

Legal Considerations Regarding Amendment to Conservation Easements

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Introduction

Over time, good administration of conservation easements will require consideration of amendments. Many types of amendments will be uncontroversial. Among these will be amendments that enhance the conservation purposes of the easement by adding conservation covenants. Other uncontroversial amendments will involve administrative matters or routine corrections to typographical errors. At the other end of the spectrum, land trusts will seldom have difficulty deciding not to amend easements when the proposed amendment neither offers improved service of the conservation purposes nor involves changed circumstances that make service of those purposes impracticable.

Land trusts will, however, also have to make decisions about how to handle amendments that offer some prospect of improvement in the meeting of broad conservation purposes, or at least on balance bring about conservation results perceived to be equally beneficial, while still responding to some need for alteration brought about by changed circumstances. Faced with that kind of decision, land trusts need to carefully consider the legal landscape surrounding the issue of amendments.

In preparing this summary, we reviewed the law of each state with respect to amendment of conservation easements, and we surveyed the law of each state regarding charitable trusts. We read the relevant text and comments of the Uniform Conservation Easements Act (UCEA) and the Uniform Trust Code (UTC). We researched the question of fraudulent solicitation in selected states. We reviewed relevant federal law, including the tax benefit rule, and we read selected cases and law review articles dealing with charities and their public responsibilities.

At the least, land trusts considering an amendment of conservation easement should carefully review the law of the states in which they operate for specific procedures to be followed: in Arizona, New York, Nebraska, Massachusetts, and Mississippi, this is particularly evident.¹ In New York, for example, if the terms of the easement do not provide for amendment, the state code section dealing with modification of conservation easements references the more general real property law of New York, which provides for modification only when a court finds in an enforcement proceeding that the purposes are not of actual and substantial benefit, citing (without limitation) changed conditions or impossibility.² In Nebraska, state law provides that specified public bodies must consider both the creation and the modification of conservation easements.³

¹ See ARIZ. REV. STAT. § 33-274 (2006); N. Y. ENVTL. CONSERV. LAW § 49-0307 (2006); NEB. REV. STAT. § 76-2, 114 (2006); MASS. GEN. LAWS ch. 184. § 31-32 (2006); MISS. CODE. ANN. § 89-19-1 to 89-19-15 (2006).

² N. Y. ENVTL. CONSERV. LAW § 49-0307.

³ NEB. REV. STAT. § 76-2, 112. 76-2, 114.

In addition to considerations of state law, which will be reviewed below, both the Congress and the Internal Revenue Service have frequently expressed concern regarding amendments affecting the conservation of land burdened by a conservation easement for which a deduction was taken.⁴

Some would argue that state legislatures that require amendment procedures have made unwise legislative choices that unduly restrict citizens, and that federal expressions of disapproval are nothing more than groundless overreaching. Our view, by contrast, is that the legal traditions that provide the foundation for the legislative decision to authorize land trusts to accept conservation easements and donors to deduct donated easements provide ample space for the imposition of authority designed to preserve these easements. For a multitude of reasons, land trusts must act with the highest degree of care when considering amendments that could affect the conservation of the land originally subject to the easement.

State Law

Conservation Easement Law

Analysis of legal considerations begins with state codification of conservation easement law. Twenty-four state statutes (and those of the District of Columbia) incorporate amendment language similar to that contained in the UCEA⁵ (that is, conservation easements may be modified in the same manner as other easements), and eighteen states appear not to have addressed the issue in statute or case law.⁶ Of the remaining states, a handful, mentioned earlier, directly or indirectly specify procedures to be followed, and the rest utilize words slightly different from the UCEA, but generally provide for amending conservation easements as other easements may be amended.⁷

⁴ See, e.g. Instructions to Form 990, Schedule A.

