



NORTH CENTRAL CONSERVANCY TRUST

EASEMENT AMENDMENT POLICY & PROCESS

Land Trust Standards and Practices 11H1

Adopted, Board of Directors May 12, 2020

I. POLICY & BACKGROUND

North Central Conservancy Trust (NCCT) holds conservation easements on property in order to protect, in perpetuity, the conservation values of the land for the benefit of present and future generations. Because conservation easement acquisitions are accomplished through voluntary agreements with landowners, the success of the program depends upon the confidence of these owners that NCCT will meet its obligations to monitor and enforce the agreements in perpetuity. This confidence would be seriously eroded if NCCT allowed inappropriate modification of its conservation easements.

As ownership, laws, or conditions in or adjacent to properties change, property owners or NCCT itself may seek to amend the terms and/or conditions stipulated in its easements. This policy is written to ensure that future amendments uphold both the original intent of the donated easement and the organization's stewardship obligation under the Internal Revenue Code. It is the express intent that this workable policy be based on the premise that an amendment reflect either a change for the better or a change that has a neutral effect, but the amendment must never result in a net degradation of the conservation values the easement is designed to protect. Amendments, whether requested by the Grantor or NCCT, may only be adopted with written concurrence of both parties.

It is the policy of NCCT to consider amendments to conservation easements only in exceptional circumstances. Any request for an easement amendment shall meet the standards set forth in this policy. If the request is made by the Grantor, it shall be the responsibility of the Grantor, at the Grantor's expense, to provide information sufficient to demonstrate that the standards are met. An amendment may be approved only if the Board of Directors determines that:

- (1) The requested amendment is warranted under one or more of the purposes set forth below;
- (2) The requested amendment is the minimum change necessary to satisfy that purpose;
- (3) The requested amendment shall be consistent with the documented intent (if any), of the donor, grantor and direct funding source;
- (4) The requested amendment does not jeopardize NCCT's tax exempt status or status as a charitable organization under federal law; and
- (5) The requested amendment will not erode the confidence of NCCT's supporters – including both past and future donors of conservation easements and other interests in land – about the goals of the organization or its intent to enforce its conservation agreements. Unless the amendment is requested by NCCT, the landowner requesting the amendment shall sign an agreement to pay all costs, including but not limited to costs and fees for staff, legal, and other professional services pertaining to reviewing the change and, if approved, costs for its implementation. Payment of such costs shall be made whether or not the request is approved.

II. PURPOSES

NCCT intends for this policy to conform to all requirements of law, the Land Trust Alliance Standards and Practices, and all other NCCT policies. The purpose of this document is to outline NCCT's policy for amending conservation easements that it holds and to guide its related practices. NCCT recognizes that amendments to a conservation easement should not be routine, but can serve to strengthen the effectiveness of an easement, to improve its enforceability, or to correct inadvertent mistakes made during the drafting or recording of the conservation easement deed.

III. PERMITTED TYPES OF AMENDMENTS

NCCT will consider the amendment of its conservation easements only in the following circumstances, in accordance with the Land Trust Alliance's seven amendment principles. Any amendment must:

1. Clearly serve the public interest and be consistent with NCCT's mission
2. Comply with all applicable laws.

The easement amendment must comply with all applicable policies of NCCT, and with federal, state and local laws pertaining to conservation easements, tax deductions, and charitable organizations.

3. Not jeopardize NCCT's tax exempt status
4. Not provide impermissible private benefit or private inurement

Under no circumstances will NCCT approve an amendment that may result in a net increase to the landowner's property value that was subject to a charitable contribution or estate tax deduction in violation of the impermissible private benefit and private inurement provisions of the Internal Revenue Code and the Standards and Practices of the Land Trust Alliance.

5. Be consistent with the conservation purposes of easement.

NCCT may authorize minor amendments of the conservation easement where the amendment does not enable new land uses that are incompatible with the conservation purposes of the original easement; and the amendment will have a de minimis effect on the easement provisions.

