

Amending Conservation Easements

Evolving Practices and Legal Principles



Land Trust Alliance

Amending Conservation Easements: *Evolving Practices and Legal Principles*

2ND EDITION

2017

The Land Trust Alliance's mission is to save the places people love by strengthening land conservation across America.

Founded in 1982, the Land Trust Alliance is a national land conservation organization that works to save the places people love and need by strengthening land conservation across America. The Alliance represents 1,100 member land trusts supported by more than 100,000 volunteers and five million members nationwide. The Alliance is based in Washington, DC, and operates several regional offices. More information about the Alliance is available at www.landtrustalliance.org.

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For information, write the Land Trust Alliance, 1250 H St NW Suite 600, Washington DC 20005 (202-638-4725, www.lta.org).

Edited by Sylvia Bates, Mary Burke.

Designed by Peter Holm.

This publication is designed to provide accurate, authoritative information in regard to the subject matter covered. It is produced with the understanding that the Land Trust Alliance is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of experienced professional advisers should be sought.

Cover photo: Sawyer Quarry Nature Preserve (OH). The easement was amended to include additional acreage and bring language up to current standards. Photographer: Andrew Cole. Used with permission of Black Swamp Conservancy.

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FOREWORD AND ACKNOWLEDGMENTS

This report, originally published in 2007 and now updated in 2017, reveals the complexity and range of perspectives in easement amendment decisions. It identifies seven definitive amendment principles that should guide all easement amendment decisions and provides questions to help land trusts evaluate amendment requests and potential risks. This report also presents a range of case studies that can help land trusts when deciding 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 provides further clarification and details to assist land trusts as they develop amendment policies and procedures and evaluate and implement proposed amendments. 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 results.

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 conserve 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 programs across the country at risk.

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Introduction

Overview: Changes from the 2007 Report

Since its initial publication in 2007, *Amending Conservation Easements*, informally called the Amendment Report, has been one of the most commonly used and referenced Land Trust Alliance publications. One of the themes of this report is that land trusts need to plan for and respond to changing laws, standards and circumstances when considering amendments. Thus, it makes sense that the report will need occasional updates to remain useful. In the 2017 edition, there is no change to the fundamental concepts and conclusions of the 2007 report. Rather, the new edition brings in post-2007 information based on state enabling statute changes, new case law, Land Trust Accreditation Commission requirements and Land Trust Alliance research projects.

In terms of recent research, the 2017 edition draws upon information contained in *A Guided Tour of the Conservation Easement Enabling Statutes*, which includes a lengthy analysis of amendment and termination. Furthermore, in 2014 the Alliance conducted two different statistical studies of easement amendment and termination, the findings of which are summarized in *Results of Land Trust Alliance Research and Survey on Easement Modification and Termination*, Land Trust Alliance, 2014. In addition, the Alliance commissioned a report to delve into some of the responses to the 2014 surveys, which led to the *Follow-Up Report on Terminations and Amendments*, Robert H. Levin, August 2015. (These reports can be found on the Land Trust Alliance's [Learning Center](#).)

Here are the key changes in the 2017 edition:

- *Restructure*. Various parts of the document have been restructured to provide a better flow and to centralize treatment of discrete topics. For example, the original introduction and executive summary have been consolidated into a single introduction (chapter 1). The amendment principles are now centrally located in their own chapter. Meanwhile, the previous sections on amendment

policies and amendment procedures have been consolidated into one new chapter. Sidebar features that were scattered throughout the case studies have been relocated to other relevant sections.

- *Accreditation Requirements Manual*. Where appropriate, references to or citations from the Land Trust Accreditation Commission's *Accreditation Requirements Manual: A Land Trust's Guide to Understanding Key Elements of Accreditation* have been added.
- *Documenting impermissible private benefit and private inurement*. The sidebar on documenting the existence or lack of impermissible private benefit and private inurement has been expanded to provide more nuance and to add information from the Land Trust Accreditation Commission *Requirements Manual*.
- *Overhaul of state enabling statutes section*. The subsection addressing the state conservation easement enabling statutes has been reworked to reflect recent case law and new research on these statutes. Much of this information is taken from the 2014 enabling statutes report.
- *More stringent IRS positions*. The Internal Revenue Service (IRS) has adopted fewer forgiving positions in recent years. In its March 2016 statement *Abusive Transactions Involving Charitable Contributions of Easements*, the IRS noted it is seeing taxpayers that have sometimes used or developed easement properties in a manner inconsistent with section 501(c)(3) and charities that have "allowed property owners to modify the easement or develop the land in a manner inconsistent with the easement's restrictions" (see www.irs.gov/charities-non-profits/conservation-easements).
- *Charitable trust doctrine*. The section on the charitable trust doctrine has been simplified to provide practical guidance for land trusts (the legal discussion has been moved to Appendix D).
- *Deviations from the original grantor's intent*. A new paragraph has been added to the "Outside the Amendment Principles" section to discuss when an amendment that deviates from the original grantor's intent may be considered.

- *Four corners issue.* Discussion of the four corners issue has been consolidated into one section, which has also been updated to reflect recent case law, as well as data contained in the *Follow-Up Report on Terminations and Amendments*.
- *Case studies.* The case studies have been updated to reflect current best practices.

Navigating Perpetuity

When a land trust accepts a perpetual conservation easement, it 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 of 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 are also robust, enforceable and fair, both to the public and to the landowners. The concept of amendment recognizes that neither original grantors nor land trusts are infallible, that natural forces can transform a landscape in a moment or over a century and that amendments can strengthen protections as well as weaken them. Exceptional circumstances sometimes warrant amendments, and a land trust should be prepared for that possibility while also remaining vigilant in protecting an easement’s purposes and restrictions forever.

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. Or perhaps a landowner proposes adding substantially more acreage to an easement in return for relaxing a forbidden land use practice. Addressing these complex amendment proposals involves difficult judgments, thorough legal and factual analysis and

Most conservation easements are written to last in perpetuity. Approach any change to a conservation easement with great caution and careful scrutiny.

legal and scientific expertise. Experts do not always agree on what or how public interest policies should apply and may even disagree on what laws govern. Some of the case studies in chapter 7 demonstrate how land trusts might respond to these amendment situations.

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*. What can we learn 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 experienced land trusts, legal practitioners and legal academics.

Land trusts cannot act alone in their decisions because a number of groups have a vested interest in the success of easements. First, the IRS has a direct interest in the operation of all nonprofits and in amendments to easements for which landowners took tax deductions. This interest is reflected in audit guidelines and in IRS Form 990 questions and instructions and in other ways.¹ In addition to the IRS, landowners, donors, funders and others watch amendment decisions and may alter their actions as a result.

Land trusts also cannot disregard funder, 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 lose goodwill in their communities, which will jeopardize future easement conveyances. An angry donor or land trust member may generate enormous adverse publicity sufficient to chill an easement program for many years. In all cases, land trusts must treat those who seek amendments with respect, whether an amendment is possible or must be denied.

The Land Trust Alliance does not have all the answers to these complex issues. No one does. Easement amendments occupy an evolving area of law, and each amendment arises in a unique context of varying facts, circumstances 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 early 2017. Each land trust must consult its own experienced legal counsel and other advisers and determine its own level of risk tolerance in addressing amendment issues.

Just as the land trust community demonstrated its commitment to excellence by establishing *Land Trust Standards and Practices* and the Land Trust Accreditation Commission, so too will the community lead the way in finding the best professional and ethical solutions

to the challenges of drafting, stewarding and amending conservation easements. Although differences in legal opinions will continue, we honor the diversity of expert thinking that enriches and informs our community. What we share is a commitment to the value of private land conservation, a concern for the long-term success of perpetual conservation easements and a commitment to keep the public trust through highly ethical operations.

The diversity of opinion has developed in part because guidance from the courts and the IRS is primarily episodic and case specific. Many individual IRS publications, Tax Court opinions and appellate decisions have been triggered by the specific facts of one conservation easement and its provisions, sometimes its amendment. Does the determination in that instance apply with full force to a similar or different easement? Should the land trust community expand the impact of an opinion or decision to govern other circumstances or limit the impact only to those facts or to similar facts? No Internal Revenue Code provisions address amendments directly, and the Treasury Regulations offer no direct guidance. Both protect the perpetuity of conservation easements, but various kinds of amendments and circumstances triggering amendments also protect perpetuity.

For many years, the IRS indicated that at least scrivener's errors, omitted easement exhibits and bona fide boundary disputes are appropriate instances to amend conservation easements.² Similarly, court decisions over the years affirmed that at least some amendments are proper.³ Certainly, the land trust community has always understood that some amendments in some circumstances are appropriate and even necessary.

The Dilemma of Change

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

Land trusts need a thoughtful approach to deal with change. 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. Moreover, a land trust may find itself in circumstances where proposing an amendment itself is the best solution to resolve a conservation easement violation. 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.

The Dilemma of Uncertainty

There is no one-size-fits-all approach, primarily because each conservation easement amendment proposal involves unique facts, laws vary from state to state and there has been little guidance from the federal government or courts. Conservation easements are a relatively new tool, and little legal precedent exists today to guide amendment decisions. Overlapping (or contradictory or silent) federal and state laws impose requirements that may be difficult to translate into practice on the ground. Chapter 2 tries to unpack and interpret these various legal issues.

In spite of this background of legal uncertainty, land trusts still must respond to landowner requests and may also encounter situations in which proposing an amendment resolves a stewardship issue. Land trusts should undertake these decisions in ways that minimize the risk of error. Land trusts that follow conservative policies satisfying the most stringent laws that might apply may create unnecessary work or be overly rigid in considering amendment proposals. Land trusts that adopt lax policies or practices may not comply with legal or ethical requirements, may place their nonprofit status at risk and may lose donors and community respect. 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 the desire to settle a dispute, eliminate a monitoring burden or obtain a new benefit.

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 grantors, members, affected landowners, funders, federal and state regulators and the general public. Because state and federal laws on some types of easement

amendments are uncertain, land trusts should approach amendments with caution.

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.

Despite the cautions described here, legitimate amendment proposals 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 by improving and upgrading outdated easement language, increasing resource protections and creating other positive conservation results. However, deciding to grant an amendment should be made consciously and deliberately, in light of all known factors and possible risks. The key is to create a policy based on the guiding principles outlined in this report. This policy governs all amendment decisions to ensure consistency and fairness and to serve as a reminder that all amendments must serve public and not private interests.

The Amendment Principles: A Guide to Resolving Dilemmas

The heart of this report is the enumeration and exploration of the amendment principles. These principles represent an attempt to bring order to the diverse factors at play in amendment scenarios. Following the amendment principles will minimize the risk of overlooking an important issue. Since this report's initial publication in 2007, many land trusts have directly incorporated the amendment principles into their amendment policies and practices. Land trust accreditation also requires that all amendments satisfy the amendment principles.

No amendment policy should be more permissive than the amendment principles allow, but some land trusts may choose to adopt more conservative amendment guidelines. The amendment principles are discussed in detail in chapter 3.

The Legal Context

Any discussion of conservation easement amendments must begin with a grasp of the fundamental federal and state laws that apply and an understanding of the origin of the easement.

Land trusts that choose to ignore legal limitations on easement amendments run the risk of 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 can be very severe and, in the most egregious cases, may include loss of tax-exempt status.

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.⁴ Legal counsel should analyze both federal law and applicable state law, rather than relying exclusively on either one, because all of these principles may have varying applications in the different states. Federal law will govern if applicable, whether or not it is in conflict with state law.

Federal Law: IRC Section 170(h) and the Treasury Regulations

If the conservation easement was created as a charitable contribution to be claimed for a federal income tax deduction, then Internal Revenue Code Section 170(h) and the Treasury Regulations Section 1.170A-14 apply if the deduction is taken. The Code and Regulations have the following requirements. 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 a qualified charitable organization that agrees to continue to enforce the easement. The holder can only

CONSERVATION EASEMENT ORIGINS

Conservation easements may be created:

- By donation, with or without a federal deduction for the amount of the donation
- By purchase or bargain sale, with government or donated funds, with or without a federal deduction based on the bargain sale amount
- By exaction, as a result of land use regulatory processes
- In settlement of a dispute or enforcement proceeding
- By reservation, in which land trust land is transferred by the land trust subject to an easement

Federal and state law may apply differently to amendments to conservation easements of different origin. Thus, any legal analysis should consider the origin of the easement. This report broadly deals with easements regardless of origin but is geared to meet the requirements of easements with donated or bargain sale elements.

terminate or extinguish an easement via a judicial proceeding when changed conditions surrounding the subject property have made the continued use of the encumbered land for conservation purposes impossible or impractical. Payment must be made to the holder of a share of proceeds proportionate to the easement's value from a subsequent sale or development of the land. The proceeds must be used for similar conservation purposes. All modifications to easements must be reported and concisely described on Form 990, as described below. Finally, to be eligible to accept tax-deductible conservation easements, a land trust, according to the IRC, "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 ends of the spectrum of permitted and prohibited amendments can be discerned. A land trust that lacks the required commitment or resources may lose its nonprofit status if it agrees to amendments that violate the perpetuity requirement or otherwise fail to protect the conservation purposes of the donated easement.

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.⁵ To the extent an amendment amounts to a partial extinguishment or termination, a conservative approach and federal law dictate that the land trust must satisfy all of these requirements.⁶ While all modifications to easements must

Recent reports commissioned by the Land Trust Alliance reflect a lack of consistency and diligence in how land trusts are completing Schedule D with respect to amendments and terminations. For example, the Alliance's 2014 report found that, of the 553 reported amendments analyzed over a five-year period, 30 percent lacked a description and 12 percent of the descriptions were ambiguous or unclear on Schedule D. In part, this may be due to the fact that the requirement of a written description is spelled out only in the Schedule D Instructions and not on Schedule D itself. Another possibility is that there is significant variation in how the Form 990 and Schedule D are prepared; some land trusts use a CPA who specializes in nonprofits, others use a less-specialized CPA or accountant and others prepare the documents in-house. Furthermore, there was a large drop-off in the reported total number of conservation easements held by land trusts between 2011 and 2012, suggesting that many land trusts failed to complete Schedule D in 2012. Likewise, the 2015 *Follow-Up Report on Amendment and Termination* noted some confusion by land trusts staff with respect to past Schedule D responses. In any event, land trusts are encouraged to ensure that their Schedule D filings are fully accurate because the information on the form is useful not only to the IRS and the general public but also to the wider land trust community. Also note that complete and accurate filing of all applicable sections of the Form 990, including Schedule D, is a requirement for land trust accreditation.

be reported and concisely described on Form 990, the IRS does recognize that correction of errors and other administrative clarifications are expected and may not need a judicial proceeding.⁷ Land trusts may want to consider using a judicial proceeding or attorney general review whenever the evaluation of risk and the level of certainty present significant doubts.

In recent years, the U.S. Tax Court and a U.S. Court of Appeals have agreed with the IRS that certain substitution or exchange provisions in a conservation easement can cause the easement to fail under section 170(h). These provisions differed somewhat from case to case, but each of them expressly allowed the landowner to remove some land from the conservation easement in exchange for adding other land. These substitution provisions were included in addition to the more standard amendment provisions found in most easements. In three separate cases, the courts held that the substitution provisions disqualified the easement deductions under section 170(h)(2)(C) because a specific parcel of real property was not protected in perpetuity.⁸ These cases will be further discussed, but they are noted here to underscore that the IRS and the courts take seriously the perpetuity requirements of section 170(h).

IRS Form 990, the annual report filed by tax-exempt organizations with average annual revenue exceeding \$50,000 a year, now

requires land trusts to provide detailed information on Schedule D about their easements and any amendments (called *modifications* on the form), transfers, sales, releases, extinguishments or terminations, including a concise explanation of the modification and the reason for it. Completed Form 990s are available on the Internet⁹ 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 to the public and underscores the IRS's current interest in easement amendments.

Federal Law: Private Inurement and Impermissible Private Benefit

Federal tax law prohibits tax-exempt nonprofit organizations from disposing of their assets in ways that create impermissible private benefit or private inurement. This prohibition means that a land trust cannot participate in an amendment that conveys either a net financial gain to any private party unless that amount is insubstantial or a necessary incidence of accomplishing a greater public benefit. Furthermore, an amendment cannot provide any measurable benefit at all to a board or staff member or other land trust insider (other than fair compensation for services).¹⁰ A land trust that engages in impermissible private benefit or private inurement risks losing its tax-exempt status. Those that engage in private inurement may also suffer financial penalties known as *intermediate sanctions for excess benefit transactions*. These prohibitions apply to amendments to *all* conservation easements held by tax-exempt organizations, 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.¹¹

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.¹² Private inurement often arises when an organization pays unreasonable compensation (that is, more than the value of the services) to an insider, 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 bar all transactions between a publicly supported charitable organization and those who have a close relationship to it. Many land trust board members, for example, donate conservation easements to their land trusts. Instead, such transactions are tested against a standard of reasonableness that calls for a roughly equal exchange of benefits among the parties and looks to how comparable charitable organizations, acting prudently, conduct their affairs.¹³ 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 1997 empower the IRS to impose an excise tax (a financial sanction) on the excess benefit to insiders who improperly benefit from transactions with a nonprofit.

Most transactions that implicate the private inurement prohibition are also conflict of interest transactions under state law.

Impermissible Private Benefit

The doctrine of impermissible private benefit generally prohibits a tax-exempt organization from using its assets to benefit *any* individual or entity, not just an insider. Land trusts must consider the public benefit in all land and easement transactions, including amendments. Accordingly, the doctrine of impermissible 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 because the benefit to the public cannot be achieved without necessarily benefiting private individuals.¹⁴ A *quantitatively incidental* private benefit is insubstantial when viewed in relation to the public benefit conferred by the activity.¹⁵ Conveyance of incidental private benefit is often unavoidable. Knowing what the IRS would consider "incidental" is difficult. Land trusts should consult with experienced legal and other advisers (such as an appraiser) to make the determination and *document their due diligence*. A charitable organization that violates the impermissible private benefit prohibition risks the loss of its tax-exempt status.

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 the easement only allows the existing house. This proposed amendment would clearly put dollars in the landowner's pocket, by increasing the fair market value of the property.¹⁶ The amendment would convey impermissible private benefit in violation of the law.

Incidental and, Therefore, Permissible 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—that is, the benefit to the public from the conservation easement could not be achieved without necessarily benefiting the neighboring landowners. Accordingly, this effect is considered incidental private benefit.

Documenting the Existence or Nonexistence of Private Inurement and Impermissible 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 there is any concern as to impermissible private benefit or private inurement, the land trust should consult an experienced tax or conservation attorney and other advisers, then obtain or create appropriate documentation to help establish that no private inurement or impermissible private benefit resulted from the amendment. Documentation might include appraisals or other contemporaneous evidence (such as a letter of opinion from a qualified real estate professional, correspondence with an attorney, board materials, memos to the file and so forth) appropriate to the scope of the activity and the scale of the amendment.

The land trust should document the lack of any potential financial gain to a degree commensurate with the likelihood of gain. If an amendment 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. If there is only a remote chance that the amendment would increase the value of the landowner's property, then an opinion letter by a real estate agent or an appraiser might be sensible documentation.

If there is a realistic potential or appearance of private inurement or impermissible private benefit, the land trust should obtain a professional appraisal or analysis by an appraiser that evaluates the financial

impact of the proposed amendment on the subject or other property of the landowner. If there is no gain, then the appraisal or analysis documents that fact for the permanent file and may be used to defend against any later claims that the amendment conferred impermissible private benefit or private inurement. If there is gain, the appraisal provides a basis on which to negotiate terms to offset the financial gain to the landowner or to deny the amendment proposal. An attorney or appraiser can assist in determining what level of documentation is appropriate. (Note: Corrections of mutual mistakes in easements are an exception to the rule that an appraisal is needed, but *only if* any appraisal for tax purposes contemplated the correct terms or interpretation and not the error.)

Unfortunately, in certain geographic areas there is a lack of appraisers who are experienced with conservation easements. Occasionally, land trusts have sought an appraisal of an amendment but have not found an appraiser qualified and willing to take the assignment. On other occasions, an appraiser accepts the assignment, but the cost is excessive. If a land trust finds itself in either of these situations, it should fully document its attempts to obtain an appraisal at a reasonable cost and then seek to obtain the next best level of independent documentation, such as a letter of opinion from the appraiser or a real estate professional. Some amendment provisions require the owner who seeks an amendment to pay all associated expenses, so cost should not be an issue for the land trust. Also, in some circumstances, a general real estate appraiser may be able to provide an adequate assessment.

State Law: Conservation Easement Enabling Statutes

Every state except North Dakota has enacted some form of perpetual conservation easement enabling statute. These enabling statutes serve as the frame upon which thousands of easements have been granted in recent decades. Many states passed enabling statutes in order to counter the possible illegitimacy at common law of a negative, perpetual easement in gross and to establish the validity of conservation easements.

A clear majority of the conservation easement enabling statutes does not explicitly restrict amendments or terminations.¹⁷ In fact, only 13 of the 50 statutes provide any procedural or substantive restrictions at all. And of these 13, only four can arguably be said to provide any sort of comprehensive approach to the issue. For a

chart showing how each state's enabling statute addresses a variety of issues, including amendments, and a checklist of useful enabling statute provisions, see Appendix B.

The conservation easement enabling statutes can be loosely classified into a handful of categories, each of which offers different treatment of amendment and termination. As of January 2017, 21 states, plus the District of Columbia and the U.S. Virgin Islands, have adopted some version of the Uniform Conservation Easement Act (UCEA), a model enabling statute first published in 1981. The UCEA contains two provisions concerning amendments. Section 2(a) of the UCEA states that easements “may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” Meanwhile, section 3(b) provides: “This 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.” Section 3(b) addresses amendment and termination in a judicial context, and the reference to “principles of law and equity” may be an allusion to charitable trust common law principles.

The meaning of sections 2(a) (and, to a lesser extent, section 3[b]) of the UCEA has been the subject of much debate in the legal, land trust and academic communities. Differing interpretations of section 2(a) exist, depending on the specifics of the particular state law and depending on the interpretation of the particular legal adviser applying the facts of the specific circumstances to actual on-the-ground conservation issues. Sections 2(a) and 3(b) offer little guidance to states for how specifically to address amendment and termination, procedurally or substantively. These sections invite the opportunity for clarification of a state's statute within its existing legal framework of case and statutory laws. For a detailed discussion of this debate, see the Land Trust Alliance's *Guided Tour of the Conservation Easement Enabling Statutes*, available on [The Learning Center](#) (updated in 2014).

Most of the non-UCEA-based enabling statutes are silent on the issue of amendment and termination and, thus, do not provide useful guidance for landowners, land trusts and the courts, even when federal law is inapplicable and state law would control. A few enabling statutes (Alabama, Florida, Illinois, Indiana) address termination and amendment directly. For more information on the conservation easement enabling statutes, see *A Guided Tour of the Conservation Easement Enabling Statutes*.

As of January 2014, nine different statutes (Arizona, Maine,

Montana, Nebraska, New York, Pennsylvania, Rhode Island, Virginia and West Virginia) provide both amendment and termination restrictions of one sort or another. Another four statutes (Iowa, Massachusetts, Mississippi and New Jersey) provide restrictions only on termination, although in New Jersey and Massachusetts, at least, the relevant governmental agency interprets the statutory language to also apply to amendments that are contrary to the easement's purposes.

Four different state statutes (Maine, Montana, Nebraska and Rhode Island) include comprehensive restrictions on both amendment and termination. Maine enacted a thorough overhaul of its amendment and termination provisions in 2007, and Rhode Island followed suit in 2012.¹⁸ Maine and Rhode Island's enabling statutes address common amendment and termination methods and impose a blanket minimum standard on non-court-approved amendments. Namely, they require that amendments do not "materially detract from the conservation values intended for protection." Thus, even if the holder and landowner agree on an amendment, they may not execute it without court approval if the amendment materially detracts from the conservation values (the characteristics of a property that provide important benefits to the public and make the property worthy of permanent conservation) intended for protection.

Maine and Rhode Island's statutes generally follow a public oversight approach, while at the same time leaving the holder a degree of discretion in deciding how to apply the standards.¹⁹ Given that an amendment not in compliance with the statutory requirements would be legally void, owners and holders are motivated to be cautious about agreeing to amendments that do not clearly comply with the statutory requirements. Owners are motivated to avoid a cloud on their title, and holders want to avoid approving prohibited activities, violating their fiduciary duties to easement donors and the public and conferring private benefit. The state attorney general's office performs a public service by providing informal advice regarding whether a proposed amendment requires court approval.

Finally, New Hampshire and Massachusetts deserve mention because although their respective statutes do not contain detailed termination and amendment restrictions, New Hampshire's Office of the Attorney General issued comprehensive formal guidance, and Massachusetts's Department of Environmental Protection has a consistent practice to oversee amendments and terminations.²⁰ The

full text of the UCEA and the comments, as amended in 2007, can be found online at the Uniform Law Commission.

State Law: Laws Governing Charitable Organizations

All 50 states have laws governing the activities of charitable nonprofits formed under their laws or operating within their jurisdictions. These laws seek to ensure that charities operate in accordance with their governance documents, honor the intent of their donors and fulfill their public purposes. A division of each state attorney general's office usually has oversight of charitable organizations, although some states assign these responsibilities to other agencies. States vary significantly in the number of staff assigned to this purpose and in their focus and funding.²¹

Most land trusts are charitable organizations, and the conservation easements they hold might be characterized as charitable assets conveyed for specific charitable purposes. Some authorities believe that conservation easements constitute restricted charitable gifts or *charitable trusts* subject to state charitable trust law. (See Appendix D for a brief primer on the charitable trust doctrine.) Few land trusts formally draft conservation easements as charitable trusts. Even if not expressly so written, however, it is possible that a state attorney general, other public officials or the courts may construe a specific conservation easement as a charitable trust (except in states where there is clear enabling language and clear easement drafting to indicate that conservation easements are unrestricted gifts of real property interests).

The states vary. Montana, for example, permits a conservation easement to create a charitable trust if the documents are clear in their purpose. This express clarity of purpose is not required in other states.²²

Occasionally, some states have construed a particular easement as having characteristics that subject its termination to public oversight. When 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's common law and whether there are superseding statutes that would trump the common law doctrines, the applicability of federal law, the manner in which the land trust acquired the easement, the nature of the proposed amendment, the authority to amend included in the easement and other circumstances.

The details of various laws vary from state to state, and a land trust must, therefore, consult with qualified legal counsel about the specific state law in question as applied to the specific facts under consideration. 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 and the easement terms and subject to applicable federal and state law.

Absent an amendment provision, the land trust has those implied powers under state law to amend the easement with the landowner consent. To the extent changed circumstances necessitate an amendment to the easement that exceeds the land trust's express or implied powers under state law, the land trust can seek judicial or other regulatory body approval of amendments. The doctrines of administrative deviation or *cy pres*, or other superseding federal or state statutory law or administrative procedure, may have a role in determining the extent of amendment authority.²³ For example, a land trust and landowner could use *cy pres* to amend an easement on farmland that is now under water due to climate change. Finally, *cy pres*²⁴ is usually inapplicable to easements purchased at fair market value.

Section 414 of the Uniform Trust Code (UTC), which applies to trusts generally, allows for the modification or termination of certain "uneconomic" trusts. The section specifically provides that it does not apply to "an easement for conservation or preservation." A UTC comment in this section explains that a conservation easement "will frequently create a charitable trust." As of late 2015, 31 states have adopted the UTC, and some states have expressly excluded or modified section 414 in order to separate conservation easements from charitable trusts.²⁵

Finally, the Restatement (Third) Property: Servitudes §7.11 adopted by the American Law Institute in 2000 has special provisions limiting amendment 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."

The UCEA, the UTC and the Restatement are not "the law" in their own right, but the first two are the law in those states that have adopted them. All three sources are respected authorities in every state. Moreover, although the 2007 commentary to the UCEA has

not been adopted or endorsed by any state, and commentary does not have the full force of law, courts have looked to uniform law comments to construe state laws based on the uniform laws when there is uncertainty or ambiguity. What is clear is that there is significant uncertainty, and land trusts and their advisers would be prudent to take a measured balanced approach.

Donor Protection Laws

A variety of state statutes create donor protection laws. The land trust's attorney should evaluate and advise the land trust about whether these laws might apply to certain conservation easement amendments. These laws broadly include charitable solicitation and other consumer protection laws and fiduciary laws. The laws address intentional deceptive practices, which, in egregious circumstances, might include soliciting an easement or an amendment. For example, a land trust accepts an easement donation from an elderly landowner with clearly unenforceable clauses that are of particular concern to the landowner. The land trust attempted to negotiate other language, but the donor insisted, and the land trust accepted the easement anyway. The board agreed to take the easement, intending to amend it after her death to remove the unenforceable restrictions. The conversation is memorialized in the board minutes. Of course, no legitimate land trust should take this action because it is, at best, poor relationship building and, at worst, deceptive or even illegal. But if one did, then possibly the heirs or the attorney general might have a donor protection law cause of action. These causes of action include:

- a. *Charitable Solicitation and Other Consumer Protection Laws.* As of March 2014, 40 states had enacted some form of charitable solicitation statute, specifically prohibiting fraudulent solicitation, while other states address the issue by common law.²⁶ What constitutes fraudulent solicitation is extremely fact dependent, usually with an assessment of intent to deceive or defraud. A variety of consumer protection laws may also apply, depending on whether charities are seen to engage in commercial transactions. A land trust will want to be honest about its stewardship administration, its amendment policy and other policies with grantors and funders to avoid personal and regulatory causes of action for fraud and deceit. To date, however, there have been no reported cases of such claims nor state attorney general actions on such a basis.

Nonetheless, land trusts must consider the implications of all applicable state laws in amendment decisions and, most especially, those decisions that are on the highest end of the risk spectrum.

