

# **Amendment Policy**

## **General Policy**

While the open-space easements that the Virginia Outdoors Foundation (VOF) holds are perpetual in nature, VOF recognizes that certain circumstances justify an amendment to a deed of easement, for example, ambiguous or conflicting language in the deed, drafting errors in the deed, unforeseen changes in laws, the need to improve enforceability of the easement, or a landowner's desire to improve protection of conservation values.

The general amendment policy of VOF is that an open-space easement (an "Easement") will not be amended unless VOF determines, for example, that the amendment will correct ambiguous or conflicting language or errors in drafting, will address unforeseen changes in laws, will improve enforceability of the Easement, will add land to the property subject to the Easement, and/or will improve protection of the conservation values of the Property. Amendments shall have a positive or not less than neutral outcome on protection of the property's conservation values. In addition, the amendment must not (1) affect the Easement's perpetual duration, (2) conflict with or be contrary to or inconsistent with the conservation purposes of the Easement, or (3) create an impermissible private benefit or private inurement as defined in federal tax law. With this general policy in mind, the following preliminary matters and guiding principles outline the decision-making process that the Board and Staff should use in evaluating proposed amendments.

## **Preliminary Matters and Guiding Principles**

1. Ensure that there are no feasible alternatives achieving the purpose that is intended to be achieved by the amendment.
2. Ensure that the benefit to be realized by the amendment is sufficient to justify the time and effort that will be expended in developing the amendment, taking into consideration any hardship on the landowner in not amending the Easement.
3. If the proposed amendment presents a conflict of interest, the conflict should be resolved before amending the Easement (see applicable laws and VOF conflicts of interest policies).
4. The amendment should be consistent with the overall purposes of the Easement and result in either a positive or not-less than neutral conservation outcome.
5. Like the original Easement, the amendment must conform to the comprehensive plan of the locality in which the property is located and must not be in violation of any applicable laws or regulations.
6. When feasible, the amendment should replace the language and provisions in the original Easement with appropriate language and provisions of or from the current template. However, a determination should be made that any less restrictive provisions in the current template are either omitted or offset by more restrictive provisions in the amendment to ensure that there is no impermissible private benefit accruing to the landowner. If this is difficult for staff to determine, an appraisal may be required to help make this determination.

7. In drafting the amendment, care should be taken to avoid creating unnecessary burdens on Stewardship, such as additional monitoring or enforcement requirements or approvals. Concomitantly, provisions that could ease the burden of administration by Stewardship should be considered.

8. Consideration should be given as to whether the amendment might undermine the public's confidence in VOF and its intent to enforce its easements. The fact that a neighbor may oppose the amendment because of its effect on his land is not relevant to the creation of the amendment.

The underlying principle is whether the public benefit of the Easement, as amended, is served.

### **List of Amendments Commonly Needed/Encountered (Singly or in Combination)**

1. Amendments placing additional land under the protection of the Easement.

2. Amendments releasing reserved rights, such as division rights or the right to construct dwellings or other buildings or structures.

3. Amendments adding protections, such as restrictions on siting of buildings and structures, a collective footprint restriction, addition of riparian protection zones, addition of karst protection buffers, etc.

4. Amendments modernizing the language of the Easement to conform to the current template, provided that any less restrictive provisions are clearly offset by other more restrictive provisions. The problem here is that some additional buildings and structures and some additional uses are permitted in more recent templates, some or all of which, to prevent an impermissible private benefit, could be excluded from the deed of amendment. Such an amendment should also assist Stewardship in monitoring and enforcing the restrictions in the Easement.

5. Amendments clarifying ambiguous or conflicting language in the original Easement without altering the intent of or uses permitted under the easement.

6. Amendments correcting drafting errors in the deed or modifying erroneous legal descriptions of the property as determined by a subsequent survey of the property, either of which is sometimes done by a deed of correction.

7. Amendments transferring a portion of the property to an adjacent owner whose property is also under VOF Easement or involving an exchange of a portion of the property with an adjacent owner whose property is also under VOF Easement. The portion of the property being transferred must be subject to the same or more restrictive provisions than are contained in the original Easement. This is usually done by a deed of boundary line adjustment.

8. Amendments involving revisions made to address changes in laws, such as an amendment adding qualifying language to ensure that the Easement is consistent with new requirements for tax benefits.

9. Amendments to permit unanticipated or unspecified land uses that, although not addressed in the original Easement, are consistent with the conservation purpose of the Easement and do not adversely impact conservation values.

10. Amendments to terms of the Easement that may be impossible to meet because of regulatory or engineering constraints unforeseen when the original Easement was drafted. Such amendments should ensure that the amendment results in substantially equivalent protection of conservation values.

11. Amendments that modify easement terms while achieving an overall improvement in conservation value protection.

RESOLUTION

**A RESOLUTION OF THE VIRGINIA OUTDOORS FOUNDATION BOARD OF TRUSTEES ADOPTING A REVISED AMENDMENT POLICY AND DELEGATING AUTHORITY TO STAFF TO ESTABLISH AND REVISE PROCEDURES FOR AMENDMENTS**

WHEREAS, the Virginia Outdoors Foundation (VOF) Staff presented an Amendment Policy and Procedures document to the Board of Trustees of the Virginia Outdoors Foundation (the Board) at its meeting on January 24, 2008, which policy was adopted by resolution of the Board; and

WHEREAS, by resolution of the Board adopted on October 24, 2013, the Board granted administrative authority to Staff to approve certain categories of amendments; and

WHEREAS, by resolution of the Board adopted on June 25, 2015, the Board granted administrative authority to Staff to approve amendments of existing open-space easements in strict accordance with the Board-approved Amendment and Procedures Policy, provided that they have been reviewed and approved by a Deputy Director and Staff Attorney; and

WHEREAS, Staff has made slight revisions to the Amendment Policy that principally involve increasing the list of types of amendments that Staff encounters, which revised policy document has removed the procedures portion of the policy from the Amendment Policy set forth in the original policy adopted on January 24, 2008; and

WHEREAS, Staff has determined that it would save Staff time and benefit landowners requesting amendments to have the amendment portion of the policy be separated from the procedures portion of the policy, to have the revised amendment portion of the policy be approved by the Board, and to have establishment and revision of the procedures as needed from time to time delegated to Staff.

NOW, THEREFORE, BE IT RESOLVED

That on this 24<sup>th</sup> day of March, 2016, the VOF Board of Trustees does hereby adopt the revised Amendment Policy, a copy of which is attached hereto and made a part hereof, and

AND BE IT FURTHER RESOLVED

That the Board does hereby delegate and grant Staff administrative authority to approve amendments of existing open-space easements in strict accordance with the revised Amendment Policy adopted herein, provided that they have been reviewed and approved by a Deputy Director and Staff Attorney; and

AND BE IT FINALLY RESOLVED

That the Board delegates and grants to the Staff administrative authority to establish and revise amendment procedures as they are needed from time to time.

ADOPTED by a vote of

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ATTEST: Brett Glymph, Executive Director