

Model Montana Conservation Easement Amendment Policy¹

I. General Policy Statement

1. As provided in the Montana Open Space and Voluntary Conservation Easement Act, Section 76-6-101 et seq., M.C.A (the “Act”), the Land Trust (LT) acquires and holds conservation easement rights in property in perpetuity to preserve and protect the conservation values of the land for the benefit of the public. Such conservation values may include scenic, agricultural, recreational, open-space, and wildlife resources, and other conservation values that are specifically identified in the conservation easement document.

2. LT acquires conservation easements through voluntary agreements with landowners, including donations, bargain purchases, full value purchases, and assignments. As required by Montana law, LT must ensure that its conservation easements provide public benefits in accordance with the Act. The confidence of landowners and of the general public will be enhanced if LT amends its conservation easements only when safeguarding the public’s interest in conservation lands. Amendments to conservation easements must also comply with federal tax law. Amendments that confer private inurement or private benefit, for example, may result in penalties and fines levied by the Internal Revenue Service on both the LT and on others who engage in improper amendments.

3. For these reasons and others, LT generally holds and enforces its conservation easements as originally written. Amendments of conservation easements will not be granted under circumstances described in Part II of this Policy.

4. Notwithstanding LT’s general policy of holding and enforcing conservation easements as originally written, LT recognizes that amendments of conservation easements are sometimes necessary or warranted to clarify the interests and goals of the parties to easements or to better serve the public interest. In such circumstances, conservation easement amendments will be approved only in accordance with the circumstances set forth below in Part III and in accordance with the procedures set forth in Section V.

¹ This “Model Montana Conservation Easement Amendment Policy” was prepared by the Montana Association of Land Trusts (MALT). The intention of this Model Policy is not to require adoption of every word or every provision, but to assist MALT members in developing their own conservation easement amendment policies in compliance with sound organizational management principles, Montana laws of conservation easements and governance of tax-exempt organizations, federal tax law, and the Land Trust Alliance’s Standards and Practices.

5. Conservation easement amendments may also be approved by LT if an easement is threatened, in whole or in part, with condemnation under Montana's eminent domain laws. Section IV discusses the criteria under which LT may approve such amendments consistently with Montana law.

6. In very rare circumstances, conservation easements may also be reformed under Montana law (Section 76-6-107, M.C.A.) when circumstances have changed so dramatically since the date of conservation easement creation that they no longer serve their original purposes and/or no longer provide significant public benefit. Section VI provides guidance with respect to these unusual instances when and how conservation easements may be reformed consistent with Montana law.

7. LT's policy is that a party who requests a conservation easement amendment or modification shall pay all of LT's costs, including staff time, consulting fees, costs of appraisal, attorneys fees, and costs of implementation, that are associated with review of the amendment or modification request, whether or not the amendment or modification is granted. At LT's sole discretion, LT may waive the foregoing requirements, in whole or in part.

II. Circumstances Under Which LT Will Refuse to Amend Conservation Easements

Amendments of conservation easements will not be granted if such amendments:

- Jeopardize LT's tax-exempt status or LT's status as an organization that is qualified to hold perpetual land use restrictions under state or federal law;
- Do not serve the Act's public interest goals and purposes;
- Will cause the easement to fall out of compliance with applicable federal, state or local laws, regulations or ordinances;
- Are not consistent with express and specific duties or obligations to the public that are identified in the conservation easement itself or that arise by operation of law;
- Are not consistent with express and specific rights of third parties who hold interests in the conservation easement by virtue of the conservation easement instrument itself, funding agreements, by operation of law, or as mandated by federal, state or local laws, regulations or ordinances.
- Do not comply with LT's mission or other organizational policies, including its conflict of interest policies.
- Confer prohibited private benefit or inurement.

The foregoing list is not exclusive and LT reserves the right to refuse amendment requests, in its discretion, in favor of holding and enforcing the terms of the original conservation easement as originally recorded.

III. Conditions Under Which Amendment Requests May Be Considered

LT will consider amending conservation easements under circumstances described in this Section III, but nothing in this Section III shall be interpreted to require LT to grant a conservation easement amendment request, even if all of the criteria set forth below are met. LT shall have unlimited discretion to grant or to deny each amendment request and shall evaluate each request on a case-by-case basis.

1. **Prior Agreement.** Conservation easements may be amended if their terms anticipate that they may be amended in specific ways under specific circumstances. Such terms must be set forth in the conservation easement document.

