

CHESTNUT HILL CONSERVANCY

POLICY ON AMENDING CONSERVATION AND PRESERVATION EASEMENTS

INTRODUCTION

The Chestnut Hill Conservancy (“Conservancy”) and the Friends of the Wissahickon (“FOW”) maintain a joint program to acquire conservation (land protection) and preservation (historic building façade protection) easements for the benefit of present and future generations. The easements acquired through the joint program are held by the Conservancy. The purpose of the conservation easements is to conserve key open spaces in Chestnut Hill and neighboring areas. Priority is given to parcels that border the Wissahickon Creek and its tributaries, thereby enhancing the protection of an important source of drinking water for the City of Philadelphia. Preservation easements protect historically and architecturally significant buildings in Chestnut Hill and neighboring areas. As holder of the easements, the Conservancy is obligated to protect them in perpetuity by monitoring properties with easements at least annually and enforcing its easements in the event of a violation.

The Conservancy recognizes that it may be necessary or desirable on rare occasions to modify the terms of its easements, but the Conservancy will do so only in accordance with applicable law and only for uses that have a beneficial effect on the conservation and preservation values they protect. Therefore, it is the Conservancy’s policy to hold and enforce its easements as written, except in the limited circumstances described in this policy. All requests for amendment of the terms of an easement will be reviewed according to the procedures set forth in this policy.

Because every property is unique, no decision by the Conservancy with respect to the amendment of an easement will create a precedent with respect to any other request for an amendment. The amendment process, if any, laid out in the original easement, together with this policy, will guide the consideration of any proposed amendment. Although this amendment policy sets forth certain guidelines and procedures, nothing herein will be deemed to impair the sole and absolute discretion of the Conservancy’s Board of Directors (“Board”) in determining whether any proposed amendment is acceptable to the Conservancy.

1. AMENDMENT POLICY

The Conservancy will grant amendments to its easements only in the following circumstances:

A. Correction of an Error or Ambiguity. The Conservancy may amend an easement to correct a drafting error or oversight made at the time the easement was granted. This may include correction of a legal description, inclusion of standard language that was unintentionally omitted or clarification of an ambiguity in the terms of the restrictions in order to avoid litigation over the interpretation of the document in the future.

B. Prior Agreement. Occasionally, an easement contains a specific provision or there is an unrecorded agreement or other document allowing modification of the easement terms at a future date under defined circumstances. Such agreements must be set forth in the easement or in a separate document signed by all parties, including the Conservancy, on or before the date the easement was executed. The amendment must be consistent with the terms and conservation/preservation intent of the original agreement.

C. Settlement of Condemnation Proceedings. In rare instances, easements held by the Conservancy may be subject to condemnation for public purposes, such as highways, schools, etc. In the event of a lawful condemnation proceeding, the Conservancy will attempt to preserve the intent of the original agreement to the greatest extent possible.

i. Whenever all or part of the property is taken in the exercise of eminent domain by a public, corporate or other authority so as to abrogate in whole or in part the easement, the property owner and the Conservancy will act jointly to recover the full damages resulting from such a taking with all incidental or direct damages and expenses incurred by them thereby to be paid out of the damages recovered.

ii. The balance of the damages recovered will be divided between them in proportion to the fair market value on the date of execution of the easement deed of their respective interests in the condemned portion of the property. For this purpose, the Conservancy's interest will be the amount by which the fair market value of the property immediately prior to the execution of the recorded easement was reduced by the restrictions imposed. The Conservancy will use its share of the proceeds in a manner consistent with and in furtherance of the conservation/preservation purposes set forth in the easement deed.

D. Substantial Alteration or Destruction of a Conservation/Preservation Value. In the case of alteration or destruction caused by a cataclysmic event, such as a tornado, hurricane, earthquake, fire, or destruction of habitat caused by climate change, that could greatly alter the conservation/preservation values an easement is intended to protect, the Conservancy may amend the easement to protect the remaining conservation/preservation values, provided that the amendment meets the requirements listed in section 3, below. If there are no conservation/preservation values remaining, the Conservancy may petition a court of competent jurisdiction to terminate the easement.

E. Modification Consistent with Easement Purpose and Internal Revenue Code Requirements. An amendment must not adversely affect the Conservancy's status as a tax-exempt nonprofit charitable organization under any federal or state law, including Sections 170(h) and 501(c)(3) of the Internal Revenue Code of 1986, as amended, or successor provisions and the laws of the Commonwealth of Pennsylvania. The following criteria are elements of the Internal Revenue Code and are binding on federal tax-exempt charitable organizations. These criteria may not be

bypassed or waived. An amendment that violates any of these criteria could jeopardize the Conservancy's status as a federal tax-exempt organization and should not be granted.

