Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements

Guidelines for New Hampshire Easement Holders

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Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements

Guidelines for New Hampshire Easement Holders

These Guidelines are designed to define and describe the role of the Attorney General as a necessary party and, where applicable, the role of other state agencies in those situations where an amendment to or termination of a conservation easement is contemplated.

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I. INTRODUCTION

A. Conservation Easements in General

When a land trust or a government entity acquires a perpetual conservation easement, it promises the grantor, the community, and (if applicable) financial contributors that the easement will be upheld in perpetuity. The land trust or government entity becomes legally bound to enforce the easement according to its stated terms and purpose. Given that, how is it possible to contemplate amending perpetual conservation easements?

It is impossible to predict all the circumstances that may arise in the future. Even the most well-drafted conservation easement may need to be amended at some point, for example, to clarify terms, add land, improve enforceability, resolve disputes, or address unanticipated land uses.

Nevertheless, amendments should be rare. When they are contemplated, the holder of the conservation easement should embark on the path of amending only after becoming thoroughly informed regarding the proper legal and ethical principles and processes.

An excellent source of guidance regarding conservation easement amendments is *Amending Conservation Easements: Evolving Practices and Legal Principles*, published in 2007 by the Land Trust Alliance ("Amending Conservation Easements"). The information contained in this publication is essential reading for conservation easement holders, be they charitable organizations (typically land trusts) or government entities, before considering an amendment.

B. Conservation Easements as Charitable Trusts

The New Hampshire Attorney General considers any perpetual conservation easement donated as a charitable gift in whole or in part to a charitable organization or a government entity to constitute a charitable trust and thus to be subject to charitable trust principles.[1] The comments to the Uniform Trust Code, which was adopted by New Hampshire in 2004, explain:

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[1] Perpetual conservation easements are donated in whole or in part as charitable gifts to charitable organizations and government entities to be used for a specific charitable purpose—the protection of the particular land burdened by the easement for the conservation purposes specified in the deed in perpetuity. In New Hampshire, a gift made to a charitable organization or government entity to be used for a specific charitable purpose creates a charitable trust. *See, e.g.,* Trustees of Protestant Episcopal Church v. Danais, 108 N.H. 347 (1967) (testamentary devise to the trustees of a designated church of certain premises to be used as a rectory for the parish of such church and "to be occupied by the rector … and his family and by them only" created a valid charitable trust); Keene v. Martin, 96 N.H. 504 (1951) (bequest to pay for and establish a set of chime bells to be installed on the public library or some other building in the city constituted a charitable trust); State v. Federal Square Corp., 89 N.H. 538 (1938) (land and buildings thereon conveyed to a city to be used as a public library created a charitable trust); RSA 7:21 (defining a charitable trust under New Hampshire law as "any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable,

> *Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to [which] the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.*[2]

Perpetual conservation easements purchased at fair market value, exacted as part of development approval processes, or acquired in the context of mitigation may also be subject to similar equitable principles.[3] Accordingly, perpetual conservation easements, regardless of how acquired, should not be amended (or terminated) without consideration of and compliance with applicable charitable trust principles. It is, therefore, the more prudent course to assume that the same notification, review, and approval principles that apply to conservation easements donated in whole or in part apply to all perpetual conservation easements, regardless of how they were acquired.

II. AMENDMENT OF A CONSERVATION EASEMENT

A. Step One – Seven Principles

As the first step in considering any proposed amendment, the holder should make sure the amendment complies with ALL of the following seven principles (see *Amending Conservation Easements* at 32):

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nonprofit, educational, or community purpose."). See also Restatement (Third) of Trusts (2003) § 28, cmt. a ("An outright devisee or donation to a ... charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust …. A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee …."). Even in jurisdictions in which a gift made for a specific charitable purpose is not characterized as a technical "trust," the substantive rules governing the administration of charitable trusts, including the doctrine of cy pres, nonetheless apply. *See, e.g.,* St. Joseph's Hosp. v. Bennett, 22 N.E.2d 305, 308 (N.Y. 1939); Restatement (Second) of Trusts § 348.1, cmt f. (1959).

[2] Uniform Trust Code § 414, cmt. The sections of New Hampshire's Uniform Trust Code concerning the modification or termination of charitable trusts for the most part merely codified or replaced already existing New Hampshire common and statutory law. Michelle M. Arruda, *The Uniform Trust Code: A New Resource for Old (and New!) Trust Law*, 46 N.H.B.J. 6, 9 (2006). *See also* Uniform Conservation Easement Act, § 3, cmt. ("because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements"); Restatement (Third) of Property: Servitudes § 7.11 (2000) (recommending that the modification and termination of conservation easements be governed by a special set of rules based on the charitable trust doctrine of cy pres). See also Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 Wyo. L. Rev. 1 (2009).