- b. *Fiduciary Laws.* Most states have a statute or common law that protects vulnerable individuals, such as the aged or incapacitated. In other states, the protection also extends to any weaker or less knowledgeable person. In these circumstances, the state imposes a fiduciary duty upon the advantaged party to act in the other party's best interests or, at a minimum, not to deceive or take advantage of the other party. Certain transactions by charities, perhaps including conservation easement amendments, could be covered by these statutes and a cause of action for breach of fiduciary duty. 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" (see 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 when an individual donor has relied on the charity and the charity has known of the reliance and taken advantage. Breach of fiduciary duty typically supports recovery of punitive damages, as well as recovery of property and compensatory damages. In addition, the publicity from such a lawsuit would be adverse, especially if the land trust loses the lawsuit. Even if there is no legal basis for a lawsuit or court action, it behooves land trusts to treat everyone respectfully and to be transparent, open and honest in all actions. Following good practices will protect a land trust's most valuable asset: its reputation.

Conflict of Interest Laws

All nonprofits must comply with state and federal laws prohibiting certain actions by board members and staff who have a conflict of

interest. At the federal level, conflict of interest transactions will usually be governed by the private inurement prohibition that comes along with 501(c)(3) status, but a variety of state laws are also relevant. In addition, because the definition of a *conflict* varies to some degree from state to state, a conflict may arise in circumstances that do not involve private inurement. For example, a New Hampshire statute imposes strict limits on financial transactions between nonprofits and their board of directors, and certain transactions require prior approval by the probate court because the Office of the Attorney General declared conservation easements to fall under charitable trusts.²⁷ This is an example of how state laws can affect a conservation easement amendment particularly involving a board director land-owner, so land trusts must exercise care and have a knowledgeable attorney examine all applicable state laws relevant to the facts and circumstances of the amendment before them.

Land trusts must interpret state law in tandem with their internal conflict of interest policies. Often a board will draft a policy to apply more strictly than state law requires, including a more expansive definition of who is an insider or interested party, following the example of Practice 4A of *Land Trust Standards and Practices*:

Dealing with Conflicts of Interest

1. Adopt a written conflict of interest policy that addresses, for all insiders, how conflicts are identified and avoided or managed
2. Document the disclosure and management of actual and potential conflicts
3. When engaging in any transaction with an insider,
 - a. Follow the conflict of interest policy
 - b. Contemporaneously document that there is no private inurement

Furthermore, the practice expressly requires compliance with the land trust's conflict of interest policy when addressing amendment requests (4A3a, above). 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.

Land trusts should consult with experienced legal counsel and other land trusts active in the states where they operate for guidance on these matters. For new easements, land trusts should nego-

tiate with easement grantors for the desired level of amendment discretion and include an amendment provision in easement deeds expressly granting them such discretion, subject to federal and state law requirements, so there is no confusion or misunderstanding regarding the land trust's ability to agree to amendments in the stated circumstances.

Contract Law

Conservation easements are typically treated as involving elements of both real property interests and contracts. Land trust advisers will need to evaluate state law on real property and contracts in any modification consideration. Additionally, easements that are partially or completely funded by grants from private foundations or government agencies may also be subject to binding grant agreements (sometimes called project agreements) that may have implications for modifications of particular easements they funded. Land trusts will need excellent recordkeeping in order to ascertain if any third-party contracts affect easement modification decisions. Sometimes in a split easement, for example, under state law an amendment concluded with one of the landowners may need to be approved by the other landowner even though the amendment does not affect the second landowner's land because the state law on contracts views the split easement land as a "common scheme" or shared contract.

As with all the other areas of law discussed above, land trusts are prudent to have competent attorneys advise them on the applicability of all laws and regulations to the particular facts and circumstances under consideration. While an unhappy donor or grantor can certainly sue a land trust, the land trust can be prepared to meet such challenges and can understand in advance arguments that may not succeed in court but that may have an adverse effect in public. Having a media and community response plan for high-risk amendments is a sound addition to sensible legal advice. Practical balanced measured risk assessment and appropriate action always helps.

What's a Land Trust to Do?

Conservation experts differ as to what legal doctrines apply.²⁸ Everyone can cite authority to support their arguments. For land trusts, it comes down to ensuring the integrity of land conservation and public confidence in land trusts with every proposed amendment. Therefore, land trusts should follow these practical and important steps when considering an amendment proposal:

For discussions of different approaches to interpreting and amending 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; *Conservation Easement Amendments: A View from the Field*, by Andrew C. Dana; *Amending Perpetual Conservation Easements: Confronting Dilemmas of Change*, by Darby Bradley; *Perpetuity Is Forever, Almost Always*, by Ann Taylor Schwing; and *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements and Understanding When Perpetual Is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, both by Jessica Jay. All the articles are available online at the Alliance's The Learning Center. See also Appendix D.

1. Determine if the amendment is low or high risk, and then seek third-party evaluation for high-risk amendments
2. Understand what can transform a low-risk amendment into a high-risk amendment
3. Document all amendment processes and decisions fully
4. Use the best judgment possible, even when it might take longer or cost more, to ensure that all critical stakeholders have been properly advised of a significant amendment in proportion to their interests, whether those interests are legal, financial or emotional.

A land trust must also have a qualified attorney to check applicable state statutes and common law to know how a conservation easement is treated in its state and whether the land trust might need to seek the review of the state attorney general or approval of a court.

The Amendment Principles: Theory into Practice

Amendment Principles in Detail

What is a land trust to do when faced with a landowner who wants to amend an easement? First, a land trust should have a written policy that helps it comply with the law, addresses amendment proposals consistently over time and furthers the mission of the organization, while also signifying to landowners and the public that the organization is serious about honoring the permanence of protections afforded by their easements. At the core of a sound amendment policy are the seven amendment principles that, when applied to a proposed amendment, will help ensure the land trust's decisions are sound and within the law. No amendment policy should be more permissive than the amendment principles allow, but some land trusts may choose to adopt more conservative amendment guidelines. A conservation easement amendment should meet *all* of the amendment principles—failing even a single one should be cause for rejecting the amendment.

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 it made a decision. The Land Trust Accreditation Commission expressly includes the amendment principles as a Policy/Procedure Element in evaluating whether a land trust meets Indicator Practice 11H1. In order to meet this requirement, land trusts should incorporate the amendment principles into their amendment policies.

Principle 1: The amendment clearly serves the public interest and is consistent with the land trust's mission.

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,

AMENDMENT PRINCIPLES

A conservation easement amendment should conform to *all* of the following amendment 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 grantor and any direct funding source
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement

including its members and the community it serves, equity to all landowners and its obligation to uphold commitments made 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 results. 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 "Too Much Change and Excessive Scope and Scale," 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 include supporting the state's agricultural economy, scenic beauty and cultural heritage through conservation of working farms (page 99).

Principle 2: The amendment complies with all applicable federal, state and local laws.

Principle 2 requires that amendments comply with federal, state and local law. Evaluating compliance requires careful analysis of all relevant laws discussed in chapter 2 and all other laws that might apply; the specific conservation easement's terms; the organization's amendment policy; the substance of the proposed amendment and its foreseeable effects; whether the easement was the subject of a federal income tax deduction; whether it was the result of a regulatory process, subject to

continuing regulatory oversight; whether it was purchased and any of the funding sources that may have a legal or programmatic interest; and so on.

The legal test also requires consideration of written representations made to the grantor or funding source that may be affected by the proposed amendment. State laws may limit the nature of amendments that can be made or impose additional requirements on the land trust that require assessment by qualified legal counsel.

Principle 3: The amendment does not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.

Principle 3 requires that the land trust preserve its tax-exempt, charitable status. At a minimum, the land trust must protect its continuing existence and ability to hold conservation easements. For example, agreeing to an egregious amendment could cause the IRS to terminate a land trust's nonprofit status or to reject a future easement deduction because the land trust has not demonstrated its commitment to protect the conservation purposes of the donation as required by §170(h).

Principle 4: The amendment does not result in private inurement or confer impermissible private benefit.

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

Does the proposed amendment involve a board member, staff or other insider to the organization? Private inurement is flatly prohibited by IRC §501(c)(3) and accompanying regulations.

Does the proposed amendment involve potential private benefit to any private parties? Section 501(c)(3) also prohibits tax-exempt organizations from conveying impermissible private benefit.

If the potential for private inurement or impermissible private benefit exists, the land trust must either deny the amendment or eliminate the potential financial gain. Potential financial gain to the easement landowner might be offset by adding new restrictions to the easement that enhance conservation values or reduce the value of the land or by placing additional land under easement (see case studies "Consolidation and Reconfiguration of Easements" and "Too Much Change and Excessive Scope and Scale?" on pages 82 and 99).

Any negotiated solution should always result in clear protection of the public's interest in land conservation (see case studies "Expiring

Time to Build,” “Amending to Resolve a Violation: Sale of Separate Parcels,” and “Amending to Resolve Violations” on pages 69, 86, and 88). The land trust should not accept an offered cash donation as a full offset to the potential financial gain.

Principle 5: The amendment is consistent with the conservation purpose(s) 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 the specific resources and conservation values protected by the original easement. 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 “Parcel A and Parcel B Trade-Off Variations on page 94.”

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 scope and scale, requiring careful analysis and best judgment on the part of the land trust, all evaluated in light of applicable law, the intent of the land trust, grantor or funder, the public’s interest and the other amendment screening questions. For an illustration, see case study “Too Much Change and Excessive Scope and Scale” on page 99.

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 substantive alteration of a conservation purpose a high-risk area that falls outside the amendment principles and may require court or attorney general approval.

Principle 6: The amendment is consistent with the documented intent of the grantor and any direct funding source.

Land trusts undertake (whether ethically or legally) obligations to easement grantors and funders as part of the easement acquisition

process. Additional obligations may arise from promises and representations made during negotiations of the transaction. If a grantor or funder specifies their intent to protect specific conservation values above others and receives written assurance that this intent will be honored, an amendment harming those values might be viewed as a betrayal. Whether that grantor or funder or their heirs could sue to enforce the stated intent would depend on multiple issues of federal and state law, but they could damage the land trust by generating unsympathetic news reports and sharing their story with prospective grantors and funders.

Grantor and funder intent is best found in the text of the conservation easement itself and in any 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 grantors and funders are satisfied is critical to an ongoing conservation program. Land trusts should be cognizant of what they do and the decisions they make in all contexts, including amendment, in view of the public perception of their actions. Any doubt about intent and amendment might be addressed through meetings with prospective grantors and funders, writing explanatory newsletter articles or letters to neighbors of easement land when the land trust approves or, even in some circumstances, denies amendment.

Principle 7: The amendment has 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, impacts of climate change 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.

Principle 7 can involve weighing trade-offs 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 written 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. 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 scope and scale, requiring careful analysis and best judgment within the constraints of applicable law and in conformity with the grantor's documented intent. See especially case studies "Expiring Time to Build," "Consolidation and Reconfiguration of Easements," "Amending to Resolve a Violation: Sale of Separate Parcels," and "Parcel A and Parcel B Trade-Off Variations" on pages 69, 82, 86 and 94. and for illustrations of principle 7.

If a less-than-neutral result is anticipated as to a conservation value protected by the easement, or may be perceived as such 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. This area of law is unsettled. It is essential to consult experienced legal counsel on a case-by-case basis, conduct a thorough risk analysis and proceed carefully.

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 advisers—wildlife habitat experts or natural resource consultants, for example—to help evaluate and document how the conservation values may be affected.

Screening Questions

Although the amendment principles should be the starting point for evaluating a proposed amendment, land trusts should pose additional questions. These screening questions supplement the amendment principles and often will reveal the need for more information gathering or due diligence.

1. 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.

2. 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. Land trusts should evaluate whether they need to involve funding sources 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 lack legal standing to sue, the land trust should evaluate what steps to take to avoid conflicts with any reasonable and long-standing expectations of those directly affected by the original easement.

If the easement was donated and an income tax deduction taken, there may be tax implications for the taxpayer. The taxpayer and counsel must evaluate those implications if they are still within the statute of limitations for that particular federal tax deduction. The IRS and the courts have not spoken on this point, and a landowner's tax concerns as to a deduction usually end when the statute of limitations runs to challenge the deduction. However, the IRS retains power to audit the land trust and sanction it if egregious charitable organization violations are proven. Addressing these fact-intensive questions may require legal counsel with significant tax expertise.

In some states, review by or approval of a court, state agency, attorney general or other public official may be required. Even if not required, review or approval may be desirable for reassurance that the public interest is protected, especially where public funds may have been used to purchase the easement.

3. Are there any stakeholders that it would be wise to engage?

Some attorneys advise that the grantor of a conservation easement retains no legal interest in the easement after the property is conveyed to a new landowner. Other legal experts advise that easement grantors (and their heirs) do retain certain rights, particularly if the easement is considered a charitable trust. This is an unsettled area of law, and the answer is uncertain.

Even if the land trust may not be legally obliged to consult with the original grantor on amendments, it may choose to do so for other reasons. A land trust may decide to consult with the grantor as a matter of courtesy and good public relations; a land trust should evaluate its strategy on a case-by-case basis. One angry grantor or funder who feels betrayed can generate damaging publicity that the land trust could have avoided by advising them early in the amendment process.

Land trusts should also consider reaching out to other parties, such as direct financial supporters. Neighbors, community groups or others may also be interested in a proposed amendment. The land trust may consider if it makes sense to seek input from these third parties while evaluating organizational capacity, community expectations and general public perception of the transparency of its actions (see case studies “Amending to Resolve a Violation: Sale of Separate Parcels” and “Amending to Resolve a Violation: A Parking Lot Problem” on pages 86 and 91). 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.

4. Are there any title issues to resolve?

It is paramount for the land trust to run the title before getting too far along in the amendment process. Any mortgages (or other third-party interests, such as liens or leases) recorded before or after the original easement was conveyed should be subordinated to the easement amendment by the mortgagee. Otherwise, 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 proposed amendment, the land trust should evaluate whether the proposed amendment should be approved by all owners of portions of the property to avoid conflicts with expectations of those directly affected by the original easement (see case study “Amending to Resolve Violations” on page 88).

5. 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 proposed 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 neighbors noticing, and others 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. (See examples in case studies "Amending to Resolve a Violation: A Parking Lot Problem," "Parcel A and Parcel B Trade-Off Variations" and "Too Much Change and Excessive Scope and Scale?" on pages 91, 94 and 99).

6. Is additional expert advice needed?

In addition to experienced legal counsel, the land trust may need the services of professional appraisers, natural resource experts, fish and wildlife experts or other professional advisers. Having expert opinions is especially important when weighing complex trade-offs and impacts on conservation values in a proposed amendment. (Case study "Consolidation and Reconfiguration of Easements" on page 82 illustrates this point.)

7. 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 discussions. Improved easement administration and stewardship may also count as a plus in determining whether an amendment meets principle 7 because better stewardship can better protect the conservation values of easement land (see case studies "Excessive Stewardship Obligation and Unenforceable Terms," "Ambiguous Easement

Terms” and “Consolidation and Reconfiguration of Easements” on pages 71, 74 and 82). 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.

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

Early gathering of the information that will form the baseline data relating to amendments may assist the land trust in identifying and evaluating the amendment’s advantages and disadvantages. Efforts to evaluate the effect of the proposed amendment on the conservation values may be flawed without this information.

The land trust should update the baseline with a current conditions report at the time of any amendment that affects the land. An amendment to add an omitted exhibit or to correct an error usually will not require preparation of a current conditions report.

The landowner should normally pay the cost to avoid private benefit, unless it was the land trust that sought the amendment or the land trust negotiated additional offsetting changes.

9. 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 landowner.

10. Will a Form 8283 need to be prepared?

Some amendments, most obviously those that add acreage or impose new restrictions or extinguish existing reservations, 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 additional attention to ensure that the land trust meets its obligations.

11. What information needs to be gathered to prepare Form 990?

IRS Form 990 Schedule D requires disclosure of all amendments and terminations of any conservation easement.

The Four Corners Issue

The amendment principles, including principles 5 and 7, do not directly address the question of how to weigh beneficial, neutral or harmful conservation results when a proposed amendment affects land outside the original boundaries of the protected property. 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? Or must its deliberations be limited to the four corners of the original easement boundaries?

Some land trusts may choose to limit amendment considerations to just within the geographic boundary of the original easement (within the four corners). Others may choose to 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 nonadjacent parcel.

To be clear, the amendment principles do allow 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. If a proposed amendment negatively affects a conservation value of the easement area but will protect new land with significant conservation values, 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 results for the proposed amendment. The key is that the net effect of the amendment on the conservation purposes of the original easement be either neutral or enhancing. Again, depending on scope and scale, this could be a high-risk amendment, so land trusts must proceed cautiously.

The Land Trust Accreditation Commission also allows for flexibility in addressing the four corners issue. The *Requirements Manual* devotes several paragraphs to the general issue of full or partial termination of easements, and it includes a set of standards for land trusts to meet if land is exchanged in and out of an easement through an amendment. Both accredited and nonaccredited land trusts are encouraged to consult these standards when considering such an easement amendment.

SPILLOVER BENEFITS

Spillover benefits are the benefits enjoyed by a conservation property when neighboring property is also protected. Many conservation values of protected land—scenic values, wildlife habitat, agriculture, forestry, recreation 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.

No clear law exists yet on the four corners issues. Four corners amendments are highly dependent on the full facts and circumstances at hand. Three federal tax law cases addressed permitted alterations to the boundary or the land originally covered by a donated easement pursuant to §170(h)(2)(c) of the Code.²⁹ See Appendix C for more details on this issue. Those three cases did not deal with the validity of any amendments, but rather with the separate and distinct question of whether a specific exchange provision in an easement (that allowed land to be swapped in and out of the easement) could disqualify the easement under §170(h). The Tax Court itself noted this distinction in *Belk II*, stating that “*Belk I* does not speak to the ability of parties to modify the real property subject to the conservation easement; it simply requires that there be a specific piece of real property subject to the use restriction granted in perpetuity.” Land trusts should treat any amendment that removes more land from the easement than a very minor boundary correction and clarification as high risk and subject it to a greater level of scrutiny.

The 2015 *Follow-Up Report on Terminations and Amendments* showed that land trusts do occasionally engage in amendments that exchange land in and out of the easement property. Some exchanges were initiated by the landowner and were usually a response to an action the landowner sought to take or had taken on the protected property. Others were the result of a third party’s actions, often but not always an abutting landowner. Sometimes these exchanges came about based on a boundary adjustment that had nothing to do with the conservation easement; other times they were a solution to an encroachment violation. Moreover, most of the 29 exchanges documented in the report involved small areas of land removed from the original protected property layout. Of the 20 exchanges where acreage figures were available, 16 involved removals of two acres or less.

In fact, the median size of removed land was 0.6 acres. Meanwhile, of the 20 measured exchanges, 10 resulted in a net increase in protected land, while another 10 were equal exchanges. There was no reported exchange that led to a decrease in the size of the protected property.

Ultimately, each land trust must develop its own policy on the four corners question considering, at a minimum, federal and state law, organizational mission, type of conservation easement involved and public perception. Ideally, the land trust's position on this issue is spelled out in its amendment policy, so a land trust does not have to figure out where it stands in the heat of a difficult amendment request or when it is considering proposing an amendment to resolve an easement dispute or violation. For examples illustrating the four corners issues, see case studies "Consolidation and Reconfiguration of Easements," "Amending to Resolve a Violation: Sale of Separate Parcels" and "Amending to Resolve a Violation: A Parking Lot Problem" on pages 82, 86 and 91.

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 amendment 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, that the best interest of all parties would be better served by negotiating a settlement with the condemning authority and that 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.

A comprehensive discussion of amendments that fail to comply with the amendment principles is beyond the scope of this publication. However, because land trusts deal with condemnation with some frequency, case study "Partial Condemnation for Storm Water Drainage Improvement" on page 100 provides a relatively noncontroversial condemnation example to illustrate an amendment in lieu of condemnation.

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, a great earthquake and other major changes not contemplated by the easement may effectively defeat a conservation purpose. An amendment may be the best way to address the circumstances that then face the land trust.
3. *Deviations from Grantor Intent.* Occasionally, land trusts have accepted conservation easements that include a provision at the request of the grantor that is later found to be harmful to the conservation purposes of the easement, contrary to public policy or impossible or impracticable to enforce. Typically, but not always, these problematic provisions are found in older easements before land trusts learned through trial and error what sorts of restrictions work or do not work. Examples vary and are dependent on context but might include specifications about interiors of structures and who may reside in them, prohibitions against mountain biking, predatory animals (like cats and dogs), hunting or all-terrain vehicle use or any sort of public access altogether. If the original grantor is still the landowner and agrees to an amendment eliminating or altering these restrictions, then the question of intent is no longer relevant. But often the original grantor is no longer the landowner and has passed away or cannot be located. In these circumstances, principle 6, pertaining to intent, should not be read as an absolute bar to such amendments. To be clear, intent is still an important factor that should be taken into account very seriously by a land trust. An amendment that is at odds with documented grantor intent may very well entail added risk, and approval by the state attorney general or a court might be one way to protect the land trust from some of the risk of disapproval by heirs or by government agencies. However, these considerations should not dictate that the land trust must veto a proposed amendment when it has significant conservation-based reasons for considering it. See case study “Excessive Stewardship Obligation and Unenforce-

able Terms” on page 71 for an example of an amendment that could be considered despite being contrary to the original grantor’s intent. Also, much of the tension can be eliminated by divining the *reasons* that drove the drafting and then reframe or rephrase the amendment to support the spirit of the intent while removing the unenforceable actual language.

The three situations listed above often involve inconsistency with or harm to a purpose of the easement or result in net negative conservation change to the easement property. Thus, amending under any of these conditions is high risk, both legally and in terms of public perception. Land trusts might consider seeking review by the state attorney general or, if warranted, approval by a court. Taking these steps will help ensure that the land trust achieves its overall public purposes while providing protection from criticism and from losing any challenges to the amendment.

Amendment Policies and Procedures and Alternatives to Amendments

Amendment Policies

All land trusts that hold easements should have a written policy or procedure guiding amendment decisions, as noted in Practice 11H of *Land Trust Standards and Practices*. The amendment policy provides a land trust with a structure in which to consider a potential amendment, make a decision and then document the reasons for its decisions. A written amendment policy identifies standards for accepting or rejecting amendments.

An amendment policy also 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, grantors, organizational members, funders, supporters and the general public about the land trust's intent to uphold the permanence of the protections afforded by a conservation easement while still maintaining appropriate flexibility to respond to unanticipated change in a principled fashion. An amendment policy demonstrates that the land trust is prepared to address changes in ways that respect the grantor's documented intent, the public interest and specific easement purposes and restrictions; are in full compliance with the law; and advance the land trust's charitable mission.

For additional background information and examples of amendment policies and procedures, see Appendix A, and *Land Trust Standards and Practices*.

Contents of an Amendment Policy

Amendment policies typically include:

- *Statement of the Land Trust's Philosophy on Amendments.*
An amendment policy should declare that easements are perpetual, consistent with applicable law. Any amendment should enhance an easement's protections or at least be neutral with respect to impacts on protected

11H. Amendments

1. Adopt a written policy or procedure addressing conservation easement amendments that is consistent with the Land Trust Alliance amendment principles.
2. Evaluate all conservation easement amendment proposals with due diligence sufficient to satisfy the amendment principles.
3. If an amendment is used to adjust conservation easement boundaries (such as to remedy disputes or encroachment) and results in a *de minimis* extinguishment, document how the land trust's actions address the terms of J.1. below.

11J. Partial or Full Extinguishment

1. In the rare case that it is necessary to extinguish a conservation easement, in whole or in part,
 - a. Follow the terms of the conservation easement with respect to taking appropriate action and obtain judicial or regulatory review when required by law or specified in the easement deed
 - b. Ensure there is no private inurement or impermissible private benefit
 - c. Take steps to avoid or mitigate harm to conservation values and/or use any proceeds in a manner consistent with the conservation easement deed
 - d. Consider the land trust's actions in the context of its reputation and the impact on the land conservation community at large

—*Land Trust Standards and Practices* (2017)

conservation values and purposes. The statement should 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 acceptable. A land trust should directly incorporate the amendment principles into its policy. No amendment policy should be more permissive than the amendment principles allow; however, some land trusts may choose to adopt more conservative amendment guidelines. It is also useful if the policy spells out the land trust's general position on the four corners issue.
- *Additional Requirements.* The policy should also include any additional requirements recognized by the land trust (and addressed by the screening questions), such as compliance with its conflict of interest policy, compliance with grantor and funder requirements and

payment of the land trust's costs associated with the amendment.

- *Allowable Purposes of Amendments.* Many amendment policies list circumstances under which an amendment proposal may be considered, such as to address mutual errors, add acreage, add restrictions, remove reserved rights or resolve a conservation easement violation. Others provide a more open-ended statement of the types of amendments that the land trust may allow.
- *Practical Details.* The amendment policy usually explains how a landowner may make an amendment request (or the circumstances under which a land trust can initiate an amendment proposal), identifies supporting materials they must submit 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. These points may be set out in the procedures. Additional practical details include when and how the land trust will supplement baseline documentation with a current conditions report, update the title search and title insurance policy and who will pay for it.
- *Procedures.* As discussed below, sometimes the land trust's evaluation procedures are included directly in the amendment policy and sometimes they are set forth in a separate document. At the very least, however, the policy should include what role the board and any committees play in the amendment process.

Amendment Procedures

Accompanying the policy should be procedures the land trust will use to evaluate all amendment proposals, ensuring that all key points are considered and that everyone is treated equitably. Written amendment procedures (as a separate document or part of the amendment policy), establish who is in charge of evaluating amendment requests

Every land trust should have written amendment procedures that outline and explain the steps the organization follows, as applicable, in evaluating a proposed amendment.

and who is authorized to approve or deny requests. The overall *policy* guidelines are usually in a form that the land trust can share with owners of easement land, potential easement grantors, funders and the public. Some land trusts keep amendment *procedures* in a separate document intended to be used internally, although most land trusts will share these procedures on request. Either format is acceptable.

Amendment procedures typically include a detailed explanation of how the land trust evaluates and implements a proposed amendment. Essentially, this document is the implementation piece, defining the roles of staff, committees, the board and legal counsel in reviewing the amendment proposal.

Volunteer-led land trusts typically authorize a board committee to review requests in consultation with qualified legal counsel with the final decision made by the full board. Staffed organizations often have staff review requests and then work with a board 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 requests with counsel and make a recommendation directly to the board. Depending on the nature of the proposed amendment and the easement, land trusts may need to hire outside consultants—such as natural resource experts, specialized conservation lawyers and appraisers—to conduct certain tasks. The boards of some larger staffed organizations authorize staff to complete amendments that meet defined criteria, such as those with little or no risk. In all cases, the land trust board is accountable for the final decision.

Benefits of Written Amendment Procedures

Established written procedures outline the steps in evaluating a proposed amendment, enabling a land trust to address all issues consistently. Because most land trusts encounter amendments infrequently, board or staff members may have to evaluate an amendment proposal 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, 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 toward approval of 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 defuse 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. At the same time, a land trust should avoid extraneous detail in the written record because it can obscure the decision and should document the reasons for omitting any detailed procedures.

Examples of written amendment procedures appear in Appendix A. Other examples can be found online at the Land Trust Alliance’s [Learning Center](#).

Implementing an Amendment Policy and Procedure

How does a land trust implement its amendment policy and procedures when evaluating an amendment proposal? 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.

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 formal written amendment procedures.

Even with solid procedures in place, the process does not usually unfold as linearly as presented here. The process outlined below covers typical easement amendment scenarios and offers a basic structure for written amendment procedures. But 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.

1. *Informal Discussion and Negotiation.* Usually, there’s a soft start to an amendment proposal. A landowner may call to discuss the desired change informally, or the inquiry may come during annual monitoring or a land trust event. This early conversation can help the organization understand

what easement modifications may be requested. It can also help the landowner understand what types of amendments would be unacceptable to the land trust. In some cases, techniques other than amendment may better address the issue, such as an interpretation or approval, and amendment can be avoided.

2. *The Initial Proposal.* Often the landowner initiates an amendment proposal, but a land trust may also do so. Some land trusts are proactively amending their older easements, with landowner cooperation, to revise archaic language. In such circumstances, the procedural details will vary because the land trust is seeking the landowner's approval. Further, a land trust also might propose an amendment as a solution to resolve a conservation easement violation. See case studies "Expiring Time to Build," "Ambiguous Easement Terms," "Amending to Resolve a Violation: Sale of Separate Parcels" and "Amending to Resolve Violations." on pages 69, 74, 86, and 88. Regardless of who initiates the proposed amendment, the land trust should uphold all tenets of its amendment policy.
3. *Sharing the Amendment Policy.* Soon after determining that an amendment might be appropriate, the land trust should provide its amendment policy to the landowner. The policy details the criteria the land trust uses to evaluate amendment proposals and creates a business-like tone for the interactions. 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 proposed 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.
4. *Landowner's Legal Counsel.* Early in the process, the land trust should advise the landowner, in writing, to obtain their own legal counsel.
5. *Written Proposal.* Assuming that the parties have decided to proceed and have not identified a satisfactory alternative to an amendment, the landowner (or land trust) should submit the amendment proposal in writing.
6. *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 easement's conservation values, purposes and restrictions. Photos taken during the site visit can document the preamendment 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 in question.

7. *Obtain a Title Report.* Run the title before getting too far along in the process. The land trust will need to know if there are other interest holders, mortgages or liens on the property that went into effect subsequent to the easement. These may need to be addressed or subordinated to validate the amendment or to prevent a possible foreclosure from transferring the property under the terms of the original easement. Contact the title insurer to ask about procedures and costs to update the title insurance policy.
8. *Land Trust's Legal Counsel.* Many land trusts seek legal counsel early in the amendment process; others may use experienced staff or a staff attorney for the initial evaluation and then involve legal counsel later in amendment negotiations. Involving experienced legal counsel early in the process may result in more streamlined solutions and may assist in conversations with landowners. There is no one correct approach, but land trusts should involve legal counsel in every amendment to evaluate the legal risks and draft or review the final document.
9. *Application of the Amendment Principles and Screening Questions.* From the first conversation with a landowner about a proposed amendment, the land trust should have the amendment principles and the screening questions in mind. At some point, once the land trust obtains sufficient facts and details about the proposed amendment, it is useful for the land trust staff or other initial decision makers to carefully evaluate the proposal using these two rubrics. Many organizations use a standard form that evaluates the amendment proposal on the basis of how it meets the amendment principles and the screening questions. See Appendix A for a handy checklist for reviewing

an amendment proposal.

