

Understanding the Debate about Conservation Easement Amendments

BY JANE ELLEN HAMILTON

Editor's note: The issues surrounding conservation easement amendments are fact-specific and highly dependent on state law. The Land Trust Alliance is committed to providing land trusts with the information and resources they need to make the best amendment decisions. This article is not intended to reflect endorsement of one position over the other by the author or the Land Trust Alliance. We thank the reviewers who provided input on the article.

Most people in the land trust community believe that in certain circumstances conservation easement amendments can strengthen land protection goals. While land trusts should exercise caution and adhere to sound practices, they should not fear entering into these agreements with landowners to ensure that easements withstand the test of time. The use of amendments to conservation easements is expected to increase as easements age, protected land changes hands and on-the-ground conditions evolve.

Although there is substantial guidance on what due diligence land trusts should perform when considering a conservation easement amendment (*see Resources*), there are some amendment proposals that create more questions than answers. It can be difficult to determine when a potential amendment crosses the line into the territory of unacceptable change.

The extent to which land trusts can amend their easements without oversight from an outside party is perhaps the most controversial subject in the field of land conservation today. Everyone involved in the debate has the best interests of land trusts and the future of voluntary land conservation at heart, yet some land conservation professionals hold distinct positions on the issue.

Most practitioners fall somewhere in the middle of a spectrum of thought on amendments, with the two positions discussed below at either end of that spectrum. This article reviews these positions because they are causing the most debate within the community, and understanding and evaluating them can be confusing to those who have not been immersed in these discussions. The article ends with helpful resources and practical pointers for moving forward.

The Debate

The debate exists because the land conservation community operates with a great deal of legal uncertainty with respect to amendments. One thing we know is that land trusts organized under Section 501(c)(3) of the Internal Revenue Code (IRC) must operate for the public benefit. Land trusts cannot participate in amendments that create any private inurement or allow impermissible private benefit (excess benefit transactions). Additionally, various state laws affect amendments and add another layer of complexity that creates more uncertainty. Finally, as tax-exempt organizations, land trusts are subject to oversight by state attorneys general, but how that relates to amendments is not clear in most states.

Federal laws governing tax-deductible easements do not explicitly address amendments, and only a handful of states' laws do.¹ IRC Sec. 170(h) and its accompanying Treasury Regulations require that the conservation purposes of tax-deductible conservation easements be protected in perpetuity, but how far this requirement extends to limit or even prohibit amendments has been vigorously debated.

Eventually, this legal uncertainty will be resolved through legislation, regulation, judicial opinions or parts of all three. For now, land trusts must live with some uncertainty and do their best to address amendments in ways that protect their charitable status and preserve their community's trust by upholding the legal and ethical obligations contained in their conservation easements. This article presents differing perspectives on the amendment debate so that land trust boards and staff can educate themselves and their attorneys about the issues and use this understanding to ask the right questions about any amendments they might consider.

Land Trust Standards and Practices: 11I. Amendments.

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

The debate over conservation easement amendments can be summarized by these questions: Are conservation easements treated as charitable trusts (or restricted charitable gifts) or are they treated as unrestricted charitable gifts of partial interests in real property? What oversight of conservation easement amendments should be exercised and by whom?

An Explanation for Treating Conservation Easements as Charitable Trusts

The enormous public investment in conservation easements (through tax subsidies² and government-funded purchase programs) and the conservation values they are intended to protect for the benefit of future generations will be lost or eroded if easement holders are able to modify, release or swap their easements at will. In addition, land trusts will lose the trust of donors and their communities. Therefore, some mechanism is needed to ensure that easement holders uphold conservation easements and respect the intent of their grantors.

