

Amending Conservation Easements:
Update from the
Charitable Trusts Unit

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New Hampshire's Experience

- In 2008, N.H. Attorney General, now US Senator Kelly Ayotte, took the position conservation easements are valid charitable trusts
- Easements held by nonprofit charitable organizations are subject to donor intent and are enforceable by the Attorney General
- By extension, proposed amendments are reviewed by the Office of the Attorney General

Development of Guidelines

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

Guidelines for New Hampshire Easement Holders

<http://clca.forestsociety.org/pdf/amending-or-terminating-conservation-easements.pdf>

Guidelines Generally

- Categorization:
 - Low Risk Amendments
 - More Risk Amendments
 - High Risk Amendments/Terminations
- Application process to AG's Office
- Seven Principles

Seven Principles

- Clearly serves the public interest and consistent with easement holder's mission
- Comply with all applicable state, federal and local laws
- Not jeopardize the easement holder's tax exempt status under either federal or state law

- Not result in private inurement or confer an impermissible private benefit
- Be consistent with the conservation purposes and intent of the easement
- Be consistent with the documented intent of the donor, grantor, and any direct funding source

- Have a net beneficial or neutral effect on the relevant conservation values or attributes protected by the easement

Low Risk Amendments

- E.g., correction of scrivener's errors, correction of boundary lines, adding land to a CE, or other changes that do not diminish and may enhance the conservation purposes of the easement.
- If review is necessary or requested, AG will issue a “no action” letter.

Sample “No-Action” Letter

Dear _____,

We have now completed our analysis of the above-captioned proposed amendment to the [Easement] in _____, New Hampshire.

The Charitable Trusts Unit hereby issues a **no action letter**, effective _____, 2014, relative to the requested amendment as follows: The proposed amendment is a low risk amendment.

The Land Trust Organization has provided documentation of its compliance with the seven principles contained in the publication Amending or Terminating Conservation Easements.

The proposed amendment is consistent with the Organization’s amendment policy and has been approved by the Organization’s legal counsel, staff, committees, and Board of Trustees.

If you have any questions, please do not hesitate to contact this office. Thank you for your cooperation in this matter.

More Risk Amendments

- Most difficult of the three categories to analyze.
- May involve “trade-offs” or private benefit/inurement; may negatively affect conservation purposes of easement; may give rise to objections from grantor, heirs, abutters, media, or other parties.
- Requires a greater degree of review by the AG.