⁵ The following states have adopted the UCEA: Alabama, ALA. CODE §§ 35-18-1 to 35-18-6 (2006); Alaska, ALASKA STAT. §§34.17.010 to 34.17.060 (2006); Arkansas, ARK. CODE ANN. §§ 15-20-401 to 15-20-410 (2006); Delaware, DEL. CODE ANN. tit. 7 §§ 6901-6905 (2006); District of Columbia, D.C. CODE §§42-201 to 42-205 (2006); Georgia, GA. CODE ANN. §§ 44-10-1 to 44-10-8 (2006); Idaho, IDAHO CODE ANN. §§ 55-2101 to 55-2109 (2006); Indiana, IND. CODE §§ 32-23-5-1 to 32-23-5-8 (2006); Kansas, KAN. STAT. ANN. §§ 58-3810 to 58-3817 (2006); Kentucky, KY. REV. STAT. ANN. §§ 382.800 to 382.860 (2006); Louisiana, LA. REV. STAT. ANN. §§ 9:1271 to 9:1276 (2006); Maine, ME. REV. STAT. ANN. tit. 33 §§ 476 to 479-B (2006); Minnesota, MINN. STAT. §§ 84C.01 to 84C.05 (2006); Nevada, NEV. REV. STAT. §§ 111.390 to 111.440 (2006); New Mexico, N. M. STAT. §§ 47-12-1 to 47-12-6 (2006); North Carolina, N. C. GEN. STAT. §§ 121-34 to 121-42 (2006); Oklahoma, OKLA. STAT. tit. 60 §§ 49.1 to 49.8 (2006); Oregon, OR. REV. STAT. §§ 271.715 to 271.795 (2006); South Carolina, S.C. CODE ANN. S27-8-10 to 27-8-80 (2006); South Dakota, S. D. CODIFIED LAWS §§ 1-19B-56 to 1-19B-60 (2006); Texas, TEX. NAT. RES. CODE. ANN. §§ 183.011 to 183.005 (2006); Virginia, VA. CODE ANN. §§ 10.1-1009 to 10.1-1016 (2006); West Virginia, W. Va. Code §§ 20-12-1 to 20-12-8 (2006); Wisconsin, WIS. STAT. § 700.40 (2006); and Wyoming, WYO. STAT. ANN. §§ 34-1-201 to 34-1-207 (2006).

⁶ These states include: California (which does prescribe remedies for breach and req. for termination of open space easements), Connecticut, Florida, Hawaii, Illinois, Iowa (perpetual unless expressly limited), Michigan, Missouri, Montana, New Hampshire, New Jersey (provides for hearing and approval before “release”), North Dakota, Ohio, Pennsylvania (other than for open space interests), Rhode Island, Tennessee, Vermont, and Washington.

⁷ These states include: Colorado, COLO. REV. STAT. §§ 38-30.5-101 to 38-30.5-111 (2006); Maryland, MD. CODE ANN. REAL PROP. §§ 2-118 *e.t seq.* (2006); and Utah, UTAH CODE ANN. §§ 57-18-1 to 57-18-7 (2006).

Though the UCEA opens the door to the amendment of conservation easements, and even provides text and commentary to the effect that conservation easements may be terminated in the same manner as other easements,⁸ one has to conclude the drafters meant “by following the same legal forms” rather than “may in all cases be released or amended for any reason or no reason.” It is clear from the full set of comments to the UCEA that the drafters assumed that charitable trust doctrine is a source of limits upon the discretion of land trusts to amend donated easements.⁹ For example, “the Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and enforcement of charitable trusts.” And “the Attorney General could have standing [to enforce easement provisions] in his capacity as supervisor of charitable trusts.” Further, the UCEA justifies its authorization of perpetual conservation easements by noting that the limitations on holders fit “comfortably” into charitable trust law.¹⁰

The common state conservation easement code provisions that permit modification in the same manner as other easements have led some individuals to develop a “contract” theory of amendment – the “contracting” parties may agree to alter their own private agreement. A land trust that relies on its perceived rights under contract to amend an easement as its Board or staff determines best, however, risks a number of hazards.

First, a conservation easement is not just a contract. Once the deed of easement is delivered and recorded, the relevant legal status to investigate is that of an estate in land.¹¹ The particular estate in land is itself a special one. It is an estate made valid by statutory exception to the general prohibition in many states on easements in gross. It is often defined by provisions and terms that would not be enforceable absent the special statutory exception provided for this particular estate. These exceptions, it seems clear, were made because state legislatures recognized that conservation easements serve public as well as private interests.