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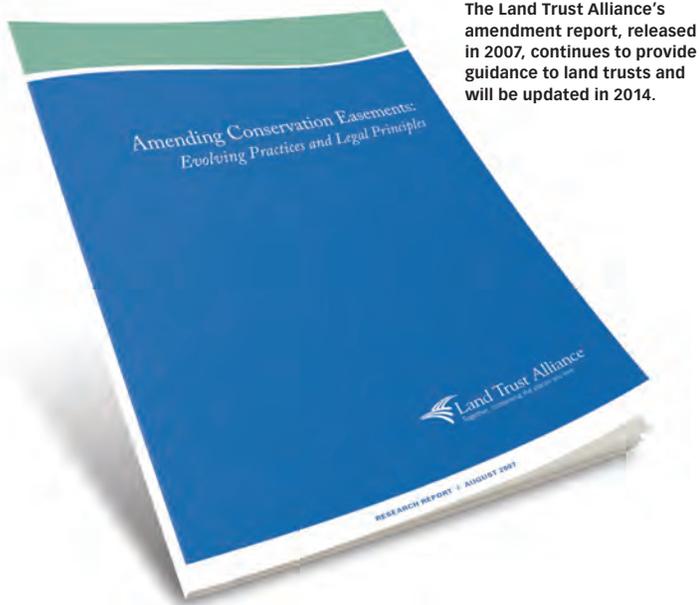
Two Examples of Amendment Decision Making

Through a collaborative process, New Hampshire adopted amendment guidelines to help easement holders comply with the state's charitable trust requirements. Perpetual conservation easements constitute a charitable trust according to the New Hampshire Attorney General (AG). New Hampshire's guidelines focus on protection of land for the perpetual conservation purposes specified in an easement by examining amendment proposals in light of their impact on the protected purposes and by using judicial charitable trust proceedings with AG involvement for certain easement modifications. The AG oversees easement amendments in the state based upon the amendment's risk level, whether the easement has an amendment provision and whether the amendment complies with the Land Trust Alliance amendment report and principles (see *Resources*). Easements with amendment provisions giving the holder discretion to amend consistent with an easement's purpose receive little or no AG scrutiny. Amendments that are inconsistent with the easement's original purpose or that remove more than a small portion of the land from the easement require court approval with the AG as a party. Amendments that fall between these two parameters are categorized by risk level and may or may not require AG approval, depending upon the circumstances.

[Society for Protection of New Hampshire Forests guidelines to amending easements subject to charitable trust principles: <http://clca.forestssociety.org/pdf/amending-or-terminating-conservation-easements.pdf>]

Montana's easement holders, working through the Montana Association of Land Trusts (MALT), developed a policy to guide land trust easement holders' decision making for amendments that does not rely on government or judicial oversight. The Model Montana Conservation Easement Amendment Policy (the Policy) serves as guidance "tailored to address unique aspects of Montana law" and is intended to guide easement holders in interpreting the state's conservation easement enabling act and developing their own policies for easement amendment. The Policy anticipates that Montana's land trusts will act responsibly to follow their missions, respect the terms of the easements they hold and adhere to state law. The Policy summarizes circumstances under which MALT members may choose to amend conservation easements for required, technical or administrative purposes, or when the original purposes of the easement prove to be impossible to meet; suggests not approving certain conservation easement amendment requests listed in the Policy; and provides guidance to MALT members in cases of substantive easement amendments, particularly those occurring under substantially changed circumstances. MALT created the Conservation Easement Reform Advisory Committee to, among other tasks, review all substantive easement amendments proposed under Montana laws and the model Policy.

[States' Approaches to Perpetual Conservation Easement Amendment and Termination, Rally 2013 presentation: <http://tlc.lta.org/library/documents/36244>, pages 14-27]



The Land Trust Alliance's amendment report, released in 2007, continues to provide guidance to land trusts and will be updated in 2014.

Landowners agree to give up equity in their land and to live with restrictions on their use of the land in exchange for the easement holder's promise to uphold the easement forever, thus protecting the property's conservation values. Therefore, conservation easement donors should be permitted to exercise control over the use of their easement property beyond their time of ownership.

Land trusts promise to protect land forever, regardless of changed circumstances. Landowners intend that their donation of a conservation easement be viewed as a restricted gift (or to have created a charitable trust) for the specific charitable purpose of permanently protecting their particular property for the conservation purposes described in the easement. Donors intend that the easement holder cannot change that purpose. However, the holder is free to amend the easement to the extent permitted by any amendment clause (and there may be additional rights to amend implied by law).

