Amending Perpetual Conservation Easements
Confronting the Dilemmas of Change: A Practitioner's View

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Abstract

As conservation easements age, land trusts have begun to confront changed circumstances that they could not have anticipated when the easements were drafted, and under which an amendment may serve conservation or other public interests. These may involve changes in law, species, technology, community needs, or even climate. The questions to be asked are:

• What criteria should be used to determine whether an easement amendment would be appropriate?

• What process should be used to make that determination?

• Who decides?

The land trust community is divided over whether or not easements are charitable trusts, which can only be amended with a court's approval. This paper explores the legal, ethical, and public relations issues surrounding amendments and the limitations of applying the charitable trust doctrine. It proposes a legislative solution to clarify the rules for amending easements in response to changed circumstances.

About the Author

Darby Bradley has worked in the field of land conservation in Vermont for more than 30 years. He joined the staff of the Vermont Land Trust as general counsel in 1981 and became its President in 1990, a post he held until 2007. During that period, VLT helped conserve more than 465,000 acres of land, including over 600 operating farms, through conservation easements and outright acquisitions. Darby has also served as Chair of the Vermont Environmental Board, Trustee of the Land Trust Alliance, and Chair of the Vermont Forest Resources Advisory Council. He chaired the working group that helped the Land Trust Alliance produce its report "Amending Conservation Easements: Evolving Practices and Legal Principles" (August 2007).

He currently serves as Special Assistant for Donor and Government Relations for the Vermont Land Trust. Darby was the first recipient of the Land Trust Alliance's Kingsbury Browne Conservation Leadership Award, created in 2006 in memory of Kingsbury Browne, a Boston attorney who inspired the creation of LTA and mentored a generation of land trust leaders. This paper was sponsored by a fellowship established by the Lincoln Institute of Land Policy and given as part of the Kingsbury Browne Award.

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The date was April 2004. My wife Liisa and I were driving across Missouri on the homeward leg of a 10-week sabbatical trip to visit over 30 land trusts around the country. I was reflecting on all that we had seen and heard, marveling at the energy and creativity these organizations were bringing to the preservation of the environmental and cultural heritage of their communities. While land trusts were under attack in the Washington Post and in some corners of Congress at the time, we clearly had much to be proud of.

But I was also looking forward. I had been part of the first wave of land trusts which used conservation easements as their primary conservation tool, although some like the Brandywine Conservancy and Maine Coast Heritage Trust had pioneered their use even earlier. While legal and IRS regulations set certain limits on our activities and we looked for advice from Kingsbury Browne and others, we mostly had the fun of making it up as we went along. Now, with my generation beginning to pass our portfolios of easements and conserved properties to new leaders, I wondered what challenges our successors would face.

As we neared St. Louis, I thought about how, just 200 years earlier, Lewis and Clark were setting out to find an overland route to the West Coast and how much our country had changed in the intervening time. Suppose I had been a land trust lawyer in 1804 and drafted a conservation easement for a farm outside of St. Louis. Could I have foreseen the coming changes in agriculture, the growth of St. Louis, the industrial and technological revolutions, the link between environmental and human health, or the arrival of a global economy, global terrorism and global climate change? And if I could have missed so much in 1804, what am I missing today that will emerge in the next 200 years? These thoughts left me with a strong sense of humility and a slight sense of the absurdity of believing that I could do anything "in perpetuity," even though that is what I had espoused.

When we returned to Vermont, I began collecting case studies in which land trusts had been confronted by circumstances that they did not anticipate—indeed, could not have anticipated—at the time the easement was drafted, but where, if the easement was strictly enforced, the result seemed to run contrary to sound public policy. I was not interested in cases in which an amendment served purely private interests or was for the financial benefit or convenience of the land trust. These could be easily dismissed as inconsistent with governing land trust law and prevailing practices. Instead, I was looking for cases that posed a dilemma between strict adherence to the language of the easement on the one hand and promoting good conservation policy and the public interest on the other.

I was also interested in understanding what the law of easement amendments really is. Nancy McLaughlin, a professor at the University of Utah College of Law had published a number of scholarly articles arguing persuasively that conservation easements are held as charitable trusts. Nancy's conclusion is that easements are governed by the "charitable trust doctrine," and unless the easement includes an explicit right to amend, any material

deviation from the easement terms must receive approval from a court. Other attorneys, including University of California, Hastings Law School professor Bill Hutton, a person I had often turned to when faced with a tough legal call, are equally adamant that the charitable trust doctrine had no applicability to easement amendments. The most knowledgeable land trust attorneys in the country seem completely divided on the issue. Absent a clear state statute or Supreme Court decision, no one can say with certainty what the law of easement amendments is.

I have also found great reluctance within the land trust community to open up the subject of amendments. In part, this is due to a fear of the slippery slope. Once you open the door to amendments even a little, where do you stop? By "just saying no," you don't have to confront the dilemma, even if "no" sometimes produces a result that seemingly runs contrary to conservation and public interests. But the reluctance is more than that. With the Post and Congress scrutinizing land conservation transactions, and with the law governing easement amendments so uncertain, who would want to focus a spotlight on their organization, when an amendment might be challenged in the press or by the IRS? In addition, amendments raise ethical issues. How can a land trust consider amending a perpetual easement when it has promised the landowner, funders, and the public that the easement would last in perpetuity?

Finally, as the land trust community is painfully aware, there have been a few examples of bad amendments that served primarily private interests and abused the public trust that had been placed in the easement holder. In a recent Wyoming case, at the request of a successor landowner, a county had simply released an easement, for which the original donor had claimed a $1.2 million tax deduction. In a less egregious, but equally wrongheaded Maryland case, an historic preservation organization partially terminated a conservation easement in return for enhanced protections on the historic buildings. This drew the ire of the donor's heirs, the Maryland Attorney General, and most of the land trust community. The organization ultimately rescinded its decision. These and a handful of other cases have heightened the fear that the public and the IRS will view all but the most innocuous of amendments as potential breaches of the public trust. Just saying "no" avoids these problems.

And yet, as the case studies in the Appendix show, an amendment may, in some circumstances, serve both conservation and public interests, even though it falls outside the strict language of the easement or the technical requirements of the charitable trust doctrine. I have no quarrel with a land trust that decides to adopt a strict constructionist approach. On the other hand, remembering how limited our ability is to anticipate the future, land trusts at least need a framework to discuss the issue. In my mind, there are three important questions:

- **What criteria should be used to determine whether an easement amendment is appropriate?**
- **What process should be used to make the determination?**
- **Who decides?**

A starting point for a discussion of easement amendments is a recent report of the Land Trust Alliance (LTA) entitled *Amending Conservation Easements: Evolving Practices and Legal Principles.* That report draws heavily on the work of a committee that included Professors McLaughlin and Hutton and the input of dozens of peer reviewers. Although the report does provide helpful guidance on many aspects of amendment policy, the committee was unable to reach a consensus on what the current law of amendments is or even what an amendment law should be. This was due in part to the differences in state laws. The result is that every land trust faces a degree of uncertainty when addressing complicated amendment questions, and must reach its own conclusions about whether and when to step onto the slippery slope.

The purpose of this paper is to pick up the conversation where the LTA report left off. It explores some of the more problematic case studies that were deleted from the LTA report because they only further muddied already cloudy water. It explains why, in this practitioner's view, the charitable trust doctrine and process does not fit comfortably into many amendment situations. At the same time, it endorses the concept of third party review in complicated amendment cases. It talks about the ethical and public relations dilemmas associated with difficult amendment decisions. Finally, because it will take decades for the courts to clarify the law in each state, it proposes a legislative solution to the current state of uncertainty and offers one approach to answering the three questions posed above.

This paper does not represent the policy of the Vermont Land Trust or the State of Vermont. Although the legislative proposal presented here has been reviewed by a number of affected state agencies, it remains to be seen whether this proposal or some variation will find acceptance in the Vermont Legislature next year. Each state and each land trust will serve as a laboratory for finding our way through the tangle of legal, ethical, and public relations issues that amendments inevitably raise. Eventually, after we have had years of experience confronting changes that the easement drafters never anticipated, we may arrive at the consensus that has thus far eluded us.

Introduction to the Case Studies Appearing in the Appendix

The six case studies in the Appendix are drawn from real examples. In some, the decision has been made. In others, it is still pending. Each is intended to highlight the dilemmas raised between strict enforcement of the easement, as drafted, and modification of the easement to respond to changed circumstances in a way that may serve public and organizational interests. There are no right answers.

In Case Study #1 - The Fire Station, a town wants to enlarge its fire station in response to community growth by acquiring a portion of a conserved parcel. It tests amendments in the face of a threat of condemnation.

In Case Study #2 - The Failed Septic System, the septic system for a house on an inholding unexpectedly fails, and the only practical alternatives are to allow a replacement system to be built on conserved land or tear the house down.

In Case Study #3 - Cell Antennas on Farm Silos, the land trust is confronted with an amendment request for a technology that didn't exist when the easement was written.

In Case Study #4 - Four Corners I, the land trust is asked to allow the construction of a guest house on conserved land in return for the elimination of an in-holding and potential house site in the middle of a conserved property.

In Case Study #5 - Four Corners II, the land trust is asked to release a portion of an existing easement in an area with relatively little conservation value to help finance the protection of an adjoining tract with high conservation value.

In Case Study #6 - Smart Growth and the Clash of Public Policies, two farmland conservation organizations, which also promote affordable housing, are asked to terminate the restrictions on development on low-productivity soils near a village to promote compact growth, reduce sprawl, and conserve more productive soils in outlying areas.

