C12. Conservation Easements:
Drafting an Enduring Amendment
Clause CLE

Friday, October 12 | 3:30 p.m. - 5 p.m.

Room 407

Session Faculty:
Karin Marchetti Ponte
Christian Dietrich

Rally 2018: The National Land Conservation Conference
Pittsburgh, PA
Conservation Easements: Drafting an Enduring Amendment Clause

Presenters:
Karin Marchetti Ponte, J.D., General Counsel, Maine Coast Heritage Trust
Christian Dietrich, J.D., General Counsel, The Montana Land Reliance

SESSION OUTLINE

I. Introduction and session overview
   a. Amendments of conservation easements generally—state of the landscape and resources for further study
   b. Types of amendments

II. Overview of legal framework applicable to amendments
   a. Conservation easements as real property interests
   b. Conservation easements as charitable trusts
   c. Background principles of state enabling statutes and differing approaches to amendments
   d. Federal tax law on extinguishment, termination, and amendments
   e. Nonprofit law governing tax-exempt organizations relating to amendments—potential for private benefit and inurement
   f. IRS audit guide and survey of amendment-related opinions expressed by IRS
   g. Survey of secondary sources addressing amendments

III. Survey of past and present court cases
   a. Belk and related cases, including Bosque Canyon and Balsam Mountain
   b. Pending litigation in Tax Court and LTA involvement as amicus
      i. IRS arguments regarding amendment clauses in Sells, Kumar, and Pine Mountain
      ii. LTA response and amicus brief arguments

IV. Drafting amendment clauses and responding to amendment requests
   a. Risk management and inclusion of amendment clauses generally—why most land trusts support including clear amendment clauses
   b. Critical elements to include in amendment clauses: overview of available guidance and LTA risk management drafting pointers
   c. Sample clauses permitting limited amendment: drafting easements that are deductible and that facilitate effective and efficient stewardship
   d. Importance of amendment policies, procedures, and documentation
   e. Practice pointers and traps to avoid

V. Discussion and questions
Index of Appendices

Appendix A: Excerpt from UCEA Background Report on Amendments.
Nancy A. McLaughlin, Uniform Conservation Easement Act Study Committee Background Report (June 11, 2017). Nancy A. McLaughlin served as Reporter for the Uniform Law Commission’s Uniform Conservation Easement Act Study Committee.

Appendix B-1: Memorandum of Law in Support of Partial Summary Judgment (IRS brief) (July 14, 2016)
Appendix B-2: Land Trust Alliance Motion for Leave to File Amicus Curiae Brief, Amicus Curiae Brief
Appendix B-3: Order on Motion for Partial Summary Judgment (September 22, 2016)

Appendix C: Case Law
Appendix C-1: Belk v. Commissioner, 774 F.3d 221 (4th Cir. 2014), affirming 140 T.C. 1 (2013)
Appendix C-2: BC Ranch II, L.P. v. Commissioner, 867 F.3d 547 (5th Cir. 2017), reversing and remanding Bosque Canyon Ranch, L.P. v. Commissioner, T.C. Memo 2015-130

Appendix D: Drafting Pointers
Appendix D-1: LTA Conservation Defense Initiative, Eight Fundamental Elements of a Sound Modification and Amendment Clause
Appendix D-2: Center of Excellence—Colorado Coalition of Land Trusts, Stewardship Checklists—Amendments
Appendix D-3: LTA Conservation Defense Initiative, Conservation Easement Drafting: Pointers for Balancing Risk
The Land Trust Alliance has long held that amendment clauses in conservation easements strengthen easements and improve enforceability. Amendment clauses enhance the “protected in perpetuity” standard and improve the chances of perpetual easement protection. Amendment clauses help conservation organizations properly address unforeseen circumstances with well-crafted guiding principles.