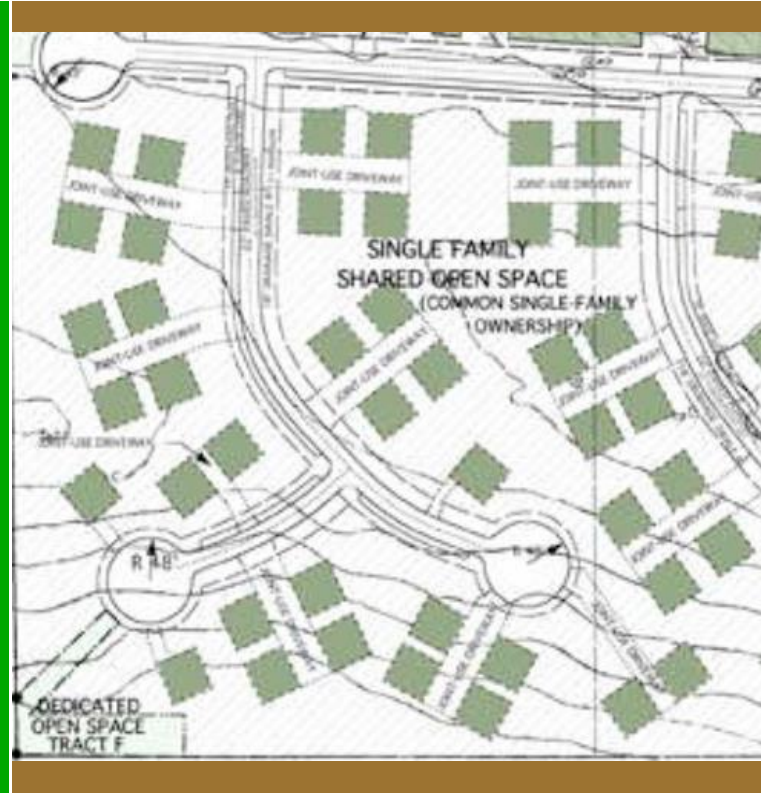
More Risk Amendment Example

(used with permission of Nancy McLaughlin)

(200 acres)

House
Lot

House
Lot



High Risk Amendments

- Complex transactions that may involve multiple parties
- Generally involve release of restrictions, removal of land from the easement, or outright extinguishment.
- Generally require court approval under a petition for cy pres or deviation; AG is a necessary party.
- Meeting with the AG early in the process is essential
- AG needs sufficient time to review and analyze.

High Risk Amendments

- Abutters, descendants, and others may seek to intervene to prevent change to the easement
- Process is expensive and generally requires a fair market appraisal of the property
- If easement owner is a municipality other statutes, including 41:14-a, may impact the amendment
- May involve court-ordered mediation to resolve disputes over the terms of CEs.

High Risk Amendment Example

(used with permission of Nancy McLaughlin)



NH Experience Generally

- There have been 69 amendment/termination requests or notices received by AG's office to date.
- What has worked well?
- Unanticipated Consequences
- Lessons Learned

What has worked well?

- The role of the AG is understood by most attorneys and easement holders
- Submission procedure is now standardized
- The Charitable Trusts Unit has developed familiarity and expertise in reading and analyzing easement deeds and supporting documentation
- Most requested easement amendments are reviewed and processed quickly

Tips for Applicants

- Contact the Charitable Trusts Unit as soon as possible even if the application is not complete
- If appropriate, schedule a “for information only” appointment to discuss unique issues or other gray areas pertaining to the easement
- Ask for samples of completed applications if you are not sure how to structure a request for an amendment

Unanticipated Consequences

- Failure of easement holder to enforce easement violation –
 - Holders of perpetual easements may not have inspected the property in question for a number of years
 - Abutting landowner discovers issue
 - Calls the easement holder and, if not satisfied, calls the Attorney General demanding the easement be enforced

Unanticipated Consequences

- Issues unique to municipal easement holders
 - Municipalities may not understand their duties and responsibilities as the holders of perpetual easements
 - Taxpayers are reluctant to appropriate money for legal fees to monitor and/or enforce easements
 - When asked by a landowner, a town or city may extinguish all or part of an easement without regard to its fiduciary duty to enforce the terms of the easement.

Examples

- Person A buys a parcel of land with a perpetual easement held by the Town. No building is allowed. Town issues building permit anyway.
- Town holds perpetual easement on large wooded parcel. Person B files a Notice of Intent to Cut with the town impacting the easement property. The easement deed requires any timber cut be under the supervision of a licensed forester. Person B clear cuts the property. The town takes no action against Person B and also collects the timber tax.

Role of the AG

- Is the easement in question a charitable trust?
- Did the town issue permits to the landowner?
- Does the town understand its duties and responsibilities?
- Is there an executory easement holder?

Challenges and Lessons Learned

- More risk amendments always take more time than anticipated
- Terms, like “agritourism”, are subject to a number of interpretations and may delay the process
- The restrictions on perpetual conservation easements are not always understood by subsequent fee holders and may lead to violations and subsequent enforcement actions
- Older easements may be poorly written and/or not contain amendment procedures

Columbia Law School

- Conservation Easement Conference – 2014
- <http://web.law.columbia.edu/attorneys-general/policy-areas/charities-law-project/conferences/conservation-easements-conference>

Contacting the Charitable Trusts Unit

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Are there any

QUESTIONS?