dunphy*) unclear whether this phrase is used to mean a charitable trust in which the trustee is a governmental entity, or to mean land that has become subject to the public trust doctrine but not a charitable trust. See also Wilson, *The Public Trust Doctrine In Massachusetts Land Law* (*supra*, fn. 48), footnote 126. See also *Opinion of the Justices to the Senate*, 369 Mass. 979, 338 N.E.2d 806 (1975).

[82] Under MUTC §105(a), the MUTC governs "Except as otherwise provided in the terms of the trust" but under MUTC §105(b)(4), "The terms of a trust prevail over any provision of this chapter except: … the power of the court to modify or terminate a trust under sections 410 through 416." The UTC Comment to §105 states, "Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and

provisions *cannot* be modified by a court would not be enforceable.[83] Thus, when drafting a new Restriction, one simple way to avoid uncertainty about whether charitable trust law requires court approval for a future amendment of the Restriction is to just say in the new Restriction that no court approval is required for any amendment, or for any amendment that does or does not change certain particular provisions in the Restriction. This simple method of course does not help an existing Restriction that has no amendment provision if that Restriction is a charitable trust.[84] Also note that a charitable trust may provide by its own terms that it may be amended or extinguished *only* by judicial proceedings.[85]

7.5. Are Restrictions typically to be treated as charitable trusts in the absence of an explicit statement in the instrument that it is or is not a charitable trust? This writer thinks Restrictions in Massachusetts ought not to be deemed charitable trusts. In Massachusetts, charitable trusts were exempt from the rule against perpetuities long before adoption of the MUTC.[86] Thus, if the things that we now call Restrictions were charitable trusts pre-MUTC, the Restriction Act was not necessary to make them enforceable in perpetuity. And yet the legislative history of the Restriction Act makes it clear that a key purpose of the legislation was to enable the then newly emerging conservation and preservation restrictions to be enforceable in perpetuity. The use of these instruments had "been limited principally by doubts as to their enforceability at common law on account of ancient rules of privity of estate or contract," and by the "probable application" of other sections of Massachusetts General Laws chapter 184 regarding the enforceability of restrictions.[87] "To lay at rest the common law doubts and make these chapter 184 sections inapplicable is the professed main purpose of the proponents" of the new legislation.[88] Although there was some effort to restyle these instruments as "easements," the legislation as adopted reflected the view that these instruments were "what have been for many years known to lawyers and judges as 'restrictions'" and "the

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powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust. … The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice… The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor." See also Restatement (Third) of Trusts § 87 (2003) ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion") and § 87 Comments ("a power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties.") McLaughlin and Weeks, *Defense I*, *supra* fn. 65, at 42-43, citing the Restatement comment ("Land trusts and government entities that negotiate for the inclusion of an amendment provision in the easement deeds they acquire—as many do—have the express power to agree with the current and any subsequent owners of the easement encumbered land to amend the easements in manners authorized by the provision. Moreover, courts will not interfere with a holder's exercise of this amendment discretion unless there has been a clear abuse.")

[83] MUTC, §105(b)(4).

[84] The retroactive effect of the MUTC may not resolve the question whether Restrictions that predate the adoption of the MUTC are or are not charitable trusts.

[85] See section 0, *infra*, regarding the Internal Revenue Code.

[86] *Jackson v. Phillips*, 14 Allen 539 (1867).

[87] Forty-Second Report, Judicial Council of Massachusetts, 1966, Special Studies, Conservation Easements, (1966) (hereinafter the "*Judicial Council Report*"), Separate Opinion of the Chairman, Frederic J. Muldoon, at p. 103.

[88] *Ibid.*

rights created would most naturally be called 'restrictions'."[89] The legislative history makes no mention of charitable trusts. It is a prime rule of statutory construction that wherever possible, no provision of a legislative enactment should be treated as superfluous, [90] let alone treating the central purpose of the legislative enactment as superfluous. Further, the drafters recognized that by making Restrictions enforceable in perpetuity, there needed to be "an adequate release or termination procedure when public need for the interest [i.e., in the Restriction] ceases."[91] The Restriction Act establishes that method for release, in whole or in part, in section 32 of chapter 184 (as described above). If Restrictions were charitable trusts, the method for release or termination would already have been in place, and it would not have been necessary to legislate it anew. Accordingly, for the Restriction Act not to have been superfluous, the legislature must not have considered Restrictions to be charitable trusts at the time of inception of the Restriction Act. Even if the foregoing reasoning were accepted, however, it does not of itself necessarily answer whether the MUTC changed the status of Restrictions (whether granted before or after the MUTC's adoption) to make them charitable trusts. This writer is of the opinion that the MUTC does not have that effect. As noted above, clearly an instrument that in all respects was eligible for the benefit of the Restriction Act could be a charitable trust if so designated by the instrument itself. But the MUTC does not say that such instruments necessarily *are* charitable trusts. The MUTC clarifies or changes the rules applicable to charitable trusts but it does not make something that is not a charitable trust into a charitable trust. If it is true that before the MUTC, Restrictions were not charitable trusts, the adoption of the MUTC does not change that. The MUTC drafters could easily have adapted the model Uniform Trust Code to Massachusetts by stating that certain Restrictions are charitable trusts, but they did not.[92] While the act creating the MUTC[93] explicitly omits sections of the model Uniform Trust Code, amends or repeals various provisions of the General Laws,[94] and adds a subsection to the Massachusetts Uniform Probate Code that cross reference a section of chapter 184 of the General Laws,[95] it makes no mention of the Restriction Act. This omission is thus more likely the result of knowledgeable intent rather than oversight, but regardless, the reading of the MUTC should not insert a provision that the legislature did not put there.[96]

7.6. The Massachusetts Uniform Prudent Management of Institutional Funds Act ("UPMIFA")[97] does not apply to "program-related asset," i.e., "an asset held by an institution primarily to accomplish a charitable purpose of the institution and not

[89] *Ibid*., p. 104.
[90] *Casa Loma, Inc. v. Alcoholic Beverages Control Comm*., 377 Mass. 231, 234 (1979) and cases cited there.
[91] Judicial Council Report, p. 105.
[92] See Report of the Ad Hoc Massachusetts Uniform Trust Code Committee **(**2010). ("The Committee proceeded to review each section of the Uniform Code, comparing it to present Massachusetts law…. In particular, the Committee (1) evaluated current Massachusetts law, preserving it where it was thought superior to the Uniform Code ….")
[93] *Supra*, Fn. 70.
[94] E.g., §50 of 2012 Acts 140, among many sections that amend a General Law.
[95] *Ibid.*
[96] *General Electric Company v. Department of Environmental Protection*, 429 Mass. 798, 803 (1999) ("[W]e do not 'read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.'")
[97] G.L. c. 180A, § 1, governing certain restricted assets of charitable organizations.

primarily for investment." By their nature, Restrictions would not be held for investment, and therefore not subject to UPMIFA.

8. **Massachusetts Environmental Policy Act** ("MEPA")[98]:

8.1. A Restriction amendment may need to comply with MEPA. The MEPA Regulations establish thresholds of environmental impact. Some level of MEPA review is required when one or more of the thresholds are met or exceeded and the subject matter of at least one of the triggering thresholds is within MEPA jurisdiction.[99] MEPA review may also be required under a "fail safe" provision.[100] The MEPA regulatory definitions[101] are key to figuring out if MEPA compliance is called for.

MEPA has jurisdiction over any "Project"[102] undertaken by an "Agency,"[103] or those aspects of a Project within the subject matter of any required "Permit,"[104] or a Project involving "Financial Assistance"[105]; and those aspects of a Project within the area of any "Land Transfer." [106]

For amendment of a Restriction held by a state agency, proposing the amendment may be a "project" (activity) and it certainly is proposed by an "agency" or approved by an "agency." For an amendment of a Restriction held by any municipal or private entity to be a "project" subject to MEPA, there would have to be a "Permit," "Financial Assistance" or a "Land Transfer." By definition, an approval by a state agency is a "permit," so if the Restriction amendment requires state-level approval under c. 184, section 32, the amendment is likely a MEPA "project,"[107] and thereby MEPA jurisdiction is established.

