

Vermont Housing and Conservation Board

Interim Policy on Amending Conservation Easements

I. Preamble

The Vermont Housing and Conservation Board and its conservation partners have approved both minor and major amendments to conservation easements where they have concluded that the amendment was in the public conservation interest. Under this policy, VHCB seeks to enhance the transparency and public participation of this process and to make approval of minor amendments more efficient. Under this policy the Conservation Issues Committee (“Committee”) of the Vermont Housing and Conservation Board (“VHCB” or “Board”) is authorized to make final decisions on proposed Major Amendments to conservation easements held or co-held by the Board, as outlined below.

Minor Amendments are consistent with the purposes of the easement, have a beneficial, neutral or *de-minimis* negative impact on the resource values protected by the easement with that test applied to lands protected by or excluded from the existing easement and activities permitted by the existing easement. Minor Amendments can be approved by VHCB staff but will be reported to the Committee, and Board. Upon request of the Vermont Attorney General (“AG”), Minor Amendments shall be reported to the AG. Requests for Minor Amendments may be submitted by a letter from the primary steward or landowner that contains all applicable information needed for VHCB staff to decide whether to approve, approve with conditions or deny the proposed amendment.

Major Amendments are subject to written comment during a comment period, oral comment at a duly warned public hearing convened by VHCB staff and review by the Committee at a duly warned public meeting at which a quorum of the Committee is present. Prior to Committee review, VHCB staff gives the public an opportunity to comment on all Major Amendments during a written comment period and at a public hearing. All comments received are summarized in the VHCB staff recommendation to the Committee. All requests for Major Amendments shall be submitted by the primary steward on an application form completed by the landowner or primary steward. VHCB staff shall commence the process contained in Section III only if VHCB and all easement co-holders are recommending approval of the proposed amendment. Within 14 days after receipt of the application, VHCB staff shall publish the notice of the comment period, public hearing and Committee meeting required by this policy. The application shall include a written summary of the proposed amendment and a certification that the landowner or primary steward has given notice to the persons listed in Section VI. For final approval by the Committee, the easement amendment must be supported by the landowner, all easement holders and any other party that has a legal right to approve the amendment.

The role of the Committee is to review the recommendation of VHCB staff that a proposed amendment should be approved because it complies with this policy. The Committee shall issue a written decision approving, approving with conditions or denying the amendment request and shall state the reasons for its action. This decision may be signed by the Committee Chair or his designee on behalf of VHCB. Given the interest of all parties to get a decision on the amendment in a reasonable time, the Committee Chair shall make every effort to expedite consideration of amendments over other matters.

II. Minor Amendments – Approval by VHCB Staff

On behalf of the Vermont Housing and Conservation Board, VHCB staff is authorized to approve Minor Amendments, as defined herein. **Minor Amendments** include the following categories of modifications:

1. Placing additional land under the protection of the easement;
2. Adding, expanding, or enhancing the easement's protection of natural or cultural resources existing on the protected property;
3. Adding a right of first refusal, an option to purchase at agricultural value, or another right to acquire an ownership interest in the property in the future;
4. Amending the easement to protect areas that were excluded from the easement or to further restrict rights and uses that were retained by the owner under the existing easement;
5. Correcting typographical or clerical errors without altering the intent of or uses permitted under the easement;
6. Modernizing or clarifying the language of the easement¹ without materially changing the purposes or permitting additional uses under the easement that will have no more than a *de minimis* negative impact on resource values;
7. Merging the easements on two or more protected properties into a single easement provided the merger does not: (a) reduce the area covered by the easement; (b) permit new uses under the easement that will have more than a *de minimis* negative impact on resource values; or (c) reduce the existing protections of the resource values
8. Modifying the legal description of the protected property to reference a subsequent survey of the area covered by or excluded from the easement;
9. Releasing the minimum acreage necessary for a public project where the land protected by the easement is or will be subject to the exercise of a right of eminent domain under Chapter 1, Article 2 of the Constitution of the State of Vermont;
10. An amendment or termination of an easement where the underlying transaction requires and receives the approval of the General Assembly.
11. An amendment or termination of a regulatory easement where the easement and the amendment require approval by a federal, state or local regulatory body, including, but not limited to, an Act 250 District Commission, Public Service Board and Development Review Boards, by issuance of a land use permit, certificate of public good or zoning permit.
12. Relocating an existing recreational trail without materially detracting from the public's access or quality of experience.
13. Adjusting the boundaries between two or more protected properties, or adjusting the boundaries of areas excluded from the easement, provided that the adjustment does not reduce the area covered by the easement by more than the greater of: 2 acres or 1% of the protected property;²
14. An amendment which all easement holders reasonably believe is consistent with the purposes³ and will have no more than a *de minimis* negative impact on the resource

¹ One example of modernizing easement language is to replace sections on home occupations and accessory uses with rural enterprise language.

