

# Amending Conservation Easements: *Evolving Practices and Legal Principles*



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## Foreword and Acknowledgements

To help inform land trusts about the latest thinking on easement amendments, the Land Trust Alliance in May 2006 convened a group of easement amendment experts from across the country. They included lawyers and academics representing differing views about the legal framework of easements and amendments. They also included experienced practitioners representing both larger and older easement programs in the country and younger regional organizations.

With lively and sometimes contentious discussion, this group looked at a wide range of amendment scenarios based on actual and hypothetical cases and struggled to find consensus on core policy and procedural tools that all land trusts should consider when facing an amendment proposal. The work of this study group, and indeed this report, illustrates that there is no single best answer—outcomes depend on case specifics, applicable state and federal laws and judgments about legal uncertainties, donor intent, conservation easement purposes, community context, and experiences and organizational goals of the specific land trust.

This report shares the thinking of these individuals and that of several other legal experts and easement practitioners, revealing the complexity and range of perspectives in easement amendment decisions. It identifies seven definitive principles that should guide all easement amendment decisions, provides screening tests and ways to analyze amendment issues and risks, and presents a range of Case Studies that raise various considerations land trusts may bring to bear in routine and challenging amendment decisions.

This information is geared to land trusts, with their particular set of public benefit and legal responsibilities as charitable nonprofit organizations. Public entities—federal, state and local agencies—that hold easements are subject to different legal constraints, but many of these easement amendment considerations will apply to their actions.

This report complements *The Conservation Easement Handbook* and *Land Trust Standards and Practices*. It provides further clarification and details to assist land trusts as they develop amendment policies and evaluate and respond to amendment requests. Using

this information, land trusts can develop responsible protocols that thoughtfully deal with inevitable changes that easement lands will face. Amendment decisions involve case-by-case analysis and ultimately require the land trust's fully informed best judgment to comply with law, honor promises made to easement donors and others, respect organizational mission, uphold the public interest, and create positive conservation outcomes.

Sound decisions about individual conservation easement amendments benefit easement programs nationwide. These decisions demonstrate to members, regulating agencies, donors, landowners and the general public that land trusts can respond to change in ways that continue to protect land and benefit society while also complying with federal, state and local law and obligations to donors, grantors, funders, land trust members and their communities. Ill-advised decisions place land trusts and conservation easement donation programs across the country at risk.

While many individuals contributed to this report, not all agreed with all portions of the final report. The Land Trust Alliance thanks the original members of the amendment group for their participation and assistance in this project, including Judy Anderson, Robert Berner, John Bernstein, Darby Bradley, Andrew C. Dana, Mike Dennis, Paul Doscher, William Hutton, Andy Loza, Karin Marchetti Ponte and Nancy A. McLaughlin. The Alliance also thanks the peer reviewers, an additional group drawn from the land trust community to enrich the initial draft report. Comments were received from K. King Burnett, Alison Elder, Shaun Fenlon, Laurel Florio, Burgess Jackson, Renee Kivikko, Terry Knowles, Tim Lindstrom, Tony Colyer-Pendas, Jeff Pidot, Leslie Ratley-Beach, Ann Taylor Schwing, David Shields, Stephen Small, Stephen W. Swartz and Tammara Van Ryn. Stephen Small and Stephen W. Swartz provided an additional level of review. The Alliance also thanks the members of the project team, including Debby Bergh, who facilitated a retreat of the amendment group, Brenda Lind, who wrote the early drafts of this report, and Ann Taylor Schwing, who produced subsequent drafts. Sylvia Bates managed this project on behalf of the Land Trust Alliance. Financial assistance for this effort was generously provided by the William Penn Foundation and the Doris Duke Charitable Foundation, and the Alliance greatly appreciates their support.

## Part 1. Introduction

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*Most conservation easements are written to last in perpetuity. Any change to any conservation easement should be approached with great caution and careful scrutiny.*

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When a land trust accepts a perpetual conservation easement, the land trust promises the easement grantor, land trust members, funding sources and the public that the land trust will uphold the easement in perpetuity. As a charitable organization, chartered under state law, and as a federally tax-exempt nonprofit entity, a land trust has legal and ethical responsibilities to ensure perpetual protection of its easements. How, then, is it possible to contemplate amending “perpetual” easements?

The occasional need to amend an easement is rooted in our inability to predict all the circumstances that may arise in the future. Any decision to amend or not to amend a conservation easement must serve public interests by ensuring that conservation easements not only endure but also are robust, enforceable and fair, both to the public and to the landowners who share a land protection partnership with land trusts. The concept of amendment recognizes that neither the original grantors nor the land trusts are infallible, that natural forces can transform a landscape in a moment or a century, and that amendments can protect more as well as less. Exceptional circumstances sometimes warrant amendments, and a land trust should be prepared for that possibility while also being responsible for ensuring an easement’s terms are followed in perpetuity.

Suppose, for example, that an owner of conservation easement land wishes to increase the acreage under the perpetual easement. Or suppose the owner wishes to remove a reserved building right or other reserved right from the easement. Perhaps both parties want to update an easement to incorporate the land trust’s improved standard language without changing the easement’s intent or conservation purposes. Many land trusts have confronted these and similar situations and have adopted written policies to address them, as directed by *Land Trust Standards and Practices*, practice 11I. What can be learned from their experiences? What criteria do they consider and what process do they follow?

How do state and federal laws affect land trust decisions? This report offers collective wisdom from land trusts experienced in these amendment situations, legal practitioners and legal academics.

As portfolios of conservation easements expand and age, land trusts face more complex amendment dilemmas. Suppose, for example:

- A landowner wants to move a reserved building site within the easement boundaries.
- A landowner proposes adding substantially more acreage to an easement in return for relaxing a land use practice forbidden or addressed ambiguously in the original easement.
- A landowner violates an actually or arguably ambiguous easement provision, and the land trust wishes to settle the dispute by an amendment to the easement, thereby eliminating the ambiguity and reducing the likelihood of future violations.
- A farmer, adapting to changes in the farm economy, proposes an amendment that would strengthen one conservation purpose in the easement but weaken another.
- A land trust wishes to revise restrictions in an older easement that impose a substantial stewardship burden and expense but offer little or no conservation benefit.
- Part or all of an easement-protected property is slated for condemnation for a public purpose.

Addressing these more complex amendment proposals involves difficult judgments, painstaking legal and factual analysis, and legal and scientific expertise. Experts do not always agree on what or how public interest policies should apply and may even disagree on what law governs. Land trusts do not act independently in their decisions because the Internal Revenue Service (IRS) has a direct interest in amendments to easements for which tax deductions were taken, reflected in its regulations and in IRS Form 990 questions. Landowners, donors, funders and others also watch amendment decisions and may alter their actions as a result. This report explores areas of agreement and disagreement and offers guidance as to how land trusts may best proceed in the face of legal uncertainty.

The Land Trust Alliance does not have all the answers to these complex issues. No one does. Easement amendments involve an evolving area of law, and each amendment arises in a unique context of varying facts and laws. The guidance in this report is the Land Trust Alliance's best effort at identifying and compiling the complexities of the legal and political landscape as of the date of the report. Each land trust must consult its own experienced legal counsel and exercise great caution in addressing amendment issues.

## I. THE DILEMMA OF CHANGE

One thing is certain: all land trusts will face the issue of easement amendments over time. Unanticipated changes arise from many quarters: natural causes and acts of God; the need of landowners who make a living from the land to adjust to unanticipated changes in business cycles and demands; new information not available when the easement was drafted; development of new technologies; and new understandings in conservation science and agriculture. With changes come new and unanticipated challenges.

Land trusts need a thoughtful approach to deal with unanticipated changes. A "just say no" approach to all amendment requests may be contrary to conservation goals, to public

policy and to the land trust's mission and standing in the community. A "just say yes" approach could violate federal and state law and the solemn obligations that land trusts assume when accepting conservation easements. The challenge for each land trust is to develop criteria and procedures to address unexpected or evolutionary changes in a manner that honors its legal and ethical obligations and maintains public confidence in the integrity of the organization and its conservation easements.

There is no "one-size-fits-all" approach, primarily because each conservation easement amendment question involves unique facts and variations in state law. The extent to which state and federal laws are applicable to easement amendments and the content of these laws are unresolved to some degree, as will be explained in this report. Land trusts will have to study, consult and share experiences with colleagues; confer with their own legal counsel, seek guidance from the state attorneys general or the courts when required or appropriate; request rulings from the IRS as needed; and always be prepared to explain their decisions to easement donors, grantors, members, affected landowners, federal and state regulators, and the general public. While the legal framework for some types of easement amendments is uncertain, caution is always strongly advised. Over time, however, land trusts may want to explore whether it would be beneficial to work with state legislatures, the IRS and Congress to clarify the applicable laws and regulations.

Despite these cautions, legitimate amendment requests can be opportunities for positive change. Amendments may allow a land trust to respond to change in ways that can increase the public benefits of an easement; to improve and upgrade outdated easement language; to increase resource protections; and to create positive conservation outcomes.

## II. THE DILEMMA OF UNCERTAINTY

As discussed throughout this report, conservation easement amendment decisions must be made in a context of unavoidable legal uncertainty. Conservation easements are a relatively new tool, so little legal precedent exists today to guide amendment decisions. Overlapping federal and state laws impose requirements that may be difficult to translate into practice on the ground.

In the face of requirements that are not yet clearly delineated, land trusts still must act and should try to do so in ways that minimize the risk of error. Conservative land trusts may elect to adopt and follow conservative amendment policies that satisfy the most stringent federal and state requirements that might apply. Their risk is limited to doing extra work or being overly rigid in considering, drafting and processing amendment requests. As land trusts adopt less stringent amendment policies or interpretations of relevant requirements, at some point, their transactions may not comply with legal or ethical requirements, their nonprofit status may be at risk, they may lose donors and community respect, and other significant harm may arise. That tipping point between being too rigid and too liberal in addressing amendment issues may be far easier to see in hindsight than in practice. Moreover, the tipping point is easily obscured when a land trust has internal reasons to act that may be unrelated to conservation, such as the desire to settle a dispute or lawsuit, the desire to eliminate an undue monitoring burden, or the anticipation of obtaining a collateral benefit. Advice from a neutral source can be invaluable in these circumstances, but each land trust must reach its own assessment of the best course of action in consultation with experienced legal counsel.

Each amendment decision presents a spectrum of varying degrees of risk versus safety, burden versus ease, and public versus private interests. A land trust elects a place along

this spectrum each time it makes a decision with respect to an amendment, whether the land trust recognizes the decision or not. Electing a place along this spectrum is best done consciously and deliberately, in light of all known factors and possible risks. External uncertainty does not require land trusts to refuse to amend conservation easements in all circumstances, but it does require thoughtful consideration of multiple legal, policy and practical issues and risks before a decision is made. Some types of amendments should never be permitted, and these should be recognized quickly so no time is wasted considering them.

### III. TERMS USED IN THIS REPORT

**Conservation values or attributes.** The features or characteristics of a property that provide important benefits to the public and make the property worthy of permanent conservation, such as presence of threatened or endangered species, important wildlife habitat, scenic views, prime agricultural soils, publicly used trails, strategic location in a corridor of protected land, water resource protection features, and so on. Conservation values are inventoried in baseline documentation, which must be updated if the conservation easement is amended to affect those values.

**Conservation purposes.** The specific purposes stated in the purpose clause of a conservation easement, typically including protection of one or more conservation values. This term is not to be confused with the conservation purposes for tax-deductible conservation easements as defined by the IRS in Treasury Regulations Section 1.170A-14 (although there is usually significant overlap).

**Private inurement and impermissible private benefit.**<sup>1</sup> Prohibitions on private inurement and impermissible private benefit designed to ensure that charitable assets are used exclusively to further public (or charitable) purposes, not private ends. Private inurement and impermissible private benefit may occur in many different forms, including, for example, payment of excessive compensation, payment of excessive rent, making inadequately secured loans, or receipt of less than fair market value on the sale or exchange of property. Violation of private inurement and private benefit rules may result in monetary penalties and, in extreme cases, the loss of the charity's tax-exempt status.

**Private inurement.** The doctrine of private inurement generally prohibits a tax-exempt organization from using its assets to benefit any individual or entity that has a close relationship to the organization, such as a director, officer, key employee, major financial contributor, or other "insider."<sup>2</sup> Private inurement often arises when an organization pays unreasonable compensation (i.e., more than the value of the services) to an insider,<sup>2</sup> but the inurement prohibition is designed to reach any transaction through which an insider is unduly benefited by an organization, directly or indirectly. The private inurement prohibition does not prohibit all transactions between a publicly-supported charitable organization and those who have a close relationship to it. Instead, such transactions are tested against a standard of "reasonableness" that calls for a

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<sup>1</sup> For a more detailed discussion of the private inurement and private benefit doctrines, see, e.g., Joint Committee on Taxation, *Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations*, 48, 52-56 (JCX-29-05) April 19, 2005 (available at <http://www.house.gov/jct/x-29-05.pdf>); Bruce R. Hopkins, *The Law of Tax Exempt Organizations* (8th edition 2003) 483-541.

<sup>2</sup> IRC §501(c)(3) provides that an organization will qualify for tax-exempt status only if "no part of the net earnings [of the organization] inures to the benefit of any private shareholder or individual," and the Treasury Regulations under §501(a) define "private shareholder or individual" as "persons having a personal and private interest in the activities of the organization."

roughly equal exchange of benefits between the parties and looks to how comparable charitable organizations, acting prudently, conduct their affairs.<sup>3</sup> Historically, the only sanction for a private inurement violation was revocation of the nonprofit's tax-exempt status. However, the intermediate sanctions rules enacted in 1996 empower the IRS to impose an excise tax on insiders who improperly benefit from transactions with a nonprofit and on its managers.

In addition to federal prohibitions on private inurement, some states regulate pecuniary benefit transactions. For example, New Hampshire state law imposes strict limits on financial transactions between nonprofits and their board members, and certain transactions require prior approval by the probate court.

**Private benefit.** The doctrine of private benefit generally prohibits a tax-exempt organization from using its assets to benefit any individual or entity impermissibly, not just an insider. Land trusts must consider the public benefit in all land and easement transactions, including amendments.<sup>4</sup> Accordingly, the doctrine of private benefit is broader than (and subsumes) the private inurement prohibition. However, unlike the absolute prohibition against private inurement, *incidental* private benefit is permissible. An *incidental* private benefit must be “incidental” to the public benefit in both a qualitative and quantitative sense. A *qualitatively incidental* private benefit occurs as a necessary concomitant of the activity that benefits the public at large; in other words, the benefit to the public cannot be achieved without necessarily benefiting private individuals.<sup>5</sup> A *quantitatively incidental* private benefit must be insubstantial when viewed in relation to the public benefit conferred by the activity.<sup>6</sup> A charitable organization that violates the private benefit prohibition risks monetary penalties and, in egregious circumstances, loss of its tax-exempt status.

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<sup>3</sup> For example, payment of reasonable compensation to officers or employees is permitted. Whether particular compensation is reasonable is a question of fact.

<sup>4</sup> The private benefit doctrine is implicit in the requirement that a tax-exempt organization operate exclusively for exempt purposes.

<sup>5</sup> *See, e.g.*, Rev. Rul. 70-186, 1970-1 C.B. 128 (organization formed to preserve a lake as a public recreational facility and to improve the condition of the water in the lake to enhance its recreational features qualified for tax-exemption under §501(c)(3) because any private benefits derived by the lakefront property owners would not lessen the public benefits flowing from the organization's operations and, “in fact, it would be impossible for the organization to accomplish its purposes without providing benefits to the lakefront property owners”).

<sup>6</sup> *See, e.g.*, Rev. Rul. 75-286, 1975-2 C.B. 210 (organization formed by residents of a city block to preserve and beautify the block that enhanced the value of the residents' properties did not qualify for tax exemption under §501(c)(3) because it was organized and operated to serve the private interests of its members; the ruling notes that it is distinguishable from Rev. Rul. 68-14, 1968-1 C.B. 243, in which an organization formed to preserve and develop the beauty of a city qualified for tax exemption under §501(c)(3) because the organization had a broad program to beautify the city rather than one restricted to improving the area adjacent to the residences of its members).



## Part 2: Executive Summary

Across the country, nearly 1,700 land trusts are conserving thousands of acres of privately owned land, bringing to their communities the benefits of wildlife habitat, public recreation, scenic views, clean air, clean water and local food. Landowners and land trusts are increasingly turning to conservation easements, restricting future development in some way, as an essential and cost-effective tool for land conservation. In fact, the number of acres under conservation easement increased 148 percent between 2000 and 2005, according to a recent report by the Land Trust Alliance. But along with the growth in areas protected by easements have come novel legal questions on the management of those easements and, in particular, how and when they may be amended, if at all. To ensure that all land trusts can benefit from expert thinking on this subject, the Alliance convened a group of attorneys and land trust practitioners who collectively have decades of experience working with such easements. This report is a compilation of the analysis and findings, sometimes conflicting, of that group. It is not intended as the final word on the subject, but rather our best reflection of the “state of the art” on conservation easement amendments. We are committed to continuing this dialogue and sharing the evolving discourse, debate and wisdom in hopes of ensuring the best possible easements with the greatest conservation impact.

As a charitable entity under state law, with federal tax-exempt status, a land trust has legal and ethical obligations to ensure the perpetual protection of its conservation easements. Exceptional circumstances may warrant easement amendment because original donors and land trusts are fallible, natural forces can transform landscapes in a moment or a century, and amendments can protect more as well as less. The challenge is to develop criteria and procedures to address unexpected or evolutionary change while honoring all legal and ethical duties and maintaining public confidence in the integrity of the land trust and its easements.

Amendment decisions now occur in a time of legal uncertainty with little precedent. Applicable federal and state laws may be difficult to translate into practice, yet land trusts still must act and should do so in ways that minimize the risk of error. Land trusts that follow conservative policies satisfying the most stringent laws that might apply may do

extra work or be overly rigid in considering amendment requests. Land trusts that adopt less stringent policies may not comply with legal or ethical requirements, may place their nonprofit status at risk, may lose donors and community respect, and may suffer other harm. The line between too rigid and too liberal is easier to see in hindsight and can be obscured by motives unrelated to conservation, such as desire to settle a dispute, eliminate a monitoring burden or obtain a new benefit. Each land trust must decide its best course of action in consultation with qualified legal counsel.

*AMENDMENT POLICY. Land Trust Standards and Practices, practice 11I provides:*

The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

Clear policies enable land trusts to address amendment issues consistently over time and to comply with law, honoring the perpetuity of conservation easements while maintaining limited and appropriate flexibility to respond to unanticipated change.

*LEGAL REQUIREMENTS. Legal constraints on land trusts considering easement amendments may include:*

- The requirements of conservation easement enabling laws in each state.
- Land trust governance documents, including articles of incorporation, bylaws and IRS tax-exemption approval documents.
- Internal Revenue Code and Treasury Regulation requirements for perpetuity and prohibitions on private inurement and private benefit.
- State and federal laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts.
- State laws on fraudulent solicitation, misrepresentation to donors, consumer protection and the like.
- State laws regulating the conduct of fiduciaries depending on the circumstances of easement creation, relationships with donors and obligations undertaken by the land trust, such as some state statutes and common law doctrines deeming nonprofits soliciting donations to be fiduciaries.
- State and local laws governing land use, conveyances and the like.
- Contractual and other obligations to easement donors, grantors, funders and others.

Land trusts that ignore these limitations risk imposition of legal sanctions, civil liability, penalties and possible loss of tax-exempt status by the IRS or by state officials that oversee nonprofits.

**Easement amendment provisions.** An amendment provision in a conservation easement affirmatively declares the land trust's powers to modify easement terms and the restrictions or requirements that apply. Easement holders should include an amendment clause to allow amendments consistent with the easement's overall purposes, subject to applicable laws. When an easement may be a charitable trust, an amendment provision grants and defines power that the land trust might otherwise lack without court approval and simplifies compliance with charitable trust requirements. In some states, an amendment clause may be necessary to make any changes to an easement. Because state laws are uncertain and may change, an amendment clause may assist in the future even if not obviously essential today. An amendment clause also informs parties that the easement may be modified, thus putting donors, grantors, landowners, members, funding sources and the general public on notice.

*AMENDMENT PRINCIPLES. A conservation easement amendment should meet all of the following principles:*

1. **Clearly serve the public interest and be consistent with the land trust's mission.**
2. **Comply with all applicable federal, state and local laws.**
3. **Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.**
4. **Not result in private inurement or confer impermissible private benefit.**
5. **Be consistent with the conservation purpose(s) and intent of the easement.**
6. **Be consistent with the documented intent of the donor, grantor and any direct funding source.**
7. **Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.**

No amendment policy should be more permissive than these Principles allow, but some land trusts may choose to adopt more conservative amendment guidelines.

**Amendment procedures.** Established written procedures outline the steps in evaluating an amendment request, enabling a land trust to address all issues consistently. Documenting decisions at each step creates a written record. Typical amendments begin with an informal request by the landowner or land trust, discussion and negotiation, sharing the amendment policy, advice to the donor to get legal counsel, a formal written request and a site visit. Once the proposal is clear, it can be evaluated against the Amendment Principles:

1. Does proposed amendment serve the public interest and further organizational mission and goals?
2. Is the amendment legally permissible under all federal, state and local laws? Could the amendment jeopardize the land trust's tax-exempt charitable status?
3. Could the proposed amendment result in private inurement or impermissible private benefit?
4. Is the proposed amendment consistent with the conservation purposes and intent of the easement?
5. Does the amendment fulfill obligations to the donor, grantor or funder? Will prospective donors, grantors and funders recognize that fact?

6. Will the proposed amendment result in a net beneficial or neutral effect on the conservation attributes or conservation values of the easement land?
7. Will land trust members and the public understand the amendment or, at least, not find it objectionable? If not, can steps be taken to improve public perception? Does the land trust understand the community ramifications of the amendment?

Answering these questions may reveal the need for more due diligence and prompt other questions:

8. How does the proposed amendment affect stewardship and administration of the easement?
9. Are there other parties that must or should be engaged in the process or that hold a legal interest in the easement?
10. Are there any “stakeholders” that it would be wise to engage?
11. Are there any conflicts of interest to be resolved?
12. Are there any title issues to resolve?
13. Are there property tax concerns?
14. Is additional expert advice needed, such as real estate appraisers, natural resource experts, fish and wildlife experts, or other professional advisors?
15. Should baseline documentation be updated and who should pay the cost to do so?
16. What information needs to be gathered to prepare Form 990 if the amendment is consummated?
17. Will a Form 8283 need to be prepared?
18. Should other questions be addressed for the particular amendment proposal?

As these questions are answered, land trusts and owners may clarify, narrow or alter the amendment proposal. After analysis by staff, experts and attorneys, it can be submitted to the land trust board. If amendment is approved, final steps include baseline updates; final legal review and drafting; attorney general, IRS or court review if necessary or appropriate; signatures; acknowledgements and recording.

**The “four corners question.”** Some land trusts consider only the original easement (“within the four corners”); this is the traditional, conservative interpretation. Others consider benefits in new land protection (“outside the four corners”) and spillover benefits to offset negative impacts of new uses on the original easement land. Few deem it proper to reduce restrictions on one parcel in exchange for added restrictions on an entirely unrelated parcel. No clear law exists, and these issues are highly fact dependent. Removal of restrictions on easement-protected land may violate that easement, harm the land trust’s protection program, require court or attorney general review, or violate federal or state law.

**Corrective deeds.** Modifications that correct mutual mistakes can be recorded as “corrective deeds” or “corrective conservation easements.” All corrections should be consistent with the Amendment Principles and the land trust’s amendment policy and procedures. Corrective deeds may present problems if there has been reliance on the existing

easement. For example, if an appraiser relied on the original deed to arrive at an easement value for tax deduction purposes that is inconsistent with the value under the corrected deed, then the appraisal must be corrected and amended tax returns filed.

**Tailored easement drafting.** Many future amendment requests can be avoided by careful drafting of easements in the first instance. At least some futures can be foreseen and addressed in the original easement so that amendment is not required later. Land trusts can reduce the problems and burdens of amendment requests by extra effort in drafting individual easements.

Securing and maintaining conservation easements in perpetuity are the most critical, and in some ways vexing, challenges and opportunities for our land trust community. As land trusts continue to increase their professionalism in implementing *Land Trust Standard and Practices* and in moving toward accreditation, we remain confident that conservation easements will continue to serve as a foremost tool for land conservation. Easements succeed because they are a flexible means for balancing great conservation opportunities with the goodwill and needs of great landowners. Much has been learned in last decade about how better to draft, monitor and defend conservation easements. Yet there is still much to learn as we see how such easements will be treated by the courts in different states and by different state and federal agencies.

Just as the land trust community demonstrated its commitment to excellence by launching *Land Trust Standards and Practices* and the Land Trust Accreditation Commission, an independent program of the Land Trust Alliance, so too will the community lead the way in finding the best professional solutions to the challenges of amending conservation easements. While differences in legal opinions will continue to exist, we honor that diversity of expert thinking that enriches and informs our community. What we share in common is a commitment to the value of private land conservation, a concern for the long-term success of conservation easements and a commitment to keep the public trust through highly ethical operations. We appreciate your feedback on this report and look forward to continuing this dialogue.



## Part 3. Amendment Policy

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*Every land trust should have a carefully prepared written amendment policy.*

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All land trusts that hold easements should have a written policy guiding amendment decisions. Such a written policy is a requirement of *Land Trust Standards and Practices*, practice 11I. The amendment policy provides a structure in which to consider a proposed amendment, make a decision, and document the supporting reasoning and justifications. A written amendment policy sets or identifies standards for acceptability and rejection of amendments. The policy contains or is accompanied by amendment procedures to evaluate the amendment proposal, ensure that all key points are considered and guide the overall decision-making process.

An amendment policy helps the land trust comply with the law, address amendment proposals consistently over time and further the mission of the organization. It also informs landowners, donors, organizational members, funders and supporters, and the general public about the land trust's intent to preserve and honor the permanence of the protections afforded by a conservation easement while still maintaining limited and appropriate flexibility to respond to unanticipated change. An amendment policy can demonstrate that the land trust is prepared to address changes that easement lands inevitably face over time in ways that respect the donor's documented intent, the public interest and specific easement program goals, and are in full compliance with law.

For additional background information and examples of amendment policies, see Appendix A, the Land Trust Alliance website, *Land Trust Standards and Practices* and accompanying appendices, *The Land Trust Standards and Practices Guidebook: An Operating Manual for Land Trusts*, and *The Conservation Easement Handbook* and its accompanying CD.