8.2. There is a long list of thresholds requiring filing an environmental notification form ("ENF") or other MEPA review if the Secretary of EEA so requires. This entire list should be reviewed in detail for every Restriction amendment that requires a state-level approval (which, as noted above, may be all of them). The one threshold that may affect every Restriction comes under the subject matter of "Land," is "Release of an interest in land held for conservation, preservation or agricultural or watershed preservation purposes."[108] Although this regulation does not refer to "partial release" or "amendment," it is likely that "release" means "in whole or in part". When this threshold

[98] G.L. c. 30, §§ 61-62H, and regulations at 301 C.M.R. 11.00 et seq.
[99] 301 C.M.R. 11.01(2)(b)(2).
[100] 301 C.M.R. 11.04.
[101] 301 C.M.R. 11.02(2).
[102] Any "work or activity that is undertaken by: (a) an Agency; or (b) a Person and requires a Permit or involves Financial Assistance or a Land Transfer." 301 C.M.R. 11.02(2).
[103] "Any agency, department, board, commission, or authority of the Commonwealth." 301 C.M.R. 11.02(2).
[104] "Any permit, license, certificate, variance, *approval*, or other entitlement for use, granted by an Agency for or by reason of a Project." [Emphasis added.] 301 C.M.R. 11.02(2).
[105] Defined as "Any direct *or indirect* financial aid to any Person provided by any Agency including, but not limited to, mortgage assistance, special taxing arrangements, grants, issuance of bonds, loans, loan guarantees, debt or equity assistance, and the allocation of Commonwealth or Federal funds." 301 C.M.R. 11.02(2).
[106] "Land Transfer" is "The execution and delivery by an Agency of any deed, lease, license or other document that transfers real property or an interest in real property" but not including "the execution and delivery of a deed, lease or license to continue a preexisting lawful use on a Project site, or amendments or extensions thereof."
[107] This author is not aware of a pronouncement to that effect by a state agency or court.
[108] 301 C.M.R. 11.03(1)(b)(5).

is triggered, an ENF is required if the Secretary so requires. Another threshold, also under "Land," is "Conversion of land held for natural resources purposes in accordance with Article 97 … to any purpose not in accordance with Article 97."[109] There is no definition of conversion. One should also be aware that even if no threshold is triggered, the Secretary, at her/his own initiative or the petition of ten taxpayers or any Agency, may require an ENF if there is a "project" and it has "the potential[that] Damage to the Environment … would be caused by a circumstance or combination of circumstances that individually would not ordinarily cause Damage to the Environment" and the filing of an ENF "is essential to avoid or minimize Damage to the Environment and will not result in an undue hardship for the Proponent."[110]

9. **Enforcement** — Standing to challenge an amendment or a state or municipal amendment decision: When a Restriction has been amended, a legal challenge to the amendment might claim that the governmental entity that approved the amendment (or refused to approve it) made an improper decision, or claim that a necessary approval had not been obtained, or claim that a party participating in the amendment, as grantor, grantee or approving authority, improperly exercised its authority. In any such challenge, standing to bring the claim is likely to be a crucial gateway issue before the substance of the claim is examined.

   9.1. There is at least one Land Court case and one Superior Court case in which a municipal enforcement decision was challenged as being a de facto amendment without the requisite Restriction Act approvals,[111] although this writer is not aware of any Massachusetts court decisions in which a formal Restriction amendment was challenged as lacking an approval required under applicable law.
   9.2. If a governmental approval or refusal to approve an amendment per the Restriction Act were deemed an adjudicatory decision it would be appealable under the Administrative Procedure Act.[112] If it were deemed to be a quasi-judicial act, a party aggrieved by the decision could bring an action for a writ of certiorari.[113] As a discretionary act, such approval or disapproval cannot be challenged by a mandamus action.[114]

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[109] 301 C.M.R. 11.03(1)(b)(3).
[110] 301 C.M.R. 11.04(1). "Damage to the Environment" is defined at 301 C.M.R. 11.02(2).
[111] *McClure v. Epsilon Group, LLC et al.*, 19 LCR 384 (2011) and *Van Liew v Chelmsford*, MA Superior Ct. Civil Action no. 12-1581, decided Nov. 9, 2012, aff'd 85 Mass. App. Ct. 1103 (2014) (both about the same Restriction and municipal action, and in both cases the judge did not regard the municipal decision as a partial release).
[112] G.L. c. 30A.
[113] G.L. c. 249, § 4 ("A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court.") Several cases can be cited to support the proposition that the EEA and municipal decisions to approve or disapprove a release or partial release of a Restriction is a quasi-judicial action, e.g., *Quinn v. Bryson*, 739 F. 2d 8, 10 (1st Cir. 1984) (building inspector's denial of a building permit as "exercise [of] some discretion and judgment — his role was not purely ministerial"); *Caswell v. Licensing Commission for Brockton*, 387 Mass. 864, 875 (1983) (video arcade license); *Butler v. East Bridgewater*, 330 Mass. 33, 37 (1953) (permit for removal of soil a "quasi judicial authority to determine the facts and to pass upon the application in each instance under the serious sense of responsibility imposed upon them by their official positions and the delicate character of the duty entrusted to them.")
[114] See *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd.*, 9 Mass. App. Ct. 775, 789 (1980) and *Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 118 (1983). See also *Van Liew v Chelmsford, ibid.* (mandamus). Cf. *Long Green Valley Ass'n v Bellevale Farms, Inc.*, 46 A.3d 473 (2012), 205 Md. App. 636, aff'd 68 A.3d 843 (2013), 32 Md. 292.

9.3. Another cause of action that might be employed would be a ten-resident suit under G.L. c. 214, § 7A,[115] alleging that "damage to the environment is occurring or is about to occur … provided, however, that the damage caused or about to be caused by such person[116] constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." One could imagine an attempt to use this civil cause of action in the context of an amendment in which approval under the Restriction Act was not sought (alleging that as the violation of an environmental statute), or as an attack on an approval or disapproval.[117]

9.4. As to a challenge that the substance of an amendment is limited or prohibited by the terms of the Restriction, when the Restriction is held by a municipality, an action might be brought by the Attorney General or a ten-taxpayer suit under G.L. c. 214, § 3, ¶ (10), alleging that the amendment was contrary to the "specific purposes" of the original Restriction.[118]

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[115] G.L. c. 214, § 7A, provides in part, "The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." The plaintiffs in *Smith v. Westfield*, *supra* fn. 52, successfully sought a restraining order to halt a school construction project on parkland under G. L. c. 214, § 7A and G. L. c. 40, § 53 (which provides a mechanism for taxpayers to enforce laws relating to the expenditure of tax money by a local government).

[116] "Person" being defined by the statute to include any legal entity, including individuals, associations, corporations, the Commonwealth, any political of its subdivision, and any administrative agency.

[117] In the context of MEPA the Supreme Judicial Court has held that if an "agency proposing a project failed to comply with the procedural requirement of a statute or regulation designed to protect the environment, the Superior Court would have subject matter jurisdiction under G. L. c. 214, § 7A." *Cummings v. Secretary of the Executive Office of Envtl. Affairs*, 402 Mass. 611, 615 (1988). A subsequent SJC opinion clarified this by saying "we did not suggest that the question turned on the discretionary or nondiscretionary nature of the Secretary's [of EEA] decision. Rather, we reasoned that, even if the Secretary's … decision [as to whether there was MEPA jurisdiction] was incorrect or arbitrary, the project proponents, and not the Secretary, were the 'person[s]' causing environmental damage as the term was used in § 7A." *Ten Persons of The Commonwealth v. Fellsway Development LLC*, 460 Mass. 366 (2011).

[118] The statute provides, "The Attorney General or ten taxpayers of a county, city, town or other subdivision may bring an action "to enforce the purpose or purposes of any gift or conveyance which has been or shall have been made to and accepted by any county, city, town or other subdivision of the commonwealth for a specific purpose or purposes in trust or otherwise, or the terms of such trust, or, if it shall have become impracticable to observe or carry out such purpose or purposes, or such terms, or, if the occasion therefor shall have terminated, to determine the purposes or uses to which the property involved shall be devoted and enforce the same." This statute cited in *Daly et al. v. McCarthy et al.*, 11 LCR 367 (Mass. Land Ct. 2003), aff'd 63 Mass.App.Ct. 1103, 823 N.E. 2d 434 (2005) (allowing standing to taxpayers bringing suit to enforce subdivision approval condition requiring agricultural preservation restriction; not granting standing to the taxpayers to enforce the APR directly). But see the Land Court decision in *McClure v. Epsilon Group* (*supra*, fn. 111) ("The Restriction is clear that the power to enforce it resides in the Selectmen and only in the Selectmen. Nothing about the Restriction lends itself plausibly to the conclusion that the Restriction was intended to vest in each citizen of Chelmsford an independent right to enforce the restrictive covenants of the Restriction, *should one or more of those citizens*, acting in their own names and interest, conclude that it was an appropriate occasion to have a court enjoin one violation of the Restriction or another." Emphasis added.) Also note that in the Land Court case *Chase et al. v. Trust for Public Land et al.*, Essex Land Ct. Misc. Case No. 329075, 16 LCR 135 (2008) dictum in the opinion (which does not have precedential value) opens the possibility that in "the context of" a ten taxpayer lawsuit under G.L. c. 214, §3, parag. 10, the plaintiffs may be "able

9.5. Conceivably an amendment could be challenged as a failure by the holder to enforce the Restriction but it is questionable who would have standing to bring such an action. There is no authority this author is aware of for the proposition that an abutter or non-abutter to land subject to a Restriction has standing to enforce the Restriction.[119] A 2011 Mass. Appeals Court decision giving abutters standing to enforce a deed Restriction[120] was not about a Restriction under the Restriction Act, and so did not address abutter standing to enforce Restrictions. If a Restriction were a charitable trust, the MUTC gives the landowner who created or contributed property to the Restriction (the "settlor") the power to "maintain a proceeding to enforce" it.[121] Perhaps because of the unusual nature of a conservation or preservation "easement", the MUTC does not state that a subsequent non-settlor owner of the land subject to the easement has such standing under the MUTC (but that does not preclude standing on some other basis).

