

# **Guide and Model Policy for Conservation Easement Amendment**



Last updated March 26, 2024

# Acknowledgements

Andrew M. Loza is the author. Justin Hollinger, Esq., provided legal review of the 2024 edition. Patricia L. Pregmon, Esq., provided legal review of the 2017 and 2014 editions.

WeConservePA produced this guidance with financial assistance from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.



*Colcom Foundation*



Nothing contained in the model and commentary is intended to be relied upon as legal advice or to create an attorney-client relationship. The material presented is generally provided in the context of Pennsylvania law and, depending on the subject, may have more or less applicability elsewhere. There is no guarantee that it is up to date or error free.

# Preface

Every easement-holding land trust should have a policy regarding conservation easement amendment to help guide responsible consideration of potential amendments.

WeConservePA produced this “[Guide and Model Policy for Conservation Easement Amendment](#)” to assist land trusts in both developing such a policy and acting responsibly in decision-making.

This guidance takes the form of a detailed model policy that takes an expansive and in-depth approach to addressing amendment matters. The intent is to provide the user with succinct, practical guidance and to package the guidance in a form that can be adopted by a land trust as its amendment policy.

For some land trusts, the level of detail is appropriate and desirable for an organizational policy. For many others, the model contains too much detail. In the latter case, a land trust may want to (1) adopt a brief policy stating that it will use the model as guidance or (2) selectively delete or edit some sections of the model before adopting it as official policy. (The deleted material may still serve as a useful guide to the land trust, just not as official policy.)

The model was developed with the recognition that land trusts have different organizational cultures; the model’s provisions are not intended to be set in stone. A land trust may want to tailor various provisions to better reflect its views on various matters. Alternatively, a land trust may want to incorporate select elements of the model into an already existing policy.

Some of the model’s provisions have endnotes to provide background information, explain the reasoning behind a provision, point the reader toward additional guidance, or suggest alternative approaches or additional provisions.

The model’s final article, “Waivers and Letters of Interpretation,” may be viewed as tangential and may or may not be desirable to include within an amendment policy. The use of lighter text in this instance reflects its peripheral nature for many organizations.

The model is drafted to conform with [Land Trust Standards and Practices](#)<sup>1</sup> and the requirements of the [Land Trust Accreditation Commission](#).

The model is also consistent with the analysis and findings contained in the guides:

- “[Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#)”
- “[The Nature of the Conservation Easement and Document Granting It](#)”
- “[Not a Charitable Trust: The Donated Conservation Easement in Pennsylvania](#)” and
- “[Not a Public Trust: Land Trust-Held Conservation Easements in Pennsylvania](#)”

Each of these guides is published by WeConservePA and, thanks to WeConservePA's supporters, available free of charge at the [WeConservePA.org Library](#).

As part of the development process, drafts of the guidance were broadly disseminated for public review. Members of WeConservePA's [policy council](#) were among those who took part in the review. The model, first published in 2014, was modestly updated in 2017 to address changes to Land Trust Standards and Practices and the latest WeConservePA research. It was again updated in 2022 to address a change in Pennsylvania law pertaining to condemnation and in 2024 to improve clarity.

WeConservePA welcomes suggestions for improving its guidance. Please email your comments to [info@WeConservePA.org](mailto:info@WeConservePA.org).

# Policy for Conservation Easement Amendment

Policy established by \_\_\_\_\_ (“LT”) on \_\_\_\_\_.

Policy amended on \_\_\_\_\_.

## Table of Contents

<b>Introduction .....</b>	<b>3</b>
Conservation in a Changing World.....	3
Principle of Conservation First .....	3
Board Approval.....	3
Guidelines .....	3
Terminology .....	3
<b>I. Process and Procedures .....</b>	<b>4</b>
A. Informal Discussion .....	4
B. Conflicts of Interest.....	4
C. Formal Request and Associated Expenses.....	4
LT-Initiated Amendments.....	4
Landowner-Initiated Amendments.....	4
D. Review.....	5
E. Preliminary Finding.....	5
F. Board Decision .....	5
G. Contingencies .....	6
H. Processing Approved Proposals .....	6
I. Modified or Rejected Proposals.....	6
J. Documentation of Decision .....	6
<b>II. Inquiries and Policy Positions.....</b>	<b>6</b>
A. Conservation Impact.....	7
Putting Conservation First.....	7
Consistency with the Easement’s Conservation Objectives .....	7
Timing of Conservation Results.....	8
B. Others with Rights .....	8
Co-Holders and Beneficiaries.....	8
Owners of Neighboring Eased Properties .....	8
Office of Attorney General .....	8
C. Internal Revenue Code Requirements.....	9
Private Inurement.....	9
Impermissible Private Benefit .....	9
D. Perception and Relationship Concerns.....	9