Fundamentally, the consequence of the conservation easement’s status as an estate in land, rather than a mere contract, is that it involves more than the parties who originally transferred and acquired it. It binds successor property owners.¹² It may define third party beneficiaries. The state Attorney General is often recognized as having standing to enforce its provisions.

These public and property characteristics mean that even conservation easements that are limited in time, or sold at free market value are more than simply private contracts. We have not researched the question of charitable trust doctrine regarding such conservation easements. But our research leads us to advise land trusts and their counsel who are considering amendment or termination of donated easements that are denominated perpetual to carefully consider whether the transaction that created the easement also created a charitable trust.

⁸ See UCEA § 2(a) (1981).

⁹ See *id.* § 3 cmt.

¹⁰ *Id.* § 2 cmt.

¹¹ See *restatement (Third) of Prop: Servitudes* § 1.1 (2000).

¹² *Id.* at cmt. a.

Charitable Trust Law

State law also governs the applicability of charitable trust doctrine to land trusts and conservation easements. Twenty-nine states and the District of Columbia have either adopted the UTC or have enacted language similar to the UTC language regarding charitable trusts.¹³

Among the comments that accompany the UTC is the following: “even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation purposes will frequently create a charitable trust,”¹⁴ and further, “[b]ecause of the fiduciary obligations imposed,...termination or substantial modification by the ‘trustee’ could constitute a breach of trust.”¹⁵

Land trusts may conclude that the scarcity of reported cases suggests that the usual enforcer of charitable trusts—the state attorney general—is unlikely to challenge its administration of conservation easements. We advise land trusts not to conclude from the sparse record that they are free to administer conservation easements as they think best. In many states, the charitable trust will prove to be of more than theoretical or abstract effect, even in the absence of reported cases of attorney general enforcement. If sufficiently motivated stakeholders disagree with an amendment being considered by a land trust they can and will call upon the attorney general’s office for enforcement. Interested parties include the donor or the donor’s heirs as well as neighbors and others who have enjoyed the benefit of the affected land under the original easement terms and feel that their interest will be compromised by the amendment. Other advocates for public supervision may include conservation and preservation organizations that believe their ability to solicit future easement donations and raise the funds necessary to continue their operations may be diminished by the public’s perception of the amendment being considered. In our judgment, the law that courts in most states would be most likely to apply upon application by an attorney general motivated by any of those sources squarely supports the proposition that a conservation easement is a charitable trust.

In most states, of course, all activities, programs and assets of land trusts are subject to restrictions associated with their trust responsibilities to uphold the public interest. In California, for example, “...gifts to charitable corporations are deemed given in trust to carry out the objects of the corporation, and the assets of charitable corporations are deemed to be impressed with a

¹³ The following eighteen states and the District have adopted the UTC; Alabama, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming. In addition, eleven states have adopted significantly similar statutory definition and methods of establishing charitable trusts. *See* CAL. PROB. CODE § 15000 *et seq.* (2006); CONN. GEN. STAT. § 45a-514 *et seq.* (2006); DEL. CODE ANN., tit 12 § 3541 (2006); GA. CODE ANN. § 53-12-110 *et seq.* (2006); IND. CODE § 30-4-2-17, 30-4-3-27 (2006); IOWA CODE § 633A.5101 *et seq.* (2006); MINN. STAT. § 501B.31 *et seq.* (2006); MONT. CODE ANN. § 72-33-501 *et seq.* (2006); N. J. STAT. ANN. § 3B:11-8 *et seq.* (2006); R. I. GEN. LAWS § 18-4-1, 18-9-4 (2006); WIS. STAT. ANN. § 701.10 (2006).

