

Amending Conservation Easements: How to Carefully Adjust to a Changing World
Presenter: Edward Sortwell Clement, Jr., Esq.
Land & Water Conservation Summit
URI Memorial Union, Kingston Campus
March 27, 2010

- I. The Issue
 - A. Perpetual Conservation Easements are written to last forever, but we cannot foresee the future and change may be the only constant in this life.
 - B. Unknown Future and Change: Land Uses Can Change (e.g., agricultural practices); Land Itself Can Change (e.g., climate change); Condemnation (e.g., part of conserved property could be condemned for a public road); Future Discovery of an Error or Ambiguity in the Conservation Easement (e.g., error found in metes and bounds description of the conservation area); etc.
 - C. A holder of Conservation Easements must always approach the possible amendment of such an Easement with extreme caution because the implications could be severe for the Easement and the land it protects, the holder, the landowner, Conservation Easement programs and the laws that support them.
 - D. Because the amendment issue can be so serious, it would be tempting for a Conservation Easement holder to decide to avoid amendments altogether.
 - E. However, responsible Conservation Easement holders recognize that dealing with amendments is inevitable and therefore they choose to develop policies and procedures to thoughtfully guide their responses to amendment requests.
- II. Rhode Island Law, Etc. Regarding Amending Easements
 - A. See Rhode Island General Laws §34-39-1 Purpose: “The purpose of this chapter is to grant a special legal status to conservation restrictions and preservation restrictions so that landowners wishing to protect and preserve real property may do so without uncertainty as to the legal effect and enforceability of those restrictions...” This initial Section of the Conservation and Preservation Restrictions on Real Property Chapter sets a goal of honoring and upholding the intent of the original grantors of Conservation Easements.
 - B. See Rhode Island General Laws §34-39-5(a) and (b) Release of Restriction. Pursuant to §34-39-5(b) a land trust may release a Conservation Easement:
 1. “...in accordance with the express terms of a restriction...”

2. "...in accordance with... applicable bylaws, or charter provisions of the holding entity..." and
 3. "...in accordance with... applicable statutes and regulations."
- C. Rhode Island case law suggests that the modification of an existing Easement, in general, must be based on the intent of the parties creating the Easement and the terms of the Easement itself. See case law for complete and actual details [Grady v. Narragansett Elec. Co., 962 A.2d 34 (R.I. 2009), Mattos v. Seaton, 839 A.2d 553 (R.I. 2004), Waterman v. Waterman, 175 A.2d 291 (R.I. 1961), etc.].
 - D. The American Law Institute's *Restatement of the Law, Property, Servitudes* and the common law of Easements in general allow for the amendment of an Easement according to the terms of the Easement which reflect the intent of the original parties (e.g., if the Easement has a modification provision, that provision typically controls). See relevant materials for complete and actual details.
 - E. The above points demonstrate the importance of clearly addressing the amendment issue, and how to handle it, within the four corners of the Conservation Easement itself so that the intentions of the parties with respect to this issue are clear and can be honored. A gray area may exist, where problems and abuses can occur, if the amendment issue is not adequately addressed within the Conservation Easement.

III. Conservation Easement Amendment Clauses

- A. Sample Conservation Easement amendment clause from the Aquidneck Land Trust:

Amendment. If circumstances arise under which an amendment to or modification of this Conservation Easement and/or Management Plan would be appropriate. Grantor and Grantee are free to jointly amend this Conservation Easement and/or Management Plan, provided that no amendment shall be allowed that will affect the qualification of this Conservation Easement or the status of Grantee under any applicable laws, including Chapter 39 of Title 34 of the Rhode Island General Laws, as amended, or Section 170(h) of the Internal Revenue Code of 1954, as amended, and any amendment shall be consistent with the purposes of this Conservation Easement, and shall not affect its perpetual duration. Furthermore, any such amendment must be recorded in the Land Evidence

Records of the _____ (SUBJECT MUNICIPALITY), Rhode Island.

