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Amendment Clauses in Easements: Ensuring Protection in Perpetuity

by Nancy A. McLaughlin

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In this article, McLaughlin examines section 170(h)(5)(A)'s requirement that the conservation purpose of a deductible conservation easement be "protected in perpetuity," and she focuses on the extent to which this requirement should limit the parties' ability to reserve the right to make post-donation changes to the terms of an easement through amendments.

"Forever is a really long time — no less so in tax law." This is the opening sentence in *Hoffman*, in which the Sixth Circuit denied a \$15 million deduction claimed for a façade easement donation.¹ Reading the remainder of this smartly written opinion, I was both delighted and somewhat dismayed.

I was delighted because the Sixth Circuit clearly understands that the requirement in section 170(h)(5)(A) has real teeth: The conservation purpose of a deductible conservation easement must indeed be "protected in perpetuity." The court even noted that perpetuity means "time without end; eternity" and in perpetuity means "endless duration; forever."²

I was somewhat dismayed, however, because in the course of its opinion the court cited a 2012 *Florida Tax Review* article of mine as support for its statement that "the parties [to a conservation

easement] can always reserve the right to make changes that are consistent with the conservation purposes of a donation."³ That statement is, and my discussion of the issue in the 2012 article was, regrettably abbreviated and imprecise, and clarification is needed.

Reserving the right to make changes that are consistent with the conservation purposes of a donation may — or may not — be consistent with the requirements of section 170(h). As explained later, it all comes down to how the conservation easement is drafted. Section 170(h)(5)(A)'s protected-in-perpetuity requirement is multifaceted and requires, among other things, perpetual protection not only of the conservation purposes of the donation but also of the subject property's specific conservation interests.⁴

This is not an abstract problem. The extent to which the parties to a deductible conservation easement can reserve the right in an amendment clause to make post-donation changes to the easement's terms is currently being considered by the Eleventh Circuit in *Pine Mountain Preserve*.⁵ If the Eleventh Circuit affirms the Tax Court majority's holding on this issue, it will cut the

³ *Id.* at 836, citing Nancy A. McLaughlin, "Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After Carpenter, Simmons, and Kaufman," 13 *Fla. Tax Rev.* 217, 285-286 (2012).

⁴ Compliance with the protected-in-perpetuity requirement requires compliance with the following component requirements: Section 170(h)(5)(B) (the no-surface-mining requirement) and reg. section 1.170A-14(c)(1)-(2) (the eligible donee and restriction-on-transfer requirements), (e)(2)-(3) (the no-inconsistent-use requirement), and (g)(1)-(6) (the general enforceable-in-perpetuity, mortgage subordination, future defeating events, mining restrictions, baseline documentation, donee notice, donee access, donee enforcement, judicial extinguishment, and proceeds requirements). See section 170(h)(1)(C), (5); reg. section 1.170A-14(e)(1); and S. Rep. No. 96-1007, at 13-14 (explaining the protected-in-perpetuity requirement).

⁵ *Pine Mountain Preserve LLP v. Commissioner*, 151 T.C. 247 (2018), on appeal in the Eleventh Circuit.

¹ *Hoffman Properties II LP v. Commissioner*, 956 F.3d 832, 833 (6th Cir. 2020), petition for rehearing *en banc* denied, No. 19-1831 (6th Cir., June 17, 2020).

² *Id.* at 834 (citations omitted).

heart out of the protected-in-perpetuity requirement and open the door to even more flagrant abuses.⁶

I. Hoffman Case Background

In *Hoffman*, the Sixth Circuit affirmed the Tax Court's holding that the Hoffman partnership was not entitled to a deduction for the donation of a façade easement on a building because the easement contained an "automatic approval" clause. Hoffman could request permission to, for example, change the appearance of the façade contrary to the secretary of the Interior's historic preservation regulations and, if the holder failed to act within 45 days, the request would be automatically approved and Hoffman could proceed with the change — even if it turned out to be inconsistent with preservation of the historic character of the façade and, thus, the conservation purpose of the easement.⁷

The Sixth Circuit explained that, because of the automatic approval clause, the donation failed to satisfy the protected-in-perpetuity requirement. If the holder of the easement failed to act upon a request from Hoffman within 45 days for any reason — such as other pressing obligations, misplaced mail, email oversight, turnover in staff, or end-of-the-year rush — the holder could lose its ability to enforce some or many of the restrictions in the easement. "There's a world of difference," said the court, "between restrictions that are enforceable 'in perpetuity' and those that are enforceable for only 45 days."⁸