¹⁴ UTC § 414 cmt. (2005)

¹⁵ *Id.*

charitable trust by virtue of the declaration of corporate purposes. Accordingly, charitable corporations are generally governed by the same rules as those applicable to charitable trusts.”¹⁶

But in addition to this general variety of charitable trust, our reading of the law as it is likely to be interpreted in most states is that the terms of a donated or partly donated conservation easement impress a specific charitable trust upon the land trust that accepts the donation. The purposes and terms of that trust are documented as provisions of the conservation easement. To return to the comments accompanying the UTC, “...the organization to whom the easement was conveyed will be deemed to be acting as a trustee of what will ostensibly appear to be a contractual arrangement...”¹⁷ The party conveying the easement need not have consciously intended to create a charitable trust.¹⁸ The purposes of the deductible conveyance and the charitable purposes of the land trust together mean that a trust is created without necessity of acknowledgment by the parties to the transaction.

The implication of charitable trust status for conservation easements is not that they cannot be amended, but that they may be amended only in a manner consistent with the fulfillment of charitable trust duties: the interests to which fiduciary loyalty is owed extend beyond the grantor and grantee. A land trust surely has certain implied powers to agree to amendments that are “necessary or appropriate” to carry out the purposes of the easement, such as to clarify vague language or correct a drafting error.¹⁹ Amendments that merely change an administrative provision in a manner that will not adversely affect the overall purpose of the easement, and might even enhance that purpose could be made by the land trust pursuant to a standard amendment provision included in an easement deed (authorizing the holder to agree to amendments that are “consistent with the purposes of the easement”) or with court approval under the less exacting administrative (or equitable) deviation doctrine.²⁰ Amendments that would adversely affect the conservation purpose of the easement as originally documented, however, will in many states be required to meet the standard of the equitable doctrine of cy pres or its modern equivalent: the trust/easement purposes may be saved from complete frustration by court mediated alteration if circumstances have rendered the precise original purposes impossible, impractical, unlawful, or (perhaps) unwise to carry out.²¹

The Restatement of Property, while not definitive or controlling upon any state, reaches this specific point:

...a conservation servitude [note that “servitude” is defined very broadly in the Restatement and the term “conservation servitude” as used therein is clearly intended to encompass conservation easements created under easement enabling statutes] held by a government body or conservation organization may not be

¹⁶ *American Ctr. for Educ. v. Cavnar*, 145 Cal. Rptr. 736 (Cal. Ct. App. 1978)

¹⁷ UTC § 414 cmt.

¹⁸ The comments to UTC § 402 cite to the comments to the Restatement (Third) of Trusts § 13 (“It is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise nature of trust relationship.”)

¹⁹ See Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* Sec. 380, at 3320 (4th ed. 1989)

²⁰ See, e.g. *id* at sec. 381; George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* Sec 396 (rev 2d ed. 1980)

²¹ See Restatement (Third) of Prop: Servitudes § 7.11.

modified or terminated because of changes that have taken place since its creation except as follows:

- (1) If that particular purpose for which the servitude was created becomes impracticable the servitude may be modified to permit its use for other purposes selected in accordance with the cy pres doctrine.²²

The comments accompanying the UCEA make much the same point (again modifying, without elaboration, the UCEA's earlier apparent openness to modification):

...under the doctrine of cy pres, *if* the purposes of a charitable trust cannot be carried out because circumstances have changed, courts...may prescribe terms and conditions that may best enable the charitable objective to be achieved while altering specific provisions of the trust.²³

As a practical matter, while trustees (absent authority expressly granted in the governing document) surely cannot unilaterally alter the substantive terms of the trust they administer, a land trust that undertakes a careful, well-documented, and transparent process to determine that the objectives of the original easement are either impossible or that changed circumstances make them highly impractical or unwise to continue to fulfill, and which devotes the assets bound up in the easement to the accomplishment of an objective which conforms as closely as possible under the new circumstances to the societal objectives of the original easement, would be well-prepared to answer questions or a challenge about its decision to allow an amendment. The notification of the attorney general or another appropriate state official would further strengthen the land trust's position; even more so, the approval of such an official.

