

## AMENDING OR TERMINATING CONSERVATION EASEMENTS: THE NEW HAMPSHIRE EXPERIENCE

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*“The New Hampshire Attorney General considers any perpetual conservation easement donated as a charitable gift in whole or in part to a charitable organization or a government entity to constitute a charitable trust and thus be subject to charitable trust principles.”<sup>1</sup>*

The New Hampshire legislature enacted laws permitting the establishment of conservation easements in 1973.<sup>2</sup> Since that time, thousands of acres in the State have been preserved and protected from development through the efforts of government entities and the land trust community, the latter of which is comprised of nonprofit land conservation organizations recognized as tax exempt under the Internal Revenue Code.<sup>3</sup> As of October 2013, the National Conservation Easement Database had gathered data on 3,500 individual conservation easements in New Hampshire held by land trusts, the State, the federal government, and local municipalities.<sup>4</sup>

Conservation easements are generally drafted to exist in perpetuity. Consequently, along with denoting the preservation of open space, agricultural

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<sup>1</sup> PAUL DOSCHER ET AL., *CTR. FOR LAND CONSERVATION ASSISTANCE, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS* (2010), available at <http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf> (providing guidelines for the amendment or termination of conservation easements).

<sup>2</sup> See N.H. REV. STAT. ANN. § 477:45–47 (1973).

<sup>3</sup> See I.R.C. § 501(c)(3) (2006).

<sup>4</sup> *State of New Hampshire and All Easements*, NAT’L CONSERVATION EASEMENT DATABASE, [http://www.conservationeasement.us/reports/easements?report\\_state=New%20Hampshire&report\\_type=All](http://www.conservationeasement.us/reports/easements?report_state=New%20Hampshire&report_type=All) (last visited Oct. 14, 2013).

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land, and important natural and historical features, an easement document ideally should contain an amendment procedure to address any unforeseen circumstances that may arise over the passage of time. However, not all easements address the issue of amendment. In addition, in some situations, the language of an easement document may be vague, inconsistent with current legal requirements, erroneous, or poorly drafted. The easement holder encountering these issues may be unsure of the remedies available to correct the problem and may not even know where to begin the search for options. As one commentator has observed,

At the outset, it is important to note that the tension between administering a perpetual trust in accordance with its terms and stated purpose and modifying the trust to respond to changing conditions is nothing new. In addition, when such situations have arisen in the past, there has been a certain degree of confusion as to which branch of government had the legal authority to resolve the problem.<sup>5</sup>

The first step in determining which branch of government has the jurisdictional authority to oversee the amendment or termination of an easement is to ascertain whether the conservation easement constitutes a restricted charitable gift or charitable trust (in some jurisdictions charitable gifts made for specific purposes are referred to as restricted gifts, and in others they are referred to as charitable trusts).<sup>6</sup> The answer may differ depending on a number of factors, including the manner in which the easement was conveyed,<sup>7</sup> whether any funds used to purchase the easement were subject to restrictions on their use, written or online materials pursuant to which the grantee solicited the conveyance, and the terms of any federal or state program pursuant to which the easement was acquired.<sup>8</sup>

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<sup>5</sup> Clemens Miller-Landau, Note, *Legislating Against Perpetuity: The Limit of the Legislative Branch's Powers to Modify or Terminate Conservation Easements*, 29 J. LAND RESOURCES & ENVTL. L. 281, 282 (2009).

<sup>6</sup> See Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 231–36 (2012) (describing the history that led to the States using different terminology to describe charitable gifts made for specific purposes and explaining that, regardless of the label used, donees must administer such gifts in accordance with the terms and purposes specified by the donors and the state attorney general has the power to enforce such gifts).

<sup>7</sup> For example, conservation easements can be exacted as part of development approval processes; purchased for full value; purchased in part-sale, part charitable gift (“bargain sale”) transactions; or donated in full as charitable gifts. In the charitable gift and bargain sale contexts, landowners will often claim federal tax benefits. See, e.g., I.R.C. § 170(h).

