

# Legal Considerations in Amending Grants of Conservation Easement



This guide informs easement holders, particularly private land trusts, of legal matters to consider under Pennsylvania law and the Internal Revenue Code when making decisions regarding the amendment of grants of conservation easement.

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## Introduction

This guide informs easement holders of legal matters to consider regarding the amendment of grants of conservation easement. It examines Pennsylvania law, including the [Conservation and Preservation Easements Act](#) (the “CPEA”),<sup>1</sup> and the Internal Revenue Code (the “IRC”), specifically the charitable exemption<sup>2</sup> and charitable gift<sup>3</sup> rules administered by the Internal Revenue Service (the “IRS”). The WeConservePA guide [The Nature of the Conservation Easement and the Document Granting It](#) addresses basic concepts critical to an understanding of this guide and the terms contained within.<sup>4</sup> Together, these guides provide the legal basis for the provisions set

<sup>1</sup> The act of June 22, 2001 (P.L. 390, No. 29) (32 P.S. §§5051-5059). See WeConservePA’s [Guide to the Conservation and Preservation Easements Act](#).

<sup>2</sup> 26 IRC §501(c)(3), accompanying regulations, and guidance pertaining to private benefit and private inurement rules published online by the Internal Revenue Service will be referred to in this guide as the “IRC charitable exemption rules.”

<sup>3</sup> 26 IRC §170(h) and accompanying regulations will be referred to in this guide as the “IRC charitable gift rules.”

<sup>4</sup> Readers are urged to review the concepts covered in [The Nature of the Conservation Easement and the Document Granting It](#) in part because a number of terms are sometimes misused or defined within the frameworks of bodies of law (contract law or trust law) that are inapplicable to the law governing conservation easements and other servitudes: the law of servitudes.

forth in WeConservePA's *Guide and Model Policy for Conservation Easement Amendment*.

By centering the mission of conservation in all deliberations regarding amendments to grants of conservation easements, holders can advance their missions without inviting undue risk. Where an amendment benefits the landowner, financially or otherwise, a tax-exempt holder must weigh those benefits against the public conservation benefits of the amendment to avoid violating the IRS rule against impermissible private benefit. This exercise is complicated by: one, the rules require weighing (not establishing equal value), but they do not provide sufficient examples of good or bad weighing; and two, the fact that, for a great number of scenarios, there are benefits to be weighed that lack realistically measurable dollar values. This ambiguity can lead holders to construct “rules,” such as a self-imposed requirement that any possible financial benefit to a landowner must always be “zeroed-out” with costs to the landowner that can be plausibly measured in dollars. Such approaches will cause holders to sacrifice amendments that would otherwise advance conservation on their eased properties and their charitable missions. The research and analysis behind this guide find minimal risk to an easement holder's tax-exempt status when a well-documented analysis completed in consideration of an amendment demonstrates a public conservation benefit reasonably showing cause for any private benefit that might accrue to the landowner.

<sup>5</sup> Easement holders are referred to in this guide as “holders.” Only governmental entities and land trusts meeting specific criteria may be holders under the CPEA (§2).

<sup>6</sup> The legal document by which a conservation easement is granted to holder is referred to in this guide as the “grant.” *The Nature of the Conservation Easement and the Document Granting It* explains that the grant is not the conservation easement but rather the instrument used to convey the property interest which is the conservation easement; as reviewed later in the guide, an amendment of the grant may or may not change the conservation easement.

<sup>7</sup> For conservation easement purposes, *third-party right of enforcement* is defined in §3 of the CPEA as “a right provided in a

## Basic Constraints on Amendment

An inquiry into legal considerations begins with basic questions:

- *Freedom to amend.* May Pennsylvania landowners and conservation easement holders<sup>5</sup> change the legal document<sup>6</sup> by which they, or their land ownership interests, are bound?
- *Holder duties under the grant.* Is the freedom of holder to amend the grant constrained by standards contained within the grant and, if so, who has the power to enforce applicable standards safeguarding enforceability of the easement in perpetuity?
- *Other legal constraints.* What other legal standards may be applicable to amendment decisions and what are the potential consequences to the holder of failing to abide by these standards?

### Freedom to Amend

In general, the terms of any recorded document affecting Pennsylvania real estate may be changed by agreement of the parties to the original document or their successors in interest, provided that the change may be accomplished without impairing the legal rights of a third party. This basic principle holds true for grants of conservation easements. A landowner and easement holder may amend a grant of conservation easement in any manner that does not prejudice the rights of a third party holding rights under the grant. A holder of third-party enforcement rights<sup>7</sup> (called, for purposes of this guide, a “beneficiary”<sup>8</sup>) may

conservation easement to enforce any of its terms, granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.”

<sup>8</sup> The beneficiary of a servitude is the person benefited by an easement or covenant running with the land. The beneficiary of a trust is the person for whose benefit the trustee holds and administers the trust property. These separate concepts are sometimes conflated. It is mistaken to conclude that because a conservation easement has a beneficiary and a trust has a beneficiary, then a conservation easement must be a kind of trust subject to equitable trust principles. For more

seek to enjoin or set aside an amendment entered into without such beneficiary's approval if the amendment impairs the interest of the beneficiary in the easement.

Individuals who granted the conservation easement but no longer own any of the eased property are not afforded access to Pennsylvania courts to intervene in any matter affecting the conservation easement.<sup>9</sup> The same is true for owners of neighboring properties and members of the general public.

## Holder Duties Under the Grant

The holder of a conservation easement holds a property interest of perpetual duration in the land itself. The grant of easement operates not only to convey this interest to the holder but also to establish certain covenants running with each of the concurrent interests held, respectively, by holder and landowners.

When drafting grants of easement, land trusts include covenants running with holder's interest in the land (the "holder covenants") that safeguard the public interest in the long-term viability of conservation easements. For example, the covenants contained in the widely-adopted *Model Grant of Conservation Easement and Declaration of Covenants* published by WeConservePA include the following safeguards (*see* §6.01):

- A requirement that the holder use the powers granted to it under the easement to block activities, uses, and improvements inconsistent with the easement's purposes.
- A prohibition on the holder transferring holder's interest in the conservation easement to anyone not eligible to be a holder under Pennsylvania law and the charitable gifts rules under the IRC and requirement that the holder maintain that same eligibility.

- A requirement that the holder use any funds received from a condemnation or other extinguishment of the easement in furtherance of its conservation purposes.
- An acknowledgement that a court of competent jurisdiction may effect a forfeiture and a transfer to a successive holder if the holder fails to abide by the covenants.

