Conservation Easements: Amendments & Violations

New Jersey Land Conservation Rally
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Session Outline

- Introduction and overview
- Understanding the national debate
- LTA Standards
- The IRS perspective
- Risk management approach to amendments
- New Jersey state law
- Dealing with easement violations
Understanding the Debate

- Law is unsettled and sometimes conflicting
- Easements as charitable trusts—*must a court always approve?*
- Easements as unrestricted gifts of partial property interests—*may the parties amend at will?*
- What oversight should be exercised and by whom?
Land Trust Alliance Standards
Standard 11: Conservation Easement Stewardship

*The land trust has a program of responsible stewardship for its easements*
LTA Amendment Practices

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.
Reasons for Amendment Requests

- Unforeseen circumstances
- New information/new technologies
- Change in conservation methods
- Change in the protected resource
- Competing public needs and benefits
- Legitimate needs of landowner
- Correct ambiguous or inadequate wording
- Resolve violations or litigation
Perpetuity

- When a land trust accepts a conservation easement, it promises that it will uphold the easement forever.

- How is it possible to amend a “perpetual” easement?

- How do we prevent unsound or abusive decisions?

- What criteria should we consider?

- What process should be followed?
Perception

- Who else must be taken into account?
  - The grantor of the easement
  - The grantor’s descendants
  - Neighbors and the community
  - Donors
  - Regulators

- What role does public opinion play?

- Where should we look for guidance?
The Rule of Law

- How do state and federal laws affect amendment decisions?
- How should we deal with legal uncertainties?
- How do IRS rules affect what we can do?
- How should we manage associated risks?
Four Perspectives

Just Say No
- Perpetuity forbids all changes to the original document

Charitable Trust
- Court or Attorney General must approve all but the most routine amendments

Private Contract
- Easements may be amended at will

Middle Ground
- Sometimes appropriate; sometimes not. Decide based on all factors
Amendment
Precepts

- Don’t violate IRS prohibitions against private inurement and private benefit
- Don’t amend an easement that is:
  - contrary to your mission
  - contrary to the documented intent of the grantor
  - contrary to the requirements of your funding sources
- All amendments must have a neutral or positive conservation impact
- Obtain DEP approval for any release of restrictions
- Consider whether court approval is needed
Things to Think About

- What does your written amendment policy say?
- What effect will the amendment have on conservation purposes?
- How will the amendment affect stewardship and administration of the easement?
- Are there any conflicts of interest?
Things to Think About

• Are there other parties who should be involved?
  ▶ Should the original grantor be contacted?
  ▶ Neighbors?
  ▶ Town?
  ▶ Green Acres? SADC? NRCS?

• What will the public perception be?
Things to Think About

- Is an appraisal needed?
  - For insiders, may also need an appraisal review
- A natural resource expert?
- Other professionals?
- Are there title or property tax issues?
  - Such as an intervening mortgage
- Should baseline documentation be updated? By whom?
Tax Concerns

- Is the landowner an “insider”?
- Have you made sure there will be no private inurement or excess private benefit?
- Should an IRS letter ruling be considered?
- What information do you need for Form 990?
- Will you need a written acknowledgement & Form 8283?
Amendment Process: Initial Request

- Initial discussion with landowner
- Consult easement amendment policy
- Inform landowner:
  - What the policy requires
  - Applicable state and tax law requirements
  - Need for formal written request
  - Need for legal counsel
Amendment Process: Evaluation

- Schedule a site visit
- Perform an internal Amendment Screening Test
  - Written evaluation of factors & criteria
  - Conformity with amendment policy
  - Risk assessment
- Consult with legal counsel
Amendment Process: Implementation

- Negotiate terms with owner
- Staff recommendation, Board vote
- Legal review & drafting
- Resolve any title issues
- Local public hearing/NJDEP review
- Revise baseline documentation
- Record Amendment & NJDEP approval certificate
- Contemporaneous written acknowledgment & Form 8283
The IRS Perspective
Tax Code and Regulations

- Silent on amendments, but address extinguishment
  - CE must prohibit extinguishment unless court determines accomplishment of conservation purposes is “impossible or impractical”

- IRS Does Not Like Amendments!
  - Be wary of including amendment provision in easements
Generally Noncontroversial Amendments

- Correcting errors and oversights
- Extinguishing reserved rights
- Adding acreage
- Adding new provisions that strengthen the easement
- Clarifying ambiguous terms
- Updating old language
More Complex Amendments

- Improving enforceability (e.g., removing excessive stewardship obligations)
- Allowing a temporary, nonconforming use
- Modifying reserved rights or use zones and loosening restrictions
- Amending to resolve a violation
- Changing the CE’s purpose
Swaps: Partial or Full Releases

- Area of much disagreement!
- Boundary line adjustments
- Land within the same property
- Adjacent parcels
- Entirely unrelated or remote parcels
Other Types of Terminations

- Condemnation
- Partial condemnation
- Changed circumstances: impossibility
- Merger of title
- Other
IRS: Noteworthy Points

Form 990 asks about all modifications and releases.