Public Perception .....	9
Future Donor Perception.....	9
Owners of Eased Land Perception.....	9
Original Donors.....	9
Undue Hardship.....	9
Other Concerned Parties.....	9
E. Is Amendment the Correct Vehicle? .....	10
F. Other Concerns .....	10
Satisfactory Title.....	10
Baseline Documentation .....	10
Violations .....	10
Owners' Seeking Tax Deduction .....	10
G. Land Trust Standards and Practices .....	10
<b>III. Categories of Amendments.....</b>	<b>11</b>
A. Administrative .....	11
Correction of Errors and Oversights and Clarification of Ambiguities.....	11
Responding to Specific Events Identified by the Grant of Conservation Easement as Necessitating Amendment.....	12
Accommodating an Agreement Pre-Dating and Superior to the Grant of Conservation Easement.....	12
Equitably Adjusting Original Terms that are Impossible to Meet.....	12
B. Pure Conservation Gain.....	12
Upgrading Documents to Conform with Improved Drafting Practices.....	12
Purely Enhancing Achievement of Conservation Objectives .....	13
Expanding the Geographic Coverage of the Easement.....	13
Expanding the Conservation Objectives Without Detriment to the Existing Objectives.....	13
C. Net Conservation Gain Consistent with Conservation Objectives.....	13
D. Changes to the Property Right .....	14
Change to Conservation Objective.....	14
Changes in Restrictive Covenants or Management Terms Detrimental to the Conservation Objectives .....	14
Change to Conservation Area.....	14
E. Amendment in Lieu of Condemnation .....	14
<b>IV. Waivers and Letters of Interpretation.....</b>	<b>15</b>
A. Waivers .....	15
B. Letter of Interpretation .....	16

# Introduction

## Conservation in a Changing World

Conservation easements are intended to last—to ensure protection of important resources, no matter people’s whims—through the decades and centuries. However, the world changes and so do understandings of how best to meet conservation objectives. LT must be prepared to address these changes in order to ensure that its conservation work is effective while assuring its supporters and the public that it is a reliable agent of conservation. To this end, LT will judiciously consider potential conservation easement amendments and take actions that are conservation-driven, ethical, and legally sound.

## Principle of Conservation First

LT’s policy for considering amendments is guided foremost by the principle of *conservation first*. This principle frames LT’s decision-making with two overarching questions:

- What action would best advance conservation in the public interest consistent with the land trust’s mission?
- What action would best support the conservation objectives of the conservation easement that is the subject of the proposed change?

## Board Approval

Amendment of a conservation easement is an extraordinary action and requires the review and approval of the board.<sup>2</sup>

## Guidelines

The principles and procedures contained within are guidelines to assist LT in its operations. They are not binding on LT and do not convey any rights or privileges to owners.

## Terminology

*Amendment memorandum.* A document prepared by LT that describes LT’s research, analysis, and decisions regarding amendment proposals so that an objective outside party at a later date can see that LT followed its policy or judiciously deviated from it, exercising reasonable judgment in its decision-making.

*Conservation objectives.* The purposes served by the conservation easement.

*Owners.* The owners of the land subject to the conservation easement and potential amendment.

*Staff.* LT staff or board members and volunteers serving in a staff capacity and authorized to act in the capacities described in this policy.

# **I. Process and Procedures**

## **A. Informal Discussion**

The owners or LT may initiate an amendment request. In either case, staff will seek to first discuss the potential change informally with the owners.<sup>3</sup>

## **B. Conflicts of Interest**

In addition to the practices set forth in LT's Conflict of Interest Policy, LT may take additional steps to place a firewall between its deliberations and decision-making and any person having a conflict of interest regarding a potential amendment transaction. LT will document these measures in its amendment memorandum if the request moves beyond the informal discussion phase.

## **C. Formal Request and Associated Expenses**

### **LT-Initiated Amendments**

If significant value is seen in LT proposing an amendment, staff will apply Section II's inquiries to the proposal and gather additional information as needed to shape a proposal potentially acceptable to LT's board and owners. If, after informal discussions, the owners express willingness to amend the easement, staff will work with owners to develop a set of terms consistent with LT's aims and acceptable to owners for making particular changes to the grant of conservation easement.