- B. Conservation Easement amendment clause should, at a minimum, define the following parameters:
 - 1. Amendment process is a discretionary process
 - 2. Amendment cannot affect the qualification of the Conservation Easement
 - 3. Amendment cannot affect the status of the grantee (i.e., land trust) under any applicable laws
 - 4. Amendment must be consistent with the conservation purposes of the Conservation Easement
 - 5. Amendment must not affect the perpetual duration of the Conservation Easement
 - 6. Amended Conservation Easement must be properly recorded

IV. Conservation Easement Amendment Policies

- A. Because the amendment process is typically discretionary, land trusts should have their own internal Conservation Easement amendment policies, in addition to sound Conservation Easement amendment clauses, to further define their amendment processes so as to ensure that amendments are done carefully and correctly.
- B. See attached model Conservation Easement amendment policy from the Aquidneck Land Trust.
- C. Basic outline of requirements to consider including in a Conservation Easement amendment policy, requirements that must be met in order to proceed with an amendment:
 - 1. The requested modification is warranted under one or more of the four circumstances set forth below:
 - a) Prior agreement
 - b) Correction of an error or ambiguity
 - c) Settlement of condemnation proceedings

- d) Minor modifications consistent with conservation purpose
 - 2. It is the minimum change necessary to satisfy that purpose.
 - 3. It will not substantially erode the confidence of the holder's supporters, including both past and future donors of Conservation Easements and other interests in land, about the goals of the organization or its intent to enforce its Conservation Easements.
 - 4. It will not violate any funding requirements.
 - 5. It is consistent with the purpose of the applicable Conservation Easement and will result in a positive or not-less than neutral conservation outcome unless prohibited by a properly mandated governmental action such as a condemnation action.
 - 6. It is consistent with the holder's mission and conflict of interest policy.
 - 7. It is consistent with the requirements of the Land Trust Alliance, including, but not limited to, its Standards and Practices.
 - 8. It will not violate any applicable laws and thus does not result in private inurement or impermissible private benefit.
- D. In general, a Conservation Easement amendment policy should only allow for an amendment where there will be no net conservation loss.

V. Land Trust Alliance's Standards and Practices

A. Practice 11I: 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.

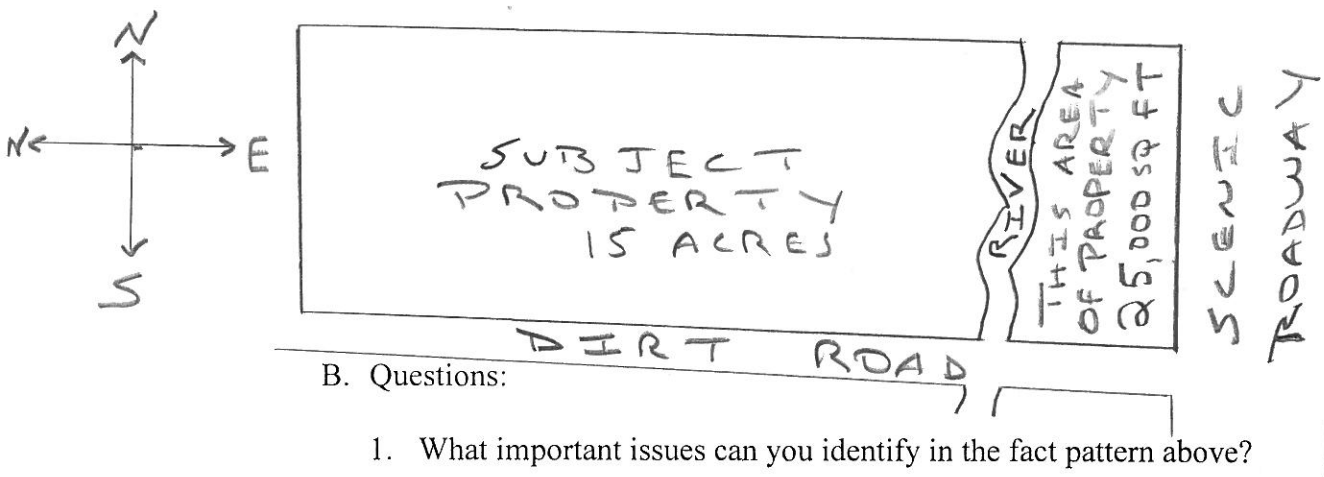
VI. Case Study

- A. Fact pattern (based largely on an actual case handled by the Aquidneck Land Trust):

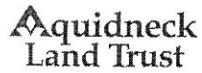
In 1996, ALT began discussing a conservation transaction with Mrs. Landowner and her attorney. Mrs. Landowner was considering donating a Conservation Easement to ALT on her 15-acre field with frontage on a State of Rhode Island scenic roadway and a river flowing through the eastern portion of the property. Mrs. Landowner was considering reserving the right to develop two residential areas on the property (one on the eastern side and one on the western side), amongst other rights. She eventually abandoned the idea of retaining two residential areas in favor of a single residential area so as to not reduce the value of her proposed gift for income tax purposes. Mrs. Landowner opted for the residential area on the eastern side of the property, between the river and the scenic roadway, as it seemed a more logical place for a house due to the paved public street with sewer and water nearby. There was a preexisting barn and shed in this eastern area as well.