*Land Trust Standards and Practices, practice 11I. Amendments.* The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

## I. OVERVIEW OF THE CONTENTS OF AN AMENDMENT POLICY

### AMENDMENT POLICIES ADDRESS:

1. Overall policy guidelines and criteria for making amendment decisions.
2. Specific procedures for evaluating amendment requests.

Some land trusts meld these into one document; others keep them as separate pieces. The overall *policy* guidelines are usually in a form that can be shared with owners of easement land, potential easement grantors, funders and the public. Some land trusts keep the amendment procedures in a separate document to be used internally and shared with others only on request. Either format is acceptable.

### AMENDMENT POLICIES TYPICALLY INCLUDE:

- *A statement of the land trust's philosophy on easement amendments.* An amendment policy should declare that easements are considered perpetual consistent with applicable law and the donor's documented intent and that any amendment should change the easement to enhance its protection or at least be neutral with respect to impacts on protected conservation values. The statement can also express the land trust's mission and goals relating to amendments.
- *Amendment principles.* An amendment policy should include the standards or thresholds that a proposed amendment must meet in order to be deemed acceptable. Seven Amendment Principles are discussed below.
- *Additional requirements.* The policy properly includes all additional requirements of the land trust, such as compliance with the organization's conflict of interest policy, compliance with donor and funder requirements and the means by which the land trust's costs will be covered.
- *Allowable purposes of amendments.* Many amendment policies list circumstances under which an amendment request may be considered, such as to address mutual errors, add acreage, add restrictions, and remove reserved rights. Others provide a more open-ended statement of the types of amendments that may be allowed.
- *Practical details.* The amendment policy usually explains how a landowner may make an amendment request, identifies materials that must be submitted with the request and the required fees, and indicates who will review the request, who will make the decision, and how the decision will be communicated to the landowner. Additional practical details include when and how the baseline documentation will be updated and who will pay for it.

Amendment *procedures* typically include a detailed explanation of how the land trust evaluates the amendment request. Essentially, this is the implementation piece, defining the roles of staff, committees, the board and legal counsel in reviewing the amendment proposal. See *Appendix A*. The amendment process is outlined in detail in Part 4 of this report.

## II. LEGAL CONTEXT

Amendments to add acreage or correct scrivener's errors raise few issues, while land trusts may not amend their conservation easements at all under certain circumstances or for certain purposes, such as the creation of an impermissible private benefit. Even amendments that are permissible should not occur without serious consideration of the ramifications. Legal constraints on land trusts that are considering conservation easement amendments may include:

- The requirements of conservation easement enabling legislation in each state.
- Land trust governance documents, including articles of incorporation, bylaws and IRS tax-exemption approval documents.
- Internal Revenue Code and Treasury Regulation requirements for perpetuity and prohibitions on private inurement and private benefit.
- State and federal laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts.
- State laws on fraudulent solicitation, misrepresentation to donors, consumer protection and the like.
- State laws regulating the conduct of fiduciaries depending on the circumstances of easement creation, relationships with donors and obligations undertaken by the land trust, such as some state statutes and common law doctrines deeming nonprofits soliciting donations to be fiduciaries.
- State and local laws governing land use, conveyances and the like.
- Contractual and other obligations to easement donors, grantors, funders and others.

Legal constraints may also include the charitable trust doctrine (which includes the doctrine of *cy pres*), the public trust doctrine and the doctrine of changed circumstances, all of which may be known by different names in different states. These doctrines have existed for many years applicable to charitable gifts outside the realm of land trusts and conservation easements, such as gifts of real property, cash and personal property. Their application to conservation easements is the subject of widely differing views in the land trust legal community. In the absence of a final decision by the highest court of the state, however, the most conservative approach would be to assume these doctrines apply to amendments, especially amendments that could diminish one or more protected conservation values.

Land trusts that choose to ignore legal limitations on easement amendments run the risk of potential legal sanctions and liabilities, including actions for breach of fiduciary duties, fines and penalties levied by the IRS, and audits or investigations by state officials charged with oversight of nonprofit organizations. These penalties are potentially very severe and, in the most egregious cases, include loss of tax-exempt status.

In addition to the legal constraints noted above, land trusts must consider other serious consequences of conservation easement amendment decisions:

- Land trusts are accountable to conservation easement donors and grantors, to whom promises may have been made and fiduciary and contractual obligations undertaken.
- Land trusts are accountable to funding sources that may have relied on land trust promises made in connection with funding and that may have attached strings to funds used to acquire the easement.
- More broadly, land trusts are accountable to their members, neighbors of easement lands and the communities the land trusts serve.

Land trusts cannot disregard donor, grantor, member and public opinion in their conservation easement amendment decisions. If they do, they may lose public and financial support, suffer negative publicity and loss of goodwill in their communities, and jeopardize future easement conveyances. An angry donor or land trust member may generate enormous adverse publicity sufficient to chill a donation program for many years. Nevertheless, land trusts must also treat those who seek amendments with respect whether amendment is possible or must be denied.

Well-drafted amendment policies are designed to ensure that amendment decisions comply with all applicable laws. Both federal and state laws apply to whether and how a land trust may amend an easement. To ensure compliance with these laws, a land trust must consult qualified legal counsel when developing its amendment policy and procedures and when considering specific amendment proposals. Some of the complexity of amendment issues arises from overlapping federal and state law, the differing laws of the 50 states, and the fact that all these laws evolve over time with administrative and judicial interpretations, legislative amendments and expanding understanding of difficult easement issues. For a recent analysis of some of these legal issues, see *Legal Considerations Regarding Amendment to Conservation Easements*, by the Conservation Law Clinic at the Indiana University School of Law, available at [www.ltanet.org](http://www.ltanet.org).

Following is a brief overview of federal and state laws that may impact conservation easement amendments.

#### *A. Federal law: IRC Section 170(h) and the Treasury Regulations*

If the conservation easement was the subject of a federal income tax deduction, then Internal Revenue Code Section 170(h) and the Treasury Regulations Section 1.170A-14 apply. Such an easement must be “granted in perpetuity” and “the conservation purpose [of the contribution must be] protected in perpetuity.” The easement must be transferable only to another government entity or qualified charitable organization that agrees to continue to enforce the easement. The easement can only be extinguished by the holder through a judicial proceeding, upon a finding that continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and with the payment to the holder of a share of proceeds from a subsequent sale or development of the land to be used for similar conservation purposes. To the extent an amendment amounts to an extinguishment, the land trust must satisfy these requirements.<sup>7</sup>

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<sup>7</sup> Significant amendments may be viewed as partial extinguishments (even if they are not spoken of in those terms), and the application of various tax rules to those situations is not yet clear. Land trusts should seek advice from qualified attorneys before undertaking an amendment that could be seen as an extinguishment of part or all of the conservation easement.

In addition, to be eligible to accept tax-deductible conservation easements, the land trust “must ... have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.” The exact limits these requirements place on a land trust’s ability to amend conservation easements are unclear, but the outer boundaries of permitted and forbidden amendments can be discerned. Both a congressional committee and the IRS have expressed concern about how tax-deductible easements have been amended and how land trusts make amendment decisions.<sup>8</sup> Care must be taken in every case to ensure that the perpetuity requirements are satisfied.

IRS Form 990, “Return of Organization Exempt From Income Tax,” the annual report filed by tax-exempt organizations with annual revenue exceeding \$25,000 a year, now requires land trusts to provide detailed information about their easements and any modifications, transfers or terminations. The completed 990 Forms are available on the Internet<sup>9</sup> and must be made available for public inspection and copying on request, so land trust members, grantors, funders, state regulators and the public can retrieve and review the information easily. The content of Form 990 may vary from year to year, but the most recent version makes amendments and related actions readily accessible public information and underscores the IRS’s current interest in easement amendments.

### ***B. Federal law: Private inurement and private benefit prohibitions***

Federal tax law prohibits tax-exempt nonprofit organizations from dispensing their assets in ways that create *impermissible private benefit or private inurement* (see Terms Used in this Report, page 12-13, and examples, in text box below. This prohibition means that a land trust cannot participate in an amendment that conveys either a net financial gain (more than *incidental private benefit*) to any private party or any measurable benefit at all to a board or staff member or other land trust “insider” (other than fair compensation for services). A land trust that does so risks losing its tax-exempt status or suffering intermediate sanctions. These prohibitions apply to amendments to all conservation easements, regardless of their initial tax-deductible status, and IRS scrutiny on these grounds is not limited by the three-year statute of limitations that governs challenges to deductibility.

#### **DOES THE AMENDMENT CREATE PRIVATE BENEFIT?**

Land trust board members, staff and legal counsel often have little or no expertise in determining the financial ramifications of proposed amendments. Accordingly, if a private benefit issue might arise, or the land trust has any concern as to private benefit, the land trust should consult an experienced tax attorney and then get an opinion from a qualified appraiser, if necessary. A complete appraisal may not be required; a “letter of opinion” (sometimes called a “restricted use appraisal report”) from a qualified appraiser may suffice. Both attorney and appraiser can assist in determining what level of appraisal is required.

#### **EXAMPLE: *Impermissible Private Benefit***

Suppose an easement landowner in a suburbanizing environment proposes an amendment to allow a new house to be constructed on easement property where none is currently allowed. This proposed amendment would clearly put dollars in

<sup>8</sup> See, specifically, Senate Finance Committee Report on The Nature Conservancy (2005), available at <http://finance.senate.gov/sitepages/TNC%20Report.htm> especially Executive Summary at 9 and Part Two at 4-7.

<sup>9</sup> E.g., Guidestar, <http://www.guidestar.org/> (last visited May 14, 2007); National Center for Charitable Statistics, <http://nccsdataweb.urban.org/FAQ/index.php?category=63> (last visited May 14, 2007).

the landowner's pocket, by increasing the fair market value of the property. The amendment would convey impermissible private benefit in violation of law.

**EXAMPLE: *Incidental Private Benefit***

Suppose a landowner proposes to amend an easement by adding additional land. Neighbors to the property (unrelated to the easement landowner) will enjoy an increase in their property value as a result. This increase in value of the neighboring properties occurs as an unavoidable concomitant of the easement conveyance—i.e., the benefit to the public from the conservation easement could not be achieved without necessarily benefiting the neighboring landowners. Accordingly, this affect is considered incidental private benefit. Conveyance of incidental private benefit is not prohibited and is often unavoidable. Knowing what the IRS would consider “incidental” is not necessarily easy, and land trusts should consult with experienced legal advisors to make the determination.

### *C. State law: Easement enabling statutes*

All 50 states have enacted some form of conservation easement enabling statute. Many provide that a conservation easement may be modified or terminated “in the same manner as other easements,” some are silent as to modification or termination, and others require approval of a public entity—a court, a state agency or even the state legislature. The State of Maine, for example, recently adopted changes to its enabling statute requiring court approval and attorney general participation for any amendment or termination that “materially detract[s] from the conservation value” of the protected property. At this time, however, laws on whether, when and how easements may be amended are unclear in numerous states.

State easement enabling statutes typically have significant variation. The Uniform Conservation Easement Act (UCEA) seeks to reduce that variation. The National Conference of Commissioners on Uniform State Laws (NCCUSL) studies state laws to determine which areas of law should be uniform and promotes the principle of uniformity by drafting and proposing specific statutes in areas of the law in which uniformity is desirable. The NCCUSL can only propose—no uniform law is effective until a state legislature adopts it. The NCCUSL approved the original UCEA in 1981, and the UCEA has been adopted by 22 states, the District of Columbia and the Virgin Islands.<sup>10</sup>

The UCEA provides, in part, that a conservation easement may be modified or terminated “in the same manner as other easements” (i.e., by agreement of the holder of the easement and the owner of the encumbered land), but “the Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.” In the original comments to the UCEA, the drafters noted that “the Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts,” and “independent of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts.”

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<sup>10</sup> The states that have adopted the Act as of April 2007 are Alabama, Alaska, Arizona, Arkansas, Delaware, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin and Wyoming. Even in adopting a Uniform Act, the states may vary its provisions in some respects. See <http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=2&tabid=60> (last visited May 14, 2007).

On February 3, 2007, the NCCUSL approved amendments to the comments to the UCEA to clarify its intention that conservation easements be treated as charitable trusts for enforcement purposes. The comment to section 3 of the UCEA, as amended, explains:

The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.

The comment to section 3 of the UCEA, as amended, concludes:

Thus, while Section 2(a) provides that a conservation easement may be modified or terminated 'in the same manner as other easements,' the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.

The comment to section 3 of the UCEA, as amended, also refers to the Restatement (Third) of Property: Servitudes and the Uniform Trust Code (discussed below), both of which recommend the application of charitable trust principles to conservation easements. The full text of the UCEA, as amended, is available at [www.nccusl.org](http://www.nccusl.org).

The 2007 commentary to the UCEA is too new to have been adopted or endorsed by any state, and commentary does not have the full force of law, but courts look to sources such as this to construe and determine the content of law when there is uncertainty or ambiguity. This commentary mirrors similar provisions of the Uniform Trust Code adopted in 2002, discussed below.

#### D. *State law: Laws governing charitable organizations*

All 50 states have laws governing the activities of nonprofits formed under their laws or operating in their jurisdictions. These laws seek to ensure that nonprofits operate in accordance with their governance documents, honor the intent of their donors and fulfill their public purposes. A division of each state's attorney general's office usually has oversight of nonprofits, although some states assign regulatory oversight to other agencies or departments. States vary significantly in the number of staff assigned to this purpose and in their focus.<sup>11</sup>

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<sup>11</sup> See National Association of State Charity Officials, <http://www.nasconet.org/> (last visited May 14, 2007). Links to all the state offices that regulate charitable organizations and charitable solicitations are available at <http://www.nasconet.org/agencies> (last visited May 14, 2007). Additional information is available at the National Center for Charitable Statistics, <http://nccsdataweb.urban.org/FAQ/index.php?category=63> (last visited May 14, 2007).

## 1. CHARITABLE TRUST DOCTRINE

Land trusts are charitable organizations, and conservation easements are charitable assets conveyed for specified charitable purposes. Accordingly, some authorities believe that conservation easements constitute restricted charitable gifts and/or “charitable trusts” subject to state charitable trust law. (*See Appendix B for a brief primer on the charitable trust doctrine.*) Few, if any, conservation easements are formally written as charitable trusts. Even if not expressly so written, however, it is possible that conservation easements may be construed as charitable trusts by the state attorney general, other public officials or the courts. If conservation easements are viewed as charitable trusts, a land trust may have limited discretion to amend conservation easements without court approval and without involvement of the state attorney general or other officials. The nature of the limitations depends on the state, the manner in which the easement was acquired, the nature of the amendment, the authority to amend included in the easement, and other circumstances.

If a conservation easement is a charitable trust, a land trust must consider state charitable trust law when contemplating amendments. The details of charitable trust law vary from state to state and a land trust must therefore consult with qualified legal counsel. As a general rule, if a conservation easement deed contains an amendment provision, the land trust has the express power to agree with the owner of the encumbered land to amend the easement as permitted by that provision. Absent an amendment provision, the land trust may have certain implied powers to agree with the landowner to amend the easement. To the extent changed circumstances necessitate amendments to the easement that exceed the land trust’s express or implied powers, the land trust can seek judicial approval of amendments pursuant to the doctrines of administrative deviation or *cy pres*, as the case may be.

Whether the charitable trust doctrine applies to conservation easements and their amendment has not been definitively decided in any state. Some state attorneys general, legal scholars and others believe the doctrine does apply, while others disagree and many have not taken any position. As noted above, the NCCUSL amended the comments to the UCEA in 2007 to clarify its intention that conservation easements be treated as charitable trusts, conforming the UCEA to comments to Uniform Trust Code §414 in 2000 recognizing that a conservation easement “will frequently create a charitable trust.” To date, the Uniform Trust Code (UTC) has been adopted in 19 states.<sup>12</sup>

Although Section 414 of the UTC, which allows for the modification or termination of certain “uneconomic” trusts, specifically provides that it does not apply to “an easement for conservation or preservation,” the UTC drafters explain in their commentary:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to

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<sup>12</sup> Alabama, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Wyoming. See [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-utc2000.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp) (last visited May 10, 2007); <http://www.uniformtrustcode.com/> (last visited May 19, 2007).

be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust.

Although these and other Uniform Laws are not “the law” in their own right, they are the law in states that have adopted them, and they are respected in other states.

Another well-respected source is the Restatement (Third) Property: Servitudes §7.11 adopted by the American Law Institute in 2000 (reproduced in Appendix 4 to *The Conservation Easement Handbook*). Section 7.11 has special provisions limiting modification or termination of conservation easements based on changed conditions, consistent with the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explain that “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes.” In the *Myrtle Grove*<sup>13</sup> case, the Maryland Attorney General intervened to oppose amendment of a conservation easement on charitable trust grounds. In a recent challenge to the termination of a perpetual conservation easement in Wyoming, *Hicks v. Dowd* (Wyoming Supreme Court May 9, 2007), the trial court held that charitable trust principles applied, the parties did not challenge the ruling on appeal, and the Wyoming Supreme Court proceeded on the assumption that there was a charitable trust without determining the issue independently.

Land trusts should have their own qualified legal counsel analyze the law in their state with respect to amendments rather than relying exclusively on national publications and sources because all of these principles have varying application in the different states. The law of the specific state must be analyzed in light of the terms of the specific easement and the other relevant facts before any determination can be made as to the choices in a particular circumstance. Although no clear precedent exists to date, courts in some states may apply the charitable trust doctrine to all perpetual conservation easements or to both perpetual and term easements. In other states, courts may find that the doctrine does not apply or applies only to easements conveyed as charitable gifts or purchased with donated funds specifically received or raised to acquire that easement. Still others may apply the doctrine to easements acquired with any donated funds.

Until the issue is finally determined by the highest court in each state, no one can know with certainty the law governing conservation easement amendments in that state. Given that application of the charitable trust doctrine to conservation easements and their amendment has not been decided in any state, experienced legal counsel is needed to determine whether a particular proposed amendment is within the powers of the land trust, or whether the land trust should seek the review of the state attorney general or approval of a court.

For a more detailed discussion of the charitable trust doctrine as it may relate to conservation easements, see *Rethinking the Perpetual Nature of Conservation Easements* and *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, both by Nancy A. McLaughlin. For a contrary opinion, see *Conservation Easement Amendments: A View from the Field*, by Andrew C. Dana. All three articles are available at [www.ltanet.org](http://www.ltanet.org). (See also Appendix D.)

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<sup>13</sup> For a discussion of this case, see McLaughlin, Nancy A., *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, University of Richmond Law Review, Vol. 40, pp. 1031-1097, 2006

## CONSERVATION EASEMENT ORIGINS

Conservation easements may be created in at least five different ways:

- (1) by donation;
- (2) by purchase or bargain sale, often with donated funds;
- (3) by “exaction,” as a result of land use regulatory processes;
- (4) in settlement of a dispute or enforcement proceeding; and
- (5) by “reservation,” in which land trust land is transferred by the land trust subject to an easement.

Federal and state law, including the charitable trust doctrine, may apply differently to amendments to conservation easements of different origin. The legal analysis should consider the origin of the easement. Most easements held by land trusts involve donated land and/or donated funds, at least in part. This report broadly deals with easements regardless of origin but is geared to meet the requirements of easements with donated elements.

## 2. FRAUDULENT SOLICITATION, CONSUMER PROTECTION, FIDUCIARY AND COMMON LAW PROTECTIONS

A related issue is the nature and content of state and local laws on solicitation of charitable funds and the application of these laws to conservation easements and their amendment. Some state statutes specifically prohibit fraudulent solicitation while other states address the issue by common law.<sup>14</sup> A variety of consumer protection laws may also apply. Some attorneys believe that a land trust that publicly describes its conservation easements as perpetual while occasionally granting amendments that diminish easement protections of conservation values risks running afoul of fraudulent solicitation or other provisions. Other attorneys feel that, unless there is clear evidence of fraud or the original easement grantor has a specific interest in the outcome, such a determination is unlikely and the attorney general will generally decline to get involved. The donor or grantor and heirs may sue for rescission or damages under at least some statutes and common law protections. Such a challenge, even if unsuccessful, could create significant negative publicity and divert land trust efforts from saving land.

The issue is complicated by possible variations in the extent to which states recognize charities as fiduciaries. For example, California declares that “there exists a fiduciary relationship between a charity or any person soliciting on behalf of a charity, and the person from whom the charitable contribution is being solicited.” Cal. Bus. & Prof. Code §17510.8. Some other states reach this result through court decisions. Even if state law does not recognize a fiduciary relationship in all interactions between charities and donors, specific relationships and interactions can be found to be fiduciary because of their particular circumstances. For example, fiduciary duties are commonly recognized as more likely to arise and as imposing higher obligations if the donor and beneficiary of the relationship is an older person. By the nature of things, most easement donors are older individuals.

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<sup>14</sup> See <http://www.cof.org/files/Documents/Building%20Strong%20Ethical%20Foundations/06AGreportfull.pdf> (last visited May 15, 2007); [http://www.ncrp.org/downloads/PDF/RP-Spring-2005-Disclosure\\_for\\_Charitable\\_Solicitors.pdf](http://www.ncrp.org/downloads/PDF/RP-Spring-2005-Disclosure_for_Charitable_Solicitors.pdf) (last visited May 15, 2007).

Given the legal uncertainties in application of fraudulent solicitation laws and fiduciary duties, how does a land trust proceed? Land trusts should consult with experienced legal counsel and other land trusts active in their home states and other states in which they operate. In addition, they may wish to consult with their state's attorney general for guidance. For new easements, land trusts should negotiate with easement grantors for the desired level of amendment discretion and include an amendment provision in easement deeds expressly granting them such discretion so there is no confusion or misunderstanding regarding the land trust's ability to agree to amendments in the stated circumstances.

### 3. CONFLICT OF INTEREST LAWS AND REQUIREMENTS

Nonprofits must comply with laws and requirements prohibiting certain actions by board members and staff who have a conflict of interest. The definition of a conflict varies to some degree across the country, but a conflict may arise in circumstances that involve neither private inurement nor private benefit. *Land Trust Standards and Practices*, practice 4A provides:

**Dealing with Conflicts of Interest.** The land trust has a written conflict of interest policy to ensure that any conflicts of interest or the appearance thereof are avoided or appropriately managed through disclosure, recusal or other means. The conflict of interest policy applies to insiders (see definitions), including board and staff members, substantial contributors, parties related to the above, those who have an ability to influence decisions of the organization and those with access to information not available to the general public. Federal and state conflict disclosure laws are followed.

Thus, in addition to the risk of private inurement, a land trust considering an amendment proposal by a land trust insider such as a board member or major donor must also ensure that it properly addresses any conflict of interest.

#### *E. Easement amendment provisions*

An amendment provision is a clause in the conservation easement that declares what powers the land trust has to modify the terms of the easement and what restrictions or requirements apply. As noted in the 2005 edition of the *Conservation Easement Handbook*, “[m]any easement drafters ... consider it prudent to set the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses.”<sup>15</sup> An easement that lacks an amendment provision may be amended if permitted under state and federal law, but amendments may otherwise be subject to invalidation unless approved by the court or attorney general.

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. Doing so clarifies up front to all parties that there are circumstances under which the conservation easement may be modified. The donor/grantor of such an easement cannot easily contend that no amendment is permitted or that the land trust concealed the possibility of an amendment. Transparency of intent is an ethical obligation; if land trusts wish to modify conservation easements in certain circumstances, land trusts should put their donors, grantors, landowners, members, funding sources and the general public on notice that amendments may occur. (*See Appendix C for sample amendment provisions.*)

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<sup>15</sup> Elizabeth Byers and Karin Marchetti Ponte, *THE CONSERVATION EASEMENT HANDBOOK* 468 (2d ed. 2005).

If a conservation easement may be treated as a charitable trust, the amendment provision grants the land trust defined powers to modify the easement by agreement with the landowner, powers that the land trust might otherwise lack for some amendments without court approval. In some states, an amendment clause may be necessary to make any changes to a conservation easement without seeking court approval. Because the law of the various states is uncertain today and may change even on points that appear certain, including an amendment provision in current easements may assist in the future even if not apparently essential today.

Some practitioners note that including an amendment provision in an easement may generate amendment requests, as a landowner may infer that amendment is an option if the landowner is unhappy with the easement terms. There is also an increased risk of soured relations with landowners if a number of amendment requests are denied or are not handled in a timely or professional manner. Others note that absence of an amendment provision could be interpreted to mean amendment is not permitted, leading to possible disputes if an easement is later amended contrary to the donor or grantor's understanding. To minimize risks, the land trust's amendment policy and supporting materials should underscore that easements are perpetual, amended only in exceptional circumstances, and that all amendments must clearly serve the public interest—not solely the interests of the landowner. A land trust should also ensure that its amendment policy is applied fairly and consistently to all amendments.

### III. AMENDMENT PRINCIPLES

Amendment Principles form the core of the amendment policy. By applying these Principles, a land trust ensures compliance with the law and sets limits on how substantially an amendment may modify a conservation easement.

#### AMENDMENT PRINCIPLES

An amendment to a conservation easement should satisfy *all* of the following:

1. Clearly serve the public interest and be consistent with the land trust's mission.
2. Comply with all applicable federal, state and local laws.
3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
4. Not result in private inurement or confer impermissible private benefit.
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

An amendment should satisfy *all* the Principles. A proposed amendment that fails to comply with all the Principles should be rejected under a land trust's amendment policy. Each Principle can be analyzed with specific questions or "screening tests," discussed in Part 4. Case Studies in Part 6 illustrate how land trusts may apply some of these Principles and tests in practice.

1. *Any amendment must clearly serve the public interest and be consistent with the land trust's mission.*

Principle 1 underscores a land trust's ethical and legal obligation to benefit the public and to further the land trust's mission. By fulfilling this obligation, a land trust honors its commitments to its members, landowners, funding sources, donors, the general public, and the landowner with whom it negotiated the original easement. *See Page 41.*

2. *Any amendment must comply with all applicable federal, state and local laws.*

Principles 2, 3 and 4 address fulfillment of critical legal requirements.

Principle 2 states the general requirement that land trusts must comply with all applicable laws, whatever their origin, including all laws relevant to conservation easements, fraudulent solicitation laws and charitable trust laws.