Staff will then present these tentative terms to the board for its consideration (skipping steps D and E immediately below).<sup>4</sup>

### **Landowner-Initiated Amendments**

If the owners aren't dissuaded from pursuing an amendment after informal discussion, staff will ask the owners to submit the following:

- A request in writing stating the specific changes desired and the reasons why the changes are needed and warranted
- As and if needed, a map or other graphical description of the requested change to better assure that each party understands the nature of the request
- As and if appropriate to the type of amendment requested and the specific circumstances, an initial payment from the owners to cover anticipated costs pertaining to LT's review of the request and shaping of the request into a proposal suitable for review by the board, regardless of whether the proposal is approved by the board. Any portion of the payment in excess of LT's costs will be refunded. Costs include but are not limited to personnel, legal services, appraisals, surveys, and overhead. (LT may, in its sole discretion, waive all or a portion of its standard payment requirement in the interest of advancing conservation.)
- As and if appropriate, a commitment by the owners to pay any of LT's costs exceeding the initial payment



## **D. Review**

Staff will apply Section II's inquiries to the request and gather additional information as needed to either determine if: (1) the request cannot be satisfied in whole or part by LT or (2) there is potential for an amendment that LT's board *might* find acceptable. Review may include obtaining legal opinions, appraisals, and other documentation necessary for LT to make a responsible decision.

Staff in its discretion may consider and discuss with owners a variety of measures beyond the owners' request in order to shape an amendment proposal that might be acceptable to the board. Examples include the suggestion of additional restrictions to offset potential impermissible private gain or the upgrading of the granting document to LT's current standard form.

## **E. Preliminary Finding**

In closing the review process, staff will determine that advancing an amendment proposal to the board either:

- *Is not warranted.* In this case, staff will notify owners and afford them the opportunity to submit within a stated timeframe for the board's consideration written justification and documentation for an amendment. Whether or not owners take this opportunity, staff will report to the board that it has reviewed and rejected the request.  
OR
- *Is warranted.* In this case, staff will work with owners to develop a set of terms acceptable to owners and *potentially* acceptable to LT for making particular changes to the grant of conservation easement. Staff will submit these terms to the board for its consideration, with or without recommendation.

In the latter case, LT's legal counsel will determine whether the potential amendment would best be carried out by a separate amendment document or via an amended and restated grant of conservation easement. All other considerations being equal, LT prefers amended and restated grants.

In either case, staff will provide board members with an amendment memorandum regarding the request.

## **F. Board Decision**

In their deliberations of a proposal, board members will review the documentation provided by staff and may reapply Section II's inquiries.

The board may approve the proposal as presented, reject it, or modify it for consideration by the owners. The board may also delay a decision pending the receipt of additional information.

## **G. Contingencies**

The board may authorize the execution and recording of an amendment document with contingencies such as:

- Receipt of a contribution to LT's stewardship fund or execution of a stewardship funding arrangement by the owners
- Receipt of reimbursement of additional expenses incurred by LT above and beyond owners' original payment, if any
- Update of baseline documentation and written acceptance of the same by owners
- Written approval by a co-holder of the easement
- Written consent received by a beneficiary of the easement
- Written consent of a neighbor having approval rights
- Receipt of a response from the Office of Attorney General
- Approval of Orphans Court
- Receipt of additional information confirming an assumption made in the board's deliberations

The board may also apply other contingencies standard for real estate transactions such as confirmation of clean title.

## **H. Processing Approved Proposals<sup>5</sup>**

LT's legal counsel will either prepare or review the documents prior to execution and recording.

Documents will be signed by an authorized signatory of LT and promptly recorded in the county property records.

Staff will report the recording of the amendment to the board.

## **I. Modified or Rejected Proposals**

For proposals modified or rejected by the board, the board or staff will determine the process for further consideration, if any, on a case-by-case basis.

## **J. Documentation of Decision**

LT will update or supplement the amendment memorandum to reflect any relevant findings of the board and file it with its permanent records so that, at a later date, an objective outside party can see that LT followed its policy or judiciously deviated from it, exercising reasonable judgment in its decision-making.

# **II. Inquiries and Policy Positions<sup>6</sup>**

LT will make inquiries in each of the areas described in this section for each amendment requested.

Staff will make these inquiries and document the findings in an amendment memorandum. If the matter proceeds to the board review stage, board members may derive different conclusions from the inquiries than staff or identify the need for more expansive inquiries.