Examples of acceptable amendments pursuant to prior agreement in the terms of conservation easements include amendments to:

- *Revise and replace map exhibits to document in the public record a landowner's exercise of reserved development rights;*
- *To substitute and incorporate resource management plans that the easement recognizes may be periodically updated; or*
- *To relocate building envelopes or to reconfigure transferable lots after a landowner receives the LT's prior approval, as allowed by specific agreement in the conservation easement.*

2. **Correction of Errors and Ambiguities.** Conservation easements may be amended to correct errors or oversights made at the time the conservation easements were executed and recorded. Such errors or oversights may include, but shall not be limited to, correction of legal descriptions, addition of standard language that was unintentionally omitted, and clarification of ambiguities.

- To the extent feasible, amendment authorized to clarify conservation easement ambiguities shall be supported by written statements, affidavits, or agreements between LT and the conservation easement grantor, or other written evidence, that the purpose of the amendment is to implement the parties' original intentions when LT first acquired the conservation easement from the grantor.
- If such written evidence is not available, amendments to clarify ambiguities may be approved if LT receives an opinion from its legal counsel that without such an amendment, LT faces a risk that the ambiguous terms will render the conservation easement unenforceable, in whole or in part, thereby threatening the LT's ability to protect the Conservation Values for public benefit.
- LT may also authorize amendments to resolve a good faith disputes over the meaning of easement terms, provided that no such amendments may compromise or diminish protection of the conservation values.

3. **Amendments Consistent with Conservation Purpose or that Enhance Conservation Values.** LT may authorize amendments to a conservation easement provided that

the amendments are consistent with the original land conservation intentions of LT and the grantor as articulated in the statements of purpose in the easements, and further provided that the amendments enhance, or have no adverse effect on, the conservation purposes of the easement. Amendment requests will not be granted under any circumstances if LT determines, in its sole discretion, that an amendment would affect the conservation easement's perpetual duration or would afford less protection to the Conservation Values protected by the original conservation easement or that the provisions of Section II are not met by the amendment request.

4. **Administrative Amendments.** LT may authorize amendments when the original terms of the conservation easement prove impossible to meet. For example, LT may approve a change in a designated development area to a more appropriate site if engineering constraints make it impossible to locate structures within the designated development area. LT may also amend conservation easements to update language and thereby to bring the easement into conformance with current conservation easement drafting standards.

IV. Settlement of Condemnation Proceedings and Threats of Condemnation.

Section 76-6-105(2), M.C.A., states that nothing in the Act diminishes rights of eminent domain that appear elsewhere in Montana law. Therefore, conservation easements may be subject to condemnation for public purposes. Where it appears that the condemnation power will be properly exercised to terminate a conservation easement, LT may enter into a settlement agreement with the condemning authority, after a showing of legitimate public necessity, to avoid the expense of litigation and to minimize an unnecessary burden on the judicial system. In reaching such an agreement, LT shall attempt to preserve the intent of the original conservation agreement to the greatest extent possible.

V. Suggested Procedures for Review of Amendment Requests

1. If a party seeks an amendment to a conservation easement, that party must present to LT a request in writing, stating the change in conservation easement terms sought and the specific reasons why the change may be needed or warranted. The request shall be accompanied by appropriate maps and other documentation required by LT to properly evaluate the request.

2. If LT receives such a request, LT will hold an initial consultation meeting with the party who requests the amendment. During this initial consultation meeting, costs to review and process the request and payment arrangements will be discussed and agreed upon. A cost agreement will be developed and signed before proceeding.

3. LT staff shall review all requests and, where appropriate, a representative of LT will conduct site visits.

4. Evaluation of requests shall include consultation with third parties, when appropriate, including:

- Reasonable efforts to discuss the proposed amendment with the principal parties to the original transaction, including the landowner who granted the restrictions.
- Funders, if any, of the original easement.
- Public agencies if necessary under funding agreements, co-holding or other arrangements, or pursuant to Section 76-6-206, M.C.A.
- Additional third parties, public or private, whose opinions or expertise LT determines may be helpful to its evaluation of the amendment request.

LT shall have no obligation to confer with third parties who do not have specific rights embedded in the conservation easement (e.g., funding partners, third-party enforcement right holders, named back-up grantees, etc.), and, if LT does consult third parties, any third party opinions about the propriety of granting or denying an amendment request shall be advisory only. LT retains exclusive authority to grant or deny amendment requests, within the constraints of funding requirements, the terms of the original conservation easement, and applicable laws, ordinances and regulations.

4. After LT staff compiles information and fully reviews and evaluates the request for amendment under Section I – IV of this Policy, staff shall make a recommendation to the Land Protection Committee. If the Committee finds that the amendment is legally permissible, consistent with the terms of this policy, and clearly warranted by the circumstances, the Committee will forward the request and the Committee's recommendation to the Board at its next regularly scheduled meeting. Alternatively, the Committee may make a determination that the proposed amendment is not appropriate. A decision by the Committee to disapprove the amendment will be final, unless the landowner presents a written request for review by the Board, explaining the landowner's reasons for requesting full Board review.

