

CENTER FOR NATURAL LANDS MANAGEMENT
CONSERVATION EASEMENT AMENDMENT POLICY
Adopted on September 2, 2008 via Resolution 139-08

Preamble

The Center for Natural Lands Management (Center) both holds and grants conservation easements as part of its mission to conserve native species, their habitats, and functioning ecosystems in perpetuity. With rare exception, all Center-held and accepted conservation easements are the result of mitigation or government driven requirements and are granted without charitable intent. Given the strong public interest involved and high conservation values present, these conservation easements merit assertive and stringent protection. These conservation easements commonly contain express provisions (a) granting third-party enforcement beneficiary rights to state and federal wildlife/resource agencies and/or local general purpose government entities and (b) prescribing the requirement that any amendment to the conservation easement be approved by the grantor, grantee, and the appropriate regulatory governmental body.

As used in this policy, the term conservation easement means a limitation in a deed or other instrument in the form of an easement, restriction, covenant, or condition that is binding on successive landowners and has the purpose of retaining the land in its natural condition in perpetuity.

Perceived risks associated with the amendment of conservation easements include both legal issues including tax fraud, maintaining “qualified holder” status, and charitable status and public perception issues.

Policy

The Center’s policy is to ensure that any amendment to a conservation easement, whether initiated by the Center or any other party, satisfies the following nine (9) prerequisites. Amendments should be rare. The resulting amendments shall:

- (a) Be in substantially in accord with the conservation purposes, intent, and terms of the original or previously amended conservation easement, including securing third party approvals as may be required;
- (b) Leave unaffected its perpetual duration;
- (c) Preferably enhance, and certainly not diminish, the conservation values of the conserved property;

- (d) Reflect the Center's professional judgment regarding stewardship;
- (e) Not knowingly result in private inurement;
- (f) Not knowingly be in violation of any conservation, tax, or charitable trust law;
- (g) Not have a reasonable potential of adversely affecting Center's IRC §501(c)(3) status;
- (h) To the extent possible, have all costs borne by the party initiating or causing the amendment, and
- (i) Not set a precedent that would weaken or undermine future conservation easements.

Purpose

The purpose of this policy is to ensure that the Center for Natural Lands Management fulfills its legal obligations and commitments to its mission in protecting the natural resources held under conservation easements.

Covered persons

This policy applies to employees authorized by the Board of Directors to execute binding real estate documents in general, and conservation easements in particular.

Amendment Purposes

Absent other disqualifying factors, it is the position of the Board that Center authorizations to amendment to conservation easements are appropriate only under the following limited, special circumstances:

1. Error or ambiguity. Center-held or -granted conservation easements may be amended with the consent of the other holder(s) of a realty interest in the property, and with the express written consent of the wildlife/resource agencies and/or local general purpose governments where appropriate, to correct error or ambiguity in the original conservation easement involving legal descriptions, inadvertent failure to include standard template conservation easement language or inartful drafting, or to clarify terms for future interpretive purposes.

2. Condemnation. The purpose of a Center-held or -granted state conservation easement is presumed to be the best and most necessary public use as defined under state law. Nevertheless, if a property encumbered by a conservation easement is taken in part by exercise of the power of eminent

domain and the remaining habitat is of sufficient conservation value as reasonably determined by Center's best professional conservation science practice, the Center may amend the conservation easement, with notice to (and approval of if required) any other holder(s) of a realty interest in the property, pursuant to a final order in a condemnation proceeding. In addition, if a property encumbered by a conservation easement is taken either in part where the conservation values of the remaining habitat are *de minimis* in the opinion of the Center using its best professional conservation science judgment or is taken in its entirety by exercise of the power of eminent domain, the Center may extinguish the conservation easement, with notice to and approval of the other holder(s) of a realty interest in the property and with the express written consent of the wildlife/resource agencies and/or local general purpose governments where appropriate, pursuant to a final order in a condemnation proceeding. [Note: Center as grantor or as grantee shall pursue its entitled compensation for the taking in accordance with applicable state law.]

3. Minor modifications not inconsistent with conservation values and/or conservation easement purposes. Center-held or -granted conservation easements may be amended with the consent of the other holder(s) of a realty interest in the property, and with the express written consent of the wildlife/resource agencies and/or local general purpose governments where appropriate, if (a) the amendment is consistent with the purpose, terms, and intent of the original conservation easement, and (b) the conservation value protection of the amended conservation easement is the same as or, preferably, greater than in the original conservation easement

4. Prior agreement. With the express written consent of the wildlife/resource agencies, Center-held or -granted conservation easements may be amended where the parties to the original conservation easement, or in writing incorporated into the conservation easement by reference, specifically contemplated such amendment.

5. Format. Center-held or -granted conservation easements may be amended, with the express written consent of the wildlife/resource agencies where appropriate, to upgrade or update older conservation easements to reflect changes in law or best practice conservation easement format.

6. Merger. With regard to whether the common law merger doctrine applies to state-created conservation easements, the law appears unsettled with legal writers within the land trust community of split opinion. Center supports the view of the wildlife/resource agencies that conservation easements should contain a provision that the doctrine of merger does not operate to extinguish the particular conservation easement if the conservation easement and underlying fee title become vested in the same party. If, despite this intent, should the doctrine of merger be held to apply to extinguish the Center-held or -granted conservation easement, then, with the written agreement of wildlife/resource agencies and/or local general purpose government entities, the Center should first try to assign

the subject conservation easement to a qualified replacement grantee. As an alternative in the absence of such reasonably available and willing qualified grantee, the Center should replace the subject conservation easement with a recorded restrictive covenant on the conserved property containing the same protections embodied in the conservation easement (except any prohibition against encumbering the conserved property with additional conservation easements).

7. Reconfiguration and/or Addition/Subtraction of Acreage. Contingent upon all other terms and conditions of the original conservation easement remaining unchanged, Center-held or -granted conservation easements may be amended, with the express written consent of the wildlife/resource agencies and/or local general purpose government entities where appropriate, to reconfigure the conserved property, and/or add habitat acreage to or subtract habitat acreage from the conserved property.

8. Destruction of Conservation Values by Force Majeure. Conservation easements subject to catastrophic events (e.g., fire, flooding, earthquakes, pestilence, or erosion) which irrevocably undermine or destroy preexisting conservation values on all or a portion of conserved property may be amended or extinguished consistent with the terms and conditions of the conservation easements.

9. Changed Circumstances or Conditions. Conservation easements may be subject to changed circumstances or conditions, e.g., a local government's exercise of its police powers to require a fuel modification zone within the conserved habitat. With regard to changed circumstances or conditions not otherwise addressed above that prevent the conservation purposes of the conservation easement being realized, Center will as a last resort only amend, or allow the termination of, Center-held or -granted conservation easements with the consent of the public beneficiaries through a legal proceeding assuring an equitable resolution.

Amendment Procedures

Consistent with this policy, the Executive Director, in consultation with the General Counsel, the Director of Conservation Science, and other senior staff, shall review each proposed conservation easement amendment and make a written recommendation, one supported by an evaluation that the proposed amendment is consistent with this policy, to the Board for decision.