(a) Clearly serve the public interest and be consistent with the land trust's mission.
(b) Comply with all applicable federal, state and local laws.
(c) Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law.
(d) Not result in private inurement or confer impermissible private benefit.
(e) Be consistent with the conservation purpose(s) and intent of the easement.
(f) Be consistent with the documented intent of the grantor and any direct funding source.
(g) Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

The Alliance specifically recommends an amendment clause to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws. Doing so clarifies up front for all parties the limited circumstances under which the parties may modify a conservation easement.

Land Trust Standards and Practices (2017) requires land trusts holding easements to have a written policy on amendments that articulates the principles for and limitations on amendments, consistent with the Amendment Principles. To date, tax court decisions have ruled only against clauses that explicitly provided for removal of land from the easement.

Eight Fundamental Elements of a Sound Modification and Amendment Clause.
Include all of the following elements for a well-drafted, sound and thoughtful modification and amendment clause. Please be sure to review these with the board and outside expert legal counsel. Below each fundamental element are italicized annotations citing its legal basis.

- Perpetual duration of the easement and intent to protect conservation purposes in perpetuity.

  The word "perpetuity" appears twice in 170(h). See also 9-2016 Summary Judgment order in Sells v. Commissioner, U.S. Tax Court Docket Nos. 6267-12, 6801-12, 6835-12, 6836-12, 6837-12, 6838-12, 19246-12 and13553-13 and the IRS Conservation Easement Audit Techniques Guide (revised January 24, 2018). “The restriction on the use of the real property must be enforceable in perpetuity, meaning that it lasts forever and binds all future owners. An easement deed will fail the perpetuity requirements of § 170(h)(2)(C)
Eight Fundamental Elements of a Sound Modification and Amendment Clause

and (h)(5)(A) if it allows any amendment or modification that could adversely affect the perpetual duration of the deed restriction.”

☐ Acknowledgment that natural conditions, landscape changes, consistent uses, economic and cultural conditions and technologies change over time.
  • This explains the basis for the legitimacy and logic of amendments and discretionary waivers and approvals. Word the clause to allow the land trust discretion as uses evolve over time, if consistent with the conservation purposes and values. Agricultural and silvicultural easements may need to address changes in underlying practices that evolve over time and respond to market conditions, while still protecting in perpetuity all conservation purposes and values. An essential boilerplate clause to balance this point is the prohibition on use of economic hardship to defeat prohibitions.

☐ Full disclosure that nothing requires Grantor or Grantee to modify the easement deed.
  • This element is in response to IRS briefs in various cases such as Belk, Balsam, Sells, Kumar and Pine Mountain. This element addresses the IRS requirement that a land trust retains all decision-making control and act exclusively in the public interest.

☐ Sole discretion for all determinations retained by the Grantee.
  • Avoid words such as “freely amend,” or “not unreasonably withheld” and "Grantor and Grantee agree," which raise specters of collusion for the IRS; see above. Also avoid explicit Grantor rights to require any amendment or modification.

☐ Incorporate all of the Amendment Principles.
  • The 2017 edition of the Land Trust Alliance Amendment Report lists the amendment principles, reproduced above. These principles incorporate compliance with Treasury Regs., Tax Code and case law. A number of these basic principles overlap. Drafters can treat these principles separately. Every principle should be part of the easement language somewhere in the deed. While it is not necessary to include all in the modification clause, it may be logical and prudent to have them in one place.

☐ Conforms to all of Grantee’s policies in effect at the time of the amendment.
  • The 2017 Amendment Report addresses land trust policies on modification.

☐ Any extinguishment, with the exception of corrections, requires approval as dictated by state law. Easements for which the donor obtained a federal income tax deduction must comply with the U.S. Tax Code.
  • IRC section 170(h) and the Treasury Regulations section 1.170A-14 apply, requiring that the donor must grant an easement in perpetuity and the deed must protect the conservation purpose in perpetuity.

☐ Discretionary approval, waiver and consent provision.
  • The 2017 revised Amendment Report addresses discretionary approvals. The standards for amendment and discretion are similar, but because land trusts exercise administrative discretion for temporary uses or structures or one-time events that are lesser in scope and scale than amendments, some of the standards are different. This could also be a standalone clause; however, sufficient overlap exists with modifications to reasonably encompass discretion within the modification clause.

