

MODEL CONSERVATION RESTRICTION AMENDMENT POLICY
GUIDELINES
Massachusetts Easement Defense Subcommittee
March 6, 2007

PREAMBLE

Because conservation restrictions are an important tool for permanently protecting open space and are intended to be perpetual, holders must be prepared to uphold and enforce these restrictions both in the letter and the intent of the document. Responsible stewardship is at the heart of this protection. This stewardship is dependent upon many practices, including strong and lasting relationships with landowners, appropriate and adequate baseline and monitoring records, reasonable flexibility interpreting permitted rights, and adequate plans for contingencies and potential problems and changes of circumstances.

While it is anticipated that restrictions are comprehensively written in the first place and that all issues of rights and responsibilities have been accounted for in the final document, the fact still remains that changes in time, law, practice and circumstances may give rise to a need to strengthen or improve the enforceability and coverage of a particular restriction.¹ As the need to protect valuable conservation land increases and land uses and management practices evolve, it may become necessary to consider changes to existing restrictions in order to uphold their purposes. A formally adopted Amendment Policy will help to ensure that proposed changes to existing restrictions are handled fairly and consistently and with appropriate consideration of all circumstances.

Recognizing that Amendment Policies must be tailored to the resources and expertise of a particular organization, this document is intended to be a guideline more than a sample policy. Each organization must adapt its own policy to its own needs. The Massachusetts Land Trust Coalition's Easement Defense Subcommittee recommends that every organization and agency, both state and local, that holds a conservation restriction, adopt an Amendment Policy². The following guidelines for an amendment policy have been endorsed by the

¹ **Standard 11 I. Amendments** in the LTA Standards and Practices (adopted Sept., 2004) states: *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 Massachusetts Easement Defense Operating Principles state: *5. Land trusts, state agencies, and municipalities should have a written amendment policy ensuring that the conservation purposes of the original CR are protected and that conservation values are maintained or improved.*

Massachusetts Land Trust Coalition. Additional sample policies are also available from the LTA's resource library, www.ltanet.org.

I. BACKGROUND and SCOPE

Amendment of an existing Conservation Restriction (CR) is an extraordinary procedure and is not available to a landowner as a matter of right, notwithstanding the inclusion of an amendment provision in the CR³. The success and stability of CRs is dependent upon the confidence of the landowners who contribute restrictions, those who fund land conservation, and the public at large, as well as the stewardship of the CR holder. It is imperative that these stakeholders be able to rely on a land trust to meet its obligation to monitor and enforce these agreements. This confidence may easily be eroded if a land trust permits frequent or inappropriate modifications to its CRs. Amendments could also raise problems with the Internal Revenue Service – for a land trust in relation to its tax exempt status and for a donor of a CR in relation to any charitable deduction that owner may have claimed when donating or consummating a bargain sale of a CR. For these reasons, it should be the general policy of the land trust to hold, monitor and enforce its CRs as written. There are rare circumstances, however, that may justify the need for an amendment. The right to approve or deny any request for an amendment must be at the land trust's sole discretion.

Any request for a modification of an existing CR will be reviewed with strict adherence to a written policy and implemented only when the land trust Board of Directors has determined that the proposed amendment meets the substantive and procedural requirements under its policy. The land trust will amend a CR only if the level of protection of both the conservation purposes and conservation values subsequent to the amendment is equal to or greater than that in place under the terms of the most recently recorded CR.

II. STANDARDS FOR APPROVAL OF AN AMENDMENT

The following standards are all required to be met before approval of the amendment:

A. The proposed amendment is consistent with and furthers the mission and conservation goals of the land trust and the CR;⁴

B. The amendment shall not:

³ This model policy is intended to guide the amendment process regardless of whether the original conservation restriction includes an amendment clause.

⁴ The amendment must be compatible and in agreement with all aspects of the land trust's mission and advance the land trust's mission in some concrete manner. Failure of the amendment to be completely compatible with the mission or to advance the mission in some tangible way is cause for denying the amendment.

- (i) effect or permit any private inurement or private benefit for any individual or entity;⁵
- (ii) violate the land trust's conflict of interest policy; or
- (iii) jeopardize the land trust's nonprofit status.

C. The amendment must not result in the loss or destruction of, or material damage to, the natural features or conservation values associated with the property;

D. The proposed amendment shall not effect a termination of the existing CR unless contemporaneously replaced by an amended CR consistent with this policy, nor shall the amendment cause the duration of the existing CR to be terminable;

III. ADDITIONAL FACTORS TO CONSIDER WHEN EVALUATING PROPOSED AMENDMENTS

The following factors should be considered in evaluating any proposed amendment. In order to approve or deny the proposed amendment, these factors should be considered in their entirety and satisfactorily addressed before recommending approval or denial of the amendment.

A. Does the CR address amendments and, if so, what procedures or standards are required?

B. Was the CR funded by a grant or gift, donated, purchased or required as the result of a permitting process? If so, are there requirements attached to the conveyance of the original CR (e.g., donor letters of intent, Self Help requirements, or permit requirements) that would limit our ability to amend?

C. If the CR involved a charitable donation, does the amendment have the potential to jeopardize the IRS qualification of the CR?⁶

D. Is the property or any portion of the property encumbered by a mortgage or other type of lien? Prior consent of the lien or mortgage holder may be necessary to complete an amendment.

E. Are there any other parties or co-holders, including those referenced in Paragraph B, above, who need to approve the amendment?

⁵ This standard may be difficult for a land trust to assess. Legal counsel should be consulted and land trusts should err on the side of caution. IRS regulations will offer some guidance, but may not be dispositive of how to address this issue. An appraisal is likely to be necessary not only of the affected property, but, potentially, of connected properties. The appraisal should account for uses or activities that would be permitted as a result of the amendment.

