

# **LAND CONSERVATION LAW SYLLABUS**

Term Two, Two Week Course, Meeting June 17<sup>th</sup> – 27<sup>th</sup>, 9:00-12:00am (Monday through Thursday)

Two Course Credits; Final project due by 12pm, Sunday, June 30<sup>th</sup>

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 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 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, June 30<sup>th</sup>**. Graded and commented-upon final easements will be returned to students.

**Course Materials:** All materials including the textbook, role-play exercises, and model deed of conservation easement will be hosted on the Land Trust Alliance's (LTA's) Learning Center website at <https://tlc.lta.org/vlsconslaw> to which students will be given password access for three months, **AND A HARDCOPY OF THE TEXTBOOK WILL BE PROVIDED TO STUDENTS AT BARRISTER'S BOOKSHOP ONCE STUDENTS ENROLL/REGISTER WITH BOTH VLS AND LTA**. Any updates to this syllabus or materials will be made electronically, so be sure to have the most up-to-date syllabus! Students will prepare role-play exercises and their own deed of conservation easement for class discussions.

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

## **Day 1 – Monday, June 17<sup>th</sup> – 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 course website at <https://tlc.lta.org/vlsconslaw> 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 18<sup>th</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. 32-33)

*Review* U.C.E.A. § 1(2) (pp. 40-41)

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

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 19<sup>th</sup> – 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, 2017-10; LTA Tax Advisory; 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 20<sup>th</sup> – Conservation Incentives—State and Local Taxes: Property Taxes, Income Tax Credits, and a Landowner's Story**

Reading Assignment:

*Review* VSA 6306, 6309, 6311 (p. 48-49)

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 24<sup>th</sup> – 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 25<sup>th</sup> – 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. 215-69 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 26<sup>th</sup> —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.222-32)

*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. 233-38, 242-46)

*Review* Maine revised CE enabling act (*focus on* by third parties: A.G. enforcement) (pp.263-64)

TEXTBOOK, Chapter Seven, Background, Part A, pp. 270-313, 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 27<sup>th</sup> – 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. 314-78 (*excluding* pp. 328-34), 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.