## Other Legal Constraints

As explained in *The Nature of the Conservation Easement and the Document Granting It*, the Attorney General has oversight authority over charitable assets, including conservation easement assets, to prevent squandering, waste, and dissipation. Even where a grant names no beneficiaries, the Office of the Attorney General always remains as a *de facto* beneficiary.

If the holder, by amending the grant, confers impermissible benefits to the landowners, the IRS charitable exemption rules may be applied to jeopardize the status of the holder as an exempt organization. This guide reviews these rules (the private benefit rule and the private inurement rule) in detail.

## General Rules for Amendment, Release, or Termination of Grant

The general rules governing amendment, release, or termination of grants of conservation easement under Pennsylvania law are as follows:

discussion, *see* the WeConservePA guides *Not a Public Trust: Land Trust-Held Conservation Easements in Pennsylvania* and *Not a Charitable Trust: The Donated Conservation Easement Pennsylvania*.

<sup>9</sup> See the guides *The Nature of the Conservation Easement and the Document Granting It*, *Who Has Standing?*, and *Beneficiaries and Backup Holders*, all published by WeConservePA, for additional discussion of beneficiary and standing issues.

## Amendment of Grant

### Pennsylvania law

Pennsylvania law permits amendment—or even release—of the grant as any other real estate document.<sup>10</sup> However, other legal considerations discussed in this guide bear on the holder’s decision to take such action. The content of this section is limited to formal requirements of Pennsylvania law.

Amendments of real estate documents are recorded in the public records of the county in which the land is located and are binding upon the signatories to the amendment and their successors and assigns as owners of their respective interests in the land described in the amendment.<sup>11</sup> Amendment of the grant requires assent of all parties to the grant, including legal successors in interest.

### Grant provisions regarding amendment

A grant may place limitations on a landowner and holder’s freedom to amend the grant. For example, the *Model Grant of Conservation Easement and Declaration of Covenants* (see §6.03) allows amendment of the grant at the discretion of holder and the approval of owners, provided that:

Holder determines that the Amendment: (1) will not impair Holder’s power, enforceable in perpetuity, to block activities, uses, and Improvements of the Property inconsistent with the Conservation Objectives; (2) will not result in a private benefit prohibited under the Code; and (3) will be

consistent with Holder’s policy with respect to Amendment as of the applicable date of reference.<sup>12</sup>

## Release of Easement

Pennsylvania law permits release of the conservation easement and termination of covenants as any other real estate document.<sup>13</sup>

### Voluntary release and termination

If a conservation easement is to be released in whole or in part, the easement must be formally released. This is accomplished by the recording of a legal instrument, executed by the holder, that includes a legal description of the land to be released.<sup>14</sup> A properly drafted release will also include a termination of the covenants included in the grant.

### Involuntary release by exercise of power of eminent domain

A conservation easement, like any other real estate interest, may be taken by lawful exercise of the power of condemnation or right of eminent domain<sup>15</sup> or by a voluntary purchase and sale in lieu of condemnation.<sup>16</sup> The holder is entitled to just compensation as provided by law or, if a particular allocation of damages is provided in the grant, in accordance with the agreed upon allocation.<sup>17</sup>

Holder has no obligation under Pennsylvania law to contest a taking of eased property by eminent domain.<sup>18</sup> The Model Grant of Conservation Easement and Declaration of Covenants provides holder with the right to receive condemnation proceeds commensurate with the easement value as per the IRC charitable gift rules. The IRC

<sup>10</sup> The CPEA provides in §4(a) that “a conservation easement ... may be ... modified, terminated or otherwise altered or affected in the same manner as other easements.”

<sup>11</sup> 21 P.S. §42 *et seq.*

<sup>12</sup> §6.03(a).

<sup>13</sup> CPEA §4(a).

<sup>14</sup> Conveyancing procedures are mentioned here to correct a misconception that has crept into amendment discussions. A “swap” of land subject to an easement is not the exchange of one legal description of the eased property for another. The land area no longer subject to the easement must be released from the easement by the holder.

Concurrently, the landowners grant and convey an easement on the replacement land area to holder. The parties then confirm the new legal description as the eased property. The use of recognized conveyancing procedures is important not only for clarity of the public records but also to ensure that the parties recognize that a swap involves the release of land from the operation of the grant.

<sup>15</sup> CPEA §5(d)(1)(i).

<sup>16</sup> CPEA §5(d)(1)(ii).

<sup>17</sup> CPEA §5(d)(2).

<sup>18</sup> CPEA §5(d).

charitable gift rules do not require holders to contest governmental takings of eased property by the power of eminent domain. The decision to contest, or not, is a decision in the purview of the holder's board based upon facts, circumstances, costs, and benefits of the taking in question.

[Pennsylvania's Act 45 of 2018](#) provides for special review of condemnations by local government of land subject to a conservation easement.<sup>19</sup>

## Legal Duties Affecting Amendment Decisions

### Duty to Manage Charitable Assets Responsibly

Charitable organizations are required to manage their assets so that they are used for charitable purposes and not squandered, wasted, or dissipated.<sup>20</sup> The Attorney General has the right, and duty, to protect the interest of the public in the assets of a charity.<sup>21</sup> These standards apply to all charitable assets including conservation easements. [The Nature of the Conservation Easement and the Document Granting It](#) provides examples of how an irresponsible amendment decision may violate one or more of the

standards and be subject to an enforcement action by the Attorney General.

### Board Generally Must Approve

Conservation easements are interests in real property. As such, modifications of grants of conservation easement held by land trusts are real property transactions subject to Title 15 §5546 "Purchase, sale, mortgage and lease of real property" of the Pennsylvania Consolidated Statutes. This law provides that real estate transactions are governed by the bylaws of the corporation just like any other transaction. As a general rule, any transaction outside the ordinary course of business of the organization must be brought before the board for approval. An amendment would fall into this category in most circumstances.<sup>22</sup>

### Fiduciary Duty of Directors to Make a Business Judgment in Good Faith

When a proposed amendment is submitted to the board as an action item, the directors have the duty to consider and respond to it in compliance with the standard of care required of all corporate directors.<sup>23</sup> The standard of care required of directors is the fiduciary obligation to the organization they serve to make a business judgment in good faith.<sup>24</sup>

<sup>19</sup> Act of Jun. 24, 2018, P.L. 345, No. 45.

<sup>20</sup> This topic is more fully discussed in [The Nature of the Conservation Easement and the Document Granting It](#).