9.6. An amendment subject to Article 97 for which an Article 97 legislative vote was not obtained could be challenged by the Attorney General on that ground.[122]

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to invoke Article 97 to obtain judicial review" of approval by a state agency holder of a Restriction for acts of the landowner.

[119] In *Knowles v. Codex*, 12 Mass App Ct 493, 498-499 (1981), the court denied standing to individuals to enforce a conservation Restriction held by a town conservation commission on the grounds that "it is the conservation commission which was specifically charged with the responsibility for enforcing the town's rights under the formal instrument. That charge was and is entirely consistent with the specific mandate of G.L. c. 40, § 8C … that, in towns which have conservation commissions, it is they rather than private individuals who are to 'manage and control' the public's interests in lands which are subject to conservation restrictions and easements." Land Court Judge Piper has held that a non-abutter does not have standing to enforce a CR that does not name the non-abutter as a party entitled to enforce the CR. *McClure v. Epsilon Group* (*supra*, fn. 111), citing his own Land Court decision in *Wolfe v. Gormally*, (*supra*, fn. 51) for the proposition that, "When a restriction under G.L. c. 184 states by whom it may be enforced, that language is to the exclusion of others." To the extent that *Wolfe v. Gormally* articulates this proposition, however, I read it to be in the context of restrictions subject to G.L. c. 184, §§26-30 not in the context of Restrictions created under the Restriction Act. See also *Chase v Trust for Public Land* (*Ibid*.), also citing *Wolfe v. Gormally* for that same proposition. See also footnote 4 in *Spencer v. Slavin*, 19 LCR 17 (2011), Misc. Case No. 09-397931 (also decided by Judge Piper). None of these Land Court cases are binding precedents, but they illustrate a line of judicial reasoning.

[120] *Jon Rosenfeld & others v. Zoning Board of Appeals of Mendon*, 78 Mass. App. Ct. 677 (2011), further appellate review denied, 459 Mass. 1109 (2011) ("G.L. c. 184, § 27(*a*)(2), should be interpreted in accordance with the latter of the two alternatives identified in *Brear* [*Brear v. Fagan*, 447 Mass. 68 (2006)]*:* that an owner of land that adjoins the restricted land is entitled to enforce a deed restriction, whether or not the instrument imposing the restriction contains an express statement that the adjoining land is intended to benefit from the restriction."). Note that pursuant to G.L. c. 184, § 26, a CR is exempt from the provisions of G.L. c. 184, §§ 27-30, if "if the instrument imposing such conservation, preservation, agricultural preservation, affordable housing or other restriction" is properly recorded and indexed and "describes the land by metes and bounds or by reference to a recorded or registered plan showing its boundaries." See also *Collins v Mass DCR*, 20 LCR 165 March 23 (2012).

[121] MUTC, § 405(c). "Contrary to the Restatement (Second) of Trusts section 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to a settler does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests." Comment to section 405(c) of the UTC (not the MUTC specifically). Note that this comment leaves open the door the possibility of enforcement by "persons with special interests," whoever those might be in the context of a Restriction.

[122] As to whether ten residents could have standing to enforce Article 97, it seems not to be entirely out of the question. *Animal Legal Defense Fund v. Fisheries & Wildlife Bd*., 416 Mass. 635, 641 (1993) (**"**The plaintiffs also claim standing under art. 97 …. The plaintiffs state that the board membership criteria in G.L. c. 21, § 7, harm the rights afforded them under art. 97. The plaintiffs offer no support for this assertion. Consequently, the plaintiffs' art. 97 standing claim fails." Had the plaintiffs offered support for the assertion, might their standing claim not have failed?)

10. **Internal Revenue Code and Treasury Regulations**[123]: For the value of a donation of any Restriction to be deductible from federal income tax the Restriction must satisfy requirements of the Internal Revenue Code (the "Tax Code")[124] and Treasury Regulations (the "Treasury Regulations"[125]; the Code, Treasury Regulations and the interpretation of them by courts are here collectively called "Tax Law"). A Restriction that satisfies all these requirements is a "qualified conservation contribution." Although the Tax Law establishes no requirements for a Restriction for which a charitable contribution deduction is not claimed, the requirements for a qualified conservation contribution heavily influence how Massachusetts government officials, land trusts and historical preservation organizations view Restrictions.[126] The Tax Law requirements are too extensive and complex to be addressed in these materials in complete detail and a thorough treatise of the portions of those requirements that might affect Restriction amendments would be beyond the scope of these materials.[127] Instead, these materials are limited to those aspects of Tax Law most relevant to drafting a Restriction or an amendment or to putting an amendment in place.

    The Tax Law (like the Restriction Act) contains no explicit reference to amending or modifying an Easement; it does not use the word "amend" or "modify." The analysis of how Restriction amendments are affected by Tax Law is therefore hardly straightforward. It is necessary to evaluate an amendment's compliance with Tax Law both as one action among the endless number of actions that might have a tax consequence, and as an action that either is itself analogous to donating a Restriction or that affects compliance of the amended Restriction with Tax Law. This section will first address whether a Restriction provision allowing amendments can comply with Tax Law and how the ability to amend a Restriction may affect whether the Restriction qualifies for a federal tax deduction. Then, setting aside that question and assuming an amendable Restriction can be a qualified conservation contribution, there follows a review of some Tax Law around the procedures of amending a Restriction.

    10.1. Basic Conflict between Amendments and Tax Law: As of this writing there is a debate whether an Easement donation can qualify for the federal deduction if the Easement provides for amendments. By definition an amendment changes a document and means that the thing that changed went away and did not remain in perpetuity. Therefore, the unfettered ability to amend a document confers the ability to make some or all of the document cease to exist as an enforceable requirement. Accordingly, among many relevant Tax Law requirements, the ones most germane to amendments are the requirements about perpetuity and extinguishment of a deductible Qualified Conservation Contribution.

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[123] Any information pertaining to federal taxation in this Material is neither intended, nor provided, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein, and cannot be used for such purposes.
[124] Internal Revenue Code of 1986, as amended, Section 170(h) (26 U.S.C. § 170(h)).
[125] Treasury Regulations 26 C.F.R. §1.170A–14.
[126] See, e.g., McLaughlin, *Rethinking*, pp. 472-473, n. 165.
[127] See e.g., Jay, *Not Forever I*, pp. 6-16, for a review of the possible relevance of some of the Code and Treasury Regulations to restriction amendments.

10.1.1. Perpetuity: The Tax Code and Treasury Regulations establish two core perpetuity requirements: (1) to satisfy the Code requirement that an Easement must be "exclusively for conservation purposes,"[128] and "[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity"; and (2) an Easement qualifies only if it is "a restriction (granted in perpetuity) on the use which may be made of the real property."[129] Most basically, therefore, to achieve perpetuity under Massachusetts law, a Restriction and any amendment of the Restriction must be enforceable in perpetuity by having gained the benefit of the Restriction Act.[130] But that is not sufficient. The content of the Restriction, and of any amendment[131], must not undermine or negate the perpetuity requirements. Simple examples of such disqualifying content in an amendment would be deletion of a conservation purpose, permission to undertake activity that harms one of the Restriction's conservation purposes, or content that "would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests."[132]

10.1.2. Extinguishment: The common meaning of extinguishment is, "To bring to an end, make an end, cause to die out, do away with entirely, blot out of existence; wipe out**."**[133] The general legal definition is, "to bring to an end, to put an end to, to terminate or cancel, to put out or stifle."[134] Treasury Regulations address the permissible circumstances, method and consequences of extinguishment of an Easement.[135] The circumstances must be a "change in the conditions surrounding the property," ("surrounding" in the physical and possibly metaphysical sense of the word), **"**subsequent" to the creation of the Easement, and "unexpected" (presumably unexpected at the time of creation of the Easement), but only if the "change" is such as to "make impossible or impractical the continued use of the property for