<sup>8</sup> See, e.g., *Carpenter v. Comm’r*, 103 T.C.M. (CCH) 1001, 1004 (2012) (quoting Michael M. Schmidt & Taylor T. Polluck, *Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds*, 31 COLO. LAW. 57, 58 (2002)),

If the answer is in the affirmative and the conservation easement constitutes a restricted gift or charitable trust, the regulatory authority is under the jurisdiction of the state attorney general.<sup>9</sup> Other types of conservation easements or issues that arise with respect to such easements may also fall within the purview of the attorney general in some circumstances, such as when the attorney general serves as legal counsel to the government agency holding the easement, or the proposed activity is not consistent with the charitable mission of the nonprofit organization holding the easement, or the easement is deemed to be held for charitable purposes on behalf of the public.<sup>10</sup>

During her tenure as New Hampshire's Attorney General, U.S. Senator Kelly Ayotte took the position that conservation easements in New Hampshire are charitable trusts subject to oversight by the Director of Charitable Trusts. She based her opinion on New Hampshire case law<sup>11</sup> and New Hampshire's comprehensive definition of the term "charitable trust," which states,

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*reconsideration denied and opinion supplemented in 106 T.C.M. (CCH) 62 (2013) (holding that the conservation easements at issue, which were donated as charitable gifts and for which federal charitable income tax deductions had been claimed, were not "charitable trusts," but were "restricted gifts" or "contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations").*

<sup>9</sup> See generally MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 305–06 (2004).

<sup>10</sup> See, e.g., *In re Village of Mount Prospect*, 522 N.E.2d 122, 125 (Ill. App. Ct. 1988) (finding land dedicated to Village "for public purposes" was held upon an express charitable trust and could not be sold without court approval in a *cy pres* proceeding).

<sup>11</sup> Many perpetual conservation easements are donated in whole or in part as charitable gifts to charitable organizations and government entities to be used for a specific charitable purpose—the protection of the particular land burdened by the easement for the conservation purposes specified in the deed in perpetuity. In New Hampshire, a gift made to a charitable organization or government entity to be used for a specific charitable purpose creates a charitable trust. See, e.g., *Trustees of Protestant Episcopal Church v. Danais*, 235 A.2d 518 (N.H. 1967) (holding testamentary devise to the trustees of a designated church of certain premises to be used as a rectory for the parish of such church and "to be occupied by the rector . . . and his family and by them only" created a valid charitable trust); *Keene v. Martin*, 79 A.2d 13 (N.H. 1951) (holding bequest to pay for and establish a set of chime bells to be installed on the public library or some other building in the city constituted a charitable trust); *State v. Fed. Square Corp.*, 3 A.2d 109 (N.H. 1938) (finding land and buildings thereon conveyed to a city to be used as a public library created a charitable trust); see also RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003) ("An outright devise or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust . . . . A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee . . ."). Even if a charitable gift of a perpetual conservation easement is not characterized as a technical "trust," it should be characterized as a restricted charitable gift, and the substantive rules governing the

(a) “Charitable trust” means any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, nonprofit, educational, or community purpose. Charitable trust includes, but is not limited to “charitable organization,” as that term is defined in subparagraph (b). The fact that any person or entity sought to be charged with fiduciary duties is a corporation, association, foundation, or any other type of organization that, under judicial decisions or other statutes, has not been recognized as, or has been distinguished from, a charitable trust does not provide a presumption against its being a charitable trust as defined in this paragraph.

(b) “Charitable organization” [includes] . . . [a]ny . . . entity that is or holds itself out to be established, in whole or in part, for any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, *environmental conservation*, civic, or other charitable purpose or any person who in any manner employs a charitable appeal as the basis of any solicitation or an appeal that suggests that there is a charitable purpose to any solicitation . . . .<sup>12</sup>

The New Hampshire Attorney General’s broad common law authority to regulate charitable activities was codified in 1943 to read as follows:

[T]he attorney general shall have and exercise, in addition to all the common law and statutory rights, duties and powers of the attorney general in connection with the supervision, administration and enforcement of charitable trusts, charitable solicitations, and charitable sales promotions, the rights, duties and powers set forth in RSA 7:19 through 32-a inclusive.<sup>13</sup>

The Attorney General’s position is supported by the Uniform Trust Code, adopted by New Hampshire in 2004, which specifically excludes “an easement for conservation or preservation” from the application of the Uniform Trust Code provision authorizing the modification or termination of “uneconomic trusts.”<sup>14</sup> In their commentary, the drafters of the Uniform Trust Code explained,

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will

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administration of charitable trusts, including attorney general oversight, should nonetheless apply. *See supra* notes 6 and 8; RESTATEMENT (SECOND) OF TRUSTS § 348.1 cmt f (1959).

<sup>12</sup> N.H. REV. STAT. ANN. § 7:21(II)(a)–(b)(2) (2013) (emphasis added).