*See Page 41-42.*

3. *Any amendment must not jeopardize the land trust's tax-exempt status or standing as a charitable organization under federal or state law.*

Principle 3 focuses on a land trust's status as a charitable, nonprofit tax-exempt entity under federal and state law. At a minimum, the land trust must protect its continuing existence and ability to hold conservation easements.

*See Pages 41-42.*

4. *Any amendment must not result in private inurement or confer impermissible private benefit.*

Principle 4 addresses two major violations the land trust should never commit: bestowal of any benefit on a land trust insider and bestowal of an impermissible private benefit on any person. *See Pages 42, 72-74.*

5. *Any amendment must be consistent with the conservation purposes and intent of the easement.*

Principles 5, 6 and 7 tie the amendment decision to a particular conservation easement and the land it protects.

Principle 5 requires the land trust to consider the stated purposes and implied intent in the easement and to ensure that an amendment will not erode the overarching purposes and intent of the original easement.

*See Pages 43, 80-81.*

6. *Any amendment must be consistent with the documented intent of the donor, grantor and any direct funding source.*

Principle 6 protects the land trust against claims of fraudulent solicitation and violation of the terms of the donation of the easement or funds to acquire the easement. Whether a donor gives money or an interest in land, representations by the land trust upon soliciting funds and accepting gifts are binding, both legally and ethically. *See Pages 43-44, 70-71.*

*7. Any amendment must have a net beneficial or neutral effect on the relevant conservation values protected by the easement.*

Principle 7 addresses actual on-the-ground resources protected by the conservation easement and recognizes some flexibility. This Principle acknowledges that some conservation values of an easement property may evolve over time, including, for example, species composition, habitats, recognized best agricultural practices, or other features or circumstances present when the easement was conveyed. The phrase “relevant conservation values protected by the easement” requires a land trust to use its best judgment in determining what conservation values are present and relevant when the land trust determines the potential effects of the amendment in light of the other Principles. *See Pages 44–45, 68–69.*

The Amendment Principles, taken as a whole, set a solid “bottom line” for considering proposed amendments. They provide the foundation on which a land trust can methodically analyze a proposal and document how the decision is made.

Land trusts should incorporate the substance of the Amendment Principles into their amendment policies. No amendment policy should be more permissive than these Principles allow; however, some land trusts may choose to adopt more conservative amendment guidelines. Keep in mind that these Principles comprise only part of the overall amendment policy; other parts of the policy should be tailored by each land trust to its own organizational mission and needs and the laws of the state in which the land is located.

Written amendment procedures (as a separate document or part of the amendment policy), should establish who is in charge of evaluating amendment requests and who is authorized to approve or deny requests. Volunteer-run land trusts may authorize a board committee to review requests in consultation with qualified legal counsel with the final decision made by the full board. Professionally staffed organizations often have staff review requests, and then work with a committee and legal counsel to make a recommendation to the full board. Some of the largest, most experienced land trusts rely entirely on staff to evaluate the request with counsel and make a recommendation directly to the board. Depending on the nature of the proposed amendment and the easement, land trusts may hire outside consultants, such as natural resource experts, specialized conservation lawyers and real estate appraisers, to conduct certain tasks required or recommended by the amendment procedure. The boards of some larger staffed organizations authorize staff to complete amendments that meet defined criteria. In all cases, the land trust board is accountable for the final decision.

*A. How big is the view frame? The “four corners question”*

Suppose a landowner proposes an amendment to allow a new use on easement land and, as part of the proposal, offers to place additional land under easement. This is a classic “four corners” question. May the land trust consider the benefits of the additional land protection when assessing the potentially negative impacts of the proposed amendment on the conservation purposes of the original easement? Some land trusts limit amendment considerations to just within the geographic boundary of the original easement (“within the four corners”). Other land trusts and legal advisors believe that a land trust can, if it chooses and if specific conditions are met, look beyond the original boundary

and consider conservation benefits of additional land to be conserved outside the original easement boundaries (“outside the four corners”). Few land trusts consider it appropriate to reduce restrictions on one parcel in exchange for adding restrictions on an entirely unrelated, non-adjacent parcel. No clear law exists yet on these issues, all of which are highly dependent on the full facts and circumstances at hand.

The traditional and conservative interpretation is that an amendment must have a neutral or positive conservation result with respect to the land inside the original easement boundaries. That is, as a land trust weighs the potential positive and negative effects of a proposed amendment on the conservation values of an easement property, it considers the conservation outcome strictly within the four corners of the original easement. A number of land trusts implement amendment policies with this understanding. See especially Case Studies 6 through 8 for examples that apply Principle 7 with this interpretation.

#### SPILOVER BENEFITS

“Spillover benefits” are the benefits enjoyed by a conservation property when neighboring property is also protected. Many conservation attributes of protected land—scenic values, wildlife habitat and water quality protection, for example—can be enhanced when the land is part of a larger block of protected land. To illustrate, a 40-acre parcel with breeding habitat for a rare bird may benefit when the abutting 40-acre parcel is protected as well, buffering the breeding habitat from encroachment. Spillover benefits, though difficult to quantify, can be a compelling reason to protect related parcels of land.

The Amendment Principles allow flexibility for land trusts to consider lands *outside* the original easement, if they choose, as they evaluate a proposed amendment and assess its effects on the ground. Principles 5 and 7 do not preclude a land trust from considering lands outside the original easement area when weighing a proposed amendment. Suppose a landowner proposes an amendment that negatively affects a conservation value of the easement area but will protect new land with significant conservation values by adding it to the easement area. Under Principles 5 and 7, the land trust may weigh the positives arising from the new land to be conserved and its impact on the original easement land (“spillover benefits”) as part of the overall analysis of conservation outcome for the proposed amendment, so long as the net effect of the amendment on the conservation purposes of the original easement is either neutral or enhancing. A number of land trusts now use this analysis in their amendment decisions, while others hold firm to the four corners rule. Extra caution is essential, because an amendment that removes or reduces restrictions on the original easement land in exchange for an easement encumbering additional land may violate the terms or intent of the original easement, may negatively impact the land trust’s easement donation program, may require court or attorney general review and/or may violate federal or state law requiring perpetuity. For examples illustrating these issues, see Case Studies 9, 11 and 12. *See also pages 36, 59* for further discussion of constraints on looking outside the four corners.

Each land trust must develop its own policy on the four corners question, at a minimum, considering:

- *Federal law*—The Internal Revenue Code and Treasury Regulations require that easements resulting in income tax deductions must be granted in perpetuity and that the conservation purposes of the easement must be protected in perpetuity. Does consideration of factors outside the four corners conform to or violate federal law?
- *State legal context*—State law may directly address this matter, or there may be legal precedents involving other circumstances that are relevant. The charitable trust doctrine, fraudulent solicitation rules or related restrictions may apply with different or special force to the easement or the amendment in a four corners case. At a minimum, does consideration of factors outside the four corners conform to or violate state law?
- *Organizational capacity, mission and goals*—Is the land trust equipped to address the potentially more complex analyses implied by consideration of lands outside the original boundaries of the easement? Does it have the advice of qualified attorneys and experts to address the issues? Would such an approach further or harm the mission of the land trust?
- *Public perception*—Will its landowners, members and other constituencies understand and support the broader approach of considering lands outside the original easement? Should outside the four corners amendments be approved by a representative of the public, such as the state attorney general?
- *Easement donor perception*—Will existing and prospective easement grantors react negatively, harming the land trust’s ongoing donation program?

No court decisions address the four corners question and the IRS has not issued any guidance on the issue, so land trusts that look outside the four corners assume additional risk in those transactions.

## B. *Corrective deeds*

Modifications that merely correct mutual mistakes in the original easement can be recorded as “corrective deeds” or “corrective conservation easements” rather than “amendments.” These include corrections of minor errors and oversights mutually acknowledged by the grantor and easement holder, for example, correction of scrivener’s errors, correction of erroneously stated acreage or parcel descriptions, addition of missing pages, sections or information, and the like. All corrections should be consistent with the Amendment Principles and the land trust’s amendment policy and procedures. An advantage to using the term “corrective deed” or “corrective conservation easement” as opposed to “amendment” is the title—it acknowledges a correction of an error, rather than a substantive change in the easement’s provisions or intentions of the original parties to the easement.

Corrective deeds are likely to present problems only if there has been reliance on the existing easement deed. For example, if an appraiser relied on the original deed to arrive at an easement value for tax deduction purposes that is inconsistent with the value under the corrected deed, then the appraisal must be corrected and amended tax returns filed.

### *C. Outside the Amendment Principles*

There may be extraordinary circumstances in which land trusts consider potential amendments that may not comply with one or more of the Principles. For example:

1. **THREAT OF CONDEMNATION.** When part of an easement property is to be condemned by a public entity, the easement may be amended, or terminated in part or whole, in lieu of engaging in full condemnation proceedings, provided that the land trust determines that the exercise of eminent domain would be lawful, the best interest of all parties would be better served by negotiating a settlement with the condemning authority, and the land trust receives reasonable compensation for lost conservation values and uses the funds in a manner consistent with the conservation purposes of the original easement.
2. **SUBSTANTIAL ALTERATION OR ELIMINATION OF A CONSERVATION PURPOSE.** Unanticipated major change can create situations in which one purpose is no longer relevant or must be sacrificed to meet another significant conservation purpose. Eruption of Mt. St. Helens, indisputable death of the last passenger pigeon, the next great earthquake and other major changes not contemplated by the easement may wholly or effectively defeat a conservation purpose. An amendment may be seen as the best way to address the circumstances that then face the land trust.

These cases often involve inconsistency with or harm to a purpose or purposes of the easement and/or result in a net negative conservation outcome to the easement property. In such amendments, land trusts should strongly consider seeking review and/or approval of a public entity or the court, if they are not already required to do so. External review may help ensure that overall public purposes are achieved. Approval of a public entity may also help to protect the land trust from jeopardy or criticism and from future challenges to the amendment.

Amending under any of these conditions is very high-risk territory, both legally and in terms of public perception. A comprehensive discussion of amendments that fail to comply with the Amendment Principles is beyond the scope of this report. However, because land trusts deal with condemnation with some frequency, Case Study 14 provides a relatively non-controversial condemnation example to illustrate an “amendment in lieu of condemnation.”



## Part 4. Amendment Procedures: Annotated Outline of Amendment Process

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*Every land trust should have written amendment procedures that outline and explain the steps the organization will follow in evaluating a proposed amendment.*

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How does a land trust implement an amendment policy when presented with an amendment request? Written amendment procedures set out practical steps to evaluate proposed amendments using the Amendment Principles, other requirements of the amendment policy and applicable law. Having a written procedure helps a land trust address all components of the policy in a consistent and fair way. Because most land trusts see few amendment requests, each new request may be reviewed by board or staff members with little or no prior amendment experience; written procedures help carry forward a land trust’s institutional knowledge. Along with its conflict of interest policy,<sup>16</sup> written amendment procedures also provide “backbone” to a land trust faced with an amendment proposal from an insider, close friend or supporter when the relationship might otherwise pressure the land trust to approve the amendment. Documenting the procedural steps and decisions also provides the land trust with a written record to demonstrate the reasoning behind its decision. A detailed written record may diffuse claims from disgruntled landowners that they were not afforded “due process” or fair treatment or that the land trust’s amendment decisions were arbitrary. A detailed written record may also enable a land trust to respond to criticism and challenges by federal and state authorities and other third parties.

While certain key steps are common, much variation exists in the details and order of the steps. The particulars of the amendment review process depend on the staffing level, board governance style and individual organizational experience with amendments. The details are influenced by the legal context as well. No universal amendment procedure fits every organization; each land trust must tailor its own amendment review process to its particular organizational requirements. Examples of some written amendment procedures appear in Appendix A.

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<sup>16</sup> For more information on conflict of interest policies, see *Land Trust Standards and Practices*, Standard 4.

The following annotated outline sets out a general process for amending conservation easements, including the basic steps and key questions that a land trust should use in evaluating amendment proposals and completing amendments. This process can be used as a starting point to develop more formal written amendment procedures.

## I. INITIATING THE PROPOSED AMENDMENT

- A. **The initial request.** Usually the landowner initiates an amendment request, but a land trust may also do so. Some land trusts are proactively amending easements, with landowner cooperation, to revise archaic language in older easements. In such circumstances, the procedural details will vary because the land trust is seeking landowner approval. Regardless, the land trust should uphold all tenets of its amendment policy.
- B. **Discussion and negotiation.** Usually, there's a "soft start" to amendment requests. A landowner may call to discuss the desired change informally. This conversation can help the organization understand what easement modifications may be requested. In some cases, techniques other than amendment may better address the problem, and amendment can be avoided (see sidebar on discretionary approval or license, discretionary waiver, and interpretation letter, page 67 and Case Study 5 pages 65-66).
- C. **The amendment policy.** Early in the process, the land trust should provide the amendment policy to the landowner. The policy informs the landowner about the criteria under which the land trust evaluates amendment requests. The land trust can explain the practical details in the policy and procedures, including what should be submitted (for example, a written statement describing the requested change and the reasons for it, maps and other documentation needed), how costs are handled (most land trusts require the landowner to pay all of the land trust's costs, some with up-front deposits), and the land trust's process and anticipated timeline.
- D. **Landowner's legal counsel.** Also early in the process, the land trust should advise the landowner, in writing, to obtain his or her own legal counsel.
- E. **The written request.** Unless dissuaded by discussions with land trust representatives and counsel, the landowner (or land trust) should submit the amendment request in writing.
- F. **Site visit.** The land trust usually visits the site, except in the simplest cases with no significant change to the easement or in cases in which a reserved right is extinguished. The site visit allows the land trust to identify the amendment's potential effects on the conservation values and purposes of the easement. Photos taken during the site visit can document the pre-amendment condition of the land, supplementing baseline and monitoring photos that may not be fully up to date or may not focus on the specific part of the easement land in question.

## II. REVIEWING THE REQUEST: AMENDMENT SCREENING TESTS

Land trusts typically use basic screening tests to determine whether a proposed amendment meets the thresholds of the Amendment Principles.

### 1. *Public interest and organizational mission test: Does the proposed amendment serve the public interest and further organizational mission and goals?*

A land trust's mission, goals and underlying obligation to serve the public interest always steer amendment decisions. Many amendment proposals involve unanticipated circumstances that challenge an organization to consider its role in the community, its ethical and legal obligation to provide public benefit to its broad constituency, including its members and the community it serves, and its obligation to uphold commitments made to donors upon accepting gifts of money or interests in land.

Reflecting on mission, goals and public interests to be served can help an organization suggest and negotiate creative solutions to controversial and complex amendment proposals and thereby achieve genuinely positive outcomes. In other instances, a land trust's obligation to fulfill its mission and serve the public interest might cause it to deny a proposed amendment. For instance, in Case Study 13, a land trust facing a proposal to allow intensive agricultural practices on an existing dairy farm should consider the amendment's incompatibility with organizational and easement goals, which included supporting the state's agricultural economy, scenic beauty and cultural heritage through conservation of working farms.

### 2. *Legal tests: Is the amendment legally permissible under federal, state and local law? Could the amendment jeopardize the land trust's tax-exempt, charitable status?*

The Amendment Principles require that amendments comply with federal, state and local law. (*See pages 32–37 for an overview.*) Evaluating compliance requires careful analysis of all relevant laws, the specific conservation easement's terms, the organization's amendment policy, the substance of the proposed amendment, whether the subject easement is or may be considered a charitable trust under state law; whether the easement was the subject of a federal income tax deduction; whether it was the result of a regulatory process and is subject to regulatory oversight; whether it was purchased and any of the funding sources may have a legal or programmatic interest; and so on.

The Amendment Principles also require that the land trust preserve its tax-exempt, charitable status. (*See page 32.*)

The legal test also requires consideration of representations made to the donor, grantor or funding source and any contractual obligations that may be affected by the proposed amendment. State statutory and common law on fraudulent solicitation, misrepresentation and the like may limit the nature of amendments that can be made or impose additional requirements on the land trust.

Many land trusts seek legal counsel early in the amendment process; others may use experienced staff for the initial evaluation and then involve legal counsel later in amendment negotiations. Either way, land trusts must involve

legal counsel in every amendment to evaluate the legal risks and draft or review the final document. Involving experienced legal counsel early in the process may result in more streamlined solutions and may assist in conversations with landowners.

3. *Financial test: Could the proposed amendment result in private inurement or impermissible private benefit?*

Amendment Principle 4 prohibits an easement amendment from creating private inurement or impermissible private benefit. A land trust must obey this requirement to preserve its tax-exempt status.

Does the proposed amendment involve a board member, staff or other “insider” to the organization? (*See page 33.*) Private inurement is absolutely prohibited by applicable statutes for tax-exempt organizations.

Does the proposed amendment involve potential private benefit to any private parties? (*See page 25, 31, 55 and Terms Used in this Report, page 12.*) Laws governing tax-exempt organizations prohibit conveyance of impermissible private benefit.

If the potential for private inurement or impermissible private benefit exists, the land trust must either deny the amendment or negotiate to eliminate the potential financial gain. For example, potential financial gain to the easement landowner might be offset by adding restrictions to the easement that reduce the value of the land or by placing additional land under easement. *See pages 77-80.* Any negotiated solution should always result in clear protection of the public’s interest in land conservation. See Case Studies 7, 8 and 9. The land trust cannot accept an offered cash donation as an offset to the potential financial gain except in rare circumstances approved by a court or when the amendment plainly causes no conservation detriment.

The land trust should document the lack of any potential financial gain to a degree commensurate with the likelihood of gain. If an amendment request only increases restrictions on the easement property and unequivocally reduces the value of the land, it may be sufficient simply to document the reasons that there is no impermissible private benefit or private inurement in the project file. On the other hand, if there is any potential of private inurement or impermissible private benefit, it is strongly recommended that the land trust obtain a professional appraisal to evaluate the financial impact of the proposed amendment on the property or other property of the landowner. If there is no gain, then the appraisal documents that fact for the permanent file and may be used to defend against any later claims that the amendment conferred impermissible private benefit. If there is gain, the appraisal provides a basis on which to negotiate terms that offset any financial gain to the landowner or to deny the amendment request.

*(Corrections to easements are an exception to the rule that an appraisal is needed, but ONLY IF the initial appraisal contemplated the correct terms or interpretation, and not the error.)*

4. *Conservation purposes test: Is the proposed amendment consistent with the conservation purposes and intent of the easement?*

Principle 5 requires that an amendment be consistent with the original conservation purposes of the easement. In determining consistency, land trusts must consider the general purposes of the easement as a whole, as well as the impacts an amendment may have on specific resources or conservation values protected by the original easement. Negative effects on some of the conservation values of the easement land may be permissible as long as the net effect of the amendment on the overall purposes of the easement is either neutral or enhancing. Well-drafted easement language may assist in determining whether such an amendment is acceptable. For an example of this type of analysis, see *Case Study 11, Scenario 2*.

Proposed amendments may result in minor shifting of relative priorities among specific conservation purposes and may be seen as causing negative impacts to some purposes, with positive impacts to others. For example, a proposal to allow a new agricultural management practice might, as a side effect, favor the easement's agricultural purposes over its wildlife habitat protection purposes. Determining whether such a shift is acceptable is a matter of scale, careful analysis and best judgment on the part of the land trust, all evaluated in light of applicable law, the intent of the donor, grantor or funder, the public's interest and the other amendment screening tests. For an illustration, see *Case Study 13*.

How much change is too much? Wholesale changes to the purposes themselves, major changes to restrictions relating to one or more purposes, or complete removal of one or more purposes, would be inconsistent with the easement's conservation purposes in all but the most extraordinary case. Most easement practitioners consider removal or alteration of a conservation purpose a high-risk area that falls outside the Amendment Principles and may require court or attorney general approval (*see page 37*).

5. *Existing and prospective donor test: Does the amendment fulfill any obligations to the donor, grantor or funder? Will prospective donors, grantors and funders recognize that fact?*

Land trusts become bound by obligations to easement donors, grantors and funders as part of the donation process. The conservation easement itself is, in part, a contract between land trust and donor or grantor, and additional obligations may arise from promises and representations made during negotiations relating to the donation. A donor, grantor or funder may communicate the intent to protect specific conservation values above others, receive assurance that this intent will be honored, and then view an amendment permitting harm to the favored value as a betrayal. Whether that donor, grantor or funder or their heirs could sue to enforce the stated intent would depend on multiple issues of state law, but they could do great damage to the land trust by news reports and communications with prospective donors, grantors and funders.

Donor, grantor and funder intent is best found in the text of the conservation easement itself or in the funding documentation. With a well-drafted easement, there is no need to look beyond the easement itself and the clear import of its words. At the time the easement is signed, the intent of all parties including the land trust should be expressed fully and clearly in the written easement.

Ensuring that prospective donors, grantors and funders recognize that existing donors, grantors and funders are satisfied is critical to an ongoing protection program. Prospective easement grantors often watch a land trust for months or years before revealing their interest in granting an easement. Funders may also watch before committing substantial funds. Amendments that may trouble prospective donors and funders put land trusts at risk, particularly because the land trust may never know why donations are not made. Solutions include holding special meetings with prospective donors, grantors and funders, writing explanatory newsletter articles or letters to neighbors of easement land when amendments are made or denied, and in certain cases declining amendment.

6. *Conservation results test: Will the proposed amendment result in a net beneficial or neutral effect on the conservation attributes of the easement land?*

This test can involve weighing tradeoffs among numerous positive and negative impacts of the amendment on the conservation values of the easement land, then making a judgment about the amendment's overall impact on those values, the donor's intent and the public interests served by the easement. Suppose a landowner proposes an amendment that would allow a minor expansion of an existing building envelope on the easement property while also increasing restrictions on another part of the easement property to enhance protection of important wildlife habitat (a tradeoff "within the four corners"). The land trust may or may not conclude that the effect of the amendment would be beneficial or neutral overall with respect to all of the property's conservation values and the public interests served. Again, the decision is a matter of scale, careful analysis and best judgment, within the constraints of applicable law and in conformity with the donor's documented intent. See especially Case Studies 8, 9, 11 and 12 for illustrations of this test.

If the analysis involves additional property proposed for protection as part of the amendment, is it acceptable if the original easement land's conservation values experience net degradation, so long as the overall package of properties involved in the amendment ensures a significant net positive result? Different land trusts reach highly conflicting answers, and there is no clear law to answer these questions. Many experts agree that, for the proposal to be deemed acceptable, the original easement land must experience a net positive or at least neutral conservation result. (*See page 34.*)

Consider a proposal to amend an easement to accommodate a septic system to be constructed on a small portion of the original easement land. The landowner offers concurrently to protect an adjacent parcel. Perhaps the original easement land would enjoy "spillover benefits" (*see Spillover Benefits, page 35*) from protection of the neighboring property. Sufficient spillover benefits may tip the balance toward positive conservation results for the original easement land.

If a less-than-neutral result is anticipated as to a conservation value protected by the easement, or may be perceived by third parties, the land trust must carefully consider the legal and public relations risks of amending. Some attorneys believe court approval is needed if a less-than-neutral result is anticipated, unless the easement contains an amendment provision that grants sufficient flexibility for

the particular amendment. If a tax deduction was enjoyed on donation of the easement, some attorneys also believe IRS approval is advisable. This area of law is unsettled at this time; it is essential to consult experienced legal counsel on a case-by-case basis.

The more controversial or questionable the conservation results, the more detailed the analysis and documentation must be to justify an amendment decision. If the conservation results are unclear or more subtle, land trusts should call in outside advisors—wildlife habitat experts or natural resource consultants, for example—to help evaluate and document the conservation values to be affected.

*7. Public perception test: Will land trust members and the public understand the amendment or, at least, not find it objectionable? If not, what steps can be taken to improve public perception? Does the land trust understand the community ramifications of the amendment?*

What are the public relations risks of the amendment? Will it have any adverse impact on public confidence in the land trust? Would it set a helpful or awkward precedent for the land trust when faced with future amendment requests? Could the amendment cause a reasonable person to be suspicious or skeptical about the land trust's commitment to uphold its easements? The amendment will be weighed in the court of public opinion, if not a court of law. Some amendments occur without notice by neighbors and others while some may be immediately visible or known in the community. While public perception alone may not often be a basis for denial, a land trust may work with the landowner to ensure that any publicity of the amendment is balanced and fully explains the reasons for the amendment and the lack of suitable alternatives. (*See examples in Case Studies 10, 11 and 13.*)

Often, application of the screening tests will reveal the need for more information gathering, or due diligence, to answer the following questions.

*8. How does the proposed amendment affect stewardship and administration of the easement?*

Experienced land trusts advise that amendment proposals may provide opportunities to improve easement language, thereby alleviating potential monitoring and enforcement difficulties. Sometimes, improved easement administration is a major goal in amendment negotiations. Improved easement administration and stewardship may also count as a plus in the conservation results test, as better stewardship can better protect the conservation values of easement land. (*See Case Studies 3, 4 and 12.*) Conversely, if an amendment would increase the stewardship burden, the land trust should weigh this negative factor and perhaps mitigate this increased burden by requiring a financial contribution to the land trust's stewardship fund. However this is handled, the land trust should be clear that the amendment is not being "purchased."

9. *Are there other parties that must or should be engaged in the process or that hold a legal interest in the easement?*

If the original easement was purchased, direct funding sources may have a legal or programmatic interest in the easement. Some public funding programs have rules that effectively prohibit amendments. The land trust may also consult with funding sources as a matter of courtesy and good public relations; this should be evaluated on a case-by-case basis.

If the easement property is part of a larger easement property that was subdivided, owners of other parcels encumbered by the same easement may have legal standing to challenge an amendment. Even if their consent is not required and such landowners do not have legal standing to sue, the land trust should evaluate whether a proposed amendment should be approved by all such landowners to avoid conflicts with the settled expectations of those directly affected by the original easement.

If the easement was donated and an income tax deduction taken, an IRS ruling may be advisable or required. The IRS and the courts have not spoken on this point, and some attorneys believe the landowner's tax concerns as to a deduction end when the statute of limitations runs to challenge the deduction. The IRS retains power to sanction the land trust, however, and some amendments may have their own tax consequences. These are subjects that require legal counsel with significant tax expertise to address these fact-intensive questions.

In some states, review by or approval of a court, state agency, attorney general or other public official may be required by statute or under charitable trust law. Even if not required, review or approval may be desirable for reassurance that the public interest is protected.