10. *Negotiation as Needed.* Amendments often involve back-and-forth negotiation to address issues that the land trust identifies based on the amendment principles or the screening questions. The land trust may suggest additional restrictions to offset potential financial gain or to compensate for negative impacts on the conservation values. The land trust may negotiate for a less extensive amendment than initially proposed. The land trust may also request an overall easement upgrade to current, standard easement language to improve easement stewardship and enforceability. Many iterations may appear before the land trust is satisfied the amendment meets all the amendment principles and screening questions, and the landowner and land trust agree that the amendment is acceptable. In many instances, the negotiations reach an impasse (or an alternative solution emerges), the process is cut short and the following steps are no longer applicable.
11. *Recommendation and Vote.* The staff or committee that reviewed the amendment proposal generally makes a recommendation to the board for a full board vote. Some larger land trusts authorize staff to complete routine amendments under certain conditions without a full board vote, if doing so is consistent with a well-defined organizational policy and delegation criteria. No matter who makes the actual decision, the full board is always accountable for all easement amendment decisions.
12. *Notification of the Landowner.* Whether the land trust approves or denies an amendment proposal, 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 its decision. 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.
13. *Baseline Documentation.* An amendment that changes reserved rights or any other easement terms may potentially affect the information documented in the original

easement baseline. If so, baseline documentation should be updated with a current conditions report 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 land trust should document the condition of the corridor at the time of the amendment. An amendment that protects a new suite of conservation values should also trigger a current conditions report or supplement to the baseline documentation. Any added land needs baseline documentation as well. The owner should sign any current conditions or baseline supplement in the same manner as the original baseline.

14. *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 an attorney should prepare or review the formal amendment document. As with all real estate conveyances, professional legal review of the final amendment is needed, but legal review and participation in amendment decisions is also critical throughout the amendment process.
15. *Attorney General, IRS or Court Review, if Necessary or Appropriate.* In a few states, the land trust is required by the conservation easement enabling statute or other applicable law or administrative guidelines to seek review by an independent government body prior to executing the amendment. Generally, as stated in detail in the foregoing, the high-risk end of the spectrum entails more potential benefit from external review. The decision in each of these circumstances is dependent upon the specific facts of the situation and must be made in the context of applicable federal and state law. See screening question 2.
16. *Signature and Recording.* The landowner and land trust (and any other parties with legal interests in the easement or the land) sign the amendment document and record it in the appropriate public land records after updating the final title examination and any other necessary steps are completed.
17. *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.

18. *Form 990*. The land trust should make a note to include the amendment in its next Form 990 Schedule D to comply with federal requirements for §501(c)(3) nonprofits.
19. *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 believe that there is no reason 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 of amendments.

Alternatives to Amendments

A formal amendment is not the only way to address a landowner request or to solve an easement stewardship issue. Sometimes, a landowner request isn't really for an amendment at all but for a specific interpretation of the easement language. Land trusts may use alternative approaches to address minor issues that do not negatively impact the purposes or conservation values of the easement, do not involve impermissible private benefit nor 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. As with amendments, it is important for land trusts to evaluate the options, risks and benefits of these approaches with experienced legal counsel, follow the amendment principles with the screening questions and understand the long-term effect on equitable treatment of other landowners in similar situations. For an example in which these alternatives could be considered, see case study "Temporary Nonconforming Use." on page 66.

Discretionary Approval. Some easements contain a discretionary approval provision that allows the land trust to approve, under certain conditions, activities that are otherwise restricted or not specifically addressed by the easement. The benefits of this type of provision allow the land trust to address unanticipated change and minor short-term problems or questions without using an amendment. Having the discretionary approval provision in the easement itself evidences that the grantor and land trust agreed that the use of discretionary approval was acceptable when entering into the ease-

SEEKING ATTORNEY GENERAL REVIEW OR COURT APPROVAL

The Nature Conservancy's (TNC) amendment policy requires an internal examination as to whether consultation with the state attorney general or court approval is required, as follows:

State Approval. The assigned Conservancy attorney will determine whether the relevant state authority that provides oversight of Conservation Interests or charitable organizations has an interest in the proposed amendment. If the state authority does express an interest, then the approval or acquiescence of the state authority must be obtained.

Judicial Approval. If the proposed amendment would result in an extinguishment or termination of the Conservation Interest in whole or in part, then the assigned Conservancy attorney shall determine whether the Conservancy has a legal obligation to obtain a judicial order approving the proposed amendment. If such a legal obligation exists, the Conservancy shall obtain a judicial order before amending the Conservation Interest.

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.

With few exceptions, however, submissions of proposed conservation easement amendments to the attorneys general or the courts in most states have been relatively few and infrequent. When such a request is submitted, it may be sufficiently outside the normal workload of the attorney general staff that a timely (or any) 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 long, and seeking review by the court with jurisdiction can result in delay and significant expense, given that a court may prioritize its other responsibilities above approving an easement amendment.

Land trusts should anticipate these delays and plan accordingly. In some cases, the attorney general has worked or 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.

Some attorney general offices are willing and able to address amendment proposals promptly, sometimes with email requests and responses. Even when that is not possible, attorney general approval reduces the likelihood of a successful challenge by a government body or a member of the public, provided that all relevant documents were provided and that the amendment was fully and accurately stated.

ment and, for donated easements, that the flexibility was considered in the appraisal. Some land trusts use a license to permit the specific activity and define limits. See a sample discretionary approval letter in Appendix A. The best forms of discretionary approval are limited as to who, what, where, when and how approval is granted. Broad

discretionary approval is dangerous because it lacks these limits and may permit too many to do too much for too long. The IRS may deem broad discretionary approval as a violation of the perpetuity requirement. Land trusts that grant broad discretionary approval must be wary of conferring impermissible private benefit or private inurement.

Interpretation Letter. A land trust may write an interpretation letter in response to a landowner's question about whether particular uses or activities are 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 amend 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, where, what and how long the use is allowed. Interpretation letters may be used when the easement is silent or when it is ambiguous on the specific point.

Discretionary Waiver. A land trust may choose not to enforce a technical violation of an easement and issue a discretionary waiver to the landowner. For example, upon finding a rustic 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 and remove the structure upon a certain date. 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. A broad waiver carries the same risks as a broad discretionary approval.

Amendment Provisions, Easement Drafting and Amendment Drafting Format

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 *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.”³⁰ An easement that lacks an amendment provision might still be amended under a state’s common law of real property or contracts, so it is important to understand the applicable state law.

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 amended. The grantor of an easement with such a provision cannot easily contend that no amendment is permitted or that the land trust concealed the possibility of an amendment. (See Appendix A for sample amendment provisions.)

If a conservation easement is treated as a charitable trust, the amendment provision grants the land trust defined powers to modify the easement by agreement with the landowner, which the land trust might otherwise lack without court approval. Because the various states’ laws are uncertain today and may change tomorrow—even on points that appear certain—including an amendment provision is essential.

A typical amendment provision that places clear limits on amendments should not be confused with other provisions that serve as a *de facto* preapproval of specific kinds of amendments, such as substitution or swap provisions that cause a conservation easement

It is worth noting that starting in 2015, some IRS personnel have suggested that the mere existence of an amendment provision in a conservation easement could disqualify that easement from deductibility under §170(h) as a violation of the perpetuity requirement. The Alliance sees this pronouncement as an IRS trial tactic, not law, and has requested that the IRS clarify and retreat from this position. In this same vein, the Alliance recommends that land trusts hold steady in their established practices and continue to include well-drafted amendment provisions in their conservation easements. As of this writing, the Alliance is considering legislation to clarify that certain amendments be permitted.

to fail under §170(h). Land trusts (and landowners who are interested in charitable deductions) should be wary of any nontraditional amendment provision that prefigures approval of a specific kind of amendment, especially one that involves removal of any land from the easement property. Additionally, as seen in the trio of Tax Court cases, the courts disapprove of any degree of grantor control of the approval or direction of any amendment. Land trust sole discretion may cause less consternation.

Careful Easement Planning and Drafting

Many amendments can be avoided by careful planning and drafting of easements. Easement drafters can foresee at least some future events and address them in the original easement so that amendment is not required later. Sometimes, excluding certain acreage from the easement can avoid potential amendments; the land can be added later once the uncertainties have resolved themselves.

In particular, drafters should take care to ensure the land trust can monitor and enforce every easement restriction, and all restrictions are 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 proposals. One example is an all-terrain vehicle (ATV) prohibition: Evidence of ATV use does not necessarily indicate the identity of the user; ATV use may or may not affect the conservation values 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 there are other considerations tending to justify ATV use. Prohibitions on hunting

are another example; finding shell casings may establish that someone was shooting, but more is needed to prove hunting and to identify the hunter. Similarly, prohibitions on pesticide use and requirements for organic farming are difficult to monitor without sophisticated and expensive scientific testing. If the land trust agrees to include such restrictions, the cost of testing should be built into the stewardship endowment for the easement at the time of its creation, and the easement should 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 amendment. Moreover, 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 drafting issue that arises frequently relates to the permanence of easement restrictions and the changeability of 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. This choice needs to be made consciously and carefully. 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.

Imagine this scenario: A conservation easement excludes some acreage on which the landowner intends to subdivide and sell a cluster of several residential lots. When the land trust and the landowner negotiate the conservation easement, the land trust assumes its interests are best served by encouraging the landowner to minimize the excluded acreage, in order to maximize the area protected by the conservation easement. Zoning regulations at the time the conservation easement is executed allow the landowner to meet their objectives for the number of residential lots the landowner can sell. The zoning authority then subsequently increases minimum lot size requirements before the landowner subdivides and sells the lots. If the zoning authority refuses to grant the landowner a variance on minimum lot size, the landowner cannot sell the planned number of lots, which means significantly less revenue than anticipated. The landowner would likely request a conservation easement amendment increasing the size of the excluded area. Such an amendment would be

difficult for the land trust to approve because it would entail removing acreage from the easement. The land trust can mitigate the risk of this scenario somewhat when drafting the conservation easement by anticipating that minimum lot size requirements might increase in the future and allowing a larger excluded area that could meet such requirements. Alternatively, the conservation easement could explicitly state that any change in zoning requirements are at the grantor's risk and that no modification will be made to increase the land area in the future.

The broader lesson is to identify probable 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.

Amendment Drafting 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 and the benefit of including recitals establishing satisfaction of perpetuity and other requirements.

In general, for simple amendments that affect just one or two clauses of an easement, the amendment document may simply restate just those paragraphs. This short format may also be used when adding acreage to an easement—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 amended form. This kind of format is usually titled a *restated easement* or an *amended and restated easement*, and it completely supersedes and replaces the original easement document.

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 reaffirm for the public record the land trust's and the landowner's 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 one or more separate amendment documents that modify the original easement. If a deduction is to be taken based on the amendment, the

requirements of IRC §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 or making new additional errors.

The document should make clear how the amendment serves the public interest. Many attorneys recommend that the amendment include recitals at the beginning of the document to explain the easement holder's reasoning and any facts or events that support the amendment. 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. As a general rule, judges give weight to recitals as the statement of the genesis of the document, its rationale and factual history and the common thinking of the parties before any dispute arose.

Modifications that merely correct mutual mistakes in the original easement can be recorded as *corrective deeds* or *corrective conservation easements* rather than *amendments*. These are corrections of minor errors and oversights mutually acknowledged by the grantor and easement holder. Common examples include correction of scrivener's errors, correction of erroneously stated acreage or parcel descriptions and the addition of missing pages or information intended by all to be in the original agreement. All corrections should be consistent with the amendment principles³¹ 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. However, for the purposes of IRS Form 990 Schedule D, land trusts must report corrective deeds as amendments.

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 easement deed to arrive at an easement value for tax deduction purposes that is inconsistent with the size and value under the corrected deed, then the appraisal must be corrected and amended tax returns filed. Landowners should consult with their own tax counsel.

Placement of an Amendment along the Risk Spectrums

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

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, noncontroversial amendments that a land trust may complete with a relatively simple internal process, documentation and recording.

If the proposed amendment is uncertain in terms of legal permissibility or public perception, involves a difficult financial evaluation or has both positive and negative effects on conservation values, the land trust will need to consider more factors and document the reasons behind its decision thoroughly. The middle of the spectrum includes amendments whose complexity may require the land trust to seek advice from external parties, such as appraisers, natural resource specialists or other experts. This middle range also includes more complex amendments about which the land trust might also seek comment from public entities, neighbors or other stakeholders to make its decision.

In the most complex cases, where there may be damage to the easement purposes or net negative effects to conservation values, the land trust could consider voluntarily seeking approval from an independent government body. In some cases, it may legally be required to do so.

Various low to moderately high 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.

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 thoroughly, to involve appraisers, other experts and neutral advisers and to consider alternatives or deny the amendment. The points are not of equal value; the risk may be loss of nonprofit status in one instance, 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 other risks are unavoidable consequences of the transaction. Moreover, land trusts should not simply add up the points to reach a decision because not every risk is equal; for example, impermissible private benefit or private inurement will trump a low-risk finding on all other points absent altering the transaction to eliminate the private benefit or private inurement.

Placement of an Amendment along the Risk Spectrums

LEGAL RISK SPECTRUM

LEGAL RISK SPECTRUM							Moderate Risk		Highest Risk
Low Risk									
IRC/Reg Concerns: Impact on Conservation Purposes	Amendment does not affect conservation purposes protected in perpetuity or affects in positive ways only	Amendment has a neutral effect on conservation purposes of the easement land	Amendment has a neutral effect on conservation purposes protected in perpetuity positively but is net neutral	Amendment affects conservation purposes protected in perpetuity both positively and negatively but is net neutral	Amendment might harm conservation values protected in perpetuity (might not be net neutral)	Amendment might harm conservation values protected in perpetuity (might not be net neutral)	Amendment might harm conservation values protected in perpetuity (might not be net neutral)	Amendment might harm conservation values protected in perpetuity (might not be net neutral)	Amendment might harm conservation values protected in perpetuity (might not be net neutral)
IRC/Reg Concerns: Impact on Other Conservation Values	Amendment has a beneficial effect on conservation values of the easement land	Amendment has a neutral effect on conservation values of the easement land	Amendment has a net neutral effect on conservation values of the easement land	Amendment alters restrictions but with net neutral effect	Amendment alters restrictions but with net neutral effect	Amendment alters restrictions but with net neutral effect	Amendment alters restrictions but with net neutral effect	Amendment alters restrictions but with net neutral effect	Amendment alters restrictions but with net neutral effect
IRC/Reg Concerns: Impact on Easement Restrictions	Amendment does not alter or delete any original restrictions in the easement	Amendment alters restrictions but only to expand or enhance them	Amendment alters restrictions but only to expand or enhance them	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes
IRC/Reg Concerns: Extent of Language Change	Amendment corrects a scrivener's or other technical nonsubstantive error	Amendment makes <i>de minimis</i> (nominal) changes or clarifications	Amendment makes <i>de minimis</i> (nominal) changes or clarifications	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes	Amendment makes minor changes
Private Inurement	No land trust insider is involved	Land trust insider is involved but receives no benefit	Land trust insider is involved but receives no benefit	Amendment might benefit land trust insider nominally or incidentally, or it is not clear if the person is an insider	Amendment might benefit land trust insider nominally or incidentally, or it is not clear if the person is an insider	Amendment might benefit land trust insider nominally or incidentally, or it is not clear if the person is an insider	Amendment might benefit land trust insider nominally or incidentally, or it is not clear if the person is an insider	Amendment might benefit land trust insider nominally or incidentally, or it is not clear if the person is an insider	Amendment might benefit land trust insider nominally or incidentally, or it is not clear if the person is an insider
Impermissible Private Benefit	No financial benefit at all to any private party	Incidental private benefit to unrelated parties ²⁰	Incidental private benefit to unrelated parties ²⁰	No net financial benefit to any private party; any benefit is offset by detriment	No net financial benefit to any private party; any benefit is offset by detriment	No net financial benefit to any private party; any benefit is offset by detriment	No net financial benefit to any private party; any benefit is offset by detriment	No net financial benefit to any private party; any benefit is offset by detriment	No net financial benefit to any private party; any benefit is offset by detriment
Appraisal	Full independent appraisal shows lack of private inurement or impermissible private benefit	Appraisal to confirm lack of private benefit or private inurement is clearly unnecessary	Appraisal to confirm lack of private benefit or private inurement is clearly unnecessary	No consideration of appraisal to assess possible benefit to private party or insider	No consideration of appraisal to assess possible benefit to private party or insider	No consideration of appraisal to assess possible benefit to private party or insider	No consideration of appraisal to assess possible benefit to private party or insider	No consideration of appraisal to assess possible benefit to private party or insider	No consideration of appraisal to assess possible benefit to private party or insider
State Nonprofit Law Requirements	Amendment furthers or is consistent with land trust's mission	Amendment is neutral	Amendment is neutral	Amendment is not inconsistent with land trust's mission	Amendment is not inconsistent with land trust's mission	Amendment is not inconsistent with land trust's mission	Amendment is not inconsistent with land trust's mission	Amendment is not inconsistent with land trust's mission	Amendment is not inconsistent with land trust's mission
State Easement Enabling Laws	State law permits easement amendment	State law is neutral	State law is neutral	State law is silent but not inconsistent	State law is silent but not inconsistent	State law is silent but not inconsistent	State law is silent but not inconsistent	State law is silent but not inconsistent	State law is silent but not inconsistent
State Charitable Trust Requirements	Easement is not a charitable trust	Easement is or might be a charitable trust; requirements are satisfied	Easement is or might be a charitable trust; requirements are satisfied	Easement is or might be a charitable trust; requirements are substantially satisfied	Easement is or might be a charitable trust; requirements are substantially satisfied	Easement is or might be a charitable trust; requirements are substantially satisfied	Easement is or might be a charitable trust; requirements are substantially satisfied	Easement is or might be a charitable trust; requirements are substantially satisfied	Easement is or might be a charitable trust; requirements are substantially satisfied
Compliance with Other State Donor Protection Laws	Amendment is consistent with land trust representations, generally and specifically	Amendment is neutral with respect to land trust representations, generally and specifically	Amendment is neutral with respect to land trust representations, generally and specifically	Amendment is not inconsistent with land trust representations, generally and specifically	Amendment is not inconsistent with land trust representations, generally and specifically	Amendment is not inconsistent with land trust representations, generally and specifically	Amendment is not inconsistent with land trust representations, generally and specifically	Amendment is not inconsistent with land trust representations, generally and specifically	Amendment is not inconsistent with land trust representations, generally and specifically
Compliance with Local Ordinances	Amendment is not contrary to local law and meets current zoning/similar requirements	Amendment expressly addresses any inconsistency with local zoning law	Amendment is silent or neutral	Amendment might create ambiguity with local zoning law in the future	Amendment might create ambiguity with local zoning law in the future	Amendment might create ambiguity with local zoning law in the future	Amendment might create ambiguity with local zoning law in the future	Amendment might create ambiguity with local zoning law in the future	Amendment might create ambiguity with local zoning law in the future

RISK SPECTRUM ON OTHER ISSUES

Low Risk						Moderate Risk		Highest Risk	
Original Grantor Consultation, if Living; Consideration of Next Heirs, if Applicable	Grantor informed and approves this amendment; adult heirs consulted if living nearby	Grantor informed and approves amendments generally or this type of amendment; adult heirs consulted if living nearby	Grantor knows and is unconcerned	Grantor does not know and is not consulted; adult heirs not consulted	Original grantor or adult heirs oppose this specific amendment				
Neighbors/Land Trust Members/Community Approval	Neighbors/members/community approve this amendment	Neighbors/members/community approve this type of amendment	Neighbors/members/community know and are unconcerned	Neighbors/members/community are unaware/not consulted	Neighbors/members/community oppose this amendment				
Media Attention	Amendment likely to receive no media attention	Amendment likely to receive positive media attention	Amendment may receive neutral media attention	Adverse media attention is likely	Adverse media attention is certain				
Degree of Land Trust Review and Analysis	Amendment is fully reviewed by land trust staff and/or knowledgeable committee, full board and qualified attorney	Amendment is reviewed in proportion to its scope and scale and following the land trust amendment policy	Amendment is reviewed in proportion to its scope and scale and following the land trust amendment policy	Amendment is minimally reviewed by land trust staff and/or committee without qualified attorney	Amendment is minimally reviewed by land trust staff and/or committee without qualified attorney or full board review				
Degree of Expert Consultation	Relevant expert scientific or other advice is obtained, or it is clearly not needed and documented	Modest expert scientific or other advice is obtained as needed and documented	Modest expert scientific or other advice is obtained as needed and documented	Minimal expert scientific or other advice is obtained, but more might be needed	Land trust does not obtain expert scientific or other advice when clearly needed				
Effect on Land Trust Stewardship Capacity	Amendment imposes no new or undenowed stewardship obligations, or amendment improves easement enforceability	Amendment does not improve enforceability of easement, but adds no new stewardship obligations	Amendment does not improve enforceability of easement, but adds no new stewardship obligations	Amendment imposes nominal stewardship obligations without additional funds	Amendment adds new, undenowed stewardship obligations and does not improve enforceability				
Trade-Offs/Four Corners Rule	Straightforward amendment that simply adds acreage, adds restrictions, extinguishes reserved rights and the like (i.e., no trade-offs)	Amendment involves no trade-off or simple trade-offs of conservation values on only one easement parcel	Amendment involves no trade-offs of conservation values; more than one easement property	Amendment involves simple trade-offs of conservation values; more than one easement property	Highly complex and/or controversial amendment, likely to require review by public entities, to be outside amendment principles and to fail some screening questions				

RISK SPECTRUM ON CONTRACT AND POTENTIAL CONTRACT ISSUES

Low Risk						Moderate Risk		Highest Risk	
Compliance with Conservation Easement	Easement expressly permits this amendment	Easement expressly permits this type of amendment	Easement expressly permits amendments in general	Easement is silent, but state law clearly permits amendments	Easement and state law are silent	Easement expressly forbids this amendment or all amendments			
Complexity	Simple amendment, easily understood	Minor amendment, easily understood	Moderate changes and complexity, but concept is clear	Complex with multiple changes	Multipart complex amendment with multiple stakeholders	Conflicting views and purposes of multiple stakeholders with complex tradeoffs			
Third-Party Rights Created by Easement	Amendment protects any third-party rights stated in the easement and is approved by those third parties	Amendment is neutral	Amendment is not inconsistent with express third-party rights	Amendment is uncertain	Amendment abrogates express third-party rights				
Direct Funder Approval	Funders fully approve this amendment or funding agreement does not require notice	Funders approve this sort of amendment or amendment generally	Funders know and are unconcerned	Funders do not know and are not consulted	Funders oppose this amendment				

Case Studies

How do land trusts implement the amendment principles, the screening questions, the foregoing procedures and the risk spectrums? The following case studies present a variety of amendment situations, ranging from simple to complex. Each story shows how land trusts may approach amendment proposals on a practical level and what considerations may bear on the decision. Although the case studies are largely hypothetical, most are based on actual scenarios encountered by land trusts.

Many of the case studies raise more questions than they answer because of the unclear state of the law on easement amendments. They are offered to encourage thinking about the questions and considerations presented, *not* to provide cookbook answers. They illustrate the need for comprehensive evaluation, clear thinking and the highest integrity as the land trust proceeds with problem solving and risk balancing. Remember, every proposed amendment must be evaluated on a case-by-case basis with experienced legal counsel in light of all applicable laws. With the highest risk amendments, it is a good idea to have an external sounding board to ensure that you have not overlooked something critical. The board needs full information and assessment of risks and benefits before it decides on an amendment.

The case studies do not exhaustively explain how every aspect of the amendment principles or the screening questions may be addressed—only selected relevant details and procedures are discussed (the amendment principles are noted in each case study). Additionally, variations in some scenarios illustrate how facts can influence the degree of risk in an amendment. Assume in each case that each land trust was operating with an established amendment policy and procedures in hand and under the advice of experienced legal counsel.

The benefits of involving experienced expert local legal counsel to

Every potential amendment involves a unique set of facts and circumstances. Land trusts must consider each amendment on a case-by-case basis, in consultation with legal experts' advice, in light of the particular easement terms and relevant federal, state and local law.

THE AMENDMENT PRINCIPLES: A REFRESHER

All amendments should:

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 grantor and any direct funding source
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement

explain and identify various laws are illustrated by a few additional legal conventions that affect some of the case studies.

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 character as those listed. For example, if the conservation easement prohibition on trail use refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, a court *might* use *ejusdem generis* to rule that motor-powered vehicles would not include drones, airplanes or motorboats because the list included only land-based transportation.

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 liberally in support of its conservation purposes or 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.

Always consider potential reactions of landowners to the land trust response and evaluate the downside risks in proportion to the level of confidence that the land trust attorney and board members have on prevailing in court. Consider the various alternatives: What does the owner really want? What can the land trust agree to, if anything, given existing law and other circumstances?

Low- to Moderate-Risk Amendments

Case Study 1: Extinguishing Reserved Rights

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.

Considerations

The land trust evaluated this proposal using its written amendment policy and amendment principles. Staff determined that the proposed amendment clearly would have a positive conservation result (principles 1, 5 and 7). In the financial analysis, the landowners were giving up substantial economic value, so private benefit was not a concern (principle 4). George and Martha are not land trust insiders; they were the original grantors, and there was no mortgage that would require subordination to the amendment (principles 2, 3, 4 and 6). The land trust worked with its real estate attorneys to draft, complete and record the amendment consistent with its amendment procedure (principles 2, 3 and 4). The land trust supplemented the baseline to indicate the removal of the two house sites, but a current conditions report was not needed. If George and Martha intend to claim a charitable deduction for canceling the two reserved house sites, they must obtain a qualified appraisal substantiating the value of their contribution and satisfy the Form 8283 requirements.

The land trust could have achieved the same effects by placing a second conservation easement over the same land, affirming the first easement and eliminating the reserved rights. However, having two operative easements recorded at different times may be cumbersome.

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.

This amendment might offer an opportunity to approach neighbors to explain the benefits of conservation easements with George and Martha as allies. New easements on adjacent land would enhance the protection provided by this easement.

Key Points Using the Amendment Principles

- This straightforward amendment proposal has a clear conservation gain and no discernable downsides. By running the proposed amendment through its amendment policy criteria, the land trust documented its reasoning that the amendment was allowable. (This approach helps to satisfy principles 1, 3, 4, 5, 6 and 7.)
- The land trust applied the screening questions 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 after involving qualified legal counsel early in the process. (This approach helps to satisfy principles 1 and 2.)
- The land trust had no conflict or self-serving motive that could cloud its thinking or be credibly used by an independent government body to call its decision into question. The land trust fully documented the decisions and addressed any stakeholder considerations proportionately to the issue. (This satisfies all the amendment principles because there are no trade-offs, no benefit to the grantors and no negatives for the public, and the amendment is totally consistent with the land trust mission, completely consistent with all applicable laws and policies and obviously beneficial.)
- 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.

Case Study 2: Adding Acres

Scenario

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

Considerations

The land trust welcomed the notion of protecting the balance of the property and ran Jorge's proposal through its amendment policy (principles 1 and 3). Staff found that the proposed additional land had similar qualities to the first easement property and was 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 (principle 4). Jorge 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 separate, new easement for the additional land. The original easement land and the proposed additional land have similar conservation values, and the conservation purposes and restrictions for the properties would be virtually identical. Easement stewardship would be streamlined if the whole property were under a single easement. Further, Jorge 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 either of the two parcels. The land trust supported this goal as well (principles 2, 5, 6 and 7). 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 a current conditions report, consistent with its amendment procedure.

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. There are a number of issues to consider. First, 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

values 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 an easement with different conservation purposes and restrictions, a land trust should consider creating a new conservation easement for the additional land.

Second, 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 decide whether to continue using the old language in both easements. Monitoring similar adjacent lands with the same owner when part of the land is under an old template and part under a new one may be challenging.

Finally, financial value donated via an easement amendment may qualify for federal tax benefits; as with all tax matters, advise the landowner to review this situation with their personal legal counsel and tax adviser. The owner's intent to seek a deduction may support using a new easement; this is a matter to discuss with the grantor's attorney but should not outweigh land trust administrative concerns.

Key Points Using the Amendment Principles

- This straightforward amendment proposal has a clear conservation gain and no discernable downsides. By running the proposed amendment through its amendment policy criteria, the land trust documented its reasoning that the amendment was allowable. (This helps to satisfy principles 1, 3, 4, 5, 6 and 7.)
- The land trust applied the screening questions 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 after involving qualified legal counsel early in the process. (This helps to satisfy principles 1 and 2.)
- The land trust had no conflict or self-serving motive that could cloud its thinking or be used by others to call its

decision into question. The land trust fully documented the decisions and addressed any stakeholder considerations proportionately to the issue. (This satisfies all the amendment principles because there are no trade-offs, no benefit to the grantor and no negatives for the public, and the amendment is totally consistent with the land trust mission, completely consistent with all applicable laws and policies and obviously beneficial.)

- This case study illustrates a low-risk amendment in which the land trust board could make the decision on its own, with the input of legal counsel, but without seeking analysis from outside experts or other constituents.