<sup>13</sup> *Id.* § 7:19(I).

<sup>14</sup> *Id.* § 564-B:4-414(d).

frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value.<sup>15</sup>

As with comments to any uniform act, the comments to the Uniform Trust Code should be relied upon as a guide in interpreting that Act to achieve uniformity among the States that have adopted it.<sup>16</sup>

The Attorney General’s position is also supported by the Uniform Conservation Easement Act<sup>17</sup> and the Restatement (Third) of Property: Servitudes.<sup>18</sup> In their commentary to the Uniform Conservation Easement Act, which was approved by the Uniform Law Commission in 1981 and amended in 2007, the drafters explain,

The Act leaves intact the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts. Such law may create standing to enforce a conservation easement in the Attorney General or other person empowered to supervise charitable trusts (Section 3(4)).<sup>19</sup>

[B]ecause conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the

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<sup>15</sup> UNIF. TRUST CODE § 414 cmt. (2010), *available at* [http://www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf).

<sup>16</sup> *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (“Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved . . . . Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.”).

<sup>17</sup> UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 165 (2008), *available at* [http://www.uniformlaws.org/shared/docs/conservation\\_easement/ucea\\_final\\_81%20with%2007amends.pdf](http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf).

<sup>18</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

<sup>19</sup> UNIF. CONSERVATION EASEMENT ACT, Commissioners’ Prefatory Note at 3.

enforcement of charitable trusts should apply to conservation easements.<sup>20</sup>

The Restatement (Third) of Property: Servitudes, published by the American Law Institute in 2000, similarly provides that the modification and termination of conservation easements held by government bodies or conservation organizations should be governed, not by the real property law doctrine of changed conditions, but by a special set of rules based on the charitable trust doctrine of *cy pres*.<sup>21</sup> In their commentary, the drafters of the Restatement explain,

Because of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes . . . .<sup>22</sup>

All 501(c)(3) nonprofit organizations active in New Hampshire, with the exception of religious organizations, are required to register with and report to the Director of Charitable Trusts. Although the affected nonprofit land trust organizations were in compliance with these specific regulatory requirements and generally cognizant of their fiduciary responsibilities with regard to gifts of cash and other property to be used for specific charitable purposes, the initial release of the Attorney General's definition of conservation easements as charitable trusts caused anxiety in the New Hampshire land trust community. Concerns focused

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<sup>20</sup> *Id.* § 3, cmt.; see K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 33 UTAH ENVTL. L. REV. 87 (2013).

<sup>21</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11.

<sup>22</sup> *Id.* § 7.11 cmt. a; see also *id.* § 8.5 cmt. a (providing that, because “[t]he resources protected by conservation servitudes provide important public benefits, but are often fragile and vulnerable to degradation by actions of the holder of the servient estate[,]” such servitudes are enforceable by coercive remedies and other relief designed to both give full effect to the purposes of the servitudes and deter servient owners from conduct that threatens the protected resources). The drafters explain that “[§ 8.5], in combination with § 7.11, is designed to protect the long-term utility of conservation servitudes by encouraging courts to enforce them as vigorously as possible and by discouraging servient owners from engaging in conduct that lessens the effectiveness of the servitude or frustrates its purpose.” *Id.*; see also *id.* § 3.1 illus. 4 (“Because the legislature has authorized conservation servitudes, a court would not be justified in finding that other policies outweighed the policy expressed by the statute.”); *id.* § 4.3(4) (“If no duration is stated . . . a conservation or preservation servitude is perpetual.”); *id.* § 4.6(1)(b) (“The benefit of a conservation servitude held by a governmental body or conservation organization as defined in § 1.6 is transferable only to another governmental body or conservation organization unless the instrument that created the servitude provides otherwise.”); *id.* § 7.16(5) (“Unless a different result is required by the applicable statute, [conservation and preservation] servitudes are not subject to termination under a marketable-title act”).

particularly on the potential for increased government regulation, recordkeeping, and reporting requirements, and the negative consequences that could result from a failure to meet the regulators' expectations.

To address these concerns, a series of meetings was convened to discuss the educational and facilitative role that the Attorney General's office plays in the charitable sector, the legal and practical implications for land trusts soliciting and accepting charitable gifts of conservation easements, and options designed to minimize the regulatory burden on such organizations. At the outset, the participants and other stakeholders recommended the Attorney General issue written guidance to assist land trust organizations in complying with the laws pertaining to conservation easements.