Over time, circumstances change, often in unforeseen ways, so even absent an amendment provision, the core purposes or administrative terms of these charitable trusts may be able to be amended, with the approval of a court. Courts can authorize changes in the administrative terms of a conservation easement viewed as a charitable trust if compliance with that term is impossible or illegal—due to, for example, changed conditions—or if compliance with the

term would defeat or substantially impair the ability to accomplish the purpose of the charitable trust. In this instance, the court can substitute a new conservation purpose that is as near as possible to the original purpose so that the charitable trust (conservation easement) continues to exist.

Because charitable trusts are viewed as benefitting the public rather than any particular individual, the state attorney general would typically be made a party to actions seeking to amend a conservation easement treated as a charitable trust. Taken together, the role of the courts and attorneys general in approving changes to easements treated as charitable trusts is to protect the public's interest in the easement.

There is currently very little oversight of amendment decisions. Although a land trust that agrees to an amendment that results in an excess benefit transaction could be fined and may risk losing its tax-exempt status, it is unlikely the land trust's actions would be discovered by any regulatory authority. While it is true that a land trust must disclose all amendments it enters into during the tax year on the IRS Form 990, there is no indication that the IRS reviews that information or will ever use it to oversee amendment decisions. Although state attorneys general have oversight over the charities in their state, this authority is usually only exercised after misconduct by a charity becomes known; these offices do not generally audit charities' day-to-day activities.

Without effective oversight that could head off problems before they receive widespread media attention, the actions of "rogue" land trusts or even easement holders that believe they are operating under accepted best practices but make mistakes can adversely impact the entire land conservation community.

Landowners can bring threats of expensive lawsuits and other actions to compel the land trust to agree to an improper amendment. If land trusts have the sole authority to make all decisions about amendments without any outside oversight, they may be vulnerable to such pressure. Conversely, third-party oversight offers the easement holder a shield against such threats.

For these reasons, advocates of the charitable trust principle's application to conservation easements believe it will protect easements' public benefits, preserve the public's financial investment in conservation, ensure that grantors have confidence that their intentions will be honored over time and still provide a means for appropriate flexibility to change easements due to new circumstances.

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An Explanation for Treating Conservation Easements as Unrestricted Charitable Gifts of Partial Property Interests

Landowners understand that most state laws provide that conservation easements may be amended like other types of easements, such as a driveway or utility easement, if both parties agree. Therefore, land trusts may assume that landowners intended that their easements may be modified if both parties to the easement agree. Easement donors understand that circumstances change, public values change and their properties someday may no longer provide the conservation benefits they did when the easement was granted. Thus, an easement's perpetuity clause reflects landowners' aspirational preferences or desires for future property use and management, not an effort to assert absolute control over how future landowners use the land. Thus, easement donors accept the perpetuity clause in an easement primarily to comply with state law, to secure federal tax benefits or to satisfy a land trust's decision to only accept perpetual easements.

Easement donors restrict their own rights to use property, but do not attempt to limit how easement holders manage the conservation rights they have been granted. Therefore, land trusts, not original easement donors, should determine appropriate changes to conservation easements to be responsive to the community's needs and with full authority to interpret and manage their conservation easements for the public benefit.

Amendments agreed to by the parties to the easement do not lack public oversight. Existing laws and other constraints prevent land trusts from freely amending their conservation easements without serious consideration of the ramifications of their actions. These constraints include state conservation easement enabling legislation, the land trust's own governance documents and federal and state laws governing nonprofit status and management. If a land trust acts contrary to these laws or fails to follow its amendment policy or an amendment clause, it could face claims it breached a contract or its fiduciary duties or that it acted arbitrarily and capriciously; the IRS could levy fines and penalties for engaging in excess benefit transactions or failing to act in the public interest; or the land trust could lose its tax-exempt status or face an audit by state officials charged with oversight of nonprofit organizations. In addition, most easement holders are nonprofit organizations or public agencies directly accountable to their members and funders or to the electorate. Such organizations cannot disregard public opinion in their amendment decisions for fear of losing critical public support.

