

LAND CONSERVATION LAW SYLLABUS

Term Two, Two Week Course, Meeting July 11th – 21st, 9:00-12:00am (Monday through Thursday)

Two Course Credits; Final project due by 8am, July 25th

Taught By: Jessica E. Jay, Attorney at Law

Conservation Law, P.C.

phone: 303-674-3709, fax: 303-674-3715

email: conservationlaw@msn.com

website: www.conservationlaw.org

Prerequisites: Students *will benefit from having taken* an introductory-level property law, real property transactions, or tax law courses, or from practical experience in land conservation or real property transactions, though none of these are a prerequisite.

Evaluation: Students will be evaluated based on preparedness for class, class participation in discussions and role-playing exercises, and final conservation easement draft. The final conservation easement deed will serve as the final exam/graded project and will be due to the Registrar's final exam box or the electronic portal by no later than and to be picked up by **8:00am, July 25th**. Graded and commented-upon final easements will be returned to the ELC for distribution to you.

Course Materials: All reading material will be provided electronically, including the textbook, role-play exercises, and model deed of conservation easement, all of which will be hosted on **THE COURSE WEBSITE**.

Any updates to this syllabus or materials will be made electronically, so be sure you have the most up-to-date syllabus!). Students will prepare role-play exercises and their own deed of conservation easement for class discussions, and **WILL BENEFIT FROM PRINTING OUT AT LEAST THE FIRST CHAPTER OF THE TEXTBOOK FOR FREQUENT REFERENCING**.

Office Hours: After class 12:00-1:00, and/or by appointment.

Day 1 – Monday, July 11th – Conservation Easements—A Tool to Protect the Environment—What Are They and How Do They Work?

Reading Assignment:

COURSE WEBSITE: Model Conservation Easement, First Role Play Exercise

TEXTBOOK, Chapter One, pp. 5-50, (which you will benefit from **PRINTING OUT**) including:

Read Origins and Background

Read 26 U.S.C. § 170 Charitable Contributions and Gifts (focus on 170(h))

Skim 26 U.S.C. § 2032A, Pension Protection Act and Extension, IRS Guidance Notice 2007-50, IRS Q&A

Read 26 C.F.R. § 1.170A-14 Qualified Conservation Contributions (*focus on* 1.170A-14(a), (b), (d), (e), (f)(1))

Read Restatement of the Law (Third) Property (Servitudes) (*focus on* §§ 1.6, 4.3)

Read Uniform Conservation Easement Act and Commentary AMENDED 2007 (*focus on* §§1(1), 2(a)&(c), 4)

Read Vermont Statutes Annotated (*focus on* §§821, 822, 823, 6301, 6303(5), 6308(b))

Conservation Transaction: Download (from **THE COURSE WEBSITE**) and bring to class model conservation easement and first role play exercise, by hardcopy or electronically. After role play exercise, determine family's needs, land's conservation value(s), and land trust mission. Determine whether land trust is a good fit with land owner. Review model conservation easement and its conservation value sample language and begin drafting conservation values section of conservation easement.

Day 2 – Tuesday, July 12th – Qualified Organizations, Perpetual Stewardship and Enforcement Responsibilities, Standards and Practices, and Due Diligence for Conservation Transactions

Reading Assignment:

Review § 170(h)(1), (3), (5), (6) (pp. 15-16)

Review § 1.170A-14(a), (c), (g) (pp. 19-20, 26-28)

Review Restatement of the Law (Third) Property (Servitudes) §1.6(2) (p. 32), §4.6 (p. 33)

Review U.C.E.A. § 1(2) (pp. 40-41)

Review V.S.A. §§ 821(c), 822, 6301a(2), 6307 (pp. 46-47, pp. 48-49)

COURSE WEBSITE: Skim materials packet from Leslie Ratley-Beach

TEXTBOOK, Chapter Two, Subchapters A and B, pp. 51-94, including:

Read Background (skim land trust risk management section)