10. *Are there any "stakeholders" that it would be wise to engage?*

Some attorneys advise that, in some states, the donor or grantor of a conservation easement retains no legal interest in the easement after the property is conveyed to a new landowner. In these states, the land trust is legally not obliged to consult with the donor on amendments but may do so for other reasons. Other legal experts advise that easement donors (and their heirs) do retain certain rights particularly if the easement is considered a charitable trust. In still other states, the answer is not determined. This is an unsettled area of law, and a land trust must consult qualified legal advisors.

Whatever the status of state law, representations made to a donor or grantor may create rights that may be triggered by an amendment. There may be contract rights enjoyed by a donor, grantor or funder or other rights or concerns that require or justify their involvement. A land trust may consult with them as a matter of courtesy and good public relations; this issue should be evaluated on a case-by-case basis. One angry donor, grantor or funder that feels betrayed can generate damaging publicity that might have been avoided by early involvement.

Other parties to the easement, such as direct financial supporters, may be consulted as well. Neighbors, community groups or others may also be interested in a proposed amendment. The land trust should consider whether and how to seek information and reaction from these stakeholders, evaluating organizational

capacity, community expectations and general public perception of the transparency of land trust actions. (See *Case Studies 9 and 10.*) Nevertheless, land trusts are ultimately responsible for their amendment decisions and must, therefore, fulfill their fiduciary and other obligations, not the interests expressed by third parties.

**11. *Are there any conflicts of interest to be resolved?***

If board members, staff or other decision makers have actual or potential conflicts of interest with respect to a proposed amendment, these must be addressed, consistent with the land trust's written conflict of interest policy. (See *Land Trust Standards and Practices, standard 4, Conflicts of Interest.*) Presence of conflicts of interest may indicate possible private inurement or heighten the need for consideration of public relations issues presented by the proposed amendment.

**12. *Are there any title issues to resolve?***

Check the title. Any mortgages or other third-party interests (liens, leases, etc.) recorded before or after the easement was conveyed generally should be subordinated to the easement amendment, or a foreclosure might transfer the property under the terms of the original easement. Also, if the conservation easement allows transfers of title to portions of the property and these transfer rights have been exercised so that two or more people own the property subject to the easement at the time of the amendment request, the land trust should evaluate whether a proposed amendment should be approved by all owners of the original property to avoid conflicts with settled expectations of those directly affected by the original easement.

**13. *Are there property tax concerns?***

The land trust may check, or advise the landowner to check, with the local taxing authority to ensure that the amendment will not disqualify the easement from any special taxation program, if such considerations are important to the affected parties.

**14. *Is additional expert advice needed?***

In addition to experienced legal counsel, the land trust may need the services of professional real estate appraisers, natural resource experts, fish and wildlife experts, or other professional advisors. Having expert opinions is especially important when weighing complex tradeoffs and impacts on conservation values in a proposed amendment. (*Case Study 12 illustrates this point.*)

**15. *Should the baseline documentation be updated and who should pay the cost to do so?***

Although baseline documentation is usually prepared near the end of the evaluation process for conservation easements, earlier gathering of the information that will form the baseline data relating to amendments may assist in identifying and evaluating their benefits and detriments. Absent that information, efforts to evaluate the effect of the proposed amendment on the conservation values may be flawed.

**16. *What information needs to be gathered to prepare Form 990 if the amendment is consummated?***

IRS Form 990 now requires disclosure of all amendments, modifications and terminations of any conservation easement.

**17. *Will a Form 8283 need to be prepared?***

Some amendments, most obviously those that add acreage or impose new restrictions, may qualify for a tax deduction. Various land trusts handle the processing of Form 8283 differently, but amendments that may qualify for a deduction will require some consideration to ensure that the land trust's obligations are met.

**18. *Should other questions be addressed for the particular amendment proposal?***

For example, land trusts sometimes wish to seek review and approval from public entities or a court for certain amendments and, in some cases, may be required to do so.

**SEEKING ATTORNEY GENERAL REVIEW OR COURT APPROVAL**

The Nature Conservancy's (TNC) amendment policy (*see Appendix A-2*) requires consultation with the state attorney general, as follows:

As a condition of any amendments that alter, eliminate or reduce covenants on all or a portion of the property, TNC's amendment procedure requires that TNC and the landowner will seek approval of the relevant state authority [often the attorney general] that has oversight of charitable organizations within the state of the easement. The amendment procedure does not apply to amendments that add covenants, provide clarification of ambiguous terms or are deemed de minimis.

Mike Dennis of TNC reports that, given the uncertainties in the law and the fact that TNC operates in all 50 states, this approach helps avoid future challenges to an amendment by the state.

In most states, however, conservation easement amendments to date have been relatively few and infrequently submitted to the attorneys general or the courts. When such a request is submitted, it may be sufficiently outside the normal work load of the attorney general staff that a timely response may not be possible. Depending on the state and the circumstances, consultation with the attorney general or other elected officials may politicize conservation easement amendment decisions in ways neither the land trust nor the landowner deem desirable. Similarly, court dockets can be very long, and seeking review by the court with jurisdiction, given the nature of easement amendments as compared to other court responsibilities, can result in delay.

Paul Doscher of the Society for the Protection of New Hampshire Forests advises that land trusts should anticipate the delays that these realities may create and plan accordingly. He adds that it may be advisable for the land conservation community in a state to initiate a dialog with the office of the attorney general regarding the prospect of increased amendment review requests. In some cases, the attorney general may work with the land trust community to develop guidance on which types of amendments

it wants to review and which it does not. Further, this consultation may help develop protocols for communication with the attorney general so that questions about amendments can be more easily categorized and evaluated.

### III. NEGOTIATION AS NEEDED

Amendments often involve back-and-forth negotiation to address issues that the land trust identifies in the screening tests. The land trust may suggest additional restrictions to offset potential financial gain to the landowner or to compensate for negative impacts on the conservation values. The land trust may negotiate for a less extensive amendment than initially requested. The land trust may request an overall easement “upgrade” to current standard easement language to improve easement stewardship and enforceability. Many iterations may appear before all the screening tests are satisfied and the landowner and land trust agree that the amendment is acceptable. In some instances, the negotiations reach an impasse and no amendment is made.

### IV. COMPLETING THE AMENDMENT IF APPROVED

- A. **Recommendation and vote.** The staff or committee that reviewed the amendment request generally makes a recommendation to the board for a full board vote. Some larger land trusts authorize staff to complete amendments under certain conditions without a full board vote, if it is consistent with a well-defined organizational policy and delegation criteria. But the full board is always accountable for all easement amendment decisions.
- B. **Notification of the landowner.** Whether the land trust grants or denies an amendment request, it must thoroughly document the specific reasons for its action, couched in the context of the easement amendment review criteria set forth in the land trust’s amendment policies and procedures. The land trust must then clearly communicate to the landowner, in writing, the basis of the decision to grant or deny the amendment request. Landowners need to know that the land trust’s decision is based on applicable laws and its amendment policy and that the policy is applied fairly to all proposed amendments.
- C. **Baseline documentation.** An amendment that changes reserved rights or any other easement terms may potentially affect the land’s conservation values, as documented in the original easement baseline. If so, baseline documentation should be updated to reflect the condition of the property at the time of the amendment. For example, if an amendment increases restrictions along a riparian corridor to prevent disturbance to vegetation, the condition of the corridor at the time of the amendment should be documented and added to the baseline. An amendment that protects a new suite of conservation values should trigger an update to the baseline documentation. Any added land needs baseline documentation.
- D. **Legal review and amendment drafting.** Usually the land trust prepares the amendment document. Much of the drafting is likely to be completed earlier in the process, but the formal amendment document must be prepared. As with all real estate conveyances, professional legal review of the final amendment is always needed, but legal review and participation in amendment decisions is critical throughout the amendment process.

- E. **Attorney general, IRS or court review if necessary or appropriate.** In some states, the land trust is required by statute to seek review by public entities prior to executing the amendment, such as holding a public hearing or seeking approval from a public agency. If the easement was the subject of a recent tax deduction, a private letter ruling from the IRS may be beneficial; the landowner should consult personal tax counsel on this issue. If the charitable trust doctrine may apply and the amendment exceeds the discretion granted to the land trust in the easement deed, or the amendment alters the easement's conservation purposes or values in any negative way, approval by a court or the state attorney general may be essential or desirable to protect the land trust's actions from challenge. If the proposed amendment is likely to be controversial, the land trust may elect to have review by the attorney general or court to shield the land trust's decision from criticism. The decision in each of these circumstances is highly fact specific and must be made in the context of applicable state law.
- F. **Signature and recording.** The amendment document is signed by the landowner and land trust and recorded in the appropriate public land records after final title examination and any necessary steps are completed.
- G. **Form 8283.** If the amendment qualifies for a tax deduction, the land trust should request a copy of the appraisal and complete Form 8283 following normal land trust procedures.
- H. **Notification of outside parties.** Notifying public entities or other parties about the completion of an amendment is at the discretion of the land trust. Some organizations routinely notify the municipality, county or other local government. Others advise that there is no reason or requirement to notify any outside parties and that there may be disadvantages to calling unnecessary attention to an easement amendment. IRS Form 990 effectively provides public notice on the Internet for those who look for it.

#### AMENDMENT FORMAT

Easement amendments have several acceptable formats. The format of an amendment will vary based on state laws on transfer of property interests and recordation of documents, as well as various other considerations such as the desirability of upgrading the easement language to the land trust's newer model easement.

In general, for very simple amendments that affect just one or two clauses of an easement, some attorneys believe the amendment document can simply restate just those paragraphs. Adding acreage to an easement may be handled using this short format as well if state conveyancing requirements are satisfied.

For more complex amendments that affect many parts of the easement document, usually the entire easement is restated and ratified in its modified form.

Some legal experts recommend always restating the entire document, with an express ratification of terms that have not been changed by the amendment, even for simple amendments, to restate for the public record the land trust's and the landowners commitment to the specific and general conservation purposes served by the easement. Such a practice also makes it easy for future landowners and easement monitors to have the complete easement at hand, without multiple amendment

documents that modify the original easement. If a deduction is to be taken based on the amendment, the requirements of IRC Section 170(h) are most clearly met by restating the easement in a single document with additional recitals to establish the conservation values furthered by the amendment.

If the easement is not completely restated, the amendment must be drafted to ensure that no one can argue that it entirely supersedes the original easement. The title of the document must clearly identify it to ensure that it is not lost or misunderstood in later title searches. The key is to avoid inadvertently reducing or losing restrictions or other provisions in the rewrite.

The document should make clear how the amendment serves the public interest. Some attorneys recommend that the amendment include recitals at the beginning of the document to explain the easement holder's reasoning. Such transparency in any conservation easement amendment is critical, and if the amendment is challenged in the future, these recitals may help the easement holder defend its decision.

The process outlined above covers typical easement amendment scenarios and offers a basic structure for written amendment procedures. It is impossible to prepare a step-by-step procedure that covers all the variations that land trusts may eventually encounter. Ultimately, land trusts must rely not only on their amendment procedures but also on their careful analysis, experience and legal advice to ensure the best process for making amendment decisions.



## Part 5. Placement of an Amendment along the Risk Spectrums

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*In practice, amendment requests are as varied as the lands and resources that are protected by conservation easements. Consequently, the process for evaluating these requests also varies greatly, depending in part on how complex or controversial the amendment proposal may be.*

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At the simplest end of the spectrum, a land trust might determine that a proposed amendment fits well with organizational mission, will have no negative impact on conservation values or easement purposes, is legally permissible, and has no potential for conveying impermissible private benefit or inurement. Low risk amendments include the simplest, non-controversial amendments that a land trust may complete with a relatively simple internal process and documentation.

If the proposed amendment is more uncertain in terms of legal permissibility or public perception, or if it involves difficult evaluation of financial outcomes or positive and negative effects on conservation values, the land trust will need to consider more factors and document the reasons behind its decision more thoroughly. The middle of the spectrum includes amendments whose complexity may require the land trust to seek advice and documentation from external parties, such as appraisers, natural resource specialists or other expert consultants, and amendments with even greater complexity in which the land trust might also voluntarily seek information and reaction from public entities, neighbors or other stakeholders to make its decision.

In the most complex cases, where there may be damage to fulfillment of easement purposes or net negative effects to conservation values, the land trust should strongly consider seeking approval from a public entity and/or a court and may legally be required to do so under the charitable trust doctrine or otherwise. High risk amendments involve legally required approval of public entities, amendments that involve extraordinary circumstances for which review and approval from a public entity are effectively necessary even if not legally mandatory, and amendments that may place the land trust's existence in jeopardy.

A variety of low to moderate risk amendments are illustrated in the Case Studies that follow, as well as one relatively simple “amendment in lieu of condemnation” example. High risk amendments that may involve the required oversight or approval of government entities are largely beyond the scope of this report because their complexity and factual detail prevent meaningful presentation or because they fall outside the Amendment Principles. (*See page 37*).

The following chart reflects the spectrum of low to highest risk for each of a number of decision points relating to the amendment of a conservation easement. An amendment that falls on the low risk side for every point is likely to be appropriate in most states and circumstances. As amendments increase in complexity, the land trust should take increasing care to evaluate the issues carefully, to involve appraisers, other experts and neutral advisors and to consider alternatives including denial of the amendment. The points are not of equal value; for one the risk may be loss of nonprofit status while the risk for another may be adverse publicity. Some risks can be mitigated or avoided by a land trust that is aware the risk exists, while others are unavoidable consequences of the transaction. Moreover, the points cannot be counted up to reach a decision; for example, impermissible private benefit or private inurement will trump a low risk finding on all other points absent alteration of the transaction to eliminate the private benefit or private inurement. Explanation of these variations appears in the text.

## LEGAL RISK SPECTRUM

	LOW RISK		MORE RISK		HIGHEST RISK
<b>IRC/Reg Concerns: impact on conservation purposes</b>	Amendment does not affect conservation purposes protected in perpetuity or affects in positive ways only		Amendment affects conservation purposes protected in perpetuity both positively and negatively	Amendment might harm conservation purposes protected in perpetuity	Amendment definitely harms or negates conservation purposes protected in perpetuity
<b>IRC/Reg Concerns: impact on conservation values</b>	Amendment has a beneficial effect on conservation values of the CE land	Amendment has a neutral effect on conservation values of the CE land			Amendment has a negative effect on conservation values of the CE land
<b>IRC/Reg Concerns: commitment and resources</b>	LT clearly has both commitment to protect conservation purposes and resources to enforce restrictions				LT lacks commitment to protect conservation purposes or resources to enforce restrictions
<b>IRC/Reg Concerns: extent of language change</b>	Amendment corrects a scrivener's error	Amendment makes de minimis changes or clarifications			Amendment alters basic provisions and protections
<b>Private Inurement</b>	No LT insider is involved at all	LT insider involved but receives no benefit at all		Amendment might benefit LT insider modestly/remotely	Amendment clearly benefits LT insider
<b>Private Benefit</b>	No financial benefit at all to any private party	"Incidental" private benefit to unrelated parties; risk grows by liberal construction of "incidental"	No net financial benefit to any private party; any benefit is offset by detriment	Possible financial benefit to a private party	Clear financial benefit to a private party
<b>Private Benefit/Appraisal</b>	Full independent appraisal shows lack of private benefit	Appraisal to confirm lack of private benefit is clearly unnecessary	No consideration of appraisal to assess possible benefit to private party	No appraisal despite possible benefit to private party	No appraisal despite clear benefit to a private party or amendment when appraisal reveals private benefit
<b>State Nonprofit Law Requirements</b>	Amendment furthers or is consistent with LT's mission		Amendment is not inconsistent with LT's mission	LT's mission is not clear; difficult to see whether amendment furthers mission	Amendment is contrary to LT's mission
<b>State Easement Enabling Laws</b>	State law permits easement amendment			State law is uncertain	State law forbids easement amendment or this type of amendment
<b>State Charitable Trust Requirements</b>	CE cannot be considered a charitable trust	CE is or might be a charitable trust; requirements are satisfied		CE might be a charitable trust; requirements are not satisfied	CE is a charitable trust; requirements are not satisfied
<b>Compliance with State Fraudulent Solicitation Laws</b>	Amendment is consistent with LT solicitations for fee land, CE or funds				Amendment is contrary to LT solicitations for fee land, CE or funds
<b>Compliance with Local Ordinances</b>	Amendment is not contrary to local law and meets current zoning/similar requirements				Amendment is contrary to local law or inconsistent with current zoning/similar requirements

## RISK SPECTRUM ON CONTRACT AND POTENTIAL CONTRACT ISSUES

	LOW RISK		MORE RISK		HIGHEST RISK	
<b>Compliance with Conservation Easement</b>	CE expressly permits this amendment	CE expressly permits this sort of amendment	CE expressly permits amendments in general	CE is silent but state law clearly permits CE amendments	CE is silent and state law is uncertain	CE expressly forbids this amendment or all amendments
<b>Complexity</b>	Simple amendment easily understood				Multi-part complex amendment	
<b>Violation of Third-Party Rights Created by CE</b>	Amendment protects third-party rights in CE and is approved by those third parties		Amendment is not inconsistent with third party rights		Amendment abrogates third-party rights	
<b>Donor/Grantor Approval</b>	Donor/heirs/grantor approves this amendment	Donor/heirs/grantor approves this sort of amendment	Donor/heirs/grantor knows and is unconcerned	Donor/heirs/grantor does not know/is not consulted	Donor/heirs/grantor opposes this amendment	
<b>Direct Funder Approval</b>	Funders fully approve this amendment	Funders approve this sort of amendment	Funders know and are unconcerned	Funders do not know/ are not consulted	Funders oppose this amendment	

## RISK SPECTRUM ON OTHER ISSUES

	LOW RISK		MORE RISK		HIGHEST RISK
<b>Neighbors/LT Members/Community Approval</b>	Neighbors/members/ community approve this amendment	Neighbors/members/ community approve this sort of amendment	Neighbors/members/ community know and are unconcerned	Neighbors/members/ community are unaware/ not consulted	Neighbors/members/ community oppose this amendment
<b>Media Attention</b>	Amendment likely to receive positive or no media attention			Adverse media attention is likely	Adverse media attention is certain
<b>Degree of LT Review and Analysis</b>	Amendment is fully reviewed by LT staff and/or knowledgeable committee, full board and qualified attorney			Amendment is minimally reviewed by LT staff and/or committee or board without qualified attorney	Amendment is minimally reviewed by LT staff and/or committee without qualified attorney or full board review
<b>Degree of Expert Consultation</b>	Relevant expert scientific or other advice is obtained, or it is clearly not needed and documented				No expert scientific or other advice is obtained but clearly needed
<b>Degree of LT Effort and Expense in Amendment</b>	LT staff time and expenses will be fully paid by requesting party or will be minimal				Amendment will impose heavy financial and time burdens on LT with little or no hope of payment
<b>Effect on LT Stewardship Capacity</b>	Amendment imposes no new or unendowed stewardship obligations; or amendment improves CE enforceability		Amendment does not improve enforceability of CE		Amendment adds new, unendowed stewardship obligations
<b>Tradeoffs</b>  <b>Four Corners Rule</b>	Straightforward amendment that simply adds acreage, adds restrictions, extinguishes reserved rights, and the like (i.e., no tradeoffs)	Amendment involves no tradeoff or simple tradeoffs of conservation values on only one CE parcel	Amendment involves simple tradeoffs of conservation values; more than one CE property	Amendment with complex financial outcome or tradeoffs of conservation values or among multiple CE properties or new land added to original CE	Highly complex and/or controversial amendment; likely to require review by public entities, to be out-side Amendment Principles and to fail some screening tests

## Part 6. Case Studies

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*Every potential amendment involves a unique set of facts and circumstances. Each amendment must be considered on a case-by-case basis, with expert legal advice, in light of the particular easement terms and relevant federal, state and local law.*

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How do land trusts implement the Amendment Principles and the foregoing procedures and risk spectrums? The following Case Studies illustrate amendment situations ranging from simple to complex, showing how land trusts approach amendment requests on a practical level and some of the considerations that may bear on the decision. While the Case Studies are largely hypothetical, most are based on actual scenarios encountered by land trusts.

These Case Studies cannot provide template analyses or outcomes even for the scenarios presented and especially not for other fact patterns. Practitioners in other venues may assess a scenario very differently and may reach entirely different conclusions due to many factors, such as different state laws, different community values, different land trust missions and different assessments of the conservation values. None of these Case Studies has been tested in the courts, and none establishes legal precedent. Unfortunately but unavoidably, many of the Case Studies raise more questions than they answer as a result of the unclear state of the law on easement amendments. The Case Studies are offered to trigger thinking about the questions and considerations presented, not to provide cookbook answers. Remember, every proposed amendment must be evaluated on a case-by-case basis with experienced legal counsel in light of applicable law.

The Case Studies do not always explain how every aspect of the Amendment Principles may be addressed—only selected details are discussed that are relevant to the aspect of the Amendment Principles and procedures on which the specific Study is focused. Assume in each case that each land trust was operating with an established amendment policy and procedure in hand and the advice of experienced legal counsel.

Other land trusts and their legal advisors may assess the Case Studies very differently and may reach entirely different conclusions due to many factors, such as differing interpretations of federal law, different state laws and differing interpretations thereof, different community values, different land trust missions and different assessments of the conservation values. These sometimes conflicting perspectives illustrate the importance of context; land trusts address amendments guided not only by their amendment policy but also by their organizational missions, history and the requirements of federal, state and local law. Ultimately, every amendment decision weighs the impact of the proposed amendment on the public interest served by the conservation easement, within the constraints of applicable federal, state, local and nonprofit law and of the easement itself.

### 1. *Extinguishing reserved rights: A “straightforward” amendment without tradeoff issues*

**Scenario:** When George and Martha placed an easement on their property 15 years ago, they reserved the rights to create two additional house lots. They thought their children might wish to exercise these rights. Now the children have made lives for themselves in other places, and George and Martha wish to remove these reserved rights permanently, so that no more houses can ever be built on their land. They proposed this idea to the land trust that holds the easement.

**Resolution:** The land trust evaluated this proposal using the land trust’s written amendment policy. Staff determined that the proposed amendment clearly would have a positive conservation result. In the financial analysis, the landowners were giving up substantial economic value, so private benefit was not a concern. They were not land trust insiders. Nor was there a mortgage to consider that would require subordination to the amendment. The land trust worked with its real estate attorneys to draft and complete and record the amendment consistent with its amendment procedure. The baseline was supplemented to remove the two house sites, but a new baseline was not needed.

#### KEY POINTS:

- This straightforward amendment proposal has a clear conservation gain and no discernable downsides. By running the proposed amendment through the amendment policy tests, the land trust documented its reasoning that the amendment was allowable.
- The land trust applied the amendment screening tests at a scale appropriate to the proposal; it used staff analysis rather than hiring expert naturalists or a professional appraiser. If a land trust without staff faced this proposal, its volunteer board would ultimately make the decision, involving qualified legal counsel early in the process.
- This is a good example of a low risk amendment in which the land trust could make the decision on its own, with the advice and drafting services of legal counsel, but without seeking analysis from outside experts or other constituents.
- If George and Martha intend to claim a charitable deduction for canceling the two reserved house sites, they need personal tax counsel, must obtain a “qualified appraisal” substantiating the value of their contribution, and satisfy the Form 8283 requirements.
- This amendment could have been achieved by a second conservation easement over the same land, affirming the first easement and eliminating the reserved rights. The best format will vary based on state law on recordation and transfer and various other considerations such as the desirability of upgrading the easement language to the land trust’s newer model easement.

- The land trust had no discernable conflict nor motivation outside its traditional, land-saving motive, so its decision is not easily questioned.
- This amendment might offer an opportunity to approach neighbors to explain about conservation easements with George and Martha as allies. New easements on adjacent land would enhance the protection provided by this easement.

## 2. *Adding acreage: Another “straightforward” amendment without tradeoff issues*

**Scenario:** Joshua, looking forward to retirement, worked closely with his legal and financial advisors to develop a plan to protect his substantial land holdings permanently while taking advantage of all available federal tax benefits. Six years ago, the local land trust gladly accepted a donated conservation easement in which Joshua protected about half of his property. He now wishes to add the abutting parcel, the balance of his land, to the conservation easement.

**Resolution:** The land trust welcomed the notion of protecting the balance of the property, and it ran Joshua’s proposal through its amendment policy. Staff found that the proposed additional land had similar qualities to the first easement property and was highly worthy of permanent protection. In the financial analysis, the landowner would be making a substantial gift of value, so private benefit was not a concern. Joshua occasionally answered the land trust’s annual appeal with a modest donation, but he was not an insider. The land trust also considered the pros and cons of amending the original easement to include the additional land, versus creating a new easement for the additional land. The original easement land and the proposed additional land had similar conservation attributes, and the conservation purposes for the properties would be identical. Easement stewardship would be streamlined if the whole property were under a single easement. Further, Joshua wished to ensure that all the land under easement would remain under one ownership, a goal that the easement amendment could accomplish by prohibiting separate conveyance of the two parcels. The land trust supported this goal as well. The parties agreed to amend the easement to include the additional land, and the land trust worked with legal counsel to draft and complete the amendment and new baseline consistent with its amendment procedure.

### KEY POINTS:

- This proposal has a clear conservation gain and no discernable downsides. The land trust had no conflict or self-serving motive that could cloud its thinking or be used by others to draw its decision into question.
- For amendments that add acreage, a land trust should weigh whether it would be better to amend the original easement or protect the additional land under a new easement. In some states, new acreage should always be added with the conveyancing language of a new deed. If the proposed additional land abuts the original easement land, has similar conservation attributes, and would have identical easement conservation purposes, the original conservation easement may be amended to include the additional acreage if consistent with state law. But if the additional acreage would be divisible from the original easement land, does not abut the original easement land, has substantially different conservation values, or would be better protected under different conservation purposes, a land trust should consider creating a new conservation easement for the additional land.

- If the land trust had strengthened its template conservation easement since the first easement was conveyed, this could be the ideal time to add the improved language using a replacement conservation easement that would protect the original and the new easement land under a single easement with the upgraded language. This is always a good goal, but there may be times when the landowner will not agree. In that case, it may be better to add the new acreage and continue using the old language.
- Financial value donated via an easement amendment may qualify for federal tax benefits; as with all tax matters, advise the landowner to review this with his or her own counsel and tax advisor.
- This illustrates a low risk amendment in which the land trust could make the decision on its own, with the input of legal counsel, but without seeking analysis from outside experts or other constituents.