Because these case studies are referred to from time to time in this paper, the reader may find it helpful to read or at least scan the Appendix at the outset, and then go back to them at the end. The author welcomes case studies raising similar legal, ethical, public relations, and public policy dilemmas that other land trusts have experienced or are familiar with.

State Law and the Charitable Trust Doctrine

The authority to acquire, hold, enforce, transfer, amend, and otherwise administer a conservation easement is principally a matter of state law. While federal law places certain limits on the conduct of 501(c) (3) organizations and establishes the requirements for tax-deductibility of donated easements, it is state law that authorizes the creation of a land trust and sets the rules under which they must operate. Unfortunately, except for a few states such as Maine, which recently amended its easement-enabling statutes, the rules governing easement amendments and terminations are too vague to provide land trusts and other easement holders with clear guidance on the subject.

For many years, many practitioners (including this author) assumed that a land trust had the authority, as the owner of the interest, to amend an easement. This view was, of course, constrained by the prohibitions against private inurement and impermissible private benefit; the requirement that a charitable organization operate within its charter; the need to maintain credibility and confidence with its members and the general public; and a desire to serve the public interest. Nevertheless, if an amendment made sense in light of unanticipated circumstances, was consistent with state law, and had the support of the original landowner and the community, these practitioners assumed the land trust had the authority to amend. In recent years, however, that view has been challenged, first by University of Utah College of Law professor Nancy McLaughlin and later by the attorney generals for Maryland and New Hampshire, among others. Their position is that conservation easements constitute charitable trusts, and that any material change to the

administrative requirements or charitable purposes of the easement must be sanctioned by the courts under the charitable trust doctrine.

The charitable trust doctrine evolved from English and American common law to deal with cases where, as the result of changed circumstances, it is no longer possible or practical to carry out the terms of the trust document as was originally intended. Many states have now codified the doctrine into their laws governing charitable trusts. To give an example of why the charitable trust doctrine is needed, I recall reading in law school about a trust that had been established to combat piracy on the Great Lakes. Eventually, the pirates were routed, so what could the trustee do with the remaining money? Several years ago a small college in Vermont went out of business. What should happen to the endowment funds that were created to support the programs at the now defunct college? Under the charitable trust doctrine, the trustee and the college in each case petitioned the courts to modify the terms of the trust, because it was no longer possible or practical to implement the trust as written.

Charitable trust proceedings fall into two general categories: The first involves modification of the administrative terms of the trust. If, for example, a trust requires the trustee to invest the principal only in tax-exempt bonds, and changes in the investment climate make that imprudent, the trustee may petition the court to modify the restriction to allow more freedom in making investment decisions. Under modern rules, courts are often quite willing to accommodate administrative deviations, so long as the basic purposes of the trust will remain unchanged.

The second category of cases, as illustrated by the pirate and college examples above, is one in which the trustee seeks a change in the charitable purposes of the trust. Here, the trustee must show that it is "impossible or impracticable" to fulfill the purposes of the trust as written. If the court agrees, it may then modify the original purposes under the doctrine of cy pres. Cy pres means "as near as possible." It allows the court to remold the purposes of the trust to come as close as possible to the creator's original intent. In the pirate case, the court might allow the fund to be used to promote shipping on the Great Lakes. In the college case, the endowments may be transferred to another institution to fund similar educational programs. Under cy pres, the court has broad discretion in crafting changes to the trust. However, it only has that authority if it first finds that carrying out the original purposes of the trust is "impossible or impracticable."

For the reasons explained below, I have been skeptical about the wisdom of a wholesale application of the charitable trust doctrine to conservation easements. Nevertheless, I have come to appreciate the benefits of requiring a third-party review – although not necessarily judicial review – for all material amendments of easements. Sometimes, in the swirl of the moment, it is difficult to think clearly about conflicting interests or better alternatives. Third-party review can help sort that out. In addition, as the Wyoming and Maryland cases cited above illustrate, there is always a risk that a land trust or a governmental holder will amend or terminate an easement when it does not serve the public interest. When that happens, it not only damages the standing of that organization, but of the entire land trust community. By submitting material changes in the terms or

purposes of an easement to public scrutiny, we will provide greater transparency for our decisions, expose ourselves to other viewpoints, and in the process build greater public understanding and confidence in our organizations and missions.

The reservations I have about the application of the charitable trust doctrine are several: First, if the charitable trust doctrine is applicable at all, it seems most likely to govern easements that are created with some element of charitable intent: either a donated easement or one purchased with donated funds. However, not all easement acquisitions have this element. Some easements are created when a land trust sells a property that it has acquired without any restrictions through purchase or gift. Others may result from the settlement of an easement violation or of a boundary dispute between adjoining landowners. In Case Study #6, the easement was purchased entirely with funds from an organization with a dual mission of promoting land conservation and affordable housing. If the easement holders later decide to make an adjustment that would promote affordable housing near the village center and agricultural land protection in outlying areas, and that decision has the endorsement of the community and the state, why should the charitable trust doctrine require the holders to also establish that it is "impossible or impracticable" to maintain the easement as is? If a reviewing judge finds that the easement cannot be amended because the original purposes of the easement can still be achieved, the practical outcome may be more sprawl and the loss of better farmland. At the same time, it makes little sense to this author to evolve one set of rules for easements created with charitable intent and another set of rules for easements created without. In 50 or 100 years, it will be difficult to determine which is which. A single set of standards should apply to all easement amendments.

My second concern is over the standard of "impossible or impracticable," the threshold requirement for any change under *cy pres*. In each of the case studies cited in the Appendix, there is nothing impossible or impracticable that prevents the land trust from enforcing the original easement exactly as written. In doing so, however, important conservation opportunities may be lost and the public interest may not be well served. A third-party reviewer may consider the issue of impossibility or impracticability due to altered circumstances in deciding whether to approve an amendment. However, failure to show impossibility or impracticability should not bar the review.

A third reservation arises from the Wyoming case Hicks v. Dowd, in which a county held a conservation easement, but terminated it without regard to the original donor's intent or the public's conservation interests. In the appeal, the Wyoming Supreme Court accepted (as a finding of fact, not as a matter of law) that the easement was a charitable trust. The Court then dismissed the suit brought by local citizens without ever reaching a decision on the appropriateness of the termination. The Court concluded that the members of the public who challenged the county's action lacked "standing" to bring the suit. Only the Wyoming Attorney General, as the legal representative of the trust's beneficiaries (i.e., the general public), had the ability to challenge the county's decision. The Court suggested, but did not rule, that the Wyoming Attorney General reconsider its decision not to intervene in the case.

While the Wyoming Supreme Court decision may be consistent with charitable trust doctrine in that state, it raises a very worrisome possibility: If an attorney general chooses not intervene in easement amendment cases, whether because of workload, other priorities, politics or any other reason, there remains no effective mechanism to protect the public interest from inappropriate amendments. It is true that had a nonprofit land trust terminated an easement without full compensation, as the county did, it would swiftly lose its tax-exempt status and be out of business. Nevertheless, under Hicks v. Dowd, this still may not save the easement, should the attorney general decide not to intervene. The rules for amendments should be the same for both governmental and nongovernmental easement holders, and enforcement should not depend upon the work load or political whims of the state's attorney general.

A fourth reason for not strictly adhering to the charitable trust doctrine is that there are many provisions included in the standard conservation easement that are initiated by a party other than a landowner. Land trust have (or should have) a standard easement template in order to promote greater consistency in interpretation and ease of administration. State and federal law may require certain standard language. In the case of purchased easements, funders may insist upon certain provisions. In short, the language of a conservation easement is usually derived from many sources, including the landowner, land trust, funders, state and federal law, and IRS regulations. In some cases, the landowner may even object to a particular provision, but decide to sign the easement anyway. Later, as those requirements and provisions change, alterations to the easement may, in certain circumstances, also be appropriate to reflect current law and public policy. The charitable trust doctrine may not allow such flexibility. Under the legislative proposal described beginning on page 14 below, the changes may still undergo third-party review and approval. However, the land trust and the landowner would not first have to meet the threshold of showing that the original easement is impossible or impracticable to enforce.

Finally, I personally favor having the third-party review conducted by an independent administrative panel that represents a cross section of conservation and other public interests. It seems more likely that a permanent panel would provide greater consistency in the logic applied, and the outcomes reached, in amendment cases than would a series of rotating judges, who may have little or no familiarity with land conservation and who may decide charitable trust cases on a case-by-case basis solely on equitable grounds and without full consideration of the public interest. It is also important that, unlike what happened in the Wyoming case, members of the public have an opportunity to state their opinions about the proposed amendment, without the normal limitations of party status, rules of evidence, cross-examination, and other contested case rules. These issues will be discussed at greater length below.

In summary, the debate over the charitable trust doctrine has provided important new perspectives within the land trust community. However, in most states whether, and the degree to which, the doctrine is applicable to conservation easements is not clear. This uncertainty seems likely to continue for decades to come, unless as in the case of Maine, the legislature creates a legislative solution. The origins of the charitable trust doctrine

are quite different from the origins of property and conservation easement law. The land trust community should draw on the best of both traditions and fashion an amendment process that will serve conservation, landowners, land trusts, and the community at large.