Read 26 U.S.C. § 501(c)(3) and 26 C.F.R. § 1.501(c)(3)-1

Skim Land Trust Standards and Practices: (focus on 9: Sound Transactions and 11: Stewardship of Conservation Easements)

Read MET v. Gaynor

Skim Butler Summary

Skim Subchapter B Due Diligence

Guest Speaker: Leslie Ratley-Beach, Conservation Defense Director, Land Trust Alliance

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Examine Land Trust's mission, identify conservation values on the subject property, revise/draft conservation easement to meet conservation values and mission, review minerals, and other requirements. Examine subject property title insurance policy for ownership, minerals, and other title issues. Determine responsibilities regarding subject property conservation value protection, documentation, minerals, and monitoring. Draft easement to address responsibilities and to incorporate new facts; use drafting sections from Appendix of Textbook for guidance.

Day 3 – Wednesday, July 13th – Conservation Incentives—Federal Income and Estate Taxes, and IRS Scrutiny

Reading Assignment:

Review § 170(a), (b)(1)(C), (E), (f)(8), (11) (pp. 13-14)

Review 26 U.S.C. § 2032A, P.P.A. Extension/IRS Guidance/Notice 2007-50 (pp. 16-18)

Review § 1.170A-14(e), (h), (i) (pp. 25, 28-31)

Review Land Trust Standards and Practices, Practice 10 (pp. 68)

COURSE WEBSITE: Skim Washington Post/The Nature Conservancy Series

TEXTBOOK, Chapter Three, Background, Subchapters A and B, pp. 98-130, including:

Read Background

Read 26 U.S.C. § 2051 and 26 C.F.R. § 20.2051

Read 26 U.S.C. § 2055 and 26 C.F.R. § 20.2055

Read 16 U.S.C. § 2031(c)

Skim IRS Notices Regarding 2004-41 and 2004-86; Joint Committee on Taxation Subcommittee Recommendations; LTA Form 990 Guidance

Read Glass v. Commissioner, 124 T.C. No. 16; No. 17878-99 (May 25, 2005); appealed No. 06-1398 (December 21, 2006)

Skim Tax Court Summaries

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Examine income tax incentives for landowners, crunch numbers for deductions to offset taxable income, establish value of conservation easement donation, determine net benefit to family for income tax purposes. Examine consequences of bargain sale for income tax purposes and/or estate tax benefits. Revise relevant conservation easement sections.

Day 4 – Thursday, July 14th – Conservation Incentives—State and Local Taxes: Property Taxes, Income Tax Credits, and a Landowner's Story

Reading Assignment:

COURSE WEBSITE: Skim State Tax Credits Summary

TEXTBOOK, Chapter Four, pp. 131-51, including:

Read Background

Skim Vermont Use Value Act

Read Parkinson v. Board of Assessors of Medfield, 481 N.E.2d 491 (Mass., 1985); Parkinson v. Board of Assessors of Medfield, 495 N.E.2d 294 (Mass., 1986)

Read In the Matter of Wilhelmina duPont Ross v. Town of Santa Clara, 266 A.D. 2d 678, 698 N.Y.S.2d (1999)

Read Colorado Conservation Easement Tax Credit Act, C.R.S. §39-22-522

[Read as Background for Role Play:

COURSE WEBSITE: French & Pickering Creeks Conservation Trust v. Natale Article

Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, Va. Law Rev. 739 (2002);

TEXTBOOK, Chapter Four, Subchapter B, pp.147-51, Lessons from a Long Easement Violation Battle]

[Skim as Background for Field Trip! COURSE WEBSITE: Hurricane Flats CE and Maps]

Guest Speaker: FIELD TRIP! Upper Valley Land Trust, Craig Privett, and CE donor, Geo Honingford.

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Apply credit option to family's income scenario, determine how much of a benefit family could receive and/or how much of a credit they could sell under program mimicking Colorado's credit program. Examine property tax changes and agricultural preservation options within Vermont conservation statutes. Determine net benefit to family from property tax reductions, income tax offsets, and conservation tax credits. Consider family's private property rights arguments. Revise conservation easement to incorporate new facts.