The Sixth Circuit distinguished *Hoffman* from *Simmons*⁹ and *Kaufman*,¹⁰ in which deductions for façade easement donations were upheld even though the easement deeds allowed the holder

"to give its consent (for example, to changes in the Façade) or to abandon some or all of its rights."¹¹ The Sixth Circuit appropriately expressed some skepticism about the reasoning underlying those holdings.¹² It also noted that the automatic approval clause in *Hoffman* was not "needed to allow changes that may become necessary 'to make a building livable or usable for future generations.'"¹³ It was at this point that the court cited my 2012 *Florida Tax Review* article in support of its statement that the parties to a conservation easement "can always reserve the right to make changes that are consistent with the conservation purposes of a donation."¹⁴

But what exactly does it mean to reserve the right to make changes that are consistent with the conservation purposes of a donation? To understand, we must examine the relevant easement deed as a whole and dig a little more deeply into the protected-in-perpetuity requirement.

II. Read the Easement Deed

In my 2012 article, I explained that it is fairly standard practice to address the need to be able to respond to changing conditions, and at the same time comply with section 170(h)(5)(A)'s protected-in-perpetuity requirement, by including an "appropriately limited" amendment clause in an easement deed.¹⁵ I further explained that the typical amendment clause grants the holder the express right to agree to changes or amendments, but only if the amendments are, among other things, consistent with the conservation purposes of the easement.¹⁶ I also referenced the amendment clause in the 1988

¹¹ *Hoffman*, 956 F.3d at 836 (citations omitted).

¹² *Id.* ("Whatever one thinks of that reasoning [in *Simmons* and *Kaufman*] . . . the provision here goes much further.") For additional cases in which courts distinguished *Simmons* and *Kaufman*, see *Mitchell v. Commissioner*, 775 F.3d 1243, 1253-1254 n.6 (10th Cir. 2015), *aff'g* T.C. Memo. 2013-204, *8-*9; *Belk v. Commissioner*, 774 F.3d 221, 227-228 (4th Cir. 2014), *aff'g* T.C. Memo. 2013-154, *6; and *Carpenter v. Commissioner*, T.C. Memo. 2013-172, *7-*9. See also Section III (discussing the significance of special rules applicable only to historic preservation easements) and *Palmolive Building Investors LLC v. Commissioner*, 149 T.C. 380, 399 (2017) (declining to follow *Kaufman* in a case not appealable to the First Circuit).

¹³ *Hoffman*, 956 F.3d at 836.

¹⁴ See *supra* note 3 and accompanying text.

¹⁵ McLaughlin, *supra* note 3, at 285.

¹⁶ *Id.* at 285-286.

⁶ See, e.g., Peter Elkind, "The IRS Tried to Crack Down on Rich People Using an 'Abusive' Tax Deduction. It Hasn't Gone So Well," *ProPublica* (Jan. 3, 2020); IR-2020-130 (June 25, 2020) (IRS settlement offer for syndicated conservation easements); McLaughlin, "Tax-Deductible Conservation Easements and the Essential Perpetuity Requirements," 37 *Va. Tax Rev.* 1 (2017) (case law reveals various forms of noncompliance and abuse outside of the syndication context).

⁷ *Hoffman*, 956 F.3d at 834.

⁸ *Id.*

⁹ *Commissioner v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011).

¹⁰ *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012).

Conservation Easement Handbook's model conservation easement, which provides, in relevant part:

Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code . . . and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration.¹⁷

To fully understand the operation of this amendment clause, it must be read in the context of the model easement as a whole. The amendment clause provides that any amendment must be consistent with “the purpose of this Easement.” The purpose clause of the model easement provides, in relevant part:

Purpose. It is the purpose of this Easement to assure that the Property will be retained forever [predominantly] in its [for example, natural, scenic, historic, agricultural, forested, and/or open space] condition and to prevent any use of the Property that will significantly impair or interfere with the conservation values of the Property.¹⁸

The “conservation values of the Property” are, in turn, to be described in “Whereas” clauses of the model easement, which provide in relevant part:

WHEREAS, the property possesses [for example, natural, scenic, open space, historical, educational, and /or recreational] values (collectively, “conservation values”) of great importance to Grantors, the people of

[county, locale, or region] and the people of the State of _____; and

WHEREAS, in particular, ____ [describe specific conservation values] ____; and

WHEREAS, the specific conservation values of the Property are documented in an inventory of relevant features of the Property, dated _____, 19 __ [on file at the offices of Grantee — or — attached hereto as Exhibit B] and incorporated by this reference (“Baseline Documentation”), which consists of reports, maps, photographs, and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of this grant and which is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant; and

...