Case Study 3: Temporary Nonconforming Use

Scenario

A farmer granted 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 the use of all-terrain vehicles (ATVs) 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 prohibited the specific proposed use, but the land trust considered the scope, 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 a specific purpose for his journey might be hunting, so one could argue that his ATV use was arguably consistent with the easement and, in fact, did not require any permission at all even when the ATV was also used for hunting. Land trust staff were also concerned about the Americans with Disabilities Act and whether it applied, so they were trying to be careful in an area of unfamiliar law.

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 criteria, including the amendment principles, should be used to guide its decision making. This approach ensures consistency, even if a land trust uses one of the alternatives to amendment.

Key Points Using the Amendment Principles

- One option might be to amend this easement to clarify that the landowner may use an ATV under additional specific circumstances, or generally on the property for uses consistent with the conservation purposes, but not to allow any other person to use one and to prohibit all erosion, which can result from such use. More thoughtful initial easement drafting could have avoided this problem. (This approach helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7.) However, amending the easement to allow the use proposed by the farmer could be seen as an unnecessarily permanent solution to a temporary problem.
- 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 back acreage for hunting) and prohibiting damage to the land from the use. Other options might be an informal letter of agreement stating an interpretation of the easement consistent with this use. The choice of approach would be affected by the circumstances and relevant state law. Oral agreements should be avoided as they are likely to foster later disagreement. A license, letter or interpretation (with some appropriate proportional documentation) allows the land trust to approve this use with defined limits and requirements, without making it permanent and applicable to future landowners. This approach can be appropriate where issues of noncompliance with easement terms are minor, temporary and involve no negative effects on conservation values or easement purposes. Caution and careful analysis

are essential. (This type of interpretation may help to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)

- This case illustrates a low to modest risk in the amendment spectrums.

A Twist

What if the farmer then says that his daughter is taking over the farm and learning the business so she will accompany him on an ATV to monitor farm and forestry activities while also hunting?

Key Points Using the Amendment Principles

With the addition of a second person, this case illustrates a modest risk in the amendment spectrums; however, as a family member and the next business operator and future landowner, she has a legitimate role in maintaining the easement's stated purposes. Expanding the approval with those express stipulations increases the risk spectrum slightly to the moderate level but can still satisfy all the amendment principles.

Yet Another Twist

As the land trust hands the farmer the signed approval letter for only himself and his daughter and with several critical conditions and limits expressed, he casually mentions that twice a year all his buddies from town and their kids come out for a fun weekend of riding and camping on his land. He assumes that is just fine but thought he'd mention it.

Key Points Using the Amendment Principles

This request has likely now exceeded the scope and scale intended by the easement restriction. The weekend event is an entirely recreational activity and does not benefit the farming or forestry permitted uses and conservation purposes of the land or easement. The easement has no exception permitting occasional camping and similar group recreational activities. Explaining why that makes this event a big problem and why the land trust cannot agree to it may be the best way to proceed and is consistent with the amendment principles. The farmer might go ahead anyway, assuming the land trust won't notice a onetime event. If he does and the land trust discovers it, the land trust has a violation on its hands, but given the easement language, the land trust may have little choice under this scenario. Approving this activity would place this example at the high end of the risk spectrum.

Case Study 4: Expiring Time to Build

Scenario

An early conservation easement on a 150-acre parcel allows the protected property to be divided into three tracts. Each of the three tracts has a reserved right for one single-family residence to be constructed on an undetermined site. The right to build these houses is reserved to the three children of the grantor, and the rights are due to expire 13 years after the date of the easement. After eight years, none of the sites had been built on and the grantor had passed away. The 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 land trust did not extend the limit, the children 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. Some locations would clearly be more harmful to conservation values than others, given the roads and utilities, impact on scenic values and other consequences.

If the land trust extended the right, 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 period of years and for the three children to give the land trust the right of approval over the locations of all three building sites to ensure they are in line with the conservation purposes of the easement.

Key Points Using the Amendment Principles

- The land trust determines whether there would be any private benefit or impact on the easement purposes. In this case, 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 might have created a private benefit if it is not clear enough that the children had the wherewithal to actually build during the stipulated time. (This determination helps to satisfy principles 3 and 4.)

- 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 result for the property. (This approach helps to satisfy principles 1, 2, 5 and 7.)
- 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 houses 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 time selecting building sites and thinking 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. (This strategy helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- 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. Easement grantors may accept this sort of restriction with little resistance, and it significantly reduces the likelihood of construction and of impermissible private benefit. (This restriction could help satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- This case study illustrates a lower risk amendment, involving weighing trade-offs within conservation easement boundaries.

Case Study 5: Excessive Stewardship Obligation and Unenforceable Terms

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 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, the land trust must take into account that logic, if it can be discerned, when 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 nonemployees or part-time employees could move in immediately after the annual monitoring visit. Similarly, the specific bunkhouse hallway requirements are difficult beyond reasonable monitoring expectations and do not appear directly relevant to the purposes or conservation values of the easement. However, there

was a reason this provision was included in the easement, and land trusts would be wise to fully examine the goals of the language at the time before 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. An option to an amendment is to issue an interpretation letter that reduces the stewardship monitoring and administrative burden in monitoring the provision. The land trust might decide not to monitor the employment status of people living in the bunkhouse or might choose to grant discretionary approval for part-time employees who live there. Land trusts must be very cautious here. A land trust should consider these approaches only for those factors that have no impact on the easement purposes, no significant impact on the conservation values of the property and no potential for bestowing impermissible private benefit. Addressing legitimate concerns about perpetual stewardship administration, while not the sole determinant, are important and legitimate rationales for decision making. Any changes to the easement may require changes to the baseline documentation (or a current conditions report).

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, in NRCS (Natural Resources Conservation Service) plans for the ranch and local cattle community standards to interpret the standard to require an *average* two-inch grass length based on measurements at multiple locations. But when, and how often, must the grass length requirement be satisfied? 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 or at least a net neutral result (for all conservation values of the easement), which includes improved easement stewardship as one factor.

More thoughtful initial easement drafting in 2000 could have avoided this problem. Either omitting the troublesome provisions or including an explanation of the purposes they serve and their importance would have enabled the land trust to address these provisions more effectively. Modifying easement restrictions to improve enforceability requires appropriate analysis using all the amendment principles, the screening tests and careful adherence to the amendment policy.

Key Points Using the Amendment Principles

- 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 values of the property, 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. Improved stewardship of the easement's purposes may be a good reason to do so, providing that the amendment strengthens the overall protection of the land to offset the modification of the apparently nonsubstantive restriction. There is no way to know without research and investigation what motivated the bunkhouse provisions and how significant the provisions were to the grantor. (This research will help to satisfy principles 5, 6 and 7.)
- The two-inch grass length provision, however, protects the land from overgrazing and resulting erosion, so it is difficult to say it is irrelevant to conservation values. However, it could be modified to retain the intent to protect from overgrazing but be phrased in a way that removes all ambiguity about how that is accomplished and measured. (This modification helps to satisfy 5, 6 and 7.)
- In removing restrictions from an easement, the land trust must consider carefully whether releasing restrictions may result in impermissible private benefit or private inurement. When there is uncertainty, a qualified appraiser should review the situation and prepare an appraisal, if warranted. (This review helps to satisfy principles 3 and 4.)
- Moreover, entire removal of restrictions resulting in material harm to conservation values (such as health of the soil and vegetation) may violate the perpetuity requirements in federal tax law, which, in turn, may raise issues on the Form 990 reporting of the amendment. Therefore, reasonable modification to retain the effect but make the language enforceable by removing ambiguity would better satisfy the amendment principles (principles 1, 2, 3, 4, 5, 6 and 7).
- This case illustrates a moderate risk in the amendment spectrums.

Case Study 6: Ambiguous Easement Terms

Scenario

In the 1980s, a land trust accepted a conservation easement that included a residence and accessory 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 turn the large existing residence into a bed-and-breakfast inn and to host small 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 protected property. 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 of *commercial* that have multiple inconsistencies 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. The land trust should also consider the likelihood that the same ambiguity over the definition of *commercial* exists in other easements. Therefore, it should take great care in resolving the first dispute to arise as it may set a precedent. The judge in a second lawsuit may look to the results in the first, so a single bad decision can be repeated. As a public relations matter, land trusts may find it difficult to explain different treatment of seemingly similar circumstances.

Considerations

The land trust observed that the underlying problem was inherent ambiguity in the now-outdated easement language. If the easement allows “all uses not inconsistent with the easement” and a residence and accessory buildings, then how much additional use would be allowed and be considered “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? What about weddings? Is the addition of any commercial use inconsistent, or did the original easement permit modest commercial uses

consistent with its other provisions? Resolving this matter is all about balancing the degree of ambiguity with a proportional response that meets all seven amendment principles in at least a net neutral manner.

Amendment Option 1

One solution might be to acknowledge the extent of the ambiguity via a written legal opinion from an outside trial attorney who analyzes not only interpretation of the easement and application of other state laws but also litigation risk and confidence in the land trust prevailing in court. Should the ambiguity be high with other state laws generally encompassing limited commercial activities on such land and a low confidence of prevailing in court, then the land trust may determine that amending the easement to confine the inn and function activities to a defined area near the existing house and within modest scope and scale restraints will be enough to satisfy the amendment principles. Within that area only, 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. This satisfies the principles given the high ambiguity of the language and the low confidence of prevailing in court.

Amendment Option 2

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 similar social functions that threaten 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. This is an even more restricted solution and potentially more desirable if the landowners will accept it. Remember to consider ease of stewardship administration. The land trust may want to have the landowners pay an additional stewardship endowment and pay for all costs of the evaluation, documentation and amendment process in both scenarios.

Amendment Option 3

A third possibility is that the land trust either has in its modern template, or creates a generic template clause, giving the land trust sole

discretion to determine if a proposed use not specifically mentioned is consistent with the easement and to approve any such consistent uses with any conditions or limitations that it may deem appropriate. The land trust would then amend the easement to include that clause, write a detailed approval letter with numerous conditions and append a locator map. This strategy allows more scope for dealing with details off record, allows a map to be included and precludes having to go through this exercise yet again when another such commercial use issue pops up. The land trust would then have a standard clause to use in other similar situations providing equity to other landowners. Then the land trust structures any approvals to fully satisfy all amendment principles, or denies the approval request again because of failure to satisfy one or more of the principles.

Unless the land trust is confident that the easement allows the proposed commercial uses, the land trust will need to address the issue of impermissible private benefit or private inurement. Absent that confidence, the land trust takes a significant risk if it grants the amendment.

Any of these 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 the land trust and the landowners at a disadvantage—but how much depends on other state laws. Any solution along these lines may necessitate some informational conversations and outreach 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. Although public sentiment is a significant consideration, the land trust should be careful not to overemphasize its importance in proportion to the scope and scale of the issue and in the decision-making process.

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 (remember it did not prohibit it either, so the land trust has litigation risk). 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. The

stated uses in this easement are a residence, agriculture, forestry and conservation, and a court might well find that other commercial uses are not permitted at all or are permitted under state regulations. The degree of ambiguity needs to be carefully and rationally evaluated with the land trust board and counsel. The more ambiguity, the more risk of litigation.

Mediation might help the parties arrive at a suitable amendment resolution. If the landowners reject any compromise that the land trust can accept, there may be no option other than a court proceeding.³³

Key Points Using the Amendment Principles

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 older easements.

- The land trust must preserve the purposes of the original easement in any negotiated solution. In addition to reading the easement itself, the land trust should review the full file to ensure that the land trust understands the sources of the original language, to the extent documented, any concerns expressed by the grantor and any promises made to the grantor or others. All of these details should ideally be documented in the easement and the baseline themselves and not in extrinsic evidence. (Reviewing the history of the easement helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- All of the outlined courses above run some risk of offending someone. The proportionality of the solution and the care taken to address this dilemma can either reduce or escalate the serious risk of adverse reactions with neighbors, land trust members, 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. (This planning helps to satisfy principles 1, 6 and 7.)
- Depending on the specific factual circumstances and level of easement ambiguity, a land trust may conclude that the amendment options' effect on the property's conservation values is neutral or beneficial (per *Land*

Trust Standards and Practices and the amendment principles) 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 forth. (This strategy helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)

- 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, to protect against impermissible private benefit, the land trust should consider obtaining an appraisal or, at least, some other independent substantiation by a real estate professional to document the amendment's effect on property value, rather than relying on internal judgment. The appraiser or real estate professional may need an independent legal opinion of the permitted uses before and after the amendment. (This helps to satisfy principles 3 and 4.)
- Finally, depending on the specific factual circumstances and level of easement ambiguity, the land trust may insist that the existing easement prohibits both bed-and-breakfast and catered weddings and events or prohibits one but not the other if grounds exist to distinguish them. (This helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7 but may result in litigation and thus would need a full legal analysis of the strength of the decision in court.)
- As part of the full-risk analysis, the land trust and counsel should consider potential landowner reactions to any decision and the land trust confidence in its ability to prevail in court. Mediation may be a good interim step in such disputes. The land trust may want to pay for and

obtain an official legal opinion on the confidence in prevailing under various scenarios with the various risk considerations for the full board to evaluate.

- This case study illustrates a moderate to moderately high risk on the amendment spectrum, depending on the resolution selected, the extent of ambiguity and the uses requested. Clarifying easement language requires a thorough analysis using all the amendment principles and screening questions and careful adherence to the amendment policy.

Case Study 7: Modifying Subdivision Reserved Rights

Scenario

A conservation easement on a 1,300-acre ranch with agricultural and scenic purposes also allows the separate transfer of 600 acres of the core undeveloped part of the ranch, leaving the existing buildings plus 700 acres together. The 600 acres can be further subdivided into six 100-acre tracts, each with rights to build a residence and related outbuildings and agricultural structures. Thus, the easement allows a total of seven separate ownerships and residences, each capable of being a standalone ranch unit. When the landowners attempt to sell portions of the property, however, this configuration of land and building rights proved unmarketable.

The landowners propose an amendment rearranging the transfer rights. The amendment would create a 650-acre tract with the potential for subdivision of two 100-acre lots, for which there is a current buyer. 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. To summarize, under the original easement, the property could be divided into one 700-acre lot and six 100-acre lots, whereas under the proposed amendment, the property could be divided into a 450-acre lot, a 350-acre lot and five 100-acre lots.

Considerations

The easement was not donated, but was created by the land trust when the property was originally sold as part of a conservation buyer transaction. The property continues to be owned by the same conservation buyers that originally acquired it from the land trust; thus,

there are no previous original grantors to consider. Any amendment would require one or multiple current conditions reports.

Key Points Using the Amendment Principles

- As stated, the original configuration would have resulted in a maximum of one 700-acre and six 100-acre parcels. The amended configuration would also have seven parcels in a different configuration of one 450-, one 350- and five 100-acre parcels. Depending on the placement of the parcels on the ground, the amendment could be neutral to the conservation purposes, diminish or enhance conservation values. (This analysis will help to satisfy principles 3, 4, 5, 6 and 7.)
- This decision cannot be made in the abstract. Is there a conservation reason the 700 acres were originally retained as a single unit? 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 may require the expert advice of staff or independent agriculture experts to assess the impact of siting roads and structures (although the reconfiguration does not increase the overall number of roads and structures). Another strategy to consider is requiring a shared road for the six 100-acre lots or two lots to a road, instead of an individual road for each lot. Such creative problem solving could produce a resolution that satisfies all the amendment principles, solves the landowner's problems and results in a win for all. (This approach would help to satisfy principles 1, 2, 3, 4, 5, 6 and 7).
- 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. (These restrictions could help satisfy principles 1 and 7.)

- The owners have concluded that this property is unmarketable with the current easement, raising potential private benefit concerns. The land trust should hire an independent appraiser to determine the extent to which the market value of the entire property would be altered by the proposed amendment to the easement. The land trust should remember that 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.
- The land trust could also talk with the potential buyers to discern the obstacles to marketability in the current configuration. Their reluctance may not be due to the configuration at all but rather a rooted opposition to having encumbrances. In such circumstances, no modifications will solve that problem, so the owners' broker needs to look at other marketing approaches. If this reluctance is likely, the land trust might begin with this inquiry because it may eliminate the amendment request. (This analysis helps to satisfy principles 3 and 4.)
- 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 might oppose its division into smaller, differently situated units, even though the result is still seven residential large parcels all capable of ranching (that is, there would not be any additional traffic, construction or different uses of the land). Almost all states' laws do not confer neighbor standing, but angry neighbors can create significant bad publicity even if they cannot sue. It may be prudent to at least evaluate likely stakeholder reaction and take the time to have conversations with those most likely to be concerned. (This approach helps to satisfy principles 1, 2 and 3.)
- Land trusts in this situation could seek the opinion of the state attorney general division charged with oversight of charitable organizations and conservation easements, if applicable and if the attorney general has jurisdiction—some state attorneys general don't have the time, resources

or authority to address every question a land trust has. By seeking an opinion from an independent government body, the land trust can reduce the chance that a later challenge to the amendment or to the land trust's decision will not prevail.

- This case illustrates a moderate risk in the amendment spectrums.

Case Study 8: Consolidation and Reconfiguration of Easements

Scenario

A landowner purchased a 6,000-acre ranch and, in 2010, 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 defined building envelopes. This landowner went on to acquire three additional adjoining ranches, totaling 5,500 acres, each one subject to preexisting separate conservation easements with the same land trust negotiated by the prior owners. 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 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. The easement could fix the floating building sites to specific building envelopes in locations best suited to protect habitat. 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 and would have a single document to review before making changes on the property rather than multiple documents.

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 values or conferred private benefit to the landowner or others. The landowner proposed a reconfiguration that relinquished two floating home sites, one 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 an independent 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 trade-offs in the proposed amendment, the land trust created a matrix similar to the one on page 84. 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.

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

Given this scenario, a land trust 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

Sample Matrix on Impacts of Proposed Amendment					
	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

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. Under the law of the state, owners of these lots had an interest in the conservation purposes of the original conservation easements, so the land trust may need to obtain their consent to the consolidated conservation easement. In most cases, the land trust should also meet with the original easement grantors to explain how the consolidated easement continues to reflect their intentions to preserve and protect their properties in perpetuity.

The amendment could be accomplished through a document called “Restatement, Amendment and Ratification of Conservation Easements,” a title that would explicitly describe what the land trust and landowner are 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 grantors of the original conservation easements might be consulted so they understand that their intent is being upheld and the consultation documented in the land trust file. Overall, the land trust should attempt to make the changes made to the original conservation easements transparent in the restatement, including the redistribution of conservation rights and the unification of the land, so that there would be no question about why the amendment serves the public interest. The land trust’s analysis

should weigh conservation trade-offs on individual properties subject to different conservation easements and on the 11,500-acre property as a whole after its ownership was consolidated. It should carefully document the process to support its 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.

Key Points Using the Amendment Principles

- The analysis can properly assess the improved administration and enforceability of the easement as a conservation benefit to the whole, which is a legitimate positive factor in weighing trade-offs in easement amendments. (The improved administration and enforceability of the easement helps to satisfy principles 1, 2, 3 and 5.)
- Public relations become especially important in a situation like this one. A land trust should carefully consider who might object to the amendment and why as part of its analysis on whether to proceed. If the land trust decides to go forward, it should undertake appropriate outreach to the original grantors and neighbors and other interested persons to ensure that they understand the amendment and its benefits to the conservation values. (This approach helps to satisfy principles 1, 2, 3, 5, 6 and 7.)
- The land trust might voluntarily seek opinions and written evaluations from outside sources, including experts on the areas protected by the conservation purposes and an independent appraiser, as well as experienced legal counsel. As applicable in a few states, the state attorney general may need to be consulted. (These strategies could help to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- A land trust should handle this complex amendment as a moderate- to high-risk amendment, given the redistribution of rights offset by enhanced conservation.

Case Study 9: Amending to Resolve a Violation: Sale of Separate Parcels

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 grantor objects. Notwithstanding these restrictions, the landowner (who was the original easement grantor) 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 only after the fact 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 could enforce the easement and compel rescission of the sale. If the easement includes a cost and fees recovery clause, the lawsuit may pose a less significant longer term 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 affects 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 impermissible private benefit because the separate sale of the single tract likely increased the value of the easement property as a whole. An appraiser would likely determine that a single tract would be worth more as a separate parcel than it was as a portion of a larger ownership that was not dividable.

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 re-creation of the conditions prior to the violation.

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.

Creation of additional restrictions in an amendment could solve the private benefit problem. The easement contains 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, also 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. The land trust should be sure to prudently examine the need and amount of additional funding to also be paid as part of this resolution for additional stewardship and defense costs.

Key Points Using the Amendment Principles

- 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. (This approach helps to satisfy principles 1, 2, 5, 6 and 7.)
- The land trust should also 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. (This strategy could help to satisfy principles 3 and 4.)
- 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 approach could help to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)

- This situation is a moderate-risk amendment, in which the land trust weighs trade-offs within the conservation easement boundaries in the context of a clear easement violation and considers stewardship obligations and adding additional acres potentially outside the four corners of the easement so that a net neutral result occurs.

Moderate- to High-Risk Amendments

Case Study 10: Amending to Resolve Violations

Scenario

In the 1990s, a couple donated a conservation easement on their 70-acre property. They reserved the right to construct up to four residences in a two-acre building area and subdivide and convey the residences after they are built, along with areas of land surrounding each residence to create marketable house lots. The lots would still be subject to the conservation easement after sale to new owners. Within the building area, the couple retained the right to remove trees, but outside the building area, only the right to prune trees.

As of the 2013 monitoring visit, the couple was in their late 80s and had not developed or sold any of the allowed residences. They informed the land trust that they intended to divide the property into two parcels, give one containing the building area to their adult son and sell the other to a neighbor. In that monitoring visit, the land trust found that the son had removed a half-acre of trees outside the building area to create an orchard and enhance his view from the building area. The son was building a residence and a barn with a garage apartment in the building area, with a septic field outside the building area, which was not allowed by the conservation easement.

To address the violations posed by the tree removal and septic field, the land trust proposed amending the conservation easement prior

to the couple transferring the property to new owners. The amendment would extinguish two of the allowed residences and subdivisions; update the monitoring and enforcement provisions to current standards; allow fields, pastures and orchards near the building area, not to exceed three acres; clarify that the landowners have limited noncommercial forest management rights to improve habitat, control invasive species and exercise their reserved rights; and allow necessary infrastructure outside the building area for the residences in the building area, such as septic fields and driveways. The couple agreed to all the proposed amendment terms and executed and recorded the amendment in May 2014 before the closing in which they would transfer part of the property to the neighbor. During the amendment process, the land trust reached out to the son by email and phone messages to keep him informed about the process, but he did not respond.

When the land trust monitored the conservation easement in fall 2014, the son said the amendment was invalid because his parents had already deeded part of the property to him in February, before they executed the amendment in May, and they could not sign the amendment on his behalf. He had a deed to his part of the property dated February that he had not recorded and about which no one had told the land trust. He was angry about the amendment because he was unwilling to give up the previously allowed residences and subdivision rights, and he disputed there having ever been any easement violations in the first place. He accused the land trust of having tricked his parents into giving up the residential construction and subdivision rights and said he would not abide by the amendment.

The land trust negotiated with the son to resolve the dispute, facilitated over several months by attorneys on both sides. Eventually, he agreed to a new amendment, similar to the first amendment, except that he is allowed to build four residences in the building area rather than two, but without further subdivisions. The recitals of the new amendment state that it supersedes the previously recorded amendment, which was invalid due to a mistake of fact as to who were the proper parties to sign the amendment. This results in a reduction of two division rights.

Considerations

The land trust followed its amendment policy and procedures for both of the amendment processes. On balance, the benefit of extinguishing two allowed potential subdivisions and updating moni-

toring and enforcement terms to current standards outweighed any likelihood of negative impacts from the new rights (the orchard and the septic system) the landowner gained. In both processes, the land trust obtained an opinion letter from an independent environmental consulting firm that the additional rights gained by the landowner do not diminish the protection of conservation values afforded by the conservation easement. For each amendment, the land trust obtained an opinion letter from the appraiser who originally appraised the conservation easement when it was donated, stating that the amendment did not increase the financial value of the land subject to the conservation easement and did not cause impermissible private benefit. Because the second amendment process occurred after the couple sold a portion of the property to a neighbor, the land trust included the neighbor in the new amendment process, and the neighbor signed the amendment.

The land trust may have had a legal claim that the amendment signed by the parents was valid because the son did not record his deed and no one told the land trust that his parents had transferred the land to him. This first amendment would have extinguished more rights (eliminating two residences) than the amendment the son subsequently agreed to. However, it's uncertain that the amendment would have actually gone into effect. Because of the legal ambiguities, the land trust preferred to find a negotiated solution rather than attempt to impose that amendment on an unhappy son and risk litigation.

Key Points Using the Amendment Principles

- In analyzing the amendment “redo,” the land trust treated the “attempted amendment” signed by the parents as invalid and having no effect. It analyzed whether to approve the new amendment by comparing it with the original conservation easement, not by comparing it with the previously attempted amendment as though it had been effective. (This analysis helps to satisfy principles 1, 2, 3, 5, 6 and 7.)
- The appraiser who analyzed each amendment for impermissible private benefit acknowledged the prior attempted amendment and stated that neither version of the amendment would add economic value to the land subject to the conservation easement. (This analysis helps to satisfy principles 3 and 4.)

- The environmental consulting firm found that the limited forest management rights added in the amendment could enhance forest health and, accordingly, could benefit the conservation values of the property. (This finding helps to satisfy principles 1 and 7.)
- The right to create and manage fields, pastures and orchards, not to exceed three acres, includes the son's half-acre orchard, impacts relatively few acres in comparison to the total acreage protected by the conservation easement and is located near the building area. (These circumstances help to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- The limited rights that the landowner gained are consistent with the land trust's current standard template. The result is consistent with the land trust's enforcement policy. The son paid for all the costs related to the final amendment. (These results help to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- This case illustrates a moderate to moderately high risk in the amendment spectrums.

Case Study 11: Amending to Resolve a Violation: A Parking Lot Problem

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 that encroached on the protected property. 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 no parties 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 through 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 this

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 values of the easement area. However, 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 Using the Amendment Principles

- 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 re-create prior conditions and causing harm to other, as yet untouched, land. (This approach could help to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- The land trust considered land outside the original four corners of the easement in deciding whether to amend the easement and remove the parking lot from the easement area. Here, the land trust concluded that 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, because the land trust is resolving a violation, the original easement must experience a net positive or at least net neutral conservation result, which could occur in this case via the spillover benefits from the adjacent land conserved. (This approach helps to satisfy principles 1, 2, 3, 4, 5 and 7.)

- 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. (This strategy helps to satisfy principles 1, 5 and 7.)
- The land trust should determine whether the amendment should allow the specific parking area use within the easement in the specific location the lot 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 that could be offset with additional stewardship funding. (This approach helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7.)
- Seeking review by an independent government body, especially if some land is removed from the easement, may be advisable, especially if the neighbors express grave concerns. In a few states, review by the attorney general may be required.
- This amendment is an example of moderate risk, in which the land trust voluntarily seeks advice from outside parties.

A Twist

The landowner has no offsets to offer to correct the violation or the removal of the parking area from the easement. This increases the risk of proceeding with this amendment to the high-risk area. The parties therefore conclude that the land must remain in the easement area and evaluate how and whether the parking area might be allowed to remain. Overall, the parking area had no significant impact on the purposes and important conservation values of the easement area. The land trust weighs additional restrictions to the excluded area if it has important conservation values (for example, scenic values). (That approach helps to satisfy principles 1, 2, 3, 4, 5, 6 and 7, provided that significant additional stewardship and defense funds plus all costs of the correction are paid to the land trust.)

Yet Another Twist

The landowner has no offsets to offer to correct the violation or removal of the parking area from the easement. This increases the risk of proceeding with this amendment to the high-risk area. Accepting cash solely as the offset while satisfying impermissible private benefit concerns does not address the other amendment principles satisfactorily. In this scenario, the land trust may not be able to approve an amendment and may have to pursue remedies for the violation.

Case Study 12: Parcel A and Parcel B Trade-Off Variations

This example includes several scenarios to illustrate how different variables might affect the land trust's decision. Ms. Wong 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. Wong 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. The land trust must still carefully evaluate the proposed amendment through its amendment policy and procedures, including consulting with experienced legal counsel, and document compliance with the policy.

Scenario 1: Key Points Using the Amendment Principles

Ms. Wong proposes to amend the original easement, adding Parcel B to Parcel A, while reserving the right to build one house on Parcel B. She has reviewed the land trust's new standard easement that the land trust modified to remove ambiguities and strengthen the enforce-

ment 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. It is good to amend conservation easements to add acreage and strengthen their terms, and this amendment is low risk and satisfies principles 1, 2, 3, 4, 5, 6 and 7.

- 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 difficulty of its stewardship, cause confusion and risk an unintended violation. Additional stewardship and defense funds might partly offset this increase in difficulty and risk.
- The land trust might want to consider asking Ms. Wong 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 merged easement, or both the separate easements, can provide that the parcels cannot be separately sold.

Scenario 2: Key Points Using the Amendment Principles

Ms. Wong 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 values, a home site anywhere on Parcel B would interfere with its special wildlife habitat and a migration path, 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 result if there was no home site on that parcel. A home site on Parcel

- A would not negatively impact Parcel A's conservation values. (This proposal has a net neutral or possibly a net positive overall result and satisfies principles 1, 5 and 7.)
- However, if the land trust takes a larger view—that is, looks beyond the original easement boundaries to weigh trade-offs between both properties—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 values of Parcel A. Spillover benefits are difficult to evaluate, and the courts have not affirmatively accepted them, but they could create a positive change to Parcel A individually and definitely create a positive result to Parcel B by conserving it without any building rights. (This approach has a net neutral or possibly positive result, satisfying principles 1, 5 and 7.)
 - 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 values is significantly increased. (This has a net neutral or possibly positive result, satisfying principles 1, 5 and 7.)
 - 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. (This strategy helps to satisfy principles 3 and 4.)
 - 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 and possibly enhances (with

spillover from Parcel B) 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 shortsighted. To help make the decision, a land trust should be guided by its overall mission and goals in the community. (This plan could help satisfy principles 1, 2, 3 and 5.)

