

Ice Age Trail Alliance, Inc.

Policy: Easement Amendment

Approved: Board of Directors

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As Amended Through: April 18, 2024

Related Policies: Code of Ethics and Conflict of Interest Policy, Easement Enforcement Policy, Record Retention Policy

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1.0 Background and Purpose

The Ice Age Trail Alliance, Inc. (the “Alliance”) is a non-stock corporation organized pursuant to Chapter 181 and is a qualified holder of conservation easements pursuant to Section 700.40 of Wisconsin Statutes. The Alliance acquires and holds conservation and other types of easements on property in order to protect, promote, build and maintain, in perpetuity, the conservation values of the land, including scenic, historic, natural, recreational and cultural qualities of the region, for the benefit of present and future generations. All volunteers and Staff involved in the easement amendment process should uphold the easement’s main purpose: to protect the Ice Age National Scenic Trail, its associated conservation values, and the Alliance’s image both in its ability to achieve its mission and to enforce specific easements. The Alliance is committed to ensuring the perpetuity of all easements that it holds, and shall not seek amendment or termination of any conservation easement without first ensuring that such an amendment or a termination clearly serves the public interests and is consistent with The Alliance’s mission.

The success of the Alliance’s land protection program depends in part on the public’s and landowner’s confidence that the Alliance will meet its obligation to monitor and to enforce easements and other such real estate agreements in perpetuity. This confidence could be eroded if the Alliance were to allow indiscriminate and unwarranted modification or terminations of its easements.

Furthermore, amendments to donated or purchased easements can raise serious problems with the Internal Revenue Service (IRS) when a tax deduction was claimed for its donation. The Alliance’s tax-exempt status as an organization may be jeopardized if easements are amended gratuitously. An easement donor who has claimed a charitable deduction for a gift of an easement may lose that deduction if the easement is amended.¹ Any amendment that results in a benefit to a landowner or to any other private party may create “private inurement” or “private benefit” if the benefits conferred by the amendment are more than incidental. The United States Tax Code prohibits the Alliance from

¹ See I.R.C. § 170(h).

engaging in any actions that create private inurement or private benefit greater than incidental benefit.²

It is the Alliance's policy to hold and to enforce its conservation easements as written. Amendments to conservation easements will be authorized only in limited situations and only in the types of conditions outlined below. No amendments will be granted that could jeopardize the Alliance's tax-exempt status or that could cause the easement to fall out of compliance with applicable federal, state or local laws, regulations or ordinances.

As a general rule, no one person should make decisions regarding the easement amendment response without first involving the Alliance Board of Directors, Land Conservation Committee, the Executive Director & CEO and other Staff, partners, attorneys and/or volunteers. By following these guidelines, the Alliance will protect its legal rights and economic value in the easement, while maintaining its ability to accept tax-deductible easement gifts and its tax-exempt status.

2.0 Role of the Parties

- A. The **Board of Directors (the "Board")** is responsible for approving all amendments to or extinguishments of easements, regardless of whether or not the amendment or extinguishment involves materially significant costs. The Board shall remain apprised of easement amendment issues via the Easement Amendment Procedures as stated in Section 4 below.
- B. The **Land Conservation Committee**, or other similar such committee, investigates proposed amendments or extinguishments, assesses the merits and concerns, consistent with the terms of the Policy Statement in Section 3.D below, and clearly warranted by the circumstances. The Land Conservation Committee may recommend approvals and provide reports to the Board.
- C. **Staff**, which includes the Senior Director of Land Conservation, Property Steward, a similar staff position, or their assignee, coordinates the easement amendment process, including: (a) analysis of the potential amendment; (b) meeting with the landowner; (c) providing information about the amendment to the Executive Director & CEO, Board, appropriate committees, and legal counsel; (d) communicating with local volunteers if needed; (e) consulting with various parties to determine whether an amendment is possible under the amendment policy; compiling information from other, similar amendments, both within the organization and from other organizations; and (g) drafting letters and other communications.
- D. The **Executive Director & CEO** is the signatory for all legal communications (i.e. official letters) to the easement landowner and to any third parties. Such actions are authorized pursuant to Alliance bylaws. If not done by the Land Conservation Committee, the Executive Director & CEO may provide the Board with updates of easement amendment issues.

