

U.S. Forest Legacy Program
Amendment and Termination of FLP
Conservation Easements



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Are there safeguards in place to ensure:

- Lands protected have high-priority conservation values
- Easements are drafted to protect those values
- Easements are accurately valued
- Easements are appropriately monitored and enforced
- Controls on modification and termination

- Case law
- Relevant laws
- Thoughts on sample FLP CEs
- Suggestions regarding amendment and termination

Myrtle Grove Controversy



Photo credit: Michael O. Bourne, 08/76

Property name: Myrtle Grove

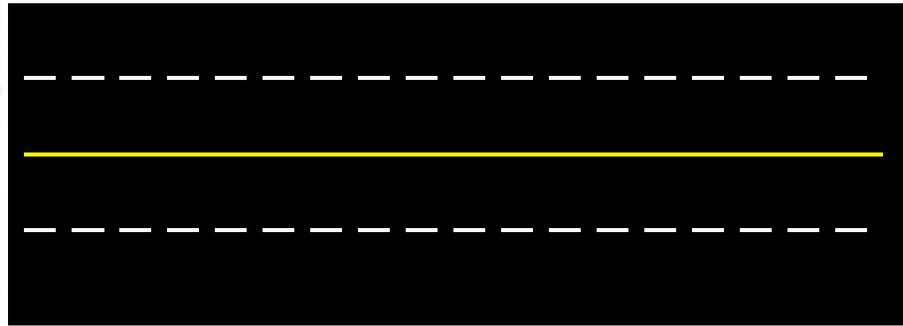
Date Listed: 8/13/1974

Inventory No.: T-53

Location: Goldsborough Neck Road, Bantry, Talbot County



Walmart Controversy



Bjork v. Draper



Hicks v. Dowd; Salzburg v. Dowd



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Relevant Laws

FLP Requirements

- CEs are Perpetual
- “Reversion” Provision
- “Assignment” Provision

State CE Enabling Statutes

- Duration
 - Perpetual
 - Term
 - Terminable (non perpetual)

State CE Enabling Statutes

- Modification and Termination
 - Some are silent
 - Some provide “in the same manner as other easements”
 - Some impose conditions

Federal Tax Law

Internal Revenue Code § 170(h)

Federal Charitable Income Tax Deduction

Easement must be:

- “granted in perpetuity,”
- to a government entity or charitable org,
- “exclusively for conservation purposes,” and
- conservation purpose must be “protected in perpetuity.”

Treasury Regulation Requirements

- restriction on transfer
- eligible donee
- no inconsistent use
- general enforceable in perpetuity
- mortgage subordination
- mining restrictions
- baseline documentation
- donee notice
- donee access
- donee enforcement
- extinguishment
- division of proceeds

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Carpenter v. Comm'r

T.C. Memo. 2013-172, *denying reconsideration of and supplementing* T.C. Memo. 2012-1



“To make our position clear, extinguishment by judicial proceedings is mandatory. Therefore, we reject petitioners' argument that [Treas. Reg. § 1.170A-14(g)(6), the Extinguishment Regulation] contemplates any alternative to judicial extinguishment.”

Belk v. Comm'r

T.C. Memo 2013-154, *denying reconsideration of and supplementing* 140 T.C. No. 1 (2013)



“According to petitioners, as long as they agree not to develop 184 acres of land, the Court (and the ... (IRS)) should not be concerned with what land actually comprises those 184 acres. We have already rejected the notion of such “floating easements” ... section 170(h)(2)(C) requires that taxpayers donate an interest in an identifiable, specific piece of real property.”

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Nancy McLaughlin, 5/13/2014

State Laws Governing Administration of
Charities and Charitable Gifts

Carpenter v. Comm'r

T.C. Memo. 2012-1



“We find that petitioners' transfers to [the LT] did constitute restricted gifts. Restricted gifts are “contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations.” Schmidt, ‘Modern Tomb Raiders: Nonprofit Organizations' Impermissible Use of Restricted Funds,’ 31 Colo. Law. 57, 58 (2002).”

- § 170(h)(5)(A): A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is “protected in perpetuity.”
 - Standard amendment provision should comply with this requirement
- Private benefit (for govt. entity, constitutional prohibition)
- *De minimis* boundary line adjustments and settlements in lieu of condemnation

Reversion

The Grantee acknowledges that this Easement was acquired with Federal funds under the Forest Legacy Program ... and that the interest acquired cannot be sold, exchanged, or otherwise disposed , [except as provided in ...] unless the United States is reimbursed the market value of the interest in land at the time of disposal. Provided, however, the Secretary of Agriculture may exercise discretion to consent to such sale, exchange, or disposition upon the State's tender of equal valued consideration acceptable to the Secretary.

U.S. Fish and Wildlife Service Interest

Grantee may not amend, modify, or dispose of in any manner, the conservation easement interest without prior notice to, and written approval of, the Regional Director, U.S. Fish and Wildlife Service.

Amendment Policy & Procedures

- Define “amendment”
- Require uniform standard amendment provision
- Provide examples of permissible/impermissible amendments
- Require federal entity receive notice of and approve amendments and any other substantive alteration (discretionary approvals, use agts, licenses, etc.)

Federal Standard/Procedure for Termination

- Federal Tax Law Standard/Procedure
- Federal Agency Approval Subject to Standard
- State Approval, But Subject to Standard

Single Separate Section in FLP CEs Dealing With:

- Restriction on Transfer/Assignment
- Reversion
- Amendment
- Extinguishment
- Division of Proceeds on Extinguishment