[128] Code § 170(h)((1)(C). The qualifying "Conservation Purposes" are defined in Code § 170(h)(4) and Treas. Reg. §1.170A–14(d).
[129] Code §170(h)(2)(C).
[130] See *supra*, section 4 for these requirements.
[131] The IRS instructions for Part II, Line 3, of Schedule D of form 990, which requires reporting on the modification or termination of conservation restrictions (see *infra*, section **Error! Reference source not found.**) begin by stating, To be eligible for a federal charitable income tax deduction for the donation of a conservation easement to a qualified organization, the easement must be granted in perpetuity," and go on, "Tax exemption may be undermined by the modification, transfer, release, extinguishment, or termination of an easement." Instructions for the 2015 Schedule D (Form 990) Supplemental Financial Statements (hereinafter, "990 Instructions") available at http://www.irs.gov/pub/irs-pdf/i990sd.pdf (as of September 7, 2016). The IRS is presumably thereby clearly signaling that amendments will be scrutinized for their affect on the perpetuity requirement. And note, according to the IRS Audit Guide, an amendment should not change the "*nature"* of the restriction (**"**An easement is not enforceable in perpetuity if it allows amendments that change the nature of the restrictions imposed on the property").
[132] Treas. Reg. § 1.170A-14(e)(2). Compare Treas. Reg. § 1.170A-14(g)(5) re. reserved rights "the exercise of which may *impair* the conservation interests associated with the property" (emphasis added). Note that conservation interests are not synonymous with conservation purposes. "Conservation interest" is not defined in the Code or Treasury Regulations but there are examples in the Treasury Regulations that may shed light on the meaning, e.g., at §1.170A–14 (e)(2) (a significant naturally occurring ecosystem on other property), §1.170A–14(e)(3) (a scenic view), and §1.170A–14(g)(4)(1) (topography and landscape in a mining context).
[133] *Webster's Third New International Dictionary,* Merriam Webster, 2002.
[134] *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, 2014.
[135] Treas. Reg. §1.170A–14(g)(6).

conservation purposes." The method must be by judicial proceeding.[136] The consequences deal with what has to happen to the proceeds from a subsequent sale or exchange of the property.[137] Because extinguishment is presented in the Treasury Regulations in this context the concept logically should be applicable to removal of the Easement from a portion of the property that was the subject of the original donation, although that has not been established by judicial interpretation and the Regulation's repeated use of the phrase "the property," rather than simply "property," could be read to mean that extinguishment must be all or nothing.

10.2. Cases: Five federal court decisions are of prime importance[138] in an effort to understand how Tax Law affects the amendment of Restrictions: and *Simons II*[139], *Kaufman III*[140], *Carpenter II, Belk III*[141], and *Bosque Canyon II*[142].

10.2.1. *Simmons II*: The D.C. Circuit Appeals Court upheld a deduction for a historic preservation façade easement which included a clause stating, "[N]othing herein contained shall be construed to limit the Grantee's right to give its consent (e.g., to changes in a façade) or to abandon some or all of its rights hereunder." According to the court, the IRS argued that "this clause… is inconsistent with conservation in perpetuity because it leaves … [the donee] free to consent to an ahistorical change in the façade" (that is, to the property protected by the Easement) "and to abandon altogether its right to enforce the restrictions set out in the deeds. The Commissioner also asserts the deeds will not prevent uses of the properties 'inconsistent with' their conservation because neither easement includes a clause providing for the perpetuation of the easements in the event … [the donee] ceases to exist or simply abandons its right to enforce the easements." The Appeals Court said this clause has "no discrete effect upon the perpetuity of the easements." The court was impressed by the amici briefs' reasoning that "this type of clause is needed to allow a charitable organization that holds a conservation easement to accommodate such change as may become necessary 'to make a building livable or usable for future generations' while still ensuring the change is consistent with the conservation

[136] "To make our position clear, extinguishment by judicial proceedings is mandatory." *Carpenter v. Commissioner*, T. C. Memo 2013-172 (July 25, 2013) (*Carpenter II*). Prior to Carpenter II the provision regarding judicial extinguishment had not been definitively interpreted by a federal court to mean that judicial extinguishment is the only method by which a qualified conservation contribution may be extinguished.

[137] "[A]ll of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution" (Treas. Reg. §1.170A–14(g)(6)(1)) in the manner detailed in Treas. Reg. §1.170A–14(g)(6)(2).

[138] These are not the only court decisions that refer to amendments. In *Strasburg v. Commissioner*, 79 T.C.M. 1697 (2000) the Tax Court looked at the appraisal of a restriction that was amended but the court only discussed valuation. Jay points out that *Strasburg* "demonstrated that amendments to conservation easements can occur and be consistent with the Code and Treasury Regulations" (Jay, *Not Forever*, at 16). Strasburg was decided in 2000. In the more recent *Butler v. Commissioner*, 2012 T.C. Memo 72, a 2004 conservation deed amended "several portions" of a 2003 conservation deed, "enlarging the portion of the property encumbered by the easement and permitting the encumbered property to be subdivided into 15 tracts instead of only 5." The court only noted the amendment to say it would treat both documents as conservation deed.

[139] *Commissioner v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011) ("*Simmons II")*.

[140] *Kaufman v. Commissioner*, 687 F.3d 21 (2012) (*Kaufman III*).

[141] *Belk v. Commissioner*, 774 F.3d 221 (2014) (U.S. Ct. App., 4th Cir., No. 13-2161) (*Belk III*)

[142] *BC Ranch II, LP v. Commissioner*, ___ F.3d ___ (2017) U.S. Ct. App. 5th Cir., No. 16-60068, Cons. w/16-60069 (*Bosque Canyon II*).

purpose of the easement."[143] Note that this formulation is different from the extinguishment regulation's requirement of "make impossible or impractical the continued use of the property for conservation purposes."[144]

10.2.2. *Kaufman III*: The First Circuit Appeals Court, citing *Simmons II,* upheld the deduction for a historic preservation façade easement donated by Kaufman containing the same clause as in *Simmons II*. The court put significant importance on the need not to "deprive the donee organization of flexibility to deal with remote contingencies." In addition to the reasoning in *Simmons II* about the remoteness of the possibility that the donee would abandon the easement or improperly grant consent, the Court added, "the concern posited by the IRS" that the donee could abandon the easement or improperly grant consent "is within … [the IRS'] power to control: the IRS's own regulations require that tax-exempt organizations such as the Trust be operated 'exclusively' for charitable purposes, 26 C.F.R. § 1.501(c)(3)-1, a requirement that the IRS can enforce against the Trust."[145]

10.2.3. *Carpenter II*: As previously noted, *Carpenter II* is known for making judicial proceedings the exclusive approved method of extinguishment. In *Carpenter II* the Tax Court disqualified an easement which allowed for extinguishment in whole or in part by mutual consent of donor and donee if circumstances rendered the purpose of the Easement "impossible to accomplish."[146] The court tried to distinguish the case from *Kaufman III* (and by implication, *Simmons II*) saying that unlike those case, the Carpenter Easement "allows the parties … to determine for themselves whether conditions have changed and whether any change in conditions makes impossible or impractical the continued use of the property for conservation purposes." The court also wrote, "Nor do we read *Kaufman III* as sanctioning petitioners' argument of putting into the hands of the parties to a conservation agreement the authority to determine when to extinguish the conservation easement so long as the donee organization gets its share of the proceeds of a subsequent sale. In fact, the First Circuit noted that "paragraph (g)(6) only applies when the easement is 'extinguished by judicial proceeding' (citation omitted)." While *Carpenter II* does not turn on the disposition of subsequent sale proceeds, it is not at all clear to this reader how or why the court found this situation distinct from *Simmons II* and *Kaufman III* as to the method of changing or terminating the Easement.[147]

10.2.4. *Belk III*: The Fourth Circuit Appeals Court rejected the Belk conservation easement, which conditionally reserved the donor's right to cause new contiguous land to be added to the easement's protection in exchange for release of an equal or lesser area of land originally protected by the easement (a "swap"), subject to the donee's approval based on certain factors.[148] A swap is essentially an amendment, couched as a conditional right. The

[143] For the Tax Court below, *Simmons v. Commissioner*, 98 T.C.M. 211 (2009) ("Simmons I"), allowing the holder the power to consent to façade changes was acceptable because the Treasury Regulations for an easement that protects a historic property within a registered historic district (Treas. Reg. §1.170A-14(d)(5)) specifically allows "future development" "only if the terms of the restrictions require that such development conform with appropriate local, state, or Federal standards for construction or rehabilitation within the district."

[144] Treas. Reg. §1.170A–14(g)(6)(1).

[145] *Kaufman III* also addressed the subordination requirement of the Treasury Regulations.

[146] The Restriction provision read, "Extinguishment--If circumstances arise in the future such that render the purpose of this Conservation Easement impossible to accomplish, this Conservation Easement can be terminated or extinguished, whether in whole or in part, by judicial proceedings, or by mutual written agreement of both parties, provided no other parties will be impacted and no laws or regulations are violated by such termination…. [Emphasis added.]"

