

## **Easement Amendment Policy<sup>1</sup>**

### **I. Background**

Similar to other land trusts, as Capital Region Land Conservancy's (CRLC) easements mature, it is likely that property owners and the organization itself may seek to amend the terms and/or conditions stipulated in its easements. This policy is written to ensure that future amendments both uphold the original intent of the donated easement and the organization's stewardship obligation under the Internal Revenue Service (IRS) Code. It is the expressed intent of CRLC's Board of Directors that this workable policy be based on the premise that an amendment reflect either a change for the better or change for the neutral in terms of its protection of conservation values on the subject property, but the amendment must never result in a net degradation of the conservation values the easement is designed to protect.

As CRLC easements are accomplished through voluntary agreements with landowners, the success of our program depends upon the confidence of these owners that CRLC will meet its obligation as grantee/holder to monitor and enforce the easement. This confidence will be seriously eroded if CRLC allows unwarranted modification of its conservation easements. Amendments could also raise potential problems with the IRS both for CRLC, in terms of its tax-exempt status, and for easement donors, in terms of any charitable deduction that may have been claimed for a gift.

Therefore, it is the policy of CRLC to hold and enforce its conservation agreements as written. As such, CRLC will permit amendments to conservation easements only in very exceptional circumstances.<sup>2</sup>

### **II. Minimum Criteria for Approval of Amendments**

Any request for an easement amendment will be reviewed according to the procedures set forth in this policy, and will be implemented where the Board of Directors determines that:

- A. the requested modification is warranted under one or more of the specified purposes set forth in Part III.1 through 6 below; and
- B. it is the minimum change necessary to satisfy that purpose; and
- C. the modification does not set an unfavorable precedent for future amendments; and
- D. it will not erode the confidence of CRLC supporters – including both past and future donors of conservation restrictions and other interests in land – about the goals of the organization or its intent to enforce its conservation agreements; and

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<sup>1</sup> LTA Standard and Practice 11I

<sup>2</sup> LTA Standard and Practice 11E

- E. the modification will not degrade the conservation values of the original easement, including impairment of CRLC's ability to ensure easement terms are met or change the easement's perpetual duration; and
- F. it will not result in private inurement, impermissible private benefit, or a net increase to the landowner's property value that was subject to a charitable contribution or estate tax deduction under the Internal Revenue Service Tax Code. CRLC may commission or require the landowner to commission an independent appraisal to determine the value the requested amendment(s) may add to the value of the easement; and
- G. the modification must comply with all federal and state tax laws pertaining to conservation easements.

Unless specifically waived by the Board of Directors, or the amendment is requested by CRLC, the landowner requesting the amendment shall pay all staff costs pertaining to reviewing the change, whether or not the request is approved; and, if approved, costs for its implementation.

### **III. Purpose of Requested Amendment**

CRLC will consider modification to its conservation easements only in the following circumstances:

1. Prior Agreement. When the original conservation easement has included a specific provision allowing modification of the restrictions at a future date under specified circumstances, the amendment must be consistent with the terms and conservation intent of the original easement.
2. Correction of an Error or Ambiguity. CRLC may authorize an amendment to correct an obvious error or oversight, acknowledged by grantor and grantee, made at the time the conservation easement was entered into. This may include correction of a legal description, inclusion of standard language that was unintentionally omitted, or clarification of ambiguous language or obsolete terms in order to avoid litigation over the interpretation of the document in the future.
3. Settlement of Condemnation Proceedings. Conservation easements held by CRLC are subject to condemnation for public purposes as specified in Virginia Statutes, and the United States Code. Where it appears that the condemnation power would be properly exercised, CRLC may enter into a settlement agreement with the condemning authority. In reaching such an agreement, CRLC shall attempt to preserve the intent of the original conservation easement to the greatest extent possible.
4. Other Modifications Consistent with Conservation Purpose. CRLC may authorize other modifications of the conservation easements where (a) the modification is not inconsistent with the intent of the principal parties of the original conservation easement; (b) the amendment is substantially equivalent to or enhances the conservation goals of the original easement; (c) the amendment does not foster new land uses that are incompatible with the conservation purposes of the original easement; (d) the amendment will not

materially alter or degrade the easement's provisions; and (e) the amendment involves removal of reserved rights.

5. Substantial Alteration or Destruction of a Conservation Value. CRLC may authorize an amendment or termination of an easement following significant impairment of conservation values caused by a force majeure event such as volcanic eruption, earthquake, fire, rising sea levels, destruction of habitat or species extinction. In this situation, CRLC may amend the easement to protect and preserve the remaining conservation values provided that the terms of the amended easement are fully protective of all remaining conservation values and remain consistent with the easements original conservation purposes. If there are no conservation values remaining, CRLC may petition a court of competent jurisdiction to terminate the easement.
6. Add Acreage. CRLC may authorize an amendment to the easement to increase the acreage to the existing easement.

#### **IV. PROCEDURES FOR REQUESTING AN AMENDMENT**

A. Any landowner seeking amendment of a CRLC held conservation easement shall:

1. File a request in writing to CRLC stating what change is being sought and the specific reasons why it is needed or warranted, including which of the permitted purposes under Part III above the request falls under.
2. Where appropriate, furnish a copy of maps and other supporting documentation.

B. CRLC shall follow these procedures:

1. The Executive Director of CRLC shall review all requests and, where appropriate, shall refer them to the Land Conservation Manager or other designated staff member for an evaluation, a site visit if warranted, and recommendation. The Executive Director shall also inform any co-holder of this request in writing and provide them with all related documentation.
2. The Land Conservation Manager or other designated staff member will report to the CRLC Easement Committee which will review the requested easement amendment and make a recommendation to the CRLC Board of Directors. This recommendation will be consistent with the recommendation of the co-holder if applicable, otherwise, CRLC and the co-holder will arrive at consensus through the arbitration procedures set forth in the signed Memorandum of Understanding between the two organizations. The recommendation should contain the following:
  - a) A description of the proposed amendment;
  - b) A recommendation to approve or disapprove the proposed amendment which, in the event a recommendation to approve is made, shall be accompanied by:

- (i) A description of the amendment's purpose and statement of consistency with one or more of the specified purposes allowed under Part III above;
  - (ii) Facts that support a finding that the amendment will not result in any material degradation of the conservation values the easement is designed to protect;
  - (iii) A list of any conditions or terms that must be included in the amendment to ensure protection of the current and future conservation values of the amendment property and the remaining easement.
3. At their next meeting, the Board of Directors will vote to:
- a) Preliminarily approve
  - b) Preliminarily approve with modification, or
  - c) Reject the request for amendment.

Preliminary approval shall require a majority vote of the Board of Directors or the Board may delegate its approval authority to the Executive Committee or Easement Committee.

- 4. If the Board votes to preliminarily approve the amendment, the amendment will be drafted. All amendments must be reviewed and approved by CRLC's legal counsel.
- 5. The final draft of the amendment and a written summary of the reasons why it is being requested, along with a description of any changes since the Board gave preliminary approval, will be presented to the Board of Directors for final approval.
- 6. The Board's decision will be recorded in the minutes of the board meeting.
- 7. The amendment will be duly recorded. Originals and copies of the amendment deed and all related documentation shall be retained according to CRLC's Records Policy.