² Under I.R.C. § 501(c)(3) an organization must not be organized or operated for the benefit of private interests. However, incidental private benefit is often unavoidable (i.e. neighbors are to benefit from neighboring easement).

- E. **Legal Counsel** is engaged by Staff, and if there are to be costs for the counsel, there must be prior approval by the Executive Director & CEO. Counsel will help determine if the amendment is legally permissible and may help the Alliance understand the legal implications of the amendment and potential legal actions.
- F. **Landowners** are those individuals and/or entities who hold title to the land on which the easement is located. Third-party landowners are landowners that are not the direct landowner of an easement property.
- G. **Partners** are organizations that have a legal interest in the easement, which may include easement co-holders and fund providers. Often when public funds are used to purchase the easement, these funds carry with them specific conditions and limitations that must be considered.
- H. **Other persons** such as natural resource professionals may be consulted for their particular expertise.

3.0 Determine the Reasons for the Amendment and Conditions under Which Amendment Requests May be Considered

The Alliance will consider amendments to its conservation easements only under the following circumstances:

A. Prior Agreement

In rare cases, a conservation easement may have a specific provision allowing modification of the easement at a future date under specified circumstances. Such agreements must be set forth in the conservation easement document or in a separate written document signed by the Alliance and by the conservation easement grantor at or prior to the time the conservation easement is executed. The amendment must be consistent with the terms and conservation intent of the original agreement.

B. Correction of an Obvious Error or of an Ambiguity

The Alliance may authorize an amendment to correct an obvious error or an oversight made at the time the conservation easement was executed. Such errors or oversights may include, but shall not be limited to, correction of a legal description, inclusion of standard language that was unintentionally omitted or clarification of an ambiguity. Any amendment authorized to clarify a conservation easement ambiguity shall be supported by written statements, affidavits, agreements or other tangible evidence that shows that the intention of the amendment is to clarify and to implement the parties' original intent at the time that the Alliance first acquired the conservation easement from the grantor.

C. Settlement of Condemnation Proceedings

Conservation easements that the Alliance holds are subject to condemnation for public purposes, such as highways and schools. Where it appears that the government may properly

exercise its condemnation power to terminate an Alliance conservation easement, the Alliance may enter into a settlement agreement with the condemning authority and the landowner in order to avoid the expense of litigation. In reaching such an agreement, the Alliance shall attempt to preserve the intent of the original conservation easement to the greatest extent possible.

D. Amendments Consistent with Conservation Purpose and Enhancing Conservation Values- Policy Statement

The Alliance may authorize amendments to a conservation easement provided that (a) the amendment is consistent with the original intent of the principal parties as expressed in the original conservation easement; (b) the amendment is equivalent to or enhances the conservation goals of the original easement; and (c) the amendment has no adverse effect on the conservation easement purposes, now and into the future. Nothing in this Policy Statement shall be interpreted to require the Alliance to grant a conservation easement amendment request, even if all of the foregoing criteria are met. The Alliance shall have unlimited discretion to grant or to deny each amendment request and shall evaluate each request on a case-by-case basis.

E. Required Findings

As a matter of policy, and subject to the discretion of the Board, the Alliance may agree to an amendment only if it determines that each of the following is satisfied:

1. The amendment is consistent with the Mission of the Alliance;
2. The amendment has a net beneficial or neutral effect on the relevant conservation values protected by the original easement.
3. The amendment is not inconsistent with the purpose of the easement;
4. The amendment does not affect the validity of the easement under Section 700.40 of the Wisconsin Statutes;
5. The amendment does not affect the easement's perpetual duration or affect the qualification of this easement or of the status of the easement holder under Section 170(h) of the Internal Revenue Code of 1986 or any successor provision;
6. No amendment shall affect a termination of the existing easement unless the terminated easement is immediately replaced by an amended easement consistent with this policy. No amendment shall cause the perpetual duration of an existing easement to be terminable.
7. The amendment will not hinder the Alliance's ability to steward, defend or enforce the conservation easement.
8. The amendment will not result in any private inurement or impermissible private benefit.