- 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, to satisfy principle 2.
- 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 grantors 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. (This approach could help to satisfy principles 5, 6 and 7.)
- Documented grantor/direct funder intent must also be considered. In this case, the original easement grantor of Parcel A still owns the land, but if that were not the case, the land trust should consider consulting with the original grantor, if possible. While the easement grantor does not retain approval authority over easement amendments (unless that authority was specifically granted in the easement or is granted in state law), an angry grantor or funder can create problems and bad publicity for the land trust, even if standing to sue in court is not recognized. (This plan helps to satisfy principle 6.)
- This amendment could be handled as moderate to moderately high risk on the amendment spectrums,

depending on the land trust's assessment of the conservation values and the state laws applicable to the facts.

Scenario 3: Key Points Using the Amendment Principles

Now suppose Ms. Wong 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 noncontiguous, 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 trade-off of negative conservation impacts to Parcel A for positive conservation impacts to Parcel B. 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 general rule regardless of the size or conservation importance of Parcel B; otherwise the amendment may not satisfy any of the amendment principles.
- The public perception risks become much greater if Parcel B is not directly connected to Parcel A. There may be cases where this amendment might enhance overall conservation seen broadly, but the public relations and legal risks make it difficult at best. (This approach may not satisfy principles 5, 6 and 7.)
- Federal and state applicable laws may not be satisfied in this scenario. All analysis requires outside qualified legal written evaluation to satisfy principle 2.
- Although the final decision would rest on the specifics of the case, this is a high-risk amendment, and it is unlikely that the land trust would proceed under these circumstances.

Scenario 4: Key Points Using the Amendment Principles

Finally, suppose Ms. Wong 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

Accepting cash as the entire or even most of an exchange for revising easement terms is high risk: The land trust's public credibility may be jeopardized by the appearance of conservation being for sale. 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. It may also establish the perception that violations can be excused by a payment after the fact. (This approach would not likely satisfy any of the amendment principles, with the possible exception of principle 4.)

Case Study 13: Too Much Change and Excessive Scope and Scale?

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, the community and the land trust's goals, the land trust found that the negative impacts on the other conservation values protected by the easement far outweighed the positive impact on the

agricultural enterprise. Moreover, expanded operations would likely have made the farm more economically profitable, which might raise concerns about possible impermissible private benefit.

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 scope and 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 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.

Key Points Using the Amendment Principles

- 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.
- Denying this request satisfies principles 1, 2, 3, 4, 5, 6 and 7. It would require major modification of the request to enable any amendment to satisfy the amendment principles in this situation.
- A land trust should handle this proposal as a high-risk amendment.

Outside the Amendment Principles

Case Study 14: Partial Condemnation for Storm Water Drainage Improvement

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 decision 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 land trust used the modest condemnation proceeds to construct an interpretive kiosk on the property as permitted by the easement.

Key Points Using the Amendment Principles

- The land trust did not voluntarily amend or release the easement but entered into negotiated condemnation proceedings—a situation that falls outside the amendment principles but for which a land trust can still (and should) find utility for them.
- 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 insist that the infrastructure be moved to a more suitable location or reconfigured to reduce negative results. Then, when satisfied and properly compensated, the land trust

could proceed with a formal written notice of pending condemnation and a deed or right-of-way in lieu of actual condemnation. Remember that not all entities have condemnation authority.

- By requiring the public entity to document the actual condemnation decision with a detailed negotiated plan, 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.
- The land trust must be fully and properly compensated.
- Rarely does this scenario require an actual amendment because the deed in lieu of condemnation or the right-of-way signed by the land trust modifies the conservation easement automatically upon recording.

Some Final Observations on the Case Studies

These case studies illustrate just a handful of the many different fact patterns that land trusts face. Different legal jurisdictions and organizational missions affect how land trusts handle these amendment proposals. Despite all the variables, these examples also show how land trusts typically converge on basic common steps to make their amendment decisions. It's important to remember that the amendment principles and screening questions allow the land trust to objectively evaluate a proposed amendment's compliance with law, consistency with easement purposes and effect on conservation values of the property. In addition, when faced with an amendment request, the land trust should:

- Gather information as needed to apply these tests and document the results
- Always consult qualified legal counsel
- Seek input from outside parties, such as experts like appraisers and biologists, as needed (generally, the more complex or controversial the amendment, the more advice from outside sources and authorities should be sought)
- Remember that it can negotiate positive conservation results from less-than-optimal amendment proposals rather than simply saying no
- Realize that, sometimes, the right answer is "no"

Trends and Conclusions

Experience shows that, as conservation easements age, amendment proposals become increasingly complex. Changes on the land, changes in ownership, evolving economic forces and community needs, market and scientific changes, climate change impacts, outdated easement language and conservation easement violations all bring to the surface new amendment challenges. While the land trust community continuously refines its techniques as it gains experience, critical areas remain uncertain. Thus, the land trust community, lawmakers and the courts are finding their way by:

- *Evaluating amendment proposals.* Land trusts continually refine their methods for evaluating the effects of proposed amendments. In particular, they review their methods of weighing trade-offs in conservation values and impacts to conservation purposes. As more land trusts gain experience, decision-making and documentation methods are becoming more consistent across the community. In the long run, solid amendment policies and consistency in the way they are applied nationally 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 will influence best practices, judicial decisions and legislative enactments, which, in turn, will clarify state and federal laws and provide clearer guidance to practitioners. Legal advisers do not always agree about the legal underpinnings of easements and the constraints on amendments, but we can expect that uncertainties will be resolved over time as the courts test amendments and applicable laws, as the IRS views are clarified and as state legislatures refine easement enabling statutes. Some states may follow Maine and Rhode Island's lead by amending their enabling statutes to establish clear amendment and termination standards and procedures.

- *Clarifying the role of public entity oversight, if any.* With more experience, leaders in the field will develop clearer guidance about when it is recommended, advantageous or legally required to seek approval of an independent government body for a proposed amendment and how best to do so. Likewise, land trusts can help these entities to simplify and streamline their practices for approval of proposed amendments.
- *Clarifying the effect of easement origin.* How an amendment policy applies to different types of conservation easements—whether donated, purchased, reserved or exacted—is relevant as part of the amendment process considerations.
- *Improving easement language to minimize the need for amendments.* Drafting conservation purposes and restrictions to endure without amendment is an evolving art. Land trusts have learned that easements should not include language that is unnecessarily restrictive, ambiguous or time limited; does not support the conservation purposes; or is disproportionately difficult to monitor and enforce. They continually improve easement language to be flexible enough to accommodate changes in technology, changes from nature and new economic uses of the land. All easement drafters must stay attuned to lessons from the ground and to learn from others' successes and mistakes, as well as from their own.
- *Including amendment provisions in conservation easements.* Land trusts can avoid many of the state law uncertainties associated with easement amendments if their easements include a well-drafted amendment provision. The provision affirmatively reserves to the land trust authority to amend and informs grantors that amendments may occur.

Although conservation easements have been in use for several decades, the land trust community's experience with amendments is still relatively minimal and evolving. Amendment questions often do not arise until the property has changed hands because the original easement grantors usually remain comfortable with their decisions. As a result, land trusts may go years before facing complex amendment decisions. This publication seeks to provide land trusts with the most current and best available practical advice. Key points for land trusts to remember:

- Focus on solid initial easement drafting to minimize the need for future amendments to the greatest extent possible.
- Adopt and use a standard easement format or template and boilerplate provisions that reduce errors and ambiguity.
- Avoid overcommitment on easement drafting and the timing of completion. Now that the tax incentives are permanent, land trusts and landowners have more time to make thoughtful decisions without the threat of expiration of the tax incentives at year-end.
- Include in the easement deed an amendment provision that affirmatively reserves to the land trust authority to amend and informs grantors that amendments may occur.
- Consider amendments with caution proportional to the circumstances and the risk.
- Develop and follow a written amendment policy and procedures that include the amendment principles and screening questions, as well as the organizational mission and goals so that land trust intent is clear.
- Obtain expert legal advice to develop an amendment policy and to review and draft proposed amendments.
- Discuss the land trust's amendment policy with the easement grantor and any direct funders of the project.
- Use organizational mission and goals to inform amendment decisions so that conservation easements will continue to benefit the public despite any change.
- Be transparent in land trust actions and be prepared to confirm them when landowners, land trust members, the public and state and federal regulators question decisions.
- Act with recognition that any land trust actions, including but not limited to amendments, may cause scrutiny by state and federal regulators and independent government bodies with repercussions beyond the land trust and into the national land trust community.
- Explain decisions to board and staff to continue institutional knowledge, culture and messaging.
- Keep current with developments as the amendment field continues to evolve. For more information on training opportunities, go to www.lta.org.

Whether, when, who, what and how to modify conservation easements will be a perpetual challenge to the land trust community's obligation to ensure lasting land conservation that serves public interests. A land trust must uphold this obligation, even when confronted with inevitable changes that the passage of time may bring to easement properties. There are a number of tools that land trusts may use 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 advisers to keep land trusts informed on this issue.

Sample Documents

Sample Amendment Provisions

The Land Trust Alliance does not endorse any of these provisions, and any provision must be tailored to the law of the particular state, the mission, policies and intent of the specific land trust, the intent of the individual grantor or funding source, the circumstances of the particular land and all other relevant factors. We include these as illustrations of various approaches to including *Amendment Report* principles in an amendment clause.

Sample 1

Other Rights of Holder. The items set forth below are also rights vested in Holder by this Grant; however, Holder, in its discretion, may or may not exercise them:

- (a) Amendment. To enter into an Amendment with Owners if 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.

From the [Model Grant of Conservation Easement](#), 7th ed used by Pennsylvania land trusts and local governments. Provided by the Pennsylvania Land Trust Association.

Sample 2

5.6. Amendment. This Conservation Easement may be amended only upon the written consent of Grantee and by a recorded instrument signed by the then current Grantor (owner) of the Property (or of the parcel of the Property affected by such amendment) and Grantee. Any amendment of this Conservation Easement shall be at the discretion of the Grantee (which may

establish such requirements for the submission of plans and other documentation as it deems necessary to make the determination required or permitted of it hereunder) and only if such amendment: a) does not result in material impairment of the conservation values that are protected by this Conservation Easement; b) is consistent with the applicable Purpose(s) of this Conservation Easement and with the Grantee's then current Conservation Easement Amendment Policy; c) does not affect the perpetual nature of this Conservation Easement; and d) complies with Article 49, Title 3 of the New York Environmental Conservation Law, Section 170(h) of the Internal Revenue Code, as amended, and any regulations promulgated pursuant thereto. Subject to the foregoing, amendments may include changes necessary to effectuate the Purposes of the Conservation Easement in response to global warming and climate change-caused effects. Grantee shall have no right or power to agree to any amendment that would result in this Conservation Easement failing to qualify as a valid conservation easement under the Environmental Conservation Law or Section 170(h). The Grantor requesting the amendment shall reimburse Grantee for all expenses, including staff time and reasonable Attorneys' Fees, incurred in evaluating, preparing and executing the amendment.

From the Columbia Land Conservancy (NY). The state of New York requires an amendment clause for an easement to be amendable.

Sample 3

B. Amendment. Grantors and Grantees recognize that circumstances could arise that justify an amendment of certain of the Provisions contained in this Conservation Easement. To this end, Grantors and Grantees have the right to agree to amendments to this Conservation Easement; provided, however, that:

- (1) No amendment shall be allowed if it would adversely affect the qualification of this Conservation Easement or the status of Grantees under any applicable state or federal law, including Section 170(h) of the Internal Revenue Code;
- (2) No amendment shall be allowed if it would create private inurement or private benefit;
- (3) Proposed amendments will not be approved unless, in the opinion of each Grantee, the requested amendment

satisfies the more stringent of the following: (A) (i) the amendment either enhances or has no adverse effect on the Conservation Purpose protected by this Conservation Easement and (ii) the amendment upholds the intent of the original Grantors and the fiduciary obligation of the Grantees to protect the Property for the benefit of the public in perpetuity; or (B) the amendment complies with such Grantee's amendment policy at the time that the amendment is requested;

- (4) The amendment must be in conformity with all of each Grantee's policies in effect at the time of the amendment;
- (5) The amendment is subject to and dependent upon approval of the Maryland Board of Public Works; and
- (6) The amendment must be recorded among the Land Records in the county or counties where this Conservation Easement is recorded.

Grantors and Grantees may agree to an amendment in lieu of engaging in full condemnation proceedings; provided that Grantees determine that the exercise of condemnation would be lawful, the best interest of all parties would be better served by negotiating a settlement with the condemning authority, and the Grantees receive and use compensation as set forth in Art. X.C above. In such event, an amendment shall only be required to satisfy Art. XI.B (5) and (6).

Proposed amendments that exceed the discretion granted to the Grantors and Grantees pursuant to this Provision are permitted only if they are authorized by a Maryland court having jurisdiction, and in evaluating any such proposed amendment, the court shall apply the law of charitable trusts as then in effect in the State of Maryland. Nothing in this Article XI.B shall require Grantors or Grantees to (i) agree to any amendment; or (ii) consult or negotiate regarding any amendment.

Provided by the Maryland Environmental Trust.

Sample 4

Amendment. If circumstances arise under which an amendment to this Deed would be appropriate, as determined by the Grantee in its sole discretion, the Parties may jointly amend this Deed in writing according to the formalities dictated by state law. However, no amendment shall be allowed that will (i) confer a private benefit to Grantor

or any other individual greater than the benefit to the general public [see Treasury Regulation §1.170A-14(h)(3)(i)]; (ii) result in private inurement for a board member, staff or contract employee of Grantee [see Treasury Regulation §1.501(c)(3)-1(c)(2)]; (iii) affect the qualifications of this Easement under any applicable laws; or (iv) affect the perpetual duration of the Easement. Grantee shall have the right to charge a fee to Grantor for time and costs associated with any amendment. Any amendment must be in writing, signed by the Parties, and recorded in the official records of _____ County, Colorado.

This clause was based on a sample provided by Colorado Open Lands.

Sample 5

Amendment. This Conservation Easement may be amended only in very limited circumstances and only upon the following conditions:

- Any amendment will comply with Grantee's adopted policy on amending conservation easements, as such policy may be in effect from time to time. Such policy may include requirements for biological assessments, requirements for appraisals, and other items;
- There shall be no amendment permitting the location of a residential structure outside of the ADA;
- No amendment will be granted unless the Grantee determines that such amendment will enhance, or at a minimum, it will not adversely affect in any way the agricultural, scenic and other protective goals of this Conservation Easement and is otherwise consistent with the overall Purposes and intent of this Easement; and

8.5.D. Any amendment of this Easement shall be at the discretion of the Grantee and shall comply with IRC §170(h). If Grantor requests the amendment, Grantor shall reimburse the Grantee for all expenses, including, for example, staff time, reasonable attorneys' fees, and recording costs incurred in preparing and executing the amendment.

Provided by Black Canyon Regional Land Trust (CO), which is in the process of merging its operations with Mesa Land Trust

Please call Land Trust Alliance staff to discuss any concerns you may have about donated conservation easements and IRS audit and trial tactics. Alternatives exist to document good-faith full disclosure and to preserve clarity on amendments.

Sample Amendment Policies

The sample amendment policies included here are designated as recommended documents by the Land Trust Accreditation Commission. The versions reprinted here are annotated. Additional sample policies can be downloaded from [The Learning Center](#).

Sample 1

Practice 11I – Conservation Easement Amendment Policy
Accreditation Requirements Annotated (also see the *Requirements Manual*)

The organization's amendment policy must include all of the items highlighted below.

[LAND TRUST]
CONSERVATION EASEMENT AMENDMENT POLICY

1. INTRODUCTION

[LAND TRUST] holds conservation easements to protection conservation values in accordance with IRC 170(h). [LAND TRUST] is obligated to protect these conservation values in perpetuity by monitoring its easements at least annually and enforcing them in the event of a violation. [LAND TRUST] recognizes that it may be necessary or desirable on rare occasions to modify the terms of its easements, but [LAND TRUST] will do so only in accordance with applicable law and only for uses that have a beneficial or neutral effect on the conservation values they protect.

Must have net
beneficial or neutral
effect on
conservation values

Therefore, it is [LAND TRUST]'s policy to hold and enforce its conservation easements as written, except in the limited circumstances described in this policy. All requests for consent, waiver, modification or amendment of the terms of an easement ("amendment") will be reviewed according to the procedures set forth in this policy.

Because every property is unique, no decision by [LAND TRUST] with respect to the amendment of a conservation easement shall create a precedent with respect to any other request for an amendment. The amendment policy process laid out in the original conservation easement deed will guide the consideration of any proposed amendment.

Although this amendment policy sets forth certain guidelines and procedures, nothing herein shall be deemed to impair the sole and absolute discretion of the board of directors in determining whether any proposed amendment is acceptable to [LAND TRUST].

Circumstances
for which the
land trust
would
consider an
amendment

2. AMENDMENT POLICY

[LAND TRUST] will consider amendments to its conservation easements only in the following circumstances:

- A. Correction of an Error or Ambiguity. [LAND TRUST] may amend an easement to correct a drafting error or oversight made at the time the easement was granted. This may include correction of a legal description, inclusion of standard language that was unintentionally omitted or clarification of an ambiguity in the terms of the restrictions in order to avoid litigation over the interpretation of the document in the future.
- B. Prior Agreement. Occasionally, an easement contains a specific provision or there is an unrecorded agreement or other document allowing modification of the easement terms at a future date under defined circumstances. Such agreements must be set forth in the conservation easement or in a separate document signed by all parties,

including [LAND TRUST], on or before the date the easement was executed. The amendment must be consistent with the terms and conservation intent of the original agreement.

- C. Settlement of Condemnation Proceedings. Conservation easements and other interests in land held by [LAND TRUST] may be subject to condemnation for public purposes, such as highways, schools, etc. In the event of a lawful condemnation proceeding, [LAND TRUST] shall attempt to preserve the intent of the original conservation agreement to the greatest extent possible.

- i. Whenever all or part of the property is taken in the exercise of eminent domain by a public, corporate or other authority so as to abrogate in whole or in part the conservation easement, the landowner and [LAND TRUST] shall act jointly to recover the full damages resulting from such a taking with all incidental or direct damages and expenses incurred by them thereby to be paid out of the damages recovered.
- ii. The balance of the damages recovered shall be divided between them in proportion to the fair market value on the date of execution of the easement deed of their respective interests in the condemned portion of the property. For this purpose, [LAND TRUST]'s interest shall be the amount by which the fair market value of the property immediately prior to the execution of the conservation easement deed was reduced by the restrictions imposed. [LAND TRUST] shall use its share of the proceeds in a manner consistent with and in furtherance of the conservation purposes set forth in the easement deed.

- D. Substantial Alteration or Destruction of a Conservation Value. Alteration or destruction caused by a cataclysmic event, such as a volcanic eruption, earthquake, fire, rising sea levels, destruction of habitat caused by climate change or species extinction, are examples of actions or circumstances that could greatly alter conservation values an easement is intended to protect. In this situation, [LAND TRUST] may amend the easement to protect and preserve the remaining conservation values, provided that the amendment meets the requirements listed in section 3, below. If there are no conservation values remaining, [LAND TRUST] may petition a court of competent jurisdiction to terminate the easement.

- E. Minor Modifications Consistent with Conservation Purpose. [LAND TRUST] may authorize other minor modifications of the conservation restrictions upon making the following findings:

Must
serve
public
interest

- i. The amendment clearly serves the public interest and is consistent with [LAND TRUST]'s mission.
- ii. The amendment is consistent with the conservation purposes and intent of the easement.

Must be
consistent
with land
trust
mission

Must be consistent with the
conservation purposes and
intent of original easement

Must comply with federal, state and local laws

- iii. The amendment complies with all applicable federal, state and local laws and regulations.

Must not jeopardize the organization's tax-exempt or charitable status

- iv. The amendment has a net beneficial or neutral effect on the relevant conservation values protected by the easement.
- v. There are no feasible alternatives available to achieve the purpose of the amendment.
- vi. The amendment will not jeopardize [LAND TRUST]'s tax-exempt status or status as a charitable organization under federal or state law.

Must not result in private inurement or confer impermissible private benefit

- vii. The amendment does not result in private inurement or confer impermissible private benefit.

Must be consistent with the original intent of donor, grantor, and any funding source

- viii. The amendment is consistent with the documented intent of the donor, grantor and any direct funding source.
- ix. The amendment will not impair [LAND TRUST]'s ability to steward, defend or enforce the conservation easement.
- x. No amendment shall effect a termination of the existing easement unless the terminated easement is immediately replaced by an amended easement consistent with this policy. No amendment shall cause the perpetual duration of an existing easement to be terminable.

- xi. The amendment will not undermine the public's confidence in [LAND TRUST] to protect conservation values in perpetuity.

- xii. No amendment shall be approved by [LAND TRUST] that is likely to result in the conservation easement failing to qualify as a valid conservation easement under the Internal Revenue Code.

3. PROCEDURES FOR AMENDING A CONSERVATION EASEMENT

- A. Amendments may be initiated by the landowner or [LAND TRUST].
- B. Amendment requests must be submitted in writing. The request should include a description of the change being requested, the reasons why it is warranted, a map of the property showing areas affected by the proposed amendment and any other information that justifies the request.
- C. Each request by a landowner must be accompanied by a payment of \$500 to cover anticipated costs in reviewing the amendment request, regardless of whether the request is approved, and if it is approved, the costs of drafting and recording the amendment. Any unexpended portion of the fee will be refunded. Additionally, the

landowner will be responsible for any costs exceeding the initial fee, as billed by [LAND TRUST], and the costs of any required documentation, such as a survey, boundary marking or updated baseline documentation report.

- D. Staff and/or the Lands Committee will review the amendment request for consistency with the original conservation easement deed, this policy, the [LAND TRUST] Conflict of Interest Policy and any related documentation. Legal counsel will review the findings. Other persons, such as natural resource professionals, may be consulted. A site visit and meeting with the current landowner and/or original donor may be conducted. The Lands Committee will review the request and make a recommendation to the board of directors.
- E. A written summary of the proposed amendment and the reasons why it is being requested will be presented to the [LAND TRUST] board of directors for preliminary approval. Such approval will be granted or withheld using the criteria listed in section 2E, above. The board's findings and decision will be recorded in the minutes of the board meeting.
- F. If the board grants preliminary approval, the amendment will be drafted by staff or by counsel. All amendments must be reviewed and approved by [LAND TRUST]'s legal counsel.
- G. The final draft of the amendment and a written summary of the reasons for its request will be presented to the board of directors for final approval. The board's decision and any additional findings will be recorded in the minutes of the board meeting.
- H. If the terms of the amendment are approved, [LAND TRUST] staff will have the title status reviewed by legal counsel to determine whether further title insurance and subordination of lenders is required to ensure that the amended conservation easement is covered by any policy and any lenders will be subject to the amendment.
- I. The amendment will be duly recorded. Originals and copies of the amendment deed and all related documentation shall be retained according to [LAND TRUST]'s recordkeeping policy.

Role of committees

Role of board

4. STEWARDSHIP AND LEGAL DEFENSE ENDOWMENT

If an amendment requested by a landowner will increase the administrative burden on [LAND TRUST] for future monitoring of compliance and/or enforcement of the conservation easement, [LAND TRUST] will advise the landowner of the amount of additional funding needed for the Conservation Stewardship Fund Endowment and suspend processing of the amendment until and unless the landowner has agreed to deposit the additional amount in the event [LAND TRUST] approves the amendment.

This policy is adopted by [LAND TRUST] board of directors on [DATE].

Sample 2

Practice 11I – Sample 2 Conservation Easement Amendment Policy

[LAND TRUST] Easement Amendment Policy and Procedures [DATE]

[LAND TRUST] acquires conservation easements with the intent to hold them in perpetuity and to enforce their terms and provisions as they are originally written. However, [LAND TRUST] recognizes that given the perpetual term of its easements, it is possible that changes in future conditions or circumstances may justify amending an easement to strengthen the easement, clarify its language or improve its enforceability.

The following principles, policies and procedures are intended to guide consideration of an amendment to any conservation easement, whether the amendment is proposed by [LAND TRUST], an easement landowner or a third party.

A. Amendment Principles

A conservation easement amendment must meet all of the following principles (except for amendments in lieu of condemnation, which are addressed separately):

1. Clearly serve the public interest, be consistent with [LAND TRUST]'s mission and conform to [LAND TRUST]'s conflict of interest policy
2. Comply with all applicable federal, state and local laws
3. Not jeopardize [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 purposes and intent of the easement
6. Be consistent with the documented intent (if any) 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

B. Policy

If a proposed amendment of a conservation easement meets the Amendment Principles set forth above, is recommended by [LAND TRUST] staff after the screening process described below, is recommended by the stewardship committee of [LAND TRUST]'s board of directors, is approved by the [LAND TRUST] board by a two-thirds vote of the number of [LAND TRUST] directors then in office and by any other required parties, the amendment may be implemented.

1. **Some examples.** The following are examples of circumstances in which it may be appropriate to amend an easement, subject to the Amendment Principles, above, and discretionary recommendations and approvals by staff, stewardship committee

and board. This list is not intended to include all of the circumstances in which an amendment may be appropriate, and each amendment, whether referred to in the list or not, must be considered in the context of the specific facts involved.

- To add land to an easement
 - To add restrictions on uses or activities that enhance the protected values or easement purposes
 - To carry out a specific agreement set forth in the easement or in an agreement executed by all parties to the easement prior to the initial execution of the easement
 - To correct a typographical error or other minor mistake
 - To make minor boundary adjustments
 - To upgrade to current standard language
 - To reflect changes in law or policy
 - To improve easement enforcement or administration
 - To clarify or rectify an ambiguity to resolve a dispute and/or to strengthen easement provisions
 - To allow uses or technology not in existence or contemplated at the time of granting of the easement
 - To permit changes to or elimination of specified sites or locations for permitted activities or uses
 - To settle condemnation proceedings (see Condemnation Proceedings, below)
2. **Costs.** Normally, if an amendment is proposed by a landowner, the landowner will have to bear all of [LAND TRUST]'s costs associated with the amendment. Those costs would include the costs of negotiation and implementation of the amendment (e.g. staff costs, costs for expert advice, an appraisal or a survey, costs of title insurance, closing costs, etc.) and all ongoing future costs (e.g. increased costs for monitoring). On the other hand, if [LAND TRUST] initiates an amendment, it will ordinarily bear its costs and all closing costs. However, there are numerous factors that might result in [LAND TRUST] determining that fairness requires it to bear some or all of the costs, even when the landowner initiates the amendment process. Examples of cases in which judgment may be applied would include, without limitation, cases where the need for an amendment resulted from a mutual error or where the amendment is need to resolve an ambiguity in the easement terms to the benefit of both parties or where the net result of an amendment initiated by a landowner is to enhance significantly the conservation values to be protected by the easement. The issue of cost allocation will be dealt with in each situation after the amendment is clear and its net consequences are reasonably understood. At that point, [LAND TRUST] will discuss the effect of this provision and obtain the landowner's express written agreement to be bound by the cost allocation proposed by [LAND TRUST]. That agreement will include, among other terms, agreement by [LAND TRUST] that if it intends to seek reimbursement from the landowner, it will not incur significant costs for outside services or other substantial out-of-pocket expenses without first advising the landowner of [LAND TRUST]'s plan so that the

landowner will have an opportunity to change the amendment proposal to avoid or minimize such expenditures or to withdraw it altogether.

C. Amendment Procedures

Typical amendments begin with an informal request by the landowner or by [LAND TRUST], discussion and negotiation, sharing this Easement Amendment Policy and advice to the landowner that he/she will need to get legal counsel. In all cases, the process requires a formal written request by the party initiating the amendment process and, except when clearly unnecessary, a site visit. The agreement relating to costs referenced above will need to be completed and signed.

1. **Staff evaluation.** Once the proposal is clear, it will be evaluated by [LAND TRUST] staff against basic screening tests to determine whether it meets the thresholds of the Amendment Principles. Staff will refer to the Land Trust Alliance's *Amending Conservation Easements: Evolving Practices and Legal Principles* 2007 research report section entitled "Reviewing the Request: Amendment Screening Tests" as the basis for its review of any proposed amendment, except amendments involving condemnation proceedings (see section D, below). As a result of this process, staff and the landowner may wish to revise the proposal to resolve issues or make improvements in the proposal. After completing its evaluation, staff will make its recommendations to the stewardship committee in advance of a board vote.
2. **Staff recommendation to stewardship committee.** When staff has completed its evaluation, including necessary documentation, it will make a written report with its recommendation to the stewardship committee as to approval or disapproval of the proposed amendment and on what terms and conditions. If staff is recommending approval, the report shall address each of the Amendment Principles, and if compliance with any of those principles is uncertain to any significant degree, staff will provide sufficient information to the committee so that the committee can appreciate the uncertainty and any risks to [LAND TRUST] that may be involved. If the recommendation is disapproval, staff's report will focus on the reasons for such disapproval without the necessity to address principles that are not relevant.
3. **Committee recommendation to board, board action and communication to landowner.** The stewardship committee, by a vote of a majority of committee members, may disapprove the proposed amendment or it may approve the proposed amendment, approve a revised version of the amendment or approve an amendment subject to stated terms and conditions. The committee will report its recommendation to the board.

After deliberation, the board will vote on the amendment as recommended by the stewardship committee or the board may revise the proposal and/or add other terms and conditions. Approval of an amendment requires approval by a two-thirds vote of the number of [LAND TRUST] directors then in office.

When the board has acted, the board shall thoroughly document the specific reasons for its action, couched in the context of the easement amendment review criteria set forth in this document. The board will designate an appropriate person to communicate to the landowner in writing the basis for the decision of the board. Every reasonable effort will be made to let the landowner know that [LAND TRUST]'s decision was based on applicable laws and this amendment policy and that the policy is applied fairly to all proposed amendments. [LAND TRUST] will also communicate its decision to the other parties with an interest in the property or rights of approval or disapproval.