However, a land trust committed to complying with the law that wishes to agree to an amendment that adversely affects the conservation purposes of an easement should carefully review the applicable state law of conservation easements and charitable trusts to determine whether prudence dictates seeking the approval of an appropriate court. If there is doubt about whether court approval is required or not, there is a subsidiary benefit of securing court approval: doing so offers an opportunity for official legitimization of the amendment decision. To proceed without it may well be risky from both a public relations and legal perspective.

Finally we suggest that the law regarding amendment of conservation easements is likely to develop and change as more amendments are sought and reviewed. As the jurisprudence develops, it would not be surprising to find courts of equity using charitable trust doctrine as a guide in adjudicating a dispute over an amendment of an instrument clearly drafted as a conservation easement without insisting on slavish adherence to all of the requirements of that doctrine.

Other State Law Considerations

Trustees considering amendment of conservation easements must also be conscious of their duties of care and fidelity regarding the assets of the institutions to which they are

²² *Id.*

²³ UCEA § 3 cmt. (emphasis added).

fiduciaries. These duties have occasionally been implicated in disputes involving art museums and the disposition of donated works of art; those cases – involving objects of personal property generally subject to more liberal standards of disposition and fungibility, and lacking the contextual law surrounding real estate and easements in gross — hold some lessons for land trusts.²⁴ Courts and commentators (while acknowledging that works of art may be de-accessioned absent specific restrictions) have had little difficulty in finding that the museums are in a trust relationship to the public with respect to the artworks they steward.²⁵ The Metropolitan Museum of Art, having suffered through a barrage of criticism following a de-accessioning episode, and recognizing its public trust obligations, adopted a policy that after engaging in the most cautious internal evaluation of a decision regarding art in its collections, it would, prior to a proposed sale or exchange, notify the New York attorney general.²⁶

A land trust considering amendments that would release land from conservation restrictions should also check the relevant state law regarding registration prior to solicitation of charitable funds. Some states have passed legislation that specifically prohibits fraudulent solicitation.²⁷ A land trust that publicly describes its conservation of lands under easement as perpetual while occasionally granting amendments that may portray its conservation as less than so, risks running afoul of fraudulent solicitation provisions. The easement donor, or his or her heirs, donors of acquisition and stewardship funds to the original project, and neighbors aggrieved by a land trust's decision to permit an amendment of the conservation easement are among those that may approach the attorney general or other governing authority complaining of fraudulent solicitation. California is likely not the only state in which a fraudulent representation in connection with a charitable solicitation made merely negligently is criminal.²⁸

It has been suggested that an amendment that adversely affects the conservation purposes of an easement can be rendered defensible by the application of the value freed up to the general purposes of the land trust, to other important land, or even to adjacent land. The acquisition of other land may be acknowledged as an indicator of good faith, but absent the *cy pres* elements, is unlikely to be adjudged an adequate argument for the validity of an amendment that would otherwise be ruled unlawful. Contracts regarding land are, after all, subject to specific performance, on the theory that land is not fungible.²⁹ Generally, it isn't sufficient to perform on an obligation regarding land by delivering the value of the land in cash, or delivering other land of nominally similar characteristics.³⁰ Similarly, a land trust may fail to meet its legal obligations if it attempts to do so by substituting one parcel of land for another, or general conservation activity for the specific activity called for in a conservation easement.

Federal Law

²⁴ See, e.g., *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art To Meet Museum Operating Expenses*, 94 MICH. L.REV. 1041 (1996)

²⁵ *Id.*

²⁶ *Id.* at 1061.

²⁷ See, e.g., CAL. BUS. & PROF. CODE § 17510-17510-95 (2006); IND. CODE ANN. § 23-7-8 (2006); MASS. GEN. LAWS ANN. ch.68, § 18-35 (2006); and N. Y. EXEC. LAW § 171-1-177 (Consol. 2006).

²⁸ CAL. PEN. CODE § 532d (2006).

²⁹ Restatement (Second) of Contracts § 360 cmt. e (1981).

³⁰ *Id.*

Federal constraints on amendment of conservation easements emerge from the tax code. Beyond the implications of the code's specifications for deduction of conservation easements, land trusts contemplating controversial amendments need to consider that federal privileges are not immutable.