5. The Board may approve, reject, or approve with modifications the request. Approval shall require a 2/3 majority vote of the full Board.

6. Montana law does not specifically provide for, or require, public review and approval of conservation easement amendments to correct errors, to clarify ambiguities, or to implement changes to easements contemplated by prior agreement. Amendments that add or remove property or materially change the purposes or terms of easements shall be submitted (i) to the local planning authority for review pursuant to Section 76-6-206, MCA and (ii) for judicial review and approval, if the conservation easement was donated in whole or in part if a charitable deduction was claimed, and if federal tax law so requires.

CHARITABLE TRUST EXCEPTION: If the original grantor of the conservation easement expressly creates a charitable trust by documenting a specific intention to do so in the terms of the conservation easement, review of the proposed amendment by the Montana attorney general and judicial approval of any amendment that reforms or alters the original terms of the conservation easement may be necessary.

7. All easement amendments that are approved by the Board must be made in writing, signed by both parties, and must be recorded in the land title records of the local jurisdiction in which the affected property is located.

VI. Modification and Reform of Conservation Easements as Authorized by Montana Law.

This Section VI of the Model Policy provides MALT members guidance in approaching conservation easement modifications which are authorized under Section 76-6-107, M.C.A. This statute permits modifications of conservation easements if such modifications are “necessary to the public interest.” The Model Policy suggests ways in which MALT members may approach such necessity determinations in an analytical way while remaining grounded in the requirements of state and federal law to protect the public’s interest in land trusts’ conservation rights in perpetuity.

Consistent with Section 76-6-107(1), M.C.A., LT may authorize “conversions” and “diversions” of dedicated to open space land, including conservation easements,² to other uses (hereafter referred to as “modifications” or “reforms” of conservation easements), provided that the modifications are (a) necessary to the public interest; (b) consistent with local comprehensive planning; and (c) permitted by the terms of conservation easement amendment clauses in conservation easements, by separate conservation easement acquisition agreements, or by a governing body resolutions.

LT’s paramount responsibility under law with respect to the conservation easement rights it holds is to ensure those rights continue to provide public benefits in perpetuity. If public benefits are threatened, diminished or impaired as a result of an irreparable conservation easement violation, changing resource conditions, changing public values and public policies, or other changed circumstances, Section 76-6-107, M.C.A., and this Section VI may provide LT with opportunities to reform its conservation easement rights, and thereby to protect the LT’s ability to continue to serve the public interest in perpetuity. The reforms contemplated by Section VI may involve, for example, substituting new conservation purposes into the original conservation easement, or even substituting new conservation lands, to better reflect changed conditions on the property and/or changing public conservation values.

² Section 76-6-107, M.C.A., does not define the terms “*conversion*” or “*diversion*” but common definitions with relevance to conservation easement modification include:

Convert: “To change in form, character, or function” and “to change from one form or function to another; to alter for more effective utilization”.

Divert: “To cause to change course or take a different route; to reallocate (a resource) to a different purpose” and “to turn from one course or use to another”.

See *Merriam-Webster’s Online Dictionary* (2010) and *Compact Oxford English Dictionary Online* (2010).

As a general matter, however, conservation easement reform under Section 76-6-107, M.C.A., is not ever deemed “necessary” by the LT – and such reform is therefore not authorized by statute or permitted under this Section VI -- if the original purposes and terms of the conservation easement may be enforced or achieved, unless the public benefits provided by the easement are substantially diminished or impaired. Furthermore, no conservation easement reform may be undertaken pursuant to Section 76-6-107, M.C.A., and this Section VI unless such reform is consistent with Section II above.

Accordingly, subject to Section II of this Policy, the LT will consider conservation easement reforms under Montana’s statutory provisions as follows:

1. LT shall determine whether the original purposes and terms of the conservation easement cannot be achieved or whether the public benefits provided by the conservation easement, as written, have been substantially diminished or impaired by changed circumstances. If so, LT must evaluate the “necessity” of a proposed modification of the easement to serve the public interest, consistent with Section 76-6-107(1)(a), M.C.A., and in accordance with the following alternative criteria:

a. **Is conservation easement modification necessary to preserve the LT’s conservation easement rights in land, and, thereby, to ensure a continued flow of public benefits from the conservation easement?**

i. Such modifications involve changes to easements that are necessary to protect, preserve and perpetuate threatened or diminished conservation easement property rights that LT holds to provide conservation benefits to the general public.