Optional Elements.
You might consider including these additional optional elements in the conservation easement
Eight Fundamental Elements of a Sound Modification and Amendment Clause

or in your policy. Consider which is appropriate for your area, risks, funders, program and stakeholders.

1. Grantor compensates Grantee for actual and reasonable expenses (including staff costs) associated with processing the amendment. Require a stewardship fee in accordance with the policies of the Grantee at the time the parties sign and record the amendment.

2. No amendment effective unless documented in writing, executed by the Grantee and the Grantor (and any third-party interest holders), notarized and recorded according to the real estate laws of your state. Holders of any mortgages or other liens must subordinate their interests to any substantive modification because foreclosure of unsubordinated modifications extinguishes that modification and potentially jeopardizes easement enforcement.

3. Confirm Grantor obtained their own tax counsel, and Grantee is not responsible for any tax consequences of any nature or type and that the Grantee gives no assurances, no representations and no guarantees.

4. Require an updated baseline if the changes made affect the on-the-ground conditions.

5. Many amendments require documentation from outside experts regarding conservation values and property attributes, as well as value as determined by Grantee's appraisal and paid for by the Grantor.

Avoid an IRS Audit.
If your donors or donor attorneys fear an IRS audit, consider recommending a moderate and fully substantiated appraisal, a fully substantiated documentation of the entire transaction and including the amendment clause the elements above. If you do remove your standard amendment clause, then, at a minimum, document in writing signed by all parties for the land trust’s permanent records that the deviation from the practice of having an amendment clause does not indicate a presumption against any amendment.

General Suggestions.
• Draft defensively.
• Strive for a reasonable balance; you can’t anticipate or define everything.
• Clearly express the intentions of all parties to the easement to guide courts on interpretation.
• Avoid jargon, abbreviations, colloquialisms, terms of art or technical terms.
• Beware of common law that may construe easement language against conservation.
• Understand the politics of your jurisdiction and its influence on the judiciary.
• Include clause on conservation construction and conservation easement enabling act.
• Avoid conflict between clauses, and make explicit all assumptions.
• Explicitly address all conservation values and protected attributes.

Example Clauses.
The Land Trust Alliance is not engaged in rendering legal, accounting or other professional counsel or advice. The below example clauses merely illustrate the above fundamental elements of a sound amendment and modification clause. The IRS has not approved these clauses. These clauses are not a substitute for your own legal counsel’s review and advice on your state law issues affecting modification of conservation easements, as well as your own land trust’s policies. This checklist of fundamental elements should assist you to construct your own tailored
Eight Fundamental Elements of a Sound Modification and Amendment Clause

modification clause by including all of the elements in such a clause. The following examples illustrate three ways in which land trusts across the country incorporated the elements into their template. In one case, some of the elements appear in clauses other than the modification clause, so many ways exist to address IRS concerns, state law, Land Trust Standards and Practices, the Amendment Principles, risk balancing and the land trust’s individual policy. Thank you for exercising care and diligence in your template drafting.

Example Clause One:

14. AMENDMENT & DISCRETIONARY CONSENT

The Landowner and Easement Holder [and Executory Interest Holder] recognize and agree that [natural conditions, landscapes, consistent uses, and technologies change over time, and] unforeseen or changed circumstances could arise in which an amendment to certain terms or restrictions of this Easement would be appropriate and desirable, or that some activities may require the discretionary consent of the Easement Holder, as further described below. To this end, the Landowner and Easement Holder [and Executory Interest Holder] have the right to agree to amendments to this Easement, and the Easement Holder may exercise discretionary consent, all in accordance with:

- The provisions and limitations of this Sect. 14;
- The then-current policies of the Easement Holder; and
- Applicable governmental laws, rules, and/or regulations.