Federal Law and the "Nuclear Option"

Legal experts largely agree that the Internal Revenue Service has no authority to challenge an easement amendment for which no charitable deduction was claimed, so long as the amendment does not result in any impermissible private benefit or private inurement to an "insider." Even where a donor has claimed a charitable deduction for a donation or bargain-sale of an easement, these experts also agree that after the expiration of the three-year statute of limitations for the review of income tax returns, the IRS can no longer challenge the deduction or the amendment.

Nevertheless, the IRS might, possibly, still take action against a land trust that approves an amendment by disqualifying that organization as a future recipient for qualified easement donations. This is the so-called "nuclear option." IRS regulations allow a donor to claim a deduction under IRC Section 170(h) only if the recipient organization has "a commitment to protect the conservation purposes of the donation and (has) the resources to enforce the restrictions." Although it has never done so, some commentators argue that the IRS could take the position that, because a land trust has approved amendments to its easements, it has not demonstrated the requisite commitment to protect and enforce the easement, and therefore tax deductions for future easement donations to that organization may be denied. IRS staff members appearing at LTA's annual conferences have reinforced that perception by stating as recently as October 2007 that amendments are appropriate in only very limited circumstances, such as when correcting scrivener's errors or adding conserved land. The very possibility of losing one's eligibility to receive tax-deductible easement gifts will frighten some land trusts into inaction, even when they believe that an amendment is appropriate and serves the public interest.

The one exception to the general requirement that easements be perpetual (which even the IRS seems to accept without question) is changes resulting from eminent domain proceedings. Few people would argue that a land trust that amends or terminates an easement under threat of condemnation should lose its status as an eligible easement recipient. In fact, IRS rules require that easements include a formula for dividing the proceeds between the landowner and easement holder, in the event an easement and the underlying land are taken by eminent domain.

Why wouldn't the IRS be concerned about a land trust's acquiescence to the loss of a perpetual easement by eminent domain? One might surmise that there are three reasons: First, the taking is intended to serve a substantial public purpose. It is not for the convenience of the landowner or the land trust. Second, there is a public entity—the condemnation authority, whose decisions are reviewable by the courts—that decides when a condemnation is in the public interest. Third, the owners of the condemned

property don't receive any financial windfall from the condemnation. They are entitled to receive only the value of what they have lost.

Voluntary amendment cases are somewhat different, of course. Yet, if these same three elements are present in the amendment process – substantial public benefit, independent determination of where the public interest lies, and no financial windfall to landowners – should the IRS, as a matter of public policy, still be concerned about the outcome of amendment cases?

There can certainly be some hesitancy about raising the issue of amendments at a time when Congress has recently completed an investigation of conservation easement practices and when the IRS is conducting hundreds of audits into donated easements. Still, at some point the land trust community must begin to educate Congress and the IRS about the dilemmas that ever-changing circumstances will begin to pose for land trusts, landowners, and communities. We need to discuss the cases where, under certain circumstances and with appropriate procedural safeguards, an amendment may actually serve the public interest. Congress and the IRS have a legitimate interest in ensuring that the public's investment in land conservation is protected. This does not mean that the public interest is always best served by blindly objecting to all substantial changes to perpetual easements, especially when the evidence runs clearly to the contrary. Congress and the IRS should have the right to expect, however, that if amendments are allowed, there be adequate standards and procedural safeguards to ensure that the public's interest is protected.

I would note in passing that the discussion about easement amendments should not be confined to just Congress and the IRS. It must also involve federal agencies that fund state or non-profit easement purchases. A recent case of an easement acquired with funds from the federal Farm and Ranchland Protection Program illustrates the point. The State of Vermont and a power company were seeking to upgrade an electric transmission line through Vermont's Champlain Valley, where there are close to farms under easement. When the company proposed locating a substation on FRPP-assisted conserved land, the Natural Resources Conservation Service said that it would not allow this to happen under any circumstances, even condemnation. While I agreed with the result in that case because there were other suitable sites for the substation, I question the wisdom of saying "never, under any circumstances" if there are no reasonable alternatives and an amendment would result in significant public benefits and only a minimal loss in conservation values. However, that's a topic for another time.

Another difficult issue in amendment cases involves the determination and calculation of "impermissible private benefit." Although an amendment clearly may not result in such benefit, there is virtually no guidance in the IRS regulations or case law on when they may occur or how to make the calculation. There are instances when an amendment may have significant public benefits and cause a minor loss in the conservation values of the original easement, and still result in substantial benefits to private landowners. The reverse can also be true. The land trust community needs greater guidance from the IRS

on when an amendment may result in "impermissible private benefit," and how to make that calculation.

Ethical Dilemmas

Aside from the questions surrounding state and federal laws, the issue that is often most quickly raised whenever the subject of amendments is broached is ethics. How can a land trust even think about amending an easement when it has represented the easement as perpetual? Don't their ethical obligations to their landowners require them to refuse all but the most innocuous changes?

In truth, a land trust's ethical obligations are not just to the landowner. If that were the case, a land trust could sell the development rights back to the original landowner, so long as it was fully compensated for the value of the rights. If there is no impermissible private benefit, it would seem perfectly legal. Yet, should this happen, the howls of public outrage which would surely ensue suggest that the land trust has ethical obligations extending beyond the person who originally conveyed the easement.

I believe that land trusts have ethical obligations to at least five stakeholders: The first is the **Landowner**; this includes the person who originally conveyed the easement and those who come afterwards. The second is the **Funders**, the people and organizations that funded the acquisition and, in the case of donated easement, the taxpayers. Third is the **Community at Large,** the human community who gives the land trust its existence as a tax-exempt, non-profit public interest institution and creates the conditions and incentives which allow the organization to be successful. The fourth is the **Land,** which includes other species and natural systems that Aldo Leopold believed the human community is a part. Finally, we have an ethical obligation to the **Land Trust** and our successors who, because we will not be around forever, must steward the easements we wrote and keep the promises we made.

At the time an easement is signed, the interests of all five stakeholders more or less coincide with each other. True, some members of the Community at Large may object to permanent restrictions on land, or the IRS may challenge an appraisal, but in general the interests of the five stakeholder groups would appeared to be aligned with the transaction. Later, with the passage of time and the introduction of new information, changes on surrounding lands, different needs of society, and other circumstances not anticipated at the outset, the interests of some stakeholders may begin to change. When that happens, it places the land trust in a difficult position. Which set of interests should the land trust favor? To which stakeholder group does the land trust owe its primary ethical responsibility?

A short example may illustrate the problem. Suppose a landowner bargain-sells an easement on 100 acres of land at 50 percent of the appraised value. In the easement, the landowner retains the right to build a single house in a pre-approved location. To cover the cost of the purchase, the land trust conducts a community fundraising campaign. One of the contributors is a neighbor who lives across the road from the property being

conserved and whose view will be protected by the easement. The house site designated in the fundraising materials is not visible from the neighbor's house.

Several years after the easement is signed, but before the landowner builds a house, a wildlife biologist conducting research in the area discovers that the house site is located in the middle of a critical wildlife corridor. The biologist suggests that the house site be moved to a different location. The landowner agrees. However, the neighbor objects, because the new house site would be visible from his home. How should the land trust decide?

The land trust's first step, of course, would be to try to accommodate everyone's interests by finding a location that protects the wildlife, satisfies the landowner, and preserves the neighbor's view. Failing that, the land trust would probably weigh the relative benefits and costs to the interests of the affected stakeholders. If the benefits to wildlife conservation (i.e., to the Land) are great, it might approve the change, even if this is to the detriment of one of the Funders. This will be a difficult choice, and fairness may dictate that the land trust refund the neighbor's contribution. However, the point is that the land trust's ethical obligation to one group of stakeholders should not always stand in the way, if the ethical obligation to another group is paramount.

In weighing a land trust's ethical obligations, I tend to place its primary obligation on the side of the Community At Large, which includes the Land in Aldo Leopold's sense. It is the community after all which gives the land trust its existence and provides tax incentives, funding and other means to allow it to succeed. This does not mean that a land trust must blindly adhere to whatever the Community at Large wants, especially when non-conservation interests are asserted. It must still work hard to try to serve the interests of all interested parties. However, it must also recognize that sometimes circumstances will make that impossible, and it will then be forced to choose one group of interests over another.

This inherent conflict in ethical obligations reinforces the importance of having third-party review for all major easement amendments. In the example given above, if the easement gives the land trust the authority to approve a different location, it may do so without further review, although it may still want to refund the neighbor's contribution based on its previous representations. If that authority does not exist, however, third-party review would seem appropriate. The criteria and procedures for that review will come later in this paper. The important point in this hypothetical case is that changed circumstances – in this case, new scientific information – may dictate a modification to the original plan. To make the change would not, in my view, be unethical.

Each land trust must decide how it will balance its multiple ethical obligations, and then be prepared to explain its decisions to its members and the general public. This leads us to the subject of public relations and how easement amendments may affect the land trust's standing within the community.

Public Relations

Beyond the legal uncertainties and the ethical dilemmas, the most immediate concern a land trust may have about amendments is their effect upon its membership and community support. The concern is real. A poorly conceived or poorly explained amendment may have disastrous consequences for the organization, resulting in reduced financial support and fewer landowners willing to consider conveying an easement. The organization must protect its goodwill and the public's trust, if it is to survive.