Application of charitable trust principles to conservation easements will greatly increase the time to process amendments and their cost. Furthermore, requiring the involvement of courts and state attorneys general in all amendment decisions is an inefficient use of their resources and could inject political and personal biases into decision making rather than focusing on the conservation implications of the amendment. Judges are often

Resources

"Amending Conservation Easements: Evolving Practices and Legal Principles," Land Trust Alliance Research Report, 2007: www.lta.org/publications (referred to in article as "the amendment report")

The Learning Center – Collections – Conservation Easement Amendment, Modification and Termination: <http://tlc.lta.org/tlc/collections/811>

"Finding Common Ground on Easement Modification and Termination" June 2013 meeting executive summary: www.lta.org/conservation/conservation-defense/documents/finding-common-ground-executive-summary

To see state statutes on amendments go to www.lta.org/savingland.

NOTES:

¹ Only four states, Maine, New Hampshire, Rhode Island and California, have addressed the issue through legislation or regulatory guidance; Massachusetts addresses amendments to the extent they result in partial terminations of easements.

² Approximately \$2 billion in federal taxpayer subsidies were provided for conservation easement donations between 2003 and 2008 (Land Trust Alliance).

overworked, uninformed about the facts and specifics of the law and not necessarily accountable for their actions. The lack of judicial accountability and the risk of politicizing amendment decisions raise significant public policy concerns and could lead to a lack of predictability about how amendments would be handled.

The application of charitable trust principles to amendments raises additional concerns: how they would apply to purchased, regulatory, condemned or exacted easements; how they would apply to easements with multiple holders; uncertainty about implied powers; and possibly expanding the number of parties who could sue to challenge an amendment decision. Moreover, the fact that a charitable trust's purpose can only be changed due to the impracticability or impossibility of achieving the purpose is considered too high a standard to be responsive to inevitable changes over time.

Proponents of treating conservation easements as private agreements that may be amended at the parties' discretion believe that this approach better fulfills the needs of the public benefitted by the conservation easement over time, gives land trusts appropriate and needed flexibility to address change, and reduces cost, time and the risk of politicizing amendment decisions.

The Middle Ground

As noted, most practitioners and attorneys fall somewhere between the two ends of the spectrum of opinions about amendments. They see a conservation easement as a hybrid that is a real estate interest held by a charity subject to oversight by various regulators and affected by a wide variety of state and federal laws. They can see the public interest in ensuring that significant changes that adversely affect the easement purposes and intentions of *both* original parties may need some type of oversight. And they know that most easement modifications are minor or nominal and should not be caught up in bureaucracy but instead handled in a principled and practical manner.

The majority of amendments are modest, with positive or net neutral effects on donor intent and conservation purposes, goals and values. When faced with any amendment decision—especially more complex scenarios—land trusts should consult the many resources available to them through the Land Trust Alliance, starting with “Amending Conservation Easements: Evolving Practices and Legal Principles” (the amendment report) (*see Resources*); abide by *Land Trust Standards and Practices* and their own internal policies and the

provisions of any amendment clause; and consult with qualified attorneys who know the laws of the state, as well as applicable federal laws.

Practical Pointers

What else can land trusts do in this climate of legal uncertainty?

- Commit to discussing the concept of perpetuity and change with landowners *before* they convey a conservation easement to the land trust so that landowners can make informed decisions.
- Focus on good initial easement drafting to avoid the need for future amendments to the greatest extent possible.
- Insert an amendment clause in every conservation easement. Land trusts should be clear with donors about the land trusts' ability to enter into amendments and any restrictions on this ability.
- Have a carefully prepared, written amendment policy.
- Use the amendment principles, the amendment screening tests and the risk spectrums in the amendment report to help guide and evaluate amendment decisions.
- Keep up with the latest learning as related laws and best practices continue to evolve.

The Land Trust Alliance is committed to continuing to engage on amendment issues. The next steps for the Alliance include:

- In conjunction with the University of Wisconsin Survey Center, a survey of land trusts on amendments in early 2014 to gain a better understanding of the nature and extent of easement modification and termination. Land trusts should be on the lookout for the survey and respond as completely as possible.
- Reissuing the 2007 amendment report (exact format and extent of the revisions to be determined, but survey results will be reflected).
- More listening sessions, ask an expert-type workshops and overall conversation on amendments at state and regional conferences and other venues.

While many issues remain unresolved, the Alliance will foster a community of people committed to respectful discussion of the complexities of conservation easement amendments. 🌿

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