### 3. *Ambiguous easement terms: Clarifying easement language*

**Scenario:** In the 1980s, a land trust accepted a conservation easement that included a residence and buildings within the easement area. The purposes of the easement were generally stated as protecting open space for the scenic enjoyment of the general public, and the allowed uses included conservation, agriculture, forestry and other uses not inconsistent with the easement. Years later, when the property changed hands, the new owners decided to open a bed-and-breakfast inn and to host small intimate weddings. These proposed commercial uses were permitted under present and past local ordinances and state law.

Neighbors complained to the land trust that these uses violated the easement. The new owners asserted that the original easement language allowed these uses so long as they did not affect the conservation values of the larger property.

**Considerations:** The land trust observed that the underlying problem was inherent ambiguity in the now-outdated easement language. If “all uses not inconsistent with the easement” were allowed, and a residence and buildings were allowed at the outset, then how much additional use would be allowed and “not inconsistent”? Would a one-bed guestroom rental, ancillary to the residence, be consistent with the easement? Would a commercial inn with 15 rooms be consistent? Is the addition of any commercial use inconsistent or did the original easement permit commercial uses consistent with its other provisions?

One solution might be to acknowledge the ambiguity and amend the easement to confine the inn and function activities to a defined area near the existing house. Within that area, the amendment could provide that the owners could conduct minor commercial uses, such as home occupations, providing bed-and-breakfast accommodations, and catering weddings and social functions, consistent with and permitted by local zoning, so long as the uses do not negatively impact the conservation and scenic values of the property.

Another solution might be to amend and clarify the easement to permit defined home occupations and bed-and-breakfast accommodations but not the higher-traffic uses presented by catered weddings and social functions that offend the peace of the neighborhood. Depending on the location of buildings, roads and amenities in relation to nearby public roads, other protected lands and neighbors, these uses may diminish the easement’s protection for open space for the scenic enjoyment of the general public.

Either of these first two options imposes some limitations on the landowners' intended uses but permits some uses the neighbors oppose. The land trust has some negotiating room because the easement ambiguity puts both land trust and landowners at a disadvantage. Any solution along these lines may necessitate some "damage control" with the neighbors. Some land trusts may opt to hold a neighborhood meeting or to send a letter to the neighbors explaining the difficulties of the situation and the solution proposed or reached. The timing and nature of these communications will vary with the facts and the relationships in question.

Still another solution could be to conclude that the commercial uses are not consistent with the easement. As originally written, the easement did not unambiguously allow commercial use. The then-existing structures were residential, the purpose of the easement was protection of open space for scenic enjoyment, and the stated allowed uses were conservation, agriculture, forestry and other uses not inconsistent with the easement. The "other uses" language creates enough of an ambiguity to give everyone something to argue. One rule of contract construction followed in many states is *ejusdem generis*, meaning of the same kind or class; this rule means that a general word or phrase following a list of specifics will be interpreted to include only those items of the same type as those listed. The stated uses in this easement are a residence, agriculture, forestry and conservation, and a court might well find that commercial uses are not permitted at all. If the landowners reject any compromise that the land trust can accept, there may be no option other than a court proceeding. Some land trusts propose mediation or arbitration before filing suit; others file suit, and in still other cases the landowner is first to file the lawsuit.

The omission of any definition of "commercial" from many early conservation easements creates ambiguity in cases like this because general state law will contain many definitions with multiple inconsistencies that are inappropriate to the conservation easement setting for various reasons. As a result, this type of dispute is likely to arise fairly frequently with respect to older easements. When facing an ambiguity such as this presented by a single landowner, the land trust should consider the likelihood that the same ambiguity exists in other easements. The more likely it is, the more care should be taken in resolving the first dispute to arise. As a public relations matter, land trusts may find it difficult to explain different treatment of seemingly similar circumstances.

#### KEY POINTS:

- It's inevitable that some easements with older language will cause stewardship challenges and reveal the need to clarify and improve troublesome easement language, reducing the opportunity for future damage and improving ease of stewardship. Land trusts continually learn from these challenges to create better standard language for new easements, but the "old" language remains in prior easements.
- Most states follow the rule that, when two reasonable interpretations of a legal document are possible, the court will interpret the document against the drafter. Land trusts typically control the drafting of conservation easements, so drafting ambiguities will normally be resolved against the land trust if a dispute arises. This issue can be alleviated but not eliminated by a boilerplate provision in which the parties agree to construe the easement as having been drafted jointly.
- Land trusts can avoid some issues if they adopt a standard easement template. The more consistency there is among easements, especially in the boilerplate sections, the greater the likelihood that they will be explained and administered in the same manner. Predictability is a benefit for both the land trust and the landowners.

- The land trust may be able to use this problem as an opportunity to resolve the ambiguity in the easement terms if it can negotiate with the property owners and neighbors to develop a solution that would define and limit the proposed and future uses.
- By running the proposed solution through its amendment policy and procedure, the land trust must establish that the purposes of the original easement are preserved in any negotiated solution. In addition to reading the easement itself, the land trust should review the project from negotiation of the original easement to ensure that the land trust understands the sources of the original language, the concerns expressed by the donor/grantor and any promises made to the donor/grantor or others.
- Most experts agree that no part of the easement area should be released from the easement under any solution for many reasons, most notably, the perpetuity requirements in federal tax law and the prohibition on private benefit.
- Any solution other than outright prohibition of all commercial activity presents serious risk of adverse public relations issues with neighbors and perhaps a broader cross-section of land trust members, members of the public and the media. The land trust should consider whether to address these issues proactively instead of allowing them to explode out of control.
- Depending on the specific factual circumstances and level of easement ambiguity, a land trust may conclude that the amendment's effect on the property's conservation values is neutral or beneficial in light of the overall positive effect on the easement's stewardship and, therefore, on its long-term enforceability. A land trust may cement or enhance the strength of that conclusion by negotiating the addition of new restrictions to the easement, such as riparian protection along a stream, prohibition of cutting trees in specific fragile areas, and so on.
- Again, depending on the specific factual circumstances, level of easement ambiguity and any new restrictions, a land trust may determine that the landowner would receive no discernable financial gain from the amendment if the original easement language was sufficiently ambiguous to allow the landowner land use rights of equal or greater financial value before the amendment. In this situation, most experts would recommend obtaining a professional appraisal to document the amendment's effect on property value, rather than relying on internal judgment. The appraiser is likely to need an independent legal opinion of the permitted uses before and after the amendment.
- Finally, depending on the specific factual circumstances and level of easement ambiguity, the land trust may stand on the existing easement and enforce it, prohibiting both bed-and-breakfast and catered weddings and events or prohibiting one but not the other if grounds exist to distinguish them.
- This Case Study illustrates a modest to moderate risk case on the amendment spectrums depending on the resolution selected. Clarifying easement language requires a thorough analysis using all the screening tests of the amendment policy.

#### 4. *Excessive stewardship obligation: Improving enforceability*

**Scenario:** An easement conveyed to a land trust in 2000 protects a 1,000-acre ranch. The primary easement purposes are to protect ranchland, agricultural production and wildlife habitat. All structures on the ranch are contained in a single building envelope within the easement, which allows for one primary residence and one bunkhouse. According to the easement terms, the use of the bunkhouse is limited to the ranch's full-time employees, a hallway in the bunkhouse must be located and designed in a certain manner, and overgrazing is prohibited, with a standard of no grazing below a two-inch grass length cover.

The land trust believes that some of these easement provisions provide little or no conservation benefit and impose an unrealistic monitoring burden. The easement was negotiated and signed in the last days of December, when the land trust's regular attorney was unavailable and the land trust's usual internal checks and balances were lacking. The land trust would like to amend this easement to improve its enforceability, while ensuring that its purposes and intent are upheld.

**Considerations:** These easement terms raise more questions than they answer, and the land trust should begin with a careful review of the project file, discussions with present and former land trust personnel who participated in the creation of this easement and discussions with the donor or grantor and any representatives. The provisions that seem strange and unnecessary now may have had an underlying logic that is not immediately apparent to current land trust staff. If so, that logic must be taken into account in making any amendment decision.

For example, the bunkhouse limit to full-time employees may have been designed to ensure that those who lived in the bunkhouse had a relationship to the land and could be required to protect it as part of their employment. This restriction, however, presents monitoring problems, because non-employees or part-time employees could move in immediately after the annual monitoring visit. Similarly, the very specific bunkhouse hallway requirements are difficult beyond reasonable monitoring expectations and do not appear directly relevant to the purposes or conservation attributes of the easement. However, there surely was a reason this provision was included in the easement, and land trusts would be wise to hesitate changing something they do not understand. The project file and discussions with those who worked on the easement negotiation and drafting originally may reveal the hidden logic of these bunkhouse provisions.

The two-inch overgrazing standard is also problematic, because it is difficult to measure accurately over the ranch as a whole. The land trust faces interpretation questions as to the intent of the two-inch standard and may find support in the easement, its project file and local cattle community standards to interpret the standard to require an average two-inch grass length based on measurements at multiple locations. Alternatively, an amendment might require compliance with an agricultural management plan or compliance with accepted, more easily monitored standards. The goal of interpretation or amendment should be a net positive conservation result, including improved easement stewardship as a positive factor in the balance sheet.

## KEY POINTS:

- Some legal experts believe that, if the restrictions do not support the purposes and intent of the easement, and if the restrictions are not required to protect the relevant conservation attributes of the property, the land trust may consider amending those particular terms. It may be appropriate to replace difficult-to-monitor restrictions with more easily monitored provisions that better address the issues or, in some cases, it may be appropriate to remove them. These attorneys believe that improved stewardship of the easement's purposes is a good reason to do so, providing that the amendment strengthens the overall protection of the land.
- Other attorneys believe amendments in these situations pose a serious risk on many grounds, including potentially loss of perpetuity, private benefit and breach of promises made to the donor, grantor or funder. These seemingly obscure restrictions may have had special importance to the donor/grantor. Amendment of provisions that were key to the donor/grantor's decision to grant the easement may raise issues of fraudulent solicitation, charitable trust doctrine and donor relations.
- In removing restrictions from an easement, the land trust must consider carefully whether releasing restrictions may result in an impermissible private benefit or private inurement. When there is uncertainty, the situation should be reviewed by a qualified appraiser and an appraisal prepared, if warranted. Moreover, removal of restrictions resulting in harm to conservation values violates the perpetuity requirements in federal tax law if a deduction was taken for the easement donation.
- Alternatives that the land trust could consider in this case include choosing not to enforce the easement with respect to technical violations – a “discretionary waiver” —or granting discretionary approval for the use or activity in question. For example, the land trust might not monitor the employment status of people living in the bunkhouse or might choose to grant discretionary approval for part-time employees that live there. Land trusts must be very cautious here. These approaches should be considered only for true technical violations that have no impact on the easement purposes, no significant impact on the conservation values of the property, and no potential for transferring impermissible private benefit. Neutral advice may be essential in determining whether the requirement and violation are technical or only alleviating a perceived monitoring burden for land trust personnel.
- Any changes to the easement may require changes to the baseline documentation.
- More thoughtful initial easement drafting in 2000 could have avoided this problem!
- This case illustrates a moderate to significant risk in the amendment spectrums. Modifying easement restrictions to improve enforceability requires appropriate analysis using all the tests of the amendment policy.

#### THOUGHTFUL EASEMENT DRAFTING CAN AVOID MANY EASEMENT AMENDMENTS LATER

Many amendment problems confronted today could have been avoided with better initial easement drafting. Drafters must take care to ensure every easement restriction is monitorable and enforceable and is in direct support of the stated conservation purposes of the easement.

Restrictions that are difficult to monitor are especially likely to be the subject of amendment requests. One example is an all-terrain vehicle (ATV) prohibition: evidence of ATV use does not necessarily indicate who the user was, ATV use may or may not affect the conservation attributes of the property, and enforcement may be difficult without a constant presence on the easement property. The land trust may seek to enforce the prohibition by requiring the landowner to enforce laws against trespassing, but that option may be difficult under some states' laws and may generate a backlash of public opinion if the landowner is elderly, use of ATVs is widely accepted, or various other circumstances exist. Similarly, prohibitions on pesticide use and organic farming requirements are difficult to monitor without sophisticated and expensive scientific testing. The cost of the testing should be built into the stewardship endowment for the easement at the time of its creation, and the easement can be drafted to adopt the standards of a recognized organic farming organization or other neutral source with expertise so that changes in testing protocols and the like will not require easement amendment.

If it is not readily possible to monitor the restricted activity, it may also be difficult to evaluate the effect of a proposed amendment to the restriction.

One frequent drafting issue arises at the intersection of the easement restrictions and local zoning restrictions. The easement may lock then current zoning into place in the restrictions or may allow certain restrictions to vary over time as local zoning changes occur. In the former, the landowner is bound by zoning requirements locked in the easement or by later zoning, whichever is more restrictive, because the easement cannot free the landowner from compliance with law. In the latter, the easement restrictions on the selected points mirror the zoning and may be more or less restrictive in future years. Neither option is inherently better in the abstract, but lack of clarity is uniformly bad.

**A COROLLARY PRINCIPLE:** Amendments themselves must be drafted with clarity. The reasons for the amendment must be transparent and defensible and should be stated lucidly in the amendment document itself.

#### *5. Temporary non-conforming use: Avoiding permanent amendment*

**Scenario:** A farmer protected his land with a conservation easement protecting agricultural soils, scenic values and wildlife habitat. In addition to typical use limitations, the easement prohibited use of motor vehicles for purposes other than farming or forestry and specifically prohibited all-terrain vehicles (ATVs) from using the property for recreational purposes. As the farmer got older, however, he realized that he needed to use his ATV if he wanted to join his friends out in the “back forty” to go hunting. He sought permission from the land trust.

**Considerations:** The easement terms prohibited the specific proposed use, but the land trust considered the scale and intent of the farmer's request. Land trust staff found that the ATV use proposed by the farmer would have no significant effects on the property's conservation values and would not conflict with the conservation purposes of the easement. Moreover, the farmer was entitled to use the ATV for farming and forestry purposes. He would observe conditions and changes in the land for those purposes even if his specific purpose might be hunting, so one could argue that his ATV use was arguably consistent with the easement even when it was also for hunting.

**KEY POINTS:**

- One option might be to amend this easement to permit the landowner to use an ATV under additional specific circumstances but not to allow any other person to use one.
- Amending the easement to allow the use proposed by the farmer could be seen as an unnecessarily permanent solution to a temporary problem.
- With advice from legal counsel, some believe that the land trust could grant permission in the form of a "license" limiting the scope of use to one person (the farmer), for a specified length of time (the farmer's life), and for a defined purpose (accessing the backland for hunting). Other options might be an informal letter agreement stating an interpretation of the easement consistent with this use or even an oral agreement. The choice of approach would be affected by the circumstances and relevant state law, although oral agreements carry significant danger of later disagreement.
- A license, letter or oral agreement allows the land trust to approve this use with defined limits and without making it permanent and applicable to future landowners. This approach can be appropriate where issues of non-compliance with easement terms are minor, temporary and involve no negative effects on conservation values or easement purposes. Caution and careful legal analysis are essential.
- Land trusts must consider issues of precedent and public relations, as well as their legal and ethical responsibilities to uphold easement terms. Unanticipated changes in technology, economic use and landowner needs continually create new challenges. Alternatives to amendment, including discretionary approval and discretionary waiver, can be important tools to address such change.
- Although this easement may not be formally amended, the land trust's amendment policy tests should be used to guide its decision making. This approach ensures consistency even if a land trust uses one of the alternatives to amendment.

## ALTERNATIVES TO AMENDMENT: DISCRETIONARY APPROVAL, LICENSE, INTERPRETATION LETTER, DISCRETIONARY WAIVER

Some easements contain a “discretionary approval” provision that allows the land trust to approve, under certain conditions, activities that are restricted or not specifically addressed by the easement. This built-in flexibility may allow the land trust to address unanticipated change and minor, short-term problems or questions without using an amendment. (Some practitioners feel this provision can have the effect of encouraging a proliferation of approval requests for new uses, many of which may be unacceptable.) Some land trusts use the form of a “license” to permit the specific requested activity and define limits. *See a sample discretionary approval letter in Appendix C.*

A land trust may write an “interpretation letter” to a landowner responding to a question about whether particular uses or activities would be allowed on an easement. For example, suppose a farmer wants to know whether giving hayrides for a fee is allowed as an agricultural use on easement land, as the easement terms do not specifically address this use. Rather than permanently amending the easement to allow (or forbid) the hayride right for all future owners, the land trust could address the specific question in a letter, perhaps setting limits on when, by whom and how long the use is allowed.

A “discretionary waiver” refers to the land trust’s ability to choose not to enforce against technical easement violations. For example, upon finding a rustic child’s tree house built on easement land where the easement prohibits all structures, a land trust might allow the tree house to stay and simply advise the landowner, in writing, not to expand that use. This approach may be used to address minor, technical, relatively short-term violations of an easement that do not impair the property’s conservation values.

Land trusts may use these approaches to address minor easement issues that do not impact the purposes or conservation values of the easement, do not involve private benefit or private inurement, and otherwise comply with the law. For problems or uses that are likely to be temporary, these less permanent approaches can be more appropriate than amending the easement. There are risks in creating precedent, however. One concern is that these methods are very similar to amendments but shortcut the amendment process in ways that can potentially undermine easement programs. As with amendments, it is important for land trusts to evaluate the options, risks and benefits of these approaches with experienced legal counsel.

All of the foregoing alternatives raise the possibility that the land trust will need to report its action on IRS Form 990 as a form of modification or release of the easement. The instructions for Form 990, Question 3c on Schedule A require the land trust to provide the following information: “The number of easements modified, sold, transferred, released, or terminated during the year and the acreage of these easements. For each easement, explain the reason for the modification, sale, transfer, release or termination.” While the full scope of this required reporting is not clear, the plain language of Question 3c is clear: if a land trust modifies, sells, transfers, releases, or terminates an easement, that action must be reported to the IRS along with an explanation of why the land trust did it. Land trusts must be mindful of this reporting requirement when actions are taken that need to be reported and should, accordingly, have good, complete, contemporaneous recordkeeping and minutes with respect to such actions. Does this mean that land trusts must report non-perpetual licenses, temporary waivers and the like as a form of modification or release of the easement? Land trusts must consider how to address this question with qualified legal counsel.

#### *6. Modifying subdivision reserved rights / workout of debt owed to land trust: Evaluating impacts to conservation purposes and conservation values*

**Scenario:** A conservation easement on a 1,300-acre ranch allowed the separate transfer of 600 acres from the core part of the ranch, leaving the existing buildings plus 700 acres together. The 600 acres could be further subdivided into six 100-acre tracts, each with rights to build a residence and outbuildings. Thus, the easement allowed a total of seven separate ownerships. When the landowners attempted to sell portions of the property, however, this configuration of land and building rights proved unmarketable. They needed to sell off portions of the property to make the payments on the loan that they had received (as conservation buyers of the restricted land) from the land trust when the easement was initially placed on the land. They were in default on the loan, facing foreclosure by the land trust.

The landowners proposed an amendment rearranging the transfer rights. It would create a 650-acre tract with potential for subdivision of two 100-acre lots, for which there was a buyer. This part of the amendment would allow the landowners to sell property to make their loan payments to the land trust, resolving the immediate problem of defaulted debt. The 650-acre balance of the property would retain the other subdivision rights, specifically allowing creation of a 350-acre lot around the core ranch and buildings, and three 100-acre lots, for the same total of seven potential ownerships for the property as a whole.

The easement had not been donated, and the property continued to be owned by the same conservation buyers that originally acquired it from the land trust; thus there were no previous owners or donors to consider.

**Considerations:** This situation creates a conflict of interest for the land trust, in that it has a direct financial interest in the easement property and potentially conflicting ethical and legal obligations to uphold the easement and obtain payment of the loan. As a result, the land trust’s actions are more open to question by neighbors, members, third parties and government agencies, and the land trust must scrutinize its own decisions carefully because self interest may cloud its internal decision-making process.

## KEY POINTS:

- The land trust's amendment policy and procedures are especially valuable when debt due and owing or other self interest is a driver in the negotiation, and the land trust might compromise easement intent for self interest, or appear to do so in the eyes of the public. The land trust's careful adherence to its standard analysis and documentation procedures can help to avoid the pitfalls and maintain integrity in the process.
- The land trust should consider whether there are neighbors or other outside parties that could have concerns about the amendment. Neighbors of the 700-acre parcel may well oppose its division into smaller units, resulting in additional traffic, construction and use of the land. Whether their opposition can rise to the level of a successful lawsuit depends on state law standing rules, but angry neighbors can create significant bad publicity even if they cannot sue. The land trust's obvious self interest would fuel any bad publicity.
- The original configuration would have resulted in a maximum of one 700-acre and six 100-acre parcels. The amended configuration would have one 450, one 350 and five 100-acre parcels. Depending on the placement of the parcels on the ground, the amendment could alter the conservation purposes and diminish or enhance conservation values. This decision cannot be made in the abstract. It is appropriate to start with a staff evaluation of the amendment with respect to the resources that the easement was intended to protect for an initial determination whether the change in the subdivision provisions would have a positive, neutral or negative effect on the property's conservation values. If the staff finds negative impacts, then the transaction may need to be restructured. Sufficient negative impacts may prevent the amendment. Before the amendment is adopted, the land trust is very likely to require the expert advice of appropriate biologists to assess the impact of roads and structures as well as the division of a watershed or migration route into separate parcels.
- The land trust might enhance conservation values by prohibiting construction on the environmentally sensitive areas and in places in the scenic viewshed. Other restrictions may be appropriate depending on the nature of the land and other circumstances.
- Any amendment would require a new baseline.
- The owners have concluded that this property is unmarketable with the current easement, raising serious private benefit concerns. An independent appraiser should be hired to determine the extent to which the market value of the entire property would be altered by the proposed amendment to the easement. An enhancement of market value would reflect a private benefit to the owners that is forbidden; private benefit prohibitions apply to all nonprofits and all of their transactions, not simply to donated conservation easements. Presence of private benefit revealed by the appraisal might be addressed by reducing the total number of parcels to five or six, by imposing restrictions not prescribed in the original easement, and by similar techniques.
- Some land trusts in this situation would seek the opinion of the state attorney general division charged with oversight of charitable organizations and conservation easements. Although attorney general or other governmental approval of amendments may not be mandatory in a particular case, by seeking the state's blessing, the land trust can help ensure that there will not be a later challenge to the amendment or to the land trust's decision. The state's blessing can be especially beneficial in cases like this, in which the land trust is directly interested in the outcome.

## 7. *Change in landowner's goals: Weighing tradeoffs within easement boundaries*

**Scenario:** An early conservation easement on a 150-acre parcel allowed the property to be divided into three tracts. Each of the three tracts had a reserved right for one single family residence to be constructed on an undetermined site. The right to build these houses was reserved to the three children of the grantor, and the rights were due to expire 13 years after the date of the easement. After eight years, none of the sites had been built on. The then-deceased grantor's children approached the land trust seeking to have the time limit extended. They asserted that they did not wish to build at this time, but, if the limit were not extended, they would do so anyway to avoid losing the right. The land trust concluded that the children had the funds and the ability to proceed with construction in the remaining five years.

**Considerations:** The land trust considered the pros and cons of extending the reserved right, including potential private benefit and impact on conservation values. If the right were not extended, the land trust believed that three houses would likely be built prior to the time limit. Further, if the houses were built immediately, there was no restriction as to where on the property they could be constructed.

If the right were extended, the houses might not be built at all. Many land trusts would be unwilling, however, simply to extend the right without negotiating a net positive conservation result. One solution would be for the parties to extend the reserved rights for the houses for an additional 20 years and for the three children to give the land trust the right of approval over the locations of all three building sites, to be based on each site's consistency with the purposes of the conservation easement.

### KEY POINTS:

- The land trust should review any negotiated amendment through the amendment screening tests and determine whether there would be any private benefit or impact on the easement purposes. The impact of the proposed solution on the conservation values of the property would be positive because the house site selection would be linked to the easement purposes. Without the added restrictions, however, the amendment would have created a private benefit.
- The land trust's risk/benefit analysis of the scenarios with or without the amendment can help to identify the negotiation point for potential conservation gain. If a "just say no" approach were used, the land trust could miss an opportunity to create a positive conservation outcome for the property.
- By using a right of approval, the land trust avoided an extended negotiation to define where the three houses and roads could be built. Given that some or all might not be built, the right of approval provided sufficient control over construction in the future. Moreover, the three children might become more enthusiastic about building the houses if they spent the time to select building sites and think about the nature and needs of the houses they might build. Conversely, if the children do not feel pressured to expend the financial resources to build immediately, they may never choose to exercise the right to build at all.
- An additional restriction that might have been included in original drafting or in amendment of this easement would be the expiration of the building right upon the sale or transfer of the property. This restriction could apply to all sales and transfers

or to those outside the defined family. Some easement donors may accept this sort of restriction with little resistance, and it significantly reduces the likelihood of construction.

- This illustrates a low risk amendment, involving weighing tradeoffs within conservation easement boundaries.

#### *8. Amending to resolve a violation, sale of separate parcels: Weighing tradeoffs within easement boundaries*

**Scenario:** A conservation easement property consists of three contiguous but separate legal parcels. The easement prohibits subdivision or separate conveyance of these individual tracts, a standard prohibition the land trust includes in all its easements unless the donor objects. Notwithstanding these restrictions, the landowner (and easement donor) sold one of the three tracts along with some of his adjacent unrestricted land. He, his attorney, the buyer's attorney and the title insurer all failed to note the prohibition against the separate conveyance. The land trust was notified of the sale and subsequently notified the buyer and seller that it deemed this a violation of the conservation easement. All parties, upon examining the easement, acknowledged the error.

**Considerations:** The land trust could demand that the sale be rescinded and could sue to achieve that result. The owner and unsuccessful buyer could look to their attorneys and, depending on policy terms, to the title insurer for damages. Absent unusual circumstances or serious delay, a court would enforce the easement and compel rescission of the sale. If the easement includes an attorneys' fees clause, the lawsuit would be unlikely to pose a significant economic burden on the land trust, but lawsuits have no guarantees. Moreover, even successful lawsuits can produce adverse publicity. The land trust should consider all risks and benefits before commencing litigation.

Depending on the configuration of the land and the factual circumstances, the land trust could consider whether the separate sale of the single tract from the other two negatively affected the purposes or conservation values of the easement. This determination may require outside scientific expertise. If the purposes and conservation values are not affected, and the owner and buyer do not wish to rescind, the land trust could consider amendment of the easement.