Part of maintaining goodwill and public confidence is having a reputation for reasonableness. In the cell antenna case (Case Study #3), it would have seemed unreasonable for the land trust to disallow a commercial use that didn't exist when the easement was written, when the use had so little negative impact on conservation values and provided significant public benefits (e.g., cellular phone reception and the elimination of the need to construct a free-standing cell tower). In Case Study #2, where the septic system on an in-holding failed, the land trust may be seen as unreasonable if a person lost his or her home, when a benign solution existed right next door. On the other hand, in Case Study #6, the easement holders may decide not to approve the changes, regardless of the public benefits, if they feel that the public will not agree with, or does not understand, the state's long-standing public policy of encouraging compact human settlements surrounded by rural countryside.

Two factors will be paramount in the public's reaction to an amendment proposal. The first is the public's perception about whether the amendment clearly serves the public's interests, and especially the public's conservation interests. It cannot be a close call. The benefits must be substantial and obvious. If they become intermingled with perceptions that the amendment is motivated for the financial benefit of the land trust or to accommodate the wishes of a wealthy or influential landowner, the amendment should be dead in the water, or the land trust will be.

The second factor is the land trust's ability to explain its decision. Regardless of the merits of an amendment, the land trust cannot assume that its members or the general public will understand and agree with its reasoning. The greater the change under consideration, the harder the organization must work to explain its thinking to the public before making a final decision. There will always be some people who take a cynical approach and look for ulterior motives. It is the views of the mainstream that matter most, and the land trust will have to work to get them on its side.

Over the past two years, whenever I have visited donors and landowners, including people who have donated easements on their land, I have talked about some of the dilemmas posed by the case studies in the Appendix. On the whole, I have been pleasantly surprised by the thoughtfulness of people's reactions and their receptivity to the land trust's willingness to even consider the cases. Only one person, a former board member of the Vermont Land Trust, expressed serious reservations. Outside of Vermont and VLT's membership, however, the reaction has been decidedly more mixed. Clearly, if the land trust community is going to address this issue, we have a lot of explaining

ahead of us. If we take the time to do this, I think we'll actually strengthen landowner and public confidence in our programs.

In addition to the land trust's explanation of its case, public acceptance of significant amendments will be enhanced, if the public has an opportunity to express its opinions before a final decision is made and if there is an independent review and approval of the proposal. It is this view that lies behind the proposal to create an independent Easement Amendment and Termination Panel, to which this paper now turns. By increasing the transparency of major amendment decisions and giving the public the ability to weigh in, the benefits in public understanding and acceptance will outweigh the burden of an additional process.

Toward a Legislative Solution

Because it will be decades before the courts in fifty states will be able to address the many issues surrounding easement amendments, including the applicability of the charitable trust doctrine, a legislative solution is needed to resolve the current legal uncertainties and guide land trusts on the topic. Maine was the first to take this step. In 2007, Maine adopted legislation that requires court approval for any amendment which "materially detracts" from the conservation values of the easement. It applies to both purchased and donated easements, and governs governmental as well as nonprofit easement holders. While the Maine law has elements similar to the charitable trust doctrine, it introduces public interest as well as donor intent into the court's consideration. It also seemingly does away with the doctrine's threshold requirement of "impossible or impracticable." New Hampshire's Attorney General has taken the position that the state's adoption of the Uniform Trust Code means the charitable trust doctrine applies at least to donated easements. Maryland's Attorney General and the Maryland Environmental Trust have reached similar conclusions based on that state's laws. Massachusetts has a unique statute that requires town and state approval of all perpetual conservation easements, so presumably any amendments in that state must also be approved under the same procedure.

Vermont has approximately 2,000 eased properties statewide; however, the law governing amendments and terminations is unclear. While there have been no perceived abuses of donor intent or the public interest to date, it is in the interest of landowners, the land trust community and the public at large to establish clear boundaries for when easement holders alone may decide upon an amendment request, when third-party review and approval is required, and what procedural and substantive criteria will be for approval. The balance of this paper presents and discusses one approach to a solution. It proposes the creation of an Easement Amendment and Termination Panel within an existing state board. Other states with different institutions and political traditions will take different approaches, including the use of the courts. To a great extent, the states can serve as laboratories in which the land trust community will experiment and from which the best standards and practices will emerge.

The Easement Amendment and Termination Panel

In the 1950s, Vermont established a Water Resources Board to classify the state's rivers and oversee the state's water resources protection program. In 1970, it created the Vermont Environmental Board to administer the state's principal development control law, Act 250. Four years ago, the Legislature merged the two boards into a nine-member Natural Resources Board (VNRB). VNRB has separate water resources and land use panels, but the two panels share a common board chair and staff. The members are appointed by the Governor to staggered four-year terms and are confirmed by the Senate.

This proposal would create a third panel, the Easement Amendment and Termination Panel (Panel) with VNRB. The Panel would review all changes to established conservation easements that do not fall within certain defined exceptions. The review authority would apply to both government and nonprofit easement holders, as defined by Vermont's easement enabling legislation, and would govern all easements, whether created by purchase, donation, or other means. The process and criteria for the Panel's decisions are described below.

The Panel itself would include three members drawn from the full VNRB board, one each from the water resources and land use panels, plus the board chair. Two additional members with experience and expertise in the land conservation field would also be appointed by the Governor and confirmed by the Senate. One of the additional members, plus an alternate, would be selected from a list of not less than three candidates nominated by the Vermont Housing and Conservation Board (VHCB). VHCB is a quasigovernmental board that administers Vermont's land conservation and affordable housing grants program. It establishes the policies governing the acquisition and stewardship of easements purchased with state funding. The other appointee and alternate would be drawn from a list of at least three candidates submitted by the nonprofit land trust community in Vermont. Any land trust that has completed ten or more easement acquisitions in Vermont would be eligible to participate. No person who has been employed as a staff member or consultant or who has served on the board of VHCB or an eligible land trust during the preceding 12 months would be eligible for appointment.

The purpose of including the two additional appointees is to ensure that the Panel has members who are knowledgeable about the land conservation process and policies. At the same time, a majority of Panel members would be drawn from other disciplines to ensure that the Panel will reach an independent decision that best serves the public interest.

Threshold Considerations

Not all easement amendments would require the Panel's review. If an amendment clearly falls within the amendment principles set forth in LTA's report, *Amending Conservation Easements,* the holder should have the authority to proceed without third-party review. LTA's principles require that the amendment:

• Clearly serves the public interest and is consistent with the land trust's mission.
• Is consistent with the conservation purpose(s) and intent of the easement.
• Is consistent with the documented intent of the donor, grantor, and any direct funding source.
• Complies with all applicable federal, state, and local laws.
• Does not jeopardize the land trust's tax-exempt status as a charitable organization under federal or state law.
• Does not result in private inurement or confer impermissible private benefit.
• Has a net beneficial or neutral effect on the relevant conservation values protected by the easement.

Most of the written amendment policies that have been adopted by land trusts across the country already reflect these principles. This would not change under this proposal. Only if an amendment falls outside any of the seven principles would third-party review be required.

There is one area of ambiguity and disagreement within the land trust community that involves the last of these seven principles. The question is whether, when determining the net beneficial or neutral effect of an amendment, the land trust may look beyond the "four corners" of the original easement, and weigh the enhancement value of protecting additional land against any loss of conservation value within the original parcel. Case Studies #4 and #5 in the appendix highlight this situation. In both cases, the amendment could not be considered "neutral or enhancing" to the easement's stated purposes, if only the effect on the land covered by the original easement is considered. On the other hand, by looking beyond the original parcel to consider the conservation impact upon a wider area, both amendments could be found "neutral or enhancing."

Some land trusts have adopted a conservative approach and look only within the four corners of the original easement to determine whether the change is "neutral or enhancing" to the conservation values. Others have weighed the net conservation value on both the original and additional land together. This proposal would adopt the more conservative approach. The amendment would be exempt from the Panel's review only if it has a net beneficial or neutral effect on the land governed by the original easement. If no additional land is being placed under conservation easement, the question of net beneficial or neutral effect would be examined within the four corners of the original easement. If there is additional land being conserved, but a previously prohibited use will be permitted without any offsetting gain in conservation value within the original parcel, it would be reviewed. Even if the loss in conservation value on the original parcel is *de minimus* (as in Case Study #4 involving the guest house), and the conservation gain due to the additional land is substantial, the amendment would be reviewed. The Panel may still endorse the amendment, but at least the Attorney General and the public would have an opportunity voice their concerns about the trade-off in conservation values between the original and additional parcels. To avoid the necessity of a public hearing in noncontroversial cases, however, the Panel should have the authority to waive the hearing

after public notice, if nobody files an objection to the petition and the Panel members have no questions for the holder.

Relatively few amendments should reach the jurisdictional threshold that would require the Panel's review. Most land trusts are greatly cautioned, as they should be, by their desire to honor the landowner's wishes, carry out the purposes for which they acquired the easement, protect their reputation in the community, and (in the future) qualify for accreditation by the Land Trust Alliance. Most easement amendments fall well within the LTA principles outlined above. These amendments may eliminate reserved landowner rights, place additional adjacent land under the easement, or place reserved building rights in less intrusive locations. Others are intended to correct drafting errors or clarify ambiguous language, which could become the source of future dispute. Changes of this type do not alter the intent of the original parties. Indeed, many enhance the conservation purposes of the original easement. It is only when a proposed amendment does not clearly fall within the LTA principles and the land trust still believes that the amendment will serve the public interest, that the review process is triggered.

There is a second threshold issue. The Panel's jurisdiction would be triggered only when the holder of the conservation easement submits the amendment petition. A landowner who seeks an amendment of a conservation easement could not initiate a review by the Panel. The holder is and should be the first line of defense, and only the holder can start the review process. A landowner who owns or acquires a conserved property should have no right or expectation that the land trust will modify the easement, even when the landowner or the community believes that the modification would be in the public interest. The holder owns the rights in question and has an absolute right to say "no."