- 4. Final steps.** If an amendment is approved by the [LAND TRUST] board and by all other necessary parties, final steps include:
- a. Legal review of final documentation of the amendment and preparation of an amended and restated easement in form for recordation.
 - b. Legal review of any required subordination documentation from possible intervening lien holders or others.
 - c. Confirmation by a title insurance company of its willingness to issue title insurance to [LAND TRUST] insuring [LAND TRUST] in the amount requested by [LAND TRUST] and that the amended and restated easement in favor of [LAND TRUST] is a valid easement superior in priority to all deeds of trust, liens, encumbrances and easements of every nature, except items excepted from the title insurance issued to [LAND TRUST] prior to the date of the amended and restated easement.
 - d. An update by [LAND TRUST] staff of the baseline documentation to reflect the effect of the amendment.
 - e. Signed approvals by all parties with approval rights.
 - f. Appropriate instructions to a title company signed by the parties. Closing costs will be allocated and paid in accordance with the agreement between [LAND TRUST] and the landowner referenced in section 2, above.
 - g. The amended and restated easement will be signed and acknowledged by [LAND TRUST], any co-holder and the landowner and recorded at the [COUNTY] recorder's office.

D. Condemnation Proceedings

Amendment of a conservation easement as a result of condemnation proceedings is not covered by the statement of Amendment Principles, above, but is addressed in the policies and procedures set forth in this section.

If a condemning authority indicates an interest in condemning some or all of an easement property, [LAND TRUST] will work diligently to prevent a net loss of protected conservation values and will use its reasonable best efforts to preserve the intent of the original easement to the extent possible in the circumstances.

[LAND TRUST] recognizes that it may be impossible effectively to prevent condemnation for proper public purposes. When part of a [LAND TRUST] 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:

1. [LAND TRUST] determines that the exercise of eminent domain would be lawful, and the condemning authority has made all determinations and taken all actions that are required by law as conditions to its pursuing condemnation proceedings
2. [LAND TRUST] determines that the best interest of all parties would be better served, on balance, by negotiating a settlement with the condemning authority rather than engaging in litigation.

[LAND TRUST] will use the compensation in a manner consistent with the conservation purposes of the original easement.

[LAND TRUST] staff, the stewardship committee and the board will work to carry out the policies set forth above in this section, referring to the Amendment Procedures only as deemed useful in the circumstances. Approval of an amendment in lieu of condemnation will require a simple majority vote by the board. Some of the Final Steps set forth under the Amendment Procedures will apply to an amendment in lieu of condemnation with [LAND TRUST] staff determining whether and how to apply those steps in the circumstances.

Sample Amendment Checklist

What follows is a general example of an amendment checklist for you to adapt to your own organization.

1. Tools available to assist with risk analysis regarding amendments are
 - a. Your written amendment policy
 - b. The applicable easement modification clause
 - c. Triage systems (see below); these are often incorporated in a separate written amendment procedures document
 - d. The risk spectrums (see chapter 6)
 - e. *Land Trust Standards and Practices* and The Learning Center
 - f. Experienced legal counsel on call for your land trust who knows the laws of your state as well as the applicable federal laws and is capable of assisting you to analyze unique individual situations
 - g. State Attorney General Office
 - h. National experts on call through the Alliance
 - i. Each other: use peer review with other land trusts that have experience with amendments
2. Triage is critical.
 - a. Taking the challenge apart into small components to allow for a clear understanding and more manageable analysis is the first step.
 - b. Ask questions such as
 - i. What is the land trust's (or other holder's) mission?
 - ii. What does our amendment policy tell us about our shared values and beliefs about amendments?
 - iii. What does our state conservation enabling act say?
 - iv. Does the attorney general have a role?
 - v. Does any funder of the conservation easement have a condition or role?
 - vi. How did we acquire the easement: purchase, donation, exaction?
 - vii. What additional laws and regulations are implicated by the method of acquisition?
 - viii. When did we acquire the conservation easement?
 - ix. Who drafted it (the land trust or landowner)?
 - x. Did the land trust make any errors that contributed to the amendment request?

- xi. Does the conservation easement have an amendment clause? What does it require?
- xii. What is the magnitude of the amendment request?
- xiii. What is the effect of the request on the conservation easement's stated purposes?
- xiv. What do the conservation easement, the baseline, *the annual monitoring reports* and the property file tell us about the land trust and the grantor's intentions?
- xv. Are there opportunities due to other factors that make the request more conservation positive, such as updating an old easement, merging two adjacent easements, correcting seriously ambiguous clauses or correcting substantive omissions that adversely affect conservation?
- xvi. What do the stated restrictions and permitted rights suggest?
- xvii. How does the proposed amendment affect stewardship and administration of the conservation easement?
- xviii. Who else do we need to talk with? Do we have co-holders? How will this amendment go over with abutting landowners? Should we consult with them?
- xix. What alternatives are available?
- xx. Does anyone have a conflict of interest?
- xxi. Does the amendment request fall within the principles articulated in chapter 3?
 - 1. If yes, how do we document that?
 - 2. If not, how?
 - 3. Could the request be modified to satisfy the principles and policy?
 - 4. What alternatives?
- xxii. Does the amendment request fall within our amendment policy?
 - 1. If yes, how do we document that?
 - 2. If not, how?
 - 3. Could it be modified?
 - 4. What alternatives?
- xxiii. If we consider this amendment, how would we describe it on Form 990?
- xxiv. Have we addressed and documented every issue raised by the amendment risk spectrum?
- xxv. What will this cost and who pays?

- c. What does your attorney identify as potential downside risks, legal uncertainties and potential upside opportunities?

Disclaimer

This is a tool to help land trusts and is provided with the understanding that the speakers and organizations are not engaged in rendering legal, accounting or other professional counsel. If you require legal advice or other expert assistance, seek the services of competent professionals.

Sample Discretionary Consent Policies



Five Rivers Conservation Trust
Helping to protect open space in central New Hampshire

Policy and Standard Operating Procedure for Discretionary Consent Requests

for conservation easements with a discretionary consent section

Adopted by Board: December 21, 2015

Policy

Purpose and Intent

Conservation easements are perpetual. As much as we may try to anticipate the future, there will be events and circumstances which create situations that may not be anticipated with the original conservation easement language. In 2014, Five Rivers Conservation Trust ("Five Rivers") added a provision to its standard conservation easement template allowing for discretionary consent, in addition to the existing provision allowing for amendments.¹ Discretionary consent is a means for allowing accommodation of uses and activities that are not detrimental to the purposes of the original conservation easement or conservation values of a property but may not be explicitly allowed by the easement document. Discretionary consent is generally for uses or activities of limited duration. The policy and procedure described herein shall be used for those easements which provide for discretionary consent. Adherence to these policies will help ensure that discretionary consent does not erode public confidence in Five Rivers, its conservation easements and their permanence, that the expectations of donors to the original project and assurances made to the public and in proposals to grant funders are respected, and that permitted uses create no undue costs for Five Rivers.

Standards for Approval

When considering requests for discretionary consent, Five Rivers must determine that the requested change:

- Is consistent with and not detrimental to the purposes of the easement and does not significantly impair the conservation values or attributes of the property protected by the easement. This determination should include an analysis of the expected or potential effects upon the property, the impacts on conservation values and attributes identified in the easement and baseline documentation, a review of potential alternatives, an analysis of the additional costs that will be incurred by Five Rivers if the action is approved, the time needed for implementation of the request, and the duration for the requested action.
- Does not affect the perpetual duration of the easement.
- Does not create private inurement or impermissible private benefit.
- Does not affect the qualification of the easement or the status of Five Rivers under any applicable laws, including Sections 170(h) and 501(c)(3) of the Internal Revenue Code of 1986, as amended, and NH RSA 477:45-47 as may be amended from time to time.
- Does not burden Five Rivers with unacceptable additional monitoring or other costs.
- Is in accordance with applicable laws and regulations.

¹ Amendments are anticipated for changes to the easement document and involve a longer, more involved and expensive review and approval process. Amendment requests are subject to a separate policy.

Standard Operating Procedures

A. Landowner Request

The landowner must make a written request to Five Rivers. The request must be made to allow at least 90 days between the date of the next Land Protection and Stewardship Committee meeting and the date of the proposed activity. The request shall include:

1. A description of the requested action with sufficient detail to determine the type and extent of potential impacts, their frequency and duration (include sketches, maps, photos and narrative as needed).
2. The purpose of the intended action and an explanation of why the landowner believes it is consistent with and not detrimental to the purposes of the easement and why the action does not impair the conservation values of the protected property. This explanation should include:
 - a. Identification and description of the expected or potential impacts upon the property and conservation values and attributes identified in the easement and baseline documentation.
 - b. An explanation of why the proposed action is consistent with relevant baseline documentation.
 - c. A review of potential alternative courses of action to achieve the stated goal and their potential impacts.
 - d. A timeline for both implementation of the request and duration for the requested action.

B. Five Rivers Review

Five Rivers' initial review of any discretionary consent request will be performed by the Land Protection and Stewardship Committee ("Committee"). A designee of the Committee may communicate with the landowner as necessary to clarify or refine the requested action. Members of the Committee or a designee may conduct a site walk to observe conditions on the Property.

Once appropriate information has been gathered, the Committee will review the request, the easement deed, and any other relevant information and determine whether the requested activity meets the Standards for Approval stated in the "Policy".

Upon completion of its review, the Committee will make a recommendation to the Five Rivers Board of Trustees ("Board") to approve or deny the application, which recommendation may include terms or conditions the Committee deems appropriate, including but not limited to:

1. Description of any appropriate mitigation measures necessary for approval;
2. Requirement that the landowner secure any appropriate local, state or federal permits;
3. Identification of the duration for which the use will be allowed;
4. Identification of whether renewal of approval is required;
5. Limitations or prohibitions on any excavation, filling or other disturbances of soil surface not otherwise specifically permitted by the Conservation Easement;

6. Limitations or prohibitions on any proposed temporary or incidental impacts on vegetation or soil not otherwise specifically permitted by the Conservation Easement;
7. Limitations or prohibitions on any structure or improvement not otherwise specifically permitted by the easement;
8. Limitations or prohibitions on any anticipated temporary or permanent parking in support of the requested activity; and/or
9. Requirement for additional funds to cover anticipated increased stewardship obligations.

C. Decision making

The Board may provide discretionary consent if, in its sole discretion, and after consideration of the information provided by the landowner, the review and recommendations of the Committee, it determines that the project meets the Standards for Approval described in the Policy. The Board may include any terms and conditions in its approval necessary to meet the Standards of Approval or otherwise comply with the requirements of the easement. Any approval applies only to the current landowner, unless otherwise specified.

D. Recordkeeping

A copy of the decision should be placed in the property's permanent record and easement monitoring file.

Montana Land Reliance

EASEMENT INTERPRETATION PROCEDURE

If conservation easement interpretation questions arise, the landowner (Grantor or successor) and MLR shall mutually attempt to agree upon language which defines and interprets the easement terms in question in a manner that protects and preserves the Conservation Values. MLR may not agree to any interpretation of easement terms and conditions that will jeopardize MLR's good standing as a tax-exempt charitable organization qualified to hold perpetual conservation easements under applicable law, including Section 76-6-101, *et seq.*, M.C.A., and the Internal Revenue Code. Interpretations of easement terms and conditions must be consistent with the conservation purposes of the easement, must not affect the easement's perpetual duration, and either must enhance, or must have no effect on, the easement's conservation values. Furthermore, such actions must not result in prohibited inurement or impermissible private benefit to Grantor.

Mutually acceptable easement interpretations must be agreed to in writing and signed by both MLR and the Grantor. Easement interpretations are not, and cannot be treated as, substitutes for amendments of conservation easement terms and conditions.

Process for Easement Interpretation

When an easement landowner requests interpretation of the meaning and application of an easement term or condition, MLR staff shall bring such questions and requests to staff meetings for discussion and proposed resolution. Alternatively, if time does not permit MLR to wait for the next staff meeting, involved MLR staff shall bring such questions and requests to the attention of, at least, the Lands Manager, Project Manager, and one or more of the Managing Directors for discussion and proposed resolution. Obtaining the opinion of MLR's legal counsel shall be at the discretion of staff, unless staff has concerns that a proposed interpretation might cause the easement to fall out of compliance with applicable laws or might confer prohibited private benefit or inurement, in which case consultation with legal counsel is mandatory.

In reviewing a proposed easement interpretation, MLR staff must unanimously agree that a proposed interpretation:

- * is consistent with the conservation purposes of the easement;
- * does not affect the easement's perpetual duration;
- * either enhances, or has no effect on, the conservation values which are protected by the easement; and
- * must not result in prohibited inurement or private benefit to the landowner.

If staff are in unanimous agreement that the foregoing criteria are met, MLR's stewardship staff will draft an "Easement Interpretation Letter Agreement" (hereafter Letter Agreement) to be presented to the landowner for the landowner's review and approval. Such a Letter Agreement must summarize the landowner's question or request, describe the mutually acceptable interpretation of the easement term or condition, and describe the permissible activities in which the landowner may engage consistent within the scope of the interpretation

contained in the Letter Agreement. The Letter Agreement must state that MLR may revoke its consent to the Letter Agreement at any time, in its complete discretion, if MLR determines that the conservation values are being impaired by the landowner's activities.

Two original Letter Agreements must be signed by appropriate MLR staff, in accordance with the Board's "signature resolution" and by the landowner, and one original shall be kept on file with MLR and the second original shall be provided to the landowner.

If staff members are not unanimous in their approval or cannot resolve the question or request due to perceived conflicts with the above statements or with the terms and conditions of the easement, staff may inform the landowner in writing that the landowner's proposed interpretation is inconsistent with the terms and conditions of the easement, or staff may choose to bring the issue to the Board for review and resolution.

If the staff and/or Board decide not to approve any easement interpretation question or request, the involved MLR staff member will consult with MLR's legal counsel in preparing a letter explaining the reasons for MLR's disapproval.

Approved 12/1/99

Amended 3/5/13

Sample Discretionary Approval Letter

A discretionary letter covers activities not addressed in the easement and limits those activities to ensure they do not adversely affect the conservation values or purposes of the easement.

Discretionary approval letters may be used as an alternative to an easement amendment in appropriate circumstances.

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

Enabling Statute Materials

The documents in this appendix are reprinted from *A Guided Tour of the Conservation Easement Enabling Statutes*, prepared by Robert H. Levin, Esq., for the Land Trust Alliance, originally published January 2010 and updated January 2014. The entire report may be found on [The Learning Center](#).

Checklist of Useful Statutory Provisions

The following checklist is offered as one way of simplifying the review process for practitioners and legislators who are considering an amendment to their respective enabling statutes. Inclusion or exclusion on this checklist is not an endorsement and does not reflect any policy statement. Rather, this checklist is meant to prompt the question of whether inclusion of such a provision would be desirable in any given state. Where appropriate, states that have such provisions are listed in parentheses.

- ☐ Clear opening policy statement (Pennsylvania, West Virginia)
- ☐ Clear definition of holder
- ☐ Clear statement on attorney general standing (No: Alabama, Montana, New Mexico, South Dakota, Wyoming) (Yes: Arizona, Connecticut, Illinois, Maine, Mississippi, Tennessee, Virginia)
- ☐ Public approval process for easements (Massachusetts, Montana, Nebraska, Virginia)
- ☐ Comprehensive amendment and termination restrictions (Maine, Massachusetts, Montana, Nebraska, Rhode Island)
- ☐ Provision barring estoppel, laches, and waiver from defeating an easement (New York)
- ☐ Provision barring termination of easement by property tax lien foreclosure (Florida, Maine)
- ☐ Provision barring termination of easement by merger (Maine, Mississippi)
- ☐ Coordination of land-use permit process with existence of easement (Connecticut, District of Columbia, Georgia)
- ☐ Attorney fees provision (California, Hawaii, Massachusetts)
- ☐ Damage award provision (California, Colorado, Connecticut, Hawaii, Illinois)
- ☐ Buyer/seller notice provision (Maryland)
- ☐ Holder monitoring obligations (Maine)
- ☐ Copies of easements to central register or government agency (Illinois, Maine, Mississippi, Montana)
- ☐ Backup holder provision (Pennsylvania and Virginia)
- ☐ Favorable property tax treatment (California, Colorado, Georgia, Indiana, Missouri, Nebraska, New Jersey, North Carolina, Oregon, South Carolina, Texas, Virginia)
- ☐ Liberal construction provision (Pennsylvania, West Virginia)
- ☐ Substantive or procedural or compensation provisions concerning application of eminent domain to protected properties (Florida, Illinois, Massachusetts, North Carolina, Pennsylvania)
- ☐ Clear statement about duration (most states)
- ☐ Exemption from marketable title statutes (Illinois, Iowa)

Enabling Statute Materials

Comparison Chart
January 2014

STATES	Year Enacted	Pure UCEA (No Material Modifications)	Modified UCEA	Non-UCEA	Qualified Holders	Third Party Right of Enforcement	Attorney General Standing	Amendment Restrictions	Termination Restrictions	Affirmative Obligations	Property Tax Reduction	Eminent Domain Language	Public Input or Approval Upon Conveyance
Alabama	1997	*				*	Uncertain (UCEA minus)			*		*	
Alaska	1989	*			501c3	*	Uncertain (UCEA)			*		*	
Arizona	1985	*				*	AG Limited	*	*				
Arkansas	1983	*				*	Uncertain (UCEA)						
California	1979		*		501c3, Primary	Silent	Uncertain				*	*	
Colorado	1976		*		501c3, Limited	Silent	Uncertain			*	*		
Connecticut	1971		*			Silent	AG						
Delaware	1996	*				*	Uncertain (UCEA)			*			
District of Columbia	1986		*			*	Uncertain (UCEA)		*				
Florida	1986	*				*	Uncertain (UCEA)					*	
Georgia	1992	*				*	Uncertain (UCEA)				*	*	
Hawaii	1985		*		501c	Silent	Uncertain					*	
Idaho	1988		*			*	Uncertain (UCEA)		*		No	*	
Illinois	1977		*			*	AG Plus				*		
Indiana	1984	*				*	Uncertain (UCEA)			*	*		
Iowa	1971		*			Silent	Uncertain (Silent)		*			*	
Kansas	1992	*				*	Uncertain (UCEA)		*	*		*	
Kentucky	1988	*				*	Uncertain (UCEA)			*		*	
Louisiana	1987	*				*	Uncertain (UCEA)			*			
Maine	1985	*				*	AG Limited	*	*	*	*		
Maryland	1957		*			Silent	Uncertain (Silent)				*		
Massachusetts	1969		*			Silent	Uncertain (Silent)	Regulatory	*			*	*
Michigan	1995		*			Silent	Uncertain (Silent)						
Minnesota	1985	*				*	Uncertain (UCEA)			*			
Mississippi	1986		*			*	AG Plus		*	*		*	*
Missouri	1971	*				*	Uncertain (UCEA)				*	*	
Montana	1969		*		501c	Silent	Uncertain	*	*		*	*	
Nebraska	1981		*			Silent	Uncertain (Silent)	*	*	*	*	*	*
Nevada	1983	*				*	Uncertain (UCEA)			*			
New Hampshire	1973		*		Broad	Silent	Uncertain (Silent)	Regulatory		*	*		
New Jersey	1979		*		501c	Silent	Uncertain (Silent)		*		*		
New Mexico	1978	*			No gov	No gov	Uncertain (UCEA minus)			*			
New York	1983		*		501c3	*	Uncertain	*	*				
North Carolina	1979		*		Broad	Silent	Uncertain				*		
North Dakota	N/A												
Ohio	1980		*		501c3	Silent	Uncertain						
Oklahoma	1999	*				Silent	Uncertain (UCEA)			*		*	
Oregon	1983	*				*	Uncertain (UCEA)				*	*	
Pennsylvania	2001	*				*	Uncertain (UCEA)	*	*	*			*
Rhode Island	1976		*		Broad	Silent	AG	*	*	*			
South Carolina	1991	*				*	Uncertain (UCEA)		*	*	*		
South Dakota	1984	*				*	Uncertain (UCEA minus)			*			
Tennessee	1981		*			*	AG Limited			*	*	*	
Texas	1983	*				*	Uncertain (UCEA)			*	*		
UCEA	1981												
Utah	1985		*		501c3	Silent	Uncertain					*	
Vermont	1977		*			Silent	Uncertain						
Virginia	1988	*			Limited	*	AG Plus	*	*	*	*	*	*
Washington	1971		*		Principal	*	Uncertain (Silent)			*		*	
West Virginia	1995	*				*	Uncertain (UCEA)	*	*	*		*	
Wisconsin	1981	*				*	Uncertain (UCEA)			*	*		
Wyoming	2005	*				*	Uncertain (UCEA minus)			*			

Four Corners Case Law

The following are case summaries to date of important legal cases addressing the four corners issue *as originally provided in the conservation easement*. The summaries were prepared by Robert H. Levin, Esq., and are available on [The Learning Center](#). *Please note:* The opinions do not address subsequent appropriate stewardship administration.

Belk v. Commissioner (Belk III)

774 F.3d 221 (Fourth Cir. 2014) (*Belk III*), *affirming* 140 T.C. No. 1 (U.S.T.C. 2013) (*Belk I*) and T.C. Memo. 2013-154 (U.S.T.C. 2013) (*Belk II*)

- State: North Carolina
- Procedural Status: Case concluded
- Date: 2014
- Keywords: amendment; baseline documentation; charitable deduction; golf course; Internal Revenue Code; private conservation easement; protected in perpetuity; qualified real property interest; section 170(h)
- Summary of Facts and Issues: In the mid-1990's B.V. and Harriet Belk acquired and developed (through a limited liability company) a 410-acre residential community composed of 402 single-family house lots and a 185-acre golf course. The golf course was built in the middle of the residential development and is not contiguous but lies in clusters throughout the residential development. In December 2004 the Belks donated a conservation easement on the golf course to the Smoky Mountains National Land Trust (SMNLT), now known as the Southwest Regional Land Conservancy. One provision of the easement allowed the landowner to substitute land outside of but contiguous with the original protected property for equal or lesser portions of the original protected property. Such substitution would require SMNLT's approval, based on several different criteria such as no adverse effect on the conserva-

tion purposes of the easement or on any environmental features. At the same time, SMNLT's approval was not to be unreasonably withheld, and SMNLT must make a reasonable good-faith effort to help petitioners identify property that is appropriate for substitution. A separate provision in the easement's boilerplate section addressed amendments, and a so-called savings clause barred

- SMNLT from agreeing to any amendment that would disqualify the easement under
- §170(h) and applicable regulations. After commissioning an appraisal, the Belks claimed a
- \$10,524,000 charitable contribution deduction. The IRS challenged the deduction because of the substitution provision and on valuation grounds. In particular, the IRS argued that the substitution provision rendered the document a "floating easement," and as such it failed to constitute a "qualified real property interest" under IRC §170(h)(2)(C) because the restriction on the original protected property was not "granted in perpetuity."
- Holding: The Tax Court held that the conservation easement was not a "qualified real property interest" because the substitution provision allowed the grantor to change the protected property and thus the easement was not "granted in perpetuity" under IRC
 - §170(h)(2)(C). The Tax Court seemed to suggest, albeit possibly *in dicta*, that under Treasury Regulation §1.170A-14(c)(2), the only circumstance justifying removal of any portion of the protected property from the easement is if a "later unexpected change in the conditions surrounding the property . . . makes impossible or impractical the continued use of the property for conservation purposes." Unlike previous opinions and contrary to the IRS's arguments, the Tax Court went out of its way to distinguish the "granted in perpetuity" provision of §170(h)(2)(C) from the "protected in perpetuity" provision in
 - §170(h)(5), with the latter focusing specifically on the conservation purposes. Hence, the Court concluded, although the language of the substitution provision might pass muster under §170(h)(5) because the substitutions that would adversely affect the conservation

purposes were prohibited, it did not meet the requirements of §170(h)(2)(C).

- July 2013 Update: In an opinion denying the taxpayer's motion for reconsideration, the Tax Court distinguished this case from the facts in PLR 200403044 and PLR 9603018. In both of these private letter rulings, the taxpayers reserved the limited right to establish building areas in the future on the protected property, subject to the holders' written approval. The Court wrote that "*Belk I* does not speak to the ability of parties to modify the real property subject to the conservation easement; it simply requires that there be a specific piece of real property subject to the use restriction granted in perpetuity." The Tax Court also affirmed that it was irrelevant "whether the parties could have substituted property by mutual agreement without a substitution provision" because the conservation easement did in fact contain such a provision. Finally, the Tax Court distinguished the instant facts from those in *Commissioner v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011). In that case, the District of Columbia Court of Appeals held that a provision in a historic preservation façade easement that allowed the holder to consent to changes in the façade did not render the easement ineligible under 170(h). The D.C. Circuit found that the provision was essentially surplusage because the holder had discretion to agree to change the façade or abandon the easement with or without the existence of the provision. And the D.C. Circuit found that an easement holder would only exercise such discretion at its peril, and was very unlikely to do so. In contrast, the Tax Court in *Belk II* seemed to suggest that the substitution provision was different because it limited the discretion of SMNLT to object to a substitution.
- December 2014 Update: The Fourth Circuit affirmed the Tax Court, holding that the substitution provision disqualified any charitable deduction. The appellate court found that the plain language of §170(h)(2)(C), in particular the phrase "*the* real property" (emphasis added), required the identification of a specific parcel of land to be subject to the easement. Furthermore, the court noted that the substitution provision interferes with the

integrity of the appraisal and baseline documentation processes, both of which are premised on a defined and static parcel. The court also observed that the Regulations contemplate very rare and narrow circumstances in which terminations or swap amendments can occur, and this very narrowness urges an interpretation that the original parcel be immutable in the document itself. The taxpayer's comparisons to *Simmons* and *Kauffman* were deemed inapposite because those cases turned on the interpretation of perpetuity of purpose and enforcement in §170(h)(5) and not identification of the protected property in

§170(h)(2)(C). Next, the Fourth Circuit rejected the taxpayer's argument that because North Carolina's conservation easement enabling statute permits amendment, that all easements in the state would fail to qualify. The court again drew a distinction between the substitution provision, which anticipates amending the protected property's boundaries from the outset, and a later swap amendment based on changed circumstances. Finally, the court cited *Commissioner v. Procter*, 142 F.2d 824, 827–28 (Fourth Cir. 1944) and held that the “savings clause” did not trump the substitution provision because it was a “condition subsequent” clause that altered the gift following an adverse determination by the IRS or a court.

- Analysis and Notes: The specific holding that the substitution provision renders the easement ineligible under 170(h) is of minor import, because that kind of provision is very rare, if not unique, in modern conservation easement drafting. The bigger issue is to what extent these opinions shape the common law around when swap amendments are permitted. A swap amendment is an amendment by which some land is removed and other land is added to a conservation easement's protected property. A footnote in *Belk III* suggests that because of the word “exchange” in Treasury Reg. §1.170A-14(c)(2), swap amendments are permitted only in the narrow circumstances set forth therein, i.e., “[w]hen a later unexpected change . . . makes impossible or impractical the continued use of the property

for conservation purposes.” Even before *Belk I* came out, land trusts were advised to consult an experienced land conservation attorney before engaging in any swap amendment. In the wake of *Belk I*, *Belk II*, and *Belk III*, that caution is all the more warranted. Meanwhile, this series of opinions touches on the issue of whether and under what conditions building sites can be fluid when drafting an easement. In three private letter rulings (see PLR 200403044, PLR 9603018, PLR 8240869), the IRS permitted floating building sites subject to certain protections and limitations, but those sites remained part of the conservation easement protected property, unlike the case here. *Belk II* expressly distinguished the first of those PLR’s. An additional factor to consider in evaluating *Belk* is that golf course conservation easements have often been viewed skeptically by the IRS. See, for example, *RP Golf, LLC v. Commissioner*, and *Kiva Dunes Conservation, LLC v. Commissioner*, both below.

Bosque Canyon Ranch, L.P. v. Commissioner

T.C. Memo 2015-130 (U.S.T.C. 2015)

- State: Texas
- Procedural Status: Case active; on appeal to Fifth Circuit
- Date: 2015
- Keywords: appraisal penalty; baseline documentation; capital gain; charitable deduction; disguised sale; Internal Revenue Code; private conservation easement; protected in perpetuity; qualified real property interest; reasonable cause; section 170(h); substantial compliance; syndication
- Summary of Facts and Issues: In 2003, Bosque Canyon Ranch (BCR), a Texas partnership, purchased a 3,744-acre ranchland parcel for about \$5 million and spent another \$2.2 million on improvements over the next two years. In 2005, BCR began marketing limited partnership units at \$350,000 per unit. Between October and December 2005, BCR received payments totaling \$8.4 million from 24 land unit purchases. Each purchaser became a limited partner, and the partnership subsequently distributed to each limited partner a fee simple

interest in an undeveloped five-acre “Homesite” parcel. The majority of the land was held for various outdoor amenities for use by the partners. The distribution of Homesite parcels was conditioned on BCR I granting a conservation easement to the North American Land Trust (NALT) on 1,750 acres of the ranch. BCR granted the easement in December 2005, excluding the Homesites from the easement. But the easement included a provision that the boundaries of the Homesite parcels (and by corollary the easement’s internal boundaries with those Homesite parcels) could be adjusted, provided that any such adjustment could not “in [NALT’s] reasonable judgment, directly or indirectly result in any material adverse effect on any of the Conservation Purposes” and that the area of each Homesite could not be increased. BCR received an appraisal valuing the easement at \$8,400,000—the same amount as the total land unit sales. Between 2005 and 2007, BCR set up a separate partnership and structured a virtually identical development and conservation easement arrangement on another 1,732 acres of the ranch. The 2007 easement excluded 23 Homesite parcels and was appraised at \$7,500,000. Following these various transactions, the 47 limited partners owned approximately 235 acres, and 3,482 of the remaining 3,509 acres were subject to either the 2005 or the 2007 easement. The IRS challenged the charitable contribution deductions on two separate grounds. First, it cited *Belk* to claim that the boundary adjustment provision violated the requirement in §170(h)(2)(C) that a specific parcel of real property be permanently protected by the easement. Second, it contended that the baseline documentation for each easement was inadequate to meet the requirements of Reg. §1.170A-14(g)(5)(i). For example, it appeared that several portions of the baseline documentation were not completed until after the easements’ closings. Furthermore, the data in each baseline was current only as of April 2004, not the date of each easement’s conveyance. Finally, the IRS argued that the sale of partnership interests and subsequent distribution of Homesite parcels was a disguised sale under IRC §707,

and therefore, the partnerships owed capital gains tax on these transactions.