[147] Although *Carpenter II* was about a restriction on land while *Simmons II* and *Kaufman III* were about a restriction on a building façade, the *Carpenter II* court makes no mention of this distinction.

[148] The donee's determinations, inter alia, that: the new land is of the same or better "ecological stability" as the relinquished land; there would be no adverse effect on the conservation purposes of the conservation easement or on

decision in *Belk III* stands principally for the proposition that to meet the requirements of Code § 170(h)(2)(C), it is not enough for the Easement's purposes to be perpetually enforceable; the Easement must be perpetual on *the* real property protected by the Easement in the first place.[149] The Appeals Court also wrote that the Regulations' § 170A-14(g)(6) provisions about the possibility of extinguishment by judicial proceeding *subsequent* to the grant of a Easement has no bearing on the qualification of an Easement that *from the outset* allows for deviations from "a single, immutable parcel" (rejecting the taxpayer's idea that forbidding a swap provision somehow undercut the extinguishment provision.) Additionally the court said allowing swaps ran counter to the appraisal requirement[150] and baseline documentation requirements. [151] *Belk III* did not address the statement in *Belk v. Commissioner*, T.C. Memo. 2013-154 (*Belk II*) that "*Belk I*[152] does not speak to the ability of parties to modify the real property subject to the conservation easement; it simply requires that there be a specific piece of real property subject to the use restriction granted in perpetuity."[153]

10.2.5. *Bosque Canyon II*: In *Bosque Canyon II* the Fifth Circuit Court of Appeals goes in a direction different from the Fourth Circuit in *Belk III* and more like the D.C. Circuit in *Simmons II* and the First Circuit in *Kaufman III*. The Bosque Canyon conservation easements allow the donor the right to change the boundaries of reserved five acre homesite parcels within the property subject to the easements, provided: (1) the area of each homesite parcel could not be increased; (2) the exterior boundaries of the property subject to the easements could not be changed; (3) the overall amount of property subject to the easements could not be decreased; and (4) the donee agreed that in the donee's reasonable judgment, any such modification did not "directly or indirectly result in any material adverse effect on any of the Conservation Purposes." The court wrote, "Given this subdivision-like layout and the homesites' contiguity or close proximity to each other and to the only interior road providing ingress and egress to and from the public roads, the Conservation Easement Plan of the ranch visually eschews any realistic likelihood of significant future changes in homesite location — at most, only theoretical or hypothetical changes…. We are satisfied that any potential future tweaking of the boundaries of one or a few homesite locations cannot conceivably detract from the conservation *purposes* [emphasis added] for which these easements were

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any of the significant environmental features; the new land is "selected, constructed and managed so as to have no adverse impact on the Conservation Area as a whole"; and the fair market value of Trust's interest in the new land is at least equal to or greater than the fair market value of its interest in the relinquished property. *Belk v. Commissioner*, US Tax Court, 140 T.C. No. 1 (2013) (*Belk I*).

[149] The *Belk III* court distinguished its holding from *Simmons II* and *Kaufman III* because those cases addressed the perpetuity of purpose requirements of Code § 170(h)(5)(A), not the perpetuity of place requirement of § 170(h)(2)(C).

[150] Code § 170(f)(11)(D). "Permitting the Belks to change the boundaries of the Easement renders the appraisal meaningless; it is no longer an accurate reflection of the value of the donation, for parts of the donation may be clawed back."

[151] Treas. Reg. § 1.170A-14(g)(5)(i). The baseline documentation requirement "confirm[s] that a conservation easement must govern a defined and static parcel," and a swap provision undercuts the purpose of baseline documentation." The decision makes no mention of the possibility that the baseline documentation could be updated at the time of the swap.

[152] Op Cit.

[153] The court was distinguishing its ruling from the IRS position in Priv. Ltr. Rul. 200403044 (Jan. 16, 2004) and Priv. Ltr. Rul. 9603018 (Jan. 19, 1996).

granted…." The Fifth Circuit said *Belk III* was inapplicable because the Bosque easements and the configuration of the protected land[154] were markedly different enough from Belk where, by contrast, the easement "could be moved, lock, stock, and barrel, to a tract or tracts of land entirely different and remote from the property originally covered by that easement."[155] The Bosque court, like the *Belk III* court, compared the case at hand with the *Simmons II* and *Kaufman III* decisions, but for the purpose of likening Bosque to those cases. The court dismissed the distinction between the Code section at issue in *Belk III* (§ 170(h)(2)) versus that in *Simmons II* and *Kaufman III* (§ 170(h)(5(A)), saying the latter two cases stand for the "common sense" proposition that an easement may be modified to promote the underlying conservation interests, reflecting "[t]he need for flexibility to address changing or unforeseen conditions on or under property subject to a conservation easement…." The Bosque court also dismissed concerns about compliance with the appraisal requirements because of the particular facts and circumstances.[156]

10.2.6. Savings Clauses; State Law: It is worthwhile to also review what these cases say about two defenses offered to rejected amendment clauses: the "Saving Clause" and state law.

10.2.6.1. "Saving Clause": It is not uncommon for the Restriction provision allowing amendments to state something along the lines of, "no amendment shall be allowed that will adversely affect the qualification of this Restriction under any applicable laws." The Belk amendment clause stated the parties were not permitted to "agree to any amendments . . . that would result in this Conservation Easement failing to qualify . . . as a qualified conservation contribution…." The *Belk III* court interpreted the "failing to qualify" language as requiring an adverse determination by either the IRS or a court, after an amendment is agreed on by the parties, for the clause to be triggered, rather than as a limitation on what the parties could agree to before the matter ever came before the IRS or a court. As so interpreted, the court said the clause "provides that a future event alters the tax consequences of a conveyance, [and thereby] the savings clause imposes a condition subsequent and will not be enforced."[157]

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[154] The court considered the physical configuration of the property (the original protected land and the homesites) important enough to attach a plan, prepared as an exhibit in the trial.

[155] The dissent in *Bosque Canyon II* opined that the Bosque easement allowed for more than *de minimis* changes as to which property was protected and therefore failed the *Belk* test that "a conservation easement must govern a defined and static parcel."

[156] The court wrote, "Even the Commissioner's own expert confirmed that the unencumbered homesite parcels have roughly the same per-acre value as the rest of the ranch which is encumbered by the easements. Thus, changing the boundaries of some of the homesite parcels would not return any value to the easement donors." The dissent said the appraisal requirement "would be rendered meaningless if a donor were permitted to change the boundaries of the conservation easement after the donation was made and the deduction was claimed."

[157] Citing *Commissioner v. Procter*, 142 F.2d 824, 827-28 (4th Cir. 1944) and *Estate of Christiansen v. Commissioner*, 130 T.C. 1, 13 (2008), aff'd, 586 F.3d 1061 (8th Cir. 2009). The court also commented, "Indeed, relying on Procter, the IRS has found a clause void as a condition subsequent notwithstanding its failure to reference determination by a court. See Rev. Rul. 65-144, 1965-1 C.B. 442, 1965 WL 12880. The Belks do not suggest that the IRS erred in so concluding, nor do they attempt to distinguish that clause from their own." See also *Palmolive Building Investors v. Commissioner*, 149 T.C. No. 18 (2017).

10.2.6.2. State Law: In general, "In a Federal tax controversy State law controls the determination of a taxpayer's interest in property while the tax consequences are determined under Federal law."[158] *Belk III* clearly rejects the proposition that Tax Law should follow State real property law as to whether an amendment clause (enabling swaps as in Belk) is allowed in restrictions. The *Belk III* court wrote, "whether state property and contract law permits a substitution in an easement is irrelevant to the question of whether federal tax law permits a charitable deduction for the donation of such an easement . . . Thus, an easement that, like the one at hand, grants a restriction for less than a perpetual term, may be a valid conveyance under state law, but is still ineligible for a charitable deduction under federal law."[159]

10.3. Recent IRS staff statement & LTA Position: An IRS trial attorney, Marc Caine, stated at the 2015 Land Trust Alliance (LTA) convention ("Rally") that he believes that a general amendment clause to a conservation easement may disqualify it a tax deduction.[160] (The same position would logically apply to all historic preservation easements.) Note that the most recent Conservation Easement Audit Techniques Guide (ATG) says, "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."[161] The ATG and Mr. Caine's statement may not be inconsistent in that the ATG does not say that an amendments clause allowing other amendments is *ipso facto* unacceptable, and Mr. Caine may have meant that a clause allowing unlimited amendments should not qualify for a deduction but a limited amendments clause might be acceptable.

In a letter dated November 10, 2015, to Mr. Caine and Karin Gross, Senior Technician Reviewer in the IRS Office of Associate Chief Counsel, from Rand Wentworth, then LTA President, LTA questioned the validity of Mr. Caine's position.[162] The LTA takes

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[158] *Ten Twenty Six Investors V. Commissioner*, US Tax Court, 2017 TC Memo 115, citing United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 (1985).