9. The amendment is consistent with the documented intentions of the grantor, donor and any direct funding sources;
10. The amendment should occur only when there is no reasonable and feasible alternative to amendment;
11. If the original conservation easement requires notification or approval of amendments by any other parties (e.g. Wisconsin Department of Natural Resources),³ these requirements must be met before the Board grants approval;
12. The amendment does not undermine the public's confidence in the Alliance to protect conservation values in perpetuity; and
13. The Alliance's applicable policies (including Conflict of Interest Policy) and procedures, with respect to evaluating and negotiating a new conservation easement, are applied to the amendment.

4.0 Easement Amendment Procedures

- A. The Alliance, the landowner, or another directly interested party may in writing propose an amendment to an existing conservation easement. If a landowner or other third party proposes the amendment, the Alliance may require that party to pay an initial non-refundable fee of \$500 (regardless of whether or not the amendment is ultimately approved) and all reasonable costs associated with the amendment request. If the Alliance proposes the amendment, the Alliance will contact the landowner and recommend the amendment to the existing easement. If the landowner agrees to the amendment, the Alliance will be expected to pay all reasonable costs associated with the amendment.
- B. The amendment proponent must present the amendment to the Alliance's Executive Director & CEO or to Staff) in writing and state the desired change and the specific reasons for the request. The proposed amendment must be accompanied by appropriate maps, pictures, and other documentation.
- C. If requested by the landowner or other party, and upon receipt of an amendment request and the fee (if applicable), Staff will make a reasonable effort to hold an initial consultation meeting with the requestor. During this initial consultation meeting, the Alliance will discuss and may agree upon further costs to review and to process the request and upon payment arrangements. An appraisal may be required. If at the request of the landowner or other party, the Alliance may develop and have signed a cost agreement before proceeding further.

³ Under Wis. Stat. 23.0917, the easement holder may receive grant funds under the State of Wisconsin Knowles-Nelson Stewardship Program. When the easement holder receives those funds, the WDNR obtains certain rights and interests in the easement. For example, the WDNR must provide the easement holder with prior written approval of any proposed amendment, assignment or extinguishment of an easement. *See also* Section 17(A)-(D) of the Ice Age Trail Conservation Easement Form.

- D. Staff shall present all of the information, together with its recommendations, to the Land Conservation Committee. If the Land Conservation Committee concludes that the amendment is consistent with the terms of the Easement Amendment Policy, and is warranted by the circumstances, the Chair of the Land Conservation Committee or appropriate Staff shall bring the request before the entire Board. If the Land Conservation Committee feels that the proposed amendment does not meet the criteria in the Easement Amendment Policy, then the Land Conservation Committee may reject the proposed amendment, or may choose to send it to the Board with a recommendation to reject it. A written letter shall be sent to the requesting party with the determination of the committee and/or Board.
- E. The Board, in its sole discretion, may approve, approve with modification, or reject the request for amendment at its next regularly scheduled meeting or at a special meeting convened for that purpose. Approval shall require a 2/3 majority vote of the Board then in office. The decision of the Board shall be final and shall appear clearly in the minutes of the meeting.
- F. If the amendment requested by the landowner or other party will increase the administrative burden on the Alliance for future monitoring of compliance and/or enforcement of the easement, the Alliance will advise the landowner of the amount of funding needed for the Property Monitoring and/or Legal Defense Funds and will not process the amendment until and unless the landowner agrees to pay the additional amount in the event the Alliance approves the amendment.
- G. If the amendment is approved, Staff and counsel shall review title status and whether title insurance or subordination of lenders is required to ensure that the amended easement is covered by any policy and any lenders would be subject to the amendment.
- H. All easement amendments that are approved by the Board must be made in writing, signed both by the landowner and by the Alliance and recorded in the County Register of Deeds Office⁴ and all documents will be retained and stored according to the Alliance's Record Retention Policy.

⁴ Because an easement is an interest in land, an amendment to the terms of an easement is subject to the statute of frauds, and the amendment must be in writing. *See* Wis. Stat. § 706.02; *Negus v. Madison Gas*, 112 Wis. 2d 52 (Wis. Ct. App. 1983).