

Conservation Easements – Part 2 Advanced Issues
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Theme: The law, in many ways, will decide whether Conservation Easements withstand the test of time in Rhode Island. Laws supporting Conservation Easements can be changed if the public does not support them. Therefore, the Rhode Island land trust/land conservation community has a responsibility to run and champion outstanding Conservation Easement programs worthy of continued public support.

I. Amending Conservation Easements

- A. Change may be the only constant in this life, so plan accordingly!
- B. Aquidneck Land Trust/Newport National Golf Club Litigation and other Conservation Easement amendment sagas
- C. See Rhode Island General Laws §34-39-5(a) and (b). Pursuant to §34-39-5(b) private land trusts may release conservation restrictions:
 - 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."
- D. Rhode Island case law suggests that a modification or release of an existing Easement, in general, must be based on the grantor's intent and the terms of the Easement itself. See case law for complete and actual details.
- E. *Restatement of the Law (Third), Property, Servitudes* and the common law of Easements in general allow for the modification of Easements according to the terms of the easement itself (i.e., if the Easement has a modification provision, that provision controls). See relevant materials for complete and actual details.
- F. The above points suggest the importance of clearly addressing the amendment issue within the four corners of the Conservation Easement itself. A gray area may exist, where abuses can occur, if the amendment issue is not adequately addressed within the Conservation Easement. In general, a sound Conservation Easement amendment clause should at least contain the following components:

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 under any applicable laws
 4. Amendment must be consistent with the purpose of the Conservation Easement
 5. Amendment must not affect the perpetual duration of the Conservation Easement
 6. Amended Conservation Easement must be properly recorded
- G. Because the amendment process is largely discretionary, land trusts should have their own internal Conservation Easement amendment policies (*Beware of including these policies within Conservation Easements!*), in addition to sound Conservation Easement amendment clauses, to further ensure that only proper amendments are made.

1. The Land Trust Alliance's *Revised 2004 Land Trust Standards and Practices* contains the following statement:

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.

2. Basic outline of requirements to consider including in a Conservation Easement amendment policy (see Aquidneck Land Trust policy)
 - a) the requested modification is warranted under one or more of the purposes set forth below:
 - i) prior agreement
 - ii) correction of an error or ambiguity

- iii) settlement of condemnation proceedings
 - iv) minor modifications consistent with conservation purpose
- b) it is the minimum change necessary to satisfy that purpose
- c) it will not erode the confidence of the land trust’s supporters about the goals of the organization or its intent to enforce its Conservation Easements
- d) it is consistent with the purpose of the applicable Conservation Easement
- e) it is consistent with the requirements of the Land Trust Alliance, including but not limited to its *Land Trust Standards and Practices*
- f) it will not violate any applicable laws (e.g., federal and state tax laws, state laws governing Conservation Easements, charitable trust law, contract law, public trust law, etc.)
- g) Unless waived, the requestor will pay all of the land trust’s related costs

II. IRS Form 8283

A. IRS Form 8283: for non-cash charitable contributions; for substantiating charitable gifts; is attached to donor’s income tax return; and taxpayer who claims a value in excess of \$5,000 for a charitable gift must have a “qualified appraisal” supporting the claimed value.

B. The Land Trust Alliance’s *Revised 2004 Land Trust Standards and Practices* contains the following statement:

The land trust understands and complies with its responsibilities to sign the donor’s Appraisal Summary Form 8283 and to file Form 8282 regarding resale of donated property when applicable. The land trust signs Form 8283 only if the information in Section B, Part 1, “Information on Donated Property,” and Part 3, “Declaration of Appraiser,” is complete. If the land trust believes no gift has been made or the property has not been accurately described, it refuses to sign the form. If the land trust has significant reservations about the value of the gift, particularly as it may impact the credibility of the land trust, it may seek additional substantiation of value or may disclose its reservations to the donor.

C. What to make of Part 4, “Donee Acknowledgement,” and its disclaimer (“This acknowledgement does not represent agreement with the claimed fair market value.”)?

D. IRS Form 8283 may be revised – In an October 22, 2004 presentation to the American Society of Appraisers, Steven T. Miller, Commissioner, IRS Tax Exempt and Government Entities Division, stated, “As importantly, the donor’s form, the 8283, may be modified to both provide better instructions on what is permissible and to disclose better information on the type of property donated.”

E. Other interesting and related IRS Form 8283 issues: enhancement issues; quid pro quo issues; etc.

III. IRS Notice 2004-41 (issued July 12, 2004)

A. Collecting more and better information

The Service is considering changes to forms to facilitate compliance with and enforcement of the substantiation requirements.

B. Certain conservation buyer transactions (discuss other conflicting opinions – e.g., The Nature Conservancy)

In some of these questionable cases, the charitable organization purchases the property and places a conservation easement on the property. Then, the charitable organization sells the property subject to the easement to a buyer for a price that is substantially less than the price paid by the charitable organization for the property. As part of the sale, the buyer makes a second payment, designated as a “charitable contribution,” to the charitable organization. The total of the payments from the buyer to the charitable organization fully reimburses the charitable organization for the cost of the property.

In appropriate cases, the Service will treat these transactions in accordance with their substance, rather than their form. Thus, the Service may treat the total of the buyer’s payments to the charitable organization as the purchase price paid by the buyer for the property.

C. Insiders, promoters, and appraisers

In appropriate cases, the Service may challenge the tax-exempt status of the organization, based on the organization's operation for a substantial nonexempt purpose or impermissible private benefit.

In addition, the Service intends to review promotions of transactions involving improper deductions for conservation easements. Promoters, appraisers, and other persons involved in these transactions may be subject to penalties...

IV. Other Advanced/Hot Issues