Paul Doscher, Vice President for Land Conservation at the Society for the Protection of New Hampshire Forests, and Terry M. Knowles, the Assistant Director of Charitable Trusts, Office of the Attorney General of New Hampshire, spent a number of months drafting written guidelines for New Hampshire conservation easement holders. The resulting publication, *Amending or Terminating Conservation Easements: Conforming to State Charitable Trusts Requirements, Guidelines for New Hampshire Easement Holders* ("Guidelines"), was issued in 2010.<sup>23</sup>

The Guidelines provide easement holders considering the amendment or extinguishment of a conservation easement, in whole or in part, with specific information regarding whether and how to contact the Office of the Attorney General, including a step-by-step procedure to follow when contact is deemed necessary.<sup>24</sup> The Guidelines provide that "Seven Principles" must be met in all cases and require categorization of a proposed change as "Low Risk," "More Risk," or "High Risk" according to specific criteria.<sup>25</sup>

The application process itself consists of drafting a letter to the Office of the Attorney General Director of Charitable Trusts containing the following: a description of how the proposed change complies with each of the "Seven Principles;" categorization of the proposed change as "Low Risk," "More Risk," or "High Risk;" an explanation of the form and purpose of the proposed change; and documentation including, as appropriate, a copy of the original easement deed, maps, and plans, and a resolution of the governing body stating that the proposed change complies with the organization's amendment policies and procedures.<sup>26</sup>

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<sup>23</sup> See DOSCHER ET AL., *supra* note 1. Nancy A. McLaughlin, Robert W. Swenson Professor of Law at the University of S.J. Quinney College of Law, reviewed and provided helpful comments on one of the later drafts of the Guidelines.

<sup>24</sup> *Id.* at 3–10.

<sup>25</sup> *Id.* at 3–10. The Seven Principles and risk categories were drawn, in part, from the Land Trust Alliance's research report on amendments, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES, LAND TRUST ALLIANCE (2007), available at [http://iweb.lta.org/Purchase/ProductDetail.aspx?Product\\_code=DL\\_AMEND\\_RPT](http://iweb.lta.org/Purchase/ProductDetail.aspx?Product_code=DL_AMEND_RPT) (last visited Oct. 14, 2013).

<sup>26</sup> DOSCHER ET AL., *supra* note 1, at 10.

## I. THE SEVEN PRINCIPLES

The Seven Principles, which are listed below, are designed to insure compliance with federal and state laws and the fiduciary duties of a land trust organization seeking to amend or extinguish a conservation easement.<sup>27</sup>

The proposed amendment must:

1. Clearly serve the public interest and be consistent with the easement holder's mission.
2. Comply with all applicable federal, state and local laws.
3. Not jeopardize the holder's tax exempt status or status as a charitable organization under either federal or state law (if the holder is a land trust or other charitable organization).
4. Not result in "private inurement" or confer impermissible "private benefit" (as those terms are defined for federal tax law purposes and N.H. RSA 7:19-a).
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor, and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values or attributes protected by the easement.<sup>28</sup>

## II. CATEGORIZATION OF PROPOSED CHANGE

When describing the type of change proposed, the easement holder should review the definitions and examples contained in the Guidelines and select the appropriate risk classification.<sup>29</sup> Each risk category has a set of requirements that must be met by the applicant, ranging from a simple after-the-fact notification to the Attorney General in the case of some Low and Medium Risk amendments, to the necessity of court action in the case of a High Risk amendment or extinguishment.<sup>30</sup>

## III. DISCRETION GRANTED TO HOLDER TO AGREE TO AMENDMENTS

If a conservation easement contains a provision granting the holder the discretion to agree to amendments that are consistent with, or further the purpose of, the easement, the Guidelines provide that it is not necessary for the holder to

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 5–10.