Any amendment or exercise of discretionary consent shall:

- Be consistent with the Purposes of this Easement; and
- Not significantly impair Conservation Attributes; and
- Not affect the qualification of this Easement or the status of the Easement Holder under any applicable laws, including Sects. 170(h) and 501(c)(3) of the Internal Revenue Code of 1986 and regulations promulgated thereunder, as both may be amended, and NH RSA 477:45-47 as may be amended from time to time; and
- Shall not result in private inurement or confer impermissible private benefit, nor jeopardize the Easement Holder’s status as a charitable organization under state or federal law; and
- Not affect the perpetual duration of this Easement or the perpetual protection of its Purposes.

Any request by the Landowner for an amendment or for discretionary consent shall be in writing and shall describe the proposed amendment or the activity for which consent is sought in sufficient detail to allow the Easement Holder to judge the consistency of the request and of the proposed activity with the Purposes and other terms and conditions of this Easement. To evaluate and then make a determination on the Landowner’s request, the Easement Holder shall have the right to engage independent experts, at the Landowner’s sole cost, necessary for the Easement Holder to evaluate the adequacy of the proposal. If a proposed amendment or exercise of discretionary consent has aspects which, in some respects, would be detrimental to the Purposes of this Easement and/or would impair the Conservation Attributes, but, in other respects, enhance said Purposes and/or Conservation Attributes, then the Easement Holder...
shall evaluate the net effect of such impacts when considering any amendment or exercise of discretionary consent. Nothing in this Sect. 14 shall require the Easement Holder [and Executory Interest Holder] to consider, negotiate, or approve any proposed amendment or request for discretionary consent.

A. **Amendments.** Any amendment shall be executed by the Landowner and the Easement Holder [and Executory Interest Holder], subject to review by the N.H. Attorney General’s Office, Charitable Trusts Unit as necessary, and shall be recorded in the Registry of Deeds.

B. **Discretionary Consent.** If the Landowner and the Easement Holder agree that any activity otherwise prohibited herein or not contemplated by the Easement is desirable, and if the Easement Holder determines, in its sole discretion, that such activity (i) is not detrimental to the Purposes of the Easement and (ii) would not have more than *de minimis* negative impacts on the Conservation Attributes protected hereby, the Easement Holder may then consent to such activity only [after consulting the Executory Interest Holder and] under the conditions and circumstances described herein. The Easement Holder’s consent to a proposed use or activity may be limited or restricted in time, locale, or by ownership, and shall be in writing.

C. Notwithstanding the foregoing, the Landowner and Easement Holder [and Executory Interest Holder] shall have no right or power to agree to any amendment or consent to any activities that would result in the termination of this Easement.

**Example Clause Two:**

1. **Modification, Amendment and Discretion.**
   
   (a) **Background.** Grantor and Grantee have determined, in good faith, to articulate herein the limitations of any permissible modifications hereto. Grantor and Grantee recognize that natural conditions, landscapes, uses and technologies change over time, including (select appropriate: silvicultural, agricultural, economic, open space, scenic, other consistent with the particular easement) practices. Grantee and Grantor recognize that unforeseen or changed future circumstances may arise which makes it beneficial or necessary to take certain action in order to ensure the continued protection of the Conservation Values (Purposes) of the Protected Property and to guaranty the perpetual nature of this Conservation Easement. Additionally proposed activities may require the exercise of discretion by Grantee, as further described below. This Section therefore ensures that the Grantee protects the Conservation Values (Purposes) of the Protected Property in perpetuity. To this end, if approved by the Grantee in its sole discretion, Grantor and Grantee have the right to modify this Easement. Grantee may exercise its discretion in accordance with the provisions and limitations of this Section. Grantee has no obligation to agree to any modification of this Easement.