1. An amendment must not affect the easement's perpetual duration.
2. If the easement donor (the original grantor) received a federal income tax deduction, an amendment must not negatively impact a §170(h) conservation purpose for which the easement was donated, unless the amendment occurs by direction of a court. Removal or substantial change to a conservation/preservation purpose is usually a high-risk situation that should proceed only with court or Attorney General approval.
3. An amendment must clearly serve the public interest. As a federal tax-exempt charity, the Conservancy must serve the public interest. Allowing an amendment that does not serve the public interest could lead to IRS scrutiny of the Conservancy's tax-exempt status.
4. An amendment must be consistent with the Conservancy's mission. The Conservancy's mission to preserve historic, open space and cultural resources is the basis of its federal tax exemption. An organization's failure to carry out its mission could jeopardize its 501(c)(3) status.
5. An amendment must not confer impermissible private benefit.
 - i. Private benefit must be evaluated (1) as to the current owner(s) and (2) as to adjacent property owners or others who may be affected by the amendment. Private benefit is not a bar, by itself, to an amendment. Determining whether a benefit is impermissible normally requires an appraisal or an opinion by a tax professional, if the perceived benefit is financial.
 - ii. Any private benefit must be (1) insubstantial relative to the public benefit and (2) unavoidable in order to achieve the public benefit. Whether a private benefit is insubstantial may require an appraisal to document the value of the benefit and enable evaluation of the private benefit relative to the anticipated public benefit of the proposed amendment.
 - iii. Private benefit to the property owner can sometimes be balanced by increasing the restrictions in the easement, or by having the property owner give up some rights as part of the amendment process. An appraisal can help determine the relative values of the private benefit and the additional restrictions or extinguishment of rights.
 - iv. A cash donation to the land trust usually is not acceptable as an offset to otherwise impermissible private benefit.

6. An amendment must not result in private inurement.

i. The prohibition against private inurement (financial benefit to *an insider* as defined in the Conservancy's Conflict of Interest Policy) is absolute. The IRS can impose financial penalties on an organization for engaging in private inurement, and a land trust could lose its tax-exempt status (and its accreditation).

ii. This prohibition applies regardless of whether the easement donor claimed a federal tax deduction.

iii. If there is any suggestion of private inurement, the Conservancy should obtain an independent opinion or an appraisal, as appropriate, to document whether the amendment results in any private inurement.

7. An amendment that involves a Board or staff member must comply with the Conservancy's conflict of interest policy. State law governing nonprofit organizations and federal tax law prohibit certain involvement by Board and staff members who have a conflict of interest. The Conservancy's conflict of interest policy may be stricter than required by state or federal law. All conflict of interest procedures must be followed and documented as part of the amendment process.

2. PROCEDURES FOR AMENDING A CONSERVATION EASEMENT

A. Amendments may be initiated by the property owner or the Conservancy. In either case, the Conservancy staff will seek to first discuss the potential change informally with the property owner. If, after informal discussions, the property owner is willing to proceed with amending the easement, the Conservancy staff will work with the property owner to develop a set of terms consistent with the Conservancy's aims in initiating discussions and acceptable to the property owner for making particular changes to the easement. The Conservancy staff will present these tentative terms to the Conservation and Easements Committee for its consideration. If the property owner is not dissuaded from pursuing an amendment to the easement after informal discussions and consideration by the Conservation and Easements Committee, the staff will ask the property owner to submit a formal amendment request.

B. An amendment request must be submitted in writing to the Conservation and Easements Manager (or if the request is initiated by the Conservancy, it may be prepared by the Conservation and Easements Manager). The request must include a description of the change being requested and the reasons why it is warranted, including a description of how and why the amendment would be consistent with the policy described in Section 1 of this document. Where appropriate, the request will include a map and/or photos of the property showing areas affected by the proposed amendment and any other information that justifies the request.

C. Unless specifically waived or deferred by the Conservation and Easements Committee, each request by a property owner must be accompanied by a payment of \$750 to cover anticipated costs in reviewing the amendment request. The fee will not be refunded in the event the request is not approved. If the Conservancy expects that it will incur expenses above \$750 (such as for obtaining an appraisal pursuant to paragraph 2D, below), the property owner will be given the option of withdrawing the request or agreeing to pay the additional expenses. Additionally, the Conservation and Easements Committee may request an additional contribution to the Easement Stewardship Fund to cover the costs of additional monitoring obligations as a result of the amendment.