<sup>21</sup> It is the well-settled law of the Commonwealth that the Attorney General is responsible for the public supervision of charities through his *parens patriae* powers. *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa.Cmwlt.2002); *In re Estate of Coleman*, 456 Pa. 163, 317 A.2d 631 (1974). The Commonwealth has *parens patriae* standing whenever it asserts quasi-sovereign interests, which are interests that the Commonwealth has in the well-being of its populace. *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa.Cmwlt.2005). "In every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the Attorney General must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented." *In re Pruner's Estate*, 390 Pa.

529, 532-33, 136 A.2d 107, 110 (1957). It is the duty of the Attorney General to ensure that the purpose of the charity remains charitable. Consequently, the Attorney General always has standing in any case involving a charity. See *In re Milton Hershey School*, 867 A.2d 674, 685 (Pa. Cmwlt. 2005) (reversed on other grounds. For more information, see [Who Has Standing? Conservation Easements in Pennsylvania Courts](#)).

<sup>22</sup> See the WeConservePA guide [Authorization of Real Estate Transactions](#) for an in-depth discussion of nonprofit rules and processes.

<sup>23</sup> Hazen, Thomas Lee, *Punctilios and Nonprofit Corporate Governance*, U. of Pennsylvania Journal of Business Law, Vol. 14, No. 2 at p.375 (2012) (hereafter referred to as "Hazen").

<sup>24</sup> The duty of care for a director exercising business judgment is codified at 15 Pa. C.S. § 5712 (d). See also, *Principles of Nonprofit Law* §365 quoted in Hazen, p. 379.



## Duty of individual directors

The board, acting as a whole, governs the organization but this rule applies to each director individually. Those who serve as directors are personally bound to exercise their own good faith business judgment in casting their vote to approve or reject a proposed amendment.

## Highest standard of faithfulness to the holder

The duty of a director is as a fiduciary—someone who must always put the interests of the organization above any other concern. Policies directed at preventing conflicts of interest help to define situations that may be warning signs of the possibility that a director may, purposely or inadvertently, breach this duty. Several legal rules discussed later in the guide are targeted at preventing directors from benefiting themselves or other private interests rather than the public interest that the organization was created to serve. The overarching principle is that directors may consider a number of views but must act to advance the interests of the organization in light of its mission.

*Example.* In the course of debating a proposed amendment, a director of the holder observes that the amendment does not conform with voluntary standards established by a third party (for example, *Standards for Excellence* managed by the Pennsylvania Association for Nonprofit Organizations, *Land Trust Standards and Practices* published by the Land Trust Alliance, or rules established by the Land Trust Accreditation Commission). The holder's directors *can and should consider this information* (and possible repercussions) in their deliberations about what action the holder should take, but if their judgment is that the amendment is in the best interests of the holder given the entirety of the facts and circumstances, *their fiduciary duty to the holder must prevail over the voluntary third-party standard*. Again, this is not to say that a third-party standard can't be considered in the analysis and deliberation, only that it must not supersede the judgment of a director (and, by extension, the decision of a board).

## Duty to be informed

The law requires that the director be informed with respect to the subject of the business judgment to the extent he or she reasonably believes to be appropriate under the circumstances. The *Guide and Model Policy for Conservation Easement Amendment* furnishes guidance as to the scope of inquiry and information gathering needed to inform the directors of the facts and circumstances underlying each proposed amendment brought to the board for action.

## Duty to act in best interest of a charitable organization in furtherance of its charitable mission

The requirement to act not only in the best interest of the organization but in furtherance of its mission is what distinguishes the business judgment required of a director of a charitable organization from that of a for-profit corporation. In the case of the easement holder deciding an amendment issue, the directors must act to advance the land trust's charitable mission to conserve natural and scenic resources.

## Directors are in best position to make amendment decisions

Both law and custom in Pennsylvania support the principle that the directors are in the best position to make decisions for the holder—including amendment decisions. Directors are individually held to a high standard of faithfulness to make responsible, well-informed, reasonable decisions on all matters affecting the holder, including amendment decisions.

# Legal Benefits of Amending

Decades of experience have vastly improved the quality of grants of conservation easement. As the legal, cultural, and physical landscapes continue to evolve over the coming years, decades, and centuries and as experience with easements and science improve practices, the form of grants will surely change and improve as well. Keeping tabs on which existing grants would benefit from an

upgrade—i.e., amendment—is among a land trust’s stewardship duties.

### Upgrading wording and administrative terms

Amendments that further constrain activities potentially damaging to conservation values obviously may provide a material conservation benefit. Going beyond this, changes to a grant’s wording and administrative terms—from amendments that resolve ambiguity to those that facilitate exercise of the holder’s powers to uphold the easement’s conservation objectives—may deliver tremendous conservation benefit. The difference between a vague grant and one with concrete purposes and covenants can be the difference between total conservation failure and long-term success. Every occasion where an amendment is proposed—even an amendment triggered by a landowner’s self-interest—presents an opportunity to upgrade the legal effect of the existing grant for long-term conservation success.

### Ensuring applicability of the Conservation and Preservation Easements Act

The [Conservation and Preservation Easements Act](#) (the “CPEA”) facilitates the administration and enforcement of conservation easements prepared in conformance with the CPEA as compared to an easement relying solely on [common law](#):

- The CPEA states that, as a matter of public policy in Pennsylvania, conservation easements conforming to the Act are valid, notwithstanding the ways they defy traditional categorization under common law.
- The CPEA directs courts to construe language in a grant of conservation easement in favor of conservation (specifically, in favor of the purposes of the easement and the policy and purpose of the Act). This provides a distinct advantage over the

common law rules, which are generally more likely to preference a less restrictive reading of restrictions on the use of land.

- The CPEA clarifies key matters as to who has the right to enforce a conservation easement.<sup>25</sup>

The CPEA was written to extend these benefits to easements established prior to the CPEA’s enactment (June 22, 2001) that conform to CPEA requirements. However, the Commonwealth Court in 2016 declined to apply the CPEA’s liberal construction standard favoring conservation to interpret a grant of conservation easement that predated the CPEA.<sup>26</sup>

An amendment presents an opportunity to explicitly bring an existing grant under the CPEA, notwithstanding that the original grant predated the statute. Better still, a grant can be amended and restated to bring the entire arrangement up to modern standards, including a provision that explicitly requires interpretation of the grant in favor of the conservation objectives.