Some inquiries may result in immediate disqualification of the request from further consideration. Some may lead to the need for additional inquiries and research. Some will deliver answers that staff will need to consider in shaping a request into a proposal suitable for the board's consideration and judicious decision-making.

This section includes LT's established positions regarding many of the inquiries presented.

## **A. Conservation Impact**

### **Putting Conservation First**

*Would an amendment advance conservation in the public interest as well as LT's mission and goals? What other measures might LT propose as part of a potential amendment package to maximize conservation results?*

LT will consider whether an amendment would advance conservation in the public interest as well as LT's mission and goals. What impact would the change have on the protection and enhancement of natural and scenic resources?

An amendment that would fail to advance conservation in the public interest as well as LT's mission and goals will be rejected by LT.

If an amendment request is or could be made viable, LT will explore with the owners potential other changes to the granting document's restrictive covenants and management terms to aid in achievement of the conservation objectives as well as placement of additional land under easement, supplemental stewardship funding arrangements and other measures to advance conservation in the public interest consistent with LT's mission.

### **Consistency with the Easement's Conservation Objectives**

*Would an amendment be consistent with or aid in the achievement of the easement's conservation objectives?*

Would the amendment fully upgrade the grant of easement to reflect best conservation practices or modify its restrictive covenants or management terms so as to better ensure that the conservation objectives are achieved in perpetuity? Would the amendment enhance LT's ability to block land uses inconsistent with the conservation objectives or eliminate potential vulnerabilities in this ability?

The more an amendment would serve to aid the achievement of the conservation objectives, the more likely LT will find the amendment acceptable.

If the answer to all the questions is no, LT will reject the amendment except in the most extraordinary of circumstances.<sup>7</sup>

### **Timing of Conservation Results**

*What would be the immediate and short-term impacts of an amendment to the resources protected by the easement?*

If an amendment would advance conservation objectives, it ultimately will benefit the resources protected by the easement. However, some benefits are immediate while others take time to manifest, which generally adds a degree of uncertainty.

LT is more likely to support an amendment that positively impacts protected resources sooner rather than later.

## **B. Others with Rights**

### **Co-Holders and Beneficiaries**

*Is there a co-holder of the easement? Does the easement document identify beneficiaries with rights to approve an amendment?*

LT will review the grant of conservation easement to determine whether co-holders or beneficiaries have rights to approve an amendment to the easement and the nature of the rights if any. LT staff will judge based on the particular circumstances the best timing to approach and consult with the holders of these rights.

### **Owners of Neighboring Eased Properties**

*Were neighboring parcels subject to the same conservation easement? Do the owners of these parcels have any rights to approve an amendment?*

LT will investigate whether the owners of neighboring eased properties have rights to approve an amendment to the easement and the nature of the rights, if any. LT staff will judge based on the particular circumstances the best timing to approach and consult with the holders of these rights.

Even if owners of neighboring eased properties have no such approval rights, is the amendment consistent with prior, anticipated, or conceivable LT decisions affecting those properties?

### **Office of Attorney General**

*Should the Office of Attorney General be consulted and, if so, where does it stand?*

LT will consult with the Office of Attorney General prior to making a decision that would result in a change to the detriment of the conservation objectives.<sup>8</sup>

LT may, in its discretion, condition approval of such an amendment upon receipt of a written communication from the Office of the Attorney General evidencing a lack of objection.

## C. Internal Revenue Code Requirements

### Private Inurement

*Is private inurement a possibility with the requested amendment and, if so, how may the risk of such a finding be essentially eliminated?*

Staff will not consider and board will not authorize an amendment if the risk of a finding of private inurement is not negligible.

### Impermissible Private Benefit

*Is impermissible private benefit a possibility with the requested amendment and, if so, how may the risk of such a finding be minimized?*

LT must find that the risk of an amendment resulting in impermissible private benefit is small before the LT board will authorize an amendment.

## D. Perception and Relationship Concerns

### Public Perception

*Would the amendment enhance or undermine the public's confidence in LT or conservation easements? What are the community ramifications of granting or denying an amendment? How could LT communications create positive outcomes?*

### Future Donor Perception

*Would the granting or denial of an amendment request inhibit or promote future granting of conservation easements? How could LT communications create positive outcomes?*

### Owners of Eased Land Perception

*Would the granting or denial of an amendment request create a perception among other owners of land eased with LT that they may be able to obtain an amendment that LT would view as inappropriate? How could LT minimize such perception?<sup>9</sup>*

### Original Donors

*If the easement was donated, how would the original donors feel about the potential amendment?*

LT may approach the original donors of an easement to determine their feelings regarding a potential amendment. LT will give weight to these feelings but will not be bound by them.