WHEREAS, Grantee agrees by accepting this grant to honor the intentions of Grantors stated herein and to preserve and protect in perpetuity the conservation values of the Property for the benefit of this generation and the generations to come.¹⁹

The commentary to the model easement explains that the second “whereas” clause quoted above, in which the drafter is directed to “describe specific conservation values,” is likely in practice to extend to several paragraphs and its purpose is to lay the foundation for the easement by summarizing the characteristics of the subject property that have been identified for protection and the rationale for protecting them.²⁰ The commentary instructs that each resource and its location, if confined to a fixed area, should be clearly described, such as a particular view to or from a mountain range, a stand of virgin timber, a critical wetland, or an ocean access way, so that the parties, their successors, and, if necessary, the

¹⁷ Janet Diehl and Thomas S. Barrett, *The Conservation Easement Handbook, Managing Land Conservation and Historic Preservation Easement Programs* 164 (1988) (emphasis added).

¹⁸ *Id.* at 157 (emphasis added).

¹⁹ *Id.* at 156-157.

²⁰ *Id.* at 168.

courts will always be able to determine the underlying purpose of the easement.

The commentary also includes some sample “whereas” clauses describing specific conservation values, two of which are reproduced here:

WHEREAS, the Property, which exists in a substantially undisturbed natural state, harbors a diversity of plant and animal life in an unusually broad range of habitats for property of its size, including a cobble barrier beach and associated wetlands, nesting ledges, a spruce fir forest, and open meadows, the locations of which are indicated in Exhibit __ attached hereto and incorporated by this reference; and . . .

WHEREAS, a bald eagle nesting site is located on the Property as indicated in Exhibit __, which site has been identified, surveyed, and documented as nest site 20C by the Maine Eagle Project, a project of the Maine Department of Inland Fisheries and Wildlife and the Wildlife Division, College of Natural Resources, University of Maine at Orono, under agreement with the U.S. Fish and Wildlife Service.²¹

Read in the context of the model easement as a whole, it becomes clear that, in providing that “any amendment shall be consistent with the purpose of this Easement,” the amendment clause places two constraints on amendments: (1) an amendment must be consistent with the purpose of assuring that the subject property will be retained forever predominantly in its, for example, natural, scenic, historic, agricultural, forested, or open-space condition, and (2) an amendment must be consistent with the purpose of preventing any use of the property that will significantly impair or interfere with the property’s specific conservation values, and those values are to be identified in the easement and in the baseline documentation (for example, the cobble barrier beach and associated wetlands, the spruce fir forest, the open meadows, and the bald eagle nesting site).

²¹ *Id.* at 169-170.

That the model easement places these two constraints on amendments is not happenstance. To satisfy one or more of the “conservation purposes tests” of section 170(h)(4) (that is, to establish that the donation will preserve habitat, open space, an outdoor public recreational or educational land area, or an historically important land area or structure), the donor must demonstrate that the subject property has conservation values worthy of permanent protection. And to comply with section 170(h)(5)(A)’s protected-in-perpetuity requirement, the conservation easement must, among other things: (1) prevent uses of the property that would be inconsistent with the conservation purposes of the donation and (2) prevent uses of the property that would be destructive of the property’s specific conservation interests (“conservation interests” being synonymous with “conservation values”), with one limited exception. These requirements are referred to as the general enforceable-in-perpetuity and no-inconsistent-use requirements, respectively.²²

A. Enforceable-in-Perpetuity Requirement

Reg. section 1.170A-14(g)(1) sets forth the general enforceable-in-perpetuity requirement. It provides that the “interest in the property retained by the donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation.”²³ This requirement is property-specific and focuses on the overall conservation purposes of the donation. The legally enforceable restrictions must relate to the originally-protected property, and they must prevent uses of that property that would be inconsistent with the conservation purposes of the donation. A conservation easement would not comply with this requirement if it provided that its purpose is to, for example, protect habitat or open space generally, in which case the restrictions could be lifted from the originally-

²² See *supra* note 4 for a complete list of the protected-in-perpetuity component requirements.