D. If the Conservation and Easements Manager or the Conservation and Easements Committee believes that a property owner-requested amendment may involve impermissible private benefit or private inurement, the Conservation and Easements Manager will obtain an appraisal to determine whether any such issue exists. The property owner will be required to pay the cost of obtaining the appraisal, and will be given the option of withdrawing the request rather than paying for an appraisal.

E. The Conservation and Easements Manager will review the amendment request for consistency with the original easement deed, this policy, the Conservancy's Conflict of Interest Policy and any related documentation. A site visit and meeting with the current property owner and/or original donor may be conducted.

F. The Conservation and Easements Manager will prepare a Preliminary Easement Amendment Request Form and provide it to the Conservation and Easements Committee. A written summary of the proposed amendment and the reasons why it is being requested will be included along with any other documentation provided. The Conservation and Easements Committee will vote on preliminary approval of the proposed amendment using the criteria listed in section 1E, above. Preliminary approval will require a majority vote of the Conservation and Easements Committee. A decision to deny the request will be final unless the property owner requests (in writing) further review by the Board.

G. If the Conservation and Easements Committee grants preliminary approval, the amendment will be drafted by legal counsel. The Conservation and Easements Manager will consult legal counsel to determine if a title report and subordination of lenders is required to ensure that any lenders will be subject to the amendment.

H. The final draft of the amendment and a written summary of the reasons for its request, including a description and explanation of the net conservation/preservation benefit that results from the amendment, will be presented to the Board for final approval. Final approval requires a majority of a quorum of the full Board. The Board 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. The Board's decision and any additional findings will be recorded in the minutes of the Board meeting.

I. If the terms of the amendment are approved, the Conservation and Easements Manager will consult with legal counsel to determine whether an updated title report is needed. If so, the Conservation and Easements Manager will obtain the report and review it to determine if there is a new lender who will require a subordination agreement.

J. The amendment will be recorded by Conservancy staff as soon as possible after approval. Originals and copies of the amendment deed and all related documentation will be retained according to the Conservancy's recordkeeping policy.

3. WAIVERS AND LETTERS OF INTERPRETATION

A. **Waivers.** The Conservancy, without any obligation to do so, may agree to waive strict compliance with the terms of grant of an easement for a specific period of time with respect to a specific set of circumstances if the Conservancy is satisfied that the accommodation has no material effect on the conservation/preservation objectives. Any waiver must be approved by the Conservation and Easements Committee and must be issued in writing. The Chair of the Conservation and Easements Committee will inform the Board of any waiver granted at the next regularly scheduled board meeting.

The waiver does not amend the terms of the grant; rather, it is the Conservancy exercising its discretion to refrain from exercising one or more of its rights and remedies in response to a potential violation of the easement's covenants because it is satisfied that the impact on the protected resources will be negligible.

Examples of circumstances in which the Conservancy may consider a waiver are:

- a response to unusual and powerful natural phenomena like an earthquake or tornado; or
- a one-day accommodation of an uncommon event such as having a tent or parking for a family wedding in a field where such use is prohibited by the easement's covenants.

Waivers play a highly specific role as outlined above. They are not an appropriate substitute for amendments. At the time of a granting of a waiver, the Conservancy will place in its file a record of its decision to do so that confirms that:

1. the accommodation will have no material effect on the easement's conservation/preservation objectives;
2. the period of time is finite and the circumstances leading to the need for the waiver are not likely to become recurring; and
3. amendment has been considered to meet the need but waiver has been determined to be the more appropriate tool.

B. Letters of Interpretation. While an amendment may be an appropriate response to clarify an ambiguity in the terms of the grant of conservation or preservation easement, it is sometimes satisfactory for the Conservancy to issue a letter of interpretation in response to a query by owners regarding whether a particular activity is allowed or the meaning of a particular phrase.

The Conservancy will resolve any doubt with respect to interpretation of its easements in favor of permitting work necessary to protect against risks to human health or the environment, as documented and recommended by a qualified expert in the field. If an easement cannot be reasonably interpreted to permit work that is needed to protect against risks to human health or the environment, then the Conservancy may grant an amendment to, or waiver under, the easement to permit such work, even if such amendment or waiver would result in impairment of the easement's conservation/preservation objectives.

The Conservation and Easements Committee may require that a letter of interpretation be reviewed by the Conservancy's legal counsel. Any letter of interpretation will be signed by a person authorized by the Board to take such action. A copy of the letter will be filed in the organizational records.

This policy replaces the Easement Amendment Policy adopted on September 28, 2009.

Approved by the Board of Directors on September 29, 2020.

Signature:



Name and Title:

Eileen Javers, Conservancy Board President