[159] *Belk III*, at 228.

[160] Land Trust Alliance's *Conservation Defense Network Update* email, December 4, 2015. http://www.ctconservation.org/sites/default/files/From%20Leslie%20Ratley-Beach%20re%20Conservation%20Easement%20Amendment%20Clauses%2012.4.15.pdf (as of September 22, 2017).

[161] Revision Date November 4, 2016. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi5ne3hk7nWAhUM4YMKHVYrD70QFggmMAA&url=https%3A%2F%2Fwww.irs.gov%2Fpub%2Firs-utl%2Fconservation_easement.pdf&usg=AFQjCNEMMqOrCoKjIs-uhvUnw6hPFYQ_xg (as of September 22, 2017). The IRS website says audit techniques guides "help IRS examiners during audits by providing insight into issues and accounting methods unique to specific industries. While ATGs are designed to provide guidance for IRS employees, they're also useful to small business owners and tax professionals who prepare returns." https://www.irs.gov/businesses/small-businesses-self-employed/audit-techniques-guides-atgs (as of September 22, 2017).

[162] http://www.ctconservation.org/sites/default/files/AllianceLtrtoKarinGross.pdf (as of September 7, 2016). That letter cited the Tax Court's approval of a deduction for a conservation easement amendment in *Strasburg* (*supra,* fn. 138) and stated, "[I]t is hard to imagine that the framers of the federal law providing the [qualified conservation contribution tax] deduction intended that landowners would be denied a deduction because the document has an amendment clause."

the position that, "Land trusts should include an amendment provision in conservation easements to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws…. Because the various states' laws are uncertain today and may change tomorrow—even on points that appear certain—including an amendment provision is essential.[163] Leslie Ratley Beach, Director of Conservation Defense for LTA, has written on the LTA website, "We continue to strongly recommend well-drafted amendment clauses in all conservation easements…. The Alliance has long held that amendment clauses in conservation easements actually strengthen easements and improve enforceability."[164]

10.4. Analysis & Drafting: The following subsection presents some analysis of factors to consider when trying to draft a Restriction amendments clause that complies with Tax Law, without inconsistency with Massachusetts law. With apologies, no model amendments clause is offered. When drafting it is important to keep in mind that the general concept of an "amendments clause" may be broken down into three separate aspects: (1) Which provisions of the Restriction may be amended and which may not? (2) Under what circumstances may the amendable provisions be amended and/or under what circumstances are amendments prohibited? (3) Whose approval is required for an amendment of certain provisions and/or under certain circumstances?

10.4.1. Safety, risk: The wording of an amendments provision, and even whether or not to have an amendments provision, is a question of balancing risks. On one side is the risk of IRS challenge. The LTA makes a good case on the other side, that the grantee of a Restriction takes significant risk if it omits an amendments provision, because circumstances change, amendments may be legally impossible without an explicit enabling provision in the document, and because landowners may otherwise "contend that no amendment is permitted or that the land trust concealed the possibility of an amendment."[165]

10.4.2. Simple Solutions That Don't Work Well:

10.4.2.1. Silence: If this writer is correct that a Massachusetts Restriction is not a charitable trust unless the instrument says it is, the absence of an amendments clause means that (like most agreements about real estate) the Restriction is amendable by the parties (or their successors) subject only to the governmental proceedings required by the Restriction Act.[166] Thus, without an amendments clause a Restriction is open to challenge by the IRS because it may be amended in ways contrary to Tax Law.

10.4.2.2. Savings Clause: As noted above (10.2.6.1), if a Restriction says that amendments are allowed except those which would result in the Restriction's failure to qualify as a qualified conservation contribution under applicable Tax Laws, or result in failure to satisfy certain specific provisions of Treasury Regulations, that provision will not satisfy the IRS or the Fourth Circuit Court

[163] Amending CEs 2017 (*supra* fn. 3), p. 51.
[164] http://www.landtrustalliance.org/news/how-land-trusts-are-using-amendments-address-future-changes (as of September 22, 2017).
[165] LTA, *Amending CEs 2017*, p. 51.
[166] If a Restriction is a charitable trust, then under the Massachusetts Uniform Trust Code if there s no amendments clause in the document it may not be amended without a judicial proceeding (see section 7 above).

of Appeals and other courts which follow the *Belk III* ruling. The essential thing to avoid is wording which nullifies an amendment upon occurrence of some event after the amendment is in place, such as an adverse determination by either the IRS or a court. What may work is an amendments clause which says, among other things, that notwithstanding any other provision of the Restriction, no amendment shall be permitted which *in the opinion of the holder, in its sole discretion*, causes the Restriction as amended to fail to comply, at the time the amendment is proposed, with Tax Law requirements for a qualified conservation contribution. This route only addresses *which* amendments are prohibited but not whether *judicial approval* is required to adopt the amendment, in addition to approval by the parties and Massachusetts governmental bodies.

10.4.2.3. Universal Judicial Procedure Requirement: Because of the possibility that governmental authorities and courts may interpret "release" or "extinguish" as including any amendment which in any way, regardless of how *de minimis*, diminishes the control exercisable by the Restriction holder, it is tempting to require *every* amendment to be approved by judicial procedure and the Massachusetts governmental approval process. The problem with this approach is that it is extremely rigid. It doesn't allow for the possibility that Tax Laws or the Restriction Act may be amended or interpreted to allow certain amendments without approval by anyone other than the parties.

10.4.3. Red Lines: It makes sense that in any Restriction for which a federal tax deduction will be sought, the amendments provision should expressly state that the parties do not have the authority without judicial procedure to adopt an amendment which has the effect of crossing any of the following "red lines": detracting from the perpetuity of conservation purposes or the perpetuity as to applicability to the originally protected property, allowing a use which is destructive of "conservation interests" unless such use is necessary for the protection of the conservation interests that are the subject of the Restriction,[167] allowing for extinguishment without judicial process, or reducing the proportion to which the holder is entitled from sale proceeds, insurance proceeds or eminent domain award after extinguishment.

10.4.4. Classification model: Attempts have been made to develop a scheme for classifying amendments by what they amend and assigning a different review and approval procedure for each class. Examples include the LTA "risk spectrum,"[168] the unofficial set of Guidelines for New Hampshire Easement Holders, "*Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements*,"[169] and legislation proposed but defeated in Vermont.[170]

[167] Treas. Regs. §170A-14(e)(3).

[168] In *Amending CEs 2017*, ch. 6, the LTA has proposed a risk spectrum for amendments based on the simplicity or complexity of the amendment, the possible impact on conservation values or easement purposes, and likelihood of controversy. Increasing levels of risk warranted increasingly thorough processes and documentation. LTA offers a matrix categorizing the risk level of twenty-three amendment issues (including seven tax-related legal issues) by up to six common factors.

[169] Society for the Protection of New Hampshire Forests, 2010 ("*NH Guidelines*"). The publication is a collaborative effort by the New Hampshire Department of Justice, Charitable Trusts Unit; Paul Doscher at the Society for the Protection of New Hampshire Forests' Center for Land Conservation Assistance; and Nancy McLaughlin at the

Understanding these examples requires an examination of their details which would be too long to set out in a meaningful way here. These schemes suggest a classification model that may be adaptable into individual Restrictions, delineating under what circumstances an amendment which would cause certain effects may be amended by the parties without judicial procedure, under what circumstances amendments that cause such effects require judicial approval, and which effects may not be achieved by amendment without judicial procedure, regardless of the circumstances.

10.5. Procedural requirements: The following tax sections proceed on the assumption that an amendable Restriction qualifies for the federal charitable deduction and reviews of some Tax Law around the procedures of amending a Restriction.

10.5.1. Effect on the Tax Exempt Holder/Donee Organization and its Key Personnel:

10.5.1.1. Private inurement and private benefit: A 501(c)(3) tax exempt entity may not allow any of its "net earnings" to inure to the benefit of any insider – a person related to the organization (so-called *private inurement*).[171] Further, no more than an incidental *private benefit* may accrue to any person.[172] An amendment that confers more benefit on the land owner (or any other person) than on the donee may cause private inurement or private benefit.[173] An example would be an amendment that simultaneously adds low-value property to a Restriction while it increases the number of storeys allowed in a valuable house within a reserved area. When the amendment is more complex, for example when an amendment increases the restrictions on certain activities but loosens them on others, even a qualified appraisal may have a hard time determining the net financial impact.[174]

10.5.1.2. Causing private inurement or private benefit may have negative consequences for the holder/donee organization and/or its leadership. The IRS may impose a penalty on a person (such as an officer or director) in a position to exercise substantial influence over a tax exempt holder/donee organization

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University of Utah Law School. The New Hampshire Attorney General's Office has taken the position that conservation easements in New Hampshire are charitable trusts and New Hampshire's enabling statute is silent on amendment and termination.