   (b) **Form.** Any modification that Grantee determines in its sole discretion to be beneficial or necessary, shall be in the form of either (i) an amendment, in the case of a permanent modification of this Easement, including but not by way of limitation, a clerical or technical correction or modification of a reserved right; or (ii) a discretionary approval, waiver or consent in the case of a temporary activity or impact relating to the maintenance or management of the Protected Property which does not require a permanent modification of the Easement. All
amendments and discretionary actions shall be subject to this Section. Nothing in this Section, however, shall require Grantor or Grantee to consult or negotiate regarding, or to agree to any amendment or discretionary approval, consent or waiver.

(c) **Amendment Requirements.** Grantee shall not consent to any amendment of this Easement unless Grantor submits a written request for amendment pursuant to Grantee’s existing amendment policy and such amendment otherwise qualifies under Grantee’s policy then in effect respecting conservation easement amendments. The effect of such amendment shall be at least neutral with respect to or enhances the Conservation (Values) Purposes, shall be consistent with the (Values) Purposes of this Easement, shall comply with IRC Sections 170(h) and 2031(c), if applicable, with (insert state law) and any regulations promulgated pursuant to such sections, and all applicable federal, state and local laws, shall be consistent with Grantee’s public mission, shall not jeopardize the land trust’s tax-exempt status or status as a charitable organization under federal or state law, shall not result in private inurement or confer impermissible private benefit, and shall be consistent with the documented intent of the original grantor and any direct funding source as set forth in the Easement. Grantor and Grantee may amend this Easement to be more restrictive to comply with the provisions of IRC Section 2031(c). Grantee shall require subordination of any mortgage as a condition of permitting any amendment to this Easement.

(d) **Discretion.** Grantee’s may consent to or waive activities, uses or structures prohibited under this Easement or regarding which the Easement is silent or ambiguous, under the following conditions and circumstances. If, owing to unforeseen or changed circumstances, an activity, use or structure that is not expressly permitted or is otherwise prohibited under this Easement is deemed beneficial or necessary by Grantor, Grantor may request, and Grantee may in its sole discretion grant, permission for such activity, use or structure without resorting to the formalities of Grantee’s amendment policy and process, subject to the following limitations. Such request for Grantee’s consent shall (i) be made, and Grantee shall consider and respond to such request in accordance with the provisions of Section 7, entitled “Grantee’s Approval or Withholding of Approval”; and (ii) describe the proposed activity use or structure in sufficient detail to allow Grantee to evaluate the consistency of the proposed activity with the purpose of this Easement. Grantee may grant its consent only if it determines that (x) the performance of such activity is, in fact, beneficial or necessary; and (xi) such activity (A) does not adversely affect the Conservation Values or Purposes of this Easement as determined by the Grantee in its sole discretion, and (B) results in an at least neutral result with respect to or enhances the Conservation Purposes of this Easement.

(e) **General.** Notwithstanding the foregoing, Grantee and Grantor shall have no power or right to agree to any activity, use or structure that would (i) result in the extinguishment in full of this Easement; (ii) adversely affect the perpetual nature of this Easement; (iii) adversely affect the qualification of this Easement or the status of Grantee under any applicable laws, including IRC Sections 170(h) and 501(c)(3) and the laws of the State of xxxxxx; or (iv) result in either impermissible private benefit or inurement to any party. For purposes of this Section, the terms impermissible private benefit and inurement shall have the same meanings ascribed to them in IRC Section 501(c)(3) and associated Treasury Regulations. Any modification that results in a partial extinguishment with the exception of corrections and clarifications of
boundary disputes, legal descriptions and internal use demarcations, and any other *de minimus* modification, shall follow any applicable state laws regarding approvals.

(f) **Recording.** Grantor and the Grantee shall execute any amendment approved after following the procedures in this section, subject to review by xxxx if applicable in the subject state, as necessary, and shall be recorded in the xxxxxxx Registry of Deeds.

