

Outline

Drafting for Perpetuity and Principled Conservation Easement Modification

Reno, Nevada
February 6, 2014
2:00 pm to 3:00 pm

Introduction

This is a drafting session. The purpose of this session is to discuss whether it is advisable to include an amendment clause in a deed of conservation easement, and if so, which type of amendment clause. The panel will examine the language of several varieties of amendment clauses, in the context of an amendment request, from several perspectives. Bill Silberstein will present the amendment request from the perspective of the landowner, Tamara Galanter will discuss the request and amendment clauses from the perspective of the land trust, and Julie Turrini will present the perspective of the funder.

Amendment Request

In 1995 Sally and Bob Branney sold a conservation easement to the California Central Coast Land Trust to preserve their 1,000 acre ranch. This was a bargain sale. The conservation values protected by the conservation easement were scenic, open space, and agricultural. The California Coastal Conservancy provided funding for the transaction to preserve open space. The public enjoys scenic views of the northern and western parts of the property from a nearby state highway. The house, barn and other outbuildings are located in the southeastern part of the property and are not visible from the state highway. In 2011 a wildfire burned thousands of acres above the Branney's property. Heavy rains the following year resulted in a mud slide that severely damaged the house and other buildings. The soils on the southeastern part of the property are unstable, and the Branney's soils engineering study has concluded that the only stable building sites to replace the home and other buildings are in the northwestern part of the property, which is the part that is visible from the state highway. The southeast part of the property can be reclaimed for growing crops. The Branneys have approached the land trust with a request to build a new home, barn, and other outbuildings at a specified location in the northwestern part of the property. How should the land trust respond?

- A. Assume the conservation easement does not have an amendment clause.**
- B. Assume the 1995 conservation easement has any of the following amendment clauses:**

Version 1

1988 Model Conservation Easement:

Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h)

of the Internal Revenue Code of 1954, as amended, and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of _____ County, _____ [state] _____.

Version 2

Compliance with Law – No Additional Development – Not Impair Significant Conservation Values

Amendment. If circumstances arise under which an amendment to or modification of the Easement would be appropriate, Grantor and Grantee may jointly amend the Easement; provided that any such amendment or modification must be neutral as to its effects on the conservation purposes and Conservation Values or positively enhances the conservation purposes and Conservation Values of this Easement and further provided that no amendment shall be allowed that affects the qualification of the Easement under the IRS Code or state law. Any such amendment shall be consistent with the purposes of the Easement, shall not affect its perpetual duration, shall not permit additional development or improvements to be undertaken on the Property other than development or improvements currently permitted by the Easement, and shall not impair any of the significant Conservation Values of the Property. Any such amendment shall be recorded in the official records of the county in which the Property is located.

Version 3

Compliance with Law – No Private Benefit

Amendment. If circumstances arise under which an amendment to this Deed would be appropriate, the Parties are free to jointly amend this Deed by mutual written consent of all Parties, which may not be unreasonably withheld, conditioned or delayed. However, no amendment shall be allowed that will (i) confer a private benefit to Grantor or any other individual greater than the benefit to the general public [see Treasury Regulation §1.170A-14(h)(3)(i)]; (ii) result in private inurement for a board member, staff or contract employee of Grantee [see Treasury Regulation §1.501(c)(3)-1(c)(2)]; (iii) affect the qualifications of this Easement under any applicable laws; or (iv) affect the perpetual duration of the Easement. Grantee shall have the right to charge a fee to Grantor for time and costs associated with any amendment. Any amendment must be in writing, signed by the Parties, and recorded in the official records of the county in which the property is located.

Version 4

Compliance With Law – Amendment Policy – Not Negatively Impact Conservation Values

If circumstances arise under which an amendment to or modification of this Easement is appropriate, Grantor and Grantee may jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement under any applicable laws, including, but not limited to, state law and Internal Revenue Code sections 501(c)(3) and 170(h) and any amendments or successor provisions thereto. Any amendment shall be consistent with

the purpose of this Easement, shall not negatively impact the Conservation Values, shall comply with any amendment policy adopted by Grantee and in effect at the time of the amendment, and shall not affect the Easement's perpetual duration. Any amendment shall be recorded in the official records of the county in which the Property is located.

Version 5

Uphold the Intent of Original Grantors

Grantors and Grantee may jointly amend this Conservation Easement; provided that no amendment shall be allowed that will affect the qualification of this Conservation Easement or the status of Grantee under any applicable state or federal law, including Section 170(h) of the Internal Revenue Code. Proposed amendments will not be considered unless in the opinion of Grantee they (1) have no adverse effect on the conservation values protected by this Conservation Easement and (2) uphold the intent of the original grantors and the fiduciary obligation of Grantee to protect the property for the benefit of the public in perpetuity. Grantee shall not be required to agree to any amendment.

Version 6

Taken from Maine Land Conservation Attorneys Network Model Boilerplate

Not Materially Detract from Conservation Values

Amendments. Grantor and Holder recognize that rare and extraordinary circumstances could arise which warrant modification of certain of the provisions of this Conservation Easement. To this end, subject to more restrictive laws and regulations, if any, Grantor and Holder have the right to agree to amendments to this Conservation Easement without prior notice to any other party, provided that in the sole and exclusive judgment of Holder, such amendment enhances or does not materially detract from the conservation values intended for protection under this Conservation Easement. Amendments will become effective upon recording at the _____ County Registry of Deeds. Nothing in this paragraph shall require the Grantor or the Holder to agree to any amendment or to negotiate regarding any amendment. *OPTIONAL:* All rights of Holder to amend this Conservation Easement shall require the consent of the Third Party Enforcer.

- C. Would the answer differ if the Branneys did not take a charitable deduction for the conservation easement? Why?**
- D. Would the answer differ if the amendment request was made by a subsequent landowner and not the original grantor?**

E. Bjork v. Draper, 381 Ill. App. 3d 528, Appellate Court of Illinois (2008) – Bjork I

Holding: Illinois conservation easement that contained an amendment clause could be amended. However, the amendments in question conflicted with the purpose of the easement to protect scenic views and that prohibited construction of improvements, and the amendments were declared invalid.

F. What are the perspectives of:

Landowners

Land Trusts

Funders

Regulators

- Attorney General
- State Certification Program

Elected Officials

Accreditation Commission

The Press

The Public

The Original Grantor

G. Conclusion – Recommendations for a Conservation Easement Amendment Clause and why?

H. Reference Materials

- Land Trust Standards and Practices 11 I
- Amendment Principles (from Amending Conservation Easements, Land Trust Alliance Research Report August 2007)
- Excerpt from Uniform Conservation Easement Act §§ 2(a), 3(b) and Comments
- Excerpt from Maine Conservation Easement Statute – Amendment and Termination