

## Thorny issues

1. When there is an amendment of a CR covering multiple parcels under different ownerships, who has to sign the amendment? All underlying owners, or just the owner seeking an amendment? What about mortgage holders, who are subject to the original CR? Would an amendment require a new subordination, and if so, would it apply to all the underlying property owners' liens?
  2. When an amendment is solely to provide private benefit, is simply strengthening the CR language a sufficient public benefit to justify approving an amendment? What if the amendment will result in the owner being able to substantially increase its use of and/or income from the restricted land?
  3. What if the matter is in court and the court has indicated its intent to allow the encroachments/violations, or issues a decision to that effect? What if the Selectmen and Secretary refuse to approve an amendment reflecting the court's decision allowing the violations? Could the land trust simply record a copy of the decision to show that the matter was out of their hands, and they did not "consent" to the violations or the granting of prohibited private benefits. If so, what is to prevent this becoming a good way to bypass the need for an amendment or going through the c. 184 sec. 32 amendment approval process?
  4. Where an amendment clearly confers private benefit, not "a merely incidental benefit" inseparable from the provision of a benefit to the public; rather it is for the sole benefit of the private property owner, which is prohibited by the IRS (and our state laws) both as to governmental and 501 (c) (3) holders, should that enter into EOEEA's consideration of whether or not to recommend approval of a CR?
- (1) Developer puts a CR on the development that covers multiple lots – the same CR. One lot owner wants to amend the CR. Can the lot owner amend the CR unilaterally, without the assent of the other owners, who are all subject to the same CR, and perhaps relied on the CR when they purchased their lots?
- a. What if the amendment is crafted to pertain to only a single lot, and not the other owners?
  - b. What about any mortgages – would all the mortgage holders have to assent to the amendment? If not, what happens when a mortgage is foreclosed on. It would have been subordinated to the original CR, but would that subordination pertain to an amended CR?
  - c. What if the amendment allows a prohibited use, that is anathema to purposes of the CR. Say, a private enterprise that will now have thousands of kids camping, day camps, campfires, climbing structures, a maple sugar operation, archery, etc. – a YMCA camp, where the purposes of the CR were for keeping the land as is, and allowing agriculture in one area of it. The judge is saying "what's the harm?" the land trust has spent nearly all its reserves on litigation, and feels the judge is going to allow a lot more activities unless they settle and can bargain for at least some restriction on the activities. They are out fire-powered by the Y's attorney who started the conversation by saying the language in the CR that it will be kept "predominately in its open and natural condition" means 51%, and the other 49% can be used otherwise, without violating the terms of the CR.

- d. What if the court action is described as an “interpretation” of the CR? (Even though the “interpretation” clearly appears to allow a violation?). This is how one request is being characterized, although the result will be the allowance of previously prohibited activities and structures.

What if a court issues a decision that may not have been “about” the CR, but which will have the effect of giving legal sanction to a violation, with or without the CR holder’s participation?

What if an owner who agreed to a CR over a portion of his property later on realizes that the description of the CR actually covers more land than what he intended? What if a small “racetrack” is inadvertently included and both the owner and land trust agree it should come out of the CR? Would it make a difference if the owner took a tax deduction for the donation? How can this be averted in the future?

A CR does not allow vehicles, but does allow local public safety officials to use vehicles in the “reasonable performance of their duties” or “as required by public safety officials.” One of the local police officers likes to ride his motorcycle or off-road vehicle on the CR to “keep an eye on things.”