

Finding Common Ground on Easement Modification and Termination



June 28, 2013

Land Trust Alliance
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Executive Summary

The Land Trust Alliance convened the meeting “Finding Common Ground on Easement Modification and Termination” on June 28, 2013 in Denver, Colorado as part of its mission to build strong land trusts, defend the permanence of conservation easements and ensure that the work of land trusts is as strategically directed as possible. The Alliance brought together 14 highly experienced land conservation professionals to discuss the controversial issues associated with easement modification and termination.

The meeting participants acknowledged that the tenor and tone of the discourse on amending conservation easements has become increasingly acrimonious to the detriment of the land trust community as a whole. The meeting sought to maintain civil discourse while respecting the diversity of opinion among participants.

Other goals of the meeting were to build on the guidance of the Alliance’s 2007 Amendment Report, help the Alliance clarify next steps and explore areas of potential agreement on key issues related to easement modification and extinguishment.

Participants in the meeting represented a range of viewpoints. They debated with passion and respect the changing context of land conservation and easements, increasing requests for easement amendments, evolution of the law as it applies to easements and amendments, role of the IRS and third-party oversight and methodologies for amending and terminating easements. In the discussion, participants found some common ground even though they applied different legal doctrines to justify their analyses of permissible amendments.

Participants agreed that the law on easement modification and termination is unsettled in most states and continues to evolve. There was discussion that little data exists to quantify the volume or describe the characteristics of easement amendments across the country.

Participants also recognized the important role the Alliance has in encouraging civil discourse, while acknowledging that other interested parties need to take responsibility to ensure that the debate over easement modification is respectful and constructive.

The Alliance’s 2007 Amendment Report was discussed and endorsed as balanced and relevant to land trusts. The amendment principles and risk spectrums in the report continue to provide an important tool for analyses and guidance. Meeting participants recommended reissuing the report.

A variety of suggestions were offered on how to update and distribute the report to reflect evolving state and federal law and best land conservation practices and to make sure that the report is available to the widest possible audience. There was agreement that uniform definitions for key terms such as termination, partial termination and modification and extinguishment would be very helpful to the land trust community, but could be difficult to achieve.

There was recognition that operational flexibility is helpful to land trusts responding to changing conditions; that easement amendments must follow applicable local, state and federal law and that land trusts’ procedures must be clear, consistent and transparent. Several ideas were discussed to help land trusts better achieve these goals.

The meeting participants recommended a continued leadership role for the Land Trust Alliance with next steps including more meetings that explore common ground with different participants, continued discussion on the need for common courtesy and respect and setting an expectation for civility at meetings, workshops and Rally.

While many issues remain unresolved, the meeting “Finding Common Ground” began the process of building a community of people committed to respectful debate on easement modification. The views expressed in this report are those of the participants and not necessarily those of the Land Trust Alliance. “Finding Common Ground” is part of the Alliance’s ongoing commitment to continuing constructive dialogue that assists land trusts in achieving excellence in conservation practice.

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Finding Common Ground: Areas of General Agreement

The current debate

- The nature of the current discourse on easement modification is not helpful to the land trust community.
- The Alliance is not in control of the debate on easement modification, although it has an important role to play. Other communities and individuals will also influence the tone of the discussion and whether the issue can be debated in a respectful, civil manner.
- The law on the modification of easements is unsettled and evolving.
- The Land Trust Alliance does not reach 100 percent of the land trust community. This makes it difficult to educate the 600 or so land trusts that do not participate in Alliance education programs or take advantage of other Alliance resources.

The needs of land trusts

- The land trust community needs guidance on how to deal with troubled easements.
- Flexibility in managing easements is important to the land trust community and must be accompanied by clarity, consistency and transparency.
- Easement amendments must follow all applicable federal, state and local law.
- There is an increased need in stewardship capacity for land trusts, and it is challenging to raise dollars for stewardship programs.
- There is a real need within the community to grapple with definitions and apply uniform terms in land conservation work.

The Alliance 2007 Amendment Report

- The 2007 Amendment Report is relevant and useful and should be reissued.
- The principles in the Amendment Report apply to amending easements, not to advocacy on legal doctrine.
- The Amendment Report is a good tool that could be fleshed out and give more detail on how to apply the principles to real cases.
- Current Alliance guidance does not adequately address issues of complexity, diversity of conditions, state law and differing approaches of land trusts in amending easements.
- The issue of transparency is not adequately addressed in the Amendment Report.
- Cases histories of easement modifications, good and bad, are not widely shared and could be useful in helping land trusts learn how to deal with amendments.
- There is more agreement on how to amend when people are analyzing actual cases.

Terminations and releases

- The majority of participants agreed, in principle, that “in the interest of standard practice and the integrity of the entire community, the termination of an entire conservation easement requires some form of outside oversight.”
- The majority of participants agreed that certain de minimis releases, such as a settlement in lieu of condemnation and some types of boundary line adjustments, are within a land trust’s discretion and may not require third-party review or oversight.

Foreword and Acknowledgements

The Land Trust Alliance would like to acknowledge and thank the following individuals who gave their valuable time and expertise to find common ground on easement modification and termination and brought diverse interests and perspectives to the discussion with vigorous and civil debate.

David Anderson, Wood River Land Trust (ID); Andy Dana, Conservation Law Associates (MT); Jay Erickson, Montana Land Reliance; Elizabeth Hagood, Lowcountry Open Land Trust (SC); Jane Ellen Hamilton, Hamilton Consulting (MT); Vic Lane, Grand Traverse Regional Land Conservancy (MI); Kris Larson, Minnesota Land Trust; Gil Livingston, Vermont Land Trust; Bill Silberstein, Kaplan, Kirsch & Rockwell, LLP (CO); Steve Small, Law Office of Stephen J. Small, Esq. P.C. (MA); Steve Swartz, The Humane Society Wildlife Land Trust (DC); Phil Tabas, The Nature Conservancy DC; Bill Weeks, The Conservation Law Center (IN); and Jim Wyse, Coughlin Duffy LLP (NJ).

Laura Johnson, Chair, Conservation Defense Committee, Land Trust Alliance, convened and chaired the meeting. Sylvia Bates, Director of Standards and Research, Land Trust Alliance, served as project manager. Renee Kivikko, Director of Education and Leslie Ratley-Beach, Conservation Defense Director, Land Trust Alliance, provided valuable guidance in planning the meeting.

Special thanks to Bill Silberstein for the use of the offices of Kaplan, Kirsch & Rockwell, LLP where the meeting was held and to Jessica Alizadeh for her exceptional recording help.

Alice Chamberlin, Chamberlin Conflict Resolution (NH), facilitated the meeting and prepared the final report.

The meeting was preceded with a collegial dinner on the evening of June 27th in Denver. Participants had the opportunity to get better acquainted, discuss the focus of their land conservation work and share their goals for the meeting.

It is important to note that the meeting was held prior to the decision of the United States Tax Court in *Carpenter II* (*Carpenter v. Commissioner*, T.C. Memo 2013-172, filed July 25, 2013.)

This report represents a summary of the work and words of the meeting participants and does not necessarily represent the views or positions of the Land Trust Alliance.