² This reflects the boundary line adjustment easement language that NRCS uses in Vermont.

³ Any material change in the Purposes of the easement or change in the priority of Purposes would be treated as a Major Amendment.

values protected by the easement but does not fall within the types of Minor Amendments found in subsections 1-12, above;

Staff Review and Approval

Before approving a Minor Amendment, VHCB staff shall summarize the amendment and conclude in writing that the amendment:

- a. serves the public conservation interest;
- b. is consistent with the purposes of the conservation easement;
- c. is consistent with the purposes of Chapter 155 of Title 10⁴ and the Housing and Conservation Trust Fund Act;
- d. does not result in private inurement or confer impermissible private benefit to a private party, as those terms are defined in the Internal Revenue Code, 26 U.S.C. § 501(c)3;
- e. has a beneficial, neutral or *de-minimis* negative impact on the resource values of the property protected by the existing easement; **and**
- f. is supported by the landowner, all easement holders and any other party which has a legal right to approve the amendment.

In determining consistency with the conservation purposes, VHCB staff shall consider the degree to which the amendment will balance the stated goals and purposes of the easement and shall take into consideration whether these goals and purposes are ranked by the terms of the easement.

III. Minor Amendments; Discretionary Review of Certain Ones by Committee; Reports to Committee and Board

When VHCB staff intends to approve a Minor Amendment under sections II(13) or II(14) of this policy, staff shall consult with the Committee Chair to discuss whether to have the Committee review the proposed amendment pursuant to Section IV of this Policy. If the Chair believes that the proposed amendment could have more than a *de-minimis* negative impact on the resource values, the Chair shall refer the amendment to the Committee. Otherwise, staff is authorized to approve the amendment as a Minor one under Section II of this Policy.

VHCB staff shall provide a written report summarizing all Minor Amendments approved during the previous 6 months to the Committee. Upon request of the AG, VHCB staff shall also provide a copy of the written report to the AG. The Committee shall review the report and forward it to the full Board. After review by the Committee, VHCB staff shall publish the report in appropriate electronic format uploaded to the VHCB webpage (www.vhcb.org).

IV. Major Amendments: Automatic Review by Committee; Comment Period and Meeting

Major Amendments shall be reviewed by the Committee at a duly warned public meeting at which a quorum is present following a written comment period and public hearing conducted by VHCB staff. Any person may submit written comments and appear at the public hearing and Committee meeting.

After the notice requirements contained in Sections VI of this Policy have been met, VHCB staff shall give the public an opportunity to submit written comments (preferably by electronic means) on any

⁴ 10 VSA 6301, Acquisition of Interests in Land by Public Agencies.

proposed Major Amendment during a duly warned comment period of 10 business days and conduct a duly warned public hearing. VHCB strongly recommends that the primary steward attend the public hearing and review written comments so that all holders can confirm public opinion on the proposed amendment before taking final action. Shortly after this public meeting, VHCB staff shall make a recommendation to the Committee whether it should approve, approve with conditions or deny the proposed amendment. The Committee shall meet at a duly warned public meeting at which a quorum of the Committee is present to consider the VHCB staff recommendation. The comment period, public hearing and Committee meeting may be warned in the same public notice. The Committee shall make a decision on the proposed amendment at the Committee meeting or decide that additional information is required.

Following a decision of the Conservation Issues Committee on a Major Amendment, the Chair or designee shall issue a final written decision on behalf of Vermont Housing and Conservation Board approving, approving with conditions or denying the amendment request and stating the reasons for the decision. The Chair shall distribute the written decision to the primary steward who shall provide notice of the decision to the landowner, easement co-holders, municipality, and all parties who submitted comments or attended the public meeting. After all the parties have received notice of the decision, VHCB shall publish the decision in appropriate electronic format by uploading it to the VHCB webpage (www.vhcb.org).