²³ For the legislative history on which this regulation is based, see S. Rep. No. 96-1007, at 13-14 (1980).

protected property and moved to protect habitat or open space on some other property.²⁴

The amendment clause in the model easement, read in connection with the purpose clause, is drafted to enable compliance with the general enforceable-in-perpetuity requirement. It provides that any amendment must be consistent with assuring that “the Property” will be retained forever predominantly in, for example, its open-space, scenic, or natural condition, and “the Property” is defined as the originally-protected property.²⁵ Accordingly, amendments permitting uses that would be inconsistent with retaining the originally-protected property forever predominantly in its open-space, scenic, or natural condition would not be allowed.

B. No-Inconsistent-Use Requirement

Reg. section 1.170A-14(e)(2) and (3) set forth the no-inconsistent-use requirement. In contrast to the general enforceable-in-perpetuity requirement, which focuses on the protection of the overall conservation purposes of the donation, this requirement is more fine-grained and focuses on the protection of the subject property’s specific conservation interests.

Reg. section 1.170A-14(e)(2) provides the general rule: “A deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests.”²⁶ This regulation provides a helpful example: “The preservation of farmland pursuant to a State program for flood prevention and control would not qualify [for a deduction under ‘the preservation of open space’ conservation purpose] if under the terms of the contribution a significant naturally occurring ecosystem [a significant conservation interest]

could be injured or destroyed by the use of pesticides in the operation of the farm.”²⁷ This regulation further provides that “this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.”²⁸

Reg. section 1.170A-14(e)(3) provides a limited exception to the general rule: “A use that is destructive of conservation interests *will* be permitted *only* if such use is necessary for the protection of the conservation interests that are the subject of the contribution.”²⁹ This regulation also provides an example: “A deduction for the donation of an easement to preserve an archaeological site that is listed on the National Register of Historic Places will not be disallowed if site excavation consistent with sound archaeological practices may impair a scenic view of which the land is a part.”³⁰

Under these regulations, a use that is destructive of conservation interests may be permitted under the terms of a contribution in only one limited circumstance: “if such use is necessary for the protection of the conservation interests that are the subject of the contribution.” It follows that uses that are destructive of “the conservation interests that are the subject of the contribution” can never be permitted, destruction of those interests being antithetical to their protection. And a use that is destructive of “other significant conservation interests” is permitted only if necessary for the protection of the conservation interests that are the subject of the contribution.³¹ Also, based on the examples in the regulations, a use is “destructive of” conservation

²⁴ See also *Belk v. Commissioner*, 774 F.3d 221 (4th Cir. 2014) (easement authorizing substitutions violated section 170(h)(2)(C)). The originally-protected property can be released from the perpetual use restrictions only in unexpected and extraordinary circumstances — in a judicial proceeding upon a finding of impossibility or impracticality. *Id.* at 225. And in that event, the holder must be entitled to a minimum proportionate share of proceeds to be used in a manner consistent with the conservation purposes of the original contribution, thus ensuring that the conservation purpose of the gift will continue to be protected in perpetuity. Reg. section 1.170A-14(g)(6).

²⁵ See *Conservation Easement Handbook*, *supra* note 17, at 156, 157, 164.

²⁶ For the legislative history on which this regulation is based, see S. Rep. No. 96-1007, at 13 (1980).

²⁷ Reg. section 1.170A-14(e)(2).

²⁸ *Id.*

²⁹ Reg. section 1.170A-14(e)(3) (emphasis added).

³⁰ *Id.*

³¹ “Necessary,” defined in the dictionary as “That which is indispensable,” is a high bar. See *The New Shorter Oxford English Dictionary* 1895 (1993). Implicit in the example provided in reg. section 1.170A-14(e)(2) is that it is not necessary for the protection of the open space attributes of farmland to use pesticides to such an extent that they could injure or destroy significant naturally occurring ecosystems. A use that is destructive of other insignificant (that is, “meaningless” or “Of no importance; trivial; trifling”) conservation interests would presumably be permissible. See *id.* at 1379, defining “insignificant.”

interests if it impairs, injures, or destroys those interests.