6. Be consistent with grantor's intent and funding sources.

NCCT may authorize minor amendments of the conservation easements where the amendment is consistent with the intent of the principal parties as expressed in the original conservation easement.

7. Have a net gain or neutral conservation impact.

NCCT shall not approve easement amendments that degrade or increase the risk to the conservation values of the original easement. An amendment may be authorized where the amendment is equivalent to or enhances the conservation values of the original easement.

NCCT may authorize an amendment to correct an obvious error or oversight made at the time the conservation easement was entered into. Such an amendment may include correction of a legal description, inclusion of standard language that was unintentionally omitted, or clarification of an ambiguity in the terms of easement restrictions to clarify issues of interpretation of the easement that have arisen or may reasonably be expected to arise in the future.

Conservation easements held by NCCT are subject to condemnation for public purposes as specified in Wisconsin state statutes, and the United States Code. Where it appears that condemnation powers are being properly exercised, NCCT may enter into a settlement agreement with the condemning authority. In reaching such an agreement, NCCT shall attempt to preserve the intent and purposes of the original conservation easement to the greatest extent possible.

All amendments shall restate all continuing terms, shall take the form of a legal deed, and be executed and recorded as such.

IV. PROCEDURES TO AMEND A CONSERVATION EASEMENT

A. Request or Proposal. Depending on specific circumstances, the proposal to amend a conservation easement may originate from either a landowner or a NCCT staff member. Where appropriate, the request for amendment of an easement shall be accompanied by a map and other documentation.

(1) *Landowner Request*. Any landowner seeking an easement amendment shall file a request in writing to NCCT stating what change is being sought and the specific reasons why it is needed or warranted. An easement amendment request may only be submitted by the landowner(s). No easement amendment shall be approved for any person or entity that is not the owner of the easement property, or that will become effective only upon the sale of the easement property from the current landowner to a prospective purchaser.

(2) *NCCT Staff Proposal*. When the amendment proposal originates from the NCCT staff, the proposal will be outlined in a letter from the NCCT Executive Director to the landowner, stating the specific changes that are proposed and the reasons that the changes are proposed. Under some circumstances, NCCT Staff may propose an amendment to address a violation of an easement restriction that cannot be mitigated otherwise, but only if the violation resulted in no compromise of conservation values.

B. Staff Review and Negotiation. The Executive Director of NCCT shall review all requests, conduct a site visit (if necessary), and, where appropriate, refer the request to the NCCT Properties Committee to determine whether the proposed amendment has the potential to diminish the conservation values of the easement. The committee evaluation will require a thorough examination of the original easement files to ensure that the amendment clearly serves the public interest and is consistent with the overall goals and objectives of the easement and the mission of NCCT, and complies with the current Standards and Practices issued by the Land Trust Alliance. The Properties Committee shall submit a written evaluation to the Board of Directors. In evaluating a proposal and developing its recommendation, the staff will, at a minimum, consider each of the required findings listed in Section V below. Any recommendation to the Board to approve an amendment will be accompanied by a summary of the anticipated costs to complete the amendment, including staff costs. Any such recommendation to the Board must also be accompanied by an agreement signed by landowner and NCCT Executive Director stating that the landowner will cover all such costs if the amendment is approved by the NCCT Board.

C. Board Review & Decision. The Board of Directors must review and approve any proposed amendment. No amendment shall be accepted without prior authorization by an affirmative vote of two-thirds of the voting members of the full Board. The Board of Directors may approve, approve with modification, or reject the request for amendment at its next regularly scheduled meeting or at a special meeting convened for that purpose. A record of the approval vote will be included in the Board meeting minutes, a copy of which will be filed in the easement records along with the supporting materials provided to the Board.