## Differentiating Amendments by Impact on the Easement

The conservation easement is an interest in the land. As discussed in [The Nature of the Conservation Easement and the Document Granting It](#), the interest may be described, in plain language, as the power to block land uses within a particular land area that are inconsistent with the conservation purposes of the easement. Enforcing the easement means to exercise this power (and supporting powers) conveyed to the holder to uphold the conservation purposes as set forth in the grant. The grant is the document by which the easement is conveyed. The grant is not the easement, and the easement is not a grant.

<sup>25</sup> See WeConservePA’s [Guide to the Conservation and Preservation Easements Act](#).

<sup>26</sup> *Naylor v. Bd. of Supervisors of Charlestown Twp. & French & Pickering Creeks Conservation Trust, Inc.*, 247 A.3d 1182 (Table) (Pa. Commw. Ct. 2021).

An amendment to the grant may or may not detrimentally affect the conservation easement. As such, it may or may not raise enforcement issues. The central questions in analyzing a potential amendment are:

1. Whether the amendment may be reasonably expected to materially affect one or more of the key components of the definition of a conservation easement; and
2. If so, whether the effect is adverse to, or supportive of, the conservation objectives.<sup>27</sup> The different standards applied to different types of amendments under the *Guide and Model Policy for Conservation Easement Amendment* are tied to this initial, and very important, determination.

An amendment that raises enforcement issues is far more likely to trigger issues under state law (regarding the duty to manage charitable resources responsibly) and federal law governing tax-exempt organizations (as discussed below).

## Relevance of IRC Charitable Gift Rules

Donations of conservation easements only qualify as charitable donations under the IRC charitable gift rules if they are donated to a qualified organization. A qualified organization is a tax-exempt charity or governmental entity that: first, has the commitment to protect the conservation purposes of the donation, and second, has the resources to enforce the conservation restrictions.<sup>28</sup>

For the conservation easement holder, charitable gift rules regarding donation of conservation easements are relevant to conservation easement amendments insofar that poor choices by the holder regarding amendments might call into question whether it is a qualified holder and thus its

ability to accept future donations of conservation easements that qualify for federal tax benefits.

Although speculative, it is conceivable that a holder's execution of amendments detrimental to the conservation objectives of the easements under its stewardship could support an IRS claim that a holder lacks the commitment to protect conservation purposes required of a qualified organization.

Regarding the requirement for a qualified organization to have the resources to enforce conservation restrictions, the IRC charitable gift rules provide no guidance to answer the question "how much is enough?" While a single amendment (or perhaps many amendments) seems unlikely to implicate this question (and no more so than the initial donations of easements), the effect, if any, of an amendment on an organization's enforcement resources could conceivably be relevant.

## Relevance of IRC§501(c)(3) Rules

Provisions in the laws and regulations applicable to qualification of organizations for exemption from federal income tax require the organization not only to state in its application the public interest it is committed to serving but to see that it *continues to operate to serve that charitable purpose*. Thus, to remain qualified for tax-exempt status for federal income tax purposes, an organization recognized as a charitable organization under IRC§501(c)(3) (hereafter referred to as a "charitable organization") must use its charitable assets (including its conservation easements) to serve the public interest—not the interests of private persons.

Two rules have been inferred from the text of IRC§501(c)(3) that, if violated, may result in revocation of the tax-exempt status of a charity.<sup>29</sup> These are the

<sup>27</sup> From this point forward, the conservation purposes of a particular easement are usually referred to as "conservation objectives" so as to differentiate them from the generic conservation purposes described in the IRC charitable gift rules.

<sup>28</sup> IRC § 170(h)(3) and Treas. Reg. § 1.170A-14(c).

<sup>29</sup> Would the IRS revoke the tax-exempt status of a land trust that the record shows made a good faith effort to act responsibly, albeit not as the IRS would prefer, in making an amendment decision? The level of risk is unknown. The published revocation examples demonstrate



*private inurement rule*<sup>30</sup> and the *private benefit rule*,<sup>31</sup> which are discussed in the following two sections.

This discussion is not intended to be a comprehensive or detailed explanation of these rules or how the rules apply to amendment issues. Application of the rules is highly fact-sensitive, and each amendment is based on a unique set of facts and circumstances. The IRS website has comprehensive guides<sup>32</sup> that explain the application of the regulations<sup>33</sup> under IRC§501(c)(3) and the body of judicial decisions that apply the rules to specific fact situations.<sup>34</sup> (Note that none of the IRS resources address situations involving easement amendments.)

## Private Inurement

### Charitable organizations may not provide economic benefits to insiders

The IRC charitable exemption rules describe a tax-exempt charitable organization as one which “no part of the net income of which inures to the benefit of any private

shareholder or individual.” In other words, nonprofit, charitable organizations are not operated to distribute net earnings to shareholders or to individuals who, by course of conduct, are the functional equivalent of shareholders. The lack of a profit motive and the inability to distribute earnings sets charities apart from for-profit organizations (and underpins their relief from taxation). Taxpayers ought not to be supporting organizations that distribute earnings to those who are the functional equivalent of shareholders. Organizations that are found to have violated the private inurement rule risk revocation of their tax-exempt status under the IRC charitable exemption rules.<sup>35</sup>

### Any amount may be fatal to tax-exempt status

With respect to the private inurement standard, the amount of benefit is irrelevant.<sup>36</sup> The purpose of the rule is to be sure that charitable assets of the organization are not distributed to insiders. Cash and other financial

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that revocation may occur with the most egregious compliance failures but they fail to instruct beyond that. For example, [IRS Written Determination 201405018](#), released 1/31/2014, found an organization disqualified because it failed to show that it engaged in any qualified exempt activities. A single individual was the sole founder, sole chief executive, operated the organization at his own discretion and prepared tax returns for donors. The letter ruling found that the organization’s acceptance of donations of conservation easements failed to provide any public benefit.

<sup>30</sup> *Example (Private Inurement)*: A director urges support for an amendment that will permit additional residential development of the property. The director is an investor in a company that will benefit from the increase in development potential. The tax-exempt status of the holder may be jeopardized by the board’s action in accommodating a change benefitting an insider. A tax-exempt charitable organization is described as one which “no part of the net income of which inures to the benefit of any private shareholder or individual” (called the “private inurement rule”).

<sup>31</sup> *Example (Private Benefit)*: Landowners (whether or not insiders) request a change that may, or will, result in economic benefit to them. Further inquiry is needed to determine whether the tax-exempt status of the holder may be jeopardized by implementation of such an amendment. A charitable organization must not only be “organized and operated exclusively for religious, educational, or charitable

purposes” but must continue to operate only for charitable purposes (and not private interests). This is referred to as the “private benefit rule.”