Of course, there is one exception: If the State Legislature or Congress grants condemnation authority to a public or quasi-public agency, the conservation easement as well as the underlying land may be taken by eminent domain for other public purposes. In some cases, a land trust may resist a taking. However, in many cases the land trust will negotiate to modify the taking minimize the loss in conservation values. It may also litigate over the amount of financial compensation required for the loss of its conservation interests. Because condemnation cases are reviewable by the courts, they should not be subjected to a separate review by the Panel, even if the holder does not challenge the taking in court.

Initiating the Review Process

If an easement holder concludes that an amendment would be in the public interest and the amendment does not clearly conform to the LTA principles within the four corners of the original easement, it would file a petition seeking approval of the amendment with the Vermont Natural Resources Board. A copy of the petition would be sent to the Vermont Attorney General, Vermont Housing and Conservation Board, Vermont Agency of Natural Resources and Vermont Agency of Agriculture, Food and Markets. To the extent that addresses can be reasonably ascertained, the landowner(s) who conveyed the conservation easement and any people or organizations that helped fund a purchase

would also be notified. If there is more than one holder of the easement, the additional holders must also sign the petition. If another organization holds an "executory interest" that in effect allows it to assume the ownership of the easement if the amendment is approved, that organization must also sign the petition.

Upon receipt of the petition, VNRB would publish a notice in an area newspaper summarizing the nature of the petition and setting a date for a public hearing not less than 30 days later. Copies of the notice would be sent to the selectboard (town council), planning commission, and conservation commission (if any) of the town or towns in which the affected property is located, as well as to the regional planning commission. If the Natural Resources Board determines that the impact of the amendment would be minor and that a public hearing may not be necessary, the notice should state that the Panel may waive the hearing, if no request for a hearing has been filed within 15 days of the published notice.

The hearing itself would be in the nature of a "rule-making" procedure rather than a "contested case." There would be no requirement of party status. Any person wishing to speak in support of or opposition of the amendment petition would have an opportunity to provide written and oral testimony to the Panel. Rules of evidence and rights of discovery or cross-examination would not apply in order to facilitate the participation of lay citizens. However, the Panel would have the authority to compel the petitioner to make available all relevant background documents pertaining to the easement and the proposed amendment. Any person who believes that additional information is needed from the easement holder before or during the hearing may direct a request to the Panel. The Panel may then require the petitioner to produce the requested information. By making the process less legalistic and allowing participation by all interested people, the Panel is assured of receiving all the necessary information to make a decision that is in the public's interest.

Following the hearing, the Panel would issue a written decision approving, approving with conditions, or denying the amendment request and stating the reasons for the Panel's conclusions. The Panel's decision could be appealed the Vermont Supreme Court, but only the easement holder(s), the current landowner, affected town(s), state agencies that participated in the hearing, the attorney general and, in the case of a donated or bargain-sold easement, by the original donor or descendents to within three generations (i.e., great grandchildren). The Court could overturn the Panel's decision only if there had been a material mistake of law.

The Panel's decision would not affect the right of any person who funded an easement purchase to seek damages in court based upon a contractual obligation of the holder. If, for example, a foundation had made a grant for an easement purchase and conditioned the use of the funds to certain purposes, the foundation could seek recovery of the grant, if the amendment significantly diminishes the conservation values of the original easement. Similarly, a contributor could assert a claim to recover donated funds, if a land trust had acted in bad faith when raising money for the project. However, these cases should be relatively rare; the circumstances leading to a proposed amendment will usually not have

been foreseeable and most land trusts will check with donors before filing a petition for amendment. However, this remedy should be available in cases where misrepresentation or breach of contract has occurred.

The Criteria for the Panel's Decision

Before it could approve an amendment petition, the Panel would first have to make two threshold determinations, and find that the amendment falls into at least one of three criteria. The first threshold finding would be that **the amendment is consistent with the State's enabling statute for conservation easements.** In Vermont, that statute is relatively broad:

> *It is the purpose of this chapter to encourage and assist the maintenance of the present uses of Vermont's agricultural, forest, and other undeveloped land and to prevent the accelerated residential and commercial development thereof; to preserve and to enhance Vermont's scenic natural resources; to strengthen the base of the recreation industry and to increase employment, income, business, and investment; and to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety and welfare. (Title 10, Vermont Statutes Annotated, Chapter 155, Section 6301)*

The second threshold finding that the Panel must make would be that **the amendment is clearly in the public's interest.** This should not be a close call. If the public's interest is more or less evenly balanced between the original document and the amendment, the original document should be retained.

In cases in which the Panel makes both threshold determinations, it could then approve the amendment, if it finds that the amendment meets one or more of the following criteria:

1. The amendment clearly promotes or enhances the conservation purposes of the easement, even though it is inconsistent with a strict interpretation of the terms of the easement.
This criterion is intended to cover cases in which a particular provision in the easement may actually frustrate the fulfillment of a conservation purpose stated in the easement. For example, the holder of a "forever wild" easement that prohibits any use of herbicides or pesticides may find that the native flora or fauna is threatened by invasive species that can only be controlled by chemical means. If the Panel finds that retaining native species is clearly in the public's interest, and there is no reasonable alternative for doing so, it could allow this easement term to be overridden in specific instances.

2. Enforcement of an easement term would result in significant financial burdens to the easement holder or landowner and result in minimal conservation benefit to the general public.
The LTA Advisory Committee heard of many examples of easements, often drafted by land trusts who were just starting out, that included provisions imposed onerous stewardship burdens on the easement holder to enforce, but resulted in only minor conservation benefit. Among the examples were provisions which required that barns "shall only be painted red" or that "no more than two cats may live on the property." In another case, a donor required the ranch's bunkhouse to always retain a central hallway, even though the public had no right to view in the interior of the building. Over time, the land trusts and landowners found that these onerous and inflexible conditions were costly to sustain, but resulted in little public benefit. The financial burden of enforcing these provisions could even result in a loss of the land trust's ability to protect the remainder of its easement portfolio. An amendment would allow the land trust to concentrate its stewardship resources on more significant conservation resources.

3. The amendment clearly promotes or enhances one or more conservation purposes of the easement by extending the easement's protections to adjacent lands, even though it may allow the diminution of one or more conservation purposes on the property protected by the original easement.
This category would cover the "four corners" cases. Case Studies #4 and #5 are examples of amendments that would allow uses not permitted under the original easement, but would result in greatly enhanced protection by extending the easement to additional land. It could also address the dilemma of clashing public policies, such as those described in Case Study #6. In that case, the Panel could approve the termination of a portion of the original easement, if that furthered the state's "smart growth" policy, so long as it also set conditions that would ensure that the released land becomes part of a compact settlement and that other, more productive agricultural lands will be conserved as a result. Again, the overall result of the amendment must be a significant "plus" for conservation. The Panel would not have the authority to terminate or even reduce the easement's protections without substantial off-setting conservation benefits.

By including words such "clearly" or "substantially," this author is suggesting that an amendment should be approved only when the public benefit resulting from an approval greatly outweighs any loss in existing conservation values. If the Panel finds that a proposed amendment would result in roughly equivalent benefits and detriments to the public interest and conservation purposes of the easement, it should uphold the easement as original drafted. If the amendment would result in a minor loss of conservation values on the one hand and a substantial increase in conservation values on the other, the Panel may approve the change. The greater the loss in conservation values resulting from an amendment, the more compelling the reasons for making a change should be.

In considering whether to approve, approve conditionally, or deny an amendment petition, the Panel would consider all circumstances and information that may reasonably bear upon the public interest in upholding or amending the conservation easement as written. These considerations would include, but are not limited to, the following:

1. The intent of the landowner(s) who conveyed the easement, the holder(s) that acquired the easement, the persons and organizations who contributed funds for the acquisition, and any other party who participated or assisted in the acquisition.

2. The conservation purposes stated in the easement, the stated mission of the easement holder, and the goals of the conservation project as represented to funders or by any fundraising materials.

3. An evaluation of whether the circumstances leading to the proposed amendment were or could reasonably have been anticipated at the time the easement was conveyed. Changes in circumstances that may be relevant to this evaluation may include, but are not limited to, changes in applicable laws or regulations, changes in the native flora or fauna, the development of new technologies, the development of new agricultural and forestry enterprises, and changes in community conditions and needs.

4. The existence or lack of reasonable alternatives to address the changed circumstances.

5. Conditions that the Panel may reasonably place on its approval in order to minimize the impact of the amendment and promote the conservation purposes of the easement.

6. Consistency of the proposed amendment with applicable local, state, and federal laws and policies.

This list is not intended to be exhaustive. Any factor that is relevant to a determination of whether the amendment is or is not appropriate under the applicable criteria should be considered. By opening up the public hearing process to anyone who wishes to testify, the Panel is assured of having the necessary information to reach a considered decision.

In the event the Panel approves the amendment petition, it may attach conditions that are appropriate to mitigate any adverse impacts on the conservation purposes of the easement and to ensure that the amendment does not result in private inurement or impermissible private benefit. To the extent that the amendment results in financial proceeds paid for rights released or terminated as a result of the amendment, the Panel may attach conditions to ensure that those proceeds are used for purposes similar to those expressed or implied in the original easement. In the event any person who helped fund the acquisition of the original easement claims a right to recover damages resulting from a breach of contract, fraudulent solicitation, and other legal grounds, the financial proceeds should be held in escrow until the parties have settled the claim or the courts have ruled on the matter.

