

# The Prairie Enthusiasts

## Easement Amendment Policy and Procedures

Adopted by the TPE Board: 10/17/2023

The Prairie Enthusiasts (TPE) acquires conservation easements with the intent to hold them in perpetuity and to enforce their terms and provisions as they are originally written. However, TPE recognizes that given the perpetual term of its easements, it is possible that changes in future conditions or circumstances may justify amending an easement to strengthen the easement, clarify its language or improve its enforceability.

The following principles, policies and procedures are intended to guide consideration of an amendment to any conservation easement, whether the amendment is proposed by TPE, an easement landowner or a third party.

### A. Amendment Principles

A conservation easement amendment must meet all of the following principles (except for amendments in lieu of condemnation, which are addressed separately):

1. Clearly serve the public interest, be consistent with TPE's mission and conform to its conflict-of-interest policy
2. Comply will all applicable federal, state and local laws
3. Not jeopardize TPE's tax-exempt status or status as a charitable organization under federal or state law
4. Not result in private inurement or confer impermissible private benefit
5. Be consistent with the conservation purposes and intent of the easement
6. Be consistent with the documented intent (if any) of the donor, grantor and any direct funding source
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

### B. Policy

If a proposed amendment of a conservation easement meets the Amendment Principles set forth above, is recommended by the TPE staff after the screening process described below, is recommended by the TPE Land Protection Committee, is approved by the TPE Board by a two-thirds vote of the number of directors then in office and by any other required parties, the amendment may be implemented.

1. **Some examples.** The following are examples of circumstances in which it may be appropriate to amend an easement, subject to the Amendment Principles, above, and discretionary recommendations and approvals by staff, Land Protection Committee and TPE Board. This list is not intended to include all of the circumstances in which an amendment may be appropriate, and each amendment, whether referred to in the list or not, must be considered in the context of the specific facts involved.
  - To add land to an easement
  - To add restrictions on uses or activities that enhance the protected values or easement purposes
  - To carry out a specific agreement set forth in the easement or in an agreement executed by all parties to the easement prior to the initial execution of the easement
  - To correct a typographical error or other minor mistake
  - To make minor boundary adjustments
  - To upgrade to current standard language
  - To reflect changes in law or policy
  - To improve easement enforcement or administration
  - To clarify or rectify an ambiguity to resolve a dispute and/or to strengthen easement provisions
  - To allow uses or technology not in existence or contemplated at the time of granting of the easement
  - To permit changes to or elimination of specified sites or locations for permitted activities or uses
  - To settle condemnation proceedings (see Condemnation Proceedings, below)
  
2. **Costs.** Normally, if an amendment is proposed by a landowner, the landowner will have to bear all of TPE's costs associated with the amendment. Those costs would include the costs of negotiation and implementation of the amendment (e.g. staff costs, costs for expert advice, an appraisal or a survey, costs of title insurance, closing costs, etc.) and all ongoing future costs (e.g. increased costs for monitoring). On the other hand, if TPE initiates an amendment, it will ordinarily bear its costs and all closing costs. However, there are numerous factors that might result in TPE determining that fairness requires it to bear some or all of the costs, even when the landowner initiates the amendment process. Examples of cases in which judgment may be applied would include, without limitation, cases where the need for an amendment resulted from a mutual error or where the amendment is needed to resolve an ambiguity in the easement terms to the benefit of both parties or where the net result of an amendment initiated by a landowner is to enhance the conservation values to be protected by the easement.

The issue of assignment of costs between TPE and the landowner will be dealt with in each situation after the amendment is clear and its net consequences are reasonably understood. At that point, TPE will discuss the effect of this provision and obtain the landowner's express written agreement to be bound by the cost assignment proposed by TPE. That agreement will include, among other terms, agreement by TPE that if it intends to seek reimbursement from the landowner, it will not incur significant costs for outside services or other substantial out-of-pocket expenses without first advising the landowner of TPE's plan so that the landowner will have an opportunity to change the amendment proposal to avoid or minimize such expenditures or to withdraw it altogether.

### **C. Amendment Procedures**

Typical amendments begin with an informal request by the landowner or by TPE, discussion and negotiation, sharing this Easement Amendment Policy, and advice to the landowner that he/she will need to get legal counsel. In all cases, the process requires a formal written request by the party initiating the amendment process and, except when clearly unnecessary, a site visit. The agreement relating to costs referenced above will need to be completed and signed.