<sup>32</sup> See 1990 Exempt Organization – Continuing Professional Education article published by the IRS entitled “Part C. [Overview of Inurement/Private Benefit Issues in IRC 501\(c\)\(3\)](#)” (the “[1990 Guide](#)”).

and 2001 Exempt Organization – Continuing Professional Education article published by the IRS entitled “[H. Private Benefit Under IRC 501\(c\)\(3\)](#)” (the “[2001 Guide](#)”).

<sup>33</sup> Reg. 1.501(c)(3)-1(c)(2).

<sup>34</sup> As discussed below, published guidance by the IRS on the IRC charitable exemption rules sheds little light on how to apply it to amendment issues. Tests developed to evaluate whether or not exchanges of goods and services for cash constitute private benefit may not apply to amendments of grants without an exchange of consideration or, if they do, it is difficult, if not impossible, to apply the test consistent with the purpose of the rule.

<sup>35</sup> The IRC also authorizes the IRS to impose excise taxes on managers who allowed an improper benefit and the persons who received the benefit. These sanctions, located in §4958 of the IRC (rather than the tax exemption standards contained in §501(c)(3)), may be imposed instead of or in addition to revocation of tax-exempt status.

<sup>36</sup> §3.D. of the 1990 Guide.

benefits, whatever the amount, may not be distributed to those in a position to influence the decisions of the holder.

### **Standard of reasonableness**

Since transactions with insiders may be inevitable, the private inurement doctrine requires that such transactions be tested against a standard of reasonableness. The reasonableness standard focuses essentially on comparisons—how do similar organizations, acting prudently, transact their affairs in comparable circumstances?

#### *No departure from ordinary practice<sup>37</sup>*

The general rule is that if arrangements are indistinguishable from ordinary prudent business practices in comparable circumstances, a fair exchange of benefits is presumed and inurement will not be found.<sup>38</sup>

#### *Unusual economic benefit conferred<sup>39</sup>*

There is no prohibition against an exempt charity dealing with its founders, members, or others in conducting its economic affairs. However, any transaction between an organization and a private individual in which the individual appears to receive a benefit at the organization's expense presents an inurement issue.<sup>40</sup>

### **Who is an insider or other influential person?**

Whenever courts have held that a certain transaction, or course of conduct, constitutes private inurement, the underlying fact pattern is that the benefitted individual stands in a relationship with the organization which offers

him the opportunity to make use of the organization's income or assets for personal gain.<sup>41</sup>

### *Legal Control*

Directors and officers of the holder must be considered insiders as well as anyone else considered to be a person having a conflict of interest in the decision as described in holder's policy on that topic.

### *Influence Over Operations*

The class of insiders is not limited to those who are able to exercise legal control over the organization such as officers, directors, or trustees. Any individuals who have significant influence over the organization's operations may be treated as insiders in an economic sense.<sup>42</sup>

*Example:* A landowner requesting a change to a grant who is a major donor to the holder may be classed as an insider for purposes of application of the private inurement rule. Likewise, a holder who receives substantial support from governmental or foundation grants must consider the possibility that a landowner who is a Board member or official of such entity may be an insider for these purposes.

### **Private Benefit**

The IRC charitable exemption rules require that an exempt organization use its resources exclusively to advance its exempt purposes. This positive mandate carries a negative inverse—that the resources of an exempt organization

<sup>37</sup> Example of non-inurement: An elderly director requests a change to the grant recorded in 1984 against his property. The problem is that the grant does not clearly define the conservation objectives and contains numerous inconsistencies between what is prohibited and what is not permitted. Before the property is transferred, either in his lifetime or upon his death, he wants to have the grant amended and restated using the Model Grant of Conservation Easement and Declaration of Covenants (the current form used by the holder for its easements) to assure that the conservation easement on his property will be strengthened and remain viable far into the future. An inquiry of the facts and circumstances surrounding the proposed amendment does not indicate any economic benefit accruing to the director by implementation of the proposed amendment although it is possible that, under some set of hypothetical circumstances, the covenants in

the amended grant may offer greater economic opportunity than covenants in the original grant.

<sup>38</sup> §3.A.1. of 1990 Guide.

<sup>39</sup> Example: A director requests a change that would release an acre of his property from the conservation easement to facilitate the development of his adjoining non-eased property. The change would result in economic benefit to the director. There is little or no evidence of any compelling justification for the amendment. An amendment such as this does not follow the policies and practices generally accepted by reputable conservation organizations; thus, it is likely that it will be denied the presumption that it is a fair exchange in the ordinary course.

<sup>40</sup> §3.A.1. of the 1990 Guide.

<sup>41</sup> §3.B. of the 1990 Guide.

<sup>42</sup> §3.C. of the 1990 Guide.

must not benefit private interests.<sup>43</sup> Of course, most charitable activities necessarily involve some benefit to non-charitable interests. Vendors profit when they sell goods or services to a nonprofit. Members of the public who are among the charitable class served by a nonprofit may benefit from services and resources the organization provides. The conservation of one parcel of land may increase the market value of neighboring parcels. Charitable organizations could do very little if the IRC charitable exemption rules ruled out *all* transactions where a private benefit is derived by someone, somewhere. The question then is: how can charitable organizations, as they enter into transactions and arrangements with private entities, ensure that they will be viewed as serving the public interest when it is at least possible, and often probable, that private interests will economically benefit from these activities?

### **Differentiating primary purpose from incidental benefit**

An activity that results in a private benefit will not violate the private benefit rule if the private benefit is “incidental.” Whether a benefit is incidental depends upon (a) whether the private benefit is necessary in order to effectuate the organization’s exempt purpose (“qualitatively incidental”),<sup>44</sup> and (b) the magnitude of the private benefit in relation to the public benefit derived from the organization’s activities (“quantitatively incidental”).<sup>45</sup>

While both factors are commonly cited as a two-part analysis of private benefit issues, few formal determinations address them separately. For example, in one frequently cited revenue ruling,<sup>46</sup> a nonprofit’s charitable mission

was to clean and improve a lake for recreational purposes, which provided a clear benefit to lake-front property owners, who were among the primary funders of the charity. The IRS concluded its analysis after finding that the benefits of the organization’s activities flow “principally to the general public,” and that “it would be impossible for the organization to accomplish its purposes without providing benefits to the lake front property owners.” There was no subsequent analysis of magnitude of private benefit to property owners.

