

# **LAND CONSERVATION LAW SYLLABUS**

Term Two, Two Week Course, Meeting **June 21<sup>st</sup> – July 1<sup>st</sup>, 9:00am-12:00pm EDT, REMOTE** (Monday - Thursday)

Two Course Credits; Final project due by **12:00pm EDT, Saturday, July 3rd**

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 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 3rd** (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 is 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 will be available at the Teams site at <https://teams.microsoft.com/l/team/19%3aI7i-88oD5Mnx75BEpkRUyTUd9O21ABLSL2XYNbFTwWg1%40thread.tacv2/conversations?groupId=33f976ba-435c-4a0b-8cf5-b3cb0cdd5a5f&tenantId=8676127a-f6d4-4747-af4c-356f1b6c1610>

**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 12:00-1:00pm EDT, and/or by appointment

## **Syllabus Cues/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)

**Class Time Rules:** Class time will follow these "Rules" for our virtual engagement:

1. Attendance: I will take attendance at the start of the class time based on who is in the Teams meeting area with cameras on.
2. Cameras: Everyone will have their cameras turned on for the entire class.
3. Mics: Everyone will have their mics muted throughout class, except when presenting/speaking or asking questions.
4. Notifications: Everyone will shut off their notifications for/of chat.
5. Hand Raise: We will use the hand raise symbol for asking questions or making observations during discussions and guest lectures, and not in chat.
6. Screen Share: We will use the screen share tool to present findings or collaborations at the end of role play exercises.
7. Role Play Exercises: You will have both private and public channels to meet and work within during each exercise. The private channels named Group 1/2/3 will be used (1) to accomplish tasks within your specific role play group, and (2) to store your role play group's own ongoing work on and in support of your group's final conservation easement deed. The public channels named A/B/C/D will be used for individual group members to meet and accomplish tasks in the role play exercises. I will direct you ahead of time to whichever channel is appropriate for each portion of each role play exercise. For example: "From 11-11:30 Role Play Group 1 meet in your private channel named Group 1, Role Play Group 2 meet in your private channel named Group 2, and Role Play Group 3 meet in your private channel named Group 3, to work through your role play exercise tasks together. At 11:30, everyone return to the General Channel to present your Group's findings/results to the class and nominate one person from each group to present using share screen." Or "At 11:00, all role play role Number 1's meet in channel A, Number 2's meet in channel B, Number 3's meet in channel C, and Number 4's meet in channel D for 45 minutes to work through your exercise tasks together. At 11:45 everyone return to the General Channel and choose someone of your Number to report results to the class using share screen."
8. Record: I will record every class (from beginning to end) and post recording after class.

## **Day 1 – Monday, June 21<sup>st</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))

COURSE WEBSITE: Model Conservation Easement, First Role Play Exercise

Conservation Transaction: Download from course website at <https://tlc.lta.org/vlsconslaw> to have at class the 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 22<sup>nd</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

COURSE WEBSITE: Second Role Play Exercise

Guest Speaker: Nick Richardson, President and CEO, Vermont Land Trust. Moving beyond Easements: The expanding role for land trusts in ecosystems markets and other emerging land management strategies.

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 23<sup>rd</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 (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, 2017-10; LTA Tax Advisory; Down the Rabbit Hole with the IRS Parts I and II  
COURSE WEBSITE: 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 – Thursday, June 24<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)

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:

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

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, visit Hurricane Flats’ website for photos at: <http://www.hurricaneflats.com/photo-gallery.html>

Guest Speaker: VIRTUAL FIELD TRIP! CE donor, Geo Honingford, Hurricane Flats Farm and Garden

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 28<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, pp. 163-79, including:

*Read* Background

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

COURSE WEBSITE: Fifth Role Play Exercise

Guest Speaker: Peter Stein, Principal, 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 29<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, pp. 215-69 only, including:

*Read* Background

*Skim* Amendment Principles

*Skim* Strasburg v. Commissioner of Internal Revenue, 79 T.C.M. 1677 (2000) (*focus on value/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 able to terminate*)

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

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

COURSE WEBSITE:

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

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

Sixth Role Play Exercise

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 30<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*)

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

*Read* Enforcement Against Third Parties

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

Seventh Role Play Exercise

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

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 1<sup>st</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. 317-81 (*excluding* pp. 331-37), 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)

COURSE WEBSITE: Eighth Role Play Exercise

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.