Both an election to do nothing and an amendment to release the restriction would create an apparent private benefit, as the separate sale of the single tract increased the value of the easement property as a whole. That single tract was determined by an appraiser to be worth more as a separate parcel than it was as a portion of a larger ownership that was not dividable.

Creation of additional restrictions in an amendment could solve the private benefit problem. The easement contained a reserved right for one additional home site on one of the two parcels that the landowner had retained. As one option, the land trust could negotiate with the landowner to eliminate this reserved right. Extinguishment of that house site could offset the enhanced value resulting from sale of the parcel to the abutter. Further, removal of the house site would create an overall conservation gain for the easement property, offsetting the additional stewardship burden created by having two landowners instead of one for the entire conservation easement. All three tracts would remain under easement.

## KEY POINTS:

- The land trust could use its amendment policy to consider potential solutions to a violation. The policy provides a framework for the land trust to evaluate how additional restrictions could offset the additional burdens associated with the violation. The land trust might find that it is a better use of time and resources to address the violation through this framework, rather than to attempt to force rescission and recreation of the conditions prior to the violation.
- Because the sale had transferred additional land along with the easement parcel, the land trust could negotiate with the buyer to extend the easement restrictions to that additional land, with or without adjustments to address the nature of that additional land.
- The land trust should examine the easement to design potential solutions. It should weigh the neutral or negative impacts of the separate conveyance against the positive conservation results of eliminating the reserved house site. And, it should weigh the private benefit accruing to the landowner from the separate sale against the financial loss to the landowner resulting from the elimination of the house site. From the unintentional violation, the parties could create an overall positive conservation result.
- If negotiations fail, the land trust would be left with a lawsuit for rescission of the transaction as a possible remedy. A lawsuit could proceed to judgment or could be settled. Instead of a private settlement, the parties could request that the court approve the settlement terms and make appropriate orders to protect the land trust with respect to any diminution of conservation values and, should it occur, any settlement funds the land trust may receive.
- This situation is a moderate risk amendment, in which the land trust weighed tradeoffs within the conservation easement boundaries in the context of a clear easement violation.

### *9. Amending to resolve a violation, a parking lot problem: Weighing tradeoffs across easement boundaries*

**Scenario:** A 140-acre easement property surrounds a bed-and-breakfast inn that was excluded from the conservation easement. The easement's primary purposes are protection of scenic and agricultural resources. The landowner, who owns both the easement land and the excluded parcel, constructed a one-acre parking area on the edge of the protected property to serve the inn guests. The parking area was in clear violation of the easement terms.

The land trust that holds the easement observed that the parking area was well constructed and important for the inn's long-term success. Through informal consultation with the community and neighbors, the land trust found that there were no parties that objected to the parking area use of the land and that, in fact, there was local support for this type of business. In addition, the land trust believed it would be difficult to force removal of the parking lot by obtaining a court order requiring the landowner to restore the one acre to its previous condition. The local court had recently proved unsympathetic to land trust efforts to enforce another easement, and the land excluded from the easement could not be configured for a parking lot without significant alteration of several acres of previously undisturbed land.

**Considerations:** The land trust’s conservation analysis concluded that, overall, the parking area had no significant impact on the purposes and important conservation attributes of the easement area. However, the internal private benefit analysis indicated that the parking lot significantly enhanced the excluded area’s property value. The land trust could not allow this impermissible private benefit.

The landowner offered to donate a conservation easement on an abutting 25-acre property. The financial value of the additional easement more than offset the private benefit created by the parking lot. From a conservation standpoint, the 25-acre easement offered significant public benefit on its own and also offered “spillover benefits” that enhanced the original easement’s conservation values. With this additional easement in the mix and a professional appraisal, the private benefit and conservation tests of the land trust’s amendment policy could both be met.

**KEY POINTS:**

- After considering all factors, the land trust could reasonably conclude that it would best serve the public interest and uphold the land trust’s mission in the community by addressing the violation through the proposed amendment, rather than by attempting to recreate prior conditions and causing harm to other, as yet untouched, land.
- The land trust considered land outside the original easement in deciding whether to amend the easement and remove the parking lot from the easement area. The negative impact of the parking lot was outweighed by the positive impact of an additional 25 acres placed under easement. This approach assumes that negative impacts to conservation values in an original easement may in some circumstances be acceptable, provided that there is an overall net positive conservation result on the group of properties to be under the amended easement and that all conditions of the amendment policy are met. Most practitioners agree that the original easement must experience a net positive conservation result as well, which could occur in this case via the spillover benefits from the adjacent land conserved.
- The land trust wisely sought and considered the opinions of community members that might be upset by the violation or potential amendment. This is a critical step for a land trust to maintain its credibility. Without doubt, amending an easement to accommodate a violation can be a slippery slope, and a land trust must be very thoughtful about what message this would send to its community.
- In some states, legislative approval is required for easement amendments, unless amendment is specifically allowed by the easement terms. This easement contained an amendment provision, and the land trust sought advice from qualified legal counsel as to whether it was required to seek legislative approval.
- Some experts would recommend seeking review of the state attorney general in this case because the amendment had more than a de minimis effect on the original easement’s conservation values and essentially terminated the easement on the parking lot by removing it from the easement restrictions—arguably, an action that could need court approval.
- The land trust should determine whether the amendment should allow the specific parking area use within the easement in the specific location it was constructed,

as opposed to withdrawing the parking lot from the easement area. This approach avoids the potential legal problems of taking land out of the easement. It also prevents other potentially damaging future uses of the one acre, such as more intensive commercial uses, and their negative spillover effects onto the easement. On the other hand, amending the easement to allow the parking area within the easement boundaries could create greater easement stewardship challenges.

- This amendment is an example of moderate risk, in which the land trust voluntarily sought advice from outside parties. Seeking the review and approval of the state attorney general may have been advisable as well, particularly because this case involved evaluating tradeoffs outside the original easement area.

#### 10. *Mosquito control: Seeking community input*

**Scenario:** A landowner of seven acres of wetlands under easement requested an amendment that would allow the state agency that conducts mosquito control to excavate ditches and ponds on the easement area. The conservation easement prohibits excavation of any kind to protect the marsh and its waters. The site was at one time a tidal marsh but had been completely altered by an adjacent National Wildlife Refuge's manipulation of the water regime and is now a freshwater marsh.

**Considerations:** The marsh had already been greatly changed since the creation of the easement. The land trust found that the proposed amendment did not conflict with the easement purposes. The effect of the proposed amendment on the land's conservation values could be viewed as either negative or positive, given the site's history of alteration. With respect to the land trust's other goals for neighboring sites in the ecosystem, the proposed amendment would have no negative effect. With respect to private benefit, no potential for property value enhancement was found. Overall, the land trust was ambivalent. The land trust decided to solicit community input. Through local meetings, the land trust determined that 75 percent of the community opposed the proposal. On these facts, many land trusts would deny the landowner's request, although a different result might occur if the mosquitoes carried a known illness.

#### KEY POINTS:

- Running all of the amendment screening tests did not, in this case, yield an unequivocal answer. Maintaining positive public relations can be an important piece of an amendment evaluation and, in this case, it provided the turning point for resolving the amendment proposal.
- This illustrates a relatively low risk amendment evaluation. In addition to the standard screening tests, the land trust voluntarily sought advice from outside parties before making its decision.

#### 11. *Parcel A/Parcel B tradeoffs: Weighing tradeoffs across easement boundaries*

This example includes several scenarios to illustrate how different variables might affect the land trust's decision. Ms. Smith owns two contiguous 100-acre parcels in an area that is experiencing significant suburban growth pressures. Parcel A is less valuable than Parcel B, both from a conservation perspective (scenic values, wildlife habitat) and from a development perspective. Ten years ago, Ms. Smith donated an easement on Parcel A, with general easement purposes to protect the scenic views, habitat and open space. This easement allows no home sites. Now she is ready to protect Parcel B.

**Scenario 1:** Ms. Smith proposes to amend the original easement, adding Parcel B to Parcel A, but reserving the right to build one house on Parcel B. She has reviewed the land trust’s new “standard easement,” that the land trust has modified to remove ambiguities and strengthen the enforcement sections. Can the land trust revise the easement on Parcel A to upgrade it to the new standard easement language and add Parcel B?

**Considerations:** The short answer is yes. Most practitioners happily amend conservation easements to add acreage and strengthen their terms and would handle this as a low risk amendment. The land trust must still carefully evaluate the proposed amendment through its amendment policy, including consulting with experienced legal counsel, to document compliance with the policy.

- As an alternative, a new conservation easement could be created for Parcel B, but that option would not upgrade the language of the Parcel A easement to the new easement language. Having a single landowner with two easements using significantly different easement templates can only add to the confusion and risk of unintended violation.
- The land trust might want to consider asking Ms. Smith to merge the two parcels or to prohibit their separate sale. Formal merger may be preferable but may also be unduly expensive or time consuming under local law. Even if formal merger is undesirable for these reasons, the easement can provide that the parcels cannot be separately sold.

**Scenario 2:** Ms. Smith proposes to amend Parcel A as in Scenario 1 but wants to locate the house site on Parcel A instead of Parcel B, because Parcel B is more valuable for conservation. Topographic features make any building on Parcel B highly visible, but a house site could be tucked behind a knoll on Parcel A, out of sight from the public highway. In terms of wildlife attributes, a home site anywhere on Parcel B would interfere with its special wildlife habitat, but Parcel A contains no unusual habitat features. Can the land trust approve the amendment, allowing a house to be built in a location not permitted under Parcel A’s original easement?

**Considerations:**

- Analysis of the amendment’s conservation results on Parcel A and Parcel B individually reveals that Parcel B would experience a positive conservation outcome while Parcel A would have a new home site, negatively impacting its conservation values. However, if the land trust takes a larger view – that is, looks beyond the original easement boundaries to weigh tradeoffs among all the properties to be subject to the amendment—then the land trust will weigh the benefits to Parcel B against the detriments to Parcel A. Further, spillover benefits from the permanent protection of Parcel B would enhance the importance of the protected conservation attributes of Parcel A. Spillover benefits are difficult to evaluate, but spillover benefits could create a positive outcome to Parcel A individually.
- Analysis of the conservation results on Parcel A and Parcel B can also be considered as a whole: the amendment creates a net conservation gain. The protected acreage is doubled, less one house site, and the protection of scenic and habitat attributes is significantly increased.

- The financial analysis reveals that Parcel B's protection does not generate any private benefit concerns. On Parcel A, the landowner is clearly going to benefit financially from creation of a house lot where none existed under the original easement. The land trust must determine whether it is appropriate to look beyond the original easement boundaries and conduct the financial analysis on the amendment project as a whole. A professional appraisal of the impact of the amendment on Parcels A and B considered as a whole indicates that the landowner is making a significant financial gift overall, thus the amendment passes the private benefit test.
- Considering the conservation purposes, the new house site on Parcel A will prevent that specific area of land from serving the purposes of the easement, but, overall, the amendment preserves the stated purposes of the easement. In the particulars of this case, rejection of all the positives of the amendment on the basis of the relatively minimal negative impact of the house site on Parcel A could be short-sighted. To help make the decision, a land trust should be guided by its overall mission and goals in the community.
- The land trust must consult with experienced legal counsel to determine whether and how it can amend this easement, in light of the specific easement terms and state law. Because this amendment involves weighing tradeoffs outside the original easement boundaries, the land trust should consider consulting with the state attorney general's office before proceeding.
- Although not legally required, the land trust may perform a public relations analysis. Who might be likely to object to the amendment? Will neighbors or other members of the local community object to the house lot on Parcel A? How will it sound to land trust members and future easement donors who hear that the land trust revised an easement to allow a house to be built? How will it look to the local paper? The land trust may be able to act affirmatively to influence public opinion, through press releases, meetings with the newspaper reporters who are likely to cover land trust activities, newsletter articles and the like. This effort would have benefits in public understanding of this transaction and in reducing the likelihood of other, less worthy amendment requests.
- Documented donor/grantor/direct funder intent must also be considered. In this case, the original easement donor of Parcel A still owns the land, but, if that were not the case, some practitioners recommend consulting with the original donor if possible. Most experts believe that the easement donor does not retain approval authority over easement amendments (unless that authority was specifically granted in the easement or is granted in state law – again, consult with legal counsel). However, an angry donor, grantor or funder can create problems and bad publicity for the land trust even if standing to sue in court is not recognized.
- This amendment could be allowable and handled as moderate to high risk on the amendment spectrums, depending on the land trust's assessment of the legal context.

**Scenario 3:** Now suppose Ms. Smith wishes to amend Parcel A to allow the house lot as in Scenario 2. However, the Parcel B proposed for protection is 200 acres and is non-contiguous, located a half mile away on the other side of the hill.

### Considerations:

- The less obvious and tangible the connection between Parcel A and B, the harder it is to justify the tradeoff of negative conservation impacts to Parcel A for positive conservation impacts to Parcel B. Most experts believe that the two parcels should be contiguous or directly connected in some other way, thereby protecting resources common to the purposes of both easements – for example, protecting lands in the same wildlife travel corridor, or related lands along the same river. This is a good rule of thumb regardless of the size or conservation importance of Parcel B.
- It is a slippery slope to extinguish protection on an existing easement in favor of protecting a new parcel of land. Doing so can involve not only breaking promises to the original easement grantor but also potentially breaking promises to the community. The public perception risks become much greater if Parcel B is not directly connected to Parcel A. There may be cases where this amendment would be justified, but the public relations and legal risks make it difficult at best.
- This amendment would be significantly easier to justify if there had been no tax deduction associated with the original easement and if the easement contained a broad amendment provision that could authorize this type of amendment.
- For these reasons, most practitioners would lean toward not approving this amendment, though the final decision would rest on the specifics of the case.

**Scenario 4:** Finally, suppose Ms. Smith wishes to amend Parcel A to allow a house lot. Instead of offering additional land for protection, she offers cash to the land trust if it will approve the amendment.

**Considerations:** Most land trusts will not consider accepting cash in exchange for revising easement terms, period. While the legal experts hold differing opinions about whether the law would allow it in certain circumstances, most easement practitioners agree that the risks to the land trust’s public credibility and public trust are too high. A cash payment exceeding the value of the amendment to the landowner might address the private benefit concerns, but the land trust must also keep in mind the detrimental public relations that may flow from its actions. Moreover, the perpetuity requirements in federal tax law present significant issues for which there are no answers at this time.

### 12. Consolidation of easements: *Weighing tradeoffs across easement boundaries*

**Scenario:** A landowner purchased a 6,000-acre ranch and, in 1999, decided to donate a conservation easement to the local land trust, reserving the rights to divide it into four parcels and build four residences in described building envelopes. This landowner went on to acquire three adjoining ranches, totaling 5,500 acres, each one subject to pre-existing separate conservation easements with the same land trust. In total, the easements allowed the 11,500-acre property to be split into seven tracts, none of which could be smaller than 160 acres, and the owner could build a total of 10 residences on the property, five in designated sites and five in “floating” home sites.

Viewing the 11,500-acre property as a whole, neither the land trust nor the landowner was happy with the building envelopes and subdivisions that were allowed in the separate easements. The land trust’s stewardship staff realized that the easements would be much simpler and easier to monitor and enforce – and easier for the landowner, the public and the land trust to understand—if combined into a single easement. Such consolidation of

separate easements might also provide opportunities to enhance the conservation values of the property by moving building envelopes out of sensitive wildlife habitat for moose and eagles. A consolidated easement could also clear up outdated and ambiguous language in several of the separate easements, thereby enhancing the land trust's ability to enforce the easements. The landowner saw opportunities to move the designated home sites to more practical locations.

Negotiations commenced, and the land trust and landowner articulated their goals for a consolidated conservation easement. The land trust explained that it would not accept any consolidated easement that resulted in a net loss in conservation or conferred private benefit to the landowner or others. The landowner proposed a reconfiguration that relinquished two floating home sites, one designated home site in prime moose habitat, and two subdivision/transfer rights. On the question of habitat, two outside expert biologists confirmed that the revised, consolidated easement would enhance wildlife habitat. The owner also wanted the revised easement to allow her to create and sell a 120-acre lot (as opposed to a 160-acre lot) with mountain views but in a location that would be visible to the public. She was willing to have the consolidated easement upgraded to reflect the land trust's current language to allow for easier administration and improved enforceability.

After its preliminary analysis, the land trust hired a qualified appraiser to evaluate the financial effect of the proposed amendment and conservation easement consolidation, specifically focusing on whether the consolidation would confer impermissible private benefit on the landowner or other third parties. The appraiser determined that the landowner and others would not benefit financially from the amendment, based in large part on the reduction in the number of home sites and subdivision rights.

To help evaluate the net effect of the complex tradeoffs in the proposed amendment, the land trust created a matrix similar to the one reproduced below. The land trust, assisted by the biologists, the appraiser and legal counsel, went through the matrix cell by cell to determine the effect of the proposed amendment on each conservation value identified in each individual easement. For example, the matrix showed the amendment was positive on eagle habitat in one easement, but negative on scenic values in another.

	Effect on protection of scenic values	Effect on protection of moose habitat	Effect on protection of eagle habitat	Change in number of home sites	Change in total division rights
Easement 1	+	+	+	-2	-1
Easement 2	-	+	-	neutral	-1
Easement 3	+	-	+	-1	neutral
Easement 4	+	+	neutral	neutral	neutral
Consolidated easement	overall positive	overall positive	overall positive	reduction of three	reduction of two

This matrix is necessarily imperfect in that it cannot, in and of itself, account for the magnitude of particular values. Nevertheless, this exercise assisted the land trust in gauging the impacts of an amended, consolidated conservation easement on the specific conservation values that were protected by each original easement.

**Considerations:** Many experts agree that a land trust in this situation could conclude that the consolidated easement would serve the public interest by enhancing protection of the conservation purposes of the original conservation easements. Depending on the facts on the ground, apparent negative impacts to certain conservation values protected by the individual easements could be viewed as minimal compared to conservation gains resulting from additional restrictions on development and transfer, improvement in easement clarity, and spillover benefits from enhancing conservation protection on adjacent properties. On the question of decreasing the 160-acre minimum lot size to accommodate the proposed 120-acre lot, depending on the specific circumstances on the ground, a land trust could determine that the effect on protected conservation values would be neutral; either way, the lot would remain under easement, thereby limiting future development to one building envelope.

Several of the floating lots in the original easements had already been sold and developed. Because owners of these lots had an interest in the conservation purposes of the original conservation easements, the land trust should obtain their consent to the consolidated conservation easement. The land trust should also contact the original easement donors and obtain their agreement that the consolidated easement continued to reflect their intentions to preserve and protect their properties in perpetuity.

The amendment could be accomplished through a document entitled “Restatement, Amendment and Ratification of Conservation Easements,” a title that would explicitly describe what the land trust and landowner were doing. The recitals in a complex amendment of this sort should be extensive, detailing the history of the prior conservation easement donations and highlighting ways in which the new “Restatement” enhances conservation and public values. The donors of the original conservation easements should be asked to sign consents to the consolidated easement, which should be appended to and recorded with the Restatement. Overall the land trust should attempt to make the changes made to the original conservation easements transparent in the Restatement, including the complex reordering of conservation rights, so that there would be no question about why the amendment serves the public interest.

**KEY POINTS:**

- The land trust’s analysis should weigh conservation tradeoffs on individual properties subject to different conservation easements and on the 11,500-acre property as a whole after its ownership was consolidated. The process should be carefully documented to support the land trust’s conclusions that the conservation values identified in the original easements would be substantially protected through consolidation and that any negative impacts are offset by significant additional protected conservation values.
- The analysis can properly assess the improved administration and enforceability of the easement as a conservation benefit to the whole. Most experts concur that this is a legitimate positive factor in weighing tradeoffs in easement amendments.
- Public relations become especially important in a complex situation like this. A land trust should carefully consider who might object to the amendment as part of its analysis on whether to proceed. If the decision is made to go forward, the land trust should undertake appropriate outreach to neighbors and other interested persons to ensure that the amendment is properly understood.

- A land trust should handle this complex amendment as a moderate to high risk amendment, voluntarily seeking input from outside sources, including wildlife biologists and an independent appraiser, as well as experienced legal counsel.
- Some experts would recommend that a land trust in this situation also seek an opinion from the state attorney general on this amendment, due to the complexity of the tradeoffs and the fact that net impacts to individual easements could be perceived as negative. Though the spillover benefits and the benefits of improved enforceability are important, they are difficult to evaluate and assign to the original component easements. Others believe that seeking review and approval from a public entity in this case would be unnecessary. At this time, there are no certain answers because these issues have not been finally determined by the attorney general or courts in any state. Answers to these questions about the appropriate scope of public review turn on the nuances of the state law in which the amendment issues arise and on the level of risk the land trust is willing to accept.

### 13. *Too much change? Weighing impacts to conservation purposes and attributes*

**Scenario:** The owner of a 400-acre easement-protected dairy farm approached the land trust with an amendment proposal that would allow him to expand his herd size greatly, diversify the operation, reduce water pollution, and cut energy consumption. The proposal included expanding his herd from 400 to 2,200 cows; processing manure in a methane digester to produce electricity, bedding material for the cows and marketable fertilizer; and running wastewater through a series of greenhouses that would produce vegetables and bedding plants for local markets. The amendment request was to expand the size of the farmstead building envelope from 20 acres to 50 acres, or from 5 percent to 12.5 percent of the entire 400 acres of farmland.

**Considerations:** The focus of this land trust’s conservation program is to conserve working farms because of the importance of agriculture to the state’s economy, its scenic beauty and its cultural heritage. These are also the conservation purposes of the easement. The proposed amendment would enhance one principal purpose of the easement, the continuation of an economically viable farm, at the cost of the others. The proposed operation was out of scale with agriculture in the region, prime agricultural soils would be taken out of production, and the complex of new buildings would have had significant negative scenic impacts. Looking at the easement purposes in context of the conservation purposes and the community and the land trust’s goals, the land trust found that the positive impact on the agricultural enterprise was too far outweighed by the negative impacts on the other conservation values protected by the easement. Moreover, expanded operations would likely have made the farm more economically profitable, raising concerns about private benefit that would need to be resolved.

#### KEY POINTS:

- When easements have multiple purposes—as most do—a proposed amendment can positively impact one purpose and negatively impact others. Deciding how much is too much is a matter of scale —are the negative impacts to the purposes significant? The land trust’s mission and the community context become important guides.
- One easement drafting option that may assist in these decisions would be to provide a ranking of conservation purposes and values or a definition of considerations to be taken into account if the circumstances change. Are viewshed and scenic

values paramount, equal to or subordinate to agriculture in a particular easement? Is endangered species habitat more important than recreational access? Although the easement should protect all conservation values that the donor/grantor is prepared to protect, an easement that treats all values as equal may make future interpretation and application more difficult. On the other hand, some land trusts prefer to have the flexibility that arises when all the conservation purposes and values are on an equal footing.

- The land trust is rarely if ever obligated to say “yes.” Following the amendment policy and documenting the reasoning behind decisions will help a land trust defend whatever decision it determines is appropriate in each case.

#### 14. *Partial condemnation for storm water drainage improvement: Amending in lieu of condemnation*

**Scenario:** A conservation easement protects a large parcel of agricultural land that abuts the entire shoreline of an old river oxbow, now separate from the river channel. The property is located on the opposite side of a city street from an old industrial site being cleaned up under the state’s Brownfields program and slated to be redeveloped as an office complex, hotel and conference center.

As a condition for redevelopment of the Brownfields site, the city required the developer to install an engineered storm water retention and treatment system. The only feasible outlet from that system would require installation of drains under the city street and across the conservation easement land to the oxbow pond (a public water body). The city asked the easement landowner for a drainage easement for the project. The property owner was willing but reminded the city that there was a conservation easement on the property.

The land trust’s internal policy required that, in cases of potential condemnation, the land trust must wait for an official vote of condemnation before deciding whether to amend an easement. Negotiations with the developer, city and landowner resulted in the city’s commencement of proceedings to condemn the easement to the extent needed to construct the drainage system. The land trust determined that the proposed storm water and drainage system would provide better handling of storm water than had been the case under the existing “sheet” drainage condition and found that the plan had environmental benefits. Consistent with these findings, the land trust agreed to release the easement terms to the extent necessary for the drainage. The remainder of the easement was not affected. An amendment in lieu of condemnation was completed, and the modest condemnation proceeds were used to construct an interpretive kiosk on the property as permitted by the easement.

#### KEY POINTS:

- The land trust did not voluntarily amend or release the easement but entered into “friendly condemnation” proceedings—a situation that falls outside of the Amendment Principles.

- The land trust could reasonably conclude that the proposed condemnation did not have significant negative impact on the purposes or conservation values of the property and, in fact, had some benefits. In a different circumstance, the land trust might consider whether to fight the condemnation rather than agree to amend. Efforts to prevent actual condemnations rarely succeed, but redevelopers and government officials may speak of condemnation when the government would not actually do it.
- By requiring the public entity to go through with the condemnation vote, the land trust ensured that the proposed partial release of the easement had been officially found to achieve public purposes and would in fact be required by governmental authority—protecting the land trust from challenges that could arise if the amendment had been agreed to without formal condemnation.

These Case Studies illustrate just a handful of the many different fact patterns that land trusts face. Different legal jurisdictions and organizational missions vary how land trusts handle amendment requests. Despite all these variables, these examples also show how land trusts converge on basic common steps to make their amendment decisions:

- The Amendment Principles and screening tests allow the land trust objectively to evaluate a proposed amendment’s compliance with law, consistency with easement purposes, and effect on conservation values of the property.
- The land trust gathers information as needed to apply these tests and document the results.
- The land trust always consults qualified legal counsel.
- The land trust seeks input from outside parties, as well as from experts including an appraiser, as needed. Generally, the more complex or controversial the amendment, the more advice from outside sources and authorities should be sought.
- Land trusts can negotiate clearly positive conservation outcomes from less-than-optimal amendment proposals, rather than simply saying “no”—although sometimes, the right answer is “no.”