## **Application to Easement Amendments**

### **Amendment may benefit both the landowner and the public**

Requests for amendment are typically initiated by the landowners. In many if not most cases the landowners see some personal advantage in the amendment. Especially if additional possible changes identified by the holder and acceptable by the landowner were to be added to the mix, the holder may find that the resulting package of changes would cause no detriment to the easement and provide new and substantial public benefits. The outcomes are mutually beneficial. Unlike typical transactions that involve an exchange of goods and services, with an easement amendment there is *no exchange of value* from one party to the other. The conservation value of the easement may be increased concurrently with an increase in the value of

<sup>43</sup> The charitable exemption rules explicitly prohibit inurement, but do not mention “private benefit.” However, the statute does provide that an entity be “organized and operated exclusively for religious, charitable, scientific” and other specified purposes. Reg. 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as operated exclusively for exempt purposes only if it engages primarily in activities that accomplish one or more exempt purposes. An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. Reg. 1.501(c)(3)-1(d)(1)(ii) provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private

interest. Thus, even if an organization has many activities which further exempt purposes, exemption may be precluded if it serves a private interest. Applying the Supreme Court rationale in *Better Business Bureau of Washington, D. C., Inc. v. United States*, 326 U.S. 279 (1945), the presence of private benefit, if substantial in nature, will destroy the exemption regardless of an organization’s other charitable purposes or activities.

<sup>44</sup> Stated another way, is the private benefit an unavoidable consequence of the organization’s charitable activity?

<sup>45</sup> §4.A. of the 1990 Guide.

<sup>46</sup> Rev. Rul. 70-186, 1970-1 C.B. 128.

the eased property. An increase in one does not necessarily signify a decrease in the other.<sup>47</sup>

The IRC charitable gift rules use the diminution in the market value of land stemming from the granting of the easement as a measure of the value of the easement for purposes of quantifying the charitable deduction allowed for the gift. That measure is also used to measure the minimum amount the holder is entitled to receive were the easement to be extinguished by eminent domain or a court order. The IRC rules dictate this measure for these specific instances; however, this proportionate value valuation method is extremely reductive in that it cannot capture the true value of a conservation easement—its power to protect the conservation value of land, the downstream public benefits that flow from the perpetual exercise of that power, or the intangible features of a grant that render it more or less difficult or costly to enforce. As such, it is not an appropriate measure in other instances (including in a private benefit rule analysis).

Nevertheless, the holder must take care to see that any proposed amendment not only advances the public benefit of conserving natural and scenic resources but that it is viewed in that light and not as conferring more than an incidental private benefit on the landowner. The IRC charitable exemption rules (including guidance available online) do not address easement amendments but do provide a helpful framework for analysis.

### Analyzing private benefit—incidental versus impermissible

- **Primary purpose (operational) test.** The first inquiry in determining if and how much of a private benefit is permissible, as applied to an amendment, is focused on whether the amendment advances the mission of the holder. An amendment that can be demonstrated to strengthen the conservation

easement and advance achievement of conservation objectives is likely to pass the operational test.

- **Incidental benefit test (qualitative and quantitative).** Weighing the incidental benefit of an amendment is more difficult. Two general lines of inquiry have developed, and each is briefly summarized in the following two sections.

### Qualitative test

A private benefit is incidental in a qualitative sense if “the benefit to the public cannot be achieved without necessarily benefiting certain private individuals.”<sup>48</sup> No specific guidance exists as to how this line of inquiry applies to an amendment; however, the holder may, and typically does, have a factual basis on which to conclude that, first, the proposed amendment would strengthen the easement or afford enhanced protection for natural and scenic resources within or beyond the property; and, second, but for provisions in the amendment benefiting the landowner, the holder will not obtain these conservation gains benefiting the public interest.

### Quantitative test

In addition to the qualitative test described above, a private benefit will not be considered incidental if it provides a substantial benefit to private interests, albeit indirectly.<sup>49</sup> This involves weighing any private benefits derived from an activity of an organization against the activity’s public benefits.

The quantitative test—the weighing of private benefits against public benefits—ironically can be a subjective and largely qualitative inquiry. The IRC provides no hard-and-fast rules to guide a nonprofit (or the IRS) in the exercise.

Nonprofits however can look to actual IRS determinations that demonstrate how the IRS applies the

<sup>47</sup> The brief but long-titled WeConservePA guide *Your Loss Is Not My Benefit; Your Gain Is Not My Detriment: The Tenuous Link Between Value to Landowner and Value to Conservation in Easement Transactions* elaborates on this point.

<sup>48</sup> §4.A. of the 1990 Guide.

<sup>49</sup> §4.A. of the 1990 Guide.

quantitative test and finds impermissible private benefit, including, for example, the following:

- A nonprofit was formed for the purpose of promoting the broadcasting of classical music.<sup>50</sup> In practice, however, its activities were in direct service of a single, for-profit broadcaster, consisting of soliciting sponsors, distributing merchandise to promote the station, and conducting general marketing activities. While the stated purpose might qualify for tax-exemption, the IRS concluded that the nonprofit's activities were driving revenues to a for-profit company in a way that was, quantitatively, far from incidental.
- A nonprofit was formed for the educational purpose of promoting community understanding of modern art.<sup>51</sup> A core program was the operation of a gallery space, where artists could show and sell their works. The nonprofit received a 10% commission on each sale with the balance paid to the artists. The IRS determined that receipt by individuals of 90% of the sale proceeds was too substantial to be characterized as incidental to the nonprofit's purpose.

## Application of Tests to Amendment Scenario

The following scenario illustrates a frequently encountered fact pattern encountered as a result of proposed amendments:

*Scenario.* An easement covenant allows selective thinning of a forested property. The grant does not define the meaning of “selective” or “thinning,” nor does it indicate what considerations, if any, need to be observed to minimize harmful impacts to wildlife, the soils, the streams, or the scenic character of the property. Other records do not provide the holder with meaningful guidance as to how the holder should monitor, enforce, or interpret this covenant. A second covenant restricts timber

cutting on one portion of the property to “personal use only.” The holder recognizes the impracticality of enforcing this restriction—having no ability to monitor who is using trees cut on the property. (The holder suspects but can’t confirm that trees are sometimes harvested for non-personal use.) Thus, in practice, these covenants do little to further the easement’s conservation objectives or guide responsible management of the conservation easement.