[3] *See* In re Village of Mount Prospect, 522 N.E.2d 122, 125 (Ill. App. 1988) (land dedicated to Village "for public purposes" was held upon an express charitable trust and could not be sold without court approval in a cy pres proceeding).

The proposed amendment must:

1. Clearly serve the public interest and be consistent with the easement holder's mission.
2. Comply with all applicable federal, state, and local laws.
3. Not jeopardize the holder's tax exempt status or status as a charitable organization under either federal or state law (if the holder is a land trust or other charitable organization).
4. Not result in "private inurement" or confer impermissible "private benefit" (as those terms are defined for federal tax law purposes and N.H. RSA 7:19-a).
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor, and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values or attributes protected by the easement.

B. Step Two – Review Process

If a proposed amendment is found to comply with each of the seven principles specified in step one, the holder should next determine whether the conservation easement contains an amendment provision. The standard "amendment provision" is a provision included in a conservation easement deed that expressly grants the holder the discretion to agree to amendments that are consistent with or further the purpose of the easement.[4] As described below, the review process for amendment proposals will differ depending on whether the holder is granted the discretion to amend the terms of the conservation easement in the form of an amendment provision, and the extent of that grant of discretion. (In some cases grantors customize the standard amendment provision to preclude certain types of amendments, such as those that would increase the level of residential development permitted by the express terms of the easement.)

In very rare cases, a holder may wish to proceed with an amendment that clearly does not comply with the seven principles specified in step one. Such an amendment is by definition "high risk" and must comply with the review process specified below for high risk amendments.

1. When Conservation Easement Does not Contain an Amendment Provision

If the conservation easement does not contain an amendment provision, the holder should consult with the attorney general regarding any proposed amendment. However, the level of attorney general review will depend on whether the amendment is appropriately characterized as "low risk," "more risk," or "high risk" (see *Amending Conservation Easements* at 53-56, discussing these various risk categories).

[4] See *Amending Conservation Easements* at Appendix C-2 for sample amendment provisions.

(i) *"Low Risk" Amendments*

a. Definition of Low Risk Amendments

Low risk amendments are those that satisfy each of the following requirements:

- The amendment clearly and unquestionably complies with all of the seven principles listed in step one.
- The amendment either does not affect or has only positive affects on the conservation purposes of the easement and the conservation values (attributes) of the property.
- The holder clearly has the commitment and the capacity to enforce the easement's restrictions.
- There are clearly no private inurement issues (as that term is defined for federal tax law purposes and N.H. RSA 7:19-a) because no "insider" associated with the holder is involved.
- There is clearly no private benefit (as that term is defined for federal tax law purposes) provided to any person as a result of the amendment.
- The amendment is consistent with any solicitations for donations toward the purchase of the easement made by the holder when the easement was acquired.
- The amendment is consistent with local law and meets current zoning and similar requirements.
- The amendment is simple and easily understood.
- The amendment is approved by all necessary persons, such as holders of any contingent rights or executory interests and the owner of the encumbered land.
- There is a low probability of relevant funders, the easement grantor, the grantor's heirs, neighbors, or members of the community objecting to the amendment.
- The amendment has been reviewed and approved by the holder's board of trustees or board of directors.
- The amendment has been reviewed by relevant experts or such review is clearly not needed.

Examples of low risk amendments include those that:

- Correct scrivener's errors (typographical errors, etc.).
- Add more land to a conservation easement, provided such addition is consistent with the purpose of the easement.
- Add new restrictions that are clearly consistent with the purposes of the easement.
- Eliminate reserved rights (such as reserved house sites, cabin sites, access roads, etc.).
- Replace an antiquated property description with a new description resulting from a recordable survey.
- Correct boundary line errors resulting from an inaccurate property description, survey, or otherwise.

In each of the above situations, it is assumed that the proposed amendments are simple and easily understood and that there is no *quid pro quo* being provided in exchange for the amendment. In other words, these amendments are clearly

consistent with or further the conservation purpose of the conservation easement, and the owner of the land is receiving nothing in return (other than the potential of an additional income tax benefit based on the value of a new donation).

b. Attorney General Review of Low Risk Amendments

If an amendment clearly and unequivocally falls into the low risk category, the easement holder should notify the Attorney General, Charitable Trusts Unit that the amendment is being proposed.[5] The notification should (i) be provided to the Attorney General at least thirty days prior to the execution of the amendment, (ii) clearly describe how the proposed amendment complies with the seven principles set forth in step one, qualifies as a low risk amendment, and is consistent with the holder's organizational amendment policy, (iii) include a copy of the existing conservation easement and the proposed amendment (including identification of all places where changes are made by color marking, through a document comparison program, or other means if the easement is being amended and restated), and (iv) include copies of any relevant maps, surveys, deeds, photos, or other documents that help explain the amendment.