### Undue Hardship

*Would a denial of an amendment request cause the owners undue hardship for which neither they, nor their predecessors in land ownership, bear any responsibility?*

Undue hardship cannot be a central concern to LT given the multiplicity of concerns it must address in any amendment proposal. However, such concern will be viewed as a supporting factor in LT's analysis of the appropriateness of any amendment.

### Other Concerned Parties<sup>10</sup>

*Are there others with whom it would be wise to discuss the potential amendment?*

## **E. Is Amendment the Correct Vehicle?**

*Would a waiver or letter of interpretation better address the problem at hand?*

Staff will consider the potential applicability of these tools to the issue before asking owners to formalize a request for amendment.

## **F. Other Concerns**

### **Satisfactory Title**

*Is the owners' title to the eased property satisfactory?*

LT will confirm satisfactory title prior to closing on an amendment transaction. In general, LT will require subordination of third-party interests (mortgages, leases, etc.) to the amendment.

### **Baseline Documentation**

*Will the baseline document need to be updated?*

If an amendment is to occur, LT may require an update of the baseline documentation to ensure that the conservation values protected by the amended conservation easement are documented sufficiently to allow effective monitoring of compliance with and enforcement of the terms of the amended easement.

### **Violations**

*Is there an unresolved violation of the easement?*

LT will not amend an easement until all violations are resolved or unless a purpose of the amendment is to resolve the violations.

### **Owners' Seeking Tax Deduction**

*Will owners seek a federal tax deduction in association with the amendment?*

LT will address the processing of IRS Form 8283 as it would original grants of easement.

## **G. Land Trust Standards and Practices**

*Does the amendment conform with Land Trust Standards and Practices?*

Practice H.2. of Standard 11 of Land Trust Standards and Practices (2017) requires land trusts to “[e]valuate all conservation easement amendment proposals with due diligence sufficient to satisfy the Amendment Principles.” Those principles are that an amendment should:

1. Clearly serve the public interest and be consistent with the organization'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 grantor and any direct funding source
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement

LT adopts these principles.

LT recognizes that, *in rare circumstances*, principles 5 or 6 may conflict with board members' obligation to act in the best interest of LT in light of its mission in accordance with Pennsylvania law. Regardless, the board and its constituent members will take into account the principles, together with—as demanded of them under the law—the entirety of the facts and circumstances in their analyses, deliberations, and decision-making.

Regarding principle 6, LT recognizes that the grant of easement is its principal<sup>11</sup> record of documented intent of grantors and will review the amendment for consistency. LT also will inspect its records of restricted gifts to ensure that the amendment does not conflict with the purpose of a restricted gift.

### III. Categories of Amendments

#### A. Administrative

LT generally requires minimal documentation regarding the inquiries of Section II for amendments that sit firmly in the Administrative category.<sup>12</sup>

##### **Correction of Errors and Oversights and Clarification of Ambiguities**

The board may authorize an amendment of a conservation easement to correct errors and oversights made at the time the conservation easements were executed and recorded as well as to bring clarification to minor ambiguities contained in the easement document. Such amendments include correction of legal descriptions, addition of standard language that was unintentionally omitted, and clarification of the meaning of a phrase.

##### ***Specific Procedures***

To the extent applicable and feasible, amendments of this type will be supported by written statements, affidavits, or agreements between LT and the conservation easement grantor, or other written evidence, that the amendment will implement the parties' original intentions when LT first acquired the conservation easement from the grantor.

If such written evidence is not available, amendments will be supported by documentation that effort was made to obtain such evidence.

Particular to the resolution of ambiguity in the absence of written evidence, the amendment will be supported by an opinion from LT's legal counsel that the proposed clarification is a reasonable interpretation and resolution of the ambiguity.

### **Responding to Specific Events Identified by the Grant of Conservation Easement as Necessitating Amendment<sup>13</sup>**

Pursuant to prior agreement set forth in the terms in the grant of conservation easement that identifies the need to amend the easement in specific ways in response to specific events, the board may authorize the amendment of a conservation easement.

### **Accommodating an Agreement Pre-Dating and Superior to the Grant of Conservation Easement**

The board may authorize the amendment of a conservation easement to address changes in circumstances stemming from agreements that pre-date the recording of the grant of conservation easement and that are superior to it.