A proposed amendment desired by the landowners (who are not insiders of the holder) and the holder changes these covenants to allow forestry in accordance with a forest management plan that must be prepared in accordance with strict standards on harvesting and replanting to further the conservation objective of maintaining healthy forest while minimizing intrusion on habitats and preserving the scenic character of the property. The proposed amendment also affords the holder the opportunity to update the grant to use the holder’s present grant boilerplate, which would greatly enhance the holder’s ability to manage the easement in furtherance of the conservation objectives.

### Application of operational test

The amendment furthers the mission of the holder to protect natural and scenic resources and, specifically, furthers attainment of the conservation objectives of the easement. Thus, it conforms to the requirement that the amendment must primarily further the tax-exempt purposes of the holder.

### Application of qualitative test

The next inquiry is whether any benefit to the landowner is qualitatively incidental. There is no question that, in the reasonable judgment of the board, this change is highly beneficial both to achievement of conservation objectives and responsible management of its charitable asset, the

<sup>50</sup> Rev. Rul. 76-206, 1976-1 C.B. 154

<sup>51</sup> Rev. Rul. 76-152; 1976-1 C.B. 151



conservation easement. From the holder's perspective, the request for change is a welcome opportunity to strengthen the conservation easement and modernize the grant. The improvements could not be achieved without allowing landowners to change the method of regulating acceptable forestry from a *selective thinning* standard to a *forest management plan* standard, which is the holder's usual standard. Because the public benefits of the amendment could not be achieved without the possibility of a benefit to the landowner, any benefit to the landowner is qualitatively incidental.

### Application of quantitative test

How does the holder evaluate the profitability to the landowner of (a) harvesting timber for sale in accordance with a forest management plan as compared to (b) harvesting trees based on the landowner's judgment under the ill-defined terms of the existing grant? What weight may be given to the cost to the landowner of paying a forester to prepare (and update on a regular basis) the forest management plan? What weight may be given to the probability that the landowner is surreptitiously harvesting trees for sale anyway, and the legal difficulty of challenging that activity under the existing grant language?

Regulations<sup>52</sup> and other guidance issued by the IRS<sup>53</sup> are of little assistance in answering such questions. There are no pat answers. So, where does that leave the holder in its decision-making? The same place as charitable organizations considering innumerable other actions not involving conservation easements. They must seek what they judge as a reasonable course of action in achieving public benefits without unreasonably benefiting private interests. To help ensure that they are not perceived by the IRS as creating impermissible private benefit, they need to document, as appropriate to the scale and complexity of the action, their thoughtful, deliberate approach to investigating and evaluating the potential public and private benefits of the action (and potential alternative actions).

As unsatisfying as it may feel to some to not have the safety net of absolute rules to follow, the best any charitable organization can do is to responsibly gather the facts, carefully consider them in light of the minimal guidance available, and then seek to act reasonably based on the best judgment of its board.

## Well-Reasoned, Conservation-Focused Amendments Minimize Risk, Fears Notwithstanding

There is a total lack of evidence to substantiate a risk of adverse IRS action triggered by well-reasoned conservation easement amendments that serve a compelling conservation purpose. A review of IRS determinations and tax court rulings on the subject of private benefit *does not support* a conclusion that land trusts invite severe risk when landowners derive a benefit from an amendment that meaningfully advances an easement's public purposes.

The authors of this guide have identified only one case in which private benefit related to an easement amendment was cited in support of the revocation of tax-exempt status.<sup>54</sup> That case, however, *does not support* the conclusion that an application of the quantitative test presents a present danger to land trusts pursuing their charitable mission in good faith. The case involved an amendment to double the landowner's building rights with no reciprocal conservation benefits, along with an outrageous slew of other factual findings of egregious private benefit and violations of law.

Nevertheless, ambiguity around the applicability of the rule against impermissible private benefit (particularly the quantitative test), as well as the required reporting of amendments on IRS Form 990, creates anxiety for a number of land trusts, even with respect to amendments that plainly advance their charitable purposes.

<sup>52</sup> See [IRC §1.501\(c\)\(3\)-1\(F\)\(2\)](#).

<sup>53</sup> See Section 4 of the 1990 Guide and Section 1 of the 2001 Guide.

<sup>54</sup> [IRS private letter ruling 201110020](#) (March 11, 2011).

The following discussion is intended to confront the substantive issues and enable holders to confidently advance conservation.

## Primarily Serving the Public Benefit

The purpose of the rule against impermissible private benefit is to assure that tax-exempt charitable organizations continue to serve the public interest (as opposed to private interests). The IRC charitable exemption rules recognize that sometimes activities that serve the public benefit may also benefit private interests as well. The proper relationship between public and private benefit is phrased as “primarily” serving the public benefit. Another description is that the benefit to private interests must be “incidental.” An exercise of the quantitative test using a valuation method that disregards (rather than weighs) the public benefit of a transaction would contradict the intent of the IRC charitable exemption rules. Thus, across various IRS rulings, analysis of public benefit is a critical factor, even where a private party derives a benefit as well.<sup>55</sup>

Still, some land trusts may deny an amendment that yields a substantial conservation benefit purely out of fear that a *qualitatively incidental* private benefit to a landowner could subjectively be viewed by the IRS as too substantial to be *quantitatively incidental*. This choice ascribes legitimacy to an interpretation of the rules that frustrates the IRC provision from which the rules derive.

## The Fallacy of Replacing Informed, Careful Judgment With a Hard-and-Fast Rule

### Before-and-after valuation is inadequate to the task

Fear of adverse IRS action, compounded by the IRS’s increased scrutiny of conservation easements in the wake of

tax scams involving easements, can motivate interest in creating “hard-and-fast” rules—100% risk-free approaches—for calculating private benefit and making determinations as to whether it is impermissible. This has led most notably to notions that a before-and-after valuation of eased land that is the subject of a proposed easement amendment should be the driving force in determining whether it is appropriate for a holder to approve the amendment. If such a valuation finds that any net financial gain would accrue to the landowner as a result of the amendment, then the notional rule would dictate that the amendment not proceed.

### Pursuing 100% risk avoidance frustrates the purpose of advancing conservation

The illogic and lack of evidence to support the before-and-after valuation are addressed below. However, first, the most fundamental objection to seeking a 100% risk-free approach to easement holder decision-making is that it runs counter to the holder’s obligation to advance its charitable purposes.

### Specious inference from other rules

Research for this guide has found no guidance requiring use of the before-and-after method of valuation for the purpose of weighing public versus private benefit. However, inferences to that effect have been drawn from the rule against private benefit when read together with provisions of the IRC and Treasury Regulations that use before-and-after valuation *for other purposes*. These inferences are problematic in numerous ways.