## Part 7. Trends and Conclusions

Experience shows that, as conservation easements age, the amendment requests that land trusts receive may become increasingly complex. Changes on the land, changes in ownership, evolving economic forces and community needs, market and scientific changes, and outdated easement language all bring new amendment challenges to the table. Land trusts are learning as they address these challenges and carefully refining their techniques with experience. Here are some of the key areas under ongoing discussion in the land trust community:

- *Refining how amendment proposals are evaluated.* Land trusts continually test and refine their methods of evaluating the effects of proposed amendments, especially methods to weigh tradeoffs in conservation values and evaluate impacts to conservation purposes. As more land trusts gain experience, decision making and documentation methods are becoming more widely practiced and consistent. In the long run, solid amendment policies, and consistency in the way they are applied by land trusts nationwide, will help uphold the value of conservation easements as a land protection tool that can withstand the test of time.
- *Clarifying the law.* As land trusts implement amendments, practical experience from the field may influence land trust practices, judicial decisions and legislative enactments to clarify state and federal laws that pertain to amendments, in turn providing clearer guidance to practitioners. Now, legal advisors do not always agree about the legal underpinnings of easements and the constraints on amendments but expect that uncertainties will be resolved over time as amendments and applicable laws are tested in the courts and as state legislatures refine easement enabling statutes. In particular, the extent to which the charitable trust doctrine affects the outcome will have to be determined state by state, but some states may adopt the Uniform Conservation Easement Act, Uniform Trust Act, and Restatement analyses and thereby reduce variation in state law.
- *Clarifying the role of public entity oversight.* With experience, practitioners expect to develop clearer guidance about when it is advantageous or necessary to seek approval of a public entity and/or a court for a proposed amendment, and how best to do so.

- *Clarifying the effect of easement origin.* Practitioners are considering how amendment policy applies to different types of conservation easements, whether donated, purchased, reserved or exacted as part of regulatory processes, and whether or not tax benefits ensued. Some practitioners advocate consistent guidelines that apply to all types of easements, regardless of origin. Although consistent guidelines may impose a heavier burden than required for certain types of easements, use of consistent rules will reduce the risk of error and the likelihood of confusion in the land trust community and the public.
- *Improving easement language to avoid the need for amendments.* Drafting conservation purposes and restrictions to withstand the test of time without amendment is an evolving art. Easements should not include language that is unnecessarily restrictive, does not support the conservation purposes, or is disproportionately difficult to monitor and enforce. Land trusts continually improve their easement language to be flexible enough to accommodate changes in technology and new economic uses of the land. All easement drafters must stay attuned to lessons from the field, to learn from others' successes and mistakes as well as from their own.
- *Including amendment provisions in conservation easements.* Many of the state law uncertainties associated with easement amendments are avoided if the conservation easement deed includes an amendment provision. The provision affirmatively grants the land trust permission to enter into designated types of amendments and informs donors and grantors that amendments may occur under the specified circumstances.

#### AVOIDING AMENDMENTS THROUGH BETTER EASEMENT PLANNING

The Society for the Protection of New Hampshire Forests has found that among the most common amendment requests are those associated with its early easements with houses within conservation easement areas, as landowners today seek to do things with their homes that could not have been anticipated in easement drafting. Now, the Society usually excludes existing residential use areas from new easements. If the landowner wishes to retain the right to build a future home, the Society offers two options: (1) excluding a future house site from the easement area before conveying the easement; or (2) reserving a right in the easement to withdraw a site in the future. Given changing local land use regulations, the first approach could result in a legally substandard site in the future, which in turn could generate an amendment request. In the second option, easement terms provide that the site either be a specified number of acres, or the minimum needed for local regulatory approval, along with guidelines for location of the withdrawn site. This approach ensures that the future withdrawal does not compromise the conservation purposes and values. Under either option, the Society must approve the selected site. Instead of amending the easement when the house site is withdrawn, a survey of the site and a “notice of withdrawal” are recorded at the registry of deeds.

The broader lesson is to identify future changes that are likely to affect the easement land—physical changes such as shifting river courses as well as changes in land use and other requirements—and draft the easement proactively.

Although conservation easements have been in use for several decades, the land trust community's experience with amendments is still relatively young. The process of making amendment decisions is evolving. This report seeks to provide land trusts with the most current and best available practical advice. Key points to remember:

- Focus on good initial easement drafting to avoid the need for future amendments to the greatest extent possible. Adopt and use standard easement format and boilerplate provisions that reduce errors and ambiguity.
- Discuss the land trust's amendment policy with the easement donor/grantor and any direct funders of the project and include in the easement deed an amendment provision that expressly grants the land trust the desired level of amendment discretion.
- Consider amendments only with great caution; amendments should never be viewed as the norm.
- Develop and follow a written amendment policy and procedures that include the Amendment Principles presented in this report.
- Obtain expert legal advice to develop amendment policy and to review and draft proposed amendments.
- Use organizational mission and goals to inform amendment decisions, so that conservation easements will continue to benefit the public in the face of change.
- Be transparent in land trust actions and prepared to stand behind them when questions are raised by landowners, land trust members, the public and state and federal regulators.
- Act with recognition that any land trust action relating to amendments may trigger scrutiny by federal agencies, congressional committees and other government bodies affecting the larger land trust community.
- Keep up with the latest learning as the amendment field continues to evolve with experience.

Whether, when and how to modify conservation easements speaks to the heart of the land trust community's obligation to protect land in perpetuity and serve public interests. A land trust must uphold this obligation, even when confronted with inevitable changes that passage of time may bring to easement properties. This report provides the tools that land trusts need to address many of the challenges that change brings to conservation easements. These tools can help land trusts reach amendment decisions that comply with the law, uphold easement intent and are reasonable. The Land Trust Alliance will continue to work with easement practitioners and legal advisors to keep land trusts informed as amendment knowledge and experience continues to unfold.

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## Appendix A. Sample Amendment Policies and Procedures

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Appendix A-2 .....	The Nature Conservancy Conservation Easement Amendments Standard Operating Procedure
Appendix A-3 .....	Colorado Open Lands Conservation Easement Amendment Policy
Appendix A-4 .....	Marin Agricultural Land Trust Draft Easement Amendment Policy
Appendix A-5 .....	Society for the Protection of New Hampshire Forest Easement Amendment Internal Guidelines
Appendix A-6 .....	Brandywine Conservancy

### DISCLAIMER

These materials are furnished as examples and not as definitive recommendations. They are provided with the understanding that the Land Trust Alliance is not engaged in rendering legal or other professional counsel. If legal advice or other expert assistance is required, the services of competent professionals should be sought.

## VERMONT LAND TRUST CONSERVATION STEWARDSHIP PROGRAM AMENDMENT PRINCIPLES

**PHILOSOPHY.** Amendment requests that satisfy an expressed landowner need, have a better or at least neutral effect on the resources conserved, and improve ease of implementation and administration for stewardship staff and the landowner may be recommended for VLT Board approval. To be recommended for approval, stewardship staff must reconcile any conflicting values or multiple goals of the conservation easement. To do this stewardship staff considers all the facts and circumstances and examines the following principles and considerations. There may be other considerations relevant in individual circumstances and those will be examined too. The following principles and considerations, and any additional ones, will be weighed as appropriate to each individual circumstance. No conservation easement has only one goal. With multiple goals there will be tensions. Amendments can redefine the balance among multiple goals over time or to reflect changes in policy.

### PRINCIPLES AND CONSIDERATIONS.

- (a) it is consistent with the overall purposes of the conservation easement;
- (b) it will enhance the resource values conserved or have a neutral effect;
- (c) there are no feasible alternatives available to achieve a similar purpose;
- (d) denial will cause undue hardship over which the landowner had no control;
- (e) there are no issues regarding private benefit or any issues can be adequately addressed;
- (f) it is consistent with any other written expressions of the original Grantor's intent;
- (g) conservation easement co-holders approve of the amendment;
- (h) the likelihood of land ownership by those working the land is increased or the economic sustainability of the agricultural or forestry operation on the land is increased;
- (i) it is consistent with one of the below circumstances.

**CIRCUMSTANCES OF THE REQUESTED AMENDMENT.** VLT's Conservation Stewardship Program will recommend an amendment to a conservation easement in the following circumstances:

- I. **Prior Agreement.** In a few cases, a conservation easement has included a specific provision or an unrecorded agreement or letter allowing modification of the restrictions at a future date under specified circumstances. Such agreements must be set forth in the conservation restriction document or in a separate document signed by all parties including VLT at the time or prior to when the conservation easement was executed. The amendment must be consistent with the terms and conservation intent of the original agreement.
- II. **Upgrade Standard Language and Format.** The standard language and format of conservation easements are periodically revised to reflect new standard clauses, statutory changes, changes in policy, or to improve enforcement and administration, or enhance the protection of the conservation values of the protected property, or consolidate the legal documents in order to simplify the protection regime. Amendments for any of these purposes will be recommended so long as the changes are consistent with the intent and objectives of the original conservation easement.

- III. **Correct an Error or Ambiguity.** An amendment may be recommended to correct an obvious error or oversight that was made at the time the conservation easement was entered into. This may include correction of a legal description, inclusion of language that was unintentionally omitted, or clarification of an ambiguity in the easement in order to avoid litigation over the interpretation of the document in the future, or to cooperate in a boundary adjustment based on a survey or in an exchange of land if the resource values of the land to be received are at least equivalent to the land exchanged.
- IV. **Settle Condemnation Proceedings.** VLT may recommend a settlement agreement with the condemning authority where it appears that the land to be taken has little or no resource value, is not central to the purpose of the conservation easement and where condemnation power would be properly exercised for a recognized public purpose. If the condemnation proposed is significant, affects valuable resources and is central to the conservation easement, and there is no other better alternative site for the proposed facility, VLT may still recommend a settlement agreement with the condemning authority if the public health, welfare and safety significantly outweighs the conservation resource values, but will do so only with great caution. In reaching such an agreement, the intent of the original conservation easement must be preserved to the greatest possible extent.
- V. **Amendments to Leverage Additional Conservation.** VLT welcomes amendments to add additional land to a conservation easement. VLT also welcomes the return of reserved rights by landowners.
- VI. **Amendments to Reconfigure Conservation Easements:** Modifications or additions of reserved rights in exchange for additional land conservation may be recommended provided that the above principles and other considerations are substantially met. We will not accept agricultural options or cash as the primary value equivalent exchange for adding reserved rights. Adding farm labor housing may be an exception where we would possibly accept an agricultural option on the farm land or the whole farm. In those circumstances, we would also seek to limit the size and value of the additional housing unit by imposing size limits and value per square foot limits to the agricultural option. We might also accept them to close a value gap between the additional land conserved and the right released.
- VII. **Amendments Consistent with Conservation Purpose.** Other amendments of a conservation easement may be recommended where the modification is consistent with the goals of the original conservation project, there is no or only incidental private benefit, the amendment is substantially equivalent to or enhances the resource values protected by the conservation easement and any additional burden on the Stewardship staff is outweighed by the increased conservation value. Requests made under this section will be reviewed carefully.

**Private Benefit Test.** Conferring benefit (from a legal perspective) upon private parties without those private parties reciprocating with an equivalently valued public benefit to the VLT could threaten the tax-exempt status as an organization that is federally recognized as “operated exclusively” for charitable purposes. Treasury regulations set forth the “private benefit test” and reflects the legal requirement that VLT be “primarily engaged in activities which accomplish one or more of the exempt purposes specified in section 501(c)(3)” —that it be operated exclusively for charitable purposes and not confer benefit on private parties. Private benefit issues must be resolved before an amendment can be approved.

**Conflict of Interest:** Any conflicts of interest or potential conflicts must be resolved before an amendment can be approved. The conflicts of interest procedures must be followed.

**Requesting an Amendment.** Any landowner seeking an amendment shall write or call staff at VLT’s Conservation Stewardship Program stating the change being sought and the specific reasons for it.

**Staff Costs.** VLT may request the landowner to pay all staff costs pertaining to reviewing the change, visiting the site, and preparing the paperwork but only if the amendment is approved. The Stewardship Director may waive some or all costs for the following reasons: hardship, contributing errors by VLT, costs covered through a separate project or other grant especially if additional land is conserved. The amendment BDR will state our rationale and principles served by allowing the amendment.

All current project BDRs will recite the reasons for all exclusions due to future audit sensitivities and to provide documentation for future amendments.

**Stewardship Endowment.** VLT may request the landowner to pay an additional stewardship endowment sufficient to generate income to cover staff costs likely to be incurred under the new provisions. The usual endowment formula will be consulted to determine this amount. The Stewardship Director may elect to apply for grant funds to cover the endowment if the amendment is to conserve additional land.

*Last revised September 2005*

## TNC CONSERVATION EASEMENT AMENDMENTS

### STANDARD OPERATING PROCEDURE:

Conservation easements held by the Conservancy should be designed and written so as to avoid the need for an amendment or modification of the easement terms. It is the Conservancy's presumption that a conservation easement will not be amended or modified. In exceptional cases or in unforeseen circumstances, this presumption may be rebutted provided the following procedures are met.

This procedure is intended for proposed amendments of conservation easements that would alter, eliminate or reduce covenants on all or a portion of the property that is subject to the easement, regardless of whether or not the trade-off is an additional covenant on other property. This procedure is designed for a proposed amendment of any conservation easement held by The Nature Conservancy, regardless of whether or not the easement qualified for a federal income tax deduction, a federal gift tax exemption, was acquired in a so-called "bargain-sale" transaction, or was purchased for fair market value. This procedure does NOT apply to conservation easement amendments where the only changes are additional restrictions to be imposed on the property already protected by a conservation easement. This procedure is also not applicable where the Conservancy has determined that an amendment is clearly de minimus or where the action needed is in the nature of a clarification of the terms of the conservation easement and not a change thereto. In considering whether an amendment to a conservation easement is appropriate, the Conservancy staff member and the assigned Conservancy attorney will follow the procedure set forth below.

- A. **Conservation Purpose Test**—The Conservancy's conservation staff, after a thorough review of the proposed amendments, will make a determination that the proposed changes would not in any way diminish the overall goals and objectives of the original conservation easement. It would be preferable that the overall goals and objectives of the original conservation easement would be improved by the proposed change. It is important to note that the Conservancy is bound by the conservation purposes as outlined in the original conservation easement. To clarify or verify those conservation purposes, it is appropriate to refer to the project files at the time of the original easement to help determine the original conservation purposes.
- B. **Evaluation: Private Benefit Rule**—As a 501(c)(3) public charity, it is essential that the Conservancy make a determination that any proposed amendment will not result in a violation of the private benefit rule. In other words, if the landowner receives any value attributed to the change, then the landowner will compensate the Conservancy in an amount that is at least equivalent to value enhancement. While the Conservancy should prefer to take back compensation in the form of additional conservation lands or conservation restrictions, there may be instances where the Conservancy will receive monetary compensation. In any case, it is important to note that for purposes of the private benefit rule, the trade-off under this paragraph is a trade-off based on economic value. Therefore, it is important for the Conservancy to obtain reliable and accurate appraisal information as part of this evaluation process in order to ensure that such decisions are made with knowledge of the relevant economic circumstances.

- C. **Donor Relations**—Before amending a conservation easement that has been donated, the Conservancy will contact the original donor or the donor’s representatives to make sure that they do not have any objections to the action being proposed.
- D. **State Law**—The assigned Conservancy attorney will make a determination that the proposed amendment complies with applicable state laws, including but not limited to, the state’s enabling legislation for conservation easements.

If the first four conditions can be satisfied, then the following procedures will be followed:

- E. The conservation easement amendment transaction will be subject to the landowner and the Conservancy securing the approval of the relevant state authority that provides oversight of charitable organizations operating in the state where the property is located. Typically, such units will be located within a State Attorney General’s office, a state Department of Corporations and Taxation’s office, or a Secretary of State’s office. Depending on the outcome of discussions with the relevant state authority, it may be necessary to seek such approval from a court of law in the state where the property is located. Such prior approval of the amendment will be sought to confirm the determination that the proposed amendment will not confer a private benefit, will not otherwise violate legal and administrative operating principles for charitable organizations, and is consistent with the conservation purposes that the original grant sought to advance.
- F. Finally, any amendment of a conservation easement will be approved in advance of completion by the General Counsel and the President.

**Purpose:** To provide a clear process for the exceptional circumstances in which amendment of a conservation easement will be allowed.

**Origin:** Established February 2001. Revised October 2003.

**References, Resources, Explanatory Notes:** Conservation easements have become one of the most visible land protection tools in the United States. Despite the widespread use of conservation easements, there is little or no guidance regarding procedures that should be followed in determining whether the holder of a conservation easement should agree to amend its terms. Periodically, Conservancy staff have held discussions with the Internal Revenue Service on an informal basis and with the Land Trust Alliance and other conservation organizations about the appropriate protocols for amending conservation easements. As yet, however, no standards for amendments of conservation easements have been proposed by the Internal Revenue Service or the land trust community. In order to ensure the continued viability of conservation easements as an important conservation tool, independent and prior approval is required for amendments of conservation easements, whether requested by landowners who own property encumbered by conservation easements held by the Conservancy or otherwise deemed appropriate by Conservancy staff.

## COLORADO OPEN LANDS CONSERVATION EASEMENT AMENDMENT POLICY

*Adopted September 20, 2004*

### I. STATEMENT OF PHILOSOPHY

- A. Colorado Open Lands (COL) holds conservation easements for the following four conservation purposes (“conservation purposes” will hereinafter be referred to as “CVs”) outlined in the IRS Regulations: “outdoor recreation by, or the education of, the general public; relatively natural habitat of fish, wildlife, or plants; open space; and historically important land areas.” [Sec. 170(h)(4)(A)(i-iv)]
- B. COL’s conservation easement stewardship program is designed to:
  - 1. Uphold the terms of conservation easements,
  - 2. Maintain positive relationships with landowners,
  - 3. Comply with IRS requirements,
  - 4. Protect the tax-exempt status of COL,
  - 5. Fulfill requirements of agencies and individuals providing funding,
  - 6. And manage the program in a fiscally responsible manner.
- C. COL holds conservation easements as they are recorded and will only amend them in a manner that complies with applicable law and only for uses that have a beneficial or neutral effect on the conservation values protected by the conservation easement.

### II. AMENDMENT POLICIES

- A. An amendment must have either a beneficial or neutral effect on conservation values protected by the conservation easement.
- B. No amendment will provide private inurement for members of the Board or staff of COL, or private benefit to other parties as prohibited by IRS Regulations (see below).
- C. Any action that requires a change in the terms of the conservation easement or affects the protected conservation values will require a written and recorded amendment. Any other action may or may not require a written or recorded amendment, but in all cases will be documented by a written memorandum of understanding in the file.
- D. Conservation easements may be amended under the following circumstances:
  - 1. To fulfill agreements specified in the conservation easement,
  - 2. To correct an error in original drafting; for example:
    - a. To correct a legal description (survey description),
    - b. To correct errors in conservation easement exhibits,
    - c. To include exhibits inadvertently omitted,

3. To clarify an ambiguity in the conservation easement,
4. To adjust a conservation easement to acknowledge a condemnation by a public agency,
5. To add new provisions that strengthen the preservation and protection of conservation values,
6. Amendments may be considered for other reasons provided they have a beneficial or neutral effect on the conservation values protected by the conservation easement.

### III. AMENDMENT PROCEDURES

- A. COL reserves the right to charge a fee for review and execution of the amendment.
- B. Landowner and COL staff discuss proposed amendment and COL's Amendment Policy.
- C. Landowner or COL submits to the other party a written request to amend the conservation easement that:
  1. Outlines reasons for amendment and,
  2. Provides maps, photos, and other necessary documentation.
- D. COL staff may conduct a field review and meet with landowner as necessary.
- E. Staff will review the amendment request and documentation using the following criteria:
  1. Will the amendment have a beneficial or neutral effect on the conservation values protected by the conservation easement?
  2. Does this amendment confer a private benefit to the landowner or any other individual greater than the benefit to the general public? (See IRS Regulation 1.170A-14(h)(3)(i)). (The general public benefits through the preservation and protection of the conservation values.) If there is any question as to whether the private benefit conferred is greater than the public benefit conferred by such an amendment, such determination shall be made by an independent appraisal paid for by Grantor.
  3. Does this amendment result in private inurement for any COL board member, staff person, or contract employee? See IRS Reg. 1.501(c)(3)-1(c)(2). If so, the amendment must be denied.
  4. Is there any other conflict of interest affecting this amendment request? If so, the conflict of interest must be resolved before approving this amendment.
  5. Does the conservation easement require notification or approval of amendments by any other parties? If so, have these requirements been addressed?
  6. Will this amendment undermine the public's confidence in COL?
  7. Will the granting or denial of the amendment request create a bad precedent for future amendment requests?

8. Will the amendment affect COL's ability to steward or defend the conservation easement?
  9. Should the amendment be reflected in a restatement of the original conservation easement or in an amendment to the conservation easement?
- F. Staff will coordinate with funders or individuals as required in the original conservation easement.
  - G. Staff will update title information to assure that the correct parties are engaged in amending the easement.
  - H. The President and appointed board member of COL will make final decision.
  - I. If the terms of the amendment are approved, staff will review the title status of the property to determine whether further title insurance and subordination of lenders is required to assure that the amended conservation easement is covered by any policy and any lenders will be subject to the amendment.
  - J. The conservation easement amendment or restatement will be recorded in the county or counties in which the property is located.
  - K. All amendments shall be reported to the board of directors.

## MARIN AGRICULTURAL LAND TRUST EASEMENT AMENDMENT POLICY

Marin Agricultural Land Trust acquires conservation easements with the intent to hold the easements and enforce their terms and provisions as they are originally written. However, MALT recognizes that given the perpetual term of the easements it acquires and holds, it is possible that changes in future conditions or circumstances may justify amending an easement to strengthen the ability to achieve easement purposes, to resolve conflicts between easement purposes and unforeseen conditions or circumstances, or to clarify ambiguities, among other things.

The following policies are intended to guide consideration of an amendment to any conservation easement held by MALT, whether the amendment is proposed by MALT, an easement landowner, or a third party.

1. The proposed amendment will strengthen or have a neutral effect on the Protected Values of the easement. No amendment will be considered that could result in a net degradation of the Protected Values.
2. The proposed amendment is consistent with the purpose of the easement and the amendment provision (if any) of the easement.
3. The proposed amendment will not adversely affect MALT's tax exempt status or its status as an organization qualified to hold conservation easements under federal and state law. In particular, the proposed amendment will not result in any impermissible private benefit or inurement<sup>1</sup>.
4. The proposed amendment will minimize the consequences on the Protected Values and purpose of the easement of a threatened condemnation of a portion of the easement and/or of the property encumbered by the easement.
5. The proposed amendment will not cause any erosion of public confidence in MALT.
6. The MALT Board of Directors finds that the proposed amendment is consistent with this Easement Amendment Policy and approves the amendment by a two-thirds vote of the number of Directors then in office.

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<sup>1</sup> IRC Reg. 1.501(c)(3) provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private purpose. Private benefit is defined as "non-incidental benefits conferred on disinterested persons that serve a private interest." Public benefit often provides an incidental benefit to private individuals, which is not prohibited. Private benefit must be both qualitatively and quantitatively incidental. *Qualitatively* incidental means that the private benefit is a mere byproduct of the public benefit. For private benefit to be *quantitatively* incidental, it must be insubstantial in amount.

Inurement is a subset of private benefit and involves individuals who stand in a relationship with the organization ("insiders"—directors and employees, their relations, etc.) which offer an opportunity to make use of the organization's income or assets for personal gain. Whether private inurement exists is determined by the capacity in which the individual derives financial benefit. An individual is not entitled to unjustly enrich himself at the organization's expense. However, benefits directed to an individual as a member of a charitable class do not constitute unjust enrichment.

The following are examples of circumstances where it may be appropriate to amend an easement, subject to the policies above (this list is not intended to include all of the circumstances in which an amendment may be appropriate):

- Correction of a typographical error or other minor mistake.
- Minor boundary adjustments
- Addition of land to an easement
- Addition of restrictions on uses or activities that enhance Protected Values and easement purposes
- Clarification of an ambiguity to resolve a dispute and/or strengthen easement provisions
- To allow uses or technology not in existence or contemplated at the time of granting of the easement

## SPNHF CONSERVATION EASEMENT AMENDMENT POLICY\*

*Approved by Land Protection Committee 9/00, Board of Trustees 12/00*

SPNHF's conservation easements are achieved through voluntary agreements with landowners. Once an easement is executed, SPNHF is bound to uphold the terms of the easement as negotiated. SPNHF's record in upholding the terms and purposes of the original easement will determine whether future donors will put their trust in SPNHF.

It is SPNHF's policy to hold and enforce conservation easements as written. Amendments to conservation easements will be authorized only under exceptional circumstances and then only under the guidelines below.

- In no case will an amendment be allowed that will adversely affect the qualification of the easement (under IRS regulations) or SPNHF's qualification as a charitable organization under any applicable federal, state, and local laws or regulations.
- Issues of private benefit or inurement will be taken into account when considering amendments to easements, as required by IRS regulations.
- Any party requesting a conservation easement amendment shall pay all SPNHF costs including staff time and direct costs for reviewing the request, regardless of whether the amendment is granted, and for developing the amendment, if approved.
- The Amendment will be acceptable to SPNHF's Board of Trustees in its absolute discretion.

**Note:** An easement amendment which exclusively increases the level of protection provided by an easement or adds new land to the existing easement shall not fall under this easement amendment policy, but will be considered as a new project.

*\*This policy applies to deed restricted lands as well as conservation easement lands.*

## SPNHF CONSERVATION EASEMENT AMENDMENT INTERNAL GUIDELINES\*

*Approved by Land Protection Committee 9/00, Board of Trustees 12/00*

### APPROVABLE CONSERVATION EASEMENT AMENDMENTS

#### 1. Correction of Error or Clarification of an Ambiguity.

SPNHF may initiate an amendment to correct an error or oversight in an original conservation easement. This may include correction of a legal description, inclusion of standard language unintentionally omitted, clarification of ambiguous language or obsolete terms in order to avoid litigation over interpretation of the document in the future.

#### 2. Modification Consistent with Conservation Purpose

At times, a landowner may request an amendment that modifies the restricted uses or areas of an easement Property due to unforeseen adverse conditions or hardships. These requests will be considered for amendment only if all of the following conditions are met:

- A. The modification is not inconsistent with the purposes of the original easement; and
- B. The amendment creates a condition that enhances or is substantially equivalent to the terms of the original easement; and
- C. The net result of the modification does not enhance any property value that could be construed to violate the private benefit/inurement provisions under IRS regulations; and
- D. The modifications are made only with respect to the Property currently under easement; (amendments under this provision of the policy are not to be construed to permit a modification where additional land outside the easement Property is protected in return for modification of the easement); and
- E. The modification does not set an unfavorable precedent for future amendments; and
- F. The modification results in conditions that are monitorable and enforceable by SPNHF; and
- G. The modification is acceptable to SPNHF's Board of Trustees in its absolute discretion.

