

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 STEVEN McClAIN,)
 4541 W. Street, N.W.)
 Washington, D.C. 20007,)
)
)
 and)
)
 the TRUST FOR ARCHITECTURAL)
 EASEMENTS, f/k/a the)
 NATIONAL ARCHITECTURAL)
 TRUST, INC.,)
 1906 R Street, N.W.)
 Washington, D.C. 20009,)
)
 Defendants.)

Civil No. 11-1087

STIPULATED ORDER OF PERMANENT INJUNCTION

The United States has filed a complaint for permanent injunction under 26 U.S.C. (“I.R.C.”) §§ 7402(a) and 7408 against Steven McClain and the Trust for Architectural Easements, formerly known as the National Architectural Trust, Inc. (the “Trust”) (collectively, the “Trust Parties”). The United States and the Trust Parties have agreed to this Stipulated Order of Permanent Injunction (“Order”) pursuant to I.R.C. §§ 7402(a) and 7408, and the Trust Parties consent to be bound by its terms and to its entry without further notice. The Trust Parties waive the entry of findings of fact and conclusions of law under Rules 52 and 65 of the Federal Rules of Civil Procedure. The parties understand that this Order constitutes the final judgment in this matter, waive the right to appeal from this judgment, and agree to bear their respective costs, including any attorneys’ fees or other

expenses of this matter. Nothing in this Order shall constitute an admission of liability or wrongdoing by the Trust Parties of any matters alleged in the complaint for permanent injunction filed with the Court.

The parties also understand and agree that entry of this Stipulated Order of Permanent Injunction neither precludes the Internal Revenue Service (the "IRS") from assessing penalties against the Trust Parties for violations of the Internal Revenue Code, nor precludes the Trust Parties from contesting any such penalties. The parties understand and agree that entry of this Order does not address the separate question, which is not part of this lawsuit, of whether or not the Trust is operated exclusively for exempt purposes within the meaning of I.R.C. § 501(c)(3).

The Trust Parties further understand and agree that the Court has jurisdiction over this matter for the purposes of implementing and enforcing this Order, and understand that if they violate its terms, they may be found in civil or criminal contempt of court.

ORDER

1. IT IS HEREBY ORDERED that pursuant to I.R.C. §§ 7402 and 7408, the Trust Parties, individually and doing business as Trust or any other entity, and their representatives, agents, servants, and employees, and those persons in active concert or participation with them, are hereby permanently enjoined from directly or indirectly:

- (1) Representing and/or communicating to potential donors of historic preservation easements granted on properties for a conservation purpose, as that term is defined in I.R.C. § 170(h)(4) ("conservation easements"), that (a) donors can or should expect the appraisal of the conservation easement to produce a fair market value ("FMV")

determination that reflects 10 to 15 percent of the value of their fee simple property before the easement was donated, or (b) the IRS has promulgated a 10 to 15 percent “safe harbor” or benchmark (or any other safe harbor or benchmark) as the FMV of a conservation easement for purposes of calculating the donor’s charitable contribution deduction;

- (2) Communicating or representing in any form the existence of a 10 to 15 percent “safe harbor” or benchmark (or any other safe harbor or benchmark) for valuing the FMV of a conservation easement to potential donors, appraisers, or anyone else, whether through oral statements, speeches, or printed or published materials;
- (3) Participating in the appraisal process for a conservation easement in any regard, including but not limited to recommending or referring to conservation easement donors or potential donors any appraiser (whether individually or by the appraiser’s firm or company name) or list of appraisers for the purpose of appraising (a) a property subject to conservation easement, or (b) the purported FMV of a conservation easement, provided, however, the Trust Parties may refer prospective and actual donors or donors’ advisers to: (a) a list of all appraisers who have passed the examination of the Appraisal Institute’s Appraising Historic Preservation Easements Professional Development Program (so long as the list was not prepared or edited by or with the assistance of any of the Trust Parties); (b) a link to the Appraisal Institute’s website registry of such appraisers; or (c) a list of all appraisers who have completed another professional course offered by an independent professional organization on appraising conservation easements (so long as the list

was not prepared or edited by or with the assistance of any of the Trust Parties); and provided, however, that the Trust may review any appraisal report submitted by a donor or prospective donor, as contemplated by the terms of this Order, and, where the Trust has a significant concern that the tax deduction or supporting appraisal for the conservation easement donation may be excessive, inflated, or otherwise contrary to Section 170 and applicable Treasury Regulations, may provide comment to a donor on any deficiencies in satisfying the objective criteria for a qualified appraisal as set forth in the Code and related Treasury Regulations.