Other regulations are similarly designed to ensure the perpetual protection of the originally-protected property's specific conservation interests. For example, reg. section 1.170A-14(g)(5)(i) provides that the required documentation establishing the condition of the property at the time of an easement's donation (often referred to as the "baseline" documentation), "is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the [improper] exercise of the reserved rights." Similarly, reg. section 1.170A-14(g)(5)(ii) provides that "the donor must agree to notify the donee, in writing, before exercising any reserved right . . . which may have an adverse impact on the conservation interests."³²

The amendment clause in the model easement, read in connection with the rest of the easement, is drafted to enable compliance with the no-inconsistent-use requirement. The originally-protected property's specific conservation values are to be identified in the easement and the baseline documentation, and any amendment must be consistent with the purpose of preventing uses that would significantly impair or interfere with those values.³³ Assuming "the conservation interests that are the subject of the contribution" and any "other significant conservation interests" on the property are identified as conservation values, the amendment clause would not permit the parties to agree to uses that would be destructive of those interests.

Requiring that an amendment clause be drafted in this manner makes perfect sense. It would be pointless to require that a conservation easement not permit destructive uses at the time of its donation only to allow the parties to amend the easement post-donation to permit those uses.

C. Protecting Purposes Insufficient

Importantly, if the model conservation easement in the 1988 *Conservation Easement Handbook* had a simpler and more broadly stated purpose — such as to retain the property forever predominantly in its open-space, scenic, or natural condition, or to preserve the property as habitat or as open space — it would fail the protected-in-perpetuity requirement because the amendment clause would permit uses destructive of the conservation interests associated with the property. Specifically, the parties would be authorized to agree to amendments that would be destructive of conservation interests on part of the property in exchange for some purportedly offsetting conservation benefit elsewhere, the "net" effect of which could be characterized as "consistent with" the easement's broadly stated purpose. For example, the parties could agree to amend the easement to allow some additional residential development on part of the property, thereby injuring or destroying some conservation interests there (such as a wetland, a scenic view, or the nesting site of a rare or threatened species), provided the amendment also added use restrictions elsewhere on the property or added nearby land to the easement, in the latter case arguably providing spillover conservation benefits on the originally-protected property. These "trade-off" amendments are generally proposed by subsequent owners who find some of the perpetual restrictions inconvenient and offer, in exchange for their release, to add restrictions elsewhere or to protect nearby land.

A conservation easement that permits the parties to agree to allow uses destructive of conservation interests in exchange for purportedly offsetting conservation benefits violates the no-inconsistent-use requirement. The regulations allow the terms of a contribution to permit a use that is destructive of conservation interests in only one limited circumstance — "if such use is necessary for the protection of the conservation interests that are the subject of the contribution."³⁴ An amendment clause that permits uses destructive of conservation interests in exchange for purportedly offsetting

³² See also reg. section 1.170A-14(g)(4)(i).

³³ See Section II.

³⁴ Reg. section 1.170A-14(e)(3).

conservation benefits does not fit within that exception. Accordingly, an easement authorizing the parties to agree to those amendments should not be eligible for a deduction.

III. Special Historic Preservation Rules

Historic preservation easements, which preserve historically important land areas or certified historic structures,³⁵ are subject to some special rules that do not apply to the other categories of potentially deductible easements (that is, habitat, open space, and outdoor-recreation-or-education easements). Accordingly, some of the holdings in cases involving historic preservation easements may have limited or no usefulness as precedent in cases involving other easements. This key fact is often overlooked.

One requirement that applies only to historic preservation easements and relates directly to the ability of the parties to reserve the right to make changes is reg. section 1.170A-14(d)(5)(i), which provides: “When restrictions to preserve a building or land area within a registered historic district permit future development on the site, a deduction will be allowed . . . 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.”³⁶

In *Simmons*, which involved the donation of two façade easements, the Tax Court found compliance with that regulation to be determinative. The court explained that, although the easements allowed the holder to consent to changes to the properties, they also provided that any rehabilitative work or new construction on the façades had to comply with all applicable federal, state, and local government laws and regulations.³⁷ The court noted that reg. section 1.170A-14(d)(5) “specifically allows a donation to satisfy the conservation purposes test even if

future development is allowed, as long as that future development is subject to local, State, and Federal laws and regulations.”