Once the amendment is executed and recorded, a copy of the recorded amendment should be provided to the Attorney General.

(ii) "More Risk" Amendments

a. Definition of More Risk Amendments

More risk amendments require more review. These amendments are more complicated, may involve trade-offs, and could have the potential to create private benefit or other complications. They differ from low risk amendments in that they:

- May affect the conservation purposes both positively and negatively (i.e., some conservation purposes or attributes may benefit at the expense of others); these are generally referred to as "trade-off" amendments.
- May involve a private inurement (as that term is defined for federal tax law purposes).
- May involve private benefit (as that term is defined for federal tax law purposes).
- May not be consistent with the mission of the easement holder.
- May not be consistent with third party rights in the easement (executory or contingent interest holders).
- May be objected to by the grantor, the grantor's heirs, or neighbors, who are either aware of the proposed amendment and have expressed concerned or have not been consulted.

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[5] The term "Attorney General" as used herein refers to the Attorney General's Charitable Trusts Unit. To the extent that any parties including the N.H. Fish and Game Department, the Council on Resources and Development, the Division of Cultural and Historical Resources, etc. are represented by another bureau, the appropriate Attorney General representative from that bureau should also be contacted.

Examples of more risk amendments include those that:

- Clarify ambiguous easement terms and address disputes over the meaning and intent of the easement restrictions.
- Relocate reserved rights, such as reserved house sites.
- Add new reserved rights in exchange for the termination or reduction of existing reserved rights (i.e., involve trade-offs).
- Improve easement enforceability by removing "excessive" restrictions that provide *de minimis* or no conservation benefit.

b. Attorney General Review of More Risk Amendments

More risk amendments present potential problems and must be carefully examined. In these situations, there is a potential that an amendment would violate charitable trust rules if not properly designed and approved. Such amendments may also violate the federal tax law perpetuity requirements.[6]

Since more risk amendments have the potential to impact the laws regarding charitable trusts, the Attorney General should review each more risk amendment proposal to assess whether the amendment complies with the seven principles listed in step one. The Attorney General may offer suggestions to the holder on how to address any potential problems with such an amendment. If the Attorney General believes the proposed amendment requires review by and approval of the probate court, this will become apparent during consultation.

When to initiate consultation with the Attorney General is a key question. In general, when a holder perceives that a proposed amendment may be more than "low risk," the holder should contact the Attorney General as early in the process as possible. The holder should first gather all the important facts and determine that, in its estimation, the proposed amendment complies with the seven principles listed in step one. The holder should then send a letter to the Attorney General that (i) describes how the proposed amendment, in the holder's estimation, complies with the seven

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[6] In a 2005 report on The Nature Conservancy (TNC), the Staff of the Senate Finance Committee explained that "[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity." See United States Senate Committee on Finance, *Report on The Nature Conservancy, Executive Summary* at 9 available at http://finance.senate.gov/sitepages/TNC%20Report.htm. The Staff noted that modifications made to correct ministerial or administrative errors are permitted under present federal tax law. *Id*. at 9 n. 20. But the Staff expressed concern with regard to trade-off amendments, which both negatively impact and further the conservation purpose of an easement, but on balance are arguably either neutral with respect to or enhance such purpose. *See id.* at Pt. II 5. The Staff provided, as an example, an amendment to an easement that would permit the owner of the encumbered land to construct a larger home in exchange for restrictions further limiting the use of the land for agricultural purposes. *Id.* The Staff explained that trade-off amendments "may be difficult to measure from a conservation perspective," and that the "weighing of increases and decreases [in conservation benefits] is difficult to perform by TNC and to assess by the IRS." *Id.*

principles set forth in step one and the holder's organizational amendment policy, (ii) details the issues that make the proposed amendment more risk (as opposed to low risk), (iii) includes a copy of the existing conservation easement and the proposed amendment (including identification of all places where changes are made by color marking, through a document comparison program, or other means, if the easement is being amended and restated), and (iv) includes copies of any relevant maps, surveys, deeds, photos, or other documents that help explain the proposed amendment. If the proposed amendment is supported by the easement grantor, the grantor's heirs or assigns, funders, the holder of any executory or back-up interest, the local government, state agencies, or other public entities, their concurrence should be indicated in the letter. (It may be necessary to later supply the Attorney General with letters of endorsement.)

