

# CONSERVATION EASEMENT REFORM: AS MAINE GOES SHOULD THE NATION FOLLOW?

JEFF PIDOT\*

[S]ome dark omens cloud the future of the [land trust] movement and, absent some changes in the legal structures that support it, time may erode the happy congruity between public and private at the cost of the environment and the public good. The legal community associated with the land trust movement should address these potential problems.<sup>1</sup>

Governing with a view to “conservation-easement-time” requires many elements including laws addressing transferring, amending, and extinguishing easements. More fundamentally, though, it requires systems to track conservation easements’ terms, holders, and locations.<sup>2</sup>

Not everything is the public’s business. This is a private transaction . . . . Not everything needs to be run by the government. That’s why land trusts exist. . . . There is great land conservation and stewardship going on. Leave it alone.<sup>3</sup>

## I

### INTRODUCTION

Six years ago, the Lincoln Institute of Land Policy published *Reinventing Conservation Easements: A Critical Examination and Ideas for Reform (Reinventing Conservation Easements)*.<sup>4</sup> The work questioned the sufficiency of

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\* The author retired in 2007 from a career at the Maine Attorney General’s office, where he served as chief of the Natural Resources Division. His experience with conservation easements spans three decades of working with state government and local land trusts in Maine. During 2004–2005, he was a Visiting Fellow at the Lincoln Institute of Land Policy.

The author thanks the following people who, through personal interviews or other valuable assistance, have particularly helped in the development of this article: Julie Bellware, Linda Conti, Tim Glidden, David Kallin, Bruce Kidman, Rob Levin, Nancy McLaughlin, Amy Mills, Amy Morris, James Olmsted, Karin Marchetti Ponte, Jeff Romano, Jym St. Pierre, Peter Sly, and Alan Stearns. The author also thanks respondents to his survey evaluating their experiences with Maine’s Reform Law; their names are withheld to maintain confidentiality. Except where otherwise indicated, the views expressed here are exclusively those of the author.

1. Frederico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1078 (1996).

2. Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1242 (2009).

3. *Id.* at 1265 (quoting a land-trust representative).

4. JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (Lincoln Inst. of Land Policy 2005).

Subject to possible improvements to address these concerns, the Reform Law's provisions concerning backup enforcement by the Attorney General are widely supported.

#### D. Amendment and Termination

No aspect of conservation easement law has spawned as much controversy as the procedural and substantive standards that attend amendment and termination. The upshot has been litigation<sup>91</sup> and arguments in academic journals.<sup>92</sup> The controversy motivated the LTA to bring together a team of experts to assemble the best thinking on the subject, but the resulting report is largely a smorgasbord of viewpoints.<sup>93</sup>

That said, in the absence of clear statutory direction, the best considered and most prudent course is to adhere to the well-settled principles of charitable-trust law,<sup>94</sup> which generally require court approval in a *cy pres* or similar proceeding to authorize termination of a conservation easement or an amendment that would be detrimental to the conservation purposes of the easement. Parallel requirements apply for tax-deductible, donated easements.<sup>95</sup> Best practices for easement drafting include meticulous terms setting out the process of easement amendment and termination.<sup>96</sup> Even so, under the laws of many states these procedures are not well established or understood, so there remains the prospect of easements being wrongfully amended or terminated simply by agreement of the holder and landowner and without proper regard for the interests of the donor, public, Internal Revenue Service (IRS), or charitable-trust principles.<sup>97</sup>

In an effort to create a clearer path, Maine's Reform Law stands out in dealing explicitly with both the process and substance of easement amendment

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91. See, e.g., *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008); *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007); *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Aug. 12, 2009); *McLaughlin & Machlis*, *supra* note 77, at 54.

92. See, e.g., C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009); C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008); Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010); Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009).

93. See LAND TRUST ALLIANCE, *AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES* (2007); LEVIN, *supra* note 11, at 14–17.

94. See generally LAND TRUST ALLIANCE, *supra* note 77, at 10; LEVIN, *supra* note 11, at 16; SOC'Y FOR THE PRES. OF N.H. FORESTS, *supra* note 82; *McLaughlin & Machlis*, *supra* note 77; *McLaughlin*, *supra* note 77.

95. Treas. Reg. § 1.170A-14 (as amended in 2009); *McLaughlin*, *supra* note 14; see *Kaufman v. Comm'r*, No. 15997-09, 2011 WL 1235307, at \*9 (T.C. Apr. 4, 2011).