(g) **Costs.** If Grantor is the party requesting an amendment of, or discretionary approval pursuant to, this Easement, Grantor shall be responsible for all reasonable and customary fees and costs related to Grantee’s evaluation of said request and an amendment’s execution and, if applicable, any judicial proceeding of the sort referred to in paragraph 15.6 or 15.7, including reasonable attorney’s fees and costs, staff, contractor, legal, expert, consultant fees and costs incurred by Grantee, and any costs associated with any updated Baseline Documentation Report prepared pursuant to the provisions of this Section, if applicable to the facts and circumstances of the modification.

(h) **Updated Baseline Documentation Report.** In the event Grantor and Grantee agree to an amendment pursuant to this Section that results in alterations to the land, the easement boundaries, permanent structures or division of the land, then the Baseline Documentation Report shall be supplemented appropriately to the modification scope, scale and intensity. Grantor and Grantee shall acknowledge the supplement as memorializing the condition of the Property as of the date the amendment if any condition on the land has altered.

**Example Clause Three:**

**DISCLAIMER**

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**Call or write to us any time:**

Call us! We are here to help: Hannah Flake (202) 800-2248 and Lorri Barrett (202) 800-2219 or help@terrafirma.org | Leslie Ratley-Beach (802) 262-6051 lrbeach@lta.org | Sylvia Bates (603) 708-1073 sbates@lta.org

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## Conservation Easement Drafting: Pointers for Balancing Risk

**General Suggestions**

Draft defensively.

- Strive for a reasonable balance; you can’t anticipate or define everything.
- Clearly express the intentions of all parties to the easement to guide courts on interpretation.
- Avoid jargon, abbreviations, colloquialisms, “terms of art” or technical terms.
- Beware of common law that may construe easement language against conservation.
- Understand the politics of your jurisdiction and its influence on the judiciary.
- Include clause on conservation construction and conservation easement enabling act.
- Avoid conflict between clauses, and make explicit all assumptions.
- Explicitly address all conservation values and protected attributes.

Keep your amendment clause.

The Alliance has long held that amendment clauses in conservation easements strengthen easements and improve enforceability. Amendment clauses enhance the “protected in perpetuity” standard and improve the chances that easements will be protected in the long term. Amendment clauses help conservation organizations properly address unforeseen circumstances with well-crafted guiding principles.

Review the Amendment Principles in the 2017 *Amending Conservation Easements: Evolving Practices and Legal Principles* and ensure any amendment clause reflects those principles. The Alliance specifically recommends an amendment clause “to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws. Doing so clarifies up front for all parties that there are circumstances under which conservation easements may be modified.” Appendix A of the *Amendment Report* has sample amendment provisions.

*Lawn Trust Standards and Practices* (2017) requires land trusts holding easements to have a written policy on amendments that articulates the principles for and limitations on amendments, consistent with the Amendment Principles. To date, tax court decisions have ruled only against clauses that explicitly provided for removal of land from the easement.

**Avoiding an Audit**

If your donors or donor attorneys fear an IRS audit, consider recommending these steps:

1. Have a moderate and fully substantiated appraisal
2. Fully substantiate the entire transaction
3. Include in the amendment clause the elements listed at the end of this Pointer.

If you do remove your standard amendment clause, then, at a minimum, document in writing signed by all parties for the land trust’s permanent records that the deviation from practice of having an amendment clause does not indicate a presumption against any amendment and that future amendments will be guided by the land trust’s written amendment policy.
Please call Land Trust Alliance staff to discuss any concerns you may have about donated conservation easements and IRS audit and trial tactics. Alternatives exist to document good faith, full disclosure and to preserve clarity on amendments.

**Sample Clauses**

**Controlling Law and Interpretation.** The interpretation and performance of this Easement shall be governed by the laws of the State of XXX. Any general rule of construction to the contrary notwithstanding, this Conservation Easement shall be broadly construed in favor of the Conservation Easement to effect the conservation purposes of this Conservation Easement and the policy and purpose of the XXX Conservation Easement Act at Title XXX, XXX Revised Statutes Annotated, Sections XXX through XXX, inclusive, as amended. If any provision in this Conservation Easement is found to be ambiguous or conflicts with another, an interpretation consistent with the conservation purposes of this Conservation Easement shall govern.