A meeting with the Attorney General may be needed to clarify the facts, explain complex language or survey plans, and provide additional information.

Consultation with the Attorney General regarding more risk amendments may lead to several possible outcomes. The Attorney General may find that the proposed amendment fits within the low risk category and send the holder a "no action" letter indicating that the Attorney General will not oppose the amendment. Alternatively, the Attorney General may find certain changes that could be made to improve the amendment and, if the amendment proposal is revised accordingly and resubmitted to the Attorney General, the Attorney General will issue a "no action" letter. However, if it is determined that there are significant issues relating to the common and statutory law of restricted charitable gifts and charitable trusts, the Attorney General will likely recommend that the proposal be submitted to the probate court for review. The submission to the probate court will generally take the form of a petition for instructions (RSA 564-B:2-201(c)) or a petition for deviation (RSA 547:3-c, RSA 564-B:4-412), although in some cases it may take the form of a petition for *cy pres* (RSA 547:3-d, RSA 564-B:4-413(a)).

(iii) "High Risk" Amendments

a. Definition of High Risk Amendments

High risk amendments require review and approval by the probate court under either the doctrine of deviation (RSA 547:3-c, RSA 564-B:4-412) or the doctrine of *cy pres* (RSA 547:3-d, 564-B:4-413), as the case may be. These amendments may involve complex issues, trade-offs of restrictions, possible harm to the conservation purposes of the easement, or removal of more than a *de minimis* portion of the land from the easement's restrictions (which constitutes a partial termination or extinguishment of the easement).

High risk amendments differ from low and more risk amendments in that they may, for example:

- Result in significant harm or change to the original conservation purposes of the easement or conservation attributes of the easement property.
- Alter the basic provisions or protections of the easement.
- Involve private inurement (as that term is defined for federal tax law purposes).
- Confer a private benefit (as that term is defined for federal tax law purposes).
- Conflict with the charitable or public mission of the easement holder.
- Be contrary to solicitations made to the easement grantor or donors of funds to the holder that were used to purchase the easement..
- Be contrary to local ordinances or other requirements.
- Not be supported by the community, neighbors, the easement grantor, the grantor's heirs, or other interested parties.
- Lack appropriate scientific or expert review that is clearly needed.
- Be highly complex and difficult to explain.

Examples of high risk amendments include those that:

- Release a restriction without obtaining offsetting conservation benefits elsewhere on the easement property.
- Remove more than a *de minimis* portion of the land from the easement, whether or not in exchange for the protection of other land (abutting, nearby, or elsewhere) or other compensation, and regardless of whether the removal is characterized by the parties as a swap, amendment, adjustment, boundary resolution, release, extinguishment, termination, or otherwise. *De minimis* means so small as to be of no consequence. No exact size can be set because a *de minimis* portion of a 10-acre easement is necessarily smaller than a *de minimis* portion of a 100-acre easement or a 1,000-acre easement. Nevertheless, for this purpose, any removal of land from a conservation easement larger than one acre cannot ever be considered *de minimis*, and removal of land that is smaller than one acre may be more than *de minimis* depending on the circumstances of the easement and land. Removal of more than a *de minimis* portion of the land from an easement, however characterized, constitutes an extinguishment of the easement with respect to the land removed.
- Permit prohibited subdivision or residential or commercial development of the land.
- Release a restriction as part of a proposal to settle a violation dispute.
- Are made in exchange for cash.

There are a host of potential situations that could be considered high risk. A good rule of thumb is that if the holder of the easement believes that the proposed amendment does not clearly comply with the seven principles listed in step one, or that a reasonable case could be made that the proposed amendment does not comply with one or more of those principles, the holder should anticipate a thorough review by the Attorney General and possible review by the probate court.

Amendments that are not consistent with the purpose of a conservation easement, which may include amendments that permit prohibited subdivision and development of the land or remove more than a *de minimis* portion of the land from the protection of the easement (a partial extinguishment), *require court approval in a cy pres proceeding*. The Attorney General must be given notice of and is a necessary party to any such a proceeding.

b. Attorney General Review of High Risk Amendments

High Risk amendment proposals require consultation with and review by the Attorney General and most likely subsequent review and approval by the probate court. A holder proposing a high risk amendment should be prepared for a potentially lengthy process.