<sup>30</sup> *Id.*

obtain Attorney General review in Low Risk and many Medium Risk cases.<sup>31</sup> Rather, the holder may simply agree to an amendment, provided the holder determines that the amendment (i) complies with the Seven Principles, (ii) is consistent with the holder's organizational amendment policy, and (iii) clearly falls within the discretion granted to the holder pursuant to the amendment provision included in the easement deed.<sup>32</sup> The Guidelines advise that certain documentation should be provided to the Attorney General once such an amendment has been executed and recorded, and a holder may consult with the Attorney General if the holder has doubts regarding whether it can simply agree to a proposed amendment.<sup>33</sup>

#### IV. LOW AND MEDIUM RISK AMENDMENTS

An amendment in the Low Risk category is generally simple and designed to correct scrivener's errors, resolve boundary line disputes, add land to an existing conservation easement, or otherwise positively affect the conservation purposes of the easement.<sup>34</sup> If Attorney General review is necessary, and the Attorney General determines the Low Risk amendment meets the Seven Principles and the definitions in the Guidelines, a "no action" letter will be issued to the easement holder.<sup>35</sup>

An example of a Low Risk amendment that the Attorney General's office reviewed involved a situation in which the owner of property abutting conserved land surveyed his property and discovered that the boundary between the two properties contained a minor surveying error. The easement holder hired a surveyor to review the boundaries of the conserved land and the minor error was confirmed. After review of the proposed correction, the Attorney General issued a "no action" letter and the boundary line was corrected by agreement of the property owners.<sup>36</sup>

An amendment in the More Risk category that requires Attorney General review will be subject to greater scrutiny because "[t]hese amendments are more complicated, may involve trade-offs, and could have the potential to create private benefit or other complications."<sup>37</sup> A More Risk amendment may also affect the

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<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 10–11.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 8.

<sup>36</sup> *See id.* at 8.

<sup>37</sup> *Id.* at 6. In a 2005 report on The Nature Conservancy (TNC), the Staff of the Senate Finance Committee explained that "[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity." STAFF OF S. COMM ON FIN., 109TH CONG., REP. OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY (VOLUME I), at executive summary, 10 (Comm. Print 2005), *available at*

conservation purpose (either positively or negatively), involve IRS private inurement issues, and give rise to objections from the grantor, heirs, abutters, or other interested parties.<sup>38</sup> A meeting with the Attorney General early in the process is therefore recommended for purposes of analyzing the transaction, addressing any questions, identifying issues of concern, and ultimately determining whether the proposed amendment impacts the laws governing charities and charitable assets to an extent requiring judicial review.<sup>39</sup>

An example of a More Risk amendment that the Attorney General's office reviewed involved an easement that conserves 200 acres but reserved to the owners the right to subdivide and develop two house lots in specific locations near the eastern boundary of the property. The abutting property owner to the east later subdivided and developed her property, resulting in the creation of 25 house lots. The owners of the conserved property then wanted to relocate one of their reserved rights to a more remote location near the western boundary of the property and agreed, in exchange, to relinquish the other reserved right. In reviewing the amendment application, the Attorney General paid particular attention to private inurement and private benefit issues, and the possible effect of the change, either positive or negative, on the conservation purposes of the overall easement.<sup>40</sup> The analysis required appraisals of the property, review by a CPA to determine whether the proposed amendment would provide a private benefit as defined by the Internal Revenue Code, and a determination of the effect of the amendment on the conservation purposes of the overall easement.<sup>41</sup> In this particular example, the evidence indicated that there would be no private benefit and the change in the location of one of the reserved rights, coupled with extinguishment of the other, enhanced the conservation purpose of the easement. The Attorney General approved the amendment and no court action was required.<sup>42</sup>

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<http://www.finance.senate.gov/hearings/hearing/?id=e821cece-d9eb-1c66-4b9e-b4a6602a54f4> (last visited Oct. 14, 2013). The Staff noted that modifications made to correct ministerial or administrative errors are permitted under present federal tax law. *Id.* at 9 n.20. But the Staff expressed concern with regard to trade-off amendments, which both negatively impact and further the conservation purpose of an easement, but on balance are arguably either neutral with respect to, or enhance, such purpose. *See id.* at pt. II.5. The Staff provided, as an example, an amendment to an easement that would permit the owner of the encumbered land to construct a larger home in exchange for restrictions further limiting the use of the land for agricultural purposes. *Id.* The Staff explained that trade-off amendments “may be difficult to measure from a conservation perspective,” and that the “weighing of increases and decreases [in conservation benefits] is difficult to perform by TNC and to assess by the IRS.” *Id.*

<sup>38</sup> DOSCHER ET AL., *supra* note 1, at 6–8.

<sup>39</sup> *Id.* at 7–8.

<sup>40</sup> *See id.* at 6–8.

<sup>41</sup> *Id.* at 6–9.

<sup>42</sup> *See id.* at 8, 12.