D. Due Diligence & Document Preparation. When necessary, NCCT will request legal review by its easement counsel, and/or by independent outside counsel if deemed appropriate by NCCT. Legal review may include an analysis of whether the proposed amendment will result in a violation of the private inurement and impermissible private benefit rules of the IRS Code, and NCCT's Conflict of Interest Policy. Counsel will report all findings in writing to the NCCT Executive Director, Properties Committee, and to the Board of Directors.

During this process, the staff and counsel may decide whether a restated and amended conservation easement is preferable to a separate amendment agreement. NCCT General Counsel will review the title status of the property in question to determine if title insurance and/or subordination agreements are warranted. NCCT may retain a surveyor to update an existing survey plat or establish a new survey plat to be referenced in the amendment deed. If it is determined to be necessary to conduct an analysis of the effect of the private inurement and impermissible private benefit rules of the IRS Code on the amendment, NCCT may require the landowner to submit an appraisal of the property by a certified appraiser with experience in appraising conservation easement properties, and a tax opinion from a qualified attorney. If warranted, NCCT staff will amend or supplement the existing Baseline Documentation Report concurrently with the amendment of the conservation easement.

E. Closing. The closing of an amendment shall be administered by NCCT's General Counsel. The amendment document shall be signed by all necessary parties, and recorded. If applicable, subordination agreements will be signed by the relevant parties and concurrently recorded with the easement amendment. Additionally, the updated Baseline Document shall be signed at closing and the closing attorney shall obtain and issue a title insurance policy to NCCT covering the easement amendment.

F. Notification. Following closing, NCCT will submit photocopies of the signed easement amendment to the landowner, parties to subordination agreements, County Register of Deeds, and relevant third parties. NCCT will retain the original recorded documents in its files.

V. REQUIRED FINDINGS FOR APPROVAL OF AMENDMENT

The NCCT Properties Committee will review the requested easement amendment and make a report and recommendation to the NCCT Board of Directors for final action. The report and recommendation should contain the following:

- A. A description of the proposed amendment;

B. Facts that support a finding that the effect of the amendment will be beneficial, neutral, or negative;

C. A finding that the amendment will or will not have either a beneficial or neutral effect on the overall conservation values of the easement and, therefore, will not result in a net degradation of the conservation values the easement is designed to protect;

D. A recommendation to approve or disapprove the proposed amendment and, if approval is recommended, a list of any conditions or terms to be included in the amendment ensuring protection of the protected conservation values of the amendment property and the remaining easement.

The Board of Directors may approve, approve with modification, or deny the request for amendment at its next meeting. Approval shall require a majority vote of the Board of Directors. The Board may, at its discretion, delegate its approval authority to the Executive Committee.

VI. COVERING COSTS OF AMENDMENTS

A. Landowner Fee. Unless specifically waived by the Board of Directors, any request to amend a conservation easement from a landowner shall also be accompanied by an initial payment of \$750 to cover NCCT's staff and legal costs. Any unexpended portion of the fee shall be refunded. The landowner shall be responsible for all costs exceeding the initial fee, whether or not the request is approved. The amount of the requested fee may be increased in cases where extensive staff or legal work is needed to review and investigate a proposed amendment. If a landowner's request to amend a conservation easement is approved by the NCCT Board of Directors, the landowner must agree to cover all subsequent costs to complete the amendment. Such costs may include, but are not be limited to, NCCT staff and legal costs, land survey, title insurance policy, lenders' subordination fees, and document recording costs. No landowner fee will be required for amendments initiated by or to correct an error or omission made by NCCT.

B. Easement Stewardship Fund Deposit. If an amendment of an easement will increase NCCT's future administrative and monitoring responsibilities, NCCT staff will determine what additional funds, if any, must be deposited into its Easement Stewardship Fund concurrent with the amendment closing. Any recommendation to the NCCT Board to approve an amendment proposal shall be accompanied by a proposal to secure any additional easement stewardship funds deemed necessary by the NCCT staff.