96. See, e.g., LAND TRUST ALLIANCE, *supra* note 60, at 11I, 11K; LEVIN, *supra* note 11, at 16.

97. Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements. Part 2: Comparison To State Law* (forthcoming); PIDOT, *supra* note 4, at 22.

and termination.<sup>98</sup> Although the statute does not specifically refer to the common law of charitable trusts, it is intended to provide procedures and standards for amendment and termination that are a practical means to the same end.<sup>99</sup>

First, under the Reform Law, court approval is required for any termination and any amendment that “materially detracts” from the conservation values protected by the easement.<sup>100</sup> This threshold enables amendments that have an immaterial impact on conservation values to proceed without court approval. On the other hand, amendments that materially impair protections afforded under the easement require court approval, even though they may be traded for protections afforded other land. While the materially detract standard requires the exercise of reasonable discretion by the holder, prudence requires a cautious approach, because an amendment that is later found to violate this standard could well be voided, perhaps in an action brought by the Attorney General. To minimize this risk in a close case, informal advice from the Attorney General’s office may be sought concerning whether the amendment requires court approval under the materially detract standard.

Second, in a court action seeking approval for amendment or termination, the Attorney General must be made a party.<sup>101</sup> That presence will help ensure that the interests of the public and, in the case of a donated easement, the donor will be appropriately represented.

Third, the court’s approval of an amendment or termination must be based upon consideration of the conservation purposes expressed in the easement as well as the public interest, among other relevant factors.<sup>102</sup>

Fourth, if the value of the landowner’s fee interest is increased as a result of the amendment or termination, that increase must be paid over to the holder or to such nonprofit or government agency as the court designates, to be used for the protection of lands consistent, as nearly as possible, with the easement’s stated conservation purposes.<sup>103</sup> This provision ensures that landowners will not be unjustly enriched by an easement amendment or termination, since the holder and not the landowner owns the development and use rights set aside in the easement. This provision eliminates pressure from landowners to amend or terminate easements in order to increase the value or economic usefulness of their fee interest. It also goes significantly further to protect the public interest

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98. ME. REV. STAT. ANN. tit. 33, § 477-A(2) (Supp. 2010); LEVIN, *supra* note 11, at 17–26 (providing a comprehensive review of state statutes concerning amendment and termination).

99. By incorporating charitable-trust-like procedures and standards, including the requirement of independent court review of terminations or material amendments, the Reform Law avoids multiple issues that may be spawned by proposals to delegate such decisions to politically appointed review boards that have no history or mandate to consider charitable-trust principles.

100. ME. REV. STAT. ANN. tit. 33, § 477-A(2)(B).

101. *Id.*

102. *Id.*

103. *Id.*

in the easement than IRS regulations applicable to tax-deductible easement donations.<sup>104</sup>

Feedback concerning the amendment and termination provisions of the Reform Law displays general approval, subject to some specific concerns. The provisions are applauded as providing a framework, both procedural and substantive, for conservation easement amendments and terminations. “I think this is one of the central strengths of the Reform Law.” “This has certainly changed my approach and caused a more thorough examination of the easement as a whole.” “These provisions were widely praised by speakers at the Land Trust Rally [in 2010].” The law “has been well received and has had a useful role in guiding land trusts when faced with amendment requests.”<sup>105</sup> “First, it [gives] easement holders significant negotiating leverage when handling amendment and termination requests by landowners. Second, it [discourages] landowners from pressing ahead with court actions to amend or terminate easements without the holder’s consent.”<sup>106</sup> At the same time, the law removes financial incentives for the landowner to want to amend or terminate, which is “an important provision to limit possibilities for private inurement.”

Specific criticisms have also been noted. Drafting challenges have been encountered in melding the Reform Law’s provisions on disgorgement of the increased value of the landowner’s fee interest with the different and generally narrower Treasury requirements regarding easement termination. In the event of termination of a tax-deductible easement, Treasury regulations require that the holder be entitled to a minimum share of proceeds upon a subsequent sale or exchange based upon the value of the easement relative to the value of the land at the time of the easement’s creation.<sup>107</sup> Thus, the Treasury regulations fail to account for the appreciated value of the easement as of the time of termination. In addition, under the Treasury regulations, payment to the holder of this minimum share is deferred until the land is sold or exchanged.<sup>108</sup> In contrast, the Reform Law requires prompt disgorgement to the holder of the entire increase in value of the land as a result of the easement’s termination.<sup>109</sup> In addition, unlike the Treasury regulations, the Reform Law similarly requires disgorgement to the holder of the increase in value of the land arising from

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104. IRS requirements for extinguishment of tax-deductible, donated easements deal only with terminations and not amendments, and provide a floor for the holder’s sharing of proceeds based upon a ratio of the value of the easement relative to the value of the unencumbered fee, fixed at the time of donation rather than determined at the time of extinguishment, with payment triggered only when the property is later sold or exchanged. Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009). As to each of these elements, the more extensive and rigorous requirements of Maine’s Reform Law are more protective of the holder, the public, and the easement’s conservation purposes.