#### ***Specific Procedures***

LT will include in the amendment memorandum an explanation of the prior agreement's superior claim and how the proposed amendment is the optimal resolution of the claim.

### **Equitably Adjusting Original Terms that are Impossible to Meet<sup>14</sup>**

The original terms of a grant of conservation easement may prove impossible to meet due to regulatory, engineering, or other constraints unforeseen by LT at the time of the grant. If it is reasonably clear that LT would have agreed to alternative terms with substantially equivalent outcomes vis-à-vis the conservation objectives if this impossibility had been known at the time of the grant, the board may authorize an amendment to reflect such alternative terms.

#### ***Specific Procedures***

Amendments of this type will be supported by analysis confirming that LT would have agreed to alternative terms with substantially equivalent outcomes vis-à-vis the conservation objectives if the impossibility of the original terms had been known at the time of the grant. Analysis will also confirm that the proposed amendment is consistent with these alternative terms.

## **B. Pure Conservation Gain**

The board may authorize an amendment that provides purely conservation gain, meaning there is no detriment to the conservation objectives or loss, even temporary, to the protected resources. As with the Administrative category, LT generally requires minimal documentation regarding the inquiries of Section II for Pure Conservation Gain amendments. For this category, the key factor that the board must consider is whether the gain is sufficiently substantial to justify the expenditure of organizational energy in effecting the amendment.

### **Upgrading Documents to Conform with Improved Drafting Practices**

LT revises and updates the restrictive covenants and management terms contained in its grant of conservation easement template to reflect new understandings of the law, conservation science, and how best to manage conservation easements and achieve conservation objectives. Just as it seeks to have its newest easements take advantage of improved knowledge and practices, LT recognizes the benefit of upgrading older easement



documents to take advantage of the same. The greatest conservation gains may be obtained by updating a granting document more than a decade or two old, but it is possible to have substantial gains with even more recent documents. The board may authorize an amendment to make the granting document consistent with LT's present-day easement template.

The board generally disfavors piecemeal upgrades of granting documents, recognizing that if an amendment is to be considered, the opportunity to bring the document up to the highest drafting standard—thus maximizing the organization's effectiveness and efficiency in supporting the conservation objectives—should not be wasted.

#### **Purely Enhancing Achievement of Conservation Objectives**

The board may authorize an amendment to eliminate reserved rights that will enhance achievement of conservation objectives. Examples include eliminating or reducing the size of Minimal Protection Areas or reducing the amount of impervious coverage permitted.

#### **Expanding the Geographic Coverage of the Easement**

The board may authorize an amendment to extend the conservation easement over additional land.<sup>15</sup>

#### **Expanding the Conservation Objectives Without Detriment to the Existing Objectives**

The board may authorize an amendment to add one or more conservation objectives. For example, an older easement may state objectives of protecting the scenic quality of the landscape and preserving wildlife habitat but make no reference to water quality. The easement could be amended to expand the conservation objectives to include the protection of water resources.

#### ***Specific Procedures***

Adding a conservation objective usually will necessitate changes to the restrictive covenants to block uses inconsistent with the new objective. LT will carefully review the existing and proposed new covenants to ensure that they are consistent in advancing the expanded set of objectives.

A proposed new conservation objective could conflict with existing objectives. Although unlikely, LT will analyze the proposal to ensure that this is not the case. (If it is, then the amendment is not a pure conservation gain upgrade and bears greater scrutiny.)

### **C. Net Conservation Gain Consistent with Conservation Objectives**

The board may authorize an amendment that has the net effect of aiding in the achievement of the conservation objectives, enhancing the resources targeted for protection in the long term but potentially causing detriment to some element of the resources as well. Such an amendment involves changing one or more restrictive covenants or management terms in the easement document but no changes to the conservation objectives.

This category of amendment requires greater scrutiny and documentation by LT than an amendment involving pure conservation gain.

In these cases, the board must consider whether the net gain is sufficiently substantial to justify (1) the expenditure of organizational energy in effecting the amendment and (2) potential or actual harm to a protected resource.

## **D. Changes to the Property Right**

The preceding types of easement amendments do not fundamentally alter LT's property right—its ability to block land uses inconsistent with the conservation objectives within the conservation area. The following types of changes are far more substantial, requiring the highest level of scrutiny, documentation, and deliberation by LT.

### **Change to Conservation Objective**

The board may authorize an amendment to refine a conservation objective consistent with an improved understanding of the science and practice of conservation.