The holder should first gather all the important facts and determine that, in its estimation, the proposed amendment complies with the seven principles listed in step one. The holder should then send a letter to the Attorney General that (i) describes how the proposed amendment, in the holder's estimation, complies with the seven principles set forth in step one and the holder's organizational amendment policy, (ii) details the issues that make the proposed amendment high risk (as opposed to low risk or more risk), (iii) includes a copy of the existing conservation easement and the proposed amendment (including identification of all places where changes are made by color marking, through a document comparison program, or other means if the easement is being amended and restated), and (iv) includes copies of any relevant maps, surveys, deeds, photos, or other documents that help explain the proposed amendment. If the proposed amendment is supported by the easement grantor, the grantor's heirs or assigns, funders, the holder of any executory or back-up interest, the local government, state agencies, or other public entities, their concurrence should be indicated in the letter. (It may be necessary to later supply the Attorney General with letters of endorsement.)

A meeting with the Attorney General may be needed to clarify the facts, explain complex language or survey plans, and provide additional information.

The better job the easement holder does in preparing the amendment proposal letter for the Attorney General's review, the less likely it is that there will be substantial delays in the review process. High risk amendments are, however, questionable by their very nature, and no holder should expect that the Attorney General will consent to such an amendment or issue a "no action" letter, or that the court will approve such an amendment.

2. When Conservation Easement Contains an Amendment Provision

If a perpetual conservation easement contains a provision granting the holder the discretion to agree to amendments that are consistent with or further the purpose of the easement, it will not be necessary for the holder to obtain Attorney General review in low risk and many more risk cases. If the holder determines that the proposed amendment (i) complies with the seven principles set forth in step one, (ii) is consistent with the holder's

organizational amendment policy, and (iii) clearly falls within the discretion granted to the holder pursuant to the amendment provision included in the easement deed, the holder may agree to the amendment. Once the amendment is executed and recorded, the following should be provided to the Attorney General: (a) a copy of the original conservation easement, (b) a copy of the recorded amendment or the recorded amended and restated easement (including identification of all places where changes are made by color marking, through a document comparison program, or other means if the easement was amended and restated), and (c) a letter explaining the holder's determinations with regard to (i), (ii), and (iii) in the previous sentence.

In the case of high risk amendments, Attorney General review (and, where appropriate, court approval) should be obtained regardless of the presence of an amendment provision in the easement deed pursuant to the procedures described above.

Should the holder have any doubts regarding whether a proposed amendment (i) complies with the seven principles set forth in step one, (ii) is consistent with the holder's organizational amendment policy, (iii) falls within the discretion granted to the holder pursuant to the amendment provision included in the easement deed, or (iv) is high risk, Attorney General review is advised.

III. ATTORNEY GENERAL REVIEW

The recommended process for communicating with the Attorney General regarding amendments is for the easement holder to write a letter addressed to:

Office of the Attorney General
Charitable Trust Unit
33 Capitol Street
Concord, NH 03301-6397

Attn: Conservation Easement Amendment

The letter should include all of the information requested in the relevant section above.

The Attorney General Division of Charitable Trusts oversees thousands of charitable organizations in New Hampshire. While there will be times when case load may result in longer response times, it is the intent of the Division to respond to most amendment review requests within twenty-one days. Proposals that fall into the high risk category, otherwise have complex issues, or lack the required supporting documentation may require a longer review period. A land trust or other easement holder that does not receive a response within four weeks should contact the Division to determine the status of the review request.

The Attorney General can most efficiently and effectively review an amendment proposal if the holder gathers all necessary information, follows its organizational amendment policy, satisfies itself that the proposed amendment complies with the seven principles listed in step one, and provides sufficient information to the Attorney General to support the holder's

determination that the amendment is necessary, prudent, and otherwise appropriate. The more clearly and precisely the holder states its case in the letter to the Attorney General, the more timely, efficient, and effective the Attorney General's review will be.

When contemplating proposed amendments, easement holders should bear in mind that it is better to seek review than ask for forgiveness after the fact. *The Attorney General has the authority to petition the court to request that an improper amendment be invalidated and will do so in appropriate cases.*

The Attorney General cannot provide legal or tax advice to private parties or warrant that a proposed amendment will satisfy (or not be in violation of) the requirements under federal tax law. Holders should consult with competent legal counsel regarding the federal tax law ramifications of a proposed amendment, including possible loss of tax-exempt status or status as an eligible donee of tax-deductible conservation easements.

IV. TERMINATION OF A CONSERVATION EASEMENT

The release, extinguishment, or other termination of a conservation easement, whether in whole or in part, requires court approval in a *cy pres* proceeding. The Attorney General must be given notice of and is a necessary party to such a proceeding.

V. "ORPHANED" CONSERVATION EASEMENTS

An orphan conservation easement situation can arise when an easement holder abandons its responsibility to monitor the easement or when a land trust organization dissolves without transferring its easements to another party for monitoring and enforcement. This situation should be reported to the Attorney General as soon as possible.

For more information contact:

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