- (4) Accepting donations of conservation easements where the Trust Parties know or have reason to know that (a) the proposed donation lacks a conservation purpose, as set forth in I.R.C. §170 or related Treasury Regulations, or (b) the conservation purpose of the proposed donation is not protected in perpetuity as set forth in I.R.C. §170 or related Treasury Regulations.;
- (5) Issuing an IRS Form 8283 or document pursuant to I.R.C. Section 170(f)(8) acknowledging a donation to the Trust of a conservation easement supported by an appraisal containing a FMV conclusion which relies on (a) a “generally recognized valuation range” of 10 to 15 percent; or (b) a purported IRS acceptable valuation range;
- (6) Stating and/or communicating to potential conservation easement donors that (a) encumbering a property with a conservation easement will absolutely have a negative impact on the property’s FMV; (b) the appraisal of a conservation easement will

absolutely confirm the negative impact of a conservation easement on the overall FMV of the encumbered property; or (c) they can expect to realize a specific charitable contribution deduction or expect to realize a deduction within the specific range that the Trust has historically seen, on their federal income tax return from the donation of the conservation easement to the Trust; provided however, the Trust may represent that donations of conservation easements may allow donors to claim a charitable contribution tax deduction for the value of the donation, as determined by a qualified appraiser and in accordance with IRC section 170(h) and related Treasury Regulations; and that the value of any conservation easement donation must be based on the particular facts and circumstances of the property;

- (7) Engaging in conduct subject to penalty under I.R.C. § 6700(a), *i.e.*, by organizing or participating in the organization or sale of any entity, plan or arrangement and in connection therewith making or furnishing or causing another person to make or furnish (a) a statement with respect to the allowability of any deduction or securing of a tax benefit that the Trust Parties know or have reason to know is false or fraudulent, or (b) a gross valuation overstatement (as the term is defined in I.R.C. § 6700(b))

- (8) Engaging in conduct subject to penalty under I.R.C. § 6701, *i.e.*, by aiding, assisting in, procuring, or advising with respect to the preparation of any portion of a return, affidavit, claim or other document, when the Trust Parties know or have reason to believe that portion will be used in connection with a material matter arising under the federal tax law, and the Trust Parties know that the

relevant portion will, if used, result in the material understatement of the liability of another person; and

2. IT IS FURTHER ORDERED that the Trust Parties shall not, in requesting donations of any sums (whether termed a fee or cash donation) from conservation easement donors, base or measure such fees on a percentage of the estimated or actual (a) FMV of a contemplated donated conservation easement, or (b) amount of a charitable non-cash contribution deduction that a donor/taxpayer claims under Section 170 of the Internal Revenue Code as a result of the conservation easement donation. The contemporaneous written acknowledgement of a donated conservation easement prepared by the Trust Parties shall acknowledge the value of goods and services, if any, received in exchange for the conservation easement or cash donation; and

3. IT IS FURTHER ORDERED that the parties acknowledge that the Trust Parties may continue to assist prospective donors with the preparation of a Historic Certification Application – Part I to the National Park Service for certification of a property as certified historic structure and communicate with a donor's lender regarding the terms of a proposed conservation easement; and