The board will not authorize the elimination of a conservation objective.<sup>16</sup>

### **Changes in Restrictive Covenants or Management Terms Detrimental to the Conservation Objectives**

The board will not authorize changes in the restrictive covenants or management terms of the easement grant that would have a net adverse effect on the achievement of the conservation objectives, except in the most extraordinary of circumstances.

### **Change to Conservation Area**

The board will not authorize a change in the boundaries of a conservation easement that would remove land from the easement except in unusual and particular circumstances:<sup>17</sup>

- Amendment may be authorized to shift a portion of the conservation easement onto immediately adjacent land that shares the same conservation attributes and would be subject to the same conservation objectives as the land to be removed from the conservation easement. For the board to consider such an amendment, the shift would have to result in a net gain in area covered by the conservation easement.<sup>18</sup>
- Unless the net conservation gain to the public benefit would be extraordinarily large, the board will not authorize other trade-offs involving the removal of a conservation easement in one area for a new or enhanced conservation easement in another.

## **E. Amendment in Lieu of Condemnation**

Section 208 of Pennsylvania's Eminent Domain Code provides that, subject to exceptions (including condemnation by Commonwealth agencies), a condemnation cannot commence on land subject to a conservation easement unless a court first determines there is no reasonable and prudent alternative to the utilization of the land subject to the conservation easement.<sup>19</sup>

If a court finds there is no reasonable or prudent alternative, or if the condemnation falls under one of the exceptions, the conservation easement does not provide any power to block the use of eminent domain authority in regard to either the eased property or the conservation easement itself.

If a conservation easement is subject to a real and substantial threat of condemnation, the board will act to achieve an outcome that maximizes conservation in the public benefit consistent with LT's mission. Such outcome may include an amendment or a whole or partial extinguishment of the easement.

#### ***Specific Procedures***

The board will act under guidance of legal counsel and document the real and substantial threat under which it is taking action.

A waiver or a letter of interpretation may be a more appropriate tool than an amendment to address a particular circumstance. Conversely, without proper controls, a waiver or letter may be inappropriately applied to a situation that truly requires an amendment. Consequently, some land trusts may want to establish a policy regarding waivers and letters of interpretation, either freestanding or as an appendage of their amendment policy.

## **IV. Waivers and Letters of Interpretation**

### **A. Waivers**

LT, without any obligation to do so, may agree to waive strict compliance with the terms of grant of conservation easement for a specific period of time with respect to a specific set of circumstances if LT is satisfied that the accommodation will have no material effect on the conservation objectives. Such a waiver is a rare occurrence and must be in writing by a person authorized by the board to take such action. Staff will inform the board in writing of any waivers granted.

*The waiver does not amend the terms of the grant;* rather, it is LT exercising its discretion to refrain from exercising one or more of its rights and remedies in response to a potential violation of the easement's covenants because it is satisfied that the impact on the protected resources will be negligible.

Examples of circumstances in which LT will consider a waiver are:

- A response to unusual and powerful natural phenomena like an earthquake or tornado
- A one-day accommodation of an uncommon event such as having a tent or parking for a family wedding in a field where such use is prohibited by the easement's covenants

Waivers play a highly specific role as outlined above. They are not an appropriate substitute for amendments. At the time of a granting of a waiver, LT will place in its file a record of its decision to do so that confirms that:

1. The accommodation will have no material effect on the easement’s conservation objectives;
2. The period of time is finite and the circumstances leading to the need for the waiver are not likely to become recurring; and
3. Amendment has been considered to meet the need, but waiver has been determined to be the more appropriate tool.

## B. Letter of Interpretation

While an amendment may be an appropriate response to clarify an ambiguity in the terms of the grant of conservation easement, it is sometimes satisfactory for LT to issue a letter of interpretation in response to a query by owners regarding whether a particular activity is allowed or the meaning of a particular phrase.

Such a letter of interpretation must be reviewed by LT’s legal counsel (unless the board specifically waives this requirement for the particular instance) and signed by a person authorized by the board to take such action.

A copy of the letter will be filed in the organizational records.



---

<sup>1</sup> Practice H.1. of Standard 11 of [Land Trust Standards and Practices](#) (Land Trust Alliance, 2017) requires land trusts to “[a]dopt and follow a written policy or procedure addressing conservation easement amendments that is consistent with the Land Trust Alliance Amendment Principles.”

<sup>2</sup> See the WeConservePA guide “[Authorization of Real Estate Transactions](#).”