- **Holding:** The Tax Court ruled for the IRS in all respects. First, citing *Belk*, it held that the easements did not qualify for deductions because of the boundary adjustment provision. Second, the court said that the 2005 and 2007 baseline documentations were “unreliable, incomplete, and insufficient to establish the condition of the relevant property on the date the respective easements were granted.” The court denied a substantial compliance contention made by the partnerships on the baseline issue. Third, the court held that the transactions between the partnerships and the limited partners were indeed disguised sales. Fourth, the court assessed gross valuation misstatement penalties under IRC §6662(h). For the 2005 donation, where a reasonable cause exception to the penalty was applicable, the court noted the poor baseline documentation practices in denying this exception.
- **Analysis and Notes:** This case is significant on a number of levels. First, it represents another application of the principles underlying *Belk* and *Balsam Mountain Investments*. (The holder here, NALT, was the same land trust involved in the recent *Balsam Mountain Investments* case and the 2009 *Kiva Dunes* case.) Second, the opinion breaks new ground in holding that an inadequate baseline documentation can defeat a tax deduction. Although other Tax Court rulings have touched on baseline issues, never before has the IRS taken direct aim at insufficient baseline practices. This case should be seen as a wake-up call for land trusts to make sure they finish complete and up-to-date baselines prior to closing an easement (see Practice 11B of *Land Trust Standards and Practices*). Third, although the disguised sale issue involves partnership law and is not specific to land conservation, it is nevertheless important to the land trust community because over the last few years a handful of conservation easement promoters have pushed dubious syndication schemes, attracting IRS concern. Typically, substantial overvaluation of the easement appraisal is a key part of these schemes. Here, although the transaction scheme

with the limited partners was not a typical syndication because the partners actually received developable residential sites, the two easements combined were valued at \$15.9 million, but the aggregate purchase price and capital improvements to the property were only \$7.17 million, indicating a substantial overvaluation. See the Alliance's [Important Advisory: Tax Shelter Abuse of Conservation Donations](#) for more information regarding the need for heightened due diligence and documentation when encountering complex pass-through entity transactions, especially with the additional factors present in this case of sales to multiple investors and multiples of deduction valuation over the purchase price in just a few years. For another recent disguised sale case, see *SWF Real Estate, LLC. v. Commissioner*.

Balsam Mountain Investments, LLC v. Commissioner

T.C. Memo 2015-43 (U.S.T.C. 2015)

- State: North Carolina
- Procedural Status: Case active; period for appeal still open
- Date: 2015
- Keywords: charitable deduction; Internal Revenue Code; private conservation easement; protected in perpetuity; qualified real property interest; section 170(h)
- Summary of Facts and Issues: In 2003, Balsam Mountain Investments, LLC (Balsam) donated a conservation easement to the North American Land Trust (NALT). The easement encumbered a specific 22-acre area of land in Jackson County, but it also included a provision allowing for Balsam to make minor boundary changes to the protected property (up to 5 percent of the 22 acres) for a five-year period. The boundary changes could not reduce the total area of the protected property, had to involve contiguous property and had to be at least conservation neutral in NALT's reasonable judgment. The IRS challenged the deduction.
- Holding: Following *Belk v. Commissioner*, the Tax Court held that the conservation easement did not qualify for a charitable deduction because there was no "qualified

property interest” as required by §170(h)(2)(C). The court rejected the taxpayers’ argument that the 5 percent limitation on the boundary changes distinguished the case from *Belk*; even with this cap, there was no identifiable, specific parcel of real property protected by the easement.

- Analysis and Notes: The result here is unsurprising in light of *Belk III*’s affirmation of the Tax Court in *Belk I* and *Belk II*. For that same reason, an appeal to the Fourth Circuit (the same court that decided *Belk III*) would seem to be a long shot.

Differing Opinions on Legal Doctrines

The Land Trust Alliance and most land trust personnel and their advisers believe that conservation easement amendments can strengthen land protection goals. Research to date confirms that land trusts are using amendments prudently and sparingly, in accordance with the guidance provided by *Land Trust Standards and Practices*. As easements age and protected land changes hands, conservation easement amendments are expected to increase.

The extent to which land trusts can amend the conservation easements they hold without oversight from an outside party is perhaps the most controversial subject in the field of land conservation today. Understanding and evaluating the various perspectives on the legal spectrum of opinion and theory can be confusing to those who have not been immersed in these discussions nor had occasion to consider an amendment that pushes the boundaries beyond what is commonly acceptable.

Below is a short summary of various points of view on the legal discussion.

Charitable Organization, Charitable Act and Charitable Trusts

When 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's common law and whether there are superseding statutes that would trump the common law doctrines, the applicability of federal law, the manner in which the land trust acquired the easement, the nature of the proposed amendment, the authority to amend included in the easement and other circumstances.

Court cases and attorney general communications have addressed opinions on whether conservation easements are charitable trusts: In the *Myrtle Grove* case,³⁴ the Maryland Attorney General intervened to oppose amendment of a conservation easement on charitable trust grounds. Meanwhile, in a challenge to a county's 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. The Wyoming Supreme Court dismissed the case, holding that only the Wyoming Attorney General had standing to enforce charitable trusts.³⁵ The Wyoming Attorney General then filed a separate suit in 2008, citing charitable trust grounds as one authority; however, it was not decided. The parties settled this suit in 2010, and the court issued a stipulated judgment.³⁶ The settlement was quite favorable to land conservation interests, as the court rescinded the termination and the conservation easement was ordered to be in full force and effect, with minor amendments.

In *Windham Land Trust v. Jeffords*,³⁷ the court granted the Maine Attorney General's motion to intervene in a case involving enforcement of a conservation easement, requested in part based on the attorney general's right to enforce gifts made to charities.

Finally, in *Lyme Land Conservation Trust, Inc. v. Platner*,³⁸ a Connecticut trial court held that the attorney general could intervene in a conservation easement enforcement action by right because it had authority under Connecticut's conservation easement enabling statute and also under a separate statute to represent the public interest with respect to charitable gifts and charitable trusts. Charitable trust principles are similarly applied to land gifts to municipalities.³⁹ Another attorney general that has used the charitable trust argument in litigation over conservation easements is in Virginia (see letter on page 156).

Maine⁴⁰ and Rhode Island⁴¹ each have express statutes on amendments. New Hampshire has written guidelines from the attorney general.⁴² Connecticut is considering voluntary written guidelines.

Offices of Attorney General in Arizona, California, Pennsylvania and Virginia have written informal emails or official letters regarding the Office of the Attorney General opinion on applicability of charitable trust state laws. Those writings are reproduced at the end of this appendix.

Several articles discuss these examples:

Terry M. Knowles, "Amending or Terminating Conservation Easements: The New Hampshire Experience," *Utah Law Review* 3 (871) (2013), available at <http://epubs.utah.edu/index.php/jlrel/article/view/1154/0> (New Hampshire).

- Nancy A. McLaughlin, "Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," *University of Richmond Law Review* 40 (1031) (2006): 169 & n.155, 1056–63. (Maryland).
- Nancy A. McLaughlin, "Charitable Trust Doctrine," *Amending Conservation Easements: Evolving Practices and Legal Principles*, 1st ed. (Washington, DC: Land Trust Alliance, 2007), available on [The Learning Center](#).
- Jeff Pidot, "Conservation Easement Reform: As Maine Goes Should the Nation Follow?," *Law and Contemporary Problems* 74 (1) (2011) (Maine).
- W. William Weeks and Nancy A. McLaughlin, "*Hicks v. Dowd*, Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight," *Wyoming Law Review* 10 (73) (2010), available at www.repository.law.indiana.edu/facpub/1339.

Real Property Interest Held by a Charity

Many state and federal laws currently in effect make it clear that land trusts cannot freely amend their conservation easements without serious consideration of the ramifications of such actions. Laws that affect a land trust's consideration of an easement amendment include its state's conservation easement enabling legislation, the land trust's own governance documents and laws governing nonprofit management and the charity oversight laws of the IRS and states.

If a land trust acted contrary to these laws or failed to follow its own amendment policy or the amendment clause in its easements, it could face legal actions, such as claims it breached a contract or its fiduciary duties or that it acted arbitrarily and capriciously; fines and penalties could be levied by the IRS for engaging in improper transactions or failing to act in the public interest; or a land trust could face an audit by state officials charged with oversight of nonprofit organizations. In addition, most easement holders are nonprofit organizations or public agencies that are directly accountable to their members and funders or to the electorate. Such organizations therefore cannot disregard public opinion in their conservation easement amendment decisions, because if they do, they will lose critical public support and suffer potentially damaging publicity.

Easement grantors restrict their own rights to use property, not

the manner in which easement holders manage the conservation rights they have been granted. Therefore, land trusts, rather than the original easement grantors, should be able to determine appropriate changes to conservation easements because they are involved with the community and would be responsive to its needs and thus should have full authority to determine how to interpret and manage their conservation easements for the public benefit. Grantors' conservation goals as stated in the easements would remain important as long as mutual conservation goals may be achieved, even in part, but such intentions would not necessarily be controlling of the easement holders' public interest concerns.

Court cases discuss this state law based approach to amendments:

In *Carpenter v. Commissioner* (*Carpenter I*), the United States Tax Court held that Colorado's conservation easement enabling act provision on amendment and termination superseded any charitable trust common law that might have applied. Moreover, the opinion treats the related but distinct issue of whether, even in the absence of a charitable trust, a court should apply *cy pres* to the conservation easement. In holding that *cy pres* does not apply, the judge reasoned that the taxpayers did not manifest an intention to devote the property to general charitable purposes, pointing to the easement provision in which the landowner retained all rights not specifically granted. *Carpenter I* held that, while the specific conservation easements at issue were not charitable trusts under Colorado law, they were restricted gifts, or "contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations." Charitable gifts made for specific purposes are called charitable trusts in some states and restricted gifts in others, but the same rules govern.

In *Minnick v. Commissioner* (*Minnick I*), where the IRS challenged a conservation easement deduction due to a missing mortgage subordination, the Tax Court rejected the taxpayer's argument that the Idaho conservation easement enabling act imposed a charitable trust obligation that constituted a de facto subordination of the mortgage. Similarly, in a series of decisions, Maryland courts held that a purchased agricultural conservation easement was not a charitable trust. The intermediate appellate court amended its opinion twice before ultimately concluding that purchased easements generally do not create charitable trusts. The Maryland high court went in a somewhat different direction; it concurred that this easement was not a charitable trust, but instead of focusing on the purchase versus donation distinction, the court emphasized the noncharitable purposes of

the easement (the purpose of promoting agriculture).

It is also worth discussing another state court case that was not styled as a charitable trust case but that raised similar issues. In *Bjork v. Draper* (*Bjork I*), an Illinois appellate court invalidated an amendment that removed 809 square feet of conservation property in exchange for adding an adjacent 809 square feet. This amendment was made to accommodate a parking area off a driveway on a residential parcel and was part of a broader agreement in which the land trust approved an addition to the house in exchange for the landowner's commitment to replace aluminum siding with wooden siding. Furthermore, the area of land that had been removed from the easement was not visible from any public vantage points, whereas the area that was added to the easement property was visible to the public. A neighbor challenged the amendment. First, the court held that the easement itself, Illinois's conservation easement enabling statute and IRC §170(h) all expressly or impliedly allowed for conservation easement amendments, notwithstanding the numerous recitations of the word *perpetuity* in the easement. However, the appellate court went on to conclude that extinguishing 809 square feet of easement property to create the driveway parking area violated the easement's express prohibitions on improvements and was therefore not permitted. The parking area was subsequently ordered to be relocated off the easement property.

Bjork I is a case with convoluted facts that have been greatly simplified here, and it is beyond the scope of this report to provide a detailed analysis of the case. But the general lesson is that, if given the opportunity, courts will carefully scrutinize and may reject amendments they deem to be inconsistent with the original purposes of the easement, regardless of whether they adopt a charitable trust framework for their analysis.

Finally, in *City of Buckley v. Toman*, Docket No. 3:10-CV-05209-RBL, 2011 U.S. Dist. LEXIS 47238 (W.D. Wash., May 3, 2011) (Order on Motion to Dismiss), (W.D. Wash., Aug. 1, 2011) (Order on Motion for Reconsideration), the landowners lost a property to foreclosure in 1991, and the property was conveyed to Farmers Home Administration (FmHA, a branch of the U.S. Department of Agriculture). Eventually, FmHA sold the property back to the landowners, and three documents were simultaneously recorded at the time of the sale: a deed of trust, a quit claim deed and a wetlands reserve conservation easement. The quit claim deed states on its face that it is "[s]ubject to all easements, covenants, and conditions of record

(attached).” The conservation easement was attached to the quit claim deed, and the title company was instructed to record the quit claim deed and the conservation easement “as a single document.” Although the quit claim deed was signed by the United States, the conservation easement itself was not signed. In 2007, the City of Buckley (City) brought a quiet title action to claim a prescriptive drainage easement on a portion of the property and discovered the existence of the conservation easement. The landowners moved for dismissal for lack of subject matter jurisdiction because the conservation easement was unsigned and thus unenforceable under the Statute of Frauds. The court, in an order on a motion for summary judgment and a subsequent order denying reconsideration, held that the conservation easement was void because it was unsigned and therefore in violation of the Statute of Frauds. This case involves an application of fundamental real property law, and no special consideration was given to the fact that the document at issue was a conservation easement.

Several articles discuss these examples:

Darby Bradley, *Amending Perpetual Conservation Easements: Confronting the Dilemmas of Change: A Practitioner’s View* (Cambridge, MA: Lincoln Institute, 2008).

Andrew C. Dana, “An Analytic Approach to Complex Conservation Easement Amendment Questions,” (2007), available by contacting andy@conservationlawassociates.com.

Andrew C. Dana, “Conservation Easement Amendments: A View from the Field,” *The Back Forty: The Newsletter of Land Conservation Law* (Washington, DC: Land Conservation Law Institute, 2006), available on [The Learning Center](#).

Adam E. Draper, “Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Lands,” *Environmental Law* 34 (2004): 247–82.

C. Timothy Lindstrom, “Conservation Easements and the Charitable Trust Doctrine in Wyoming: A Response,” *Wyoming Lawyer* 33 (4) (2010): 44–46.

Significant Opinions by State Attorneys General

Arizona



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION	No. I16-003 (R15-022)
By MARK BRNOVICH ATTORNEY GENERAL	Re: Application of A.R.S § 38-511 to gratuitous grant by deed of a conservation easement
March 24, 2016	

To: Steve B. Montenegro
Arizona House of Representatives

Questions Presented

Does Arizona’s conflict of interest statute in Arizona Revised Statute (“A.R.S.”) § 38-511, apply to a private landowner’s gratuitous grant by deed of a conservation easement to the State, its political subdivisions or any department or agency of either (collectively, the “State”)?

Summary Answer

Arizona Revised Statute § 38-511 does not apply to a private landowner’s gratuitous donation of a conservation easement—which does not impose affirmative obligations on the State or require any consideration in exchange for the donation—because such a donation does not qualify as a “contract” within the meaning of A.R.S. § 38-511.

Background

Arizona's conflict of interest statutes, A.R.S. §§ 38-501 to -511, set forth those matters presenting conflicts of interest for public officers and employees. Ariz. Att'y Gen. Op. 198-025. Under A.R.S. § 38-511(A) (the "Cancellation Provision"), the State is permitted to cancel "any contract" within three years of its execution provided certain conditions are met:

The state, its political subdivisions or any department or agency of either may, within three years after its execution, cancel any contract, without penalty or further obligation, made by the state, its political subdivisions, or any of the departments or agencies of either if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the state, its political subdivisions or any of the departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract.

Arizona's statutes permitting and regulating conservation easements are set forth in A.R.S. §§ 33-271 to -276, which are modeled after the Uniform Conservation Easement Act. Under these statutes, a "conservation easement" is defined as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations for conservation purposes or to preserve the historical, architectural, archaeological or cultural aspects of real property." A.R.S. § 33-271(1). This Opinion only concerns conservation easements which are gratuitous. As presented in the request for this Opinion, the conservation easements at issue do not impose any affirmative obligations on the State or require any consideration from the State in exchange for the grant of the conservation easement.

Underlying the question presented is a tax issue. The donation of a conservation easement that meets all statutory and regulatory requirements may be claimed as a federal

charitable contribution deduction. *E.g.*, 26 U.S.C. § 170(h). To qualify for this deduction, a conservation easement must (among other things) include “a restriction (granted in perpetuity) on the use which may be made of the real property.” *Id.* § 170(h)(2)(C); 26 C.F.R. § 1.170A-14(b)(2).

As recounted in the request for this Opinion, the Internal Revenue Service has taken the position that the State’s ability to cancel any contract made by the State within three years of execution applies to all conservation easements. The easement grants are therefore “conditional and not perpetual,” and are disqualified from eligibility for a federal income tax deduction. This Opinion does not address the applicability of the federal charitable contribution deduction to conservation easements to the State. Rather, this Opinion analyzes the narrow issue of whether a *gratuitous* deed of a conservation easement to the State may be subject to the Cancellation Provision.

Analysis

No Arizona court has determined whether the Cancellation Provision in A.R.S. § 38-511(A) applies to a gratuitous deed of a conservation easement to the State. “Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). “In determining the legislature’s intent, we initially look to the language of the statute itself.” *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11 (2003). If the statute’s language is clear, we apply it “unless application of the plain meaning would lead to impossible or absurd results.” *Id.* The threshold question concerning the applicability of the Cancellation Provision to a gratuitous deed of a conservative easement to the State is whether such a grant qualifies as a “contract” within the meaning of the statute. If such a donation is not a “contract,” then the Cancellation Provision has no applicability.

The Arizona Supreme Court, adopting the approach taken in the Restatement (Second) of Contracts, has defined a contract as “a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.” *Johnson v. Earnhardt’s Gilbert Dodge, Inc.*, 212 Ariz. 381, 384, ¶ 10 (2006) (quoting Restatement (Second) of Contracts § 17(1) (1981)). “The term ‘consideration’ has a settled meaning in contract law. It is a performance or return promise that is bargained for in exchange for the promise of the other party.” *Turken v. Gordon*, 223 Ariz. 342, 349, ¶ 31 (2010) (citing Restatement (Second) of Contracts § 71) (internal quotations and alterations omitted). “In other words, consideration is what one party to a contract obligates itself to do (or to forbear from doing) in return for the promise of the other contracting party.” *Id.*

Here, the gratuitous deed of a conservation easement, which does not impose any affirmative obligations on the State or require any consideration from the State in exchange for the grant of the conservation easement, is not a “contract” within the meaning of the Cancellation Provision. Such a donation is not a contract because, as the issue has been presented, it lacks one of the two requisites for the formation of a contract, namely, consideration. *See Schade v. Diethrich*, 158 Ariz. 1, 8 (1988) (stating that the two requisites for the making of a contract are “a bargain, consisting of promises exchanged, and consideration”).

In concluding that gratuitous conservation easements are not a “contract” subject to the Cancellation Provision, this Opinion notes that a deed may be considered contractual in other contexts, for example, when determining whether an action “arises out of contract” for purposes of awarding attorneys’ fees, *see Pinetop Lakes Ass’n v. Hatch*, 135 Ariz. 196, 198 (App. 1983) (an action to enforce mutual restrictive covenant in a deed “arises out of contract” pursuant to A.R.S. § 12–341.01), or considering whether parole evidence is admissible, *Valento v. Valento*,

225 Ariz. 477, 483, ¶ 22 (App. 2010) (“a deed may be treated as a contractual agreement” for purposes of the parole evidence rule). This Opinion also does not affect the long standing rule in Arizona that the lack of consideration does not, by itself, render a deed inoperative. *See In re McDonnell’s Estate*, 65 Ariz. 248, 251 (1947) (“[W]e hold that want of consideration by itself is not enough to make [a deed] inoperative.”). Rather, it addresses the narrow issue presented by the request and concludes that a gratuitous deed of a conservation easement is not a contract subject to cancellation under A.R.S. § 38-511(A).

This interpretation—that the Cancellation Provision does not apply to a gratuitous deed of a conservation easement—is consistent with the purpose of Arizona’s conservation easement statutes. As set forth in its prefatory notes, the Uniform Conservation Easement Act (the “Uniform Act”) “maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes.”¹ Uniform Act, Refs & Annos. In furtherance of this objective, the Uniform Act enables “the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code.” *Id.* Accordingly, Arizona’s conservation easement statutes expressly provide (consistent with the Uniform Act) that “a conservation easement is **unlimited in duration** unless the instrument creating it otherwise provides.” A.R.S. § 33-272(C) (emphasis added). This language was specifically included, not only to provide parties latitude consistent with the preservation purposes of the Uniform Act, but also to enable parties “to fit within federal tax law requirements that the interest be ‘in perpetuity’ if certain tax benefits are to be derived.” Uniform Act § 2, cmt.

¹ When “a statute is based on a uniform act, we assume that the legislature intended to adopt the construction placed on the act by its drafters, and commentary to such a uniform act is highly persuasive.” *May v. Ellis*, 208 Ariz. 229, 232 ¶ 12 (2004) (internal quotations and alterations deleted).

But, if every conservation easement, even if gratuitously granted, is considered a “contract” subject to cancellation under A.R.S. § 38-511(A), then no conservation easement deeded to the State (including its political subdivisions or any department or agency of either) would ever qualify for tax deductions under the requirements of federal tax law as interpreted by the Internal Revenue Service. Such an outcome would thwart an express objective of the Uniform Act to enable parties “to fit within federal tax law requirements,” potentially chilling important donations of conservation easements for the public good.

Conclusion

Arizona Revised Statue § 38-511 does not apply to a private landowner’s gratuitous donation of a conservation easement—which does not impose affirmative obligations on the State or require any consideration in exchange for the donation—because such a donation does not qualify as a “contract” within the meaning of A.R.S. § 38-511.

Mark Brnovich
Attorney General

California

From: Belinda Johns <Belinda.Johns@doj.ca.gov>

Date: Tue, Jul 12, 2011 at 10:53 AM

“The Attorney General’s role with regard to conservation easements is pretty simple. We have consistently taken the position that conservation easements are donor-restricted charitable assets. Accordingly, the nonprofit holding the asset has a duty to protect it for its intended use, and must give us notice of intent to sell or modify the restriction. Modification would be governed by the cypres doctrine and accomplished via court approval, with notice to our office.”

Pennsylvania



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

February 16, 2016

Charitable Trusts and
Organizations Section
6th Floor Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Telephone: (412) 880-0466
Facsimile: 412-565-3181
srenwand@attorneygeneral.gov

VIA FACSIMILE AT 717-635-2944

Steven J. Schiffman, Esq.
Serratelli, Schiffman & Brown, P.C.
2080 Linglestown Road, Suite 201
Harrisburg, PA 17110

Re: Pittsburgh History & Landmarks Foundation – Granite Building

Dear Attorney Schiffman:

This will acknowledge receipt of your notice in connection with the above matter.

I have reviewed your correspondence, the proposed Petition for Approval of Assignment and Proposed Amended and Restated Deed of Façade Easement and Historic Preservation Easement Agreement, the proposed assignment of easement and amended easement (as well as the various supporting documentation). Based upon these documents and our discussions, I have no objection to the above Petition, proposed assignment of easement and amended easement. Please forward a copy of the executed Order and other documents so that I can complete my file.

Please be advised that the above review was conducted pursuant to the *parens patriae* role of the Charitable Trusts and Organizations Section, and has no bearing on any taxation, antitrust, consumer protection, or other issues unrelated to that function. This letter is based on the particular facts and circumstances submitted in the above matter; it does not constitute a formal Attorney General's Opinion, and it has no value as a precedent.

Very truly yours,

A handwritten signature in cursive script, reading "Sandra Mackey Renwand".

Sandra Mackey Renwand
Senior Deputy Attorney General

SMR:clk

Virginia



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

August 31, 2012

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Thomas Davis Rust
Member, House of Delegates
Herndon Town Hall
730 Elden Street
Herndon, Virginia 20170

Dear Delegate Rust:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a conservation easement is extinguished by application of the common law doctrine of merger when the holder of the conservation easement under the Virginia Conservation Easement Act¹ or the Open-Space Land Act² acquires the fee simple interest in the same land.

Response

It is my opinion that a conservation easement obtained under the Virginia Conservation Easement Act ("VCEA") or the Open-Space Land Act ("OSLA") is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

Background

You relate that the Commonwealth, through its Department of Conservation and Recreation ("DCR"), is considering the acquisition of certain real property to be used as a public park. You also relate that some of the subject property is encumbered by existing conservation easements.³

Applicable Law and Discussion

Merger is described as the "annihilation of one estate in another"⁴ and under contemporary Virginia jurisprudence, it is the general rule that existing easements are extinguished by operation of law

¹ Virginia Conservation Easement Act, VA. CODE ANN. §§ 10.1-1009 through 10.1-1016 (2012).

² Open-Space Land Act, VA. CODE ANN. §§ 10.1-1700 through 10.1-1705 (2012).

³ For purposes of this opinion, I make no distinction between conservation easements created under OSLA or VCEA, unless specifically noted.

Honorable Thomas Davis Rust
August 31, 2012
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when the easement holder acquires the fee simple title to the encumbered land.⁵ Upon unity of ownership, “the [easement] right must necessarily cease to be an easement, for it becomes one of the rights of property to which all owners of land are entitled.”⁶ In other words, one cannot have an easement in his own land. As recently explained by one Virginia trial court, it is generally the case that when the easement holder becomes the owner of the encumbered land, the need or purpose of the easement is eliminated.⁷ Nevertheless, as noted by that same trial court and discussed herein, conservation easements are not typical easements whose purposes are necessarily obviated when ownership of the two estates – the easement and fee – become united in the same person or entity.⁸

Conservation easements, which are a recent creation of the law,⁹ stand in sharp contrast to conventional easements, such as right-of-way or recreational easements. Conventional easements are private agreements entered into for the exclusive benefit of the grantee or similarly situated future owners of that property. In the case of a right-of-way easement, it follows that the easement would merge into the fee upon unity of ownership because the easement, as a separate, independent encumbrance, is no longer necessary; the right ceases to be an easement because it becomes one of the rights to which all owners of land are entitled.¹⁰ The formation of conservation easements, on the other hand, are authorized under OSLA and VCEA in order to facilitate conservation and historic preservation in furtherance of the Commonwealth’s policy to protect its natural resources and historic sites.¹¹ As the statutory framework

⁴ Little v. Bowen, 76 Va. 724, 727 (1882).

⁵ See Read v. Jones, 152 Va. 226, 231, 146 S.E. 263, 264 (1929) (easements are extinguished when ownership of the dominant and servient estates become united in one and the same person); accord Davis v. Henning, 250 Va. 271, 462 S.E.2d 106 (1995) (easement for ingress and egress was extinguished by the doctrine of merger when easement holder acquired ownership of the encumbered land); see also Little, 76 Va. at 727 (“[Merger] takes place usually when a greater estate and a less coincide and meet in one and the same person ... whereby the less is immediately merged – that is, drowned in the greater.”).

⁶ Read, 152 Va. at 232, 146 S.E. at 264.

⁷ Piedmont Env’tl Council v. Malawer, 80 Va. Cir. 116, 118 (Jan. 28, 2010).

⁸ *Id.* at 118-19.

⁹ See 1966 Va. Acts ch. 461 (OLSA); 1988 Va. Acts chs. 720, 891 (VCEA).

¹⁰ Read, 152 Va. at 232, 146 S.E. at 264.

¹¹ See 1966 Va. Acts ch. 461 (declaring that “the provision and preservation of permanent open-space land are necessary to help ... provide or preserve necessary park, recreational, historic and scenic areas, and to conserve land and other natural resources” and authorizing the acquisition of real property interests, including easements in gross, as a means of preserving open-space land); United States v. Blackman, 270 Va. 68, 81, 613 S.E.2d 442, 448 (2005) (“In enacting VCEA, the General Assembly undertook to comprehensively address various land interests that can be used for conserving and preserving the natural and historical nature of property. In so doing, the General Assembly addressed the use of such easements in a manner consistent with [current law], the Open-Space Land Act, and the public policy favoring land conservation and preservation of historic sites and buildings in the Commonwealth as expressed in the Constitution of Virginia.”). See also VA. CONST. art. XI, § 1 (“To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth’s policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”); VA. CONST. art. XI, § 2 (“In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation

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of OSLA and VCEA demonstrate, conservation easements serve a much more public function than conventional easements.