⁶ A landowner should be advised to seek advice from his/her legal or tax counsel.

F. Could the amendment

- (i) undermine the confidence of the community or alter the community's positive view of the land trust?
- (ii) affect the attitude of the land trust's supporters or future CR grantors?
- (iii) have any adverse impact on neighbors, abutters, or the community as a whole?

G. Have local officials or the Executive Office of Environmental Affairs, Division of Conservation Services taken any position on the amendment?

H. Will denial of the amendment cause any undue hardship on the landowner? (Note that hardship by itself is never a reason to approve an amendment, but hardship – or lack thereof – may be a factor in the land trust's decision)

I. Will the amendment cause any additional issues regarding stewardship responsibilities for the property or for neighboring conserved properties?

J. Are there any feasible alternatives to an amendment? If not, is the proposed change in language the minimum change necessary to address the issue raised by the amendment?

K. Will the amendment result in the release of any land interest by the land trust or by the landowner?⁷

L. Will the amendment terminate or impair existing public access rights?

M. Does the amendment result in a change in location of a building envelope? If so, does the relocation positively or negatively impact the conservation values or natural features of the CR?

N. Is the amendment requested by circumstances beyond the control of the landowner and the land trust or in relation to a proposed extinguishment of rights by a public agency or court?

O. Does the amendment comply with all applicable laws and regulations, including Article 97 of the Massachusetts Constitution, M.G.L. c.184, §§ 31-32 and Internal Revenue Service regulations and is it consistent with charitable trust, public trust and public use issues?

P. Are there important resources not identified in the original CR that would be adversely affected by the proposed amendment?

⁷ It is necessary to check the organization's bylaws to determine the nature of the vote required to release an interest in land. A "supermajority" vote may be required to validate such a step.

Q. Are there other terms of the CR that should be amended to strengthen or improve its enforceability or are there any errors or ambiguities in the language of the last recorded CR that can be corrected?

R. Should the old CR be replaced with a new CR instead of amending the existing CR?

IV. PROCEDURES

A. Landowner Initiated Amendments

A landowner requesting a conservation restriction amendment shall do so in writing, giving specific reasons why the landowner deems an amendment to be necessary and warranted, and describing in detail any proposed construction, re-grading, landscaping, planting, or other plans or activities affecting the land area in question. The landowner shall provide information on the alternatives to an amendment that were considered and the reasons why the alternatives were not deemed feasible. The landowner shall provide all documentation necessary for the land trust to make an informed evaluation of the relevant circumstances. The land trust may consult with the original donor, neighboring property owners, government officials and others who might have an interest in the restricted property or the restriction or proposed changes to the CR.

The land trust may require the party making the request to pay all staff, legal costs and out-of-pocket expenses incurred by the land trust to review and amend the restriction, whether or not the amendment is approved, including costs incurred for any hearings and/or approval by the host community and/or EOEAs. The land trust may also require the payment of an additional stewardship endowment to cover expanded costs likely to be incurred as a result of the amended provisions. A money deposit may be required to cover the costs of considering the amendment. Any unused balance will be returned. The party making the request may be billed for all costs, including staff time, over and above the amount of the deposit.

Where applicable, the landowner may be required to cover the cost of an appraisal of the value of the CR before and after the proposed amendment, as well as the before and after values of any other property of the landowner if the proposed amendment has the potential to impact the value of other land. Property of the landowner shall include any other property that is anticipated to be the subject of negotiation, agreement, or acquisition in the foreseeable future. If the amendment has the potential to result in a gain to the economic value of the landowner, the owner should be advised to report this information to the DOR and the IRS.

The land trust will evaluate the request and present an evaluation to the Board of Directors.⁸ Reasons and an explanation for accepting or denying the proposed

⁸ The land trust should place its own chain of decision making here.

amendment shall be documented in the property file. This narrative shall describe the analysis of whether the proposed amendment meets the standards set forth in Section II, above, and include an analysis consistent with the evaluation of factors set forth in Section III, above. Any conditions to be mandated in relation to a positive recommendation shall also be documented together with the reasons for such conditions. This review may include a requested written evaluation by an attorney addressing whether the proposed amendment complies with local, state and federal law and whether any private benefit will inure to any individual or entity.

The land trust will notify the landowner of its decision in writing. If the land trust wishes to reconsider the amendment based on additional information, it shall notify the landowner that he/she may submit further written justification and documentation.

The amendment must be approved in accordance with M.G.L. c. 184, §32, and any applicable municipal laws.

B. Land Trust Initiated Amendments

If the land trust recognizes the need for an amendment consistent with this policy, it will contact the landowner and recommend the amendment to the existing restriction. If the land trust and the landowner reach agreement on the language of the amendment, which conforms to the policy set forth above, the proposed amendment will be submitted to the land trust Board of Directors for consideration. The land trust will follow the same procedures as outlined in IV.A., Paragraph 1, above. The land trust should consider covering some portion or all of the legal and other expenses, including appraisal costs, related to the completion of the amendment, dependent upon what arrangements are negotiated by the parties.

V. LIMITATIONS

The recommendation to grant or deny a request for an amendment shall be within the sole and absolute discretion of the land trust, whose determination shall be final, conclusive and binding upon all parties. Approval or denial by the land trust is not binding on, and is subject to, approval by the town/city and the Executive Office of Environmental Affairs. No action by the land trust with respect to a particular request for amendment shall be deemed to establish any precedent applicable to any subsequent request for amendment, whether by the same or any other party.