<sup>3</sup> Casual conversation may help the organization and owners alike understand the goals, needs, and limitations of each. At this early stage, LT may want to provide owners with key points from the organization’s amendment policy. In some cases, staff may recognize that an action other than amendment may better address the situation and informally discuss this with the owners.

<sup>4</sup> Some organizations may wish to elaborate regarding costs, e.g., “Staff may but is not obligated to ask the owners to share any expenses.”

<sup>5</sup> As a reminder regarding tax reporting, some organizations may wish to add a section to the end of the article: “Reporting to IRS. LT will report all amendments as required by the Internal Revenue Service with annual tax reporting.”

<sup>6</sup> In interpreting and implementing sections A, B, and C of this article, users are encouraged to review the guide “[Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#).”

---

<sup>7</sup> In rare circumstances, land trusts are faced with an amendment proposal that *might be detrimental* to the conservation objectives of a particular easement yet, in the bigger picture, would substantially advance conservation in the public interest and the land trust's mission and goals. Such situations are unique in their specifics and require the highest scrutiny, deepest analysis, and lengthiest deliberations by LT. This policy anticipates a request for a letter of non-objection from the Attorney General in any such situation.

<sup>8</sup> If a conservation easement was established as a charitable trust, an unlikely event in Pennsylvania, this might also necessitate Office of Attorney General review as well as Orphans Court approval. An organization that holds one or more easements as a charitable trust may wish to expand this section to address this. See the WeConservePA guides "[Not a Charitable Trust: The Donated Conservation Easement in Pennsylvania](#)" and "[Amending Grants of Conservation Easement: Legal Considerations for Land Trusts](#)" for more information.

<sup>9</sup> An amendment may be sensible within the confines of the particular easement but be damaging to conservation if extended to lands and easements not sharing the same circumstances.

<sup>10</sup> Neighbors and others, although they may have no legal rights, may have perspectives and concerns that it might be productive to hear.

<sup>11</sup> The grant of easement is the best indicator of the final meeting of the minds of the parties. Evidence of earlier intentions may be useful to resolve conflicts, ambiguities, or mistakes in the final document.

<sup>12</sup> Amendments of these types are generally recognized as noncontroversial, presenting minimal risk to the organization legally or in the realm of public relations.

<sup>13</sup> Examples of such amendments include:

- The designation of a Minimal Protection Area within an area previously identified as appropriate for such designation and clarification that this reserved right was exercised
- The allocation to lots of reserved rights to create impervious coverage or construct Improvements following a permitted subdivision of the property

<sup>14</sup> Examples of circumstances that may lead to such amendments include:

- Changes to local land use regulations disallow a subdivision and land development that was expressly permitted by the grant of conservation easement. The restrictive covenants of the easement could be adjusted to shift the lot lines and building location without changing the impact on the conservation values as compared to the anticipated impacts under the existing covenants.
- An engineering report determines that the soils in the vicinity of a permitted building site, which was expected to utilize a septic field, do not percolate. The restrictive covenants of the easement could be adjusted to relocate the planned septic field without changing the impact on the conservation values as compared to the anticipated impacts under the existing covenants.

---

<sup>15</sup> Such an amendment is generally preferable to establishing a new easement over the additional property because it is usually simpler to administer one easement and it enables stronger limits on subdivision.

<sup>16</sup> Land trusts may choose to qualify this with “except in the most extraordinary of circumstances.” The model’s default language, which excludes this qualification, is designed to unambiguously conform to Land Trust Standards and Practices.

<sup>17</sup> Practice H.3. of Standard 11 of Standards and Practices states that: “If an amendment is used to adjust conservation easement boundaries... and results in a *de minimis* extinguishment, document how the land trust’s actions address the terms of J.1. below.” Practice J.1. in turn reads: “In the rare case that it is necessary to extinguish a conservation easement, in whole or in part,

- a. Follow the terms of the conservation easement with respect to taking appropriate action, and obtain judicial or regulatory review when required by law or specified in the easement deed
- b. Ensure there is no private inurement or impermissible private benefit
- c. Take steps to avoid or mitigate harm to conservation values and/or use any proceeds in a manner consistent with the conservation easement deed
- d. Consider the land trust’s actions in the context of its reputation and the impact on the land conservation community at large”

<sup>18</sup> Some organizations may prefer this last sentence to read: “For the board to consider such an amendment, the shift would have to result in no net loss in area covered by the conservation easement.”

<sup>19</sup> See the WeConservePA guide “[Eminent Domain and Conserved Land in Pennsylvania](#)” for more information.