In affirming the Tax Court’s holding in *Simmons*, the D.C. Circuit similarly found the backstop of federal, state, and local historic preservation laws to be important. It noted that each easement deed requires the donor to ensure that any change to a façade will comply with applicable federal, state, and local governmental laws and regulations, and any change in a façade to which the holder might consent would have to comply with all those laws, including the District of Columbia’s historic preservation laws.³⁸

The regulations applicable to habitat, open space, and outdoor-recreation-or-education easements do not similarly authorize deductions for easements that allow future development so long as the development conforms with appropriate local, state, or federal standards. This fundamental difference in the rules governing deductibility leads to differences in the drafting of easements.³⁹ It also calls into serious question the relevance of some of the holdings addressing the protected-in-perpetuity requirement in cases involving historic preservation easements (such as in *Simmons* and *Kaufman*) to cases involving habitat, open-space, and outdoor-recreation-or-education easements.

IV. Conclusion

To comply with section 170(h)(5)(A)’s protected-in-perpetuity requirement, it is not sufficient for a conservation easement to prevent uses of the originally-protected property that would be inconsistent with the conservation purposes of the donation. The easement must also (among other things) not permit uses that could

³⁸ *Simmons*, 646 F.3d at 8, 11.

³⁹ For example, the façade easements at issue in *Simmons* provided: “Grantor agrees that any rehabilitation work or new construction work on the Facade, whether or not Grantee has given consent to undertake the same, will comply with the requirements of all applicable federal, state and local governmental laws and regulations. Without limiting the foregoing, Grantor’s attention is directed to the Secretary of the Interior’s Standards for Rehabilitating Historic Buildings, presently codified at 36 Code of Federal Regulations Part 67, and to the District of Columbia Landmarks Preservation Ordinance.” *Conservation Easement Deed of Gift Between Dorothy Simmons, Grantor, and The L’Enfant Trust, Grantee 2* (Nov. 18, 2003); and *Conservation Easement Deed of Gift Between Dorothy Simmons, Grantor, and The L’Enfant Trust, Grantee 2* (Jan. 26, 2004) (on file with author, emphasis added).

³⁵ See section 170(h)(4)(A)(iv).

³⁶ Other requirements applicable only to historic preservation easements include section 170(h)(4)(B) (special rules for buildings in registered historic districts) and reg. section 1.170A-14(d)(5)(iv) and (v) (special public-access requirements).

³⁷ *Simmons v. Commissioner*, T.C. Memo. 2009-208, at *5.

be destructive of the conservation interests that are the subject of the contribution or, with one limited exception, any other significant conservation interests on the property. Any reserved right to make changes should have to comply with these and all other applicable section 170(h) and regulation requirements,⁴⁰ and to assess compliance it is necessary to read the easement deed as a whole.⁴¹ It also is important to recognize that historic preservation easements are subject to special rules and, thus, some of the holdings in cases involving historic preservation easements are not good precedent for cases involving habitat, open-space, or outdoor-recreation-or-education easements.

Forever is a really long time, and careful drafting is required to ensure it. ■

⁴⁰For example, a reserved right to make changes should also not permit the parties to agree to remove land from the easement (see *Belk v. Commissioner*, 774 F.3d 221 (4th Cir. 2014)) or relax or remove clauses that were included in the easement to satisfy component requirements of the protected-in-perpetuity requirement, such as the restriction-on-transfer requirement (see reg. section 1.170A-14(c)(2)), the mining restrictions requirement (see reg. section 1.170A-14(g)(4)), the donee notice, access, and enforcement requirements (see reg. section 1.170A-14(g)(5)(ii)), the judicial extinguishment requirement (see reg. section 1.170A-14(g)(6)(i)), and the division of proceeds requirement (see reg. section 1.170A-14(g)(6)(ii)). It would be pointless to require taxpayers to include specific clauses in their easement deeds to be eligible for the deduction only to allow the parties to relax or remove those clauses post-donation by amendment. See, e.g., *PBBM-Rose Hill v. Commissioner*, 900 F.3d 193, 205-209 (5th Cir. 2018) (discussing the required “proceeds clause”).

⁴¹The IRS recently issued a safe-harbor amendment clause, with the caveat that the clause must be considered in the context of the deed as a whole and the surrounding facts and circumstances. See AM 2020-001.

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