

AMENDING CONSERVATION EASEMENTS The 2014 Approach



Bill Silberstein
KAPLAN KIRSCH ROCKWELL
March 17, 2014

Amending Conservation Easements: Evolving Practices and Legal Principles

(Washington, D.C.: Land Trust Alliance, August 2007)

<http://tlc.lta.org/library/documents/1830>

Amendment Survey

Uncertainty in the Law and Guiding Principles

- State Enabling Acts



Uncertainty in the Law and Guiding Principles

– IRS Zone of Tolerance

- Treasury Regulation 1.170A-14(g)(6)
Extinguishment
 - (i) In general. If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

Uncertainty in the Law and Guiding Principles

- *Belk v. Commissioner*, 140 T.C. 1 (Jan. 28, 2013) (Belk I)
- *Belk v. Commissioner*, T.C. Memo. 2013-154, June 19, 2013 (Belk II)

We probably shouldn't have used this slide...



Uncertainty in the Law and Guiding Principles

- Charitable Trust vs. Property Interests
- Lack of Case Law
- The Meaning of Impermissible Private Benefit
- The Need for Flexibility

FEAR

- of Doing the Wrong Thing
- of Regulators
- of Upsetting Constituents



State Fixes

- Maine Statute
 - ME. Rev. State. Ann. Title 33 §476
- New Hampshire Attorney General Guidelines
 - <http://doj.nh.gov/charitable-trusts/conservation-easements.htm>
- Montana Association of Land Trusts
 - Model Conservation Easement Amendment Policy
- Triage

Amendment Requests

Where the Rubber Meets the Road...



Amendment Requests

- Principled Easement Modifications

Amendment Requests

- Land Trust Standards and Practices 11 I
 - 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.

Amendment Requests

- Amendment Principles. *A conservation easement amendment should meet all of the following principles:*
 - 1. Clearly serve the public interest and be consistent with the land trust's mission.
 - 2. Comply with all applicable federal, state and local laws.
 - 3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
 - 4. Not result in private inurement or confer impermissible private benefit.
 - 5. Be consistent with the conservation purpose(s) and intent of the easement.
 - 6. Be consistent with the documented intent of the donor, grantor and any direct funding source.
 - 7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

Discussion & Storytelling



Cocktails!



Questions?

WILLIAM M. SILBERSTEIN

Kaplan Kirsch & Rockwell LLP

1675 Broadway #2300

Denver, CO 80202

303.825.7000

bsilberstein@kaplankirsch.com