**Economic Hardship.** In making this grant, Grantor has considered the possibility that uses prohibited by the terms of this Conservation Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. In addition, the unprofitability of conducting or implementing any or all of the uses permitted under the terms of this Conservation Easement shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment. It is the intent of both Grantor and Grantee that any such economic changes shall not be deemed to be changed conditions or a change of circumstances justifying the judicial termination, extinguishment or amendment of this Conservation Easement.

**Enforcement.** Grantee may make periodic inspection of all or any portion of the Protected Property to determine compliance with this Conservation Easement. Grantee shall have the right of reasonable access to the Protected Property for inspection and enforcement purposes. In the event that a Grantee becomes aware of an event or circumstance of noncompliance with this Grant, Grantee shall give notice to Grantor of such event or circumstance of noncompliance via certified mail, return receipt requested, and demand corrective action by Grantor sufficient to abate such event or circumstance of noncompliance and restore the Protected Property to its previous condition. Failure by Grantor to cause discontinuance, abatement or such other corrective action as may be demanded by Grantee within a reasonable time after receipt of notice and reasonable opportunity to take corrective action shall entitle Grantee to bring an action in a court of competent jurisdiction to enforce this Conservation Easement and to recover any damages arising from such noncompliance. The parties to this Grant specifically acknowledge that events and circumstances of noncompliance constitute immediate and irreparable injury, loss and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the court deems just. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity or through administrative proceedings. Nothing in this enforcement section shall be construed as imposing a liability upon a prior owner of the Protected Property, when the event or circumstance of noncompliance occurred after said prior owner's ownership or control of the Protected Property terminated.

**Future Evolution.** No use shall be made of the Protected Property and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purposes of this Conservation Easement. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Conservation Easement, they are unable to foresee all potential future land uses, future
technologies and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Conservation Easement or the Protected Property. Grantee, therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Conservation Easement or (b) alterations in existing uses or structures are consistent with the Purposes of this Conservation Easement.

**Land and Ownership Division.** The entire Protected Property described in Exhibit A may be granted, sold, exchanged, devised, gifted, transferred or otherwise conveyed in unified title as one (1) parcel only. The following are expressly prohibited: the legal or “de facto” division or subdivision of the Property, which shall include, but shall not be limited to, any subdivision, short subdivision into remainder tracts, platting, testamentary division or other process by which the Property is divided in ownership or in which legal or equitable title to different portions of the Property are held by different owners. Grantor may not indirectly divide any of the Property through the allocation of property rights among partners, shareholders or members of any legal entity, creation of a horizontal property regime, interval or time-share ownership, partitioning among tenants-in-common, judicial partition or by any other means.

**Nonwaiver.** The failure or delay of the Grantee, for any reason whatsoever, to take any action required or contemplated hereunder or to discover a violation or initiate an action to enforce this Conservation Easement or any other action shall not constitute a waiver, laches or estoppel of its rights to do so later.

**Purpose.** In conveying the development rights, conservation easement and restrictions described herein to Grantee, it is the intent of Grantor and Grantee that the interests conveyed herein shall include all development rights except those specifically permitted to the Grantor herein and those reasonably required to carry out the permitted uses of the Protected Property as herein described. The development rights and perpetual conservation easement restrictions hereby conveyed to Grantee consists of covenants on the part of Grantor to do or refrain from doing, severally and collectively, the various acts set forth below. It is hereby acknowledged that the development rights and perpetual conservation easement restrictions constitutes a servitude upon and runs with the land. Grantor and Grantee recognize these (XXX) resource values of the Protected Property and share the common purpose of conserving these values by the conveyance of conservation restrictions and development rights to prevent the use, fragmentation or development of the Protected Property for any purpose or in any manner which would conflict with the maintenance of these resource values. Grantee accepts such conservation restrictions and development rights in order to conserve these values for present and future generations as these values may evolve over time.