Conclusion

Easement amendments has been the most difficult, contentious and confusing issue that the land trust community has faced in the 30-plus years that I have worked in the field. The confluence of legal, ethical, public relations, and practical considerations makes it difficult for even the largest and most experienced conservation organizations to decide with confidence what they can do. That some of the most prominent and experienced land conservation attorneys in the country disagree vehemently over which state and federal laws govern amendments makes the task even more daunting for land trust boards and staff. It will take decades for the courts to sort out all the legal questions surrounding easement amendments. And since different courts may arrive at different answers, it is likely that the current confusion will continue for a very long time, unless we develop a legislative solution.

The present generation of land trust practitioners may choose the safest path, which would be to ignore the dilemmas and just say "no." I suspect that our successors will not have that luxury. As the cases in the Appendix show, saying "no" may result in less land conservation, in personal hardship, in undesirable secondary impacts, and in less rational land use patterns. If that happens – if land trusts come to be seen as unthinking, unimaginative, immovable, uncaring and in a word bureaucratic – the public good will that we have so assiduously built over the past four decades may begin to erode.

One legacy we can leave to our successors -- who will inherit both our good deeds and our mistakes – is a roadmap for dealing with circumstances that we never anticipated or could have anticipated at the time we wrote the easements. We cannot leave the answers because we don't even know what the questions will be. By developing a process and criteria for resolving these questions, we can do an enormous service to those who will have to keep our promises.

For the reasons already stated, I have reservations about a wholesale application of the charitable trust doctrine to conservation easement law. However, I have come to believe that despite the additional expense and delay involved, third-party review of all major amendments and terminations is in the interests of the land trust community for reasons of greater public acceptance, transparency of decision-making, and resolution of conflicting ethical obligations.

Each state must craft a process that is appropriate to its own particular legal traditions and political institutions. Maine has led off. Perhaps Vermont and others will follow. To a great extent, the states will become the laboratories for experimentation with a process from which the rest of us will learn and improve. This will be an interesting and challenging time for the land trust community. In the decades ahead, as the pace of conservation begins to slow and we focus increasing attention on easement stewardship, confronting the dilemmas of change is where the action will be.

Case Studies

The following cases are drawn from actual examples. In some instances, the facts have been altered somewhat to sharpen the dilemma between enforcing the easement exactly as written and serving the public interest. These cases are not the norm. In the vast majority of easements, enforcing the easement and serving the public interest will be the same. Still, as the number of easements accumulates and as the years and decades pass, land trusts will be faced with dilemmas like these with increasing frequency. The reader should note that in all the case studies described here, except perhaps the first one in which the town could exercise its eminent domain authority, there is nothing "impossible or impracticable" about administering the easement as written. The question to ponder is whether the result of saying "no" serves the public's interests and the land trust's mission and standing within the community.

Case Study #1 – The Fire Station

In a small rural community, the station of a local volunteer fire department sits on the edge of a large agricultural field. Twenty years earlier, the Land Trust acquired a conservation easement on the field, using a combination of state, town and privately raised funds. In the intervening years, the community has grown substantially, so much so that the fire department needs to increase the number and size of its equipment. To do this, it must expand the building, but there is insufficient land at the present site. After investigating all possible alternate sites, the department concludes that the current location is the best because (1) it allows the department to build an addition rather than an entirely new building, making expansion less expensive; and (2) the roads from this site provide the best access to different parts of the community. The department therefore approaches the owner of the field and the Land Trust to see if the department can acquire one acre of land without restrictions, so that it can build the addition. The landowner, being public-spirited and feeling the change would result in an insignificant loss of cropland, is willing to donate the acre of land to the department. The state funder and the town council also support the proposal. What should the Land Trust do?

Comments and Questions. In some respects, this is the easiest of the case studies to resolve, because the town can resort to condemnation to take the needed land, should it choose to do so. On the other hand, it may be reluctant to exercise its eminent domain authority because of the expense and the precedent it sets. The town may instead apply

public relations rather than legal pressure to persuade the Land Trust to release the easement on the one acre.

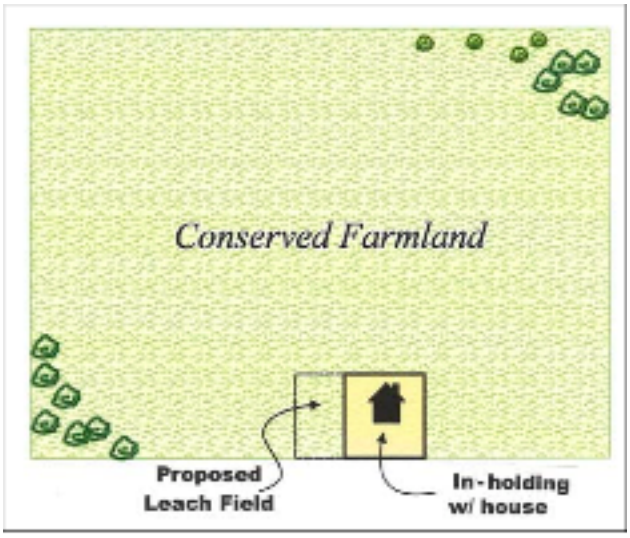
Clearly, there is a public benefit in making the change by giving a growing community adequate fire protection. Just as clearly, the change is not "neutral or enhancing" in terms of the public conservation benefit. Even though the loss of conservation value is small, it is nonetheless a loss. A neighboring landowner, for whom the larger building will be in view, may object to the change. Would it make a difference if that landowner had contributed funds to save the field 20 years earlier? Should it?

If the Land Trust agrees to release the easement on the one acre of land, must it be compensated for giving up its interest, or can it make a gift to the town (assuming that would not be a violation of its charitable charter)?

The Vermont Land Trust has faced this situation three times, twice involving easement lands and once with fee-owned land. It agreed to the changes in the first two instances, because the change served the public interest, there were no better alternate sites, and the loss to conservation was minimal. In the case of the fee-owned land, several neighbors objected, even though the loss of land would have been small, the existing site was in the village (no sprawl), and it was served by town water. The department found an alternate site and did not pursue its request to VLT, so no decision had to be made.

If Vermont had an Easement Amendment and Termination Panel, I would now bring these cases to the Panel for approval, so that the fire department, the neighbors, and other interested parties would have an opportunity to argue their case. If the Town had commenced formal condemnation proceedings, those proceedings would supersede those of the Panel. Without such a Panel, I would today run them past the Vermont Attorney General to see if there was an objection. In any case, absent a clear ruling on the applicability of the charitable trust doctrine in Vermont, I would not see this case as worthy of a court's time.

Case Study #2 – The Failed Septic System



The facts here are almost identical to Case Study #1, except that instead of a fire station, the in-holding in the conserved farm field is an individual residence. The resident is an 80-yearold widow who has lived in town all her life. Last year, her septic system failed. Because of state regulations governing on-site septic disposal that were adopted ten years earlier, she is unable to build a replacement system on her own land. The house is too far out of town to tie into the municipal sewage system, and besides, building a sewage line would only encourage undesired growth in the area. However, a suitable site has been found on the neighboring conserved land, so she asks the farmer if he will sell her an acre for the new leach field. He agrees, but she also needs the Land Trust's agreement to release the easement on the one acre and allow the farmer to subdivide the land. What should the Land Trust do?

Comments and Questions. This case is perhaps more difficult because the public benefit of making the change is less clear than in Case Study #1. However, there is a personal hardship that was not of the landowner's making. There is also a public interest in stopping existing pollution of ground and surface waters. As important to the Land Trust is its standing within the community – something that could be damaged, if the result of saying "no" is that the widow is forced to abandon her home. The Land Trust may win the legal battle that it is enforcing its easement as written, but it is likely to lose the war of public opinion.

Faced with this situation, I would first examine whether there are truly no other sites available for the septic system. Sometimes a person will want to take the easiest and cheapest path to a solution. However, if there is truly no alternative, I would try to get to "yes." This is a case that should go to an Easement Amendment and Termination Panel or, absent that, to the attorney general.

I would feel very differently about this case if the septic system had been functioning properly, but the owner of the in-holding wanted to tear down the existing 1,500 square foot home in order to build a 5,000-square-foot "McMansion." In that case, I would see no public benefit in making the change, even if the owner is willing to pay an exorbitant price for the acre of land.

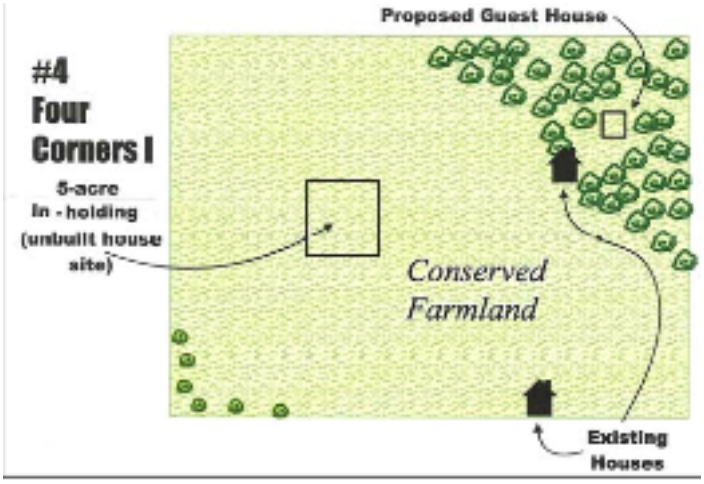
Case Study #3 – Cell Antennas on Farm Silos

One type of changed circumstances our successors will face is the development of new technologies that we never dreamed of. Thirty years ago, when the Vermont Land Trust was starting out, few of us had any idea that cell phones were in our future, so our easements made no provision for them. Then, about eight years ago, owners of conserved farms were approached by cellular companies seeking to install cell antennas on the side of, or even inside, existing farm silos. The antennas were virtually invisible, did not affect the use of the silo, and provided the farmer with some added revenue. In addition to improving local cell coverage, these antennas would also eliminate the need to construct separate towers on unconserved ridgelines.