PROCEDURES FOR REQUESTING AND APPROVING AN AMENDMENT

1. SPNHF or the landowner may initiate amendments.
2. Amendment requests must be made in writing. The request should include a description of the change being requested, a map of the property showing areas affected by the proposed amendment (if applicable), and a list of reasons why the request is warranted.
3. Each request by a landowner must be accompanied by a \$750 payment to cover anticipated staff and direct costs pertaining to review of the request, regardless of whether the request is approved, and if approved, to carry out development of the amendment. Any unexpended portion of the fee will be refunded, but the landowner will be responsible for all costs exceeding the initial fee, as billed by SPNHF. Any documentation required, such as a boundary survey and monumentation, will be the responsibility of the landowner. SPNHF may request an additional Conservation Easement Stewardship Fund donation if the nature of the amendment would increase SPNHF's stewardship responsibilities. There will be no fees for corrections due to SPNHF errors or omissions.
4. The stewardship director will review any amendment request for consistency with regard to this policy, the original conservation easement deed, related documentation and the features of the land. The Land Protection Director, legal counsel, other SPNHF staff or natural resource professionals, may review the request. A site visit, meeting with the current landowner and/or original donor may be arranged. A recommendation will be made to the Land Protection Committee regarding acceptance of the amendment, unless the request clearly does not meet the criteria of this policy. If approved by the Land Protection Committee, SPNHF's Board of Trustees will vote on the amendment.
5. Consideration of amendment requests & development of approved amendments will be taken up as staff schedules and priorities allow. However, amendment consideration and development will be superseded in priority by monitoring and enforcement of SPNHF easements.

*\*These Guidelines apply to deed restricted lands as well as conservation easement lands. Amendments to easements or deed restrictions must follow these guidelines unless the guidelines are amended by SPNHF's Board of Trustees.*

## BRANDYWINE CONSERVANCY

*Adopted by the Board of Trustees December 1999*

### I. SCOPE

This policy sets forth the principles governing the amendment of existing conservation easements of which the Brandywine Conservancy (the “Conservancy”) is the grantee and the procedures for effecting such an amendment.

### II. PURPOSES

In furtherance of its mission the Conservancy accepts and administers conservation easements protecting natural and historic resources, with particular emphasis on protecting water resources. Circumstances can arise which make it desirable to change the terms of existing easements. By way of example, amendment may be necessary if there are unforeseen changes in laws or land use practices which cause the easement to have unintended consequences. Or, for example, the Conservancy itself may desire amendment to improve the effectiveness of existing easements, to avoid costly legal proceedings, or to provide additional conservation benefits.

This amendment policy sets forth the procedures for effecting an amendment of a conservation easement and the basic principles that will guide the Conservancy and its staff in exercising its sole and absolute discretion as to whether a proposed amendment of an existing easement is acceptable to the Conservancy.

### III. GUIDELINES

- A. Amendment is an extraordinary procedure and not available to a landowner as a matter of right, unless the easement itself or Federal, state, or local law mandates that a particular amendment must be adopted.
- B. Amendment should occur only when the goal to be achieved is desirable for the Conservancy and there is no reasonable and feasible alternative to achieving the desired goal.
- C. Except for (i) an amendment mandated by the easement itself or by law, and (ii) an amendment made necessary by circumstances beyond the control of the landowner and the Conservancy, such as condemnation proceedings, and if under those circumstances the easement is reasonably likely to terminate or be unenforceable without the amendment, an amendment must be consistent with the conservation purposes of the existing easement. If the amendment is pursuant to the foregoing exceptions, and cannot be consistent with the conservation purposes of the existing easement, it must be as consistent with those purposes as is reasonable and feasible. In addition:
  - (i) if the Conservancy initiates the amendment, it must be conservation neutral or provide a net conservation benefit; or
  - (ii) if the landowner initiates the amendment, it must provide a net conservation benefit and must not increase the market value of the eased property.

- D. Any net conservation benefit must be determined with respect to the eased property and property abutting the eased property and is to be determined by the Conservancy.
- E. Any market values must be determined by a qualified, independent appraisal.
- F. No amendment shall (i) effect a termination of the existing easement unless the terminated easement is immediately replaced by an amended easement consistent with this policy, and (ii) cause the perpetual duration of an existing easement to be terminable.
- G. The Conservancy shall administer this amendment policy in a manner sensitive to all interests and in a manner that does not inhibit future donations of conservation easements.
- H. Because every property is unique, no decision by the Conservancy with respect to an amendment of a conservation easement shall form a precedent with respect to any other request for an amendment.
- I. The applicable policies and procedures of the Conservancy with respect to evaluating and negotiating a new conservation easement are to be applied to any amendment, such as, by way of example but not limitation, policies and procedures related to excess benefits transactions.
- J. The Conservancy will give weight to (but will not be bound by) carrying out the original intentions of the grantor as expressed in the conservation easement.
- K. No amendment shall be approved by the Conservancy that is reasonably likely to result in the conservation easement failing to qualify as a valid conservation easement under the Internal Revenue Code or other applicable laws.
- L. No amendment to terminate or impair public access rights in an existing easement shall be approved by the Conservancy except in compliance with applicable legal procedures.

#### IV. PROCEDURES

- A. Conservancy-Initiated Amendments.** If the Conservancy staff recognizes the need for an amendment consistent with this policy, it will contact the landowner and recommend the amendment to the existing easement. After the Conservancy staff and the Landowner have reached agreement on the language of the amendment, which must satisfy the Guidelines set forth in Section III above, the proposed amendment will be submitted to the Conservancy's Environmental Committee for consideration as provided below. If the Conservancy determines that the amendment is mutually beneficial to the Landowner and the Conservancy, the Landowner may be asked to share any expenses. If the amendment is important to the Conservancy's mission, the Conservancy may proceed, whether or not the Landowner agrees to share expenses.

## **B. Landowner-Initiated Amendments.**

1. A Landowner seeking modification of an existing conservation easement must submit the request in writing to the Conservancy stating the nature of the desired change and the specific reasons why the change is needed and warranted. Where appropriate, or if the Conservancy staff so requires, the request must be accompanied by a map and/or other documentation. The Landowner may be required to agree in writing to reimburse the Conservancy for all staff time and expenses, including legal fees and costs, associated with the requested amendment.
  2. The Conservancy staff will review each request for amendment to determine whether the request is properly documented and satisfies the Guidelines set forth in Section III above. Throughout such review the Conservancy staff will strive to promote good relations with the Landowner and use the opportunity to meet and educate the Landowner regarding the purpose and conservation benefits of the existing easement. The Conservancy staff may, but is not required to, consult with the original donor, neighboring property owners, governmental officials and others who might have an interest in the eased property or the conservation easement. If the staff determines that approval of the amendment is warranted (meaning that the amendment is properly documented, satisfies the Guidelines and is desirable for the Conservancy in its sole and absolute discretion), it will submit the amendment to the next meeting of the Environmental Committee with the staff's recommendation for approval as provided below. If the staff determines that approval of the amendment is not warranted, it will notify the Landowner in writing of its determination, and advise in writing that the Landowner may submit further written justification and documentation for the requested amendment. The written notice to the Landowner will include statements giving the Landowner at least 30 days to provide further written justification and documentation and that the Landowner's failure to do so will be deemed a waiver of this right. After affording the Landowner the stated period to provide further written justification and documentation or after such earlier time that the Landowner has either submitted written justification and documentation or waived such right, the Conservancy staff will present the requested amendment and the Landowner's written justification and documentation, if any, together with the staff's recommendation, at the next scheduled meeting of the Conservancy's Environmental Committee for its consideration as provided below.
- C. Necessary Parties.** Before submitting any amendment to the Environmental Committee with a recommendation for approval, the Conservancy staff will identify the necessary party who must, as a matter of law, or who should, as a matter of policy or practice in the Conservancy's discretion, sign any amendment and obtain assurances from each such necessary party that the party will sign the written easement amendment document in the form approved by the Conservancy. If deemed necessary, the Conservancy staff may seek legal counsel and obtain a written opinion as to the necessary parties. If the Conservancy staff has not recommended approval of an amendment, the approval of that amendment by the Environmental Committee will be subject to the condition that the identification of the necessary parties and obtaining assurances that such parties will sign the amendment will be undertaken by the Conservancy staff before such amendment is considered fully approved by the Conservancy.

- D. Endowment.** If an amendment requested by a Landowner will increase the administrative burden on the Conservancy for future monitoring of compliance and/or enforcement of the conservation easement, the Conservancy staff will advise the Landowner of the amount of additional endowment needed and suspend the processing of the amendment until and unless the Landowner has agreed to deposit the additional amount in the event the Conservancy approves the amendment.
- E. The Environmental Committee.** All amendments of existing conservation easements require the approval of the Conservancy's Environmental Committee. Unless a Landowner withdraws a requested amendment, a member of the Conservancy will in person present the amendment to the Environmental Committee at a duly constituted meeting, and will describe the eased property, summarize the pertinent terms of the existing easement, explain the reasons for the amendment, and present the staff's determination and recommendations. If a Landowner has submitted written justification and documentation for the amendment, as provided above, the Conservancy staff will provide written copies to the Environmental Committee, before the meeting if practical and otherwise at the meeting. The Environmental Committee will review the requested amendment in relation to the Guidelines set forth in Section III above and take such action as the Committee deems appropriate.
- F. Approved Amendments.** If the Environmental Committee approves an amendment of an existing easement, the amendment will be set forth in a document reviewed and approved by legal counsel to the Conservancy, signed by all necessary parties, and recorded in the governmental office where the existing easement is recorded. During this process the staff may decide whether a restated and amended conservation easement is preferable to a separate amendment agreement.

**G. Further Review.** In the event that the Environmental Committee disapproves an amendment, the Landowner may request in writing that a presentation in person be made by the Landowner and/or the Landowner's representative(s) to a subcommittee of the Environmental Committee. Such a request must be made by the Landowner within twenty (20) days after written notice of the disapproval is given to the Landowner. Upon receipt of such written request, the Conservancy staff will advise the Chair of the Environmental Committee, who will appoint a subcommittee of three or more members of the Environmental Committee to meet with the Landowner and/or the Landowner's representative(s) at a time and place convenient to all parties. At such meeting, the Landowner and/or the Landowner's representative(s) will be given the opportunity to convince the subcommittee that the prior determination of the Environmental Committee failed to take all relevant information into consideration and the Conservancy staff will be given the opportunity to explain its opposition to the amendment. The subcommittee may determine, in its sole and absolute discretion, either that (1) the Environmental Committee should reconsider the requested amendment or (2) no further action is appropriate. If the subcommittee recommends reconsideration, the chair of the subcommittee will present the amendment to the next scheduled meeting of the Environmental Committee and explain the reasons for reconsideration. If, upon reconsideration, the Environmental Committee again disapproves the amendment, the amendment will not be subject to further review.



## APPENDIX B

Appendix B-1 ..... Charitable Trust Doctrine

## CHARITABLE TRUST DOCTRINE<sup>1</sup>

by Nancy A. McLaughlin, Professor of Law, University of Utah College of Law, Salt Lake City, Utah  
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When a gift is made to a charitable organization to be used for a specific charitable purpose, the weight of authority indicates that, except to the extent granted the discretion either expressly or impliedly in the instrument of conveyance, the organization may not deviate from the administrative terms or charitable purpose of the gift without receiving judicial approval therefor under the doctrine of administrative deviation or *cy pres*—and this principle holds true whether the donor is treated as having created a charitable trust or merely as having made a restricted charitable gift (sometimes referred to as a “quasi-trust”) under state law.

### *Express Powers*

Charitable trustees have such powers as are conferred on them by the terms of the trust (i.e., express powers)<sup>2</sup>, and courts will not interfere with a trustee’s exercise of such powers unless it can be shown that the exercise was not within the bounds of reasonable judgment.<sup>3</sup> The duty of the court in such cases is not to substitute its own judgment for that of the trustee, but only to consider whether the trustee acted in good faith, from proper motivation, and within the bounds of reasonable judgment.<sup>4</sup>

Including an “amendment provision” in the instrument of conveyance grants the holder of a conservation easement the express power to agree with the current and any subsequent owner of the encumbered land to amend the easement in manners authorized by such provision. In some cases, the easement grantor and/or funders of a conservation easement project may not wish to grant such amendment discretion to the holder, or may prefer to limit the amendment discretion granted to holder by, for example, providing that the holder’s amendment discretion does not extend to amendments that would increase the level of subdivision or development permitted on the encumbered land.

### *Implied Powers*

Charitable trustees are deemed to have certain “implied powers” to do what is “necessary or appropriate” to carry out the purposes of a trust and not forbidden by the terms of the trust.<sup>5</sup> Thus, even in the absence of an amendment provision, the holder of a perpetual conservation easement might be deemed to have the implied power to agree to amendments that clearly further the

<sup>1</sup> This section contains a description of some of the general principles of law governing charitable trusts and charitable trustees, and is derived in large part from Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. Rich. L. Rev. 1031 (2006). For a discussion of these laws as they are applied in individual states, see Marion Fremont-Smith, GOVERNING NONPROFIT ORGANIZATIONS (2004).

<sup>2</sup> See Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §380, at 320 (4th ed. 1989).

<sup>3</sup> See Fremont-Smith, *supra* note 1, at 145.

<sup>4</sup> See *id.*

<sup>5</sup> See Scott & Fratcher, *supra* note 2, §380, at 320.

purpose of the easement and are not contrary to its terms—such as to clarify vague language, correct a drafting error, increase the level of protection of the encumbered property, or add additional acreage to the easement.

While courts today are more apt to find that a donor intended to confer broad powers on a trustee, because of the traditional reluctance of many courts to find that a trustee has powers that are not clearly expressed in the trust instrument, and because of the resulting doubts that arise as to the existence of certain powers, it is customary in well-drawn trust instruments to expressly confer upon the trustee any powers that are or may become necessary or appropriate for the efficient administration of the trust.<sup>6</sup> Thus, directly addressing the level of amendment discretion granted to the holder of a conservation easement in the instrument of conveyance is advisable.

To the extent changed circumstances necessitate amendments to a conservation easement that exceed the amendment discretion granted to the holder in the instrument of conveyance or the holder's implied powers, the holder can seek judicial approval of such amendments pursuant to the doctrine of administrative deviation or the doctrine of *cy pres*, as the case may be.

#### *Doctrine of Administrative Deviation*

Under the traditional formulation of the doctrine of administrative deviation, a court will authorize a trustee to deviate from an *administrative term* (as opposed to the charitable purpose) of a trust if it appears that compliance with the term is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him, compliance with the term would defeat or substantially impair the accomplishment of the purposes of the trust.<sup>7</sup> The modern tendency, however, has been to permit a trustee to deviate from an administrative term in situations where continued compliance with the term is deemed to be “undesirable,” “inexpedient,” or “inappropriate,” and regardless of whether the settlor had foreseen the circumstances.<sup>8</sup>

*In re Pulitzer*<sup>9</sup> is a classic example of the application of the doctrine of administrative deviation. Mr. Pulitzer created a trust for the benefit of his descendants, funded it with stock in a corporation that published a newspaper to which he had devoted his life, and expressly forbade the trustees from selling the stock. When the newspaper later became unprofitable and the prohibition on the sale of the stock threatened the trust corpus, the trustees sought and received judicial approval to sell the stock. In approving the deviation from the administrative terms of the trust, the court explained that “[t]he dominant purpose of Mr. Pulitzer must have been the maintenance of fair income for his children and the ultimate reception of an unimpaired corpus by the remaindermen.”

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<sup>6</sup> See Scott & Fratcher, *supra* note 2, §186, at 10.

<sup>7</sup> See Restatement (Second) of Trusts §167 (1959).

<sup>8</sup> See e.g., Scott & Fratcher, *supra* note 2, §381, at 330 n.13.

<sup>9</sup> 249 N.Y.S. 87 (Sup. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932).

## Doctrine of Cy Pres

Under the doctrine of *cy pres*: if (i) the *charitable purpose* of a trust becomes “impossible or impracticable” due to changed conditions and (ii) the donor is determined to have had a “general charitable intent,” then (iii) a court can formulate a substitute plan for the use of the trust assets for a charitable purpose that is “as near as possible” to the original purpose specified by the settlor.<sup>10</sup> With regard to the second step in the *cy pres* process, courts almost invariably find that a donor had a general charitable intent if the trust fails after it has been in existence for some period of time; some states apply a presumption of general charitable intent; and two states—Delaware and Pennsylvania—have eliminated the requirement entirely.<sup>11</sup>

*Jackson v. Phillips*<sup>12</sup> is perhaps the most famous example of the application of the doctrine of *cy pres*. That case involved a charitable trust created to promote the abolition of slavery. When the purpose of the trust became “impossible or impracticable” as a result of the adoption of the Thirteenth Amendment to the Constitution, the court applied the doctrine of *cy pres* and instructed the trustees to use the trust assets to educate the former slaves and help them integrate into American society.

The doctrines of administrative deviation and *cy pres* are distinct in that the former applies to a modification of the *administrative terms* of a trust, and the latter applies to a modification of the *charitable purpose* of a trust, although, in practice, the line between the two doctrines is less than precise. Courts tend to be more lenient in permitting trustees to deviate from the administrative terms (as opposed to charitable purpose) of a trust, presumably because deviations from administrative terms are less likely to chill future charitable donations than deviations from a donor’s specified charitable purpose.

The Myrtle Grove controversy<sup>13</sup> illustrates proposed amendments to a conservation easement that would modify the *charitable purpose* of the easement. The holder could not agree to those amendments without receiving court approval in a *cy pres* proceeding, where it would have to be shown that the purpose of the easement had become “impossible or impracticable.”

Because the beneficiary of a charitable trust is the public rather than any particular individual, the state attorney general typically is a necessary party to any administrative deviation or *cy pres* proceeding to represent the interests of the public.

When amending a conservation easement in a state where easements may be viewed as charitable trusts (i.e., at this point, in every state), a land trust must analyze the legal risks of the potential amendment within the charitable trust framework. Expert legal counsel is essential to understand the extent of a land trust’s express and implied powers to amend, and when court approval of amendments may be required.

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<sup>10</sup> See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 Harv. Envtl. L. Rev. 421, 433, 464-501 (2005).

<sup>11</sup> See *id.* at 479-80.

<sup>12</sup> 96 Mass. 539 (1867).

<sup>13</sup> See McLaughlin, Nancy A. *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, University of Richmond Law Review Vol. 40 pp. 1031 – 1097. 2006. Available at [www.ltanet.org](http://www.ltanet.org).

# Appendix C. Other Sample Materials

Appendix C-1 ..... Sample Discretionary Approval Letter

Appendix C-2 ..... Sample Amendment Provisions

**DISCLAIMER**

These materials are furnished as examples and not as definitive recommendations. They are provided with the understanding that the Land Trust Alliance is not engaged in rendering legal or other professional counsel. If legal advice or other expert assistance is required, the services of competent professionals should be sought.

## SAMPLE DISCRETIONARY APPROVAL LETTER AS ALTERNATIVE TO AMENDMENT

*Sample provided by Karin Marchetti Ponte, Esq.*

(- Letterhead Of Holder -)

Date

OWNER:

Town Official  
Town of  
Municipal Building  
City, State, Zip

Re: Conservation Easement Approval for Town Lot Changes

Dear Sirs:

We are writing this letter to grant our discretionary approval of changes made at the Town Lot, (the “Protected Property”) which is subject to a conservation easement granted to us by PREVIOUS OWNERS on \_\_\_\_\_ and recorded in Book \_\_\_\_\_, Page \_\_\_\_\_, at the \_\_\_\_\_ County Registry of Deeds (the “Easement”).

We recognize that a strict adherence to certain of the terms of the Easement would have been in conflict with the purpose of the easement, in that it had become impossible to control the public uses that is encouraged by the Easement, and the absence of such controls had placed in jeopardy the property’s high value as a scenic resource. To assure the accomplishment of both purposes, we hereby give our consent, retroactively to the time of completion, to the following changes on the Protected Property, which were approved by the Town by a meeting of its Selectmen on \_\_\_\_\_, and by HOLDER at a meeting of its Board of Directors dated \_\_\_\_\_;

- A. The installation and maintenance of a wooden post and rail fence along the northern boundary along the Road, and low wooden barriers around the newly delineated gravel parking area of not more than four thousand (4,000) square feet, as indicated in the “Sketch Plan of Proposed Park for Town, Road”, dated \_\_\_\_\_, by Surveyor, RLS # \_\_\_\_\_, and in accordance with the photographs contained in Holder’s Baseline Documentation Report dated \_\_\_\_\_, attached hereto and made a part of this approval, are hereby approved and will not be deemed to be a violation of Easement Paragraph 2, entitled Limitation of Development.
- B. The installation and maintenance of the two existing wooden picnic tables east of the parking area, and the installation of additional picnic tables, benches, and small unlighted signs to enhance and control public use, after prior written notice to Holder, and an opportunity to cooperate in the text and design of signs so that they will inform the public about the conservation protection provided by Holder and Third Party; are hereby approved and will not be deemed to be a violation of Easement Paragraph 2, entitled Limitation of Development.

C. The leveling, grading and the addition of loam and seed to the formerly gravel area east of the parking area, as indicated in the aforementioned "Sketch Plan", is hereby approved and will not be deemed to be a violation of Easement Paragraph 3, Surface Alterations.

D. The establishment of a drainage ditch and culvert in the location indicated in the aforementioned "Sketch Plan", is hereby approved and will not be deemed to be a violation of Easement Paragraph 3, Surface Alterations.

In all other respects, Holder and Third Party hereby ratify and confirm the Easement, and any forbearance or delay in providing this approval shall not be construed to be a waiver of the right to enforce other terms of the Easement or any future violation of the Easement.

Sincerely,

---

HOLDER

---

By: \_\_\_\_\_, President

THIRD PARTY

---

By: \_\_\_\_\_, President

ADDRESS

Enclosure: Baseline Documentation Report dated \_\_\_\_\_, 200

cc: EVERYONE

## SAMPLE AMENDMENT PROVISIONS

### A. *From the template conservation easement in The Conservation Easement Handbook:*

#### AMENDMENT AND DISCRETIONARY CONSENTS.

Grantor and Holder recognize that circumstances could arise that justify amendment of certain of the terms, covenants, or restrictions contained in this Conservation Easement, and that some activities may require the discretionary consent of Holder. To this end, Grantor and Holder have the right to agree to amendments and discretionary consents to this Easement without prior notice to any other party, provided that in the sole and exclusive judgment of the Holder, such amendment or discretionary consent furthers or is not inconsistent with the purpose of this grant. Amendments will become effective upon recording at the \_\_\_\_\_ County Registry of Deeds.

Notwithstanding the foregoing, the Holder and Grantor have no right or power to consent to any action or agree to any amendment that would *[insert standards based on the purpose of the Easement – for example, for easements that allow limited development: increase the level of residential development permitted by the express terms of this Conservation Easement; Or for Forever-Wild Easements: result in substantial alteration to or destruction of important natural resources,]* or limit the term or result in termination of this Conservation Easement, or adversely affect the qualification of this Easement or the status of Holder under applicable laws, including *[cite state enabling statute, if any]* Section 170(h) or 501(c)(3) of the Internal Revenue Code, successor provisions thereof, and regulations issued pursuant thereto.

### B. *From the template Maryland Environmental Trust Conservation Easement, which includes a requirement for governmental approval (see entire easement in The Conservation Easement Handbook CD Document, Chapter 21.7, referenced in Appendix D):*

Grantors and Grantee may jointly amend this Conservation Easement; provided that no amendment shall be allowed that will affect the qualification of this Conservation Easement or the status of Grantee under any applicable state or federal law, including Section 170(h) of the Internal Revenue Code. Proposed amendments will not be considered unless in the opinion of Grantee they (1) have no adverse effect on the conservation values protected by this Conservation Easement and (2) uphold the intent of the original grantors and the fiduciary obligation of Grantee to protect the property for the benefit of the public in perpetuity. Grantee shall not be required to agree to any amendment. Amendments shall be subject to approval of the Maryland Board of Public Works, and shall be recorded among the Land Records where this Conservation Easement is recorded.

C. *From a template easement used by some western land trusts:*

**Amendment.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee may jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualifications of this Easement under any applicable laws, including [*cite State Conservation Easement Law*], the Internal Revenue Code and applicable Treasury Regulations. Any amendment must be consistent with the conservation purposes of this Easement, must not affect its perpetual duration, and either must enhance, or must have no effect on, the Conservation Values which are protected by this Easement. Furthermore, any amendment must not result in prohibited inurement or private benefit to Grantor or any other parties. Any Easement amendment must be in writing, signed by both parties, and recorded in the Public Records of \_\_\_\_\_ County.

D. *From the template Pennsylvania Conservation Easement, used by land trusts and local governments:*

The grant to Holder under this Article also permits Holder, without any obligation to do so, to exercise the following rights:...To enter into an Amendment with Owners if Holder determines that the Amendment is consistent with and in furtherance of the Conservation Objectives; will not result in any private benefit prohibited under the Code; and otherwise conforms to Holder's policy with respect to Amendments.

The Land Trust Alliance does not endorse any of these sample amendment provisions as suitable for use generally in conservation easements. Any provision must be tailored to the law of the particular state, the needs of the specific land trust, the intent of the individual donor, grantor or funding source, the circumstances of the individual easement, and all other relevant factors.



## Appendix D Further Reference

Byers, Elizabeth and Karin Marchetti Ponte. *The Conservation Easement Handbook, Second Edition*. Land Trust Alliance and Trust for Public Land. 2005. Available from Land Trust Alliance, 1660 L St. NW, Suite 1100, Washington, DC 20036 or call 202-638-4725. Also available on the Web at <http://learningcenter.lta.org>. See sample amendment policies on CD Document 12.1 – 12.5.

Conservation Law Clinic, Indiana University School of Law, W. William Weeks, Director, *Legal Considerations Regarding Amendment to Conservation Easements*, 2007. Available at <http://learningcenter.lta.org>.

Dana, Andrew C. *Conservation Easement Amendments: A View from the Field*, prepared for The Back Forty, 2006. Available at <http://learningcenter.lta.org>.

Land Trust Alliance, *Land Trust Standards and Practices*, Land Trust Alliance, revised 2004. Available from Land Trust Alliance and at <http://learningcenter.lta.org>. See sample amendment policies at Practice 11I, Amendments.

McLaughlin, Nancy A. *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, University of Richmond Law Review Vol. 40 pp. 1031 – 1097. 2006. Available at <http://learningcenter.lta.org>.

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