**Terrafirma-favored Costs and Fee Recovery.** All reasonable fees and costs incurred by Grantee in administration including, without limitation, investigation, negotiation, mediation, settlement or suit of any dispute regarding this Conservation Easement, including without limitation, all fees, costs and expenses of investigation, dispute management, negotiation, mediation, settlement or suit and reasonable attorney’s, experts and consultants fees, staff time and any fees and costs of restoration, remediation or other damage correction necessitated by any such action shall be borne by Grantor; provided, however, that if Grantor ultimately prevails in full in a judicial enforcement action, each party shall bear its own costs [optional: unless Grantee is found by a final court of competent jurisdiction to have acted in bad faith]. If Grantee prevails in part, then Grantor shall be responsible for all fees and costs of both parties as set forth above.
Amendment Clause Elements
Consider the following elements for a well-drafted and thoughtfully executed amendment clause and review them with the board and outside expert legal counsel:

1. Protect conservation values forever.
2. Disclose recent IRS audit challenges on amendment clauses for deductible easements to the Grantor through written notifications or a statement in the easement.
3. State that nothing requires Grantor or Grantee to amend.
4. Vest sole discretion for all determinations in the Grantee (avoid use of Grantor consent or agreement).
5. Any amendment must comply with all of the Amendment Principles.
6. Document amendments with outside experts regarding conservation values and property attributes, as well as financial value as determined by Grantee and paid for by Grantor.
7. Prohibit any inconsistent uses, especially in special protected zones or areas.
8. Supplement the baseline documentation, if appropriate to the modification.
9. Require approval according to state law for amendments that exceed stated discretion and for extinguishments in excess of corrections and clarifications of boundaries and legal descriptions, except for deeds in lieu of condemnation where Grantee determines that the exercise of condemnation would be lawful, the best interest of all parties would be better served by negotiating a settlement with the condemning authority and Grantee receives full compensation.
10. Conform to all of Grantee’s policies in effect at the time of the amendment.
11. Compensate Grantee for the actual and reasonable expenses (including those of its staff) associated with processing the amendment, and require a stewardship contribution in accordance with the policies of the Grantee at the time the amendment is proposed.
12. Document in a notarized writing executed by Grantee and Grantor and recorded according to the real estate laws of your state.
13. Confirm Grantor obtained own tax counsel, and land trust not responsible for any tax consequences of any nature or type. No assurances; no representations by the land trust.

Call or write to us any time:
Call us! We are here to help: Hannah Flake (202) 800-2248 and Lorri Barrett (202) 800-2219 or help@terrafirma.org | Leslie Ratley-Beach (802) 262-6051 | lrbeach@ita.org | Sylvia Bates (603) 708-1073 sbates@ita.org

DISCLAIMER
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RESOURCE LIST ON CONSERVATION EASEMENT AMENDMENTS
(For documents on The Learning Center you will need to be logged in)


**CHRONOLOGICAL ORDER OF AMENDMENT ARTICLES**


Guide-and-Model-Policy-for-Conservation-Easement-Amendment


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Instructor Biographies

Karin Marchetti Ponte
Karin Marchetti Ponte is a lawyer who has devoted her career to land trust representation, in particular conservation easement design and drafting. She is the author of the drafting guide in the Conservation Easement Handbook, 2005, LTA. She has been general counsel to Maine Coast Heritage Trust since 1985, and principal at Land Conservation Legal Services since 1992. She is a member of the Claims Committee at Terrafirma Risk Retention Group. She authored legislation in Maine to limit amendment of conservation easements.

Christian Dietrich
Christian Dietrich serves as General Counsel for The Montana Land Reliance, the nation's largest statewide land trust, with over 1,000,000 acres of Big Sky country under easement. He chairs the Nonprofit Section of the State Bar of Montana, and is a graduate of St. Paul's School, Yale University and the University of Montana School of Law. Christian is the co-author of Conservation Easements: Tax and Real Estate Planning for Landowners and Advisors (American Bar Association, 2011).