The Code establishes the special and public nature of conservation easements. Acquisition and stewardship of these easements are supported by public moneys through general fund appropriations and public grants,¹² tax exemptions and benefits¹³ and tax incentives to grantors in cases of charitable gifts of conservation easements.¹⁴ Further, under OSLA and VCEA, only certain public and nonprofit entities are authorized to hold conservation easements.¹⁵ Additionally, VCEA expressly provides standing to the Attorney General and specific government agencies and localities for actions affecting conservation easements.¹⁶

The terms of OSLA and VCEA clearly evince a strong policy preference favoring the continuation of conservation easements. Specifically, holders of easements authorized under OSLA are prohibited from releasing the easement unless certain statutory criteria are met and upon the substitution of like-kind land for the released easement-encumbered land.¹⁷ Applying the doctrine of merger to extinguish the easement would circumvent these requirements. "Open-space land" could be disposed of beyond the parameters of the statute and without substitute land, resulting in a net-loss of open-space. Additionally, VCEA provides as a default that a "conservation easement shall be perpetual in nature unless the instrument creating it otherwise provides a specific time." Thus, the thrust of the statutory scheme is to promote and continue conservation efforts. Using merger to extinguish such easements therefore, would permit easement holders to extinguish them outside of the stated terms of the deed or in contravention of the stated public interest, which clearly runs contrary to the manifest intent of the statutes.¹⁸

of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations....").

¹² See § 10.1-1020 (2012) (establishing the Virginia Land Conservation Fund for purposes of providing grants to state agencies and other nonprofit entities for conservation and historic preservation purposes).

¹³ See § 10.1-1011(A) (providing an exemption of state and local taxation for perpetual conservation easements) and § 10.1-1011(B) (requiring that assessments of the fee interest in land that is subject to a perpetual conservation easement reflect the reduction in the fair market value of the land).

¹⁴ See VA. CODE ANN. §§ 58.1-510 through 58.1-513 (2009 & Supp. 2012). The provisions comprise the "Virginia Land Conservation Incentives Act of 1999" providing tax credits to individuals and corporations for donations of interests in real property for conservation and historic preservation purposes.

¹⁵ Under OSLA, an eligible public body is defined as "any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority ... or the Virginia Recreational Facilities Authority." Section 10.1-1700. Under VCEA, an eligible holder is defined as "a charitable corporation, charitable association, or charitable trust ..." whose primary purposes include "(i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property." Section 10.1-1009.

¹⁶ Section 10.1-1013.

¹⁷ Section 10.1-1704.

¹⁸ I note that federal tax law similarly imposes restrictions on the transfer or extinguishing of certain deeds for conservation easements. First, for those easements conveyed as a tax-deductible charitable gift, a tax deduction is available only if the deed requires the property to continue to advance its conservation purposes.¹⁸ See 26 C.F.R. § 1.170A-14. Second, if an unexpected change in the conditions of the property renders it unsuitable for conservation

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Based on the foregoing public policy objectives and regulation of these easements, it can be concluded that conservation easements are held and administered by the easement holders not for themselves, but on behalf of the public¹⁹ and in furtherance of state policy. A 2010 circuit court decision supports this conclusion. In that case, the court found that conservation easements “are not subject to the typical common law analysis of merger as would be appropriate to rights of way between two adjoining tracts[;]”²⁰ for, as the court found, the holder of a conservation easement is “not the sole party receiving the benefit of th[e] easement.”²¹ The court looked to the intent of the parties to create a permanent conservation easement and the extensive statutory framework to facilitate the same in determining that merger would not apply to extinguish the subject conservation easement.²²

In the proposed transaction you describe, DCR would acquire land that is encumbered by a conservation easement. Assuming the encumbered land is covered by a conservation easement under the OSLA, both estates (the easement and the fee) would be owned by the Commonwealth (or one of its agencies). Nevertheless, mere ownership of the estates by the Commonwealth would not necessarily obviate the purpose of or need for the conservation easement: that is, the easement would continue to provide natural or historic resource protection in accordance with its stated terms and in furtherance of state policy.²³ This stands in sharp contrast to a conventional easement – such as a right-of-way or recreational easement – whose purpose or necessity is obviated when the easement holder becomes the owner of the encumbered land.²⁴ Moreover, allowing merger to extinguish the conservation easement in this instance would put DCR, a public actor, in the peculiar position of obstructing state policy in contravention to its stated mission to conserve the Commonwealth’s natural resources. In my view, such an inapposite result cannot be supported by invoking a doctrine developed at common law for the sole purpose of simplifying the land records²⁵ and without reference to the policies or statutes authorizing conservation easements in Virginia.

Therefore, in light of the various statutory limitations on extinguishment of a conservation easement, and because the preservation of a conservation easement would continue to provide natural and historic resource protection in furtherance of state policy, it is my opinion that the doctrine of merger

purposes, a deduction still may be available if a court extinguishes the deed’s restrictions and the proceeds of a subsequent transfer of the property are used by the grantee in a manner consistent with the conservation purposes of the original gift. 26 C.F.R. § 1.170A-14(g)(6)(i).

¹⁹ See Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 DUKE J. L. & CONTEMP. PROBS. 279, 280 (2011). The author points out the public and charitable status of conservation easement holders and public subsidies to acquire such easements to demonstrate that conservation easements “are held and enforced by government entities and charitable organizations on behalf of the public.” *Id.* at 280.

²⁰ *Piedmont Envt’l Council*, 80 Va. Cir. at 119 (construing *United States v. Blackman*, 270 Va. 68, 613 S.E.2d 442 (2005)).

²¹ *Id.* at 118.

²² *Id.* at 118-19.

²³ See McLaughlin, *supra* note 19, at 287.

²⁴ *Piedmont Envt’l Council*, 80 Va. Cir. at 118 (“The clear intent of the parties was the creation of a detailed conservation easement in perpetuity, so as to protect the scenic value of the real estate for the general public. This contrasts with a scenario in which some years later the owner of a dominant and servient tract became one and the same, this eliminating the need or purpose of the easement”).

²⁵ See McLaughlin, *supra* note 19, at 288 (citing the RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 8.5 cmt. a (1997)) (“The merger doctrine was developed solely to serve the function of simplifying property titles in an era when writings were not used to release property interests.”).

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would not apply to extinguish a conservation easement when the easement holder acquires fee simple title to the encumbered land. If the proposed transaction is completed so that the Commonwealth acquires the fee interest to land for which it already holds a conservation easement, the conservation easement would continue to be held by the Commonwealth subject to the limitations on its transfer and release imposed by the OSLA,²⁶ while the fee, if not similarly restricted,²⁷ could be sold or otherwise transferred in the discretion of DCR's director.²⁸

Conclusion

Accordingly, it is my opinion that a conservation easement obtained under the Virginia Conservation Easement Act or the Open-Space Land Act is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C. II", with a stylized flourish at the end.

Kenneth T. Cuccinelli, II
Attorney General

²⁶ See § 10.1-1701 (authorizing public bodies to hold conservation easements under OSLA) and § 10.1-1704 (prohibiting the release of “open-space land” unless in accordance with the specific requirements of the statute).

²⁷ See McLaughlin, *supra* note 19, at 285 n.22 (discussing instances where technically, but to no effect, merger may occur when the instruments of conveyance for both the easement and the fee interest “have precisely the same terms and purpose – protection of the conservation values of the subject property in perpetuity as specified in the easement.”).

²⁸ See, e.g., VA. CODE ANN. § 10.1-109 (2012) (authorizing the Director of DCR, with the consent and approval of the Governor and the General Assembly, to convey, lease or demise to any person for consideration any lands owned or controlled by DCR).

Drafting Examples of Litigation

For illustrative examples of drafting, stewardship and enforcement where the courts disagreed with the easement holders' actions or interpretations, see these case summaries prepared by Robert H. Levin, Esq., available on [The Learning Center](#):

Little Miami, Inc. v. Young Men's Christian Ass'n of Greater Dayton, No. 10 CV 78603 (Ct. Common Pleas Warren Cty., March 22, 2011).

Orange County Land Trust v. Tamira Amelia Farms, LLC, No. 2009-7441 (Supr. Ct. N.Y., Orange Cty., Feb. 22 2013) (Decision and Judgment) (unpublished), affirmed July 20, 2016, by the New York State Appellate Division.

Racine v. United States, 858 F.2d 506 (Ninth Cir. 1988)

Redwood Constr. Corp. v. Doornbosch, 248 AD2d 698, 655 N.Y.S.2d 655 (N.Y. App. Div. 1998).

United States v. Park, 536 F.3d 1058 (Ninth Cir. 2008), reversing 2006 U.S. Dist. LEXIS 66399 (D. Idaho September 15, 2006); on remand, 2009 U.S. Dist. LEXIS 82861 (D. Idaho, September 11, 2009).

Werner et al. v. United States, 581 F.2d 168 (Eighth Cir. 1978).

Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P., No. 78462 (20th Jud. Cir. Va., June 19, 2014), aff'd—A.3d—(Va., February 12, 2016).

Not all such litigation over ambiguities, real or fabricated, has an adverse conservation result. Most cases are resolved in favor of the land trust, but care must be exercised at every stage of the transaction, from design and drafting through stewardship and enforcement. Care is also required at any trial to build a solid record and use credible outside experts to include conservation appropriate opinions in the trial record. For a sampling of positive case results, see these case law summaries prepared by Robert H. Levin, Esq., available on [The Learning Center](#):

Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110 (D.C. Cir. 1994).

- Bennett v. Commissioner of Food and Agric.*, 576 N.E.2d 1365 (Mass. 1991).
- Kaiser v. Village of Hartland*, 599 N.W.2d 666 (Wis. Ct. App. 1999) (unpublished).
- Lamb v. Wyoming Game and Fish Comm'n*, 985 P.2d 433 (Wyo. 1999).
- Lyme Land Conservation Trust, Inc. v. Platner*, No. KNL-CV-09-6001607-S, 2010 Conn. Super. LEXIS 1571 (Super. Ct. Conn. Jud. Dist. New London, June 24, 2010) (*Lyme I*); 2013 WL 3625348 (Super. Ct. Conn. Jud. Dist. New London, May 29, 2013) (*Lyme II*); (Super. Ct. Conn. Jud. Dist. New London, March 27, 2015) (Decision on liability, damages and attorney fees) (*Lyme III*).
- Mann v. Levin*, 2004 VT 100.
- Nature Conservancy v. Sims*, 680 F.3d 672 (Sixth Cir. 2012), affirming 2009 U.S. Dist. LEXIS 66554 (E.D. Kentucky, July 30, 2009) (Memorandum Opinion and Order on Fees); 2009 U.S. Dist. LEXIS 17659 (E.D. Kentucky, March 5, 2009) (Memorandum Opinion and Order); (E.D. Kentucky, May 15, 2007) (Preliminary injunction).
- New England Forestry Foundation v. Kouropoulos*, No. 226-2011-CV-0724 (N.H. Super. Ct. Hillsborough Southern Dist., May 30, 2013) (unpublished).
- Ray v. Western Pennsylvania Conservancy*, No. 1799 WDA 2011 (Pa. Super. Ct., Feb. 21, 2013), affirming No. 3388 of 2011, 2011 Pa. Dist. & Cty. Dec. LEXIS 367 (Pa. C. Westmoreland Cty., October 19, 2011) (Opinion and Order denying Plaintiffs' Motion for Judgment on the Pleadings).
- Southbury Land Trust, Inc. v. Andricovich*, 757 A.2d 1263 (Conn. App. Ct. 2000).
- Stockport Mountain Corporation LLC v. Norcross Wildlife Foundation, Inc.*, No. 3:11cv514, 2012 U.S. Dist. LEXIS 27433 (M.D. Pa., March 1, 2012) (Memorandum Decision Denying Motion to Dismiss); 2013 WL 4538822 (M.D. Pa., August 27, 2013) (Memorandum Decision Granting Summary Judgment); 2014 WL 116311 (M.D. Pa., January 10, 2014).

United States v. Jackson, 2006 U.S. Dist. LEXIS 83020 (D. Idaho, November 14, 2006) (unpublished), 2007 U.S. Dist. LEXIS 29171 (D. Idaho, April 17, 2007) (unpublished).

Westchester Land Trust v. Town of Lewisboro, Docket No. 23534/10 (Supr. Ct. N.Y., Westchester Cty., July 13, 2011).

Weston Forest & Trail Assn v. Fishman, 849 N.E.2d 916 (Mass. App. Ct. 2006), affirming Misc. Case No. 301928, Decision Granting Summary Judgment, June 3, 2005 (Mass. Land Court 2005).

Windham Land Trust v. Jeffords, et. al, 2009 ME 29 (Me. 2009), affirming (Cumberland County Super. Ct., July 29, 2008) (Order granting summary judgment) (unpublished); 2007 Me. Super. LEXIS 140 (Cumberland County Super. Ct., June 29, 2007) (Order granting preliminary injunction) (unpublished).

Resource List of Conservation Easement Amendments

For documents on The Learning Center, you will need to be a Land Trust Alliance member or affiliate for access.

Byers, Elizabeth, and Karin Marchett. *The Conservation Easement Handbook*. 2nd edition. Washington, DC: Trust for Public Land and the Land Trust Alliance, 2005. Sample amendment policies are on the CD enclosed with the book. Available for purchase at www.lta.org/publications.

Haven, Robert H. *A Guided Tour of the Conservation Easement Enabling Statutes*. Washington, DC: Land Trust Alliance, 2010, updated 2014. Available on [The Learning Center](#).

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Glossary

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 necessarily synonymous 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).

Conservation values: The 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 the baseline documentation, which must be supplemented by a current conditions report if the conservation easement is amended in a way that affects those values.

Corrective deeds: Amendments that correct mutual mistakes or supply accidentally omitted exhibits can be recorded as corrective deeds, corrective conservation easements or as amendments. 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 easement 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.

Easement amendment provision: An amendment provision in a conservation easement that affirmatively declares the land trust's power to modify the easement, consistent with the easement's overall conservation purposes and subject to all applicable laws. In some states, an amendment provision may be necessary to make any changes to an easement without court approval. Because state laws may be uncertain and may change, an amendment provision

may assist in the future, even if not obviously essential today. An amendment provision also informs readers that the easement may be modified, thus putting grantors, owners, members, funding sources and the general public on notice.

Insider: 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.

The IRS generally considers insiders or disqualified persons under IRC §4598 to be persons who, at any time during the five-year period ending on the date of the transaction in question, were in a position to exercise substantial influence over the affairs of the organization. Insiders generally include: board members, key staff, substantial contributors (see IRC §507[d][2]), parties related to the above and 35 percent controlled entities. Although these are strict definitions within the tax code, land trusts are advised to take an even more proactive approach to the potential damage that conflicts of interest may cause an organization and also include in the definition of *insiders* all staff members and those with access to information not available to the general public (such as certain volunteers).

Related parties are defined by the IRS to include spouse, brothers and sisters, spouses of brothers and sisters, ancestors, children, grandchildren, great-grandchildren and spouses of children, grandchildren and great-grandchildren.

Private inurement and impermissible private benefit: These two concepts are creations of federal tax law for charitable organizations. Prohibitions on private inurement and impermissible private benefit are designed to ensure that charitable assets are used 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, making inadequately secured loans and transferring assets for less than fair market value 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 penalties⁴³ and, in extreme cases, the loss of the charity's tax-exempt status.⁴⁴

Spillover benefits: Positive results arising from additional new land to be conserved and its positive impact on the original easement land, usually to offset some other change that may have a negative effect on the original easement purposes, values or restrictions. Spillover benefits can also be used to offset private benefit and to

assure stakeholders that public benefit is enhanced or at least is net neutral.

Swap, exchange or substitution: The removal of some or all of the originally protected property from the terms and restrictions of the original deed of conservation easement in exchange for either protection of some other property or payment of cash. See the IRS Information Letter cited in the appendices,⁴⁵ as well as the court opinions in the appendices.⁴⁶

Termination or extinguishment versus amendment: In certain contexts, it can be difficult to distinguish between an amendment and a partial termination. For the purposes of this book, a full termination occurs when a conservation easement has been completely terminated or extinguished. A partial termination occurs when a geographic portion of the easement's protected property has been removed from the easement. Often a partial termination is accompanied by other changes to the easement, such as the addition of new property or strengthening of the easement's restrictions. These instances are treated as both partial terminations and amendments.

Notes

1. Both conservation purposes and conservation restrictions must be protected in perpetuity, and the easement itself must be granted in perpetuity. The Internal Revenue Code (IRC) provides that easements are tax deductible if they meet requirements in the Code and Treasury Regulations. IRC §170(a)(1). Under section 170(f)(3)(B)(iii) and 170(h), a person who contributes a qualified real property interest to a qualified organization exclusively for a conservation purpose can claim an income tax charitable deduction to the extent of the value contributed. The IRC defines *qualified real property interest* as “a restriction (granted in perpetuity) on the use which may be made of the real property” (IRC §170[h][2][C]). Moreover, IRC section 170(h) and the Treasury Regulations section 1.170A-14 apply, requiring that an easement must be granted in perpetuity and the conservation purpose of the contribution must be protected in perpetuity.
2. For example, IRS, *Conservation Easement Audit Techniques Guide*, available at www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Conservation-Easement-Audit-Techniques-Guide#_Toc137 (“Conservation easements should not be amended except in limited circumstances such as to correct a typographical error in the original easement document. An easement is not enforceable in perpetuity if it allows amendments that change the nature of the restrictions imposed on the property”).
3. For example, *Commissioner v. Simmons*, 646 F.3d 6, 10 (D.C. Cir. 2011), followed in *Kaufman v. Shulman*, 687 F.3d 21, 28 (First Cir. 2012), aff’d after remand sub nom. *Kaufman v. Commissioner*, 784 F.3d 56 (First Cir. 2015); *Strasburg v. Commissioner*, 79 T.C.M. 1697, 1704-05 (2000).
4. For a robust debate on these complexities, see Jessica E. Jay, “When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Conservation Easements,” *Harvard Environmental Law Review* 36, no. 1 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2043193; Ann Taylor Schwing, “Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements,” *Harvard Environmental Law Review* 37 (2013): 217, <http://harvardelr.com/wp-content/uploads/2013/05/Schwing.pdf>); Jessica E. Jay, “Understanding When Perpetual Is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing,” *Harvard Environmental Law Review* 37 (2013): 247, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270044.
5. See, specifically, Senate Finance Committee’s list of questions to The Nature Conservancy (2005), www.finance.senate.gov/release/senators-continue-inquiry-into-the-nature-conservancy; *IRS Conservation Easement Audit Techniques Guide*, chapter 11 (2011), www.irs.gov/Businesses/Small

- Businesses-&-Self-Employed/Conservation-Easement-Audit-Techniques-Guide (“Conservation easements are not in perpetuity if they can be abandoned or terminated”); *Belk v. Commissioner*, 774 F.3d 221 (Fourth Cir. 2014) (*Belk III*), aff’g 140 T.C. No. 1 (U.S.T.C. 2013) (*Belk I*) and T.C. Memo. 2013-154 (U.S.T.C. 2013) (*Belk II*); *Balsam Mountain Investments, LLC v. Commissioner*, T.C. Memo 2015-43 (U.S.T.C. 2015); *Bosque Canyon Ranch, L.P. v. Commissioner*, T.C. Memo 2015-130 (U.S.T.C. 2015).
- 6 The IRS views amendments releasing land or restrictions from an easement as partial extinguishments. For example, IRS Form 990 Instructions for Schedule D, available at www.irs.gov/pub/irs-pdf/i990sd.pdf (“An easement is also *released, extinguished, or terminated* when all or part of the property subject to the easement is removed from the protection of the easement in exchange for the protection of some other property or cash to be used to protect some other property”).
- 7 *Simmons v. Commissioner*, 646 F.3d 6 (D.C. Cir. 2011), affirming T.C. Memo 2009-208 (U.S.T.C. 2009).
- 8 *Belk v. Commissioner*, 774 F.3d 221 (Fourth Cir. 2014) (*Belk III*), aff’g 140 T.C. No. 1 (U.S.T.C. 2013) (*Belk I*) and T.C. Memo 2013-154 (U.S.T.C. 2013) (*Belk II*); *Balsam Mountain Investments, LLC v. Commissioner*, T.C. Memo 2015-43 (U.S.T.C. 2015); *Bosque Canyon Ranch, L.P. v. Commissioner*, T.C. Memo 2015-130 (U.S.T.C. 2015).
- 9 For example, Guidestar, www.guidestar.org/; National Center for Charitable Statistics, <http://nccsweb.urban.org/PubApps/search.php>.
- 10 IRC §501(c)(3); Treas. Reg. §1.501(c)(3)-1(d)(1)(ii).
- 11 For a more detailed discussion of the private inurement and private benefit doctrines, see Bruce R. Hopkins, *The Law of Tax-Exempt Organizations*, 11th ed. (Hoboken, NJ: Wiley, 2015), §§20.1-20.12; Jonathan Blum, *What Does Private Benefit Really Mean Day to Day*, Fifth Symposium on Advanced Legal Topics in Land Conservation (June 2015), <http://tlc.lta.org/privatebenefit>.
- 12 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 §1.501(a)-1 define “private shareholder or individual” as “persons having a personal and private interest in the activities of the organization.”
- 13 For example, payment of reasonable compensation to officers or employees is permitted. Whether a particular amount of compensation is reasonable is a question of fact.
- 14 See, for example, 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.”

- 15 See, for example, 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.
- 16 IRS private letter ruling 201110020 (March 11, 2011), www.irs.gov/pub/irs-wd/1110020.pdf (land trust violated the private benefit doctrine by amending an easement to allow two houses, when the original easement limited development to one home).
- 17 For more information on the conservation easement enabling statutes, see the Land Trust Alliance publication *A Guided Tour of the Conservation Easement Enabling Statutes* (updated in 2014), <https://tlc.lta.org/cestatutes>. One view is that the word *manner* refers to the basic property law formalities of creation, recordation, amendment and termination. Under this analysis, section 2(a) is read narrowly to require that the procedural and technical aspects of an amendment or termination track the same as those for conventional easements but do not abrogate any other potentially applicable existing law, such as the charitable trust doctrine, as it relates to a holder's ability to deviate from the terms or purposes of the charitable gifts it solicits and accepts. In other words, amendment and termination are controlled by other aspects of law, not just basic property law.

A second interpretation of section 2(a) is that it renders conservation easements subject to the same amendment and termination treatment as conventional easements. In other words, not only the mechanics but all of the substantive common law doctrines and statutes justifying amendment and termination of conventional easements apply identically to conservation easements. Some argue this interpretation governs because easements arise from the tradition of property law and not from charitable trust law traditions. Comments to the UCEA section 3 were amended by the UCEA drafters in 2007 to be clear: "the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements" (see www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act).
- 18 For an in-depth review of Maine's statutory changes, see Jeff Pidot, "Conservation Easement Reform: As Maine Goes Should the Nation Follow?," *Law and Contemporary Problems* 74 (Fall 2011): 1-27, <http://scholarship.law.duke.edu/lcp/vol74/iss4/2>.
- 19 For a useful overview of several issues that enabling statute reform might tackle, including amendment and termination, see Nancy A. McLaughlin and Jeff Pidot, "Conservation Easement Enabling Statutes: Perspectives on Reform," *Utah Law Review* 811 (University of Utah College of Law Research Paper No. 61), <http://ssrn.com/abstract=2402767>. The authors agree that other states should consider Maine and Rhode Island's approach of clarify-

- ing their enabling statutes on the issue of amendment and termination. Of course, any statutory changes should be consistent with IRC §170(h) and the accompanying regulations, especially those in §1.170A-14(g)(6) concerning terminations.
- 20 See Terry M. Knowles, “Amending or Terminating Conservation Easements: The New Hampshire Experience,” *Utah Law Review*, no. 3 (2013): 871–82, http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/knowles_amending_and_terminating_ces_nh_experience.pdf (a summary of how the guidelines are working on the ground).
 - 21 See National Association of State Charity Officials, www.nasconet.org/. Links to all the state offices that regulate charitable organizations and charitable solicitations are available at www.nasconet.org/resources.
 - 22 See Montana Annotated Code 2015, section 72-38-402 (4).
 - 23 See Jessica Jay, “When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements,” *Harvard Environmental Law Review* 36 (2012), <http://harvardelr.com/wp-content/uploads/2012/04/Jay.pdf>, and Jessica Jay, “Understanding When Perpetual Is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing,” *Harvard Environmental Law Review* 37, no. 1 (2013), <http://harvardelr.com/wp-content/uploads/2013/05/Jay.pdf>. See also Ann Taylor Schwing, “Perpetuity Is Forever, Almost Always,” *Harvard Environmental Law Review* 37, no. 1 (2013), <http://harvardelr.com/wp-content/uploads/2013/05/Schwing.pdf>.
 - 24 The court states: “In sum, this case involves a conservation easement purchased for what we understand to be the grantor’s asking price, and which expressly provides that it may be terminated after twenty-five years upon satisfaction of certain conditions. We think it unnecessary to our result, and express no opinion as to how the principles generally applicable to charitable trusts would apply to expressly perpetual conservation easements conveyed in whole or in part as charitable gifts, or purchased under other statutes or provisions.” *Long Green Valley Ass’n v. Bellevalle Farms, Inc.*, 432 Md. 292, 319 n.37, 68 A.3d 843, 859 n.37 (2013).
 - 25 See www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code.
 - 26 For a list of states with charitable solicitation statutes, see <http://multistatefiling.org/>. For an overview of and links to state charitable solicitation laws, see www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration.
 - 27 NH RSA 7:19-a., available at www.gencourt.state.nh.us/rsa/html/i/7/7-19-a.htm; Attorney General, available at <http://doj.nh.gov/charitable-trusts/conservation-easements.htm>.
 - 28 For an overview of the different positions on amendments, see Jane Ellen Hamilton, “Understanding the Debate about Conservation Easement Amendments,” *Saving Land* 33, no. 1 (2014): 14–19.
 - 29 *Belk v. Commissioner*, (Fourth Cir. 2014), [affirming](#) 140 T.C. No. 1, January 28, 2013; T.C. Memo. 2013-154, June 19, 2013, *Balsam Mountain Investments v. Commissioner*, T.C. Memo 2015-43 and *Bosque Canyon Ranch v. Commissioner*, T.C. Memo 2015-130 (U.S.T.C. July 2015).

- 30 Elizabeth Byers and Karin Marchetti Ponte, *The Conservation Easement Handbook*, 2nd ed. (Washington, DC: Land Trust Alliance, 2005), 468.
- 31 However, a corrective amendment that removes a parcel of land from the easement property that was included only by mutual mistake is consistent with principle 7 because that parcel was never intended to be protected in the first place. The same rule applies to the easement deed that mistakenly includes a portion of a neighbor's land.
- 32 Risk grows with a more generous interpretation of *incidental*.
- 33 For illustrative examples of drafting, stewardship and enforcement gone wrong, see Appendix E.
- 34 For a discussion of this case, see Nancy A. McLaughlin, "Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy," *University of Richmond Law Review* 40 (2006): 1031–97.
- 35 *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007).
- 36 *Salzburg v. Dowd*, No. CV-2008-0079 (Fourth Jud. Dist. Johnson Cty., February 17, 2010) (Stipulated Judgment).
- 37 Cumberland Super. Ct., January 2, 2008, aff'd, 967 A.2d 690, 696 & n.2 (2009).
- 38 No. KNL-CV-09-6001607-S, 2013 WL 3625348 (Super. Ct. Conn. Jud. Dist. New London, May 29, 2013) (*Lyme II*).
- 39 For example, *Blumenthal v. White*, 683 A.2d 410 (Conn. 1996) (applying charitable trust principles, including the doctrine of deviation, to a city's proposed transfer of land that had been donated to the city to be used as a public park); *Village of Hinsdale v. Chicago City Missionary Soc'y*, 30 N.E.2d 657 (Ill. 1940) (applying charitable trust principles to a village's sale of lots that had been donated to the village for the purpose of constructing a library); *State v. Rand*, 366 A.2d 183 (Me. 1976) (applying charitable trust principles to a city's use of the proceeds from the condemnation of land that had been donated to the city to be used as public park); *Cohen v. City of Lynn*, 598 N.E.2d 682 (Mass. App. 1992) (applying charitable trust principles to declare null and void a city's conveyance to a developer of land that had been conveyed to the city to be used forever for park purposes); *Tinkham v. Town of Mattapoisett*, 22 Mass. L. Rptr. 635 (2007) (applying charitable trust principles to invalidate a town's attempt to convey property received as a gift to be used for conservation purposes to a developer in exchange for other property); *In re Neher*, 18 N.E.2d 625 (N.Y., 1939) (applying charitable trust principles to a village's proposed use of a homestead that had been devised to the village to be used as a hospital and as a memorial to the tetratrix's husband); *Town of Cody v. Buffalo Bill Mem'l Ass'n*, 196 P.2d 369 (Wyo. 1948) (applying charitable trust principles to void a charitable association's transfer of land that had been donated to the association to be used to memorialize the memory of Buffalo Bill).
- 40 Maine Revised Statutes §477-A: 2, <http://legislature.maine.gov/statutes/33/title33sec477-A.html>.
- 41 Rhode Island General Laws §34-39-5 (c), <http://webserver.rilin.state.ri.us/Statutes/title34/34-39/34-39-5.HTM>.
- 42 *Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements; Guidelines for New Hampshire Easement Holders*, <http://doj.nh.gov/charitable-trusts/conservation-easements.htm>.

- 43 IRC §4958(a)-(c) (penalties on disqualified persons who engage in excess benefit transactions and on those that approve or participate in the transaction).
- 44 For example, IRS private letter ruling 201110020 (March 11, 2011), www.irs.gov/pub/irs-wd/1110020.pdf.
- 45 IRS information letter 2012-0017 (March 5, 2012), www.irs.gov/pub/irs-wd/12-0017.pdf, discussed in Melanie B. Leslie, “Conservation Easements as Charitable Property: Fiduciary Duties and the Limits of Charitable Self-Regulation,” *Utah Environmental Law Review* 33, no. 1 (2013): 164, 165.
- 46 *Belk v. Commissioner*, 774 F.3d 221 (Fourth Cir. 2014) (*Belk III*), aff’g 140 T.C. No. 1 (U.S.T.C. 2013) (*Belk I*) and T.C. Memo 2013-154 (2013) (*Belk II*); *Balsam Mountain Investments, LLC v. Commissioner*, T.C. Memo 2015-43 (2015); *Bosque Canyon Ranch, L.P. v. Commissioner*, T.C. Memo 2015-130 (2015).