105. LEVIN, *supra* note 11, at 26.

106. *Id.*

107. Treas. Reg. § 1.170A-14(g)(6).

108. *Id.*

109. ME. REV. STAT. ANN. tit. 33, § 477-A(2)(B) (Supp. 2010).

amendment.<sup>110</sup> Accordingly, the Reform Law better protects the value of the easement and the interests of the public, because (1) disgorgement is due upon termination *or* amendment without awaiting sale of the property and regardless of whether the easement was donated, and (2) disgorgement is based upon the appreciated value of the easement between the time of its creation and the time of its amendment or termination. While melding these provisions requires careful draftsmanship, in these ways the Reform Law fills in the considerable gaps left by the Treasury regulations.

Professor McLaughlin has noted<sup>111</sup> that Maine’s law technically refers to “partial releases” as allowed in the same manner as other easements,<sup>112</sup> conceivably suggesting that approval of the holder and landowner might be sufficient for such alterations. However, “partial releases” should always be recognized as a type of termination or amendment that materially detracts from the conservation values of the easement, and therefore that must meet the rigorous requirements of the law dealing with such changes, including court approval.

Professor McLaughlin has further noted that the Reform Law might be interpreted to provide more flexibility for court decision making concerning amendment or termination than the *cy pres* standard under the charitable-trust doctrine or the extinguishment standard under the Treasury regulations applicable to tax-deductible easements.<sup>113</sup> Under the Reform Law, the court’s decision to authorize termination or amendment must be based upon the “public interest” as well as consideration of the parties’ expressed conservation purposes in the easement, among “other relevant factors.”<sup>114</sup> Under the Treasury regulations and the doctrine of *cy pres*, a conservation easement may be terminated by a court if continued use of the property for conservation purposes has become “impossible or impractical”<sup>115</sup>—a standard that requires inquiry into the intent of the grantor as expressed in the easement (in other words, the stated conservation purposes of the easement) and the public interest. Accordingly, although there may be nuanced differences, the Reform Law is framed and should be interpreted to readily embrace charitable-trust principles as well as the extinguishment standard in the Treasury regulations.

Survey respondents expressed a miscellany of other specific issues. A few believed that the landowner disgorgement provision might induce some land trusts to cash out of an easement. However, the standards for permitted amendment and termination forbid consideration of any economic rationale for easement amendment or termination. Moreover, the landowner, by having to

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110. *Id.*

111. E-mail from Nancy McLaughlin, *supra* note 90.

112. ME. REV. STAT. ANN. tit. 33, § 477(1).

113. *Id.*

114. *Id.* § 477-A(2)(B).

115. Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009).

disgorge the added value to its estate due to easement termination or amendment, has no financial incentive to go through the process merely in order to pay the enhanced value over to the holder.

One respondent objected to the burden of having to obtain court approval to abandon an easement with little conservation value. Likewise, a few respondents were confused about whether court approval could be avoided for an easement covering one land area traded for another. In all such cases, it is precisely the purpose of the Reform Law to require a judge to independently pass upon such a material alteration or termination. For easement trading, the materially detract threshold requiring court approval applies to the conservation values of the property protected by the original easement, meaning that a loss to these values requires court approval even if there is a conservation gain on non-easement land or other benefits to the holder or public.

Finally, some commenters wanted to know where they might obtain advice on whether the material detract threshold had been reached so as to require court approval of an amendment. The Attorney General's office can be approached to provide this advice on an informal basis.<sup>116</sup> While such advice is not legally dispositive, informal views of the Attorney General's office provide a strong signal as to what kind of amendments would pass muster. Nonetheless, since parties to an amendment might be second guessed by others in the future, a formal ruling on the issue might be helpful in certain cases.

Despite these specific issues, the vast majority of respondents were generally pleased with the Reform Law's treatment of easement amendment and termination. One noted that the statute "has given me backbone" to deal with pressure from landowners, which was "much greater" before the Reform Law was enacted. A lawyer familiar with other state enabling acts characterized Maine's law on amendment and termination as "imperfect but the most satisfying formula I've seen."

#### E. Merger and Tax Foreclosure

Certain laws can place conservation easements in jeopardy. Under the doctrine of merger, some believe that a conservation easement might be wiped out if the easement holder later also becomes owner of the landowner's fee interest.<sup>117</sup> Similarly, if the landowner's fee interest is subject to tax foreclosure,

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116. Interview with Linda Conti, *supra* note 86.

117. LEVIN, *supra* note 11, at 34–36; PIDOT, *supra* note 4, at 24. Although the risk of merger arises where there is no clear state law on the subject, some experts believe that merger generally should not occur, since there may be no "unity of ownership" of the two estates as required for the doctrine to apply. Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 LAW & CONTEMP. PROBS. 279 (Fall 2011).