- 1. Staff evaluation.** Once the proposal is clear, it will be evaluated by TPE staff to determine whether it meets the thresholds of the Amendment Principles. Staff will refer to the most current guidance provided by the Land Trust Alliance related to amending conservation easements as the basis for its review of any proposed amendment, except amendments involving condemnation proceedings (see section D, below). As a result of this process, staff and the landowner may wish to revise the proposal to resolve issues or make improvements in the proposal. After completing its evaluation, staff will make their recommendations to the Land Protection Committee.
- 2. Staff recommendation to Land Protection Committee.** When staff has completed its evaluation, including necessary documentation, it will make a written report with its recommendation to the Land Protection Committee as to approval or disapproval of the proposed amendment and on what terms and conditions. If staff is recommending approval, the report shall address each of the Amendment Principles, and if compliance with any of those principles is uncertain to any significant degree, staff will provide sufficient information to the committee so that the committee can appreciate the uncertainty and any risks to TPE that may be involved. If the recommendation is disapproval, the staff's report will focus on the reasons for such disapproval without the necessity to address principles that are not relevant.
- 3. Committee recommendation to TPE Board, TPE Board action and communication to landowner.** The Land Protection Committee, by a majority vote, may disapprove the proposed amendment or it may approve the proposed amendment, approve a revised version of the amendment or approve an amendment subject to stated terms and

conditions. If the committee disapproves or suggests a revision, the staff will bring the decision back to the landowner for further negotiations, resulting in either a withdrawal of the proposed amendment or committee approval. Once the committee has approved the amendment, it will report its recommendation to the TPE Board.

After deliberation, the TPE Board will vote on the amendment as recommended by the Land Protection Committee or the TPE Board may revise the proposal and/or add other terms and conditions. Approval of an amendment requires approval by a two-thirds vote of the number of TPE directors then in office. When the TPE Board has acted, the TPE Board shall thoroughly document the specific reasons for its action, couched in the context of the easement amendment review criteria set forth in this document. The TPE Board will designate an appropriate person to communicate to the landowner in writing the basis for the decision.

Every reasonable effort will be made to let the landowner know that TPE's decision was based on applicable laws and this amendment policy and that the policy is applied fairly to all proposed amendments. TPE will also communicate its decision to the other parties with an interest in the property or rights of approval or disapproval.

4. **Final steps.** If an amendment is approved by the TPE Board and by all other necessary parties, final steps include:
  1. Legal review of final documentation of the amendment and preparation of an amended and restated easement in form for recordation.
  2. Legal review of any required subordination documentation from possible intervening lien holders or others.
  3. Confirmation by a title insurance company of its willingness to issue title insurance to The Prairie Enthusiasts insuring The Prairie Enthusiasts in the amount requested by The Prairie Enthusiasts and that the amended and restated easement in favor of The Prairie Enthusiasts is a valid easement superior in priority to all deeds of trust, liens, encumbrances and easements of every nature, except items excepted from the title insurance issued to The Prairie Enthusiasts prior to the date of the amended and restated easement.
  4. An update by TPE staff of the baseline documentation to reflect the effect of the amendment.
  5. Signed approvals by all parties with approval rights.
  6. Appropriate instructions to a title company signed by the parties. Closing costs will be assigned and paid in accordance with the agreement between TPE and the landowner referenced in section 2, above.
  7. The amended and restated easement will be signed and acknowledged by TPE, any co-holder and the landowner and recorded at the appropriate county recorder's office.

## **D. Condemnation Proceedings**

Amendment of a conservation easement as a result of condemnation proceedings is not covered by the statement of Amendment Principles, above, but is addressed in the policies and procedures set forth in this section. If a condemning authority indicates an interest in condemning some or all of an easement property, TPE will work diligently to prevent a net loss of protected conservation values and will use its reasonable best efforts to preserve the intent of the original easement to the extent possible in the circumstances.

TPE recognizes that it may be impossible to effectively prevent condemnation for proper public purposes. When part of a TPE-held easement property is to be condemned by a public entity, the easement may be amended, or extinguished in part or whole, in lieu of engaging in full condemnation proceedings, provided that:

1. TPE determines that the exercise of eminent domain would be lawful, and the condemning authority has made all determinations and taken all actions required by law as conditions to its pursuing condemnation proceedings, and
2. TPE determines that the best interest of all parties would be better served, on balance, by negotiating a settlement with the condemning authority rather than engaging in litigation.

TPE will have or obtain appropriate documentation of the percentage of the full value of the property represented by the conservation easement and will document its attempts to receive its proportional share of the proceeds. TPE will use the compensation in a manner consistent with the conservation purposes of the original easement.

TPE staff, the Land Protection Committee and the TPE Board will work to carry out the policies set forth above in this section, referring to the Amendment Procedures only as deemed useful in the circumstances. Approval of an amendment in lieu of condemnation will require a simple majority vote by the TPE Board. Some of the Final Steps set forth under the Amendment Procedures will apply to an amendment in lieu of condemnation with TPE staff determining whether and how to apply those steps in the circumstances.

## **E. Partial or Full Extinguishment**

In rare cases where it may be necessary to extinguish a conservation easement (in whole or in part), in addition to the considerations and steps described above TPE must take special care and fully document its actions to:

1. Follow the terms of the conservation easement with respect to taking appropriate action and obtain judicial or regulatory review when required by law or specified in the easement deed.
2. Ensure there is no private inurement or impermissible private benefit.
3. Take steps to avoid or mitigate harm to conservation values and/or use any proceeds in a manner consistent with the conservation easement deed.
4. Consider the land trust's actions in the context of its reputation and the impact on the land conservation community at large.