VLT's easements now include a "New Technologies" clause, which allows the land trust to approve the use of a technological advance, when it does not damage the conservation purposes of the easement. However, when we drafted our earliest easements, we prohibited all commercial uses that were not otherwise permitted. Unless the antennas could fit into one of the named exceptions for commercial uses – namely, agriculture, forestry, home occupations, and "accessory uses," such as making cheese from milk produced on the farm – a strict constructionist of the easement would have to say "no." However, that answer seemed to make little sense, because allowing the new technology would have significant public benefits, would result in virtually no loss of conservation values, and would eliminate an adverse aesthetic impact elsewhere in the neighborhood.

Comments and Questions. There are many technological advances in our future that will adversely impact conservation values, and that should be denied, especially if there are alternate locations available. VLT was once asked to approve a 2,200-cow dairy facility with integrated greenhouses, manure composting, and artificial wetlands to purify the wastewater. We said "no" because the buildings would have covered 12 percent of the prime agricultural soils on the farm, significantly affected scenic views in the area, and could have been located in an industrial area, since the cows would not be pastured. On the other hand, when the use of a new technology serves the public interest and has little adverse impact on the purposes of the easement, we should be able to get to "yes."

Case Study #4 – Four Corners I



Some land trusts, including the Vermont Land Trust, have been willing to look beyond the four corners of the original easement to determine whether an amendment is "neutral or enhancing" of conservation values. Others regard this as a slippery slope, which it can be. The next two case studies pose some of the dilemmas surrounding the question of whether to step onto that slope.

Ten years ago, the owner of a beautiful hill farm in east-central Vermont donated an easement on 300 acres overlooking the Connecticut River Valley. The easement included all of his land, but permitted the maintenance, extension, and replacement of two existing residences. However, the easement did not include a prime five-acre building site located in the middle of one of the farm's most productive and scenic fields. Several years earlier, the owner had gone through a friendly divorce. As part of the settlement agreement, he had deeded the five-acre parcel to his former spouse. Fortunately, she had never exercised her right to build.

Some years later, the owner sold his farm to an out-of-state buyer who wanted to restore the farm and modernize the two houses. In the course of the purchase, the buyer had contacted the former spouse and negotiated a price to acquire the five acres. After getting to know the Vermont Land Trust through its stewardship program, the new owner made the following proposal. "I'll eliminate the five-acre building site in the middle of the field and merge that land back into the conserved farm. In return, I would like the right to construct a guest house near the main house. It will be located in the woods, behind a ridge, and won't be visible from any public road. I'm not looking for a tax deduction."

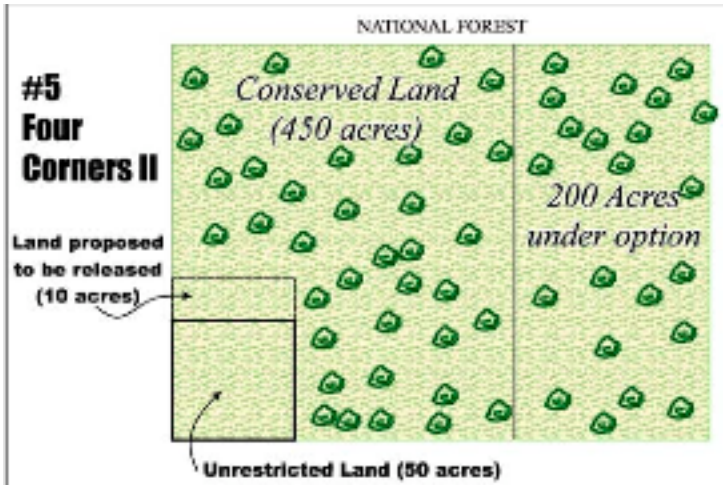
Should VLT accept this offer when it would allow the owner to construct a new structure not previously permitted on the land originally conserved?

Comments and Questions. To accept this offer, VLT had to look beyond the four corners of the original easement to determine if the conservation value was "neutral or enhancing." Although its standard easement permitted "appurtenant structures ordinarily associated with a residence," VLT had always taken the position that, in the Vermont context at least, a guest house is not a structure ordinarily associated with a standard home. Within the four corners, the amendment would allow a new structure not permitted under the original easement. However, in terms of conservation values, the elimination of a building site in the middle of the field greatly enhanced the overall conservation value of the property, both agriculturally and aesthetically. We found clear

and significant public conservation benefit to the amendment with only a *de minimus* loss to the conservation values of the original easement.

Could this be a slippery slope? Clearly, yes. A different owner might come along with a far less attractive proposal and the Land Trust would have to weigh it on its merits. I have no problem with a land trust deciding to stay strictly within the four corners of the original easement and requiring the change to be neutral or enhancing within that area. However, I also feel that a land trust could reasonably conclude it is in the public interest to approve the amendment. Putting the question before an Easement Amendment and Termination Panel or the attorney general would provide another check on the land trust to ensure the public interest is being protected.

Case Study #5 – Four Corners II



Ten years ago, a Land Trust acquired a conservation easement on 450 acres of land adjacent to a national forest. The donor had retained 50 acres of unconserved land for his home and as potential future building sites. He claimed an appropriate income tax deduction, which addressed the enhancement value of the easement on the unrestricted land. Recently, the Land Trust had acquired an option to purchase an easement on an adjacent 200 acres. The land trust as well as the local community had identified these 200 acres as the town's highest conservation priority. The land is very scenic, and because it is located adjacent to the national forest as well as 400 conserved acres, it is a prime candidate for development. The purchase price is $1 million, which represents a bargain-sale. Through heroic efforts, the Land Trust has managed to raise $750,000, which included a state grant as well as a taxpayer-supported appropriation from the town. However, the Land Trust was still $250,000 short of its target, and all potential opportunities for public and private fundraising seemed to have been exhausted. The Land Trust and the community were faced with the prospect of failure and future development of this prime conservation property.

Then the owner of the conserved 400 acres offered a creative solution: "I'll pay the Land Trust $250,000 if, in return, we can adjust the boundary of my original easement to allow two additional housesites. The housesites will be adjacent to my unrestricted land. They will have pleasant views of the National Forest. However, because of the topography of the area, they will be invisible from any public road. I do not intend to claim a tax deduction."

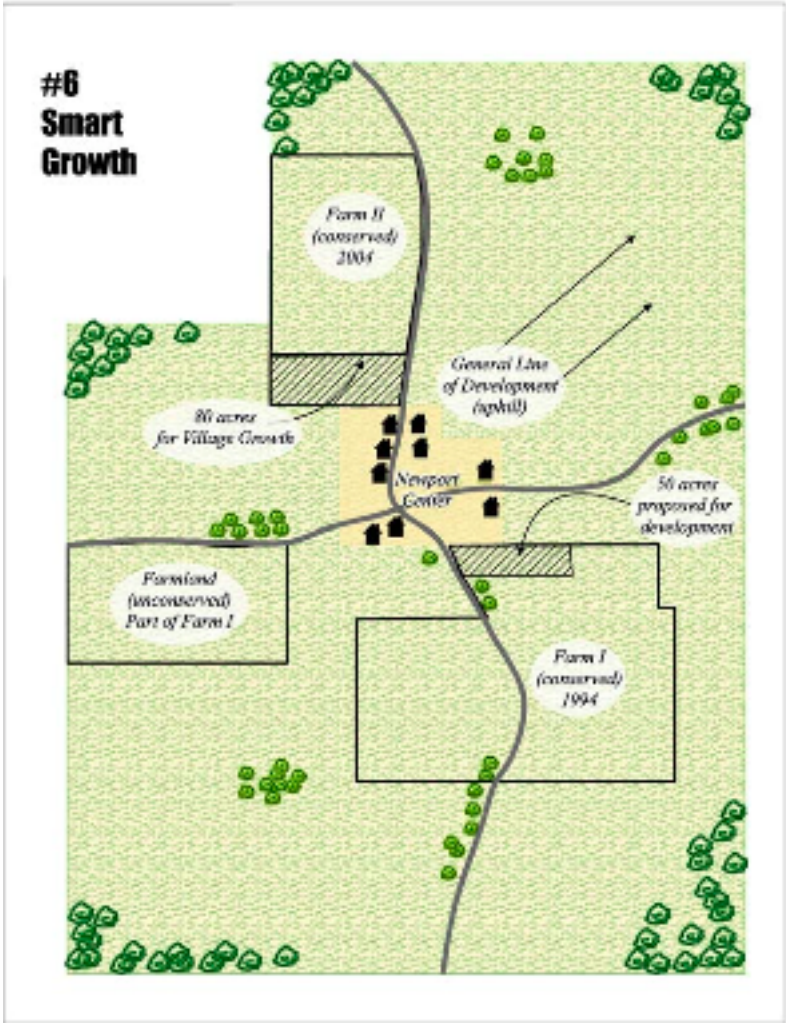
Assuming an independent, qualified appraisal confirms that that the two housesites have a value substantially less than $250,000; can or should the Land Trust accept this offer, which represents its last and only chance to reach the $1 million goal and conserve the 200 acres? People in the community support the swap.