In 1998, Mrs. Landowner donated the Conservation Easement to ALT. The Conservation Easement allowed for one single family dwelling with a garage and such other accessory buildings, as may be permitted by the municipal zoning ordinances, on the eastern part of the property between the river and the scenic roadway. The Conservation Easement also allowed for the construction of structures accessory to agricultural use, as permitted by the municipal zoning ordinances, throughout the property. The Easement also contained an amendment clause similar to the sample ALT amendment clause above.

In 2000, Mrs. Landowner passed away and her estate put the conserved property on the market. The estate identified a promising buyer, but the buyer wanted to move the permitted residential building area to the western side of the property. Two well-to-do neighbors, with land near the western side of the conserved property, get wind of the proposed amendment, hire attorneys, and begin to exert pressure on ALT in an effort to stop such an amendment.



1. What important issues can you identify in the fact pattern above?
2. What are ways that a land trust could proceed with the proposed amendment above to ensure a net conservation gain?



Policy on Amending Conservation Easements

Aquidneck Island

Aquidneck Island is the largest island in Narragansett Bay, an estuarine watershed of world renown. The Island has diverse ecological, geological, coastal, and agricultural resources, spectacular landscapes, and a rich cultural heritage grounded in marine trades and farming. Today, Aquidneck Island's natural resources and rural livelihoods are threatened by the harmful effects of human activity, particularly caused by unbridled development.

General Statement of Policy

The Aquidneck Land Trust (ALT) acquires and holds conservation easements on property in order to protect Aquidneck Island's wetland, agricultural, coastal, forest, wildlife, ecological, recreational, and open space values for the benefit of present and future generations of Rhode Islanders in general and for those who treasure Aquidneck Island in specific.

Because its acquisitions are accomplished through voluntary agreements with landowners, the success of the program depends upon the confidence of these owners that ALT will meet its obligation to monitor and enforce the agreements. This confidence would be seriously eroded if ALT allowed unrestricted modification of its conservation easements, particularly if those modifications weakened the strength of the easements with respect to preserving the values stated above. Amendments could raise potential problems with the Internal Revenue Service, both for ALT in terms of its tax-exempt status and for donors of conservation easements in terms of any charitable deduction that may have been claimed for a gift. Further, amendments could jeopardize ALT's membership in good standing with the Land Trust Alliance (LTA), whose Standards and Practices ALT has adopted, and its good standing in the land conservation community including accreditation status.

Therefore, it is the policy of ALT to hold and enforce its conservation easements as written. As such, it will permit amendments to conservation easements only in very limited circumstances. Any request for an amendment will be reviewed according to the procedures set forth in this Policy, and the requested amendment will be approved and implemented only where the ALT determines the following:

- (1) the requested modification is warranted under one or more of the four circumstances set forth below under the Purpose of Requested Amendment section of this Policy;
- (2) it is the minimum change necessary to satisfy that purpose;
- (3) it will not substantially erode the confidence of ALT's supporters – including both past and future donors of conservation easements and other interests in land – about the goals of the organization or its intent to enforce its conservation easements;
- (4) it will not violate any funding requirements;
- (5) it is consistent with the purpose of the applicable conservation easement and will result in a positive or not-less than neutral conservation outcome unless prohibited by a properly mandated governmental action such as a condemnation action;
- (6) is consistent with ALT's mission and Conflict of Interest Policy;

- (7) it is consistent with the requirements of LTA, including but not limited to its Standards and Practices; and
- (8) it will not violate any applicable laws and thus not result in private inurement or impermissible private benefit.

Additionally, unless specifically waived, the requestor shall pay all staff and out-of-pocket costs pertaining to reviewing the change, whether or not the request is approved, and if approved, to its implementation.