4. IT IS HEREBY ORDERED that in July of each year for a period of two calendar years from the date of entry of this Order, beginning July 2012, for the purpose of determining or securing compliance with its provisions, an independent monitor experienced in the appraisal of conservation easements, including historic preservation easements, shall be selected jointly by the Trust Parties and the United States (Department of Justice - Tax Division). Each side shall propose two such monitors, whose credentials include being licensed and certified in the states in which they conduct

appraisals, and who can substantiate that they have received specific training and certification in conducting appraisals of Conservation Easements as that term is defined in Paragraph 1. In the event the parties cannot agree among the pool of proposed monitors upon a single choice, the Court shall choose an independent monitor based upon their resumes submitted by the parties. The independent monitor shall be selected on or before May 31, 2012, and shall be compensated by the Trust Parties. The independent monitor shall inspect and review the donor files for five randomly-selected conservation easements donated to the Trust between July 1, 2011 and June 30, 2012, to ensure that the actions undertaken by the Trust Parties on or after the date this Order are in compliance with this Order. In July 2013, the independent monitor shall conduct a similar review of five randomly-selected conservation easements donated to the Trust between July 1, 2012 and June 30, 2013, to ensure that the actions undertaken by the Trust Parties on or after the date of this Order are in compliance with this Order. The Trust Parties shall permit the independent monitor full access to any materials, documents, or files (electronically-stored or paper) relating to the donation of the selected easements and occurring on or after the date of this Order as required to complete the monitoring process, and shall also provide available contact information of any persons, whether or not affiliated in any way with the Trust Parties, who may have information relevant to completion of the independent monitor's function as set forth in this Paragraph;

Within thirty (30) days of completion of each annual investigation, the independent monitor shall provide a written report to the Trust Parties and the United States setting forth in detail his findings; and

5. IT IS HEREBY ORDERED that, prior to accepting a donation of a conservation easement, the Trust shall prepare written correspondence to the prospective donor and/or the donor's adviser recommending that the donor seek independent legal/tax advice regarding whether the

conservation easement's appraisal satisfies the qualified appraisal requirements set forth in the Treasury Regulations; and

6. **IT IS HEREBY ORDERED** that, in the event the IRS or the U.S. Treasury Department ever promulgates, by written regulation(s) or other official published guidance, any safe harbor with respect to conservation easement valuation, or in the event that such a safe harbor is enacted by statute, the Trust Parties may petition the Court for relief from those provisions in Paragraph 1 of this Order limiting the Trust Parties' ability to make representations about the existence and scope of such safe harbors;

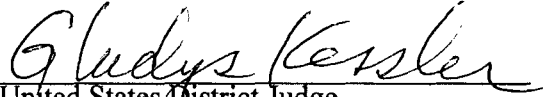
7. **IT IS HEREBY ORDERED** that the Trust Parties shall provide a copy of this injunction to all of its employees, officers, and directors, including area representatives, and shall certify to the Court that they have done so within thirty (30) days of the entry of this Order. The Trust Parties shall also post a copy of this Order on their website, or provide a link to it, for one year from the date of entry of this Order;

8. **IT IS FURTHER ORDERED** that if at any time the United States has reason to believe that the Trust Parties have violated any provision of this Order or engaged in conduct subject to penalty under I.R.C. §§ 6700(a) or 6701 after entry of this Order sufficient to subject the Trust Parties to civil contempt, the United States shall provide written notice to the Trust Parties describing the nature of the violations, and provide the Trust Parties thirty (30) days to cure any such violation before the United States seeks a finding of civil contempt. Nothing in this paragraph shall limit or constrain the United States from seeking a finding of criminal contempt against the Trust Parties if it

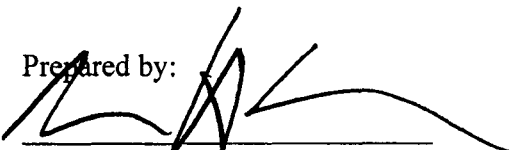
believes such action appropriate (*i.e.*, if the United States reasonably believes the Trust Parties have willfully disobeyed the terms of this Order)

9. IT IS HEREBY ORDERED that the Court retains jurisdiction to enforce this Order, and that for the purposes of monitoring the Trust Parties' compliance with its terms, the United States may conduct discovery using the formal procedures described in Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45, or as otherwise provided in the Federal Rules of Civil Procedure, or permitted by this Court.

IT IS SO ORDERED this 15th day of July 2011.



United States District Judge

Prepared by:


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