[170] See S. 119, 2013 Gen. Assembly, the bill passed by the Vermont Senate. http://legislature.vermont.gov/assets/Documents/2014/Docs/BILLS/S-0119/S-0119%20As%20Passed%20by%20the%20Senate%20(Unofficial).pdf . The statement of purpose of the bill as introduced was, "This bill proposes to amend the statutes governing conservation easements. Among other proposals, it would allow amendments of perpetual conservation easements and create processes for review of amendments that would materially affect existing conservation easements. The bill proposes to define the term 'amendment' to include modifications and whole or partial terminations of conservation easements." See also *Memorandum* re. Easement Amendment Working Group, to Members of the General Assembly from Robert Klein, Chair, Easement Amendment Working Group, January 15, 2013, http://www.leg.state.vt.us/reports/2013ExternalReports/285680.pdf.

[171] Code §501(c)(3) and Treas. Reg. §1.150(c)(3)-1(c)(2) and § 1.150(c)(3)-1(d)((1)(ii).

[172] A useful review of the private inurement and private benefit rules can be found at Staff of Senate Comm. on Finance, Report of Staff Investigation of The Nature Conservancy (Volume I), S. Doc. No. 109-27, 109th Cong., 1st Session (2005) (hereinafter "Senate Fin Comm, *TNC Report*"), Part One 3.

[173] More than the "incidental benefit [that] inures to the donor merely as a result of conservation restrictions limiting the uses to which the donor's property may be put." Treas. Reg. §1.170A– 14(e)(1).

[174] Senate Fin Comm., *TNC Report*, Part Two 5 - 7.

which agrees to an amendment that results in the landowner (or anyone else) getting more benefit than the donee.[175] If the excess private benefit is substantial enough, the IRS may challenge the tax-exempt status of the donee organization, "based on the organization's operation for a substantial nonexempt purpose or impermissible private benefit."[176] There are at least two reported incidences of the IRS revoking the tax exempt status of a conservation easement holding organization because the IRS found the organization operated for private benefit, net income inured to an insider, and the organization did not display the requisite commitment to protect conservation purposes, including one case in which the findings were based in part on the organization's approval of an amendment that benefitted the landowner and from which the organization's president derived consultant fees.[177]

10.5.1.3. Status of Holder/donee as *Qualified Organization*: To qualify for a federal tax deduction, a Restriction must be donated to a "qualified organization."[178] An amendment should not call into question whether the holder is a qualified organization. An amendment might do so in various ways. To be a qualified organization a donee must have …. "a commitment to protect the conservation purposes of the donation ...."[179] Although the same Regulation says, "A conservation group organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) will be considered to have the commitment required by the preceding sentence," nevertheless an organization that agrees to an amendment that creates "private benefit" or "private inurement" or that causes a Restriction to cease to comply with the Tax Code or Treasury Regulations may be deemed by the IRS to not be a qualified organization.[180]

10.5.1.4. Reporting: All "modified" Restrictions must be reported and explained on IRS Form 990, Schedule D, Parts II and XIII. The instructions for the 990 do not differentiate between those Restrictions for which the donor claimed a tax deduction and other Restrictions.[181] Failure to report may also affect an organization's tax exempt status.

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[175] Code §4958, Treas. Reg. §53.4958-3(a).

[176] "The Service intends to assess excise taxes under §4958 against any disqualified person who receives an excess benefit from a conservation easement transaction, and against any organization manager who knowingly participates in the transaction. In appropriate cases, the Service may challenge the tax-exempt status of the organization, based on the organization's operation for a substantial nonexempt purpose or impermissible private benefit." I.R.S. Notice 2004-41, I.R.B. 2004-28, June 30, 2004.

[177] The ruling involving an amendment was I.R.S. Priv. Ltr. Rul. 201110020, (March 11, 2011) available at http://www.irs.gov/pub/irs-wd/1110020.pdf (as of September 7, 2016)) (cited in Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment after Carpenter, Simmons, and Kaufman*, Fl. Tax Rev., Vol. 13, No. 217 (2012) (hereinafter "Tax Deductible Conservation Easements"); the other ruling was I.R.S. Priv. Ltr. Rul. 201405018 (Jan. 31, 2014), available at available at http://www.irs.gov/pub/irs-wd/1405018.pdf (as of September 7, 2016).

[178] Code §§170(h)(1)(B) and 170(h)(3), and Treas. Reg. §1.170A– 14(c).

[179] Treas. Reg. §1.170A– 14(c)(1).

[180] See discussion of enforcement practices in Senate Fin Comm, *TNC Report*, Executive Summary 9 – 10.

[181] 990 Instructions, Part II, Line 3, which also state in part, "Tax exemption may be undermined by the modification, transfer, release, extinguishment, or termination of an easement."

10.5.2. Effect on the Grantor/Landowner**:** An amendment may create a taxable benefit to the landowner and may be the basis for a sanction. The net effect of an amendment may be to increase, rather than decrease, the value of the landowner's property. That net benefit would be taxable.[182] An IRS audit must ordinarily occur within three years of the filing of a return, but that time limit is lifted in the event of fraud or a willful attempt to evade a tax.[183] These limits as to a return claiming a deduction for donation of a Restriction won't bar the IRS from looking at a later amendment to the Restriction or trying to determine whether the amendment evidences fraud or a willful attempt to evade with regard to the original Restriction deduction.

10.5.3. Subordination:[184] To satisfy the perpetuity requirement, a Restriction must not be subject to a mortgage,[185] so if there is a mortgage on the property the mortgage must be subordinated to the Restriction. Suppose there were a Restriction that itself was not subject to a mortgage but the Restriction was amended after a mortgage was recorded on the real estate, and the mortgage was not subordinated to the amendment. The foreclosure on that mortgage would extinguish the amendment, leaving the pre-amendment Restriction intact. It seems certain that no deduction could be allowed for an amendment that is subject to a mortgage even if the amendment decreased the value of the subject property. It is not known whether these facts would cause the IRS to view the entire Restriction as no longer satisfying the perpetuity requirement.[186]

10.5.4. Substantiation: If a landowner wants to seek a charitable deduction for an amendment that the owner contends further decreases the value of the affected land, it is necessary to provide the IRS with all the substantiation required to taking a deduction on a new Restriction. If the claimed deduction is for more than $500, these requirements include filing IRS form 8283.[187] If the claimed deduction were over $5,000, a qualified appraisal must accompany the form 8283.[188] The landowner must have received the holder's contemporaneous written acknowledgement[189] of the donation of the amendment.

10.5.5. Quid Pro Quo: Some amendments aim for a net enhancement of conservation purposes by trading off a benefit to the landowner for a larger benefit to the holder.

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[182] Jay, *Not Forever***,** 15, notes, **"**From the taxpayer standpoint, the IRS might treat an amendment … that returned substantial and valuable rights to the taxpayer as creating a tax benefit and apply the inclusionary version of the tax benefit doctrine. The tax benefit doctrine provides that the later recovery of amounts deducted in previous years must be included as taxable income for the later year, especially if the event giving rise to the recovery is 'fundamentally inconsistent' with the premise upon which the earlier deduction was based. This doctrine might extend to granting a perpetual conservation easement to obtain a tax deduction, and then regaining the rights bound by that conservation easement in a later year through amendment or termination. It is unlikely, however, that pursuant to this doctrine, the actions of a subsequent landowner to unwind a conservation easement would be treated the same as similar actions of the original donor, who benefited from the tax deduction" (citing *Hillsboro National Bank v. Commissioner*, 460 U.S. 370, 372 (1983) and Treas. Reg. § 111.

[183] Code 6501(a) and (c), Treas. Reg. 6501(a)-1 and (c)-1.

[184] See section 11, *infra*, for a review of subordination as a conveyancing matter.

[185] Treas. Reg. §1.170A– 14(g)(2).

[186] See *Butler v. Commissioner* for an example of the Tax Court looking at a restriction and its amendment as one restriction, but which did not present the circumstance of the hypothetical posed here.

[187] Treas. Reg. §1.170A-13(b)(3).

[188] Treas. Reg. §1.170A-13(c)(2).

[189] Treas. Reg. §1.170A-13(b)(1).

Such amendment s arguably creates a quid pro quo transaction. A contribution is deductible only if and to the extent it exceeds the market value of the benefit received.[190] Accordingly, for a "net benefit" amendment to be a charitable contribution, there must really be a net benefit to the holder.[191] To make the net benefit determination, the appraisal of the amendment must identify and value the benefit received by the landowner as well as the benefit received by the holder.[192]

10.6. Massachusetts EEA has said they will not approve an amendment if the holder's status is adversely affected under tax law.[193]

10.7. The Massachusetts Tax Statute at G.L. c. 62, § 6(p) and c. 63, § 38AA[194] should also be consulted, in tandem with federal tax law.