Those privileges enable land trusts, as public charities, to be exempt from taxation of their assets and their revenue. Donations to them generate tax deductions for the donor. Activities funded by money so donated must be consistent with the general and specific charitable purposes that make the land trust eligible to receive deductible contributions.³¹ The deductibility of conservation easements is treated even more carefully under the tax code. Donations of conservation easements are deductible only if perpetual and only as an exception to the partial interest rule.³² In effect, all citizens pay through foregone public revenue for the conservation services provided by land trusts, and quite specifically for the conservation interest represented by a deductible conservation easement. It is not a difficult case to make that land trusts can not have wide discretion with respect to the stewardship of the assets entrusted to their care through such extraordinary legislative provisions.

Tax consequences for the donor are likely to be limited after the three year statute of limitations passes. An active IRS might, however, seek to claim or recapture, under the tax benefit rule, the value of a deduction taken for a conservation easement if a later filing indicated the realization by the taxpayer of some or all of that previously deducted value in the sale of that parcel.

For the land trust, the granting of an amendment that meets a donor's objective (and certainly one that meets that objective without clearly generating a greater benefit for conservation) risks an inquiry by the IRS into whether the land trust is using its assets exclusively for charitable purposes, as it is required to do.³³

Finally, land trusts and their counsel should consider whether they would be concerned that an IRS sufficiently unhappy with conservation easement administration – short of arguing for a termination by statute of the privilege of deductibility – could argue that the federal law that authorizes land trusts to accept federally deductible donations of easements, and donors to deduct them, grants that privilege conditionally. Among the conditions impliedly imposed is the commitment and capability of the non-profit to administer the easement in such a way that the statutory “perpetual” requirement of the arrangement remains meaningful. Acceptance of the deductible easement (the argument goes) means acceptance of the conditions. Agreeing to amendments that release land or dissipate conservation benefit from the burdens of the easement absent changed circumstances breaches a duty that arises from the acceptance of the conditioned privilege, and justifies equitable intervention by a court.³⁴

³¹ See 26 U.S.C. § 170(c)(2) (2006).

³² *Id.* § 170(h)

³³ 26 U.S.C. § 501(c)(3) (2006).

³⁴ See, e.g. Judge Cardozo's comment in *Beatty v Guggenheim Exploration Co.* 122 N. E. 378,380 (1919) “A constructive trust is the formula through which the conscience of equity finds expression”. Or Bogert, “a

General Considerations of Overall Legal Strategy

It is in the interest of the entire land trust community to recognize that a fundamental issue in the future is going to be the defense of conservation easements. Flexibility and ingenuity in resolving small issues in a manner consistent with the conservation purposes of the easement so that major disputes are early averted are laudable and desirable. However, when land trusts argue for wide discretion to amend or terminate easements to accommodate their own changing priorities, or donor's needs, they weaken the entire movements' position with respect to court enforced defense of easements that land trusts seek to uphold under attack by original donors or subsequent holders.

Conclusion

A land trust considering an amendment of a conservation easement must first determine – in as objective and transparent a fashion as possible – what kind of amendment it is. Amendments that are necessary in order to carry out the purposes of the easement may be carried out with a minimum of process, and amendments to the administrative provisions of the easement that do not negatively affect the conservation purposes may be approved under the provisions of the easement or allowed under a permissive standard. A land trust that wishes to proceed with an amendment that modifies the conservation purposes of the original easement ought to proceed with great caution, seek counsel as to the law of conservation easements and charitable trusts in the states that have jurisdiction, carefully document the process it follows, open the record of its decisions to public scrutiny, and consider the possibility that affirmation of its conclusions in the appropriate government forum is required.

constructive trust will be erected wherever necessary to satisfy the demands of justice..." both quoted in *United States v Riveccio*, 661 F. Supp. 281 (E. D. N. Y. 1987). Or Scott and Fratcher, at Sec. 462.1 and Sec. 2.8 regarding express trusts. "An express trust may be created even though the parties do not call it a trust...it is sufficient if what they appear to have in mind is in its essentials what the courts mean when they speak of a trust."