Day 5 – Monday, July 18th – Transactions on a Landscape—Agricultural and Working Forest Conservation Easements, and Financing Conservation—Lyme Timber Case Study

Reading Assignment:

Review 26 U.S.C. § 170(h)(4)(a)(iii) (p. 15)

Review 26 U.S.C. § 2032A (p. 16)

Review 26 C.F.R. § 1.170A-14(d)(1)(iii) (p. 20); (d)(4)(i),(iii), (iii)(B), (pp. 20-22); (e) (p. 25), (f) Examples (2), and (5) (pp. 25-26)

COURSE WEBSITE: *Read* William J. Ginn, Investing in Nature, The Connecticut Headwaters Case Study

Read Peter Stein, Working Forests and Conservation Easements, Silviculture Magazine

Skim Forest Land Deal Sets Record

TEXTBOOK, Chapter Five, Background, Subchapter A, pp. 152-69, including:

Read Background

Read Libertyville v. Bank of Waukegan 504 N.E.2d 1305 (Ill. 1987)

Read Southbury Land Trust, Inc. v. Andricovich, 757 A.2d 1263 (Conn. App., 2000)

Read Bennett v. Commissioner of Food and Agriculture, 576 N.E.2d 1365 (Mass., 1991)

Guest Speaker: Elizabeth Adams, The Lyme Timber Company

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Consider discussion points for working forests and working ranch and farmland. Contemplate case study example, discuss past, present, future possibilities. Continue revising and drafting conservation easement: revise and negotiate recitals and permitted/prohibited use and resource management sections of conservation easement.

Day 6 – Tuesday, July 19th – The Challenge of Perpetuity: Changed Conditions, Amendment, and Termination of Conservation Easements; a Land Trust's Experience

Reading Assignment:

Review 26 U.S.C. § 170(h)(2)(C), (5) (A) (pp. 15-16)

Review 26 C.F.R. § 1.170A-14(c)(2), (g)(6) (pp. 19-20, 28)

Review Restatement of the Law (Third) Property (Servitudes) §§7.9, 7.10, 7.11, 7.16 (pp. 33-36)

Review UCEA §2(a), §3(b) (pp. 41-43)

Review V.S.A. §6308 (p. 49)

Review 26 U.S.C. § 501(c)(3), 26 C.F.R. § 1.501(c)(3) (p. 60-62)

Review Standards and Practices 11 I, J, K (pp. 69)

COURSE WEBSITE: *Skim* Vermont Proposed Legislation

Skim Article/Case Studies: Darby Bradley, “Amending Perpetual Conservation Easements: Confronting the Dilemmas of Change: A Practitioner’s View”

Skim Alexander Arpad, “Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts” 37 Real Prop. Prob. & Tr. J. 91 (2002)

Skim Jessica Jay, *When Perpetual is Not Forever*, 36 Harvard Env. Law Rev. 1 (2012); and *Understanding When Perpetual is Not Forever*, 37 Harvard Env. Law Rev. (2013)

TEXTBOOK, Chapter Six, Background, Amendment and Termination, pp. 177-262, including:

Read Background

Skim Amendment Principles

Skim *Strasburg v. Commissioner of Internal Revenue*, 79 T.C.M. 1677 (2000) (*focus on* tone, amendment)

Skim *Bjork v. Draper*, 381 Ill.App.3d 528, 886 N.E.2d 563, 319 Ill. Dec. 800 (Ill.App. 2 Dist., 2008) and Illinois Conservation Easement Enabling Act (*focus on* termination and amendment issues)

Skim *Hicks v. Dowd*, P.3d 914, 2007 WY 74 (2007); NPR *Shifting Ground Piece*; *Salzburg v. Dowd*, Stipulated Judgment (*focus on* termination and amendment issues)

Skim *Walter and Otero County Land Trust* (05-CV-96, Order [Otero Cty. Dist. Ct., June 21, 2005])

Skim Maine revised CE enabling act (*focus on* termination and amendment issues)