1. *Examples of modifications that may be appropriate under this measure include but are not limited to:*

- a. *Modifications made necessary as a result of a conservation easement violation which diminishes or destroys protected conservation values and the LT’s conservation rights therein;*
- b. *Modifications made necessary by activities on adjacent or nearby properties which diminish or harm protected conservation values on easement protected property, eroding the value of the LT’s conservation rights; or*
- c. *Modifications to add or substitute new conservation purposes in an easement if the original purposes of the easement no longer provide significant public benefits, as long as the protected land provides other conservation values that are identified as important under the Act.*

b. **Is conservation easement modification necessary to ensure that the conservation easement remains relevant and responsive to changing laws and public policies, consistent with the Act?**

i. Such modifications involve reordering of the importance of public conservation values by federal, state or local government, and the LT’s

responsibility, as a publicly supported, tax-exempt organization, to be responsive to changing public priorities in land conservation law and policy.

1. *Examples of appropriate modifications under this measure include but are not limited to modifications made necessary by new laws that eliminate or alter protected conservation easement values, such as:*
 - a. *Legislative adoption of policies identifying renewable energy production as an overriding public conservation goal;*
 - b. *Adoption of local conservation policies that require removal of decadent or damaged forest resources to protect the general health and welfare of citizens; and*
 - c. *Federal or state mandates pertaining to the management of farmland, rangeland or habitat easements acquired or administered under federal or state land conservation programs.*

c. Is conservation easement modification necessary to ensure that the conservation easement continues to serve the original, articulated purposes of the easement?

- i. Such modifications involve changes in resource conditions and/or the status of protected conservation values and the LT's fiduciary and organizational responsibilities to adapt easement terms to such changing conditions to better serve the original conservation purposes of the easement.

1. *Examples of appropriate modifications under this measure include but are not limited to:*
 - a. *Modifications to a habitat easement made necessary by climate change which has altered the mix of wildlife habitat values provided by the conservation easement when it was first granted (e.g., easement was taken to protect wetlands but now provides high quality grassland habitats);*
 - b. *Modifications made necessary to a "forever-wild" forestland easement by unanticipated catastrophic wildfire that destroys protected forest resources but requires active management to prevent erosion and rehabilitate the forest resource; or*
 - c. *Modifications made necessary to an easement that protects specific educational opportunities that are no longer provided in the state by expanding the definition of educational uses in the easement to include other uses that may be made of the easement property.*

2. LT must submit the proposed modification to review by local planning authorities pursuant to Section 76-6-107(1)(b) and Section 76-6-206, M.C.A., to confirm that the proposed modification is consistent with local comprehensive planning.
3. LT will confirm that the modification is permitted by the terms of an amendment clause in the conservation easement, by the conservation easement acquisition agreement, or by a governing body resolution, in accordance with Section 76-6-107(1)(c), M.C.A.

4. All modification requests considered under this Section VI, shall be reviewed by the LT with reference to whether the proposed modification is consistent with policies and purposes of the Act, as stated in Section 76-6-102 and 76-6-103, M.C.A.
5. If any real property is removed from the protection of the conservation easement as a result of the modification, other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land must be substituted within three years, consistent with Section 76-6-107(2), M.C.A.
6. LT must determine whether modifications to the terms of its conservation easements adversely affect the legitimate rights and expectations of easement grantors and their successors, and other third parties with specific rights in the easement, and, if so, the written consent of such parties must be secured before finalizing the modification.

Prior to finalizing any conservation easement modification or reform under Section 76-6-107, M.C.A., and this Section VI, LT will submit all such conservation easement modifications considered under this Section VI (i) to the MALT Conservation Easement Reform Advisory Committee³ for its review and recommendations, and (ii) for judicial review and approval, if the conservation easement was donated in whole or in part if a charitable deduction was claimed, and if federal tax law so requires.

No modification under this Section VI will be granted under any circumstances if LT determines, in its sole discretion, that the modification would affect the perpetual duration of the LT's conservation easement rights, would diminish the benefits enjoyed by the public, or would result in prohibited private benefit or inurement to any party. Nothing in this Section VI shall be interpreted to require LT to grant a conservation easement modification request, even if all of the foregoing criteria are met. LT shall have unlimited discretion to grant or to deny each modification request and shall evaluate each request on a case-by-case basis.

³ In recognition of the importance of protection the public interest and ensuring compliance with the terms and purposes of state law and the conservation easement modification and reform guidelines set forth in this Section VI, MALT has created a Conservation Easement Reform Advisory Committee ("Advisory Committee") which has the authority to review all easement modifications contemplated under Section VI. The Advisory Committee is comprised of three land trust professionals and two legal experts (currently two former Montana Supreme Court Justices), appointed by the MALT Executive Committee and ratified by majority vote of the MALT membership. The purpose of the Advisory Committee is to conduct a thorough and timely review of conservation easement modifications proposed under Section 76-6-107, M.C.A., and Section VI. Upon receipt and review of easement modification proposals, the Advisory Committee will issue written recommendations and comments to the land trust proposing the amendment to consider, with a copy of that document provided to the full membership MALT.