## V. HIGH RISK AMENDMENTS

High Risk amendment proposals require consultation with, and review by, the Attorney General and may require review and approval by the probate court.<sup>43</sup> High Risk amendments can range from the removal of more than a de minimis portion of the land from the easement, to the release of restrictions, to the complete extinguishment of an easement.<sup>44</sup> Because these changes generally will be contrary to the underlying purpose of the easement, a high degree of review by the Attorney General will be required.<sup>45</sup> These transactions are complex and may also potentially involve federal tax law issues, such as private inurement, impermissible private benefit, and risk of loss of tax-exempt status. It is therefore recommended that the easement holder begin the review process early. As noted in the Guidelines, the Attorney General cannot provide legal or tax advice or warrant that a proposed amendment will satisfy (or not be in violation of) the requirements under federal tax law.<sup>46</sup>

In some cases, a conservation easement deed will specify that the easement can be (i) transferred only to another qualified holder that agrees to continue to enforce the easement (as required by Treasury Regulation § 1.170A-14(c)(2)) and (ii) extinguished as provided in Treasury Regulation § 1.170A-14(g)(6) (i.e., in a judicial proceeding upon a finding that continued use of the property for conservation purpose has become impossible or impractical), which the Tax Court has stated appears to be a regulatory version of *cy pres*.<sup>47</sup> In such cases, the easement can be extinguished in accordance with the terms of the instrument—the regulatory version of *cy pres*—but the Attorney General’s office should be notified to ensure the office has the opportunity to represent the public interest.

An example of a High Risk amendment that the Attorney General’s office reviewed involved a thirty-year-old conservation easement on a 500-acre parcel of land. The 500 acres consisted of a single tract of land bisected by a town road resulting in a configuration whereby 495 acres were situated on the south side of the road and five acres were situated on the north side of the road. The town map assigned two different tax map numbers to this parcel: one to the large parcel and one to the small parcel. An individual owned the underlying fee, and a land trust held the easement on behalf of the public. The owner of the fee died and the land passed to his three children. The children sold the five-acre parcel to a third party but failed to reference the conservation easement in the deed. The new owner did not examine the title to the parcel and subsequently built a house on the five acres. The land trust, in monitoring the easement, discovered that the house had been built on the conserved area. After performing a detailed analysis, the land trust

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<sup>43</sup> *Id.* at 10.

<sup>44</sup> *See id.* at 8–9.

<sup>45</sup> *See id.* at 10.

<sup>46</sup> *Id.* at 12.

<sup>47</sup> *See Kaufman v. Comm’r*, 136 T.C. 294, 306–07 (2011), *vacated and remanded in part on other grounds sub nom. Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012).

determined that the five-acre parcel had little conservation value and did not affect the overall conservation purpose of the main parcel. Based upon that determination, the land trust sought extinguishment of the conservation easement on the five-acre parcel. After review by the Attorney General, a petition for extinguishment to which the Attorney General was a party and consented was submitted to the court. Pursuant to the doctrine of *cy pres*, the court authorized the requested partial extinguishment of the conservation easement in exchange for the new owner's payment of an amount by which the five acres had increased in value to the land trust to be used to steward the remaining 495 acres under easement. The court determined that extinguishment of the easement and use of the resulting proceeds to steward the easement on the remaining land was consistent with the conservation purpose of the easement and the wishes of the donor. Because High Risk amendments or extinguishments such as this are complicated and may require a number of months to review, a face-to-face meeting with the Attorney General is required.<sup>48</sup>

## VI. CONCLUSION

As explained in the Guidelines: "It is impossible to predict all the circumstances that may arise in the future. Even the most well-drafted conservation easement may need to be amended at some point, for example, to clarify terms, add land, improve enforceability, resolve disputes, or address unanticipated land uses."<sup>49</sup>

Since their release in 2010, the Guidelines have been useful to the land trust community and to the New Hampshire Attorney General in facilitating a thorough and efficient review of proposed amendments to, as well as partial extinguishments of, conservation easements. This review has helped to ensure that both the public interest and investment in conservation easements and the donors' intent to preserve special places are protected in perpetuity. In the words of Professors Nancy A. McLaughlin and W. William Weeks, "[C]onservation easement donors, like all other charitable donors, should have assurance that the charitable purposes to which they dedicate their property will be honored."<sup>50</sup>

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<sup>48</sup> DOSCHER ET AL., *supra* note 1, at 10.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> Nancy A. McLaughlin & W. William Weeks, Hicks v. Dowd, *Conservation Easements, and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73, 101 (2010).