Skim Update to Relevant Federal Tax Law Cases (pp. 264-69)

[*Prepare for Role Play*]: *Review* IRS Notices 2004-41 and 2004-86 (pp. 108-11), and *Skim* Exchange Articles on Private Inurement, Conflict of Interest, and Restatement/Changed Conditions (pp. 255-58)

Guest Speaker: Julie Farrell Curtin, Esq., Pieter van Loon, Vermont Land Trust

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Contemplate potential liability for land trust to amend easement: who stands to lose, who stands to gain; contemplate consequences of IRS audit. Determine if private inurement, private benefit, or conflict of interest exists. Review Notices Regarding Improper Deductions for Conservation Easement Donations and IRS Notice 2004-41 and 2004-86, and 990 Instructions if negotiating IRS audit. Review amendment, termination, and changed condition section of easement; revise accordingly.

Day 7 – Wednesday, July 20th—The Who, What, Why, Where, When and How of Conservation Easement Enforcement—Conservation Easement Enforcement By and Against Third Parties

Reading Assignment:

Review 26 C.F.R. §1.170A-14(c)(1), (g)(5)(ii) (pp. 19, 28)

Review Restatement of the Law (Third) Property (Servitudes) §§ 8.1, 8.3, 8.5 (pp. 36-38)

Review U.C.E.A. §§1(3), 3(a)(4), plus comments, (pp. 41, 42-43)

Review V.S.A. §6308 (p. 49)

Review *Bjork v. Draper*, 381 Ill.App.3d 528, 886 N.E.2d 563, 319 Ill. Dec. 800 (Ill. App. 2 Dist., 2008); Illinois Conservation Easement Enabling Act (*focus on* enforcement by 3d parties: neighbors) (pp.212-22)

Review *Hicks v. Dowd*, P.3d 914, 2007 WY 74 (2007); *Salzburg v. Dowd*, (*focus on* enforcement by 3d parties: citizen/A.G. enforcement) (pp. 223-28, 232-36)

Review Maine revised CE enabling act (*focus on* by third parties: A.G. enforcement) (pp.253-54)

COURSE WEBSITE, Skim case-study file contents for guest lecture

TEXTBOOK, Chapter Seven, Background, Subchapter A, pp. 262-303, including:

Read Background, Enforcement By Third Parties, and Enforcement Against Third Parties (at end of chapter)

Read Tennessee Environmental Council, Inc., v. Bright Par 3 Associates, (Tenn. Ct. App. 2004); Amended Tennessee Legislation (*By third parties: citizen enforcement*)

Read Rhode Island Legislation for Attorney General Enforcement (*By third parties: A.G. Enforcement*)

Read Enforcement Against Third Parties

Guest Speaker: Donna Foster, Vermont Land Trust

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Mediate third party violation. Review and revise third party and landowner liability, ADR, enforcement provisions of conservation easement after.

Day 8 – Thursday, July 21st – The Who, What, Why, Where, When and How of Conservation Easement Enforcement—Conservation Easement Litigation and the Madden Case Study

Reading Assignment:

Review 26 C.F.R. § 1.170A-14(c)(1), (g)(5)(ii) (pp. 19, 28)

Review Restatement of the Law (Third) Property (Servitudes) § 8.5 (pp. 37-38)

Review U.C.E.A. § 1(3), 3(a)(4) (pp. 41, 42-43)

Review V.S.A. §6308 (p. 49)

TEXTBOOK, Chapter Eight, Subchapter B, pp. 309-73, *excluding* pp. 323-29, including:

Read Survey of Cases

Read Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992) and Madden Materials (Warranty Deed, Answer/Counterclaim, Opinion/Order, Madden and TNC Depositions)

Conservation Transaction: PREPARE YOUR ROLE BEFORE CLASS. Conduct mock trial direct examination and cross examination of land trust and landowner witnesses. Examine easement drafting and real-time opportunities for negotiation, mediation, and litigation to resolve potential violation; review and revise ADR and enforcement provisions for conservation easement as necessary. Make final revisions to conservation easement.