11. **Conveyancing**:

11.1. The Restriction Act requires recording of a "certificate" of the approval of a release, and although the statute does not say "release in whole or part," and presumably that applies to partial releases too.[195] Regardless of the statutory requirement, a Restriction amendment should be recorded to put third parties (e.g., future property buyers, mortgagees) on notice of its existence.[196] A buyer or mortgagee taking title to land subject to a Restriction who does not know of an unrecorded amendment may claim not to be subject to the amendment. A party about to take title to land subject to a Restriction who finds a property alteration that was forbidden but for the amendment may refuse to take title until the amendment is recorded. The potential buyer of a restricted property who was depending on an existing but unrecorded amendment to allow construction of a new structure or commencement of a use might try not to proceed with the transaction until the amendment and the certificates of governmental approval are recorded.

11.2. Whether or not a Restriction was donated, or a tax deduction obtained for a donation, a subordination to the amendment of every superior mortgage and other superior liens should be obtained. Failure to obtain a subordination will result in

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[190] Treas. Reg. §1.170A–1(h)

[191] *Rolfs v. Commissioner*, 135 T.C. No. 24 (2010); *Seventeen Seventy Sherman Street, LLC v. Commissioner*, T.C. Memo 2014-124 (2014) (*Seventeen Seventy Sherman*).

[192] *Seventeen Seventy Sherman*, at 27.

[193] See section 4.5.3, *supra*.

[194] c. 63, § 38AA(a): "'Qualified donation', a donation, or the donated portion of a bargain sale, made in perpetuity of a fee interest in real property or a less-than-fee interest in real property, including a conservation restriction, agricultural preservation restriction or watershed preservation restriction, pursuant to chapter 184, provided that such less-than-fee interest meets the requirements of qualified conservation contributions under section 170(h) of the Internal Revenue Code of 1986."

[195] G.L. c. 184, §32, fourth paragraph. It is not clear whether a Restriction loses the benefit of the Restriction Act if a certificate of approval is not recorded, and the outcome might depend on the actual or constructive knowledge of the party claiming the Restriction ought not to be enforced against them.

[196] For a related case, although not about an amendment, see *Weston Forest & Trail Association v. Fishman*, 66 Mass. App. Ct. 654 (2006). The CR holder knew of but did not contest construction in violation of the CR until after construction was complete. The Court wrote, "[e]stoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest… for purposes of enforcing a conservation restriction that is in the public interest, there is no difference between a governmental body and a private entity. Accordingly, estoppel does not apply in this case."

extinguishment of the amendment upon foreclosure of the superior lien and may create non-compliance with Internal Revenue Code and Treasury Regulations.

11.3. In recent years attorneys representing proposed grantees of Restrictions have become concerned about the affect of the Massachusetts Homestead Act, G.L. c. 188, §1-10, on the enforcement of a Restriction granted by an individual or a trust of which an individual is a beneficiary. As a result practitioners may require an affidavit from the grantor which identifies everyone in addition to the grantor who is entitled to Homestead protection of their interest in the property[197] and a recordable subordination and waiver of Homestead rights signed by all those who have such rights, as identified in the affidavit. This subordination and waiver may easily be built into the Restriction when no one other than the grantor has such rights. It is prudent to go through this process for a Restriction amendment.

12. **Open Questions**: Preservation and conservation easements have been with us in their distinct modern form for almost fifty years now, with the Massachusetts Restriction Act having been in the lead.[198] Given that Restrictions have proliferated in their number and amount of land acreage and building square footage protected, and are enforceable in perpetuity, it seems likely that the need or desire for amendments will only increase as Restrictions proliferate further and age. The National Conservation Easement Database (NCED) census of conservation easements (which does not include every conservation easement in the United States) identified 116,864 easements nationwide as of July 2016, protecting over twenty-four million acres of land.[199] The NCED numbers include 8,877 conservation easements of "permanent" duration in Massachusetts protecting 262,408 acres. Nationally, "From 1994 to 1998, the amount of land protected by privately held conservation easements nearly doubled, then nearly doubled again from 1998 to 2000, and then more than doubled again from 2000 to 2005"[200] and then increased between 2005 and 2010 by about 32%.[201] As of 2016, there were estimated to be more than 1,200 historic preservation Restrictions in Massachusetts.[202] As of 1999, about 4% of the conservation easements held by local and regional land trusts

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[197] See G.L. c. 188, §13. Although this section is applicable to a good faith purchaser for value, this does not mean that use of such affidavit is of no value to the donee of charitable gift.

[198] The Restriction Act was first adopted as c. 666 of the Acts of 1969.

[199] The NCED data is available online at http://nced.conservationregistry.org/ (as of September 7, 2016)). This NCED data shows an increase since 2014 of about 10% in the number of easements and acreage protected. The total land area protected by easements, including easements not in the NCED, was estimated in 2012 by NCED at approximately forty million acres, according Jessica Jay, Understanding When Perpetual Is Not Forever: An Update To The Challenge Of Changing Conditions, Amendment, and Termination Of Perpetual Conservation Easements, and Response to Ann Taylor Schwing, 37 Harvard Environmental Law Review 247, 248 (2013). The completeness of the NCED data is described on their website at http://www.conservationeasement.us/about/completeness (as of September 7, 2016)).

[200] Zachary Bray, *Reconciling Development and Natural Beauty: The Promise And Dilemma Of Conservation Easements*, 34 Harv. Env. L. Rev. 119,129 (2010).

[201] 2010 National Land Trust Census Report, Land Trust Alliance, November 16, 2011, formerly available at https://www.landtrustalliance.org/land-trusts/land-trust-census/2010-final-report (as of February 3, 2015). As of this writing the results of the 2015 LTA Census were not yet published.

[202] Email correspondence from Michael Steinitz, Director of the MHC's Preservation Planning Division, September 8, 2016.

nationally had been amended.[203] As amendments increase in number, the diversity of possible circumstances combined with the inevitability of changing circumstances and the ingenuity of attorneys will no doubt pose new questions and challenges to existing statutes and common law holdings, including the following:

- The biggest question at the core of amending Restrictions is where a line might be drawn to distinguish which changes extinguish, release or dispose of a Restriction and which do not. Or to put it another way, as a matter of either statutory interpretation or public policy, which amendments require (or should require) approval by a governmental authority (administrative, judicial or legislative) and which do not (or ought not)? This question in the federal tax treatment of Restrictions was made more pressing by the *Carpenter II* decision: if a Restriction may only be a qualified conservation contribution if judicial process is the sole means to extinguish the Restriction, then the tax status of every Restriction which does not forbid amendment without judicial approval is called into question. The position taken by IRS staff questioning the qualification of any Restriction which allows amendments[204] was perhaps based on this reasoning, at least in part. It therefore would be surprising if courts were not asked to further define "release" under the Restriction Act, "dispose of" under Article 97, and "extinguish" under federal tax law, and to differentiate between amendments that do or do not partially release, dispose or extinguish a Restriction.
- Likewise, it would be interesting to know definitively whether non-release amendments (assuming there are such things) are enforceable in perpetuity in Massachusetts if they are not approved through the procedure by which a partial release is required to be approved, and whether every reference in the Restriction Act to a "release" includes partial releases.
- The relative novelty of the Community Preservation Act with its requirement to impose a Restriction on certain projects may also generate new questions.
- The whole question of standing of parties other than the grantor, grantee and Attorney General to challenge the interpretation or amendment of a Restriction seems to be somewhat in flux, without any question of charitable trust having been brought into the Massachusetts litigation mix – yet.
- The question has already been raised in litigation[205] as to who has standing to claim that a holder's enforcement decision is so contrary to the express terms of a Restriction as to constitute an amendment of the Restriction, but standing has not yet been definitively set in the context of a ten-taxpayer suit, and the enforcement-amendment boundary may be explored apart from the question of standing.
- If the IRS maintains its intense scrutiny of claims for Restriction deductions, it may pay equally close attention to amendments if they become more common, and so the Tax Court may weigh in on the subject from any one of several possible angles in addition to extinguishment. If lawyers try to avoid questions about amendments by using more conditional reserved rights, that too is likely to be of interest to the IRS.

[203] René Wiesner, *Conservation Easement Amendments: Results from a Study of Land Trusts*, Exchange (Land Trust Alliance), Spring 2000, p. 9, citing the Land Trust Alliance's 1999 Conservation Easement Study.
[204] *Supra* Section 10.
[205] *Van Liew v. Chelmsford* and *McClure v. Epsilon Group*, fn. 111 *supra*.

The one thing that seems certain is that despite, or rather because of, the perpetual enforceability of conservation and preservation Restrictions, the law regarding their amendments will not remain as it is today.

Cases Cited