Easement Audit Guide

Report on Schedule D
Explain in supplemental statement

Advises agents that CEs should not be amended except to correct typographical errors.
Swaps

March 2012
CEs that are subject to swaps are not deductible

Extinguishment

September 2012
Even if state law provides mechanism to extinguish CE, must still satisfy regulations to be deductible
<table>
<thead>
<tr>
<th>Case</th>
<th>Summary</th>
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<tr>
<td><strong>Belk v. Commissioner</strong></td>
<td>CEs that allow “substitutions” are not tax-deductible</td>
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| **Carpenter v. Commissioner** | CEs are restricted gifts  
Extinguishment by judicial proceedings is mandatory |
| **Graev v. Commissioner**   | CE not deductible if it allows termination if no tax deduction |
NJ Conservation Restriction & Historic Preservation Restriction Act

- Citation: N.J.S.A. 13:8B-1 through 9
- Passed in 1979/never amended
- Enabled creation of conservation easements
  - No need to own adjacent land
  - Enforceable like other interests in land
- Requires DEP approval of “release” of conservation restrictions
What is a Conservation Restriction in New Jersey?

- Less than fee simple interest in land
- Stated as a right, restriction, easement, covenant or condition
- In any deed, will or other instrument (other than a lease)
- Executed by the owner of the land
What is a Conservation Restriction in New Jersey?

- Retention of land and water areas in their natural state
- Conservation of fish or wildlife
- Outdoor recreation or park use
- Fish or wildlife habitat
What is a Conservation Restriction in New Jersey?

Intended to limit or prohibit any or all:

- Construction of structures, including buildings, roads, billboards and signs
- Dumping or placement of soil or trash
- Disturbance of vegetation
- Mining, excavation or dredging
- Surface uses (except conservation uses)
- Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, fish and wildlife habitat preservation or retention of land and water areas for the purposes of the Act
Who Can Hold a Conservation Restriction in NJ?

**DEP Commissioner**
In the name of the State of NJ

**Local Units**
Municipalities, counties and their subdivisions and agencies

**Charitable Conservancies**
Nonprofits whose purposes include acquisition and preservation of land in a natural scenic or open condition
What is *Not* a Conservation Restriction?

- Deed restrictions between private parties
- Restrictions on filed subdivision maps (unless accompanied by a conveyance of a restriction to an eligible holder)
- Easements noted on tax maps without accompanying documentation
Types of Land Restrictions

1. Private conservation restrictions
2. Green Acres Program—funded and unfunded
3. Farmland preservation programs
4. Other state bond acts (e.g., water supply)
5. Local open space tax programs
6. DEP land use permit approvals
7. NJ Environmental Infrastructure Financing Program restrictions
8. Other state conservation funds (Pinelands, Highlands)
9. Municipal subdivision approvals
“Release” of Conservation Restrictions

- Releases require approval of NJDEP Commissioner, even if NJDEP is not a party to the conservation restriction.
- Term “release” applies to any easement amendment that makes the easement less stringent.
- Includes amendments removing an easement from one part of a property and placing it on another (swaps).
- Restrictions may be “released” in whole or in part.
“Release” of Conservation Restrictions

- Subject to conditions that may have been imposed at the time the restriction was created
- Release may be for whatever consideration the holder determines (but remember IRS)
- Funding source or applicable regulations might require compensation
“Release” of Conservation Restrictions

- Public hearing required for releases
- Advertised twice a week for three weeks before hearing
- Hearing held by governmental body
  - that holds the restriction, or
  - of the municipality where the land is situated, if a charitable conservancy holds the restriction

- **Governing body does not vote on approval!**
DEP Evaluation of Amendment Requests

Statutory standards for Commissioner’s approval of releases

- Public interest in preserving the property in its natural state
- Any state, local or regional programs in furtherance of preserving the property in its natural state
- Any state, local or regional comprehensive land use or development plan affecting the property
New Jersey Case Law

**Island Venture Associates v. NJDEP**

Purchaser of a lot with an unrecorded coastal permit-related conservation easement was not bound by the terms of the easement
New Jersey Case Law

Soussa v. Denville Twp. Planning Board
238 N.J. Super. 66 (1990)

Deed restriction imposed by a property owner on itself to memorialize conditions of planning board approval

Held:

- Denville residents were intended third party beneficiaries
- Not only may the public enforce the restriction, *the public is a necessary party in a suit to lift the restriction*
- Township does not have power to eliminate a conservation restriction
- Court can decide:
  - public benefit restriction meant to bestow,
  - whether it should be enforced in light of current realities
  - how public interest should be represented
New Jersey Case Law

American Dream at Marlboro, LLC v. Marlboro Twp.

Developer’s request to eliminate an unrecorded deed restriction imposed as a condition of earlier subdivision approval

Held:

- As in Soussa v. Denville, court confirmed that planning board has no jurisdiction to remove a conservation restriction
- Developer can’t eliminate restriction due to changed circumstances unless it has become impossible as a practical matter to accomplish the purpose for which it was created
- The doctrine of changed circumstances is narrowly applied and the test is stringent
- Burden of proof is on the developer, not the Township
Case Examples
Lessons Learned and Words of Wisdom

1. No subdivision without Holder’s approval
2. No sale of a separate lot under the same easement without Holder’s approval
3. Combining easements under same ownership reduces time and expense
4. Learn to say “no” to amendment requests
5. Some terminations make sense, but need court approval
6. Follow NJ statutory requirements
7. Be mindful of IRS regulations
8. Use an attorney
What’s a Land Trust To Do?

- Practice 11(I) of *Land Trust Standards and Practices*
- 2007 Amendment Report
- Accreditation Commission’s *Requirements Manual*
- Good legal counsel is key!
Questions and Discussion
Consider…

What changes would you like to see to Code Section 170(h) or the Treasury Regulations to address easement amendments and partial terminations?