Monetary valuation is needed in the IRC charitable gift rules for the practical purpose of putting a figure on the allowable deduction for the donation of a conservation easement. Monetary valuation also comes into play under the IRC charitable gift rules to put a figure on holder’s allocable share of proceeds of a condemnation or other

<sup>55</sup> See, for example, Revenue Ruling 67-325, C.B. 1967-2, 113, which relates to an organization exempt under section 501(c)(3) of the IRC providing recreational facilities to the residents of a township. See Revenue Ruling 66-358, C.B. 1966-2, 218, which relates to an

organization exempt under section 501(c)(3) of the IRC operating and maintaining a public park with incidental private benefits. See *Benedict Ginsberg and Adele W. Ginsberg v. Commissioner*, 46 T.C. 47 (1966).

easement extinguishment.<sup>56</sup> In these cases, a particular monetary valuation of a conservation easement is necessary to establish the value of the easement on the date it comes into existence or goes out of existence, relative to the total value of the land it encumbers.<sup>57</sup>

The actual value of a conservation easement, on the other hand, is not reasonably calculable as its impact on the market value of the land it encumbers. The true value of a conservation easement includes matters that defy conventional monetary appraisal: the protection of natural resources, species, viewsheds, recreation space, and more. The value of a given amendment might include public benefits that are equally difficult to appraise: a clarifying amendment that eliminates potential future litigation; an amendment that enhances permanent enforceability; an amendment that enhances conservation in light of natural changes to the eased land over time.

Future conservation benefits anticipated from an amendment are an important element of value and cannot be disregarded. *Where a proposed amendment may, in fact, result in a substantial increase in the value of the encumbered land, the holder needs to weigh this factor along with the extent of the conservation benefits to be achieved. But an amendment that meaningfully advances the holder's charitable mission should not be summarily rejected on the basis of the private benefit entailed.*

## Consideration of Non-Monetary Public Benefit Is Required by IRC Charitable Exemption Rules

Comparison of the public benefit in relationship to possible private benefit is the foundation of the IRC charitable

exemption rules applicable to private benefit. If no weight is given to the non-monetary conservation value of the amendment, then any opportunity to weigh the public benefit versus private benefit is precluded. Such an approach is invalid because it is in direct opposition to the private benefit rules, which require weighing the conservation value to the holder (and to the public) of an amended easement.

## Strategies to Minimize Risk of Adverse Consequences to Holder

A proposed amendment, or its implementation, may, for whatever reasons, attract scrutiny and controversy, notwithstanding the land trust's reasonable, good faith effort to act in furtherance of its mission and, as to the property, in furtherance of the conservation objectives. For example, a wealthy individual harboring ill will for their neighbor who owns the land under easement may seek to sabotage the amendment and anyone involved with no regard for the holder's informed, careful decision-making. For this scenario and others where hostile parties or substantial ambiguity in the application of the law to the particular circumstances exist, the holder may want to utilize one or more of the following strategies.

### Clear Documentation

Easement amendment decisions may involve balancing things that are impossible to balance. This is the appropriate place for a board of directors to apply its discretion in good faith, reasoning its way to a result that is in the best interests of the organization and its mission, and in a manner consistent with its amendment policy and procedures.

<sup>56</sup> The rules for allocating damages in the event of extinguishment are unsettled as of the date of this guide's publication. See *Valley Park Ranch, LLC v. Commissioner*, 162 T.C. No. 6 (2024).

<sup>57</sup> The charitable gift rules (i.e., regarding donations) are separate and distinct from the charitable exemption rules (i.e., regarding nonprofit status). However, those donation rules clearly recognize that an easement contribution to a land trust can be made "exclusively for conservation purposes" where "incidental benefit inures to the donor

merely as a result of conservation restriction limiting the uses to which the donor's property may be put." (26 CFR § 1.170A-14(e)) This provision implies a conceptual acknowledgment of the unique ways a conservation easement may simultaneously affect various rights of the landowner and the holder, and signals a policy preference for advancing good conservation even where a cognizable private benefit results.

Whether or not controversy or hostility is present, it is always wise and advantageous for the holder to have *clear, compelling written documentation to substantiate the decisions made*. Moreover, the process of documenting the rationale for the amendment can lead to a deeper and more considered analysis of the issues. The more difficult it is to plainly state the conservation-focused merits of an amendment in credible, persuasive terms, the more risk may be involved that the holder's judgment will be challenged.

## Indemnity

When a landowner requests an amendment, it is good practice for the holder to request, as a condition of moving forward, an understanding that the landowners will pay the costs and expenses incurred by the holder in considering and, if approved, implementing the amendment. Easement holders may want to consider broadening the scope of the agreement to cover costs and expenses incurred after the amendment becomes effective; for example, those incurred as a result of an inquiry by the IRS or the Attorney General or commencement of a civil action by a person alleging to be an easement beneficiary. Even if the amendment is ultimately found to be valid and consistent with applicable law, the holder will invest time and money responding to the inquiry or civil action. The holder and landowners need to sort out between themselves who is responsible for payment of these expenses before the amendment is implemented.

## Opinion of Tax Counsel

The holder may require, as a condition of finalizing the amendment, production of the opinion of competent tax counsel, satisfactory to the holder, which opinion is addressed to the holder and which states that it may be relied upon by the holder, that in the opinion of such counsel, after reviewing all of the facts and circumstances, neither the proposed amendment nor its implementation, constitutes a private benefit or private inurement in violation of the IRC. The opinion may be expanded to include other

areas of concern, if appropriate; for example, issues arising under state law.

Such tax opinions have limited utility. In the event of an adverse action by the IRS, reliance on advice of counsel may have persuasive value, but will not be dispositive of the issue.

## Letter Ruling

For total assurance, the holder may require, as a condition of finalizing the amendment, production of a letter ruling issued by the IRS confirming that neither the proposed amendment nor its implementation, as explained in the request for letter ruling, will adversely affect the tax-exempt status of the holder.

## Attorney General No-Action Letter

The holder may want to consider notifying the Attorney General of any occurrence (including a proposed amendment) that may be viewed by others (if not by holder) as a breach of a holder covenant or a possible violation of holder's duties as a charitable, nonprofit organization under state law. The notice may include additional information which the holder has relied upon in its determination that the action does not violate any holder covenant and is otherwise consistent with applicable law. The holder may request a "no action" letter evidencing the Attorney General's lack of objection to the proposed occurrence.



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