

LAND CONSERVATION LAW SYLLABUS

Term Two, Two Week Course, Meeting June 18th – 28th, 9:00-12:00am (Monday through Thursday)

Two Course Credits; Final project due by 12pm, Sunday, July 1st

Taught By: Jessica E. Jay, Attorney at Law

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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 electronic portal by no later than **12pm, July 1st**. Graded and commented-upon final easements will be returned 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 Land Trust Alliance's COURSE WEBSITE**, to which you will be given password access for three months. Any updates to this syllabus or materials will be made electronically, so check to 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, June 18th – 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, **(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, 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 – Tuesday, June 19th – 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. 32-33)

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)

COURSE WEBSITE: *Skim* materials packet from Leslie Ratley-Beach

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)

Read MET v. Gaynor

Skim Butler Summary

Skim Part B Due Diligence

Guest Speaker: Leslie Ratley-Beach, Conservation Defense Director, Land Trust Alliance (11:15)

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, June 20th – 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, Bargain-Sale Example

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, 2004-86, 2017-10; Joint Committee on Taxation Subcommittee Recommendations; LTA Form 990 Guidance

Read Glass v. Commissioner, 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, June 21st – Conservation Incentives—State and Local Taxes: Property Taxes, Income Tax Credits, and a Landowner's Story

Reading Assignment:

Review VSA 6306, (p. 48)

COURSE WEBSITE: *Skim* State Tax Credits Summary

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

Read as Background for Role Play: COURSE WEBSITE: French & Pickering Creeks Conservation Trust v. Natale Article, and Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, Va. Law Rev. 739 (2002);

TEXTBOOK, Chapter Four, Part B, pp.158-61, 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, June 25th – 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), (vi) (pp. 20-23); (e) (p. 25), (f) Examples (2), and (5) (pp. 25-26)

COURSE WEBSITE: *Read* Lyme Timber Company Documents

TEXTBOOK, Chapter Five, Background, Part A, pp. 163-79, 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: Peter Stein, 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, June 26th – 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, 6310, 6311 (p. 48-49)

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

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

COURSE WEBSITE: Read Jessica Jay, *When Perpetual is Not Forever*, 36 Harvard Env. Law Rev. 1 (2012); Read Understanding *When Perpetual is Not Forever*, 37 Harvard Env. Law Rev. (2013) (all matters below are addressed in these two articles, so read articles and skim matters in Chapter 6 with focus as indicated)

TEXTBOOK, Chapter Six, Amendment and Termination, pp. 214-69 only, including:

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)

Bjork Note, 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), Walter Note, Colorado Enabling Act Termination provision (*focus on* termination, why want/if legal to terminate)

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

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

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 and 990 Instructions if negotiating IRS audit. Review amendment, termination, and changed condition section of easement; revise accordingly.

Day 7 – Wednesday, June 27th —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)

Review V.S.A. §6307 (p. 48)

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.223-33)

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. 234-39, 243-47)

Review Maine revised CE enabling act (*focus on* by third parties: A.G. enforcement) (pp.264-65)

TEXTBOOK, Chapter Seven, Background, Part A, pp. 271-313, including:

Read Background, Enforcement By Third Parties, and Enforcement Against Third Parties (throughout Part A)

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

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, June 28th – 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. §6307 (p. 48)

TEXTBOOK, Chapter Eight, Part B, pp. 315-76 (*excluding* pp. 329-35), 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.