Purpose of Requested Amendment

ALT will consider modification to its conservation easements only in the following four circumstances:

- (1) **Prior Agreement.** Potentially, a conservation easement may include a specific provision allowing modification of its restrictions at a future date under specified circumstances. Such agreements must be set forth in the conservation easement document or in a separate document signed by both parties at the time the conservation easement was originally executed. The amendment must be consistent with the terms and conservation intent of the original agreement.
- (2) **Correction of an Error or Ambiguity.** ALT may authorize an amendment to correct an obvious error or oversight made at the time the conservation easement was entered into. This may include correction of a legal description, inclusion of standard language that was unintentionally omitted, or clarification of an ambiguity in the terms of the restrictions, in order to avoid litigation over the interpretation of the document in the future.
- (3) **Settlement of Condemnation Proceedings.** Conservation easements and other interests ALT holds in land are subject to condemnation for public purposes, such as highways, schools, etc. Where it appears that the condemnation power would be properly exercised, ALT may enter into a settlement agreement with the condemning authority in order to avoid the expense of litigation. In reaching such an agreement, ALT shall attempt to preserve the intent and purpose of the original conservation easement to the greatest extent possible.
- (4) **Minor Modifications Consistent with Conservation Purpose.** ALT may authorize other minor modifications to the conservation easement where (a) the modification is not inconsistent with the intent of the principal parties of the original conservation project, and (b) the amended easement is substantially equivalent to or enhances the conservation goals of the original document.

ALT will be extremely cautious in consenting to a change under this section, and will do so only where the circumstances suggest that a change is clearly warranted and in the best interests of conservation. For example, ALT may allow the change of a house site permitted under the conservation easement to a new location, where the new location has a lower impact on the conservation values sought to be protected under the easement. No change will be made to allow for an additional house site not provided for under the original easement.

Procedures for Requesting an Amendment

Any landowner of property conserved by ALT seeking a modification to an existing conservation easement shall file a request in writing with ALT stating what change is being sought and the specific reasons why it is needed or warranted. Where appropriate, the request shall also be accompanied by a map and other documentation. Unless waived by ALT's Executive Director, the request shall also be accompanied by a payment of \$1,000 to cover ALT's costs. Any unexpended portion of the fee shall be refunded after the decision. The landowner shall also be

responsible for all costs exceeding the initial fee unless waived by ALT's Executive Director. Any non-waived additional costs must be paid before a decision is issued.

ALT's Stewardship Director shall initially review all requests. The field review shall include reasonable efforts to contact the principal parties to the original transaction, including the landowner who donated / sold the restrictions, any town or State board or agency which contributed funds to the acquisition, and any persons who supported the acquisition through financial gifts, pledges of charitable credit, etc.

Upon the Stewardship Director's review and evaluation that a requested amendment is a "Prior Agreement," "Correction of an Error or Ambiguity," "Settlement of Condemnation Proceedings," and/or a "Minor Modifications Consistent with Conservation Purpose," as defined herein, or is deemed inconsistent with this Policy on Amending Conservation Easements, the recommendation will be forwarded to ALT's Executive Director. The Executive Director may approve, reject, or forward the recommendation to the Easement Amendment Panel described below. If the Executive Director approves the recommendation, said approval shall be final and will be shared with ALT's Board of Trustees at their next regularly scheduled meeting. However, the Executive Director's approval shall be final as to the Stewardship Director's recommendations only where said recommendations involve minor amendment requests. Minor amendment requests are those requests that do not involve commercial, excluding commercial agriculture, or residential development. If the requested amendment is not minor, the amendment request shall follow the procedure below.

The Easement Amendment Panel consists of ALT's Executive Director, Stewardship Director, General Counsel, if appropriate, Legal Defense Committee and a member of the Stewardship Committee. If the panel concludes that the amendment is legally permissible, consistent with the terms of this Policy and the subject Conservation Easement, and clearly warranted by the circumstances, the Executive Director shall forward the request and panel recommendation to the Board of Trustees. A decision of the panel to disapprove the request shall be final and will be shared with ALT's Board of Trustees at their next regularly scheduled meeting.

The Board of Trustees may approve, approve with modification, or reject any panel recommendation for approval at its next regularly scheduled meeting or at a special meeting convened for that purpose. A decision by the Board of Trustees shall be final. In all cases, approval shall require a two-thirds vote of the full Board of Trustees.