

# LAND CONSERVATION LAW SYLLABUS

Term Two, Two Week Course, Two Course Credits

Meeting June 20<sup>th</sup> – June 29<sup>th</sup>

Monday 6/19 No School – Juneteenth Observance

Meeting June 20<sup>th</sup> – June 29<sup>th</sup>

Tuesday 6/20 – Thursday 6/22 8:30am – noon

Monday 6/26 – Thursday 6/29 8:30am – noon

Final project due by 12:00pm EDT, Saturday, July 1st

Taught By: Jessica E. Jay, Attorney at Law, Conservation Law, P.C., phone: 303-674-3709

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**Prerequisites:** Students *will benefit from having taken but not be required to have taken* an introductory-level property law, real property transactions, or tax law course, 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 deed. Your group's final conservation easement deed will serve as the final exam/graded project and will be due to ME at email: [conservationlaw@msn.com](mailto:conservationlaw@msn.com) by no later than 12pm, July 1st (don't forget to put your names and Role Play grades on the front of the conservation easement). Graded and commented-upon final easements will be returned to students.

**Course Materials:** The eTextbook for sale on the Land Trust Alliance's (LTA's) Learning Center website at <https://tlc.lta.org/> to which website students will be given password access for three months. All other course materials including this syllabus, role-play exercises, and model conservation easement available on TWEN.

**Updates:** Any updates to this syllabus or materials will be made electronically, so be sure to have the most up-to-date syllabus and documents! Students will prepare role-play exercises and deed of conservation easement for class discussions.

**Office Hours:** After class 12:00-1:30pm EDT, and/or by appointment

**Syllabus Key:**

1. *Review* means refresh your memory on something you've already read
2. *Read* means prepare to discuss in class, and look to see if areas of *focus* have been provided
3. *Skim* means review for the high points and take aways  
(*Background Materials* means additional resources for research, not required for class)

## **Day 1 – Tuesday, June 20<sup>th</sup> -- Conservation Easements—A Tool to Protect the Environment—What Are They and How Do They Work?**

Reading Assignment:

TEXTBOOK, Chapter One, 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))

TWEN: Model Conservation Easement, First Role Play Exercise

Conservation Transaction: Obtain model conservation easement and first role play exercise from TWEN to have at class, as a 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 – Wednesday, June 21<sup>st</sup> – 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 (pp. 46-47)

TEXTBOOK, Chapter Two, Parts A and B, 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)

*Skim* Part B Due Diligence

TWEN: Second Role Play Exercise

Guest Speaker: Christine McShea, Staff Attorney, Vermont Land Trust

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 – Thursday, June 22<sup>nd</sup> – Conservation Incentives—Federal Income and Estate Taxes, and IRS Scrutiny**

#### Reading Assignment:

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

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

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

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

TEXTBOOK, Chapter Three, Background, Parts A and B, 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 2004-41, 2023-30; Integrity Act; LTA Tax Advisories

*Skim* Down the Rabbit Hole with the IRS Parts I and II

TWEN: Third Role Play Exercise

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 – Monday, June 26<sup>th</sup> – Conservation Incentives—State and Local Taxes: Property Taxes, Income Tax Credits, Conservation Investment, and a Landowner's Story**

#### Reading Assignment:

*Review* VSA 6306 (p. 48)

TEXTBOOK, Chapter Four, 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 and Note Summary

COURSE WEBSITE: Fourth Role Play Exercise

Read as Background for Role Play:

TWEN: French & Pickering Creeks Conservation Trust v. Natale Article

TEXTBOOK, Chapter Four, Part B, pp.189-92, Lessons from a Long Easement Violation Battle

Guest Speaker: Peter Stein, Principal, Lyme Timber Company

Skim as Background for Field Trip:

TWEN: Hurricane Flats CE and Maps

FIELD TRIP! to CE property purchased 2022, Hurricane Flats Farm and Garden, 975 S Windsor St, South Royalton, VT 05068

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 – Tuesday, June 27<sup>th</sup> – Conserving Working Lands—Farms, Ranches, and Forests, and Conservation within Emerging Markets**

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)(A), (iv)(B), (vi)(A) (pp. 20-23); (e) (p. 25); (f) Examples (2) and (5) (pp. 25-26)

TEXTBOOK, Chapter Five, Background, Part A, including:

*Read* Background

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

TWEN: Fifth Role Play Exercise

Guest Speaker:

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 – Wednesday, June 28<sup>th</sup> – The Challenge of Perpetuity: Changed Conditions, Amendment, and Termination of Conservation Easements**

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, 6310, 6311 (pp. 48-49)

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

*Review* Standards and Practices 11 H & J (p. 70)

TEXTBOOK: Chapter Six, Amendment and Termination (excluding condemnation), including:

Read Background

Read Amendment Principles

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

Read *Bjork v. Draper*, 381 Ill.App.3d 528, 886 N.E.2d 563, 319 Ill. Dec. 800 (Ill. App. 2 Dist., 2008)

Bjork Note, Illinois Conservation Easement Enabling Act (focus on termination and amendment issues and note enforcement by 3rd parties: neighbors) (pp.246-)

Read *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 and note enforcement by 3d parties: citizen/A.G. enforcement) (pp. 256-57)

Read *Walter and Otero County Land Trust* (05-CV-96, Order (Otero Cty. Dist. Ct., June 21, 2005), Walter Note, Colorado Enabling Act Termination provision (focus on termination, why able to terminate)

Read Maine revised CE enabling act (focus on termination and amendment and note enforcement by 3rd parties: A.G. enforcement) (pp.287-)

Skim Private Inurement, Conflict of Interest, and Restatement/Changed Conditions subsections

TWEN: Sixth Role Play Exercise

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

Skim *Jessica Jay, Understanding When Perpetual is Not Forever*, 37 *Harvard Env. Law Rev.* 247 (2013)

Guest Speaker: Ailla Wasstrom-Evans, Conservation Defense Fund & Education Manager, Land Trust Alliance

**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, 2004-86, 2017-10 if negotiating IRS audit. Review amendment, termination, and changed condition section of easement; revise accordingly.

**Day 7 – Thursday, June 29<sup>th</sup> – The Who, What, Why, Where, When and How of Conservation Easement Enforcement—By and Against Third Parties, 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) §§ 8.1, 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. §6307 (p. 48)

TEXTBOOK, Chapter Seven, Background, Part A & Chapter Eight, Part B, (excluding pp. 352-58)

Read Background, Enforcement by 3rd Parties and Enforcement against 3rd Parties (Part A)

Skim *Tennessee Environmental Council, Inc., v. Bright Par 3 Associates*, (Tenn. Ct. App. 2004); Amended Tennessee Legislation (focus on enforcement by 3rd parties: citizen enforcement)

Skim Rhode Island Legislation for Attorney General Enforcement (enforcement by 3rd parties: A.G.)

Read Litigation and Shining Mountain Ranch Case Study (Part B) (excluding pp. 352-58)

Skim Litigated Enforcement and Defense Cases: Judicial Themes and Approaches

Read \*\*\*BONUS ROLE PLAY\*\*\*

TWEN: Mediation Role Play Exercise (BONUS depending on time, or for group EXTRA CREDIT)

**Conservation Transaction**: PREPARE ROLE AND ENGAGE IN BEFORE LAST CLASS. Mediate third party violation. Report results at beginning of last class. Review and revise third party and landowner liability, ADR, enforcement provisions of conservation easement after exercise.

Read as Essential for FINAL REQUIRED Role Play:

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)

**TWEN: Final Role Play Exercise REQUIRED**

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.