V. Criteria for Approval of Major Amendments

The Committee shall consider all circumstances and information that may reasonably bear upon the public conservation interest in deciding whether to approve a Major Amendment to a conservation easement. The Committee may approve a Major Amendment only if it:

1. serves the public conservation interest;
2. is consistent with the purposes of Chapter 155 of Title 10⁵ and the Housing and Conservation Trust Fund Act;
3. does not result in private inurement or confer impermissible private benefit to a private party, as those terms are defined in the Internal Revenue Code, 26 U.S.C. § 501(c)3;
4. will result in adequate compensation to the holder, if the amendment is a whole or partial termination of an easement ; **AND**
5. clearly meets **one** of the following goals:
 - a. The amendment promotes or enhances the conservation purposes of the easement, even though it may be inconsistent with a strict interpretation of the terms of the easement;
 - b. The amendment clearly enhances the conservation benefit to the public, even though it allows the diminution of one or more conservation purposes on the property protected by the existing easement or releases land protected by the existing easement;⁶ **OR**

⁵ 10 VSA 6301, Acquisition of Interests in Land by Public Agencies.

⁶ This language authorizes the Committee to approve an amendment that terminates conservation restrictions on land protected by the existing easement in return for obtaining conservation restrictions on other lands outside the existing easement. This may be referred to as a “land swap”.

- c. 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 public.

VI. Major Amendments: Notice of Amendment Summary, Comment Period, Public Hearing and Committee Meeting

For Major Amendments, the primary steward or landowner shall send a summary of the proposed amendment to the city council or town select board, conservation commission and planning commission of the municipality in which the property is located, and all persons who conveyed the conservation easement within the last 25 years, unless individual notification is impracticable. Also, as part of the application, the primary steward or landowner shall provide VHCB with the names, address (U.S.P.S and electronic, if known) and telephone number of any adjacent landowners who may be affected by the amendment to the easement and, for easements purchased for less than fair market value, that of the original Grantor.

For Major Amendments, VHCB shall publish a notice containing the summary of the proposed amendment and public hearing process in at least one area newspaper over 2 weeks at least 7 days before the beginning of a comment period reasonably calculated to reach adjoining landowners who may be affected by the proposed amendment to the easement. VHCB shall also publish such notice in an appropriate electronic format uploaded to the VHCB webpage (www.vhcb.org), summarizing the nature of the amendment.

For Major Amendments, VHCB shall also send an electronic version of the notice of the public comment period, public hearing and Committee meeting to the city council or town select board, conservation commission and planning commission of the municipality in which the property is located, adjacent landowners who may be affected by the amendment to the easement and all persons who conveyed the conservation easement within the last 25 years, unless individual notification is impracticable. For easements purchased for less than fair market value, the Board shall also send notice to the original Grantor when practicable. The notice shall set forth the date, time, place and agenda for the public hearing and Committee meeting and indicate that public comments may be provided by delivering written or electronic comments to VHCB staff by a date specified in the notice or by testifying at the public hearing.

VII. Minor Modifications to Interim Policy

VHCB staff is authorized to make minor modifications to this Interim Policy in order to 1. Collaborate with primary stewards and co-holders, especially the Agency of Agriculture, Food & Markets to facilitate a joint information gathering and/or decision-making process on proposed Major Amendments; 2. Collaborate with primary stewards and co-holders, especially the Agency of Agriculture, Food & Markets on amending Stewardship Memoranda of Understanding to incorporate this Interim Policy; and 3. to correct minor errors and inconsistencies. Such modifications may be made without further authorization from the full Board provided that a copy of the revisions are sent to the Committee and Board.

VIII. Effective Date of Interim Policy

Sections 2 and 3 of this Interim Policy on Minor Amendments are effective on January 24, 2013.

For Major Amendments, this Interim Policy shall be effective on April 1, 2013

The Interim Policy shall be reviewed by the Board after 2 years or upon enactment by the State of Vermont of a comprehensive new law regarding conservation easement amendments. For purposes of

determining whether pending Major Amendments to conservation easements should be reviewed by VHCB under the policy in effect before the adoption of this Interim Policy (approval by the Chair of the Committee or, in his discretion, referral to the whole Committee) or this Interim Policy, VHCB will presume that any Major Amendment not substantially completed by April 1, 2013 will be subject to the this Interim Policy. However, this is a rebuttable presumption meaning that VHCB will consider making an exception where the primary steward demonstrates to VHCB staff that the delay involved in using the new policy will cause the landowner substantial hardship.