Comments and Questions. This case is further down the slippery slope, because the additional home sites have significant financial value whereas, arguably, the guest house in Case Study #4 did not. If the Land Trust releases or amends its easement to allow the construction of two additional houses, it must be fully compensated for any financial value realized by the landowner to avoid any impermissible private benefit. Depending upon the value of the original 450 acres and the size of the Land Trust's budget, the landowner may even be classified as a major donor and therefore an "insider," in which

case private inurement rules would apply. In either case, the Land Trust must proceed with great caution.

This case also highlights that financial values and conservation values are not always equivalent. Under the facts given, the 200 acres have very high conservation value and the additional housesites have very low conservation value. If the Land Trust is willing to look beyond the four corners of the original easement, it may decide to accept the proposal, so long as it has verified, through a qualified appraiser, that it is receiving full payment for any release of rights in the original land. In my view, this kind of case should be undertaken only if the two properties are in the same general vicinity and are therefore related, and where the public conservation benefit is clear and dramatic on the one hand and the public conservation loss is minor on the other. It is also the kind of case that should undergo third-party review and approval by an Easement Amendment and Termination Panel, the attorney general, or a court.

Case Study #6 – Smart Growth and the Clash of Public Policies



I first presented this case at LTA's Rally in 2005. For me, it epitomizes the kind of dilemmas that successful land trusts will face in the future. No decision has been made to date.

The setting is Newport Center, a small village located on the eastern edge of a broad agricultural plain in northeastern Vermont. The village has a small resident population with a school, village store, several small businesses, and a sewage treatment plant that is operating at only 50 percent capacity. Growth in the village has been slow even though the region's largest city is only five miles away. What little development has been taking place is on large lots easterly of the village, where there are beautiful views across the plain toward the Green Mountains and north into Canada.

Agriculture is still a dominant industry in the community. In 1990, over forty dairy farms were in operation in Newport and the neighboring towns of Westfield and Troy. However, one of the largest farms with 750 acres located just south of the village was in trouble. The family had declared bankruptcy and the community feared that it would be purchased by a developer and broken up. That fear subsided when a local farmer offered to buy the farm, provided the Vermont Land Trust could purchase the development rights to make the land affordable for the farmer. Fortuitously, the Vermont Legislature had created the Vermont Housing and Conservation Board (VHCB) just a few years earlier to provide funding for farm and open space conservation and for affordable housing. VLT applied for and received a grant covering 100 percent of the cost of purchasing the development rights. In due course, the farm was conserved and sold to the new farmer.

As in all farm projects where state funding is used, the conservation easement is co-held by VLT, VHCB, and the Vermont Agency of Agriculture. VLT has the primary responsibility of stewarding the easement.

At the time, the farm was only the second property to be conserved in Newport. While many native Vermonters tended to be suspicious of new ideas emanating from Montpelier, the community was enthusiastic about the transaction and the whole project came off rather smoothly.

As the years rolled by, land conservation gained steam in the region. By 2003, seven more Newport farms had joined the VHCB program, resulting in 3,500 acres of protected land. More than a dozen other farms, totaling 2,600 acres, had also been conserved in neighboring Westfield and Troy. Because these farms were located in the more rural parts of town, there were few complaints that VLT and VHCB were stifling growth.

Then in 2003, a 370-acre farm located just north of Newport Center village came on the market. Another local farmer wanted to purchase it, provided VLT or VHCB would buy the development rights. This time, however, the town selectboard (town council) objected saying, "Newport is getting land-locked by the Land Trust."

Recognizing that the town had some legitimate concerns, VLT, VHCB, and the farmer worked out the following agreement:

• The town would go through a village growth "visioning" process to determine whether a part of the farm might be needed to accommodate future growth.

• If the process determined that the town would someday need this land for expansion, the new owner would give the town an option to purchase 80 acres of the conserved land next to the village between the years 2023 and 2028. This would allow the farmer to go ahead with his current plans, while providing the town with added flexibility to plan for future growth. The town would pay the owner the fair market value for the restricted 80 acres at the time the option is exercised. It would also have to repay VHCB for its original cost of conserving the 80 acres, although in all probability, if the town included affordable housing in its plan, VHCB might waive the repayment.

This arrangement seemed to satisfy all concerns. The town went through the visioning process but then, unexpectedly, concluded that the 80 acres were <u>not</u> the best location for future village growth. The principal reasons were: (1) the 80 acres included a high percentage of prime agricultural soils, and (2) the 80 acres were located <u>below</u> the sewage treatment plant, so that waste water would have to be pumped uphill.

Having begun the process of visioning the future of Newport Center, however, the selectboard and planning commission began to look for other lands that might be suitable for village development. After considering and rejecting four other large parcels as less suitable, they settled on 50 acres of the farm that VLT and VHCB had conserved a decade earlier on the southern side of the village. The town felt that this land was suited

for development because the land had better views, was located uphill from the sewage treatment plant, and was in the general line of growth outside the village. The town then approached VLT and offered to "swap" its option on the 80 acres of the second farm for an option to purchase 50 acres on the first farm.

Several other factors are relevant to this situation:

• Since 1968, the State of Vermont has had a policy of promoting "compact settlements surrounded by rural countryside." This policy has been expressed in many statutes, including the enabling law for VHCB.

• A contributing factor to the slow growth of Newport Center is the lack of developable land available in the village. Low sewage flows also contribute to the relatively high fees village residents must pay for sewage treatment.

• The 50 acres contain only a modest amount of good agricultural soil—much of it is now in overgrown pasture. The owner does not object to selling the land for development provided there is an adequate buffer to protect his farm operation.

• The owner of the first farm also owns 130 acres of unconserved farmland west of Newport Center, which includes a high percentage of prime agricultural soils and on which he would like to sell the development rights. The town selectboard indicated it would object to this sale unless the 50 acres were made available for development. The board was also unwilling to give up the option on the 80 acres of the second farm unless the 50 acres were made available.

• If VLT was undertaking a conservation project on the first farm today, it would have raised the question of village growth needs with local officials in designing the project. In 1990, however, neither VLT nor the Town anticipated the issue.

Because easement amendments raise important and difficult issues, not the least being public perceptions, VLT has proceeded with great caution. The staff has advised the town that in no case would VLT simply release the development rights. It would explore the possibility of acquiring and "land-banking" the 50 acres until an acceptable village development plan could be worked out with the town. That plan must include provisions for affordable housing, small lots with higher densities, and public space, although it may also include room for commercial businesses, market-rate housing, and other mixed-use development.

No decision has been made. The whole land bank idea, if it is pursued, must be approved by VLT's Board, the VHCB Board, and the Vermont Agency of Agriculture. The latter's decision would require the Governor's approval and perhaps even the Legislature's authorization. Before the plan could go forward, the parties would need to notify the attorney general and schedule a public hearing in Newport Center. VHCB would also need to approve a funding plan to purchase the 50 acres (at restricted value) and the development rights on the 130-acre farm parcel. Once a village development plan is

approved, the expectation is that VHCB might waive any recapture of its investment, provided the construction of affordable housing and public spaces is included in the final plan.

Comments and Questions. Most land trusts like to believe that their work helps limit sprawl. This case study suggests is that, in certain circumstances, our easements may contribute to sprawl. If a parcel that is suitable and appropriate for development is conserved, the development pressures within that community will shift, perhaps to less appropriate locations. It places a heavy burden on land trusts to think about what land not to protect, as well as what land they should protect.

At the time the first farm was conserved, the community was entirely happy with the plan. It was only over time that the blush began to fade from the rose. No mistake was made here. It was simply that circumstances had changed-circumstances to which VLT and the state's land conservation program had contributed by their own success.

Even if the courts determine that Vermont is a charitable trust doctrine state, it seems unlikely that it would apply in this case. The funding to purchase the development rights on the first farm came entirely from VHCB, whose mission includes affordable housing as well as land conservation. VHCB would have to approve any changes made in the easement. Why should the courts second guess how VHCB uses its resources so long as its decisions are consistent with its enabling statutes?

But suppose VLT had used a combination of state, local, and privately-raised funds to purchase the development rights on the first farm? Would a person who contributed $100 or $100,000 to the fundraising effort, and whose home overlooks the 50 acres, be entitled to veto a change in the easement, even if that change serves an important public interest? Should he or she be entitled to recover that contribution from the easement holders based on breach of contract, fraudulent solicitation, or some other legal theory? Should a subsequent owner of the home have the same rights as the original donor? Must the Town of Newport be forever stuck with our "mistake" because we failed to accurately predict the future and it is neither impossible nor impracticable to enforce the original easement as written? And if VHCB agrees to the change, but VLT says "no," could the town begin proceedings to condemn VLT's interest, and if successful, what happens to the money?

These are very difficult questions for which there are no clear answers. Land trusts will have to struggle with the legal, ethical, moral, and public relations implications of cases like Newport. The easy answer is "just say no." But that may not always yield the right answer. Although we cannot predict what problems and circumstances our successors will face, we can provide — through legislation— a roadmap to help guide their decisions. The roadmap should clearly state what criteria will apply to these decisions, what process must be followed in reaching a decision, and who must decide.